INTERNATIONAL CRIMINAL COURT JURISDICTION INFLUENCING STATE SOVEREIGNITY IN KENYA

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November, 2016

DECLARATION AND CERTIFICATION

Declaration by the candidate

I declare that this thesis is my own original work with no other than the indicated sources and has not been presented in any university.

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CERTIFICATION BY SUPERVISORS

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DEDICATION

To my lovely wife Sons Nigel, Praise and my lovely Daughter Vicky for their spiritual and moral support during the whole duration of undertaking my studies.

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ABSTRACT

The international criminal court statute pledges that most serious crimes of concern to international community must not go unpunished. The novel mechanism to exert jurisdiction over state parties to the treaty intends to enforce international law to protect human rights. The ICC is a reflection of changing perceptions of how the rule of law relates to larger problems of global inequality. The court has been embroiled in criticism that it focuses on criminal cases in Africa and particularly targeting African Leaders. The Kenyan government challenged the courts intervention in the crimes committed in the country during 2007-2008 post-election violence. It is argued that the courts legal prosecutions in African countries could impede political solutions to conflicts and also negate the most sought opportunities for negotiated settlement of disputes hence abrogating the independence of member states in promoting the rule of law on their own as sovereign states. The general objective of this study was to assess the influence of ICC jurisdiction on state sovereignty in Kenya. Specific objectives were to examine the nexus between International criminal court and state sovereignty in Kenya, examine the effects of ICC jurisdiction on national interests in Kenya, evaluate ICC jurisdiction on State Responsibility to protect (R to P) in Kenya, and assess the ICC jurisdiction and State treaty obligations in Kenya. The study was guided by theoretical underpinnings as espoused in the theories of Realism and constructivism on the state in the international system. The study used descriptive research design and exploratory research design to explore the variables and provided an opportunity for the researcher to collect systematic information. The study site included Nairobi, Mombasa, Nakuru, Eldoret, Kisumu, Kakamega, Kericho, Bungoma, Laikipia, Kajiado, Kisii and Machakos counties. The study used stratified sampling, purposive sampling and random sampling. Purposive sampling was used to select Key informants in state law office ,ministry of interior coordination ,ministry of foreign affairs ,office of the president ,judiciary, immigration, foreign embassies and county administration . This selection picked out participants with immense experience, expertise and knowledge of international criminal court jurisdiction and 0state sovereignty Stratified sampling was used to ensure that the target population is divided into different strata and each stratum is represented in the sample. Stratified random sampling was used for university students, lecturers/ professionals, government and county officials, the national assembly, the senate, the business communities and civilian population. The study sampled a total of 171 respondents. Findings of this study indicated that international criminal court jurisdiction influence on state sovereignty is uncontestable; states cede some of their powers to the Hague based court through Treaty obligations. The study recommended that whereas International legal order fathoms justice there is need for states cooperation to enhance and safeguard international peace and security. A paradigm shift was recommended for states not only to cooperate but also develop comprehensive programs for restorative justice by strengthening local legislation as opposed to real politick. The overall conclusion of the study was grounded on the general objective. In as much as states are major players in international relations in the guise of sovereignty, the undisputed authority of statehood is not the preserve of an individual state rather it is subject to legalization order of international institutions that assert meaning to hegemonic regimes in international relations. It is in this breath that the impact of international criminal court jurisdiction on sovereign states is undoubtedly introgenious, dialectic and yet profane in Kenya.

LIST OF TABLES

LIST OF FIGURES

LIST OF ABBREVIATIONS AND ACRONYMS

ASP	Assembly of State Parties
APSA	American service member's protection Act
UN	United Nations
UNSC	United Nations Security Council
ICC	International Criminal Court
AU	African Union
BRIC's	Brazil, China, India (Asian Tigers)
P5	Permanent Members of the UNSC, Britain, China, France,USA, Russia
ICTY	International Court Tribunal in Yugoslavia
ICTR	International Court Tribunal for Rwanda
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
IMT	("Nuremberg Tribunal"), International Military Tribunal
IMTFE	International Military Tribunal for the Far East sitting at Tokyo (The or "Tokyo Tribunal").
ICISS	International Commission on Intervention and State Sovereignty
SCOSL	Special Court Of Sierra Leone
LRA	Lord Resistance Army
R to P	Responsibility to Protect

PTC	Pre Trial Chamber (ICC, Hague)
PGA	Parliamentarians for Global Action
USA	United States of America
OTP	Office of the Prosecutor (ICC, Hague)
RUF:	Revolutionary United Front
FRPI:	Force de Résistance Patriotique en Ituri
FNI:	Front des Nationalists et Intégrationnistes
FDLR:	Democratic Forces for the Liberation of Rwanda
MLC:	Movement for the Liberation of Congo
EAC:	East African Community
ECOWAS:	Economic Community of West African States
SADC:	Southern African Development Community
ASEAN:	Association of Southeast Asian Nations
BRICS:	Brazil, Russia, India, China and South Africa
G20:	The Group of Twenty is an international forum for the and Government's central bank governors from 20 major economies.
ODM:	Orange Democratic Movement
NGOs	Non-governmental Organization
ICL	International Criminal Law

IEBC	The Independent Electoral and Boundaries Commission
CORD	Coalition for Reforms and Democracy
KNCHR	Kenya National Commission on Human Rights
CIPEV	The Commission of Inquiry on Post-Election Violence
FIDA	The Federation of Women Lawyers

OPERATIONALIZATION OF CONCEPTS

International Criminal Court (ICC)

Refers to is first permanent court in the world established in July 2002 to try the international crimes of Genocide crimes against humanity war crimes and crimes of aggression. More than two-thirds of the members of the African Union (AU) are parties to the treaty establishing the International Criminal Court (ICC Rome Statute).Kenya is one of the member states of the African union and Assembly of State Parties (ASP) that has signed and ratified the Rome statute that created international criminal court

Jurisdiction

Refers to the practical authority to interpret and apply the law, or to govern and legislate. While African states have their complaints about the abuse of jurisdiction by European states, there remain rich possibilities for them to utilize their own domestic processes in pursuit of universal justice in preference to the ICC. After failed attempts to conduct a criminal investigation of the key perpetrators of 2007–2008 post-election violence in Kenya**,** the matter was referred to the International Criminal Court in The Hague.

Universal Jurisdiction

Refer to the relationship expressly based on the principle of complementarily, i.e., the international court is subsidiary or complementary to national courts, A fundamental aspect of the ICC statute is that the court can only try cases where domestic courts are unable or unwilling genuinely to investigate or prosecute (the complementarily principle). There has been resistance on the part of Kenya among other African states to the exercise of universal jurisdiction. The ICC is one component of a regime made up of a network of states that have undertaken to advance international criminal

justice alongside or as a complement to the ICC, acting as domestic international criminal courts in respect of ICC crimes. The six Kenyan suspects sought by the ICC, most of them senior government officials, appeared voluntarily before the Court in April 2011.

International Regimes

Institutions that are established through the principle of victor's justice and the weaker vanquished as is the case of the ICC though being perceived as independent, theP5 i.e. USA, Britain, France Russia Japan and China have a greater say in terms of politically influencing the court .the USA is in the forefront to exercising Veto powers in regard to the actions to be taken by UNSC in respect to safeguarding international peace and security.

Sovereignty

Refers to the legal identity of a state in international law, It is a concept which provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of comparative size or wealth, Sovereignty is the supreme dominion, authority or rule . The essence of statehood is sovereignty, the principle that each nation answers only to its own domestic order and is not accountable to a larger international community, save only to the extent it has consented to do so. Sovereign States are thus conceived as hermetically sealed units, atoms that spin around an international orbit, sometimes colliding, sometimes cooperating, but always separated apart, the principle that nations have the right to enjoy, integrity and political independence, free from intervention by other States .Kenya is as such a sovereign state.

Criminal Justice

This is a system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, and sanctioning those who violate laws with criminal Penalties and rehabilitation efforts. The ICC is considered a court of last resort it was only investigate or prosecute cases of the most serious crimes perpetrated by individuals not organizations or governments, and then, only when national judicial systems are unwilling or unable to handle them. Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Statute grants the ICC jurisdiction over any individual, regardless of official capacity. Two Kenyans, The deputy president, William Ruto and radio presenter Arap sang are facing trial for criminal charges at the ICC.

Territorial Integrity rule

Means that it is a crime of aggression to use armed force with intent permanently to deprive a state of any part or parts of its territory, not excluding territories for the foreign affairs of which it is responsible;

Political independence rule

Means that it is a crime of aggression to use armed force with intent to deprive a state of the entirety of one or more of the prerequisites of statehood, namely: defined territory, permanent population, constitutionally independent government and the means of conducting relations with other States;

The United Nations Security Council (UNSC)

This is one of the principal organs of the United Nations and is charged with the maintenance of international peace and security. Its powers, outlined in the United Nations Charter, include the establishment of peacekeeping operations, the

establishment of international sanctions, and the authorization of military action Kenya attempted to use the UN Security Council to rally support in its bid to have the case against Deputy President William Ruto at the International Criminal Court dropped. This was rebutted and the United Nations diplomatic mission asserted that deferring the case had been ruled out by the UN Security Council.Mr Ruto's trial at The Hague was neither a threat to international security nor a threat to peace and security in Kenya.

National Interests

The term national interest refers to the common material and spiritual needs of all the people of a nation state. In material terms a nation needs security and development. In spiritual terms, a nation needs respect and recognition from the international community. Especially for a big country spiritual needs can be as important as material needs. In the study National interests refer to; national security, national economy, national ideology and state culture (religion).In this regard, Kenya has its national interests defined in its foreign policy.

Rationes Temporis or temporal jurisdiction

Refers to the jurisdiction of a court of law over a proposed action in relation to the passage of time. The Office of the prosecutor made public its preliminary examination of 13 situations, including those that have led to the opening of investigations in Uganda, DRC, CAR, Darfur, and Kenya. According to Article 126(1), the Republic of Kenya deposited its instrument of accessions to the Rome Statute on March 15, 2005, which entered into force on June 1, 2005. The Prosecutor's preliminary examination of the situation in Kenya revealed that .crimes against humanity were committed through murder under Article 7(1)(a), rape and. other forms of sexual violence under Article 7(1)(g), deportation or forcible transfer of population under Article 7(1)(d),

and other inhuman acts under Article 7(1)(k). These crimes against humanity were committed at the end of 2007 and the beginning of 2008and hence fall under jurisdiction ratione *temporis*.

***Proprio Motu* Power**

Latin maxim meaning: the powers of the prosecutor at the International Criminal Court to investigate and bring charges, or not, as against an individual suspected of international crimes."Article 15 (of the Rome Treaty which established the International Criminal Court) ... provides the Prosecutor with an unfettered power to trigger the Court's jurisdiction *Proprio motu,* which means at his or her own initiative without any formal referral act or formal duty to initiate. The Prosecutor proceeded based on the available information that there is no reason to believe that authorizing a formal investigation in Kenya would not be in the interests of justice. The post-election violence met the criteria of Article 53 paragraph1 (a) and (b). The situation in Kenya fell under the Court's vision to prosecute the most serious crimes of concern to the international community. The idea of *Proprio motu* or a prosecutor's ability to initiate Court investigations resonates with the Kenyan cases at the ICC.

Veto Power

Refers to the absolute power of the big five namely USA Britain, France, Russia, and China to allow or prevent the adoption, by the Council, of any draft resolutions on 'substantive' matters, the 'power of veto' is also referred to as the principle of great power unanimity.

The Security Council

Refers to the UN's primary and most powerful organ for carrying out the UN's central mission of keeping peace in the world. The UN Security Council's power to refer

potential prosecutions to the International Criminal Court (ICC) in situations outside the Court's treaty-based territorial and nationality jurisdiction helps deter the perpetration of genocide, war crimes and crimes against humanity everywhere in the world

The Responsibility to Protect (R to P or R2P)

Is a norm or set of principles based on the idea that sovereignty is not a privilege, but a responsibility? R to P focuses on preventing and halting four crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing.. First, the obligation of the state is to protect those living within its own borders was stressed. Proponents of R2P strongly underlined this point because the state itself holds primary responsibility for dealing with potential problems.

TABLE OF CONTENTS

CHAPTER THREE

RESEARCH METHODOLOGY

CHAPTER FOUR

NEXUS BETWEEN INTERNATIONAL CRIMINAL COURT JURISDICTION AND STATE SOVEREIGNTY IN KENYA

CHAPTER FIVE

THE EFFECTS OF ICC JURISDICTION ON NATIONAL INTERESTS IN KENYA

CHAPTER SIX

ICC JURISDICTION AND RESPONSIBILITY TO PROTECT (R TO P) IN KENYA

CHAPTER SEVEN

ICC JURISDICTION ON STATE TREATY OBLIGATIONS IN KENYA.

CHAPTER EIGHT

SUMMARY CONCLUSIONS AND RECOMMENDATION

CHAPTER ONE

INTRODUCTION

This chapter provides the background to the study, the statement of the problem, the objectives of the study, and related research questions .The chapter also provides academic and policy justification of the study and the scope of the study .The last part of this chapter is the summary.

1.1 Background to the Study

The International criminal court (ICC) first permanent court in the world established in 2002 to try the International crimes of Genocide, crimes against humanity, war crimes and crimes of aggression. The concept of an international criminal court can be seen as early as the 15th century, but it was not until the late 19th century that international criminal law began to emerge in the form of rules governing military conflict (Jamison, 1995).

The Brussels Protocol of 1874 was one of the earliest attempts at drafting a code regulating the conduct of armies in the field. While it made no reference to enforcement or any potential consequences of violations of the agreement, it resulted in a group known as the Institute of International Law drafting the "Manual on the Laws of War on Land" in 1880. This document was to become the model for the conventions adopted at The Hague Peace Conferences of 1899 and 1907(Green, 1997).

These conventions represented major advances in international law. Most importantly, the Hague Convention IV adopted in 1907, for the first time referred to liability for breaches of international law. While the Convention simply established state obligations, not personal criminal liability, Article 3 of the 1907 Convention seems to exclude any personal liability:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.(Green, 1997).

A state is entrusted by the international community to manage its own internal affairs, among which the responsibility to protect its citizens from atrocities, the International Criminal Court represents a step towards a system of international law that reaches beyond state sovereignty. It proclaims the interest of humanity in the principle that those who commit the most serious international crimes should be held accountable. It follows from a new scheme that public interests gradually are taking shape and often prevail over private interests. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means (Cassese, 2003).

Efforts to suppress armed and sometimes unarmed dissents have in too many cases led to excessive and disproportionate actions by governments, producing in some cases excessive and unwarranted suffering on the part of civilian populations. In a few cases, regimes have launched campaigns of terror on their own populations, sometimes in the name of an ideology; sometimes spurred on by racial, religious or ethnic hatred; and sometimes purely for personal gain or plunder. In other cases they have supported or abetted terror campaigns aimed at other countries which have resulted in major destruction and loss of life (Kochler, 2001).

On 11 April 2002, ten countries ratified the Rome Statute of the International Criminal Court (ICC), bringing the total number of ratifications to more than 60 and triggering the entry into force of the Statute on 1 July 2002. Crimes within the jurisdiction of the ICC are limited by the Rome Statute to genocide, war crimes and crimes against humanity (Rome Statute, 2002).

The Court has jurisdiction over those individuals directly responsible for committing most heinous crimes, as well as others who may be indirectly responsible, such as military commanders or other superiors. Jurisdiction is limited *ratione temporis* to offences committed after the entry into force of the Rome Statute (Rome Statute 2009, Article 11) Article 12 restricts the ICC's jurisdiction to crimes committed on the territory of a State Party or those committed by a national of a State Party. Noticeably absent is jurisdiction over an accused person simply in the custody of a State Party (Wise, 2000).

An ICC investigation may be commenced either by the Security Council, pursuant to Chapter VII of the UN Charter, by a State Party or by the prosecutor acting under the *proprio motu* power (Rome Statute, Article 13).The establishment of the International Criminal Court proclaims that when territorial and national mechanisms fail to secure justice, it is the international community as a whole that must act through a central judicial body, The Court is not a substitute for active and efficient national criminal courts. On the contrary, it is intended to constitute a powerful incentive to national courts to institute proceedings against alleged criminals. The ICC only steps in when those national courts prove neither unwilling nor unable to act (Cryer, 2002).

There can be no global justice unless the worst of crimes against humanity are subject to the law. In this age, more than ever it is recognized that the crime of genocide against one people truly is an assault on us all. The establishment of an International Criminal Court was ensure that humanity's response was swift and was just (Annan, 2002). It is in view of the above that the international criminal court as a court of last resort is endowed with the responsibility to try those responsible or committing heinous crimes of international concern as was in Kenya during the 2007-2008 post-election violence.

At the global level, during and following World War I, all combatant nations put members of enemy forces on trial for offences against the laws and customs of war. Of special note in the development of international criminal law was Article 227 of the Treaty of Versailles, which authorized the creation of a special tribunal to try Kaiser Wilhelm II. Article 227 reads in part:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal was constituted to try the accused, thereby assuring him the guarantees to the right of defense (Lesaffer, 2012).

While no trial ever took place, this represented a significant departure from the traditional view, still held by many today, that a head of state should be immune from prosecution by any state other than his or her own. All that occurred following World War I where some soldiers were taken for national prosecutions in Germany, with the consent of the Allies, suggesting that it was political for the world's major powers to essentially front for the enforcement of international humanitarian norms (Bassiouni, 1998).

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (known as the "Genocide Convention") defines genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group the conditions of life calculated to bring about its physical destruction in whole or part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. The Convention confirms that genocide, whether committed in time of peace or war, is a crime under international law which parties to the Convention undertake "to prevent and to punish." The primary responsibility to prevent and stop genocide lies with the State in which this crime is committed.

We have learned important lessons. We know more keenly than ever that genocide is not a single event but a process that evolves over time, and requires planning and resources to carry out. As chilling as that sounds, it also means that with adequate information, mobilization, courage and political will, genocide can be prevented (Ban Ki-moon 2016).

This was a significant achievement but unfortunately, did not foreshadow further advances over the next four decades. Following Nuremberg and Tokyo, the UN General Assembly had given the International Law Commission (ILC) the assignment of examining the possibility of establishing a permanent international criminal court. Draft statutes were produced in the 1950s, but the Cold War made any significant progress impossible (Bassiouni, 1998).

The ILC's post-Nuremberg project was revived in 1989 via an unexpected route when Trinidad and Tobago approached the UN General Assembly to suggest an international judicial forum for drug trafficking prosecutions. The Assembly held a special session on drugs in 1989, and in 1990 the ILC submitted a report that went beyond this limited issue. The report was well received and the ILC was encouraged, without a clear mandate, to continue its project. Thus, it was able to return to the task begun in the 1940s of preparing a draft statute for a comprehensive international criminal court (Bassiouni, 1998).

The next great impetus in the development of international humanitarian law was the global conflict from 1939 to 1945 that followed the "war to end all wars." The Nazi government of Germany, in launching an offensive military campaign and committing startling atrocities, led the Allied powers to "place among their principal war aims the punishment, through the channel of organized justice, of those guilty for these crimes, whether they have ordered them, perpetrated them, or participated in them(St. James, 1942).

In the aftermath of World War II, the International Military Tribunal sitting at Nuremberg (the IMT or "Nuremberg Tribunal") and the International Military Tribunal for the Far East sitting at Tokyo (the IMTFE or "Tokyo Tribunal") were established. At Nuremberg, each of the "Big Four" Britain, France, USA and former USSR appointed a chief prosecutor, the prosecutor operated under the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, entered into force 8 August 1945 London Agreement, Article 14 (Ferencz, 1997).

As a team, they were responsible for investigating and prosecuting major war criminals responsible for “crimes against peace,” “war crimes” and “crimes against humanity.” Following the first trial of Goering and others, the partnership of prosecutors was dissolved. Disagreements over joint subsequent trials led to a compromise under which each of the four Powers was able to carry on further prosecutions within its respective zone of occupation. The United States decided to conduct twelve further trials at the Nuremberg courthouse (Ferencz, 1997).

The four powers together carried out prosecutions of the individuals responsible of international crimes against peace, war crimes and crimes against humanity. These great four nations that were flushed with victory and stung with injury stayed the hand of vengeance and voluntarily submitted their captive enemies to the judgment of the law. This is one of the most significant tributes that Power has ever paid to Reason. This resonates very well with the zeal and tact that the world powerful nations still assert today in respect to the international criminal court and its prosecution of individuals who are culpable of international crimes of grave concern as was the case of Kenyan suspects. The Nuremburg trials provided the view that states must stand together, cooperate so as to try the perpetrators of international crimes under a treaty based tribunal such as the international military tribunal (IMT) and the international military tribunal for the Far East sitting in Tokyo (IMTFE).This trial admonishes the proponent’s view of the principle state sovereignty that states are independent, sovereign and exist on their own individually.

The Nuremberg trials succeeded the powers of national courts to try criminals who were found to have committed international crimes. It is in the process of trials at Nuremberg that care and caution was sought such that the trials must be seen to be fair and just within the propensity of humanity, peace and security for humankind .In this context (Bassiouni, 2007) stated that;

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice (Bassiouni, 2007).

The American position with respect to the ICC has changed slowly since the Court first came into being. The US government has always been a staunch opponent of the ICC, particularly since President Bush formally renounced any US obligations under the Rome Statute in May 2002. As a direct result of this opposition, the president signed the American Service members' Protection Act (ASPA) into law in August 2002. This law restricts any US agency, court or government cooperation with the ICC, except when the ICC deals with US enemies; makes US support of peacekeeping missions in large part contingent on the guaranteed immunity of US personnel; and grants the president permission to free US citizens and allies from ICC custody by "any means necessary," thus earning the legislation the nickname of "The Hague Invasion Act" (Chayes, 2008).

Once the ASPA was enacted, the US government immediately began negotiating bilateral immunity agreements with nations around the world in apparent accordance with Article 98 of the Rome Statute. States that signed these agreements had to promise not to surrender Americans on their territory to the ICC.

Subject to a national interest waiver, the ASPA then denied US military assistance (education and training, and financing) to states that had not signed such agreements except NATO members, major non-NATO allies and Taiwan. Many governments thus effectively had the ASPA held over their heads. In December 2004, the US government added the Nethercutt Amendment to this arrangement. The Amendment was part of an omnibus appropriations law that went beyond military assistance to also deny a broad range of aid (through the Economic Support Fund) to states that refused to sign the immunity agreements (Hoyt 2008), (Arieff et al, 2008).

However, the US position on the bilateral immunity agreements began to soften in 2006. Amendments were made to the ASPA in 2006 and 2008, lifting restrictions on foreign military assistance to countries that had not signed such agreements, and a number of waivers were issued. The US government also generally stopped requesting immunity agreements of States Parties. All that remains of these restrictions today are the Nethercutt restrictions on aid to those countries that have not been granted a waiver (Ruiz &Kirsch, 2008).

In view of the above the American intransigence of the ICC jurisdiction has far reaching reactions on the proponents of state sovereignty. It is important to note that the U.S. has supported the creation of international courts to prosecute gross human rights abuses. It pioneered the Nuremburg and Tokyo tribunals to prosecute atrocities committed during World War II. Since then, the U.S. was a key supporter of establishing the ad hoc international criminal tribunal for the former Yugoslavia (ICTY) and international criminal tribunal for Rwanda (ICTR), which were both approved by the Security Council.

The U.S. initially was an eager participant in the effort to create an international criminal court in the 1990s. However, once negotiations began on the final version of the Rome statute, America's support waned because many of its concerns were ignored or opposed outright in the five-week United Nations diplomatic conference of plenipotentiaries on the establishment of an international criminal court held in Rome, Italy, in June 1998.

Advocates of the ICC have condemned the U.S position claiming that it undermines the morale of the ICC and is based on false legal and political pretenses. The United States has argued that its military personnel can and should be exempt from ICC investigation and prosecution, and that the ICC Statute should be revised accordingly. Regrettably, although the court's supporters have a noble purpose, there are a number of reasons to be cautious and concerned about how ratification of the Rome Statute would affect U.S. sovereignty and how ICC action could affect politically precarious situations around the world. The U.S sentiments were well articulated by David J. Scheffer, chief U.S. negotiator at the 1998 Rome conference: Rome as follows;

We indicated our willingness to be flexible.... Unfortunately, a small group of countries, meeting behind closed doors in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the court and risks deterring responsible international action to promote peace and security. (Scheffer, 1998).

U.S. Administrations concluded that the Rome Statute created a seriously flawed institution that lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances. The ICC lacks robust checks on its authority, despite strong efforts by U.S. delegates to insert them during the treaty negotiations.

The court is an independent treaty body. In theory, the states that have ratified the Rome Statute and accepted the court's authority control and in practice, the role of the Assembly of State Parties is limited. The judges themselves settle any dispute over the court's "judicial functions." The prosecutor can initiate an investigation on his own authority, and the ICC judges determine whether the investigation may proceed. The U.N. Security Council can delay an investigation for a year, a delay that can be renewed--but it cannot stop an investigation (Grossman 2004).

Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself. Defiantly then one could argue that ICC jurisdiction is an abrogation to state sovereignty.

In Africa the International criminal Court opened its first case in 2004, after Uganda referred the situation of the Lord's Resistance Army to the court. The process of case initiation was through trigger mechanisms that became complex and politically sensitive. The self-referral of Uganda and the Democratic Republic of Congo in 2004 and that of the Central African Republic in 2005 served as tests of the Court's functioning (Schabas, 2008).

In January 2005, pursuant to Security Council Resolution 1564, the International Commission of Inquiry on Darfur, chaired by Antonio Cassese, recommended that the Council refer the case under Article 13 to the ICC on the grounds of gross violation of international humanitarian law (United Nations, 2005).The Commission found that, Government forces and militias conducted indiscriminate attacks...on a widespread and systematic basis" amounting to crimes against humanity.

Indeed, for the Court to envisage global justice, its relationship with the Security Council must be revised in order to avoid a future situation of "dual justice," as seen in the case of Darfur. However, the Commission did not accuse parties to the conflict of pursuing a policy of genocide (Ciapi, 2005).

The Resolution 1593 concerning Darfur became the first situation referred by the Security Council under Article 13 of the Rome Statute, in accordance with Chapter VII of the U.N. Charter. In 2008 and 2009, the prosecutor, submitted an application for an arrest warrant for President Omar Hassan al-Bashir. In 2009 and 2010, the ICC Pre-Trial Chamber I charged Sudan's President with genocide, crimes against humanity, and war crimes). President al-Bashir became the first Head of state indicted by the ICC, discarding official immunity as protection against prosecution (Scheffer, 2002).

On 24 May 2008, Jean-Pierre Bemba, the former Vice-President of the Democratic Republic of the Congo was arrested during a visit to Belgium under a sealed warrant under accusations of war crimes and crimes against humanity committed in CAR. . His confirmation of charges hearing, taking place from 12–15 January 2009, resulted in the charges being confirmed on 15 June 2009. His trial began on 22 November 2010(ICC information page on Bemba. (Retrieved 18 March 2011)

As a consequence of the 2011 Libyan civil war and its brutal suppression, the UN Security Council voted on 26 February 2011 in Resolution 1970 unanimously to refer the situation in Libya to the ICC. On 23 June 2011, the Prosecutor formally requested the authorization from a Pre-Trial Chamber to begin an investigation into crimes allegedly committed in Côte d'Ivoire. While Côte d'Ivoire is not a state party to the Rome Statute, it has repeatedly and by different administrations accepted the ICC's jurisdiction .On 27 May 2015 in Côte d'Ivoire ,the ICC ruled that it can prosecute Simone Gbagbo can prosecute her on charges including murder and rape linked to violence that left 3,000 people dead in the aftermath of the country's disputed (OTP III, 2011).On 16 January 2013, the Prosecutor determined that there is a reasonable basis to believe that war crimes have been committed in the conflict. Thus, the Prosecutor opened an investigation (ICC, 2013).

In Rwanda, an adequate institutional response was quite a challenge because the tribunals were ad hoc. In this circumstances more than 11500 people were arrested by the Tutsi government following the Rwanda Genocide but fewer than 50 lawyer were available to "Muster defense" for the accused Due to this shortage of legal experts local dispute mechanism were adopted as special courts called Gacaca where individuals were sentenced to long term imprisonment through communal court system (Uvin, 2003).

In 2003 special court of Sierra Leone issued its first indictment for war crimes committed by former rebel leader Foday Sankoh and has military commander Sam Bockarien During 1991-2001 civil war Charles Taylor was also charged for his role in fueling sierra Leon's viscous civil war. Adhoc criminal tribunals have been active to prosecute violations of international humanitarian law in former Yugoslavia and Rwanda (Bogodan, 2002).

Following (Moreno, 2009) initial announcement of his intention to bring prosecutions against the six suspects, American President Barrack Obama called upon Kenya to co-operate with the ICC. In a statement he said:

> I urge all of Kenya's leaders, and the people whom they serve, to cooperate fully with the ICC investigation and remain focused on implementation of the reform agenda and the future of your nation. Those found responsible was be held accountable for their crimes as individuals. No community should be singled out for shame or held collectively responsible. Let the accused carry their own burdens – and let us keep in mind that under the ICC process they are innocent until proven guilty. As you move forward, Kenyans can count on the United States as a friend" (Obama, 2010).

The above statement from President Obama reiterated the fact that most African leaders are stubborn and very resistant to reforms. it is a terse statement that those found culpable of international crimes must not be spared by the international criminal law .Obama categorically pointed out that every person must carry own cross .In a nutshell President Obama cautioned that the nation is bigger than individuals and therefore the USA shall always support the nation but not individuals. This line of thought concurs with the notion that The ICC brings on board other international players into the affairs of other states. This asserts the envisioned purpose of international criminal law crossing territorial boundaries in attempts to try individuals culpable of most serious crimes of international concern.

International criminal law, it is also argued that issues to do with power, justice, and politics necessarily sucks in the role of international criminal law in conflict management. Whereas, international criminal law is not exactly a new phenomenon in international relations, its greatest influence on national politics and by extension international politics may be said to have been in the 20th and 21st Centuries. In essence the fact that Kenyans or rather Africans can be directed and or cautioned on how to deal with their internal issues as governments or states per se is a clear indication that the principle of state sovereignty is well casted in theory and hardly practical.

1.2 Statement of the Problem

The international criminal court jurisdiction is practiced with basic objective of pursuing justice in the aftermath of crimes against peace, war crimes and crimes against humanity. This has been witnessed in the Nuremburg trials which established that states must cooperate so as to try the perpetrators of international crimes under a treaty based tribunal such as the international military tribunal (IMT) and the international military tribunal for the Far East sitting in Tokyo (IMTFE) the international court tribunal of Yugoslavia (ICTY)and the international court tribunal on Rwanda (ICTR).The Nuremberg Trials were made to be fair and just within the propensity of humanity, peace and security for humankind (Bassiouni, 2007).

Whereas justice has been pursued according to the Rome Statute, its impact on state sovereignty has been varied as seen in the reconstruction of state in Sierra Leone, former Yugoslavia, Chile, Democratic Republic of Congo (DRC) etc.

However, the interplay between the international criminal court jurisdiction and state sovereignty in Kenya has generated a reinvigorated state machinery that has challenged the ICC jurisdiction to an extend that African leaders under the auspices of the African Union backed a Kenyan proposal to push for withdrawal of membership of African states from the international criminal court, claiming that it unfairly targets the African continent.

Majority of Africans leaders under the auspices of African union joined together to question the moral integrity and legality of the ICC jurisdiction. Some argued that the court is opting for political expediency instead of the universal justice spelled out in the Rome Statute. Others blatantly accused the ICC for targeting Africa. Unfortunately, the ICC is yet to adequately and effectively allay the fears of African leaders and convince them that the court's work is based exclusively on the belief that perpetrators of the most serious crimes of concern to the international community as a whole must not go unpunished.

The international criminal court prosecutions, which targeted the upper echelons of political power, are an extremely sensitive issue in Kenya. These cases have very powerful lasting socio-political implications on the country's rule of law and inter-ethnic relations. Analysis of the influence of the court's jurisdiction on sovereignty of the Kenyan state has not yet been ascertained. It is in this backdrop that this study interrogates the relationship between International criminal court's jurisdictions and state sovereignty in Kenya.

1.3 Objectives of the Study

1.3.1 General Objective

The general objective of this study was to assess the influence of ICC jurisdiction on state sovereignty in Kenya.

1.3.2 Specific Objectives

Specific objectives of the study were to:

i. Examine the nexus between International criminal court and state sovereignty in Kenya.

ii. Examine the effects of ICC jurisdiction on national interests in Kenya

iii. Evaluate ICC jurisdiction on State Responsibility to protect (R to P) in Kenya.

iv. Assess the ICC jurisdiction and State treaty obligations in Kenya.

1.4 Research Questions of the Study

i. What is the relationship between International criminal court jurisdiction and state sovereignty in Kenya?

ii. What are the effects of ICC jurisdiction on national interests in Kenya?

iii. How does ICC jurisdiction contribute to state responsibility to protect (R2P) in Kenya?

iv. How does the ICC jurisdiction affect state treaty obligations in Kenya?

1.5 Justification of the Study

The study attempts to interrogate ICC jurisdiction influence on state sovereignty in Kenya,

Policy formulation

This is a new field of great interest in Kenya. Thus the study will therefore make remarkable contribution to Diplomacy and International Relations studies at national level in terms of operationalizing National interests, responsibility to protect, territoriality principle and institutionalization of foreign policy. Except to note that the Rome Statute is not the only instrument of great inspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon (Gareth Evans, 2001).

Scholars and knowledge gap

The Kenyan cases at the ICC are of significant importance to Kenya, a country once referred to as an island of peace in the sub-Saharan Africa. The adherence to the ICC is therefore a real conundrum. This is in the consonance that ICC was established by governments but it is not clearly espoused in any given government's interest as is. The abstraction of understanding why states would agree to bind their own hands by for-swearing certain extreme options suggests that under certain circumstances an ICC commitment can contribute to an atmosphere conducive to conflict reduction and peaceful negotiation. Hence this study shall contribute immensely to provision of much sought and desired knowledge and scholarly reading in International Criminal Law, Peace and Security

Further readings

This study attempts to fathom International Criminal Court Jurisdiction and state sovereignty by emerging reasoned and evidentiary structures and approaches in interrogating the Influence of International Criminal Court Jurisdiction In State Sovereignty In GKenya However, in juxtaposition as alleged by majority of African Leaders, the long sought peace through negotiations is likely to be threatened and betrayed by the cases, convictions and or judgments by the Hague based court. The ICC must be able to operate within the realms of states national interests. The court imperative should be to tamper justice with peace in order to enhance security, stability and national healing in conflicting zones.

1.6 Scope of the Study

The study focused on ICC jurisdiction influencing state sovereignty in Kenya. This was as a result of the uniqueness of the cases that indicted for the first time in the history of the court, a Sitting President and his Deputy concurrently. The study was confined to Kenya (Nairobi, Mombasa, Nakuru, Eldoret Kisumu Kakamega Kericho Bungoma Laikipia Kajiado Kisii and Machakos counties). Nairobi county was selected being the capital city of Kenya and host of most national regional and international offices .It is also the host of the central government, The national assembly, the state law office, the judiciary and the senate The other 11 counties are selected due to their volatility during the 2007-2008 post election violence that culminated into the Kenyan cases at the International criminal court.

1.7 Chapter Summary

Chapter one gave introduction and the background on the ICC jurisdiction influence on state sovereignty in Kenya from global, regional and national approach. The statement of the problem exposed critical gaps that the study attempted to fill. The objectives of the study and the research questions guided the study. Justification and scope of study provided the direction and need for further studies in the area of research. The preceding chapter delved into a detailed analysis of relevant literature related to the study, Empirical Review of the study, theories informing the study and conceptual model showing interaction of Independent and dependent variables of the study.

CHAPTER TWO

LITERATURE REVIEW

This chapter examined the concept of ICC jurisdiction, and state sovereignty from the global, regional and national level. The two variables namely; International court jurisdiction and state sovereignty were explored in terms of, nexus between International criminal court and state sovereignty in Kenya, effects of ICC jurisdiction on national interests in Kenya, ICC jurisdiction on State Responsibility to protect (R 2 P) in Kenya and ICC jurisdiction and State treaty obligations in Kenya. Theoretical framework grounded on two theories: Realism and Constructivism. A conceptual model provided logically explaining the interaction between the independent and dependent variables.

2.1 Nexus between ICC and State Sovereignty

The International criminal court (ICC) came into being in 2002 with a broad mandate to consider genocide, war crimes, crimes against humanity and the crime of aggression. A significant and novel feature of the Court is that it was conceived as an instrument for harmonizing national and international criminal justice. Prosecution and punishment of serious offences against human dignity are still entrusted to the national or the territorial State. Territoriality and nationality remain central concepts in the international community, although for all their merits they reflect old responses: the bonds of blood and territory (Cassese, 2003).

The establishment of the International Criminal Court proclaims that when territorial and national mechanisms fail to secure justice, it is the international community as a whole that must act through a central judicial body, the ICC. The Court is not a substitute for active and efficient national criminal courts.

On the contrary, it is intended to constitute a powerful incentive to national courts to institute proceedings against alleged criminals. The ICC only steps in when those national courts prove unwilling or unable to act (Cryer 2003).

The international criminal court is an independent institution that has been established within the bounds of international law as a constitutive legalization of world politics (Abbot et al., 2000). It originates from state interactions, and leads to the establishment of international institutions and tribunals (Keohane et al., 2000), the embodiment of which are international organizations. International law is manifested in states 'commitment to agreements and joint decisions reached during interstate interactions. Such interactions need not result into written commitments, hence states' interactions over the years result into customary international law (Barnett and Fennimore, 2004).

However, legalization of world politics implies the establishment of legal frameworks within which states play their political games. For instance, sovereign equality among states is one of the legal principles that dominate world politics (Kirsch, 2003), thereby guiding states in their interactions, the violation of which is considered violation of state sovereignty. Concurrent with sovereignty are the norms of respect for the territorial integrity of states, which engenders the inviolability of territorial sovereignty. Sovereignty has the double components of territoriality, domestic sovereignty (the idea that states have sovereign control over their domestic spaces without foreign interference), and external sovereignty (which embodies the idea that states treat one another as sovereign equals (Krasner, 2002; Zacher, 2001).

John Gerard Ruggie notes that sovereign equality and respect are reciprocal. States' existence in relation to other states depends on this reciprocity it would be impossible to have a society of sovereign states unless each state, while claiming sovereignty for itself, recognized that every other state had the right to claim and enjoy its own sovereignty" (Ruggie, 1993). Thus reciprocal sovereignty has become the basis of the new international order. Though there may be violations of these sovereignty claims (Krasner, 1993) they remain central to interstate interactions.

Norms like non-interference in domestic affairs, punishments for international crimes (such as war crimes and crimes against humanity), protection and respect for fundamental human rights and freedoms embedded in the United Nations Universal Declarations on Human Rights (UN, 1948), cooperation in the management of shared resources, arms control (such as the 1997 Anti-Land Mines Convention), and respect for treaties reached among different states on different issue-areas, have made international interactions legalized. These interactions constitute interstate politics. International law is rooted in international politics, and ensures the legalization of that politics. (Rwegambo 2011)

This implies the coexistence and co-constitution of the legal and the political in international affairs. Coexistence implies that both the political and the legal are inseparable in international relations, they are concurrent. Co-constitution here implies that both international law and international relations are bedfellows; politics gives rise to law and law regulates politics. Thus legalization of world politics is apolitical process that defines international relations while politics needs to be played within legal confines; else it is seen as violation of the law.

Legalization is done by establishing institutional features characterized by obligation (where states and other international actors are bound by a commitment or a set of commitments); precision [the clear definition of required conduct, and authorization of such conduct); and delegation (the granting of authority to third parties "to implement, interpret and apply the rules; to resolve disputes; and possibly to make further rules] (Abbot et al., 2000).

This legalization prescribes as well as limits conduct: as states interact they set up rules and behavioral yardsticks from which to judge one another's behavior. In the heretofore state, actions are judged as either compliant with or deviant from international law, and relevant sanctions are imposed where applicable. States commit themselves through treaties, conventions and declarations. They set up international institutions, embodied in international organizations which are mandated to implement their decisions (Karns and Mingst, 2010).

International criminal court is one among the international institutions that has the mandate to pursue cases involving heinous crimes of international concern. Africa has experienced a large number of atrocities. One would critically argue that he rate of atrocity crimes committed on the continent would make it a natural focus for the court other issues notwithstanding .Two situations of which the ICC is seized because of the prosecutor's *proprio motu* powers are those relating to Kenya and to Côte d'Ivoire. In the case of Côte d'Ivoire, the government willingly accepted the court's jurisdiction before becoming a state party in order to allow the prosecutor to commence a case there(Ahmed 2006).

In four situations before the court Uganda, the Democratic Republic of Congo (DRC), the Central African Republic and Mali, the states themselves referred the cases though the prosecutor retained the final say on whether these cases were pursued. The further two situations Libya and Darfur were referred by the Security Council. Given that states and the Security Council have referred a majority of the cases before the court, the more pressing issue as far as the prosecutor's alleged bias is concerned, may be the non-pursuit of situations and cases in Syria, Iraq, Palestine Pakistan, Egypt and others, rather than the pursuit of African situations and cases this view is critically debatable in the context of justice for the victims vis a vis real politik (Moss 2012).

Institutions administer justice and resolve disputes; implement joint decisions regarding international cooperation; and monitor states' compliance with the law. The establishment of "third-party tribunals "to apply general legal principles, resolve transnational disputes and mediate between conflicting parties (Keohane et al., 2000) is central to the institutionalization process.

In the foregoing, international law is understood to imply not only legal bureaucratization or the establishment of institutions for interpreting and administering the law, resolving disputes and enforcing compliance; but it also implies the much-upheld legitimacy building by purposively constructing the law "within inherited traditions" from which obligation, precision and delegation derive their relevance (Fennimore and Toope,2001).

2.1.1The concept of International criminal law, Global Perspective

The general background of international law and relations was shaped by the Vienna settlement in accordance with the Treaty of Chaumont which had been concluded in March 1814 to consider the affairs of Europe as a whole, including issues affecting peace and security of that region. This gave rise to the congressional form of international government. It also meant that the great powers on the whole should observe the principle of non-intervention in matters within the domestic jurisdiction of states. But differences appeared amongst the great powers in respect of observance of the nonintervention principle. Russia was unwilling to respect the principle of non-intervention in the case of Turkey's domestic matters.

Moreover, that the principle of non-intervention should apply to Turkey's treatment of her Christian subjects was opposed by Gladstone in 1876, though under the Treaty of Paris (1856), the major European powers expressed their concern about the future treatment of the Sultan's Christian subjects in Balkans and recognized that there should be no unilateral or collective intervention in Turkey's domestic jurisdiction. (Thomson, 1967).

As regards domestic jurisdiction in this period, the Hague Conference of 1899 deserves special mention as it showed the reluctance of sovereign states to surrender matters of domestic jurisdiction to the control of an international body. Not only did the Hague Conference fail to produce an agreement on the limitation of national armaments, but also the jurisdiction of the Court of Arbitration which it set up was limited by the fact that "disputes involving vital interests of a state were expressly exempted from the Court's jurisdiction.(Holbrad, 1970).

The controversy regarding the correct interpretation of the word "intervene" has existed since the beginning of the UN. The delegations at San Francisco indicated that they understood the term "intervene" to refer to any action by any organ of the United Nations concerning a matter which was within the domestic jurisdiction of particular states. This would mean that any discussion, recommendation, inquiry or study concerning the domestic affairs of a state would amount to intervention. The intention of the drafters of the UN Charter was the formulation of a rule which would ensure that the organization would not go beyond acceptable limits and enlarge its scope of function, especially in the economic, social and cultural fields. Over the years, the phrase "Nothing ...shall authorize the United Nations to intervene" has been interpreted from various points of view.

The founders of the ICC created a new system of international criminal jurisdiction consisting of two levels which complement each other. The first level is constituted by states and their national criminal law systems. As confirmed by the principle of complementarity as the decisive basis of the Statute, states continue to have the primary duty to exercise their criminal jurisdiction over those responsible for international crimes. The second level is constituted by the International Criminal Court.

According to the principle of complementarity, the Court can only act as a last resort in cases in which national criminal law systems are unwilling or genuinely unable to carry out the investigation or prosecution. The complex system apparently needs more time to be fully accepted and adhered to by all concerned in order to develop its full potential.

At the same time, the principle of complementarity creates a curious pair of conflicting forces and hence a dilemma for the Court itself. If states generally discharge their primary duty to prosecute crimes, the Court will not be given anything to do and will have no cases. On the other hand, the Court needs exemplary and successfully handled cases (Hans Kaul, 2006).

International community and the states parties have the legitimate desire to see concrete evidence that the ICC is a meaningful and useful institution. A second major limitation is the fact that the Court is one hundred percent dependent on effective criminal cooperation, on the support of states parties. As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely cooperation from states parties As foreseen and planned by its founders, the Court is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions.12As already shown with regard to the principle of complementarity, also in this respect it was the wish of the Court's creators that states' sovereignty should prevail. (Katz 2002).

A third, very grave limitation on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Court, of difficult access, unstable and unsafe. Carrying out investigations in Uganda, the Democratic Republic of the Congo, the Central African Republic or with regard to Darfur entails logistical and technical difficulties, unprecedented problems which no other prosecutor or court is faced with.

Another grim reality is the notorious scarcity of financial and other resources available for investigations and other work of the Court. Obviously, there are also other limitations and obstacles. For example, it seems realistic to assume that "Realpolitik" and states' interest will continue, in the future, to be important obstacles to the effectiveness of the ICC (Bassiouni, 2006).

In the apparently eternal struggle between brute force and the rule of law, further disappointments and setbacks seem possible. Steadfastness stamina and the readiness to weather future difficulties and crises with determination will therefore be indispensable the ICC must continue to consolidate its ongoing development into an efficient and professional international organization and, at the same time, into a functioning and credible international court. It also remains essential that the ICC continues to show; through the way it conducts all its activities, that it is a purely judicial, objective, neutral and nonpolitical institution. The Prosecutor and his office as the driving force of the ICC bear a special responsibility (Cassese, 2006).

In more legal terms the Rome Statute and the ICC Rules of Procedure and Evidence set up the legal framework for the work of the Office of the Prosecutor. The Prosecutor and his Office are called upon to use this legal framework for, firstly, the sustained build-up of an organization which is as efficacious as possible, and secondly, the continued development of professional and efficient working methods, with clear goals and priorities, in particular with regard to investigations. The efficiency of the work of the Office of the Prosecutor is essential for the Court as a whole.

Without professional and efficient working methods, without an Office of the Prosecutor which carries out its duties in an optimal manner, the ICC cannot function is obvious that the Court cannot be successful without active and steadfast support from states parties, not only in word but also, more importantly, in concrete deed. States parties must draw appropriate conclusions from the well-known fact that the Court has no executive powers, no police, no armed forces or other executive mechanisms. Consequently, states parties and the Court must in a foreseeable future develop a new system of best practices of effective criminal cooperation (Kaul, 2006).

The complex system apparently needs more time to be fully accepted and adhered to by all concerned in order to develop its full potential. At the same time, the principle of complementarity creates a curious pair of conflicting forces and hence a dilemma for the Court itself. If states generally discharge their primary duty to prosecute crimes, the Court will not be given anything to do and will have no cases. On the other hand, the Court needs exemplary and successfully handled cases (Hans Kaul, 2006).

From cross-border pollution to terrorist training camps, from refugee flows to weapons proliferation, international problems have domestic roots that an interstate legal system is often powerless to address. To offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives. To create desirable conditions in the international system, from peace, to health to prosperity, international law must address the capacity and the will of domestic governments to respond to these issues at their sources.

In turn, the primary terrain of international law must shift and is already shifting in many instances from independent regulation above the national state to direct engagement with domestic institutions. The three principal forms of such engagement are strengthening domestic institutions, backstopping them, and compelling them to act. The most striking feature of this conception of international law is a direct emphasis on shaping or influencing political outcomes within sovereign states in accordance with international legal rules. Even in 1945, the drafters of the U.N. Charter still maintained the classical position that international law and institutions shall not "intervene in matters which are essentially within the domestic jurisdiction of any state (Burke &Slaughter, 2006).

Today, however, the objectives of international law and the very stability of the international system itself depend critically on domestic choices previously left to the determination of national political processes whether to enforce particular rules, establish institutions, or even engage in effective governance. By ensuring that national governments actually function in pursuit of collective aims, international law is starting to play a far more active role in shaping these national political choices. Assuming that current political, economic, and technological trends continue, the future effectiveness of international law will turn on its ability to influence and alter domestic politics.(Burke &Slaughter, 2006).

Article 15(8) of the Covenant of the League of Nations, Article 2(7) was inserted in the United Nations Charter (UN Charter) to limit the authority of the organization in respect of disputes which are essentially within the domestic jurisdiction of the member states. After 50years of the establishment of United Nations (UN), today it seems that the importance of the domestic jurisdiction clause has reduced considerably.

If it has not already become a misnomer in the context of the UN practice the modern state rarely think that domestic jurisdiction can provide a shield against UN jurisdiction in relation to any matter falling within its so-called reserve domain. Most of the views departing from the legal notion of domestic jurisdiction tend to move in a direction that is exactly the opposite of what the framers of the Charter wished while drafting Article 2(7) (Nolte, 2002).

These views seem to posit an objective interpretation of Article 2(7) to justify UN practice which has developed gradually since the early years oftheorganisation'sexistence.3As often as not, in the early years of the UN there were manifold debates and discussion among diplomats, statesmen and scholars about the principle of domes-tic jurisdiction stated in the Article 2(7). At times, states have resorted to the plea of domestic jurisdiction before the political organs of the United Nations quite frequently.

But it has not proved to be an effective tool which can dissuade the UN from taking steps against offending states. The rapid development of the international legal regime of human rights and a significant change as to the way "threat to peace" is being defined by the Security Council have engendered new approaches about the role of the UN which has not left untouched the meaning and application of the concept of domes-tic jurisdiction in the context of UN practices. About human rights it can be said that the increasing involvement of the UN in this area since the seventies shows an inclination of the UN to see that human rights are respected in every country (Conforti, 2005).

2.1.2 ICC jurisdiction, Africa Perspective

Every nation-state at the Rome Conference establishing the International Criminal Court had different ideas of who the ICC would go after and for what reasons. Ivory Coast's former president Laurent Gbagbo, for example, ratified the ICC treaty in hopes that the ICC would try rebels in his country. Instead, the ICC indicted Gbagbo himself. African states comprise 30 percent of the court's membership, and African citizens have been the only targets of the court's jurisdiction. More than two-thirds of the members of the African Union (AU) are parties to the treaty establishing the International Criminal Court (Lekalake & Clarke, 2015).

Nevertheless over the years the Assembly of the AU has adopted various resolutions critical of the ICC and its practice Among the questions addressed are: whether the ICC is guilty of selective prosecution of cases originating in Africa; why the AU is so critical of the ICC and how its attitude has evolved over the years; how is the ICC constrained by the customary international law doctrine of head-of-state immunity; the extent to which the prosecution of Kenya's president and deputy president pose a real challenge to the ICC's authority; the problem of witness protection before the ICC; the principle of complementarity in the African context; the AU's attempt to establish a regional court to try international crimes; and finally, the road ahead and whether it is likely that the AU will ever permit the ICC to open a liaison office in Addis Ababa (Mayerfeld ,2003).

There are 120 countries currently party to the Rome Statute and 33 African states comprise nearly 30 per cent of the court's membership, or over 60 per cent of the continent's states. By the numbers alone, assuming that conflicts occur with similar frequency in each inhabited continent, a national of a member state found to be in violation of the provisions of the statute is statistically more likely to be from Africa than from any other continent. More importantly, consider the reasons for which warrants have been issued thus far (Ahmed K, 2006).

These are not newly emerging crises that have just been brought to the world's attention. Rather, with the notable exception of Kenya, these are intractable crises that the international community has struggled to resolve in a just and timely manner. ICC warrants in these cases can be conceptualized as the next phase of international engagement and perhaps, no more invasive than the Security Council continuing to renew peace-keeping missions in the Congo, or the World Bank attaching democracy-based conditions to financial assistance (Kurt Mills, 2012).

In the Kenyan case, it is argued that the ICC was to some extent playing into local politics in its decisions to charge certain individuals and not others. The question for both domestic and international law is whether process sanitizes the political to the point where it is predictable or internally consistent. The aspiration is to build a transparent procedural base, which contemplates human dignity and equitable access and treatment before the system, and is therefore just, if not always fair. Countries from the global south frequently complain of skewed power relations in the UN Security Council. This imbalance has affected the ICC because, under the Statute of the ICC (the Rome Statute), the Security Council has the power to refer cases to the court.

The Security Council has referred some cases Libya and the Sudanese region of Darfur but not others, such as Israel and Syria. The fact that the two situations that have been referred come from Africa tends to support the suggestion that there is an anti-African bias (Nyabola N, 2012).

This has been effectively argued by John Dugard (2013) there are good reasons to pursue the cases that are under investigation or prosecution before the ICC. For one thing Africa has experienced a large number of atrocities and, statistically speaking, the rate of atrocity crimes committed on the continent would make it a natural focus for the court anyway. The victims of those crimes want justice. The people who complain about the bias tend to be African political elites, not the victims, who appear to be almost universally relieved that somebody is paying attention to their plight (Dugard, 2013).

However, there is a genuine problem, which has to do with perception and the need for the ICC to be seen to be acting in a just manner in order to maintain its authority. The universal aspirations of international criminal law are inconsistent with a focus that is limited to African states, in a world in which many other states particularly powerful ones act with apparent impunity. The refusal by Archbishop Desmond Tutu of South Africa in 2012 to share a stage with former British Prime Minister Tony Blair in Johannesburg, based on the latter's actions over the war in Iraq, called attention to this apparent moral ambivalence in relation to the way the ICC works. Tutu's moral authority helped to demonstrate that this perception problem is very real. Failure to take this problem seriously has provided some African politicians and officials with ammunition to argue that the ICC is selectively biased against Africa (Max Du Plessis, et al, 2012).

This distracts from the very real plight of victims of war crimes and crimes against humanity which have taken place on the continent. The previous chief prosecutor of the ICC, Luis Moreno Ocampo (2003–12) exacerbated the situation by failing to communicate with his African interlocutors, particularly by failing to partake in discussions with the AU. The former chairperson of the AU Commission (2008–12), Jean Pingeven emphatically stated that;

> Frankly speaking, we are not against the ICC. What we are against is Ocampo's justice (Jean Ping, 2012).

However, it is important to remember that there only two situations of which the ICC is seized because of the prosecutor's *proprio motu* power relating to Kenya and to Côte d'Ivoire. In the case of Côte d'Ivoire, the government willingly accepted the court's jurisdiction before becoming a state party in order to allow the prosecutor to commence a case there. In four situations before the court Uganda, the Democratic Republic of Congo (DRC), the Central African Republic and Mali the states themselves referred the cases (though the prosecutor retained the final say on whether these cases were pursued).

The further two situations Libya and Darfur were referred by the Security Council. Given that states and the Security Council have referred a majority of the cases before the court, the more pressing issue, as far as the prosecutor's alleged bias is concerned, may be the non-pursuit of situations and cases from other parts of the world, rather than the pursuit of African situations and cases. But at the same time, state referrals should not be understood as wholesale endorsements of international criminal justice (Alexander & Reenawalt, 2007).

In some instances, African governments have referred cases in order to manipulate the international criminal justice system for their own political purposes. For instance, President Yoweri Museveni of Uganda initially referred cases involving the Lord's Resistance Army to the court but now takes a leading role in the AU's campaign against the ICC. He has been even more vocal about his opposition to the ICC than the AU's current chairman, Prime Minister Haile Mariam Desalegn Boshe of Ethiopia, who recently announced that the organization opposed the prosecution of President Uhuru Kenyatta of Kenya for crimes against humanity and promised to raise the matter with the United Nations (Max Du Plessis, 2013).

For Kenya, that means a system through which those who have been implicated in the darkest events of the 2007/8 post-election violence are asked to account for their actions in a space that is necessarily divorced from the inevitable heat of the upcoming election. (Nyabola, 2012).

The international criminal court opened its first case in 2004, after Uganda referred the situation of the Lord's Resistance Army to the court. The process of case initiation was through trigger mechanisms that became complex and politically sensitive. Self-referral of Uganda and the Democratic Republic of Congo in 2004 and that of the Central African Republic in 2005 served as tests of the Court's functioning (Schabas 2008).

A large number of African states are states parties to the ICC's Rome Statute but the AU is very critical of the ICC and has adopted a number of resolutions reflecting this. Yet most African states at one time strongly supported the ICC. They were very active in the negotiation of the Rome Statute in the late 1990s.

This was a time of great optimism, particularly because the statute had not just the backing of African governments but also of African NGOs, grouped under the International Coalition for the ICC (Dugard, 2013). The turning point came in 2000 when Belgium issued an arrest warrant for the DRC's then-minister of foreign affairs; Abdoulaye Yerodia Ndombasi.

This was not well-received in Africa and began to sour relations between Africa and Europe over the issue of sovereign immunity. Then, in 2008, the chief of protocol to President Paul Kagame of Rwanda, Rose Kabuye, was arrested in Germany pursuant to a French arrest warrant in connection with the shooting down of the former Rwandan president's plane, which triggered the 1994 genocide. Kagame took up the issue at the UN, framing it as an abuse of universal jurisdiction by European states aimed at humiliating African political leaders. These are just two examples in a series of cases in which European states relied on universal jurisdiction to harass, in the eyes of some observers, African leaders (Sands P, 2006).

In 2008, the AU reacted to the increased use of universal jurisdiction in European states by adopting a resolution denouncing certain Western governments and courts for abusing the doctrine of universal jurisdiction and urging states not to cooperate with any Western government that issued warrants of arrest against African officials and personalities in its name.8 The watershed moment for the AU's relationship with the ICC came in March 2009, following the issuance of the first arrest warrant for President Omar al Bashir of Sudan. For states parties to the Rome Statute, this transformed it from a 'paper commitment' with no real consequences into a very real commitment with potentially serious consequences (Max Du Plessis, et al, 2012).

The Bashir arrest warrant caused the relationship between the ICC and the AU to deteriorate for two reasons. First, members of the AU felt that the issuance of the arrest warrant was an impediment to the organization's regional efforts to foster peace and reconciliation processes in Sudan, and that the ICC failed to appreciate the effect that its actions were having on these efforts. Secondly, diplomatic umbrage took over the indictment of a sitting head of state, which sparked a debate on whether the Rome Statute can legitimately extinguish diplomatic immunity in states that are not parties to it, such as Sudan (Kiyani , 2013).

The AU's opposition to the ICC has created a legal conflict for states that are parties to both institutions; different governments have chosen to resolve it in different ways. For instance, when President Jacob Zuma was due to be inaugurated in South Africa, invitations were sent out to all African heads of state, including President Bashir. As a party to the Rome Statute, South Africa would be required to arrest President Bashir, if he attended the event. Overnight this created a diplomatic scandal that was very difficult for South Africa to deal with.

After two or three days' silence from the South African government on the issue, civil society representatives threatened to request declaratory relief from a court that if President Bashir were to arrive in South Africa there would be an arrest warrant issued for him. The government eventually took the position that it would be under an obligation to arrest Bashir if he arrived in South Africa, and the Sudanese president did not attend the inauguration. South Africa's position that it is bound by the Rome Statute has been clear and consistent since then (Gill, 2010).

But it is likely that many other African states faced with a similar choice would side with the AU, not the ICC. Under customary international law senior state officials, such as President Bashir, for whom arrest warrants, were issued in 2009 and 2010, and President Kenyatta and his deputy William Ruto, whose trials began in 2013, have immunity from legal proceedings. There is a question to the how the ICC is constrained by this prohibition. The question of immunities is central to the AU. One interpretation of Article 27 of the Rome Statute, which provides that state immunity does not apply under the statute, is that it creates an exception to customary international law and allows heads of state and other senior state officials to be tried in this particular jurisdiction (Kiyani - 2013).

Article 98 of the Rome Statute appears to conflict with Article 27, however, by providing that the ICC may not request cooperation or surrender from a state where that would require that state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity. But there appears to be an acceptance that states parties, by virtue of becoming members of the Rome Statute, have waived the immunity of their own officials or have otherwise accepted that they do not have immunity (Max Du Plessis, et al, 2012).

So, at least as far as states parties are concerned, Article 98 does not apply, and there is no immunity before the court. The difficulty arises in respect of states that are not parties to the Rome Statute, such as Sudan. There are a variety of views on this issue. It has been argued that in this situation, it is irrelevant that Sudan is not a state party because the case was referred by a Security Council resolution, which is are binding on all UN member states.

In 2012 the AU Assembly asked the AU Commission to consider whether it would be possible to request an advisory opinion from the International Court of Justice (ICJ) on the question of immunity. While this initiative may not be successful, it is commendable that the AU has sought to resolve this matter through respected international law channels. It is clear that the question of immunity raises important, unresolved questions (Max du Plessis, 2012).

> There can be no global justice unless the worst of crimes against humanity are subject to the law. In this age more than ever we recognize that the crime of genocide against one people truly is an assault on us all. The establishment of an International Criminal Court was ensuring that humanity's response was swift and was just (Kofi Annan, 2002).

On 20 November 1945, the criminal trial of 23 senior Nazis opened in courtroom 600 of Nuremberg's Palace of Justice. Hermann Goering, Albert Speer and Hans Frank were among those in the dock for a variety of horrors, in a case that was cobbled together at great speed.It was a unique moment, the first time in history that individual leaders of a sovereign nation had found themselves before an international criminal court. The day heralded the promise of a new world constructed on the pillars of justice and law, a world that seems as far away as ever in the light of the current situation in Syria Gaza and the barbaric events in Paris.It cannot be said that the present plight is entirely for want of effort, reflecting the desire to tame power by the force of reason and law. Over seven long decades after Nuremberg, politicians, diplomats and lawyers struggled to put in place the semblance of an international justice system. New international crimes have been agreed; genocide, crimes against humanity, aggression and in the 1990s new courts were finally established (Max Du Plessis, 2012).

Responding to the horrors in the former Yugoslavia and Rwanda prompted the Security Council into action. Africa offers a stark illustration of the challenges. In June the South African government ignored an order from the ICC to arrest Sudan's President Omar al-Bashir for alleged genocide and war crimes in Darfur - as he visited Pretoria, provoking a crisis also with its own courts, which ordered that Bashir not be allowed to leave. The decision reflected a wider problem, one that is barely addressed in polite company: every one of the 23 cases today at the ICC involves Africa, as though that continent has a monopoly on international crime. Yet that may not to be the case. International courts are symbols of a commitment to enforce the rules that have been put in place by judicial means, a means of encouraging national courts to engage more actively. However imperfect, Nuremberg's legacy is one of potential, for the idea of accountability, for the hope that none shall not become like those who seek to destroy the world, and for the memory of justice. It's going to be a long game. The ICC as an embryonic global justice system is constructed on the anvil of atrocity. It is that which the world has today that is better than nothing. Overly, the illusion of justice does not do more harm than good (Max Du Plessis, 2012).

2.1.3 The Concept of ICC, Kenya Perspective.

The Kenyan cases were initiated by the processes of assessing the Prosecutor's request for authorization to investigate alleged crimes in Kenya, the ICC judges of Pre-Trial Chamber II requested the Prosecutor to provide clarification and additional information. The judges requested additional information and clarification with respect to the State and/reorganizational policy under article 7(2) (a) of the Rome Statute and the admissibility within the context of the situation in Kenya, to be provided no later than 3 March 2010.

Prosecutor sought authorization from Pre-Trial Chamber II to commence an investigation of the alleged crimes committed within the context of the 2007-2008 post-election violence. The Prosecutor asserted that the alleged crimes appear to constitute crimes against humanity On 31 March, 2010; the Pre-Trial Chamber II issued its decision authorizing the Prosecutor to commence his investigations into Kenya. Pre-Trial Chamber II assented to the Prosecutor's request by a two-one majority. The Chamber was mandated to review the conclusion of the Prosecutor by examining the available information, the supporting material as well as the victims' representations in order to determine whether there is reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed (Tania Deigni, 2010).

In their review the Chamber Judges considered three factors when making their decision: (i) the Court's jurisdiction; (ii) admissibility of the case; and (iii) interests of justice. With regards to the question of jurisdiction, the Judges considered whether the following three conditions were satisfied: Firstly, did the alleged crime occur within the period set out in Article 11 of the Statute? Essentially, according to Article 11, the Court only has jurisdiction only with respect to crimes committed after the entry into force of the Statute. Secondly, does the alleged crime fall within the category of crimes under Article 5 of the Statute? According to Article 7 acts that would constitute crimes against humanity include murder, rape and other forms of sexual violence, deportation and forcible transfer of population and other inhumane acts.

Thirdly, was the crime committed on the territory of a State Party to the Statute or a national of any such commit the crime? After a careful examination of the available information, the majority of the Chamber October 2010 concurred that the requirements regarding jurisdiction were fulfilled and the request was within the jurisdiction of the Court and a crime against humanity had been committed in Kenya (Sands P, 2015).

On 31 March 2011, the Kenyan government challenged the admissibility of the cases before the ICC. It argued that the adoption of Kenya's new constitution and associated legal reforms had opened the way for Kenya to conduct its own prosecutions relating to the post-election violence. On 30 May 2011, the PTC rejected these challenges, arguing that the Kenyan government had yet to begin investigations into any of the cases before the ICC. On 30 August 2011; the ICC Appeals Chamber confirmed the PTC's decision on the admissibility of the cases (Article 19(2) (b), 2011).

Kenya's government is obliged to cooperate fully with the ICC in investigations and prosecutions of crimes within its jurisdiction. The ICC does not have its own police force and so the cooperation of states is essential to the arrest and surrender of suspects. When a state fails to comply with a request to cooperate, the court may refer the matter to the Assembly of States Parties for further action (ICC article 112 Rome Statute, 2002). The assembly is made up of representatives of all states which are party to the Rome Statute, and acts as an oversight body for the ICC (Rome Statute, 2002).

However the intrigues in national and regional and international political circles, alliances in the international arena and theatrics in and out of the ICC seems to have ushered in an epoch of writing history, a new page in diplomacy and international relations among nation states .It is argued that the future of Africa's relationship with the ICC is uncertain. Some African governments have a history of manipulating the ICC for their own political advantage skillfully in some instances, as recently demonstrated by Kenya.

And when their obligations under the Rome Statute conflict with their obligations to the AU, historically, too few African governments have lived up to the former. But the picture is not entirely bleak. While the expansion of the African Court's jurisdiction to criminal matters has been interpreted as an attempt to undermine the ICC there could be a valid role for the African Court, given the right political and financial support. There is also a valid role for domestic prosecutions in international criminal justice (Abbas, 2013).

Meanwhile, there is encouraging evidence that calls for domestic action by civil society organizations are being increasingly listened to. The AU Assembly's request to the AU Commission to consider whether it would be possible to request an advisory opinion from the International Court of Justice (ICJ) on the question of immunity can also be viewed in a positive light to the extent that it demonstrates the AU's desire to oppose the ICC through legal channels where possible. It is against this backdrop that the study sought to interrogate the influence of ICC jurisdiction on Sovereignty in Kenya.

2.1.4 The Concept ICC and State Sovereignty

In the 19th century the English jurist John Austin (1790–1859) developed the concept of sovereignty by investigating who exercises sovereignty in the name of the people or of the state; he concluded that sovereignty is vested in a nation's parliament. A parliament, he argued, is a supreme organ that enacts laws binding upon everybody else but that is not itself bound by the laws and could change these laws at will. This description, however, fitted only a particular system of government, such as the one that prevailed in Great Britain during the 19th century. Austin's notion of legislative sovereignty did not entirely fit the American situation (Lorca, 2010).

The Constitution of the United States, the fundamental law of the federal union, did not endow the national legislature with supreme power but imposed important restrictions upon it. A further complication was added when the Supreme Court of the United States asserted successfully in Marbury *v.* Madison (1803) its right to declare laws unconstitutional through a procedure called judicial review. Although this development did not lead to judicial sovereignty, it seemed to vest the sovereign power in the fundamental document itself, the Constitution (Stuart Leibiger 2012).

This system of constitutional sovereignty was made more complex by the fact that the authority to propose changes in the Constitution and to approve them was vested not only in Congress but also in states and in special conventions called for that purpose. Thus, it could be argued that sovereignty continued to reside in the states or in the people, who retained all powers not delegated to the United States by the Constitution or expressly prohibited by it under the terms of the Constitution's Tenth Amendment(Sands P, 2015).

Consequently, the claims by advocates of states' rights that states continued to be sovereign were bolstered by the difficulty of finding a sole repository of sovereignty in a complex federal structure; and the concept of dual sovereignty of both the union and the component units found a theoretical basis (Smentkowski 2016).

Even if the competing theory of popular sovereignty the theory that vested sovereignty in the people of the United States was accepted, it still might be argued that this sovereignty need not be exercised on behalf of the people solely by the national government but could be divided on a functional basis between the federal and state authorities. Another assault from within on the doctrine of state sovereignty was made in the 20th century by those political scientists (e.g., Léon Duguit, Hugo Krabbe, and Harold J. Laski) who developed the theory of pluralistic sovereignty (pluralism) exercised by various political, economic, social, and religious groups that dominate the government of each state. According to this doctrine, sovereignty in each society does not reside in any particular place but shifts constantly from one group (or alliance of groups) to another. The pluralistic theory further contended that the state is but one of many examples of social solidarity and possesses no special authority in comparison to other components of society (Spalding, 2010).

State sovereignty, in its most basic sense, is being redefined not least by the forces of globalization and international cooperation .States are now widely understood to be instruments at the service of their peoples, and not vice versa .At the same time individual sovereignty by which the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent treaties has been enhanced renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them (Kofi A. Annan, 1999).

Krasner (2000), identifies the following four ways in which the term sovereignty is commonly used: Domestic sovereignty, which refers to the organization of political authority within a state and the level of control enjoyed by a state. Interdependence sovereignty, which is concerned with the question of control, for example, the ability of a state to control movements across its own borders.

The state is treated at the international level similarly to the individual at the national level. Westphalia sovereignty, which is understood as an institutional arrangement for organizing political life and is based on two principles, namely territoriality and the exclusion of external factors from domestic structures of authority (Krasner 2000).

Westphalia sovereignty is violated when external factors influence or determine the domestic authority structures. This form of sovereignty can be compromised through intervention as well as through invitation, when a state voluntarily subjects internal authority structures to external constraints. Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over apiece of territory and all the persons from time to time therein (Holmes, 1988.).

The principle of sovereign equality of states is enshrined in Article 2.1 of the UN Charter. Internally, sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the state. Generally, however, the authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.

A condition of any one state's sovereignty is a corresponding obligation to respect every other state's sovereignty: the norm of non-intervention is enshrined in Article 2.7 of the UN Charter. A sovereign state is empowered in international law to exercise exclusive and total jurisdiction within its territorial borders. Other states have the corresponding duty not to intervene in the internal affairs of a sovereign state. If that duty is violated, the victim state has the further right to defend its territorial integrity and political independence.

In the era of decolonization, the sovereign equality of states and the correlative norm of non-intervention received its most emphatic affirmation from the newly independent states At the same time, while intervention for human protection purposes was extremely rare, during the Cold War years state practice reflected the unwillingness of many countries to give up the use of intervention for political or other purposes as an instrument of policy. Leaders on both sides of the ideological divide intervened in support of friendly against local populations, while also supporting rebel movements and other opposition causes in states to which they were ideologically opposed. None were prepared to rule out a priori the use of force in another country in order to rescue nationals who were trapped and threatened there. (Danner, 2006).

The Westphalia treaties of 1648 established this principle as a cornerstone for international order. The state is entrusted by the international community to manage its own internal affairs, among which the responsibility to protect its citizens from atrocities. In African states sovereignty continues to be placed at the top of their bilateral and multilateral diplomacy. This is a departure from the rest of the international community where the state is viewed as an instrument in the service of its people (Annan 1999).

> On 3 July 2009, the African Union (AU) Assembly of Heads of State and Government (Summit) adopted a decision on the International Criminal Court's (ICC) indictment of the President of Sudan (decision), Omar Hassan Al Bashir. The essence of the decision was that African states would not cooperate with the ICC in the execution of the arrest warrant issued against Al Bashir. The decision placed African states party to the Rome Statute establishing the ICC, in the unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other (Tladi, 2009).

The AU decision also raises a number of critical questions about the direction of international law and international law-making from both a normative and an institutional perspective. From a purely institutional perspective, the decision raises questions about the relationship between the AU and the UN, the relationship between the AU and its member states vis-à-vis broader international issues, and the relationship between international organizations and their African member states vis-à-vis AU decisions. From a more normative perspective, the decision raises questions about the reality of a new value-based international law, centered on the protection of humanity and human rights and whether such a new international law can escape accusations of neo-imperialism. The pursuit of a new vision of international law predicated on the respect for human rights and concern for the plight of humanity is one which should be a common goal. Yet the vision continues to be questioned as imperialistic, colonialist and even racist (Jouannete, 2007).

Thus it may be argued that the AU decision is simply a response to this new form of imperialism one in which the ICC is seen as a Western imperial master exercising imperial power over African subjects. Put another way, the question can well be asked whether the ICC represents a tool through which Western powers can further demean the already demeaned victims of past colonialism?

The question forces us to confront the question, whose international law is this new international law that has generated so much excitement. But the decision also 4 raises questions about the respective roles of peace and justice in this new vision of international law. It forces us to confront the question of whether the ICC's pursuit of Al Bashir threatens the peace process in Sudan State sovereignty in the African continent is regarded above that of the individuals and this is due to the focus on the apparatus that runs the country and the power that is laid on the sovereign (Samkange, 2002).

The African systems of government have subjugated their role to protect the rights of the individuals and instead they are the ones in violation of these rights (Burja, 2008). African Union represents the institutionalization of Pan-Africanism. The AU was created to ensure good governance and the rule of law .The AU shall defend the sovereignty, territorial integrity and independence of its Member States. The AU's objectives include the promotion of African states sovereignty as well as the promotion of human rights within its member states. The AU has the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity (AU 2000, Article 4).

There has, in recent times, been a certain degree of excitement about the infusion of values into international law and the emergence of a 'new *jus gentium* of our times'. The characteristics of this new and emerging international law include a move away from a state-centric model of traditional international law based on the preservation of sovereignty, to one more concerned with humanity.

This idea of a limited view of sovereignty 'which brings moral value to order' is also reflected in what Jones, Pascual and Stedman have referred to as 'responsible sovereignty', a notion that sovereignty entails obligations and duties to one's own citizens and to other sovereign states(Pascual and Stedman ,2009).

The central and most controversial feature of this new value-laden approach to international law is its claim to universality. By universality, here, I refer to Simma's 'third level universality' an approach which establishes a 'public order on a global scale, a common legal order for mankind as a whole.' This concept of universality is characterized by a number of features including the establishment of a hierarchy of norms, a value-oriented approach, de-emphasizing consent in the international law-making process, and the creation of a body of international criminal law. This appeal to universality obviously has strong roots in the natural law school of thought. It is encapsulated in legal norms such *asius cogens* and obligations *erga omnes* (Simma, 2009).

The birth of international criminal tribunals, including the ICC, to try serious international crimes is a direct consequence of this appeal to universality. The Rome Statute gives the ICC the competence to try individuals, irrespective of the office held, for crimes having the character of *Jus cogens* and creating obligations *erga omnes,* namely crimes against humanity, genocide and war crimes. While there has indeed been an evolution of a more humane international law concerned with the plight of people and not only the rights and obligations of states, there have also been concurrent mass atrocities and violations of rights Rwanda, Darfur, Uganda, Kosovo are examples. Many of these atrocities, however, can be explained as failings in the system, and not necessarily as a lack of traction for this new vision of international law.(Tladi and Dlagnekova, 2006).

2.2 The Effect of ICC Jurisdiction on National Interests

The increasing involvement of international law in the internal affairs of states is an ongoing phenomenon in the contemporary international system. International law is assuming a dominant role in domestic political affairs of states in matters which exclusively belonged to the jurisdiction of domestic law. On the one hand, international law is said to have no effective influence in domestic politics due to state sovereignty. On the other, international law is said to be assuming a dominant role in domestic politics signifying a paradigm shift from state sovereignty as control to sovereignty as responsibility, including to protect own citizens. International law has traditionally been concerned primarily with interstate relations. It has long governed relationships among states. Non state actors such as individuals and international organizations enjoyed a minute fraction of international legal personality (Karsten, 2005).

Under traditional international law, domestic politics such as the claims of individuals could reach the international plane only when a state exercised diplomatic protection and espoused the claims of its nationals in an international forum. Contemporary international law reflects a shift from governing interstate relations to direct interference in domestic political issues, particularly state-citizen relations in the context of human rights (Slaughter and Burke, 2002).

It is in this context that, The International Criminal Court ICC as an independent treaty organ under international law has the mandate that supersedes National laws and tries crimes of international concerns in situations where states are unwilling or unable to do so.

International law has penetrated the once exclusive zone of domestic affair to regulate the relationships between government and their own citizens, particularly through the growing bodies of human rights law and international criminal law. Domestic political affairs have long known to be the exclusive zone governed by domestic law. Since its inception, the role of international law in domestic political affairs has been limited and dependent on a state's conception of and attitude towards the international legal system (Martin and Ortega: 2009).

A state could completely disregard international law if it had a negative attitude towards it. Furthermore, the concept of sovereignty empowered states to exercise absolute authority even if it meant violating rules of the international legal system. Today many states, Zimbabwe inclusive, still emphasize state sovereignty as basis for noncompliance with certain or all rules of international law. They still regard sovereignty as sacrosanct. Zimbabwe's rejection of the SADC tribunal's ruling in the Campbell case was based on sovereignty. The justice minister, Patrick Chinamasa, argued that Zimbabwe does not take orders from an organization such as SADC because the country recognizes the principle of non-interference in the internal affairs of another country.

Non-interference is one of the pillars of Westphalian sovereignty. From a realist point of view, a state answers to higher authority. Realists also claim that states should not entrust their welfare with international and regional organizations. International organizations are imperialistic in nature, it is argued. There is no doubt that the position taken by Zimbabwe in the Campbell case was informed by realist principles.it ought to be recognized that international law is still developing and developing fast.

According to principles of Westphalian sovereignty, no entity or entities challenges the power of a state. Non-interference in the domestic affairs of other states, border inviolability and state as the sole arbiter for making laws and administration are the golden principles of the Westphalian notion of sovereignty. States can be part of international legal system to the degree they choose by consenting to particular rules (Dugard, 2007).

International law is based on the consent of states. States possessed the power to agree or disagree with rules of international law. As a result, states had and still have the opportunity to manipulate international law for political ends by aligning themselves only to those rules which favor their national interests. Moreover, they had solutions to their internal problems. One of the things that the ICC has done, which we applauded in our report, is rendering the rulings for all six candidates simultaneously. Because, the trouble with Kenyan politics is that it is organized around ethnicity and three of the six suspects come from one ethnic group. If, by default, based on the strength of the evidence that the court has against these three suspects, if the charges against them are confirmed one day, and on another day the charges against the other three are dropped, these communities will start viewing that the court is against them, and these politicians are not averse to whipping up that kind of narrative to get support and sympathy. So for the court to render the ruling on the same day, that in itself is a good step.

Also, during the confirmation of charges hearing, the court warned most of the politicians against hate speech and statements that might whip up ethnic tensions. And to be honest, that has really brought down the political temperature in Kenya. This is one thing that the court has done and that has really worked.

The other thing is for the court to explain its limitations. In the minds of most Kenyans, these guys have already been charged. The court needs to say,

> Look, these are just one of the processes before these guys are finally committed to serving a jail time" or whatever punishment they want to hand down. So the court needs to temper these expectations with real media outreach. They need to ramp that up (OTP ,2011).

A fundamental aspect of the ICC statute was that the court can only try cases where domestic courts are unable or unwilling genuinely to investigate or prosecute The ICC was one component of a regime made up of a network of states that have undertaken to advance international criminal justice alongside or as a complement to the ICC, acting as domestic international criminal courts in respect of ICC crimes (Max du Plessis et al, 2013).

A state is entrusted by the international community to manage its own internal affairs, among which the responsibility to protect its citizens from atrocities, the International Criminal Court represents a step towards a system of international law that reaches beyond state sovereignty. It proclaims the interest of humanity in the principle that those who commit the most serious international crimes should be held accountable. It follows from a new scheme that public interests gradually are taking shape and often prevail over private interests (Cassese, 2003).

The international criminal court was established for the purpose of harmonizing national and international criminal justice. Prosecution and punishment of serious offences against human dignity are still entrusted to the national or the territorial State. . The emergence of international human rights law, international criminal law, the doctrine of responsibility to protect, international and regional tribunals such as the International criminal court (ICC) ,African Union(AU),Assembly of parties (ASP)and others is evidence that the international legal system is growing.

Consequently, the emergence of the above branches of international law has culminated in the involvement of international law in shaping domestic politics particularly protecting citizens from oppression by their governments. More so, it should be noted that this continued development of international law has had a revision effect on Westphalian concept of state sovereignty which many states are failing to recognize. If they are aware of the shift in state sovereignty they might be reluctant to embrace new sovereignty. Traditional purposes of international law have been interstate, not intra-state. The traditional foundation of international law reflects the principles of Westphalian sovereignty often seemingly made up of equal parts myth and rhetoric (Krasner, 1999: 20).

Formerly Westphalian sovereignty asserted the right to be left alone, to be free from external meddling or interference. At its inception, sovereignty was the golden rule of international law. This is because the conclusion of the Westphalia Treaty in 1648 and the birth of sovereignty were geared towards eradicating war in Europe. Sovereignty became a rule beyond the continent of Europe (Smith 2007).

The ICC marks a significant step towards the realization of a new vision of the world community. It shows that economic self-interest, nationalism and the unilateral formulation of one's own interests or of one's own way of interpreting and promoting compliance with international standards are no longer the defining characteristics of international dealings in the world community. Where these are still significant, no less crucial are the role of universal responses and the need to enforce respect for them through a central body capable of administering justice impartially, on behalf of the whole community thus having universal jurisdiction (Rome Statute, 2002).

The principle of universal jurisdiction is rooted in the belief that certain crimes, such as, genocide, war crimes, crimes against humanity, “disappearance" and extrajudicial executions. To fulfill this responsibility, more than three-fifths of all states have enacted universal jurisdiction laws (including the Rome statute of the ICC) to ensure that their national courts are able to investigate and prosecute persons suspected of committing these crimes, and to ensure that their country is not used as a "safe haven" to evade justice. Today however, challenges facing states and the international community alike demand very different responses and thus new rules for the international legal system (Slaughter and Burke, 2006).

It has come to the attention of non-state actors that states do not have solutions to problems that befall the international community. Such problems, it has been realized, emanate from within states and states are reluctant, unable or unwilling to find lasting solutions. In contemporary international politics, individual states cannot be trusted to provide amicable remedies to, for instance, human rights abuses. The doctrine of responsible to protect among others has come on board to make sure that international law alters domestic politics to make sure that states do not abuse their power in their interaction with non-state actors such as individuals. Furthermore, the process of globalization and the emergence of new transnational threats in the international system have fundamentally changed the nature of governance and the necessary purposes of international law (Leuprecht et al, 2012).

From cross border pollution to terrorist training camps, from refugee flows to weapon proliferation, international problems have domestic roots than the interstate legal system is often powerless to address. In this regard, majority of international problems that threaten both national and international relations have domestic origins.

The sources of, for instance, refugee problems, ethnicity and human rights abuses and weak/ bad governance emanate from within states. Most of these problems are a result of failure by domestic institutions to execute their policies and handle their mandates. Through the international criminal court jurisdiction states are compelled to map out strategies to mitigate the problems (Slaughter & Burke, 2006).

2.3 ICC Jurisdiction Responsibilities to Protect (R2P)

R2 P refers to a norm or set of principles based on the idea that sovereignty is not a privilege, but a responsibility. R2P focuses on preventing and halting four crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing the responsibility to protect can be thought of as having three parts (Macmillan, 2004).

A State has a responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing if the State is unable to protect its population on its own; the international community has a responsibility to assist the state by building its capacity. This can mean building early-warning capabilities, mediating conflicts between political parties, strengthening the security sector; mobilizing standby forces, and many other actions. If a State is manifestly failing to protect its citizens from mass atrocities and peaceful measures are not working, the international community has the responsibility to intervene at first diplomatically, then more coercively, and as a last resort, with military force (Evans Gareth, 2008).

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in the obligations inherent in the concept of sovereignty, the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security, specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law, the developing practice of states, regional organizations and the Security Council itself.

The responsibility to protect embraces three specific responsibilities which include the responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention. and the responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

In the international community, R to P provides a framework for using tools that already exist like mediation, early warning mechanisms, and economic sanctioning to prevent mass atrocities. Civil society organizations, States, regional organizations, and international institutions all have a role to play in the operationalization of R to P. The authority to employ the last resort and intervene militarily rests solely with United Nations Security Council and the General Assembly (Mitchell, 2005).

In order to implement RtoP, States and regional organizations need to have the necessary resources to prevent and halt mass atrocities, i.e. early warning mechanisms, stand-by forces in problem areas, mediation mechanisms.. These resources and the necessary capacity building must come from the international community, which has a historic pattern of remaining unresolved.

According to Ban Ki-Moon(2009), there are three pillars of R2P; Pillar One stresses that States have the primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (mass atrocities),Pillar Two addresses the commitment of the international community to provide assistance to States in building capacity to protect their populations from mass atrocities and to assisting those, which are under stress before crises and conflicts break out and Pillar Three focuses on the responsibility of international community to take timely and decisive action to prevent and halt mass atrocities when a State is manifestly failing to protect its populations.

A main concern surrounding R2 P is that it infringes upon national sovereignty. In reality, the first and second pillars of R to P place the responsibility to protect on the state with assistance in capacity building from the international community. The only occasions that the international community was intervene without permission from the state is when the state is either allowing or committing mass atrocities, thereby not upholding its responsibilities as a sovereign, and when peaceful measures have failed? By this logic, R to P could be said to promote sovereignty.

The scope of R to P is often questioned. The concern is whether or not R to P should apply to more than the four crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing. For example, should R to P be used to protect civilians in peril following natural disasters? In general the consensus is that the scope of R to P should remain narrow and well-defined. At the General Assembly's debate on R to P in July 2009, several Member States affirmed the scope and said that broadening the applicability of R to P could diminish its effectiveness (Lykketoft 2014).

The politics and anti-politics of the R2P in theory encompass the question as to whether the R2P'escape the logic of the political' or is it eternally beholden to the forging of friend/enemy groupings and the potential of lethal combat against the enemy? Does the norm walk a fine line between politics and anti-politics that evade the potentially extreme outcomes of each end of the spectrum? The focus of the R2P is on key theoretical principles and documents related to an attempt to discern whether it does in fact maintain the anti-political liberal stance. On the face of it, it could well be maintained that the R2Pis founded upon hostility to the sovereign state and seeks to establish a method for hindering and controlling the state's and government's power.

The liberal individualism that forms the ethical platform for the R2Phas been explicitly rendered in terms of the sovereignty of the individual over the sovereignty of the state are now widely understood to be instruments at the service of their peoples, and not vice versa (Kofi Annan, 1999).

This is an enhancement of ‘individual sovereignty’ brought about by a ‘renewed and spreading consciousness of individual rights’. Annan’s claims tapped directly into the ‘sovereignty as responsibility’ line of thought that is generally attributed to the work of Francis Deng (1996), but which also has some clear antecedents, for example in the earlier work of Michael Riesman (1990). All espouse a trenchant sense of individualism as the foundation for a distinctly modern politics that is reflected in ‘the people’s sovereignty rather than the sovereign’s sovereignty’, a phrase used by both Riesman (1990) and Annan (1999)

This concept of popular sovereignty is, in turn, grounded upon a mix of natural law claims of human rights and universal justice and particular normative claims. On the one hand, in the ICCIS (2001,) the notion of universal justice is connoted justice without borders, which points toward a claim to being beyond politics, while on the other, the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security as the foundation for a new definition of sovereignty

Alex Bellamy (2002) has attempted to avoid the pitfalls of universalism or foundationalism in arguing that Humanitarian intervention ought to be seen not in terms of the upholding of universal moral principles, but rather as theory informed practice based upon the extension of values created within particular communities. In addition, the ICISS report at times indicates the claim to ‘common sense’ of the R2Pmovement, aiming as it does toward a global ‘consensus’ on when to intervene for human protection purposes.

In this regard, the ICISS report establishes a division between those supportive of a softening of state sovereignty for the purposes of intervention and those who believe that any such move would amount to neo-colonialism. The response to this political divide comes with the suggestion that 'in the interest of all those victims who suffer and die when leadership and institutions fail, it is crucial that these divisions be resolved' (ICISS, 2001).

The path toward resolution, from the R2Pperspective, is to walk a middle path between the concerns of weaker states concerned with neo-imperialism and stronger states concerned with the promotion of 'universal values' 'Sovereignty as responsibility' then appears as the shorthand for this compromise.

The ICISS report (2001,) insists that this revised concept of sovereignty does not constitute a 'transfer or dilution of state sovereignty,' which would only be affected if a state failed to fulfill its sovereign responsibilities. In recent years, Ban Ki-Moon and Edward Luck (2009) have also been very active in promoting the idea that R2Pshould be understood as strengthening, rather than weakening, state sovereignty.

In the Report of the UN Secretary General on 'Implementing the Responsibility to Protect' (2009), it is emphasized that the responsibility to protect is an ally of sovereignty, not an adversary. The problem for this approach to sovereignty is that the idea of 'responsibility' cannot be left as an amorphous normative ideal. If responsibility is to truly exist, not just between sovereign and people, but also between sovereign states and the international community, then there must be a mechanism for holding recalcitrant states accountable for breaches of that responsibility.

This, in turn, suggests the need to use force in extreme cases, a point which is clearly accepted in all formulations of the R2P, under the 'pillar' of the 'responsibility to react.' This being the case, we can clearly see that this is a doctrine that encapsulates the possibility of combat against an enemy group (that is responsible for war crimes, crimes against humanity, or large scale abuses of human rights), and this then leads us directly back into Schmitt's understanding of the political. The question that follows goes to whether 'sovereignty' has actually been redefined under the R2Pat all. To say that the redefinition of sovereignty proposed by the R2Pdoes not necessarily offer any kind of guarantee against the persistence of irresponsible action by interventionist powers in contemporary international relations is an abstraction of the R2P.

The objective of any intervention under R2Pis stated as being for the protection of a population, not defeat of a state (The International Commission on Intervention and State Sovereignty 2001, p. XIII). But can human protection and 'defeat of a state' in battle be separated in an emergency situation? Is it not the essence of sovereign decision to resolve a crisis by 'taking charge', which of necessity requires the neutralization and replacement of any pre-existing sovereign power? In an incisive critique of Alex Bellamy's 'promise of a "beyond" to identity and difference', Gideon Baker(Baker 2010, pp. 93-94) suggests that Bellamy's argument 'ends up dialectically resolved in the direction of (a particular liberal form of) universality.' In the analysis of the Libyan case it is argued that, the R2Pis incapable of balancing its aspirations for universality and sovereignty thence, the attempt to maintain a Universalist, humanitarian stance tends toward a denial of the role and effects of power in the resolution of emergency situations. The intervening force, invariably play the role of 'king-maker' or perhaps king and this intensely political role may well involve participation in acts that look more like war crimes than human protection.

2.4 ICC Jurisdiction and State Treaty Obligations

Treaties are the primary source of international law, and the United Nations Secretary-general is the main depositary of multilateral treaties in the world. At present, over 550 multilateral treaties are deposited with the Secretary General States no longer have unfettered freedom to regulate their relations; peremptory norms now constitute a major stumbling block to that freedom. Even more significantly, States are no longer allowed to make unilateral decisions about how to react to alleged breaches of legal standards by other States. Nor, it follows, are they permitted to employ forcible means for instance, armed reprisals for imposing compliance with those legal standards. The combination of the demise of immunities with the notion of command responsibility whereby the supreme military or civilian authorities of a State may be held criminally liable for crimes perpetrated by their subordinates, if they failed to prevent or repress those crimes marks the end of traditional impunity (Cassese, 2008).

It is indeed this innovative step that scares so many States and makes them unwilling to ratify the court's statute. Cassese is right, following the genocide in Rwanda and the international community's failure to intervene; former UN Secretary General Kofi Annan asked the question;

> When does the international community intervene for the sake of protecting population? (Annan 2002).

The ICISS (2001) document stated that the threshold for the international community to protect citizens of another state by the means of military force must be Large scale loss of life, actual or apprehended, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale

ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

In addition to the internal and external responsibilities that sovereignty entails the ICISS 2001 report outlined three specific responsibilities in the R2P concept. Firstly, the responsibility to prevent which includes the responsibility to address both the root causes and the direct causes of internal conflict and other man-made crises putting populations at risk.t entails that states have responsibility to ensure that domestic tensions are addressed before they escalate (ICISS, 2001).

However, realizing that such measures can be difficult to implement for many states for a great number of reasons, such as endemic poverty or structural causes, strong support from the international community is often needed, "and in many cases may be indispensable. "The report states clearly that prevention is the single most important dimension of the responsibility to protect. However, although it is clear that prevention is better than reaction, both in terms of saving human lives and in terms of material costs, failure to prevent intrastate conflicts from occurring remains a persistent problem, and to react to on-going conflicts might be necessary to halt or stop man-made mass atrocities. This leads to the second responsibility; the responsibility to react. When prevention fails "to resolve or contain the situation, and when a state is unable or unwilling to redress to situation, then interventionary measures by other members of the broader community of states may be required. It is important to note that the responsibility to react is not synonymous with military action. The international community can, and always should, exhaust measures short of military intervention. Such non-military coercive measures include political, economic, and judicial sanctions.

Only in very extreme and exceptional cases should military action be contemplated, and only when other measures have proved inefficient. This leads to the very crux that the commission had to tackle: determining and developing consensus on when states can intervene for the sake of protecting humans from mass-atrocity crimes in another state. As the use of military force against another state will arguably always be contentious and a sensitive issue, it is highly important to establish clearer rules and guidelines for when it might be necessary to intervene, which is crucial for the legitimacy of an intervention.

When contemplating action against another state for humanitarian purposes, the norm of non-intervention must be the starting point, but it cannot be an absolute which make it a shield in which brutal state leaders can hide behind. There should be exceptions to the non-intervention norm in extreme cases, such as "violence which so genuinely shock the conscience of mankind, or which present such a clear and present danger to international security, that they require coercive military intervention. The report proposes six criteria for military intervention that ought to be given the most careful consideration. The six criteria can be listed as just cause, right intentions, last resort, proportional means, right authority, and reasonable prospects for success. ICISS, the Responsibility to Protect, 2001,

The intention of the commission by setting out these criteria is to…strengthen the order of states by providing for clear guidelines to guide concerted international action in those exceptional circumstances when violence within a state menaces all peoples, it is not to license aggression with fine words, or to provide strong states with new rationales for doubtful strategic designs.

With regards to the just cause criteria the commission agreed that for an intervention to be justified it must be a response aimed at halting or averting large scale loss of life or large scale ethnic cleansing actual or apprehended. Minimum one of these must be evident in order for the intervention to fulfill the just cause criteria. When that is the case the interveners have to fulfill the other criteria as well. That brings the report to the criteria of right intention. The primary purpose of the intervention must be to "halt or avert human suffering" and to protect the victims that were the initial justification for the intervention. When too much self-interests are involved non-humanitarian objectives may be prioritized over the victims of mass atrocity crimes and thereby obscure the effectiveness of the humanitarian objectives. Objectives such as alteration of borders, advancement of a particular combatant group's claim to self-determination, or toppling of regimes, cannot be justified. A crucial way of reducing the promotion of self-interests in interventions on humanitarian grounds is to always act multilaterally, to have support in the region of where the intervention takes place and to have support by the people for whose benefit the intervention is intended.

Any intervention must not only be driven by just cause and right intentions, it must also always be last resort. Every non-military means to halt or avert the mass-atrocities must have been explored extensively. However, this does not mean that every thinkable measure must have been tried and failed before a military intervention can take place, as there might not be time for that, it must, nevertheless, be reasonable and solid grounds for believing that other measures will not be adequate These criteria can be said to correspond with the *jus ad bellum* (right to war) element of Just War Theory (ICISS, 2001).

The international community has the responsibility to prevent mass atrocities with economic, political, and social measures, to react to current crises by diplomatic engagement, more coercive actions, and military intervention as a last resort, and to rebuild by bringing security and justice to the victim population and by finding the root cause of the mass atrocities (Baylis and Smith, 2007).

African Union (AU) pioneered the concept that the international community has a responsibility to intervene in crisis situations if the State is failing to protect its population. In the Founding Charter in 2005, African nations declared that the protection of human and people's rights would be a principle objective of the state and that the Union had the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. The AU also adopted the Ezulwini Consensus in 2005, which welcomed R2P as a tool for the prevention of mass atrocities (Williams, 2009).

International courts do not have the resources or the powers to prosecute all perpetrators of international crimes. Various treaties impose obligations on states to extradite or prosecute a person found in their territory who is suspected of certain specific offences. This obligation is known as *aut dedere aut judicare.*For the 'core crimes' of genocide, war crimes and crimes against humanity, there is a treaty-based obligation *aut dedere aut judicare* only for grave breaches of the Geneva Conventions and Additional Protocol I.

For the other core crimes it is questionable whether customary international law imposes such an obligation. The obligation aut *dedere aut judicare* is distinct from the principle of universal jurisdiction, which provides a basis for prosecution but does not, in itself, imply any obligation to extradite or prosecute.

Immunity of state officials, which acts as an obstacle to the exercise by a state of its jurisdiction, could, in practice, preclude the effective application of the obligation to extradite or prosecute (Philippe (2007).

For the core crimes of genocide, war crimes and crimes against humanity a treaty imposing an international obligation on states to extradite or prosecute would help to bring perpetrators to justice. There are many treaties that impose on states parties to them an obligation to extradite or prosecute a person found in their territory who is suspected of certain specific offences. The treaties cover crimes such as various acts of terrorism, torture, enforced disappearances, corruption and such organized crimes as human trafficking and drugs trafficking. They aim to deal with these offences by national prosecutions, facilitated by cooperation between governments. One example was the long-running attempt by Belgium to persuade Senegal to prosecute Hissène Habré for torture allegedly committed while he was president of Chad, or to extradite him to Belgium for prosecution there (Human rights watch 2006).

In proceedings brought by Belgium, the International Court of Justice (the ICJ) discussed the extent of the obligation to extradite or prosecute contained in the UN Convention on Torture, and decided that Senegal should prosecute without further delay or extradite to another country. There are some international crimes, however, that are not covered by any treaty requiring states to extradite or prosecute. Genocide, crimes against humanity, war crimes and aggression – the 'core crimes' of international law– are within the There are over 60 multilateral treaties combining extradition and prosecution as alternative courses of action in order to bring suspects to justice.

As regards the core crimes the obligation *aut dedere aut judicare* relatesonly to those war crimes that constitute 'grave breaches' of the Geneva Conventions and Additional Protocol jurisdiction of the ICC1 and states have obligations to surrender suspects to it. But in relation to the many offenders who are not before that court there are few relevant treaty obligations (Study by the Secretariat, 18 June 2010, UN) (Article 85 of the Additional Protocol I).

The Genocide Convention does not incorporate the obligation but does provide that persons charged with genocide are to be tried by a court of the state in the territory of which the crime was committed, or by an international court with jurisdiction. There is therefore no treaty-based obligation *aut dedere aut judicare* for genocide, crimes against humanity and, except in the case of grave breaches, for serious violations of the laws and customs applicable in armed conflicts of an international or non international character.

A common feature of the different treaties embodying the obligation to extradite or prosecute is that they impose upon states an obligation to ensure the prosecution of the offender either by extraditing the individual to a state that was exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute.

Beyond that, the provisions greatly vary in their formulation, content and scope, particularly with regard to the conditions for extradition and prosecution, and the relationship between these two possible courses of action. (Article VI of the Genocide Convention) (Secretariat's Survey 2010:126-150).

Customary international law treaties apply only to those states that are parties to them. But is there an obligation to extradite or prosecute under customary international law, binding on all states? If so, does it apply in respect of all or merely some crimes under international law? It has been argued that the prohibition of certain crimes under international law, including genocide, crimes against humanity and war crimes, derive their authority from a peremptory norm (*jus cogens*) from which no derogation is ever permitted. A violation of such a norm gives rise to a corresponding obligation *erga omnes* an obligation owed by states to the international community as a whole either to institute criminal proceedings or to extradite the suspect to another competent state.(Bassiouni ,1999).

This view relies on the Trial Chamber's conclusion in the *Furundžija* case in the International Criminal Tribunal for the former Yugoslavia (ICTY) that 'one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction (Prosecutor v. Furundžija ,1998)

This view has been criticized by the argument that the *erga omnes* and *jus cogens* nature of the prohibitions do not as such give rise to the formation of customary international law and do not imply the recognition of a customary nature for the obligation to extradite or prosecute (Raphaël van Steenberghe,2009).

2.4.1 Challenges of ICC Jurisdiction to State Sovereignty

The competence of the ICC to exercise jurisdiction over nationals of states that are not parties to the Rome Statute without the consent of those states. Under the ICC Statute, the ICC has jurisdiction over nationals of non-parties in three circumstances. First, the ICC may prosecute nationals of non-parties in situations referred to the ICC Prosecutor by the UN Security Council (. Art. 13 Rome statute).

Secondly, non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a state that is a party to the ICC Statute or has otherwise accepted the jurisdiction of the Court with respect to that crime. (Art. 12(2) (a) and (3) Rome statute).

Thirdly, jurisdiction may be exercised over the nationals of a non-party where the non-party has consented to the exercise of jurisdiction with respect to a particular crime. In either of the first two circumstances, the consent of the state of nationality is not a prerequisite to the exercise of jurisdiction. At least one state that is not party to the Rome Statute the United States (US) has vigorously objected to the possibility that that the ICC may assert jurisdiction over its nationals without its consent (scheffer, 1999) .

As a result of its opposition to the ICC, the US has sought to use a variety of legal and political tools to ensure that the ICC does not exercise jurisdiction over its nationals. The power of the ICC to try nationals of non-parties where they commit crimes on the territory of a party constitutes a delegation to the ICC of the criminal jurisdiction possessed by ICC parties because the Court is given the power to act only in cases where the parties could have acted individually (Ventoruzzo, 2003).

The main question that arises is whether the parties to the ICC Statute have the right to delegate their criminal jurisdiction to an international tribunal without the consent of the state of nationality of the accused person. The view that such delegations of jurisdiction are unlawful rests upon two related arguments. First it is argued that delegations of criminal jurisdiction by states are generally impermissible without the consent of the state of nationality of the accused.

Alternatively, is argued, that even if delegations of judicial jurisdiction by one state to another are permissible, such a delegation to an international tribunal is unprecedented. The argument that states may not delegate their criminal jurisdiction without the consent of the state of nationality fails to properly account for the many treaties by which states delegate their criminal jurisdiction to other states (Paust, 2000).

Despite sufficient groundwork for the ICC laid out through the Rome Statute and amended to include aggression at Kampala in 2010, the ICC in many nations' eyes has been a failure. The first elected chief prosecutor, Luis Moreno-Ocampo, an Argentine lawyer who gained fame through exposing Argentine corruption in the Trial of the Juntas, was inaugurated in 2003 and opened cases in regions such as Uganda and the Democratic Republic of Congo. Since that time Ocampo has been widely criticized for his continuous failures and this disappointment has led to reluctance of the states.

The ICC depends on the cooperation of the states that have ratified it to turn over suspects, and help in the information gathering process to speed up and actually complete fair and efficient trials. Unfortunately for the ICC, this is not always the case.

Specifically, many instances have occurred since the inception of the court where the prosecutor has the evidence, the indictment has been issued, but no trial ensues simply because the indicted is not turned over to the ICC for trial. Therefore, the suspect remains at large as an international criminal. This is especially the case with Omar Al-Bashir of the Sudan.

Due to the lack of cooperation, heads of state indicted, as well as powerful military leaders continue to purge local populations without having to answer to their crimes. Despite ratification of the Rome Statute, the perception of state cooperation and the actuality of it can be vastly different. This lackadaisical approach by party states continues to frustrate the court and its process. Something must be done to ensure that criminals indicted by the court appear at the court.

A major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security council. China has not signed the Rome Statute, and neither the United States nor Russia has ratified it. In fact, as of the Bush Administration actions of 2002, the United States actually unsigned it. This lack of participation certainly hinders the ability to enforce the laws instituted by the court. The lack of U.S. participation especially hinders any palpable advancement of the court

While the U.S. does deploy many troops overseas each year, full participation from the U.S. and the other permanent members of the Security Council is essential to the survival and effectiveness of the court. Granted veto power for permanent member status, if any of these three powers considers an indictment contradictory to the agenda of their nation, they can veto the indictment and allow the crimes and the perpetrator to go on unpunished.

The ICC has faced many of the same problems early on, and with the broadness of its jurisdiction, some of the problems facing the ICC are compounded by sheer convolution of judicial interaction with so many different states (Steiner 2004).

As it stands, one of the main goals for the ICC is to prevent itself from becoming irrelevant. Both the ICTY and ICTR struggled in the early stages, but now The ICC is thriving and has become fully recognized functioning independent institution. The influence of past tribunals has gained prominence, and in order for the ICC to mirror the successes of these tribunals, major reforms should be undertaken by the Hague based court to be seen to work albeit political considerations and external influences .

Due to recent events, especially those pertaining to Omar Al-Bashir and the Darfur conflict have exposed the ICC's weakness on the international stage in regards to persuading states to turn over criminals indicted by the court. The ICC constantly finds itself in a precarious situation, juggling the rules established as a responsibility of the court and the constant interference or agenda of all states, including those states that have ratified and also those that have not ratified the Rome Statute.

Considering the U.S.'s "war on terror" the inclusion of terrorism and terrorist acts as international crimes of grave concern, International criminal law should provide a basis with which many successfully barriers may be broken between the two parties or states . Terrorism may be the most explosive threat to all global states, and therefore inclusion into court doctrine seems to be the natural progression.

Van Krieken (1999) , asserts that, however, does not mean that one should not prepare for adding terrorism to the list of crimes for which the ICC would have jurisdiction.

The court must proceed knowing that the inclusion of terrorism under its jurisdiction was not instantly convincing the U.S. to sign and ratify the treaty. It may be a small step towards creating an atmosphere of bilateral thinking opening the waves of diplomacy and communication for both parties (Gilbert, 2002).

The face of the ICC for the long-term remains extremely convoluted. The willingness to adapt to the wishes of the majority of the permanent members of the UN Security Council remains its most compelling and arduous task. Bridging the gap between powers such as the United States and China will ultimately strengthen or weaken the court in the long run. In certain circumstances the wishes of these major powers may need to be compromised and included for the court to reach its full potential. This is a fine line considering that the court must also uphold its own authority and integrity. The court needs to broaden its spectrum in regards to intercontinental examination (Frencez 2010).

While this charge may be unfounded, it is definitely an issue that needs to be addressed. With the election of an African Chief Prosecutor, the court has definitely addressed those initial concerns. Furthermore, the indictment of war criminals in other parts of the world, for example, Afghanistan, Burma, Honduras or Palestine, the court must make it a priority to shake the label of being a lackey to the West. Overall, despite a strong foundation laid out at the Rome Conference, the ICC has had few tangible successes since its inception.

Some of this can be attributed to the youth of the court, but much can be realized specifically from the three major flaws previously discussed, the ineptness of the prosecutor's office, the unwillingness of states party to the treaty to cooperate with the wishes of the court, and the lack of support from permanent members of the UN Security Council which holds veto powers over the cases of the ICC. Due to hindrances such as these, the court has struggled to carve out its niche in the world of international criminal law (Hall, 2011).

Throughout the history and evolution of an international criminal court from World War II on, the need has never been a debatable topic. The need, due to the inevitability of humans acting inhumane towards their fellow man, especially in conflict areas, was always be present. Overall, the ICC needs to be examined in the perspective of its context. It is an adolescent institution that must function in an international system without full global support and especially lacking in support from major global powers. This can be a very precarious situation to bridge and maintain. However, success is the foundation of its power. The more successful and justifiable cases that are brought and handled before the ICC, the more that its niche in the international stage is carved. When this occurs, major powers such as the U.S. and China can ill afford to ignore the criminal court. International Criminal Court Successes and failures (Donovan, 2014).

2.5 Empirical Review

International criminal lawyers often see sovereignty as the enemy of international criminal law, though frequently failing to discuss in any depth the nature and malleability of sovereignty. Although international criminal law does involve some challenges to sovereignty, it also needs, and in some ways empowers, that sovereignty too. Humanity and the New World Order(Ashgate, 2003).

Mark Kersten (2014) debates about whether pursuing international criminal justice is helpful or harmful to peace processes has become a fixture in the realms of international relations and international law. Should justice be pursued in the context of ongoing conflicts? Should it be delayed or shelved altogether? Questions about the International Criminal Court's (ICC) impact center around the dilemma of whether it is helpful or not, to pursue accountability in the context of ongoing or recently concluded conflicts.

By indicting active participants in wars, the ICC was specifically designed and is increasingly expected to intervene in the context of active conflicts. In the case of the ICC's intervention in northern Uganda, It is argued that that the Court's arrest warrants for Joseph Kony and four other senior members of the Lord's Resistance Army (LRA) prodded them into attending the Juba peace negotiations. Others argue that the ICC arrest warrant for Kony presented an insurmountable barrier to achieving a comprehensive peace agreement between the LRA and the Government of Uganda.

Kersten (2014), examined the effects of interventions by the International Criminal Court (ICC) on peace, justice and conflict processes in northern Uganda and Libya. He argued that there is the need to move beyond the so-called "peace versus justice" debate. To the next level of appreciating that the ICC has either positive or negative effects on 'peace', has spawned in response to the Court's interventions into active and ongoing conflicts. There is no reason to doubt that the tensions and dilemmas of pursuing international criminal justice in the context on ongoing conflicts are real.

Likewise, there is no reason to doubt that the project of international criminal justice complicates conflict resolution. It certainly does. The problem is that still it is not known why or how. Hence it cannot be ascertained how far away it is from knowing whether or not, on the whole, ICC interventions are having a positive influence on conflict, peace and justice processes (Kestern, 2014).

The former Chief Prosecutor of the International Tribunal for the Former Yugoslavia and the former Director of the International Crisis Group, Louise Arbour, observed: "We all repeat the mantra that there can be no lasting peace without justice; and that's true enough. But I don't think that we have yet resolved the inevitable tensions between the two in a workable fashion"

Cassese (2009), noted that either one supports the rule of law, or one supports state sovereignty. The two are not compatible. Although Cassese has both the understanding of legal theory and the practical experience that makes such a view carry considerable weight, it is worth investigating the matter a little further. To begin with issues of theory, as a number of the works here accept, there are two views of sovereignty.

The first of these views is that of sovereignty as pre-legal, in which sovereignty represents a monolithic entity that is of clearly determinate content. This approach to sovereignty, although not absent in some of the debates in Rome, for example on the definitions of crimes, does not reflect how most states and scholars interpret sovereignty. Bodin's original, fairly absolutist, concept of sovereignty was empirically defended, so to raise such a concept of sovereignty to the normative level would be to derive an 'ought' from an 'is', or perhaps more accurately, a 'was' (Ward, 2003).

Though the AU's claim of bias may be unsubstantiated, it is not their only concern regarding foul play from the ICC. The AU has also accused the Court of breaking international law, saying that by investigating sitting heads of African states, it has failed to respect political figures' guarantees of immunity from prosecution. Prosecuted figures include the current president and vice president of Kenya as well as the president of Sudan. The international immunity law stems from an understanding that while in office, state officials fulfill critical executive duties and that undergoing prosecution for criminal offenses could hinder their performance (Sliedregt and. Vasiliev 2014),

Ethiopian Foreign Affairs Minister Tedros Adhanom Ghebreyesus summed up the sentiment at a January 2016 the twenty Sixth Ordinary Session of the UN Assembly when he said that asking a sitting president to appear before the Court was tantamount to infringing on the sovereignty of a country. And in this regard, the critics may be right: The ICC has indeed taken improper action against African leaders while they remained in office. Yet even this complaint is not so clear-cut. In the Sudanese case, like the Libyan one, it was the UNSC that referred the problems to the ICC (Kariuki, 2015).

Both referrals had the full support of all the African countries that were represented in the UNSC at the time. And in even more striking irony, many of the African cases investigated by the ICC were referred to the Court by the governments of these countries themselves. The procedures of the ICC require that justice be a two-way street: When the international community or even a country's own government asks for international aid in bringing justice, the ICC has a heavy responsibility to take action (ICC 1 January 2012).

Much of the current criticism of the ICC is reflective of some questionable political practices. In Kenya's Hague cases, for example, although government officials originally agreed to the cases be prosecuted by the ICC, the rhetorical tide quickly began to turn. Those who suspected that they might be held culpable as a result of the trial quickly began to denounce the Court. Many of the same people who had originally selected the ICC as their preferred pathway towards justice began to openly complain about the Court's failures in handling the case, accusing it of basing its evidence on hearsay rather than conducting a serious investigation (Kariuki, 2015).

Ultimately, facing a new surge of pressure from Kenya, the ICC had to drop most of the charges due to what it deemed "noncooperation by the government." The Kenyan government has also vowed to continue to impede the progress of the ICC on any remaining cases in order to prevent it from taking any decisive steps towards the provision of justice. In short, Kenya exemplifies the way in which criticisms of the ICC and its supposed focus on Africa have primarily become political maneuvers and knee-jerk reactions from those who are likely to face justice in The Hague's halls (OTP, 2014).

Kariuki (2015) further observes that Kenya is not the only government to have backtracked on its support for the ICC after the Court's scrutiny turned to its leaders. For example, in 2003, under the leadership of Laurent Gbagbo, the government of Côte d'Ivoire submitted a declaration accepting the jurisdiction of the ICC. Following violence related to the country's disputed elections of 2010, the new president, Alassane Outtara, reaffirmed the former declaration, an act that ultimately led to the indictment of former President Gbagbo. Perhaps unsurprisingly, Gbagbo and his supporters' public view of the Court shifted once it had issued arrest warrants against him and his wife.

Although the statement that the ICC has prosecuted African individuals disproportionately is undeniable, the disproportionality is not, as has been alleged, the result of any inherent prejudice. Rather, it is the result of structural factors such as limitations on the ICC's jurisdiction and a lack of alternatives for effectively prosecuting African leaders. Moreover, the accusations are often rooted in the desire of power mongers to deflect unwanted scrutiny from their own actions, rather than in any substantive malaise lurking at the core of the ICC. As long as the ICC remains the Mother Continent's best path towards justice, African countries would be wise to avoid retreating from the Court in the name of regional autonomy (Diaz 2010).

2.6 Theoretical Framework

One of the central issues of examining the ICC jurisdiction influence on state sovereignty is that not all states can be expected to cooperate with the Office of the Prosecutor. While such uncertainty involves primarily the interests of non-State Parties, it is not entirely clear as to how territorial States Parties was seek to maximize their interests in their dealings with the Hague Court. These arguments on ICC jurisdiction and state sovereignty can be traced from two mainstream theories of international relations, thus realism and constructivism. Nevertheless there are other theories in international relations that relate to this study but only one was be applied in-depth to explore and understand the concept of international criminal court jurisdiction and state sovereignty, the realism theory.

2.6.1Theory of Realism

Realism is a school of thought in international relations theory based on the position that all a state seeks is self-preservation. The theories of political realism came to be known through the works of Thomas Hobbes and Niccolò Machiavelli but it was not until Hans Morgenthau structured them formally that scholars began to study realism methodically Goodwin (2010:). A key principle of realist theory is that of survival and it could be argued that in the domestic politics governments create and enforce laws to protect citizens, thus reducing the prospect of conflict or civil war, however the same cannot be said of international politics (Lebow: 2007).

A central assumption of the realist approach to anarchy is thus that the rules of the international system are dictated by anarchy. In this sense, anarchy is perceived as a "lack of central government to enforce rules and protect states (Goldstein & Pevehouse: 2006). Realists, such as Kenneth Waltz, link this lack of a 'world government' to the continued occurrence of violence among states The absence of an authority higher than nation-states, it is argued, leads to a self-help system among states (Weber: 2009; Cudworth & Hobden: 2010); Lebow cites Mearsheimer's characterization of this anarchical, self-help international system as "a brutal arena where states look for opportunities to take advantage of each other" (Lebow: 2007). This characterization can be linked to the perception that international relations cannot escape from a state of anarchy and will continue to be dangerous as a result (Goldstein & Pevehouse: 2006). Such perceptions demonstrate that realists have a largely pessimistic view of the international system (Grieco: 1988).

In sum, all realists appear to subscribe to the belief that states are the only relevant actors in international politics and as there is no central authority to regulate or govern nation-states, a state of anarchy exists, where conflict and war is a constant threat as each state seeks to ensure its own survival at the expense of others.

Realism pre disposes the tradition of international theory centered upon the propositions that, the international system is anarchic, there is no actor above states capable of regulating their interactions; states must arrive at relations with other states on their own, rather than being dictated to by some higher controlling entity,. The international systems exist in a state of constant antagonism. States are the most important actors. All states within the system are unitary, rational actors States tend to pursue self-interest and states strive to attain as many resources as possible. The primary concern of all states is survival and that States build up military to survive. Realists think that humankind is not inherently benevolent but rather self-centered and competitive (Donnelly, and Snidal 2008).

Realists believe that there are no universal principles with which all states may guide their actions (Paziensa, 2004). Instead, a state must always be aware of the actions of the states around it and must use a pragmatic approach to resolve problems as they arise. This perspective, which is shared by theorists such as Thomas Hobbes, views human nature as egocentric not necessarily selfish and conflictual unless there exist conditions under which humans may coexist. It is also disposed of the notion that an individual's intuitive nature is made up of anarchy.

When Morgenthau (2005), wrote about realism, he insisted that it is based upon an intrinsic nature of humans .Realism maintains that universal moral principles cannot be applied to the actions of states in their abstract universal formulation, but that they must be filtered through the concrete circumstances of time and place. The individual may say for himself: *"Fiat justitia, pereat mundus* (Let justice be done, even if the world perishes)," but the state has no right to say so in the name of those who are in its care. Both individual and state must judge political action by universal moral principles, such as that of liberty.

Yet while the individual has a moral right to sacrifice himself in defense of such a moral principle, the state has no right to let its moral disapprobation of the infringement of liberty get in the way of successful political action, itself inspired by the moral principle of national survival. There can be no political morality without prudence; that is, without consideration of the political consequences of seemingly moral action. Realism, then, considers prudence, the weighing of the consequences of alternative political actions to be the supreme virtue in politics. Ethics in the abstract judge's action by its conformity with the moral law and political ethics judge's action by its political consequences. Classical and medieval philosophy knew this, and so did Lincoln when he said:

> I do the very best I know how, the very best I can, and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference

Morgenthau rooted his political realism in St. Augustine's recognition of both the inevitability and the evilness of man's lust for power. He repudiated the outlook and policy prescriptions of utopians and rationalist liberals, who, in his view, wrongly assumed that power and its hazards are arched to certain types of actions, situations, and institutions and that by reforming or abolishing them, the lust for power could be abolished and thus the moral problem for power would be thus solved. Instead, Morgenthau argued that human nature itself, rather than faulty institutions, was responsible for the misuse and temptations of power. In line with this negative view of human nature, Morgenthau rejected the tenets of the liberal strain of international relations theory, including faith in a natural harmony of interests among states, in collective security enforced by international organizations, in pacifism, in peace without power, and in the simple identification of morals and politics.

Morgenthau's grim assessment of man's predicament in the political realm underpins his six principles of political realism laid out in Politics among Nations. Morgenthau claims that;

Political realism is governed by objective laws that have their roots in human nature, which have not changed since the classical philosophies of China, India, and Greece endeavored to discover these laws. Within those bounds, it is the job of realists to assess what the rational alternatives are from which a statesman may choose. Morgenthau assumes that statesmen think and act according to interests defined in terms of power, dismissing as futile and deceptive clues to foreign policy that are exclusively in the motives or ideological preferences of statesmen.

Despite insisting that the key concept of interest defined as power maximization is universally valid, Morgenthau concedes that the meaning of that concept depends upon the political and cultural context in which foreign policy is formulated. Nevertheless, interest defined as power remains for Morgenthau "the perennial standard that directs and judges political actions. As a result, Morgenthau maintains, that universal moral principles cannot be applied to the action of states in their abstract universal formulation, but must be filtered through the concrete circumstances of time and place.

Reductionism, as proposed by philosopher Thomas Hobbes, is the idea that humans are inherently bad. Political realism is ultimately driven by power optimization. It is maintained by a balance of power. It supposes that conflict among states is inevitable in a global system characterized by anarchy. It is assumed that realism gave way to imperialism. Many also say that it is pessimistic, particularly toward globalization (Morgenthau, 2005).

Morgenthau identified, with great lucidity and insight, the formidable barriers to transcendent morality becoming a significant force in foreign policy Humans are incapable of perfection, but indeed capable of great evil and depravity, an inclination that manifests itself more acutely and perilously among states. The fog of uncertainty and the imperatives of the lustfor power sometimes confound moral reasoning and the application of moral principles to concrete circumstances.

Also, Morgenthau argues persuasively, sound moral reasoning entails not just good intentions, but a probabilistic assessment of the consequences of alternative courses of action that usually becomes clear only in retrospect. Like ideology, universal moral principle scan serve as a mere pretext for the pursuit of national policies.

According to (Carr, 2010), realism makes the privileged and powerful aware of the fact that utopianism only serves their interests. These notions about realism are vital to a state when choosing how to conduct international relations. The state emphasizes an interest in accumulating power to ensure security in an anarchic world. Power is a concept primarily thought of in terms of material resources necessary to induce harm or coerce other states to fight and win wars. The use of power places an emphasis on coercive tactics being acceptable to either accomplish something in the national interest or avoid something inimical to the national interest. The state is the most important actor under realism. It is unitary and autonomous because it speaks and acts with one voice. The power of the state is understood in terms of its military capabilities (Oneji, 2004).

A key concept under realism is the international distribution of power referred to as system polarity. Polarity refers to the number of blocs of states that exert power in an international system. A multipolar system is composed of three or more blocs, a bipolar system is composed of two blocs, and a unipolar system is dominated by a single power or hegemony. Under unipolarity realism predicts that states were bond together to oppose the hegemony and restore a balance of power. Although all states seek hegemony under realism as the only way to ensure their own security, other states in the system are incentivized to prevent the emergence of hegemony through balancing (Bald, 2012).

States employ the rational model of decision making by obtaining and acting upon complete and accurate information. The state is sovereign and guided by a national interest defined in terms of power. Since the only constraint of the international system is anarchy, there is no international authority and states are left to their own devises to ensure their own security.

Realists believe that Sovereign states are the principal actors in the international system, and special attention is afforded to large powers as they have the most influence on the international stage. International institutions, non-governmental organizations, multinational corporations, individuals and other sub-state or trans-state actors are viewed as having little independent influence (Yurdusev 2006).

States are inherently aggressive (offensive realism) and/or obsessed with security defensive realism, and that territorial expansion is only constrained by opposing power(s). This aggressive build-up, however, leads to a security dilemma whereby increasing one's security may bring along even greater instability as an opposing power builds up its own arms in response (an arms race). Thus, security becomes a zero-sum game where only relative gains can be made.

Power optimization is essential to the theory of realism. It is the mode of realism by which international relations should be managed. This idea of power politics leads a nation to focus primarily upon its own interests. Thus, national interest takes precedence over interdependence among nations. As a result of this, morality is either set aside as a hindrance to obtaining power or used as a guise to obtain the national interest (Hershberger, 2004).

Burchill (1979), states that there is no room for moral or ethical concerns, prejudice, political philosophy or individual preference in the determination of foreign policy because actions are constrained by the relative power of the state. Thus, the national interest ought to be the sole pursuit of statesmen this struggle for power and pursuit of the national interest is brought to equilibrium through a balance of power among nations.

Realists believe that there are no universal principles with which all states may guide their actions. Instead, a state must always be aware of the actions of the states around it and must use a pragmatic approach to resolve problems as they arise (Burchill, 1979).

Thucydides (2010) the father of Realism studied recurrent patterns in the strategic interaction of states in which he identified Power as the key factor in International Relations. He argues that a change in a hierarchy in weak states lead to the systems to remain stable However, if there was a change in strong states, then, there would be a possibility of war hence war is caused by a change in the control of the international systems.

According to Hobbes (2002), no one is secure and in-penetrable. There has to be government to be imposed on anarchic society. Inherently man is selfish, competitive and non-benevolent creature hence man is not moral in the state of nature. There is no notion of right or wrong, just or unjust in the state of nature. Government must be established to protect the self-interest and survival of man. The sovereignty of these governments is enshrined in international laws hence creating secret mechanisms by which the weakest of the weak must survive through confederacy operations with others.

The Europeans first violated every right of humanity by their treatment of the *Negro*, and they afterwards informed him that those rights were precious and inviolable (Duan 1999).

Strong criticism that has been leveled against the ICC is the fact that it is based on the importation of the punitive Justice system that is imported from the liberal western democratic traditions. It has total disregard for the need for the societies to make transition into peace and celebrates punishment at the end of the day.

ICC is not really a global expression of human moral consensus and the triumph of pro peace rationality over anarchy in the international arena, neither a political expression of global moral consensus nor simply a tool in the hands of super powers to work in the interests of hegemony(Cobban , 2002).

According to Machiavelli (2013), trust and affection to others can be won or lost. He introduced an element of uncertainty in International relations. He asserted that human beings can be trustworthy in prosperous times but deceitful and insidious in times of adversity hence man has the ability to be good but only good when it is in his interest to do so. On morality, he alluded that there is no morality in the state of nature and all states operate in the state of nature. He said, violence is evil and is being fueled by the moral end.

However, he said in his Book "Prince" One has to be ruthless because no one can be trusted. But, this ruthlessness has some elements of morality because the interest of the state is more powerful to be safeguarded in order to realize the security of its citizens. When the safety of one's country wholly depends on the decision to be taken, no attention should be given to Justice or Injustice. In this context, the enhancement of basic and universal human rights is central to protect those disadvantaged by the current socio political and economic system.

According to classical realists, (Akhavan,.2001) structural anarchy, or the absence of a central authority to settle disputes, is the essential feature of the contemporary system, and it gives rise to the security dilemma . In a self-help system one nation's search for security often leaves its current and potential adversaries insecure, any nation that strives for absolute security leaves all others in the system absolutely insecure, and it can provide a powerful incentive for arms races and other types of hostile interactions. Consequently, the question of relative capabilities is a crucial factor. Efforts to deal with this central element of the international system constitute the driving force behind the relations of units within the system; those that fail to cope will not survive. Thus, unlike idealists and some liberal internationalists, classical realists view conflict as a natural state of affairs rather than as a consequence that can be attributed to historical circumstances, evil leaders, flawed sociopolitical systems, or inadequate international understanding and education .A third premise that unites classical realists is their focus on geographically-based groups as the central actors in the international system. (Holsti, 1985).

As political theorist (Held,2014) and international law expert (Franceschet, 2003)argue, equality, respect for the law, and democracy can only be achieved in a post-Westphalia world that guarantees freedoms and rights social and political rights. In so far as international treaties and conventions are rarely enforced for their own sake, governments was be tempted to violate, abrogate or reinterpret them. Hence the theory of realism is very significant in the interpretation and understanding of the international criminal court jurisdiction influence on state sovereignty in Kenya.

Theory of Constructivism

The standing of constructivism as an international relations theory increased after the fall of the Berlin wall and Communism in Eastern Europe as this was something not predicted by the existing mainstream theories. Michael Barnett describes constructivist international relations theories as being concerned with how ideas define international structure, how this structure defines the interests and identities of states and how states and non-state actors reproduce this structure. The key tenet of constructivism is the belief that;

> International politics is shaped by persuasive ideas, collective responses, culture, and social identities."(Walt, 1998).

The theory of constructivism is anchored on assumptions that; Identities of the actors are constructed by institutionalized norms, values, and ideas of the social environment in which they act and Identities, norms, and culture play important roles in world politics. Hence, the identities and interests of states are a product of interactions, institutions, norms, and cultures. It is therefore the process and not the structure which determines the way states interact with each other. Normative and ideological structures are of uttermost importance because they shape the social identities of political actors. Just as the institutionalized norms of the academy shape the identity of a professor, the norms of the international system shape the identity of the sovereign state. Identities therefore inform interests and in turn, actions of the actors.

Constructivism argues that international reality is socially constructed by cognitive structures which give meaning to the material world. The theory emerged from debates concerning the scientific method of international relations theories and their role in the production of international power.

Adler ,(1997) states that constructivism occupies a middle ground between rationalist and interpretative theories of international relations. Constructivists focus on the way in which reality is socially constructed. Alexander Wendt is considered the founder of constructivism where he challenged the realist notion of anarchy and self-help in the international system. According to him, anarchy is a social construct or practice but not an inseparable condition of international relations. The constructivist approach to anarchy is often summed up by Wendt's assertion that "anarchy is what states make of it" (Wend, 1992). In this sense Wendt is arguing that "people act towards objects, including other actors, on the basis of meanings objects have for them" (Wendt, 1992); this suggests that our approach to anarchy is dependent upon the meaning we attach to anarchy and it is possible of "thinking of anarchy as having multiple meanings for different actors" (Hopf, 1998).

Central to the constructivist approach to anarchy is the inter-subjective meanings we attach to social contexts (Hopf: 1998). Social constructivism would thus ague that international relations are socially constructed and "imbued with social values, norms and assumptions" (Fierke, 2007). Adem clarifies this argument by stating things only 'exist' because we believe them to and that "if states as well as non-state actors interact with the 'belief' that they are in an anarchic environment, we would be bound to witness a particular set of behavior" (Adem, 2002).

This appears to suggest that a state or non-state actor's understanding of anarchy will lead them to behave in particular ways in the social context of international politics. Constructivists, such as Hopf, argue that anarchy can be perceived as an "imagined community" where a "continuum of anarchies is possible" (Hopf, 1998).

This means that certain issue areas of international politics can be understood as more, or less, anarchic; the distinction between how states approach arms control and economic trade is used to exemplify this, with states worrying more about the enforcement of arms control agreements as the costs of "ceding control over outcomes to other states or institutions" are greater than they would be in trade agreements

Constructivists focus on human awareness and consciousness and seek to find the role they play in world affairs. According to constructivists, theories such as realism put their focus on material aspects such as military power, economic power, and balance of power between states when explaining the behavior of states in the international system. Constructivists oppose such a one sided material focus while advocating for the analysis of social factors. To them, the social factors are the most important and this reality is also present in the observer of international relations.

The social and political world, including the international system, is not a physical entity or material object that is outside human consciousness. This makes it imperative to focus on the ideas and beliefs that inform the actors in international relations. The international system is neither an external entity such as the solar system nor does it exist in solitary. The system is a product of ideas and not material forces; it is a human invention that is not physical in nature but of an intellectual and ideational kind. The international system is therefore a set of ideas, a body of thought, a system of norms, all of which have arranged by human beings at particular times and places.

The failure of either realism or liberalism to predict the end of the Cold War boosted the credibility of constructivist theory. Constructivist theory criticizes the static assumptions of traditional international relations theory and emphasizes that international relations is a social construction.

Constructivism is a theory critical of the ontological basis of rationalist theories of international relations. Whereas realism deals mainly with security and material power, and liberalism looks primarily at economic interdependence and domestic-level factors, constructivism most concerns itself with the role of ideas in shaping the international system. Indeed it is possible there is some overlap between constructivism and realism or liberalism, but they remain separate schools of thought. By "ideas" constructivists refer to the goals, threats, fears, identities, and other elements of perceived reality that influence states and non-state actors within the international system (Seung,2013)

Constructivists believe that these ideationed factors can often have far-reaching effects, and that they can trump materialistic power concerns. For example, constructivists note that an increase in the size of the US military is likely to be viewed with much greater concern in Cuba, a traditional antagonist of the US, than in Canada, a close US ally. In the same breath it is argued that the ICC is targeting African leaders or rather policing African states sovereignty, if the multiple cases involving Africans before ICC is anything to go by (Wakabi, 2013).

Therefore, there must be perceptions at work in shaping international outcomes. As such, constructivists do not see anarchy as the invariable foundation of the international system, but rather argue, in the words of Wendt (1992), that "anarchy is what states make of it".

Constructivists also believe that social norms shape and change foreign policy over time rather than security which realists cite. In deciding the future course of action on strengthening international organizations, rationality rather than realism should guide the policies of weak and small nations.

If the state is a notional person, then sovereignty is its spine. According to neo realists, the strength of spine determines the domestic and international standing of the country. However, a constructivist would argue that since no person state, can keep its spine ramrod straight for long times, therefore, it is the flexibility of the spine, which enables the state to perform and maintain a healthy balance between its domestic and international obligations (Atul, 2003).

The moot point is how much a state should bend to ensure that its back does not break. Joining international regimes like the ICC may not damage sovereignty to an extent to which it would get affected, if one were forced to enter the global structures created by a global hegemony.

2.7 Conceptual framework

A conceptual framework is a type of intermediate theory that attempts to connect to all aspects of inquiry. Conceptual frameworks can act like maps that give coherence to empirical inquiry. It is used in research to outline possible courses of action or to present a preferred approach to an idea or thought.

2.7.1 Conceptual Model; Relationship between international criminal court Jurisdiction and state sovereignty

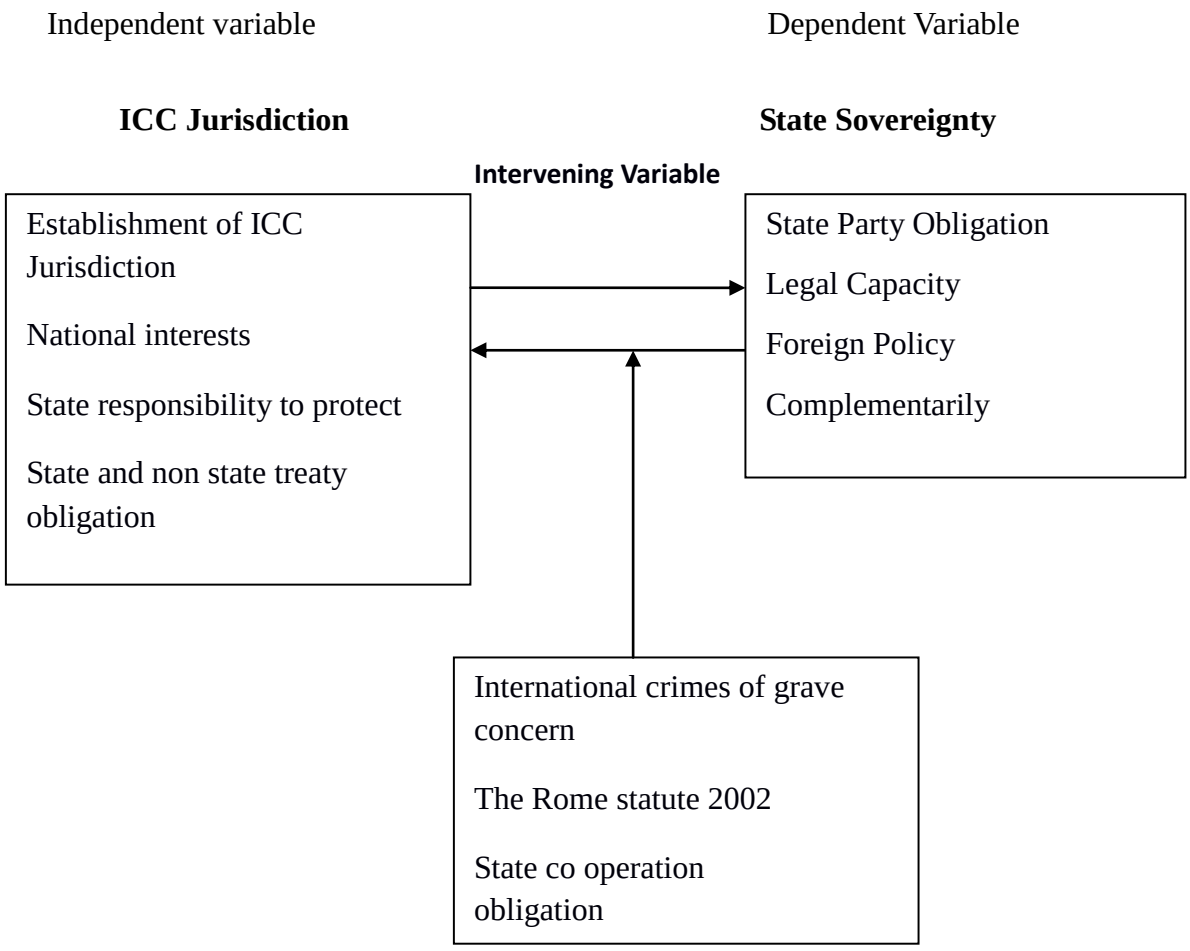

Figure 2.1: Conceptual Model

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Source: Researcher (2015)

In view of the above conceptual review it is established that The International criminal court can generally exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the Court by the United Nations Security Council. The Court is designed to complement existing national judicial systems: it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes.

Primary responsibility to investigate and punish crimes is therefore left to individual states. The ICC was created by a multi-lateral treaty, known as the Rome Statute. The Statute and hence the ICC system, entered into force on July 1st, 2002 – after a sufficient number of countries had ratified the treaty. There are 108 States, parties as of January 1st, 2009.

The conceptual model, international criminal court jurisdiction and state sovereignty illustrates that state and non state party treaty obligations, foreign policy, legal capacity as aspects of state sovereignty are influenced by international law as is witnessed with international criminal court jurisdiction. Whereas the ICC is adjudged the responsibility of safeguarding international peace and security, it is imperative to assuage the relationship between ICC and state sovereignty with the view to interrogate ICC influence on state economy, state security, state ideology and state culture. This are attributes of national interests of a state. It is also important to note that the cardinal principle of ICC is to punish individuals culpable of the most heinous acts of violence. In doing so the ICC is enthroned with the responsibility to protect. In carrying out its mandate the ICC usurps the power and authority of states responsibility to protect.

National interests refer to national security, national economy, national ideology and state culture (religion).In this regard, Kenya has its national interests defined in its foreign policy. It is in the purview of Kenya's national interests that the indicted Kenyan leaders put up a scathing spirited framing diplomacy to the African union and other states against the ICC jurisdiction for wanton interference in state sovereignty

At the same time the issue of state and non state party treaty obligations is not alienable. These goes a long way to entrench the complementarity principle in national constitutions of member states yet international law still applies to the non state parties courtesy of international crimes of grave concern, the Rome statute.

The ICC has jurisdiction only over crimes committed after the entry or force of the statute i.e. by the earliest July, 2002. The ICC covers a narrow range of international crimes, those that are traditionally considered as crimes against the international community: crimes of genocide, crimes against humanity, war crimes and the crime of aggression Although the ICC was created to establish “jurisdiction over the most serious crimes of concern to the international community as a whole," the ICC does not establish universal jurisdiction. It is complementary to national criminal jurisdictions. The ICC must defer to State jurisdiction over alleged crimes, unless the State is unwilling or unable to genuinely investigate or prosecute. The office of the prosecutor of the ICC is formally investigating 4 “situations". States self-referred three situations: Uganda and the Democratic Republic of Congo (DRC) and Central African Republic. The United Nations Security Council referred the third situation

The African continent has been beset by armed conflicts. Most of the conflicts are non-international in character. These have occurred, for example, in the Democratic Republic of the Congo (DRC), the Central African Republic, the Sudan, Uganda and Kenya. It is inevitable that when armed conflicts occur, international crimes, especially war crimes, crimes against humanity or genocide are committed by individuals. International criminal justice and humanitarian law require that perpetrators of international crimes should be brought to justice.

The international community has agreed to put an end to impunity by, among other things, establishing the ICC. Analysis is unusual, drawing from the disciplines of law and political science and therefore is a challenge to states, calling on them to unpack controversial factual issues and adding to their understanding of the complex and non-legal factors that are at play in international criminal justice. This is best understood through the Historical, political cultural economic and legal orientations.

2.8 Chapter Summary

This chapter examined the existing literature that was relevant to the study. The study discussed the concept of ICC jurisdiction, and state sovereignty from the global regional and national level. The two variables of the study are explored in terms of ICC jurisdiction influence on national interests, state sovereignty African state sovereignty vs. individual sovereignty responsibility to protect (R). State and non state treaty obligations sovereignty empirical review then a theoretical framework which is grounded on two theories: theory of constructivism and the theory of realism. The discussions in the literature review and the theories therewith are mainly based on the conceptualization of the ICC jurisdiction and state sovereignty, not much has been explored in terms of the impact of ICC jurisdiction on state sovereignty this is the gap that the study attempted to fill in the preceding chapters. Lastly a conceptual framework and conceptual model was realized logically to explain the interaction of the independent and dependent variables and finally a summary of the chapter.

CHAPTER THREE

RESEARCH METHODOLOGY

This chapter focused on the research methodology and research design that was used in the study. It presented the research design, study area, Target Population, Sample size, sampling procedure, data collection methods and research instruments namely, questionnaire, focus groups discussions, key informants, interview guide and documentary analysis. In addition, the chapter described data analysis method and spelled out the manner in which data gathered was processed, analyzed and interpreted. A brief discussion of reliability and validity of research instruments was undertaken. Lastly the limitations of the study and ethical considerations discussed.

3.1 Research Design

The study used descriptive research design. This research design was used to explore the variables and provided an opportunity for the researcher to collect systematic information to analyze the influence of International criminal court (ICC) on state sovereignty in Kenya.

Descriptive research design was best suited for this study because it allowed the use of mixed research methodology that combined elements of qualitative and quantitative methods. The exploratory design consisted of the collection and analysis of qualitative data followed by the collection and analysis of quantitative data (Creswell, 2009).

3.2 Study Site

The study was confined to Kenya, (Nairobi, and Mombasa, Nakuru, Eldoret Kisumu Kakamega Kericho Bungoma and Machakos counties. Nairobi is a capital city of Kenya and a host to Embassies of member states and signatories to the Rome statute that establishes International criminal court (ICC), United nations(UN) offices, it is also resident to the judiciary, offices of the Attorney general , Government ministries, ICC outreach and the senate, The National Assembly, numerous INGOs, INGOs, Religious centers ,mass media centers and civil society groups. Nairobi is a cosmopolitan city that has an international population distribution. The other eight (8) counties are selected due to their volatility during the 2007-2008 post election violence that culminated into the Kenyan cases at the International criminal court. This therefore provided the relevant information that was required and an opportunity for the analysis of the International criminal court (ICC) jurisdiction influence on state sovereignty in Kenya

3.3 Study Population

The term population was used in its statistical sense to denote the aggregate of units to which the survey results are to apply. (Mugenda, 2003) refers to population as the entire group of individuals, events or objects having a common observable characteristic. Diagram showing the study population

Table 3.1: Distribution of population density in selected county (town/ city)

No. Region	Population size
1 Nairobi	3,138,369
2 Mombasa	939,370
3 Kisumu	968909
4 Nakuru	1,603,325
5 Kakamega	1,660,651
7 Kericho	758,339
8 Machakos	1,098,584
9 Bungoma	1.630,934
10 Uasin Ngishu	894179
Total	

Source: Kenya Bureau of Statistics, 2014

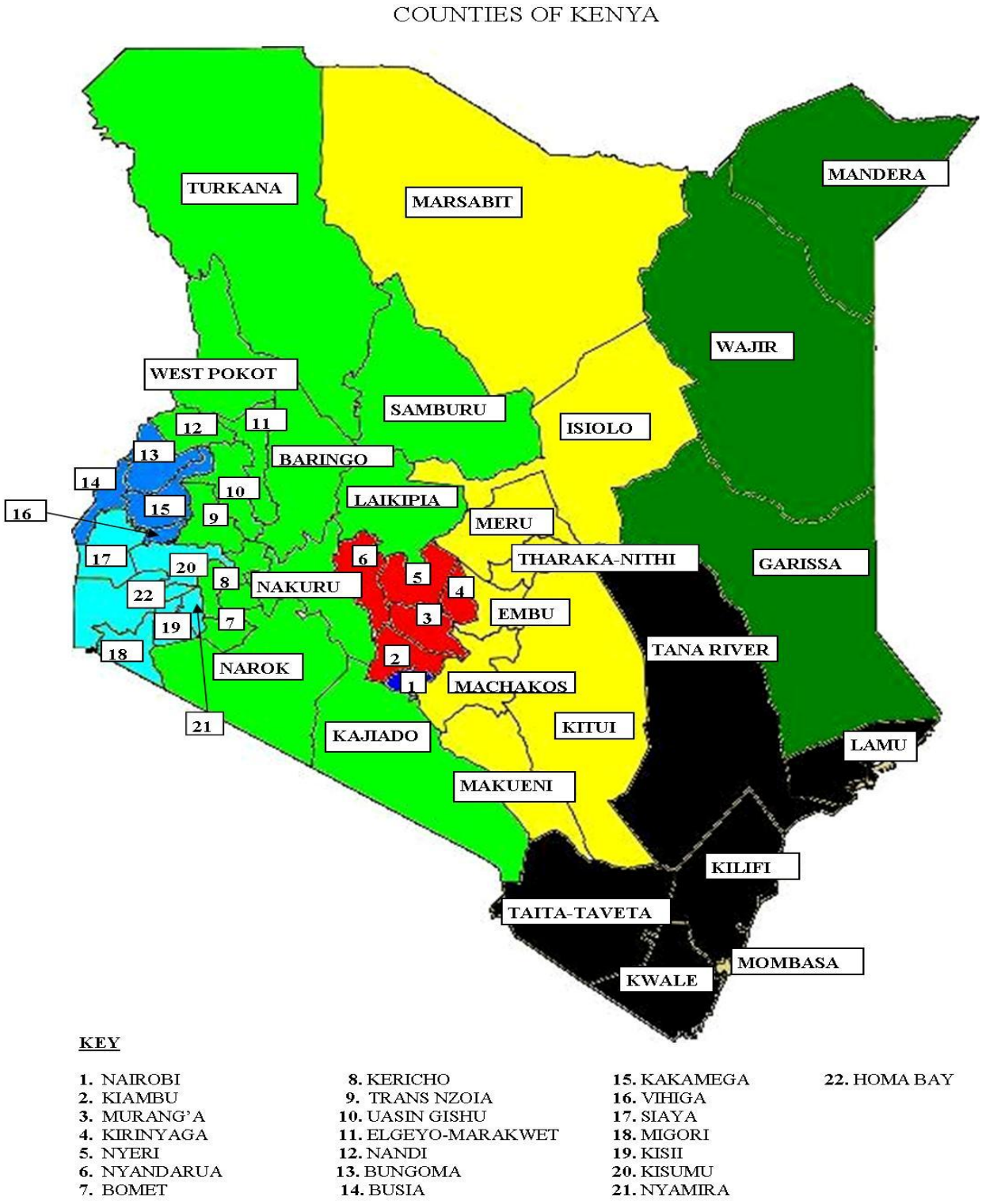


Figure 3.1: Map Showing 47 Counties Of Kenya
Source: Survey Counties Map of Kenya (2015)

3.4 Sample Frame, Sampling Design and Sample Size and Sampling Techniques

3.4.1 Sample Frame

A sample is a small representation or a subset of the entire population (Welman, 2005). Sampling frame is a list of elements from which the sample is actually drawn and closely related to the population. (Cooper, 2006). The sample frame was drawn from various key informants including those selected as State actors: national assembly, the senate , Foreign Affairs, Office Of The President, State Law Office , The Judiciary, Ministry Of Coordination And Internal Security ,Immigration, USA, UK, France, China, Japan, Russia, South Africa, and Nigeria Embassies Based In Nairobi, County Commissioners, Higher Learning Institutions Business Community And County Administration. Non-State Actors: Including NGOs, INGOs, Civil Society and Lobby Groups, Religious-Based Institutions Print and Electronic Media Organizations and Agencies (NTV, CITIZEN, K24 and KTN), Professionals ,University students, Lecturers, and Civilian Population.

3.4.2 Sample Design

Sampling is a process or technique of selecting a suitable sample or a representative part of the population for the purposes of determining parameters or characteristics of the whole population, (Kothari.1990).

The study used stratified sampling, Purposive Sampling and Random Sampling Techniques. Stratified sampling was used to identify the necessary study population a stratified sampling technique was used to identify sub-groups in the population and their proportions and select from the sub-groups the respondents to form sample size.

Purposive sampling was used to identify study units Stratified sampling was used to ensure that the target population is divided into different strata and each stratum was represented in the sample. Stratified random sampling was used for university students, lecturers/ professionals, government and county officials the national assembly the senate, the business communities and civilian population. The advantage of this method is that it increases statistical efficiency and provide data for analysis of the various sub-populations, (Cooper and Schindler, 2006).

Purposive sampling is justified in the study based on the arguments advanced by (Kombo (2006), and (Patton, 1990).that it is useful when the sample has information rich cases for in depth analysis related to the issues being studied. Purposive sampling was used for Ambassadors, Judges Attorney General, Political Party Heads, NGOs, INGOs Speakers of National Assembly Senate and Media. Purposive sampling is used for inclusion and exclusion criteria (Mualuko, 2011). Random sampling technique was used to pick respondents in lobby groups, civil society business community's higher learning institutions and the civilian population at large. In summary, the population size for the study was 300 as summarized in Table Population and sampling size.

Table 3.2 Study Population, Sample Size

Study Units	Study Population	Sample Population
Embassies	16	8
Higher Learning Institution	52	36
Media Print/Electronic	14	7
County Commissioners	9	4
Judiaciary/ State Law Offices	10	4
Office Of The President	3	1
Politicians/Party Leaders	30	9
Ministries/Interiors/Foreign Affair And Immigration	10	6
Non-State Actors	34	15
Professionals	4	3
Senate	8	3
Business Community	7	5
Civilian Population	103	70
Total	**300**	**171**

Source; Researcher, 2016

3.4.3 Sample Size

The sample size is the smaller set of the larger population, (Cooper and Schindler.2006)

Determining the sample size is a very important issue for collecting accurate results. To obtain minimum population of study, the researcher adopted Yamane's formulae in Israel (1992).

Thus $n = \frac{N}{1+N(e)^2}$

N is the target population

n is the sample size

e is the marginal error always less than 5%

According Hussey and Hussey (1997) no survey can ever be deemed free from error or provide 100% Surety and error limits of less than 5% and confidence levels of higher than 95%. The margin error is always 5%.

Thus $n = \frac{N}{1+N(e)^2}$

N is the target population = 300

n is the sample size

e is the marginal error always less than 5%

$$\frac{n=300}{1+300(0.05)} = \frac{300}{1.75}$$

Sample size =171.42=171

Table 3.3 Population study Units, Sample Size and % of Sample Size

Population Study Units	Sample Size	Percentage Sample Size
Embassies	8	4.7
Higher Learning Institution	36	21.1
Media Print/Electronic	7	4.1
County Commissioners	4	2.3
Judiaciary/ State Law Offices	4	2.3
Office Of The President	1	0.5
Politicians/Party Leaders	9	5.3
Ministries/Interiors/Foreign Affair And Immigration	6	3.5
Non-State Actors	15	8.8
Professionals	3	1.8
Senate	3	1.8
Business Community	5	2.9
Civilian Population	70	40.9

Source Researcher, 2016

3.4.4 Sampling Techniques

Mason (2006:120) maintains that sampling and selecting are principles and procedures used to identify, choose and gain access to relevant data sources from which to generate data using chosen methods. In this study, the population consisted of groups drawn from different counties in Kenya. The study used both probability and non-probability sampling techniques. This study used stratified sampling, simple random sampling technique and purposive sampling to determine the settings and the participants. Whereas quantitative studies strive for random sampling, qualitative studies often used purposeful or criterion-based sampling, that is, a sample that has the characteristics relevant to the research question(s) (Mason, 2006).

3.5 Sampling of Key Informants

Key informants include the state actors and non state actors selected using purposive sampling. This selection was intended to pick out participants with immense experience, expertise and knowledge of international criminal court jurisdiction and or state sovereignty. The basic idea was to choose respondents with different orientations and backgrounds. Their different views and approaches shall reflect the difference and provide a purposeful qualitative study(Strauss and Corbin) individuals and groups were selected purposefully from key informants, including the National assembly, the senate, Foreign Affairs, Office Of The President, State Law Office, The Judiciary, Ministry Of Coordination And Internal Security, Immigration, USA, UK, France, China, Japan, Russia, South Africa, and Nigerian Embassies Based in Nairobi, County

Commissioners, Higher Learning Institutions Business Community and County Administration. Non-State Actors: Including NGOs, INGOs, Civil Society and Lobby Groups, Religious-Based Institutions Print and Electronic Media Organizations and Agencies (NTV, CITIZEN, K24 and KTN), Professionals and Civilian Population. This was done on the basis of the researcher's knowledge of the institutions. Purposive sampling was useful since the study also relied on qualitative research; and hence important question of focus regarding ICC jurisdiction, influencing state sovereignty**.**

The study enabled the researcher to draw valid inferences or make analytical generalizations on the basis of careful observation of variables as, Establishment of ICC Jurisdiction, National interests, state responsibility to protect and state and non state treaty obligation within a relatively small proportion of the population. Simple random sampling was used to select civilian population and the individuals within religious group's higher learning institutions and county administration to participate in focus group discussions.

3.6 Description of Data Collection Instruments

Data collection was both interactive (interviews and focus group discussions) and non-interactive involving questionnaire and document analysis. This triangulation enabled the researcher to obtain a variety of information on ICC Jurisdiction influencing state sovereignty in Kenya

3.7 Qualitative Instruments

Qualitative data was collected in 2 categories, through face-to-face interviews and Focus Group Discussions. Participants and sites were identified on the basis of places and people that could best assist with understanding the central phenomenon of ICC Jurisdiction and influence on state sovereignty. A face-to-face interview schedule was used to obtain information from individuals within state and non-state actors. The state actors comprised of National assembly, the Senate, Foreign Affairs, Office Of The President, State Law Office, The Judiciary, Ministry Of Coordination and Internal Security, Immigration, USA, UK, France, China, Japan, Russia, South Africa, and Nigerian Embassies Based in Nairobi, County Commissioners, Higher Learning Institutions Business Community and County Administration.

The total number interviewed was 21 interviewees. On-state actors used comprised of NGOs, INGOs, Civil Society and Lobby Groups, Religious-Based Institutions Print and Electronic Media Organizations and Agencies (NTV, CITIZEN, K24 and KTN), Professionals and Civilian Population. Focus group discussions were conducted on individuals from religious-based organizations (Muslim, Protestant, Catholic and Universities). 6 respondents were selected by simple random sampling to participate in the focus group discussion from each category. In total, 24 respondents were selected to participate in focus discussion groups.

3.7.1 Quantitative Instruments

Questionnaires were designed forgot state and non actors. A five-point Likert-scale questionnaire (strongly disagree, disagree, partly disagree, agree, strongly agree) was be used. The questionnaires were divided into four sections. Section one on general information of the respondents (demographic data) section two, three, four, and five questions on the four aspects namely: nexus between International criminal court and state sovereignty in Kenya, effects of ICC jurisdiction on national interests in Kenya, ICC jurisdiction on State Responsibility to protect (R to P) in Kenya, and ICC jurisdiction and State treaty obligations in Kenya. The questionnaires were self-administered whereby a respondent was be asked to answer the questions themselves. On the other hand, sources of documentary data included newspapers, archival newsletters, books, security reports, newspapers and articles on ICC Jurisdiction and State Sovereignty. Primary and secondary data was used to provide an opportunity for the researcher to read between the lines of official discourse and then triangulate this information through interviews and observations.

3.8 Pilot Study

The pilot study in this research was defined as mainly a try-out of research techniques and methods, and involved administering the research instruments to randomly selected individuals. The researcher compiled a questionnaire and interview schedule which were applied to a pilot group of 2 officers each drawn from Ministry of Interior Foreign Affairs, The High court and AGs Chamber. During this process, the researcher also tested a focus group discussion on a group of members from Friends church in Nairobi as well as Civil Society organizations in Nairobi. The pilot test assisted the researcher in determining flaws, limitations, or other weaknesses within the instrument design and allowed necessary revisions prior to the implementation of the study (Kvale, 2007).

3.9 Data Collection Process

Because this study sought to generate a large amount of data from multiple sources, systematic organization of the data was key factor to prevent the researcher from becoming overwhelmed by the amount of data and to prevent the researcher from losing sight of the original research purpose and questions. The researcher trained 3 research assistants in advance of field work, and conducted a pilot study with the research assistants in advance of moving into the field in order to remove obvious barriers and problems (Patton, 2008).

The face to face interviews and the focus group discussions were organized with respondents at a convenient time and place so as to accord both the respondents and the interviewer the opportunity to create rapport and facilitate the process of interviewing to be done in a conducive atmosphere. The questionnaires were administered by the principle researcher and one research assistant.

3.10 Data Analysis and Presentation

Data was analyzed by use of descriptive statistics; through quantitative and qualitative techniques. Qualitative data was drawn from open-ended questions in the questionnaire, document analysis, interview guide and focus group discussions and presented the findings. This involved a critical assessment of each response and examining it using thematic interpretation in accordance with the main objectives of the study, which was then presented in narrative excerpts within the report. Quantitative analysis involved use of numeric measures to assess ICC Jurisdiction influencing State Sovereignty in Kenya. Analysis was done based on descriptive statistics. Under descriptive statistics, frequencies mean and percentages were used to describe the data sets and results were presented in tables, figures and pie charts The demographic information sought includes variables such as gender, age, current position in employment, period of service, professional qualifications, and education.

3.10.1 Gender of the Respondents

Majority of the respondents (n= ; 76.02%) were females, while (n=13; 23.98%) were males, no response was received from 1 respondent (n=1; 0.9%).

Table : Respondents gender

Gender	Percentage (%)
Female	76.02
Male	23.98
No Response	0.9
Total	**100**

3.10.2 Age of Respondents

It was important to ascertain the age of respondents in order to obtain a broad indication of their years. The age distributions of the respondents were as follows; (25.2%) were aged between 20-30 years, (28.3%) 31-40 years, (28.3%) 41-50 years, and (18.2%) 51-60 years

Table 3.4 : Respondents Age

Age group	Percentage (%)
20-30	25.2
31-40	28.3
41-50	28.3
51-60	18.2
Total	100

Table 4.2 shows that majority of the respondents (n=) were above 31 years of age (74.8%), with (25.2%) being 30 years or younger.

3.10.3 Education Level of the Respondents

It was important to establish the education level held by the study respondents in order to ascertain if they were equipped with relevant knowledge on ICC jurisdiction influence on state sovereignty in Kenya. As presented in figure 4.1, majority (65.6%) had college education level, 24.7% had university education level, 3.2% had post graduate education level, 5.2% had secondary education level and 1.3% had professional qualifications. These findings implied that most of the respondents were qualified to understand the nature of the study problem.

This concurs with Joppe (2000) that during research process, respondents with technical knowledge on the study problem assist in gathering reliable and accurate data on the problem under investigation. This demonstrated that most of the organization employees were qualified professionals with technical knowledge and skills on the study problem and thus provided the study with reliable information on the ICC jurisdiction influence on state sovereignty in Kenya.

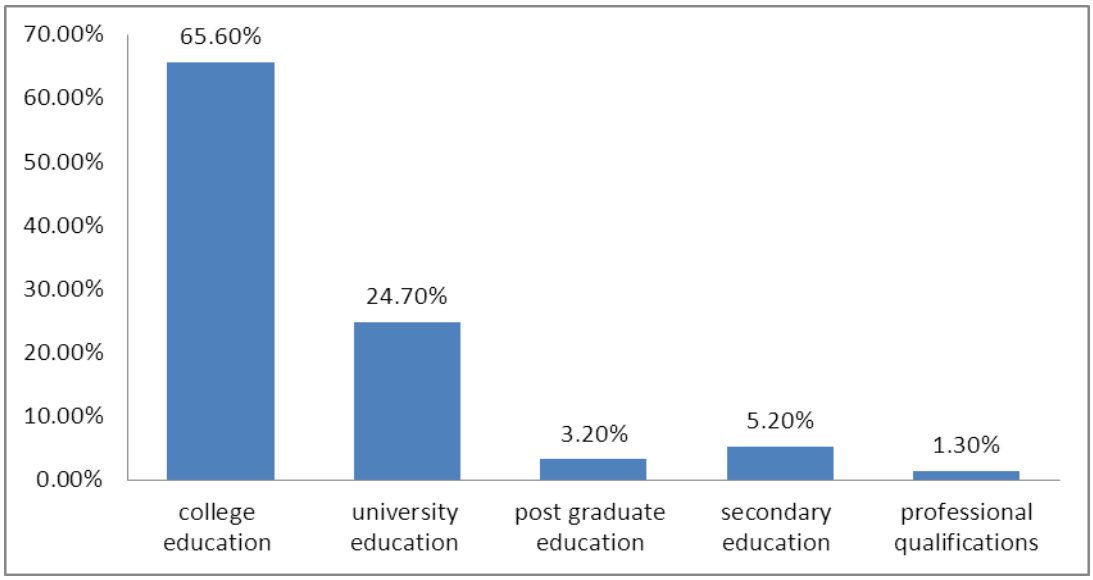


Fig 3.1 showing level of education of respondents

3.10.4 Duration in Kenya

The study sought to establish the duration the respondents had been in Kenya. Table 4.4 shows that majority (91.23%) had been in Kenya for more than 7 years, 5.85% indicated they had been in Kenya for 6-7 years while a few (2.92%) had been in Kenya for 3 - 5 years.

Duration of respondents in Kenya

Table 3.5 Duration of respondents in Kenya

Category	Percentage %
More than 7 years	91.23
6 -7 years	5.85
3 - 5 years	2.92
Total	100.0

3.11 Reliability and Validity of the Research Instruments

Babbie and Mouton (2008) say that reliability is the degree to which a researcher tests the consistency of measures yielding the same results. Data validity is the correctness and reasonableness of data. Reasonableness of data means that, for example, account numbers falling within a range, numeric data being all digits, dates having a valid day, month and year in a systematic fashion and correct spelling of names (Davis, 2011).

3.11.1 Reliability

(Phelan, 2005) define reliability as a measure of the degree to which the research instruments yield consistent results or data after repeated trials. The reliability of the research instruments for this study was measured and using the test-retest method. Thus, the questionnaires, interviews and focus group discussions were administered to a pilot group twice with a break interval of two weeks between the first and the second administration. The reliability of the questionnaires was determined through the calculation of a correlation coefficient between the first administration and the second (Douley, 2004). The computed correlation coefficient obtained was used to measure reliability of the instruments.

3.11.2 Validity

According to McMillan (2006:324), validity refers to the degree to which the explanations of the phenomena match the realities of the world. This study's instruments were tested for validity through consultations and discussions with the supervisors and experts in department of Peace and Conflict Studies of Masinde Muliro University of Science and Technology for validation. Their valuable comments, corrections, suggestions, enabled the validation of the instruments. To ensure that data was reliable and valid, a statistical test was done. A reliability test involved, "a test and retest" exercise. This means that the instruments were subjected to representative sample. Validity of questionnaires was checked by discussing with expert judgment using Likert scale namely strongly Agree (SA) Agree (a) Disagree (DA) Strongly Disagree (SD) None (N). The content validity index is CVI=Number of all relevant questions divide by total number of items.

According to Amin (2005), for the questionnaire to be accepted as valid, the average index should be 0.70 or above.

3.12 Limitations of the Study

The international criminal court debate is an emotive subject in Kenya today; hence the sensitivity of the issue seems to have torn the state into different discursive affiliations hence this resulted into reluctance from some respondents to give information out of fear and or intimidation. Some of the sampled regions are very volatile which also posed stigma /aggression.

Most government officers and agencies were reluctant and or unwilling to cooperate. With this caveat in mind, the researcher sought permission from relevant authorities and presented the same to the respondents beforehand. Further the researcher assured the respondents about the confidentiality. The strength of relying on mixed methods (qualitative and quantitative techniques) eliminated any bias.

3.13 Ethical Considerations

According to Okoth (2012), the nexus between research and quality assurance lies in the provisions of quality and its control. In addition, Okoth (2012) observes that this involves evaluation of research quality in regard to the type of research, particularly applied research, taking into consideration ethical concerns that must be jealously guarded (Okoth, 2012:53). In this study, participants' right to privacy was protected ensuring confidentiality and the guarantee that data was not shared with unauthorized people. Informed consent was secured by visiting the respondents at their respective places to explain the purpose of the study. The researcher sought for authority to collect data in Kenya from the National Council for Science, Technology and Innovation (NACOSTI), University Administration (MMUST), local administration the counties, the Ministry of Foreign Affairs, ministry of interior co-ordination, the state law office the judiciary, and the senate and county administration. Respondents were assured of confidentiality. The researcher honored and respected respondent's freedom to decline participation or to withdraw from the research study at any time.

3.14 Chapter Summary

The chapter has described the research methodology including the research design. This study employed an exploratory research design. Mixed methods research techniques (qualitative and quantitative) were used. The study covered Kenya (Nairobi, Mombasa, Nakuru, Eldoret Kisumu, Kakamega, Kericho, Bungoma and Machakos counties).The total sample size for the study was 171 respondents The study used both probability and non-probability sampling techniques; stratified sampling, simple random sampling technique and purposive sampling to determine the settings and units of the study. Piloting of the study was discussed with the view of demonstrating reconnaissance and validity of the instruments. The chapter showed how data was collected and analyzed, amidst certain limitations which, however, were overcome. The ethical issues for the study were also explored.

CHAPTER FOUR

NEXUS BETWEEN INTERNATIONAL CRIMINAL COURT JURISDICTION AND STATE SOVEREIGNTY IN KENYA

4.0 Introduction

This chapter discusses the analysis of data arising from the questionnaires used to examine Nexus between International Criminal Court Jurisdiction and State Sovereignty in Kenya. The purpose of the data analysis was to obtain information that provided a clear understanding on the influence of ICC Jurisdiction on state sovereignty in Kenya. Conclusions were drawn in comparison with the information ready available on the subject in the literature. The rationale of the International Criminal Court jurisdiction is to bring forth the debate of the courts universal jurisdiction in international criminal law and its influence on state sovereignty in Kenya in a seven fold approach namely.; National jurisdiction, transformation of state treaty obligations, jurisprudence of sovereignty, co-existence of cooperation among states, enhancing state sovereignty, implications on state sovereignty and determination by consent of sovereign states. (Slomanson, 2011).

4.2 International Criminal Court Jurisdiction And State Sovereignty.

The nexus between international criminal court jurisdiction and state sovereignty in Kenya has become fairly controversial. Majority of Kenyans of adult age are literate and able to comprehend the subject matter of the study divergently as to the relationship between ICC jurisdiction and state sovereignty. Also majority of the total respondents were persons who had stayed in Kenya for more than seven years.

Hence it is deduced that the respondents were persons well vast with the knowledge of Kenya's political landscape in the context of the Hague cases and were able to contribute surmountably to the course of the study. Much debate now focuses on the impact of international criminal court on what was conventionally regarded as indivisible and autonomous state sovereignty.

In as much as the phenomenon of sovereignty has received widespread attention from scholars and practitioners of international relations; it however, remains a contested concept. In particular, this relates to the principle of non-interference in affairs that are within the internal jurisdiction of states. This, in turn, brings into sharp focus the nexus between international criminal law and state sovereignty. More often than not, on the one hand states legitimize international law, while on the other hand international law legitimizes states (Matanga, 2015).

The rapid development of international criminal law (ICL) over the last decade has prompted a veritable avalanche of academic works in addition to numerous textbooks and works on substantive and procedural law. There is a growing body of literature on the three different levels of international criminal law enforcement: the International Criminal Court (ICC) and ad hoc tribunals, internationalized or hybrid criminal courts and the role of national legal systems in repressing international crimes. In 2001, a meeting at Princeton University proposed some principles for universal jurisdiction, pointing out that universal jurisdiction is applicable to "piracy, the crime of slavery, war crimes, and crimes against peace, crimes against humanity, genocide, and torture (Dubber, Hornle, 2014).

Nations, scholars and NGOs that advocate universal jurisdiction rely on the following theoretical bases. The first is the principle of sovereignty. The Permanent Court of International Justice affirmed the sovereign principle in the Lotus case, saying that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition. The application of this principle an outgrowth of the Lotus case established the theoretical foundation of extraterritorial jurisdiction. The second is that there exists the 'obligation *ergaomnes'* or the 'common interests of mankind' therefore there is a necessity to exercise jurisdiction over cases that infringe on the common interests of the international community. The third is the necessity towards countering criminal activity, to ensure that criminal activity does not go unpunished and avoid al-lowing criminals to ride above the law. (Husak, 2008).

In 1998, the Diplomatic Conference to discuss the establishment of the Statute of the International Criminal Court took place in Rome, where crimes of aggression and other crimes such as war crimes, genocide, and crimes against humanity were included in the jurisdiction of the Statue.

In his 2011 study On China, Dr. Henry A. Kissinger describes how in the wake of the end of the Soviet Union a "new political dispensation in the West" emerged from 1990 onwards, whereby a "new concept insisted that the world was entering a *'post-sovereign' era".* It was in that climate that civil society and other actors called for the establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY') to adjudicate serious violations of international humanitarian law in the former Yugoslavia, the one European State where political tension and violence descended into armed conflicts in the early 1990s.

Enveloped in its prevailing rhetoric at the time, the establishment of the Tribunal was agreed by consensus in the United Nations Security Council in May 1993, with lukewarm support from some members of the Council, including France and the United Kingdom, but to the general acclaim of human rights civil society and international lawyers world-wide.

The renaissance of contemporary international criminal justice cannot be extricated from this historical context, partially characterized as it was by "post-sovereign" rhetoric and aspiration. Although United Nations Security Council Resolution 827 (1993)3 establishing the ICTY was adopted 15-0, a variety of interests must have motivated States when they constructed the legal bases of the ICTY and, the following year, the Rwanda Tribunal ('ICTR'). (Lattimer, M. (2003).

For most European States, supporting the establishment of the Tribunals was almost matter of equal treatment under the Nuremberg legacy: Just as Germany after World War II had to live with the International Military Tribunal at Nuremberg, so the republics of the former Yugoslavia had to live with the ICTY. Others may have gone along out of mere exasperation at the inefficiency of traditional means to prevent and respond to atrocities: Others again accepted the establishment of the ICTY only when promised that the work to set up a permanent international criminal court would be accelerated, in part as a response to the argument of the late Slobodan Milosevic that the ICTY represented selective justice, targeted against the Serbs (Osheim & Strauss, 2008).

Moreover, an analysis of the explanations of vote after Resolution 827 (1993) was adopted shows that several Security Council members actually had significant reservations although they voted in favor, suggesting that intense diplomacy had preceded the vote. Regardless of the diversity of interests motivating capitals at the time of the vote, this form of international judicial intervention by resort to Security Council action under Chapter VII of the United Nations Charter would have been perceived differently in different States. In a triumphant Washington, many may have perceived the ICTY and ICTR as affirmations of "those principles which inevitably affect the way Americans view and react to events in other countries

> Reflecting a "simple faith in the enduring value of those principles and their universal applicability (Cohen, & Kennedy (2005).

Conveniently, the party to the ex-Yugoslav conflicts suspected of having committed most violations was an ally of Russia, the former and at that time introverted enemy of the United States. It was meant to be a relatively inexpensive 'post-sovereign' intervention, in a situation where the Security Council and its permanent members could control both the overall scope and duration of the Tribunal's work. For many Europeans, on the other hand, the Security Council's judicial intervention confirmed the binding nature of the Nuremberg Principles on which their post-World War II order had been constructed. (Hobson, J. M. (2012).

It was an affirmation that binding international law is indeed the basis of restoration and maintenance of international peace and security. It was a welcome reiteration of the modern European article of faith that only by con-straining the nation State through a thick web of international law can the unprecedented evil generated by European States through two world wars be prevented from recurring.

The Tribunals and later the International Criminal Court (ICC) reflected the secular salvation that European States embraced following the end of World War II, as a protection against their inherent capacity for wrongdoing. (Hobson, J. M. (2012).

For many Africans the establishment of the ICTR showed that the United Nations was willing to respond judicially in equal measure to mass-atrocity against African civilians as to European victimization in the former Yugoslavia. (Moghalu, K. C. (2005). Many more persons had been killed in Rwanda in 1994 than in the immediately preceding armed conflicts in the former Yugoslavia. The ICTR became a positive measure of equal treatment after the earlier establishment of the ICTY. The establishment of the Rwanda and ex-Yugoslavia Tribunals would have been perceived in quite a different light in some capitals out-side the African and Western groups of States. For example, in the largest nation, China, the exercise of foreign jurisdiction over her territory is almost universally associated with the catastrophic outcome of the 1839 Opium War and more than one hundred years of intervention and instability. (Martin, J. (2009).

In the words of Dr. Kissinger,

> The traumatic event of China's history was the collapse of central authority in China in the nineteenth century, which tempted the outside world into invasion, quasi-colonialism, or colonial competition and produced genocidal levels of casualties in civil wars, as in the Taiping Rebellion(R., Venkata Rao 2001).

It would lack historical awareness to expect Chinese to welcome imposed external criminal jurisdiction as compatible with the national interest. Importantly, Chinese and European citizens and officials may therefore have negative and positive biases respectively towards contemporary international judicial intervention for equally valid and tragic historical reasons.

‘Post-sovereignty ‘to borrow from Dr. Kissinger may mean peace and order to some, and war and suffering to others. It is not easy for those engaged in either paradigm to always appreciate the differences of approach and their background. Understanding the other side on our own terms only, may well lead to misunderstanding and unnecessary disagreement. (Simon & Schuster, 28 Jan 1998) This anthology seeks to foster a better mutual understanding among Chinese, European and other international lawyers of the relationship between State sovereignty and international criminal law.

In an interview with one of the key informants, verbatim;

> Not only do the two co-exist, but they cannot exist without each other. Criminal justice presupposes sovereign States. Punishment is an evil imposed by the community through the State to prevent another evil the crime thereby seeking to protect the community. This requires the existence of a State, that it has a criminal law and criminal justice institutions, and that the State acts through these institutions in the form of investigation, prosecution, adjudication and administration of sentence.(key informant).

From the above it can be asserted that the International criminal justice depends equally on States, to establish and accept the jurisdiction in question, fund the institution, give it access to information required to build criminal cases, to arrest and transfer suspects, and to serve sentences. State sovereignty and international criminal justice are in other words two faces of one coin. But they are minted to speak a different language, to different constituencies, and this can lead to conceptual tension.

Professor Claus Kress describes how the international law of immunities is in fashion, having been at the heart of two recent judgments of the International Court of Justice, being the subject of two recent resolutions adopted by the Institute de Droit. He discusses two closely related questions in proceedings before the International Criminal Court. The first question is:

> Whether international law immunities of States not party to the Statute of the ICC prevent the latter from exercising its jurisdiction over an incumbent Head of State, Head of Government, Foreign Minister and certain other holders of high-ranking office of such a State. Only if this first question is answered in the negative does the second question arise, which is whether such international law of immunities precludes the ICC from requesting a State Party to arrest and surrender a suspect who falls into one the above-listed categories and who is sought by an arrest warrant issued by the Court.(Schabas, W. (2010).

Professor Kress points out that both questions are highly relevant insofar as ICC Pre-Trial Chamber I decided on 4 March 2009 that the Court is not prevented by Sudan's immunity under international law from exercising its jurisdiction over the incumbent President of this non-party State, Al Bashir. More than two years later, a differently composed Pre-Trial Chamber I specified in two decisions that the Court is also not precluded from requesting the States Parties of Chad and Malawi to arrest Al Bashir during his visit to their country and to surrender him to the Court. Shortly thereafter, on 9 January 2012, the African Union Commission expressed its serious concern and disagreement with the decisions of the Chamber. Professor Kress acknowledges that at times, the maintenance of the international legal order, on the one hand, and the stability of inter-State relations, on the other hand, may prove to be conflicting goals. Clearly, the international criminal proceedings against Al Bashir adversely affect the stability of the relations of all those States which support those proceedings, with the State of Sudan, as long as Al Bashir stays in power. At the same time, those criminal proceedings aim at the maintenance and at the strengthening of the *noyaudur* of the international legal order (Kuwali, D. (2011).

During the focus discussion group one member concluded that;

> international criminal law in the strict sense comes at a price with respect to the stability of inter-State relations", but that "this price is worth paying, provided that the scope of application of substantive international criminal law strictly will not be diluted, but remains confined to the conduct that constitutes a fundamental assault to the nature of the international legal order.(discussant).

In view of the above, the conduct of states is regulated by international systems and norms for which the states themselves have voluntarily adhered to substantively and procedurally in fact and in law and that universal jurisdiction is applied, or claimed to be applied, by a state where the most serious crime is committed and when there is no connection of interests ('link point') between the forum state and place of crime, nationality or residence of the suspect or the victims or national interest.

However when considering and applying the theory of realism, the international community in fact does not have a common understanding of when 'universal jurisdiction' is applicable, the most obvious evidence of which is that there exist two forms of universal jurisdiction: 'relative universal jurisdiction' and 'absolute universal jurisdiction'. The former requires that the suspect is found within the territory of the forum state in order for universal jurisdiction to be exercised, so it requires some connection, namely the location where the suspect is found. The latter does not require any connection. Clearly, there is a significant difference between the conditions of applicability of these two forms of 'universal jurisdiction' and the target to which it may be applied. (Murungu, C., &Biegon, J. (2011). Thus a pertinent question as to whether: Universal jurisdiction 'can actually be without limits? In this context an Interviewee retorted that

> As long as states exist and are recognized in International law, the question of limitations in universal jurisdiction does not arise because being universal states are guided also universally(key informant).

The study established that international law is applicable to a limitless jurisdiction and this is an absolute form of universal jurisdiction ('universal jurisdiction in absentia') that is free of conditions such as link points. However the establishment of universal jurisdiction should be limited to situations clearly allowed by international law, and should also be limited by international law.

In essence absolute universal jurisdiction is permissible, in international law, and should be exercised only over prescribed crimes such as terrorism and piracy, and should not be universally exercised over other crimes in all accounts the study overly contends that there is a very strong relationship between ICC jurisdiction and state sovereignty.

Table 4.1 International Criminal Court Jurisdiction includes national jurisdiction

Response	Percentage
Yes	81.29%
No	12.28%
Neutral	6.43%
TOTAL	100%

Source: Researcher 2016

The above table illustrates that 81.29% of the respondents agreed that the ICC jurisdiction includes national jurisdiction a paltry 12.28% did not agree and a negligible 6.63% neither agreed nor disagreed with the statement the infact during the interview process one respondent retorted

> We(government) signed and ratified the Rome statute ,the act that created the ICC at the Hague why are we whining over this clear matter he paused , In fact our parliamentarians said "don't be vague lets go to Hague(key informant).

From the above it can be deduced that the international criminal jurisdiction and national criminal jurisdictions are in tandem yet according to principles of sovereignty in international law, a nation has jurisdiction over crimes committed within its territory, which refers to 'the principle of territory'.

Besides this, under certain circumstances, a nation also has jurisdiction based on the nationality of the suspect (‘positive principle of territory’), the nationality of the victim (‘negative principle of territory’) or the nation’s security or other important interests (‘protective principle of territory’). Whereas that the sovereignty of each nation is equal, every nation may decide to exercise jurisdiction based on the principles of territory or the individual or national interests.

Therefore under these circumstances, any nation who exercises its jurisdiction purely out of its own will, regardless of the opinions and propositions of other nations, may offend the sovereignty of other nations. This is in breach of the principle of equality of sovereign nations, and may cause conflicts between nations.

The assertion that ICC jurisdiction and national criminal jurisdictions are congruent is to emphasis on the whole idea of establishing an international criminal court was based on an ideal of justice, on the conviction that when faced with heinous crimes that affect the international community, impunity is unacceptable. Now if all national criminal jurisdictions were effective, efficient and just, as well as able to deal with such crimes, no international court would be necessary. National courts are responsible for the prosecution of those perpetrators not prosecuted by the ICC.

The ICC investigates and prosecutes only if states or national courts are unable or unwilling to do so. Kenyan authorities have an obligation under international law to provide effective remedies to victims of serious violations of human rights committed in the 2007-8 post-election violence; and reparation when crimes were committed by state agents or when the State failed to prevent certain crimes committed by private citizens.

When the Kenyan Government challenged the admissibility of the Kenyan cases before the ICC, the Pre-Trial Chamber ruled that there was no "concrete evidence of ongoing proceedings before national judges" against the accused. To date only few alleged perpetrators were brought to justice before Kenyan courts. The Kenyan Office of the Director of Public Prosecutions has reportedly initiated new investigations into at least 6,000 cases involving alleged low and mid-level perpetrators. A task force to review those cases was set up in February 2012. However, in August 2012, the task force concluded that most PEV cases were unsuitable for prosecution due to a lack of evidence.

A discussant in focus discussion group on the above was very categorical and in-depth as one member of the group earmarked,

> Kenya government at that time failed to arrest and prosecutes the perpetrators of international crimes, committed during the 2007-2008 post-election violence. How can the purported suspects of yesteryears, now the government of today, convict themselves by submitting to ICC what is deemed to be evidence of finality against themselves? This is a fallacy of all fallacies, an impossibility. (Discussant).

This argument ignites and is a microcosm of the study. It is endeared in constructivism theory as Michael Barnett articulates constructivist international relations theories as being concerned with how ideas define international structure, how this structure defines the interests and identities of states and how states and non-state actors reproduce this structure. (Sikkink, K., 2011).

The key tenet of constructivism is the belief that "International politics is shaped by persuasive ideas, collective values, culture, and social identities Constructivism argues that international reality is socially constructed by cognitive structures which give meaning to the material world. States, like people, are insecure in proportion to the extent of their freedom.

If freedom is wanted, insecurity must be accepted. Organizations that establish relations of authority and control may increase security as they decrease freedom. If might does not make right, whether among people or states, then some institution or agency has intervened to lift them out of natures realm. The more influential the agency, the stronger the desire to control it becomes. In contrast, units in an anarchic order act for their own sakes and not for the sake of preserving an organization and furthering their fortunes within it.

Force is used for ones own interest. In the absence of organization, people or states are free to leave one another alone. Even when they do not do so, they are better able, in the absence of the politics of the organization, to concentrate on the politics of the problem and to aim for a minimum agreement that will permit their separate existence rather than a maximum agreement for the sake of maintaining unity. If mighty decides, then bloody struggles over right can more easily be avoided.(Walt, 1998) This was well orchestrated by shuttle diplomacy by Kenya government officials to the united nation as and also to the assembly of state parties at the African union summit in Addis Ababa.

Table 4.2 International criminal Court Jurisdiction is a transformation of states treaty obligations.

Response	Percentage
Yes	70.18%
No	22.81%
Neutral	7.02%
TOTAL	100%

Source: Researcher (2016)

70.18% of the respondents agreed that international criminal court jurisdiction is a transformation of states treaty obligations the concept of state responsibility in this context refers to the responsibility of sovereign states to deliver a range of political goods and services to its citizens. Rothberg has identified a bundle of the most crucial political goods, roughly rank ordered, that establishes a set of criteria according to which states may be judged strong, weak, or failed (Kirsch, Philippe, and John T. Holmes, 2006)

The state's most important function is the provision of security. This means creating a safe and secure environment and developing legitimate and effective security institutions. In particular, the state is required to prevent cross border invasions and loss of territory; to eliminate domestic threats or attacks on the national order; to prevent crime; and to enable its citizens to resolve their disputes with the state and their fellow citizens. Another major political good is to address the need to create legitimate effective political and administrative institutions and participatory processes and ensuring the active and open participation of civil society in the formulation of the state's government and policies. (Jackson, R. H. 1990).

Other political goods supplied by states include medical and health care, schools and educational instruction, roads, railways, harbours and other physical infrastructure, a money and banking system, a beneficial fiscal and institutional context in which citizens can pursue personal entrepreneurial goals, and methods of regulating the sharing of the environmental concerns (Lattanzi, Flavia, 1996).

However, these responsibilities should be seen within the broader context of the global human rights norms. The Charter of the United Nations is the embodiment of the international political and moral code and Article IX calls for the promotion of higher standards of living, conditions of economic and social progress and development, and respect for human rights and fundamental freedoms which encapsulates the international consensus and articulates best-practice international behavior.

The Universal Declaration of Human Rights was the first international pronouncement of the human rights norm and places freedom, justice and peace in the world in the Inherent dignity and equal and inalienable rights of all humans. The subsequent International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights further enhanced the ideal of free human beings enjoying civil and political freedom.

The June 2000 Ministerial Conference on “A Community of Democracies” and a non-governmental conference on “World Forum on Democracy” reaffirmed the developing and developed countries' commitment to common democratic values and standards. It is these Charters, Covenants and other International Treaties that establishes the foundation for a state’s responsibilities to its citizens. (Newman, E. (2004).

International Law Commission’s (ILC), Approach to state treaty obligations

The Commission proposed three options to the General Assembly: (1) an international criminal court with exclusive jurisdiction, according to which individual States should refrain from exercising jurisdiction over crimes falling within the competence of the Court; (2) concurrent jurisdiction of the international criminal court and domestic courts; and (3) an international criminal court having only review competence that allowed it to examine decisions of domestic courts on international crimes. (Venkata Rao, 2001).

The Commission saw some disadvantages in the second alternative, considering it contrary to uniformity of application. It also viewed as problematic the potential situation in which one party wished to initiate an action before a domestic court and another party wanted it brought before the international court. However, Special Rapporteur Thiam who had prepared an earlier draft statute for the international criminal court and the Commission deemed the possibility of having concurrent jurisdiction to be satisfactory and a good compromise. In fact, without expressly referring to the concept of complementary jurisdiction, the Commission indicated that in those cases where both domestic and international jurisdiction concur, preference would be given to domestic courts and the international court would have jurisdiction only if the competent States decide not to-investigate.(William A. Sachabas,2001)

This solution was not uncontroversial within the Commission, especially for those who saw it as a source of conflicts of jurisdiction that may lead to paralysis and injustice. Some members therefore supported the idea of the ICC having exclusive jurisdiction, which would eliminate possible conflicts of jurisdiction between it and domestic courts.

In this context it is important to note that some members of the Commission emphasized that the principle of sovereignty was no longer considered to be an absolute principle as in classic international law (Arsanjani, Mahnoush H., 1999)

The Commission following a proposal made by the Special Rapporteur also proposed a fusion of options (1) and (2), according to the types of crimes to be investigated: for certain crimes the Court would have exclusive jurisdiction and for others concurrent jurisdiction. The problem with this proposal was to compile the list of crimes which would fall under each type of jurisdiction and on which views differ sharply. The third option the Court having powers of judicial review also had some supporters, who argued that this solution dealt with the uniformity problem raised by those in favor of exclusive jurisdiction. In their opinion this alternative "would also Performa preventive role in that it would be an incentive to national courts to be more careful and watchful in applying the norms of international law", and could be acceptable to States if similar systems in all existing complaints procedures in international human rights law were taken into account. However, it was finally ruled out as an unrealistic option (Lattanzi, Flavia, 1996).

4.2.1 Complementarily principle espoused in state treaty obligations.

Complementarily principle is to be found in many different forms throughout the Court's procedure, and even in the investigation phase to be carried out by the Prosecutor. First of all, the introduction to the complementary character of the Court was spelled out and emphasized in the Preamble, Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions.

This statement is supplemented by the preceding paragraphs, which establish the grounds for complementarily and the manner in which it should be understood: international crimes shock the conscience of humanity, threaten the peace, security and wellbeing of the world, and should not go unpunished; States have the main responsibility for taking the required measures to avoid impunity; and an international criminal court is needed, for the sake of present and future generations, to guard them against the most serious crimes of concern to the international community as a whole.(Robert Jackson, 1999)

The above assertions were emphasized during a focus discussion group where a participant remarked

> The constitution of Kenya 2010 has domesticated the Rome statute and in the foregoing the Kenyan leadership and the populace at large are obligated to the ICC jurisdiction.(discussant)

The Rome Statute contains in Article 1 explains the essence of establishing the Court's jurisdiction:

> An international 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" (Rome statute 2002).

The study found out that the international criminal court as a creature of the Rome statute has the prerequisites to the exercise of jurisdiction, however, this depend greatly on the willingness of all states parties concerned in the prosecution to cooperate with the Court. The Statute of the ICC in this context has been examined from the viewpoint of treaty law, for a multilateral international treaty substantively and procedurally to be effective the ICC depends not only on widespread ratification of the Rome Statute, but also on states parties complying fully with their treaty obligations.

For almost every state this will require some change to national law. Of course the degree to which new law will be necessary to implement a state party's Rome Statute obligations will depend on its existing laws and legal system. Given the necessity for implementing law, there has been a concerted effort, at the national, sub-regional and regional levels to ensure that effective implementing law is made by all ratifying states

Human Rights Watch (2011) considers the adoption of the Rome Statute to have been a watershed in the development of an effective international criminal justice system in which there are no safe havens for those who commit the worst international crimes. The drafters of the Rome Statute had high expectations that the ICC will "put an end to impunity for the perpetrators of these crimes and contribute to their prevention".

However, Human Rights Watch believes that it is equally important that states parties make their ratification meaningful through effective national implementing law that enables them to meet their principal obligation under the Rome Statute, namely cooperating with and assisting the ICC. It is presumed that all states parties will need to modify their national law in some way to meet this obligation. The full cooperation of states parties is needed for the ICC to function effectively. States parties will be relied on to assist the ICC at every stage of its investigations and prosecutions.

The ICC will not have its own police force or prisons so states will be required, on behalf of the ICC, to arrest and surrender suspects, interview witnesses, provide information and evidence to the ICC, agree to take persons sentenced to prison for the term of their imprisonment and provide any other assistance sought by the ICC.

For this reason it is crucial that states parties have national laws and procedures in place to ensure that they can fully and expeditiously meet requests for cooperation and assistance from the ICC. The ICC is only one, albeit an important, component of an effective international criminal justice system. National criminal justice systems remain the primary component.

The Rome Statute intended the ICC to step in and prosecute international crimes of greatest concern to the international community when states are unable or unwilling to prosecute. The regime in the Rome Statute reflects this intention. Therefore, an international criminal justice system needs states to pursue those who commit genocide, war crimes and crimes against humanity in order to be effective. For this reason, states need to incorporate into national law those ICC crimes that are not already on their statute books. This will enable them to prosecute the international crimes themselves, strengthening their national criminal judicial systems and contributing to the establishment of an effective international criminal justice regime.

In many countries international treaties need to be incorporated into domestic law by specific implementing legislation (dualist countries). However, in other states, referred to as “monist”, the mere ratification of an international treaty is sufficient for the treaty to be part of the law of the land. Many civil law countries are monist, while those countries with a common law tradition tend to be dualist. Typically, the constitutions of monist states provide that international treaties that are binding on the state have constitutional status and take precedence over ordinary laws in the hierarchy of national norms. For this reason, it is often argued that these countries do not need to implement treaties as they are already part of national law.

However, as the Rome Statute has the potential to impact on a wide range of national laws, including constitutional provisions and criminal substantive and procedural law, relying solely on automatic incorporation into national law may not be sufficient to meet the Rome Statute treaty obligations. Specific national laws, especially relating to substantive and procedural criminal law, should be enacted.

Because of the importance of the Rome Statute and the reliance of the ICC on the timely cooperation of states parties, Human Rights Watch urges "monist" states to make an exception for the Rome Statute. By implementing the Rome Statute into national law, they will ensure that the relevant authorities are able to cooperate fully with the ICC, that the offences against the administration of justice by the ICC are punishable under law in national courts and that the ICC crimes can be prosecuted in national courts. It is in light of the above argumentations that the study explores a strong relationship between ICC jurisdiction and state sovereignty through state treaty obligations.

Table 4.3 International Criminal Court Jurisdiction pre empts the jurisprudence of Sovereignty.

Response	Percentage
Yes	60.23%
No	29.82%
Neutral	9.94%
Total	100%

Source: Researcher 2016

60.23%of the respondents agreed that ICC jurisdiction pre-empts the jurisprudence of state sovereignty while 29.82% disagreed with the same and 9.94 declined to comment the findings of the study are clearly expressing the Preamble of the Rome Statute of the International Criminal Court ‘and article 1 that refer to the International Criminal Court (ICC) as an international institution that "shall be complementary to national criminal jurisdiction. This complementary relationship between the ICC and national criminal jurisdictions means that, as opposed to the two Adhoc Tribunals.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) the ICC does not have primary jurisdiction over national authorities," but plays a subsidiary role and supplements the domestic investigation and prosecution of the most serious crimes of international concern,(Mil. L. Rev. (2001), The Court is only meant to act when domestic authorities fail to take the necessary steps in the investigation and prosecution of crimes enumerated under Article 5 of the Statute. The Statute does not explicitly use or define the term “complementarity” as such; however, the term has been adopted by many negotiators of the Statute, and later on by commentators to refer to the entirety of norms governing the complementary relationship between the ICC and national jurisdictions, (Triffterer, O. (2008).

Article 17 establishes the substantive rules that constitute the principle of complementarity. The Statute defines the question of complementarity appertaining to the admissibility of a case rather than to the jurisdiction of the Court. As is the case with other international judicial institutions, such as the IC] or human rights courts, the issues of admissibility and jurisdiction in the sense of competence in the pending case have to be distinguished, even though both concepts are closely related. (Cf. G. Fitzmaurice, 1986).

The Court cannot exercise the jurisdiction that it has if a case is inadmissible. Thus, the principle of complementarity does not affect the existence of jurisdiction of the Court as such, but regulates when this jurisdiction may be exercised by the Courts (J. Crawford, 2003).

Seen like this, the heading of article 12 of the Statute is strictly speaking a misnomer, since it does not concern the exercise of jurisdiction, but the existence of it, Article 17 thus functions as a barrier to the exercise of jurisdiction. The Rule of Procedure and Evidence of the ICC recognize this by providing that the Court shall rule on any challenge to its jurisdiction first before dealing with matters of admissibility complementarity as discussed in the above, forms the legal anatomy of ICC jurisdiction and state sovereignty. In concurring with the above, during the interview session one interviewee reiterated;

> The historiography of ICC holds the sanctity of statehood as enshrine in the principle of sovereignty by compounding sovereignty with responsibility in states .this has opened a new chapter in the approach of international criminal law and international relations. (Key informant).

The Statute establishing the ICC is an international, multilateral treaty. According to article 31 of the Vienna Convention on the Law of Treaties, provisions of a treaty shall be interpreted, inter alia, with regard to its object and purpose. In order to understand the principle of complementarity and to facilitate and structure the interpretation of the different provisions that define the concept substantively and procedurally, it seems pertinent to enquire about the rationale of complete complementarity. The most apparent underlying interest that the complementarity regime of the Court is designed to protect and serve is the sovereignty both of State parties and third states (Nord, 2000).

Under general international law, states have the right to exercise criminal jurisdiction over acts within their jurisdiction. The exercise of criminal jurisdiction can indeed be said to be a central aspect of sovereignty itself(Brownlie, 1998) whereas it is the right of states to exercise criminal jurisdiction over crimes contained in the Statute, the preamble of the Rome statute refers to the duty of every state not limited to States parties to exercise its criminal jurisdiction over those responsible for international crimes A purpose of the complementarity principle may thus be to ensure that states abide by that duty, either by prosecuting the alleged perpetrators themselves, or by providing for an international prosecution in case of their failure to do so. The declaratory wording of the Preamble may suggest that this duty precedes the coming into force of the Statute "(recalling that it is the duty").(D.Sarooshi, (1999),While such a duty unquestionably exists with regard to some international crimes. it is questionable whether it covers all crimes in their different facets under the Statute, especially as regards crimes against humanity.

Be that as it may, it is clear that the principle of complementarity was designed to allow for the prosecution of such crimes at the international level where national systems are not doing what is necessary to avoid impunity and to deter a future commission of crimes. Moreover, and independent from the existence of a duty to prosecute, the complementarity regime is surely designed to encourage states to exercise their jurisdiction and thus make the system of international criminal law enforcement more effective.

The interest of the international community in the effective prosecution of international crimes and the endeavor to put an end to impunity, the deterrence of the future commission of such crimes is a practical engagement among states and state parties.

The primary concern of the Statute, and specifically the complementarity principle, is thus to strike an adequate balance between this interest and state sovereignty however states from the global south frequently complain of skewed power relations .

Among the questions addressed are whether the ICC is guilty of selective prosecution of cases originating in Africa ,why the AU is so critical of the ICC and how its attitude has evolved over the years and how the ICC constrained by the customary international law doctrine of head of-state immunity. In 2008, the AU reacted to the increased use of universal jurisdiction in European states by adopting a resolution denouncing certain Western governments and courts for abusing the doctrine of universal jurisdiction and urging states not to cooperate with any Western government that issued warrants of arrest against African officials and personalities in its name. The watershed moment for the AU's relationship with the ICC came in March 2009, following the issuance of the first arrest warrant for President Omar al Bashir of Sudan (Human Rights Watch (2010).

For states parties to the Rome Statute, this transformed it from a 'paper commitment' with no real consequences into a very real commitment with potentially serious consequences. An interviewee retorted;

> The issuance of warrants of arrest against Al Bashir is a pronouncement by the ICC that it is not business as usual, leaders must be warned, gone are the days of arbitrary rule, abuse of power and impunity. This is an era of sovereignty and responsibility among states. (key informant).

The Bashir arrest warrant caused the relationship between the ICC and the AU to deteriorate for two reasons. First, members of the AU felt that the issuance of the arrest warrant was an impediment to the organization's regional efforts to foster peace and reconciliation processes in Sudan, and that the ICC failed to appreciate the effect that its actions were having on these efforts.

Secondly, diplomatic umbrage was taken over the indictment of a sitting head of state, which sparked a debate over whether the Rome Statute can legitimately extinguish diplomatic immunity in states that are not parties to it, such as Sudan.

The AU's opposition to the ICC has created a legal conflict for states that are parties to both institutions; different governments have chosen to resolve it in different ways. For instance, when President Jacob Zuma was due to be inaugurated in South Africa, invitations were sent out to all African heads of state, including President Bashir. As a party to the Rome Statute, South Africa would be required to arrest President Bashir, if he attended the event. Overnight this created a diplomatic scandal that was very difficult for South Africa to deal with.

After two or three days' silence from the South African government on the issue, civil society representatives threatened to request declaratory relief from a court that if President Bashir were to arrive in South Africa there would be an arrest warrant issued for him. The government eventually took the position that it would be under an obligation to arrest Bashir if he arrived in South Africa, and the Sudanese president did not attend the inauguration. South Africa's position that it is bound by the Rome Statute has been clear and consistent since then. But it is likely that many other African states faced with a similar choice would side with the AU, not the ICC. In October 2011, when Bingu wa Mutharika was Malawi's president, Bashir attended a for the Common Market for Eastern and Southern African States summit in that country.

Malawi issued a formal memorandum in support of its decision to host Bashir, in which it relied on (i) the Au's resolution, passed in response to President Bashir's arrest warrant, urging states not to cooperate with the ICC, (ii) the customary international law doctrine of head-of-state immunity and (iii) the fact that Sudan was not a party to the Rome Statute and could therefore not be bound by its suspension of immunity, to demonstrate that it was not under obligation to arrest him.

Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir However, in June 2012 the current President of Malawi, Joyce Banda, refused to allow Bashir to attend an AU meeting in Malawi, forcing the organizers to move the meeting just three weeks before it was before it was scheduled.

In 2011, the National Transitional Council (NTC) in Libya allowed Bashir to visit Tripoli but, surprisingly, NATO states made no attempts to intervene in the matter. Indeed, Bashir was the first foreign head of state to visit the NTC in Libya after the fall of the Gaddafi regime, as the Sudanese president provided assistance to the rebels in Benghazi as 'payback' for Gaddafi's assistance to rebels in Sudan's Darfur region. The fact that Libya is not a party to the Rome Statute partly explains the NTC's failure to arrest Bashir, but it does not explain why NATO member states like the United States and the United Kingdom who undoubtedly had a moral responsibility to do something failed to intervene.

Under customary international law senior state officials, such as President Bashir, for whom arrest warrants, were issued in 2009 and 2010, and President Kenyatta and his deputy William Ruto, whose trials began in 2013, have immunity from legal proceedings. There is a question as to the how the ICC is constrained by the immunity of sitting head of state and to want extent should peace be tampered with justice? The question of immunities is central to the AU. The interpretation of Article 27 of the Rome Statute, assumes that state immunity does not apply under the statute, this creates an exception to customary international law and allows heads of state and other senior state officials to be tried under the ICC jurisdiction.

Article 98 of the Rome Statute appears to conflict with Article 27, however, by providing that the ICC may not request cooperation or surrender from a state where that would require that state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity. But there appears to be an acceptance that states parties, by virtue of becoming members of the Rome Statute, have waived the immunity of their own officials or have otherwise accepted that they do not have immunity. So, at least as far as states parties are concerned, Article 98 does not apply, and there is no immunity before the court.

The difficulty arises in respect of states that are not parties to the Rome Statute, such as Sudan. There are a variety of views on this issue. It has been argued that in this situation, it is irrelevant that Sudan is not a state party because the case was referred by a Security Council resolution, which is are binding on all UN member states.

In 2012 the AU Assembly asked the AU Commission to consider whether it would be possible to request an advisory opinion from the International Court of Justice (ICJ) on the question of immunity. The question of immunity raises important, unresolved questions. Are the cases against President Kenyatta and Deputy President Ruto so sensitive throughout Africa as to pose a real challenge to the court's authority? In May 2013, the Kenyan government successfully lobbied AU members to adopt a resolution calling for the cases to be referred to Kenya for national proceedings to be taken, rather than being left to the ICC. The resolution was supported by all states except Botswana.

The resolution regrets that the AU request to the Security Council to use its powers under Article 16 of the Rome Statute to seek a deferral of the Bashir case was not acted upon. It reaffirms those countries such as Chad, which previously welcomed Bashir, did so in conformity with the decision of the AU Assembly and therefore should not be penalized. It also stresses the need for international justice to be conducted in a transparent and fair manner in order to avoid any perception of double standards, and 'expresses concern at the threat that the indictment(s) may pose to the on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in Kenya, but also in the Region'. and, finally, the resolution 12.

In order to do this, it would be necessary to petition States through UN General Assembly (GA) to file the request because the AU has no standing before the ICJ. An alternative currently being mooted in social media is whether the Assembly of State Parties, via the GA, could request an advisory opinion from the ICJ.13 Decision on International Jurisdiction, Justice and the International Criminal court (ICC).

Article 16 of the Rome Statute provides that 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.www.chathamhouse.org.

Africa and the International Criminal Court requests a referral (presumably by the Security Council) of the cases back Kenya in order for its reformed judiciary to deal with these matters. Four points are noteworthy about the AU's resolution. First, nowhere does it mentions the victims of the violence or the citizens of the affected states. Second, the AU appears to have moved on from the Sudan issue, and is now focused almost entirely on Kenya. Nothing, except Kenya's persistent lobbying, adequately explains why Kenyatta's and Ruto's cases have proved more galvanizing than Bashir's. In further evidence of Kenya's effective lobbying campaign, the Kenyan government managed to put the issue on the AU's agenda just five days before the session, despite the agenda having been drawn up well in advance.

Third, the claim that the judiciary is reformed is one with which many Kenyan human rights and criminal justice experts disagree. A group of these experts has written to the UN secretary-general stating that there is no process of reconciliation, no mechanism to try these cases in Kenya and the threat of instability in the region is hollow.

Fourth, there was an attempt to move the AU members to withdraw from their treaty obligations under the Rome Statute, though from the text of the resolution it appears that the attempt has failed for now. It is not clear that there is any legal basis for the AU to require its members to withdrawal from their treaty obligations that were entered into voluntarily and on an individual basis.

The resolution ends by asking the AU Commission to organize brainstorming session as part of the 50 Anniversary discussion on the broad areas of International Criminal Justice System, Peace, Justice and Reconciliation as well as the impact/actions of the ICC in Africa, in order not only to inform the ICC process, but also to seek ways of strengthening African mechanisms to deal with African challenges and problems.

Although parts of the Kenyan government appear to have been lobbying hard against the ICC, there is an apparent lack of coordination within it on this issue. While Deputy President Ruto was in The Hague at a status hearing of the ICC, the Kenyan permanent representative at the UN submitted a letter to the Security Council, apparently on behalf of the government, requesting it to instruct the ICC to discontinue these cases. This was just days before the ICC prosecutor was due to address the Security Council. It is claimed that Ruto was not informed of the letter in advance and subsequently issued a letter to that effect and re-committing himself to cooperation with the ICC's legal process.

Efforts by the government to block the trials from going ahead, or effect their referral back to Kenya, were unlikely to be successful; decisions on complementarity are for the ICC alone and the fact that Kenya has not put in place the necessary legal framework to try these cases properly give the lie to the claim that the cases ought to be referred back to it. But despite the apparent futility of Kenya's campaign as it relates to Kenyatta and Ruto and Sang, it may be that in the long run, the cases may lead to the irretrievable breakdown of the relationship between the AU and the ICC. In view of the above, the study established that the jurisprudence of sovereignty is ingrained in state practice and more so in recognition of international systems and norms such as the ICC.

Table 4.4 International Criminal Court Jurisdiction Is the Co-Existence of Cooperation of international law between states

Response	Percentage
Yes	86.55%
No	6.43%
Neutral	7.02%
TOTAL	**100%**

Source: Researcher 2016

The question of the prosecution of international offences has been, and still is, very closely bound up with issues of state sovereignty. This is true with regard to both the recognition of universal criminal jurisdiction for particular offences and the creation of an international criminal court for prosecution of particularly grave international crimes. Both options seek to overcome the traditional limitations placed on states' criminal jurisdiction, limitations tied to issues of territory and citizenship thus both aim to draw criminal law more closely under the protection of common international interests.

Now that the prohibition on the use of force and the obligation of peaceful international cooperation are having an increasingly greater influence on the shape and content of the sovereignty principle, and in light of the growing interdependence of states, there is an increased need to find effective ways to protect, through criminal use, the international norms essential for the peaceful coexistence of peoples.

Accordingly, many international treaties now provide for universal criminal jurisdiction for offences that endanger the international order, there is increased recognition of the fact that offenses against the peace and security of mankind are punishable even where they are not treated as crimes under national law; a culprit's official position as government official or head of state no longer removes criminal responsibility; immunity therefore cannot be claimed.

These developments correspond with the characterization and increasing importance of peremptory rules in international law, the distinction between international delicts and international crimes in the context of the international responsibility of states, and the extension and fleshing out of the principle that states have a responsibility for activities originating on their territory and encroaching on the security of other states at the same time(Sean Murphy), however, these developments raise difficult questions and meet with considerable obstacles in the area of criminal law, and though they may try states cannot minimize the difficulties by referring to outdated concepts of sovereignty.

For a long time, the question of international implementation of criminal law was approached from the viewpoint of the need to prevent possible interference with state sovereignty and not from that of the need for coordinated struggle and cooperation in the fight against international crimes. Thus, states either cited the sovereignty principle as justification for objecting to the extension of universal criminal jurisdiction or as justification for rejecting the establishment of an international criminal court. This situation continues to exist today, though in a different fashion; there is increasing recognition that national security is at present achievable only by way of international cooperation.

In this context, however, one cannot underestimate the importance of the fact that states are the essential structural elements of today's international legal order, that they represent the effective political organizational form of peoples and that they have particular protective functions which they actually exercise.

However compelling the precept of cooperation may be, all states want to insure that other states will not be permitted to use criminal law to interfere with their sovereignty or to achieve goals incompatible with the interests of the international community and peoples 'right to self-determination. To date, the industrially strong Western powers have decisively opposed universal criminal jurisdiction in the context of a code of offences against the peace and security of mankind fearing that they might thereby lose rights of diplomatic protection for their citizens or be forced to recognize criminal judgments of states whose legal systems they do not wish to respect as being of equivalent right.

Fundamentally, the Western powers base their position on the principle of sovereignty that is sovereignty vis-a-vis the criminal jurisdiction of other states. The western powers cite the principle to justify their non-recognition of foreign criminal judgments, their refusal to extradite their own citizens, and their attempts to claim immunity for persons who were acting as state agents when they committed international crimes. The Western powers do not wish national courts to be empowered to judge the conduct of foreign governments. This essentially means removing recognition of the international relations as n bedrock of international legal order.

In this accord during focus group discussions a discussant vehemently stated that;

> Sovereignty is only on paper to smear the African leaders with political accolades as long as their states are recognized because being universal states are guided also universally are partners in the hot bed of interests with the west. Once the interests are exhausted and outlive their usefulness then it is not business as usual. States must then exhibit sovereignty with responsibility. (Discussant).

In addition, states use the sovereignty principle to justify their objections to the competence of an international criminal court The underlying fear here is that criminal jurisdiction over crimes committed on one's own territory, where the victims, citizen or national interests are at stake, will be at the mercy of an international system of criminal justice controlled by others. Thus, although the Soviet Union and other socialist countries emphatically support international cooperation of states to coordinate criminal prosecution of crimes against peace and humanity, from the outset they have repeatedly rejected the creation of an international criminal court as a supra-national institution,(Scheffer, (2001).

Following the example of Nuremburg, they have al-ways advocated the creation of ad hoc courts whose competence could be based on the existence of joint national criminal jurisdiction, decisively opposing attempts to create an international criminal court which would have the competence to act side by side, or in place of national criminal jurisdiction. They have regarded it as impossible for states to hand over their own citizens to an international court for punishment or to refrain from criminal prosecution of offences committed on their territory.

According to Cutler, A. Claire, (2001) it is, however, noteworthy that they have never objected to universal criminal jurisdiction for grave international crimes, that is, to the notion that other states, or all states, obtain a right to prosecute particularly heinous offences committed on their territory or by their citizens.

This is true despite the fact that universal jurisdiction for grave international crimes can also be regarded as an interference with sovereignty. Rejection of, and skepticism about, an international criminal court is not in any way a typically socialist attitude or a position confined to the socialist states. Britain in particular, but the US too, has opposed creation of an international criminal court. Vehemently opposed to the proposal set forth by the International Law Commission, Fitzmaurice stated that the ILC had failed to establish that states regarded creation of any such institution as at all desirable,(Wedgwood, 2001).

The debate on the Genocide Convention clearly showed that the majority of states did not favor an international criminal court. To date, no viable majority in the UN has been found to favour the creation of such a court nor, however, have most states openly opposed the idea of an international criminal court. For instance, the Nordic states in the past have explained their preference for universal jurisdiction by pointing out that the international legal regime did not yet merit the creation of an international criminal court; not only was the idea of nature of the crimes defined in the code.(Amerasinghe, 2003).

France also expressed doubts, even though it had strongly advocated creation of an international criminal court in the late 1940s.Robert Jackson, (1999), at the start of the work in 1984, Reuter, the French member on the ILC, counseled caution. An international criminal court did not yet exist; while options could be studied, the Code should not be made dependent on the creation of an international criminal court. (Thomas ,Frank,2001), in 1986 Italy's member on the ILC likewise doubted that it would be possible to convince sovereign states to accept the creation of an international criminal court; for the moment, the only possible way was universal criminal jurisdiction, but even that was seen to be achievable only step by step.

> The Italian member later qualified his statement, explaining that there was a point at which both methods, universal criminal jurisdiction of national courts and an international criminal court, faced the same difficulties. Practical difficulties that might arise in setting up an international criminal court: questions of preservation of evidence, of extradition to the court, of enforcement of judgments, etc. None of these were new questions. They had been raised repeatedly over the years and differing solutions had been put forward (Marc, Herold (2002).

In the end, all of these arguments can be reduced to concern over sovereignty. This is true whether the concern was voiced directly and openly or whether it was raised indirectly by pointing out that states were not ready to accept the jurisdiction of an international criminal court that the world was not yet ripe for it, or there were too many practical difficulties. Clearly, under present international conditions most states are neither ready to abandon criminal jurisdiction on important questions nor to take on general extradition obligations.(Morris, 2003).

Many states advocated for the creation of an international criminal court, claiming that an international court is necessary if the Draft Code of Crimes against the Peace and Security of Mankind is to be implemented effectively. These states asserted that the establishment of an international court is the only way to guarantee objective impartial jurisdiction which is particularly important and at the same time particularly hard to achieve. In addition these states often pointed out that the creation of an international criminal court was the only way to avoid differing punishment by individual states. But while these questions are certainly of central importance to the international criminal legal regime, it is not convincing to argue that the only solution to these problems is to transfer criminal jurisdiction from states to an international criminal court. (U.N. Doc 1996).

Although reference to an international criminal court is often used as an argument for not expanding the principle of universal criminal jurisdiction to crimes against the peace and security of mankind, it is unclear whether states voicing this view ultimately desire either a code or an international criminal court .A typical ex-ample is that of Britain. Early on, Britain spoke openly and decisively against an international criminal court.

It was regarded as impossible in the then present circumstances in international relations for states to accept the jurisdiction of this sort of criminal court. But the British member of the International Law Commission representative to the Sixth Committee of the General Assembly also spoke strongly against universal criminal jurisdiction of national courts. He put forth the view that a code of offences against the peace and security of mankind could be effectively realized only with the help of an international criminal court; since it was not possible to create an International Criminal Court this simply meant that a code of offence against the peace and security of mankind was illusory. Solera Oscar, (2003)

US arguments sound very similar. The US representative to the Sixth Committee voiced doubts as to whether the International Law Commission had made any progress in working out the Draft Code. Fundamental questions were still unclear, particularly those regarding the jurisdiction of an international criminal court "An international criminal tribunal," he noted, "would be a way of dealing with the question of international jurisdiction free of the vagaries and wishes of national approaches. This is not to say that an international tribunal is a good or a bad idea. “In other respects, he made it clear that the US regarded it as an error to have resumed work on the Code, even though the situation had changed considerably since 1947. The West German representative also declared that the International. **WA Schabas, (2007)**

Law Commission's work on the Draft Code of Offences against the Peace and Security of Mankind would be realistic only if "the prosecution of such crimes was left to an international court."The answer to the question of whether the creation of an international criminal court could be expected in the foreseeable future was, however, left open. Thus, the very states that regarded work on the Code as untimely or senseless were the same states which called for the creation of an international criminal court, and, in some instances, those which said the success of the Code depended on it. Hence, one cannot avoid the impression that the call for an international criminal court has served only to obstruct or delay the drawing up of the Code. **MM Whiteman, (2016)**

At the Forty-third General Assembly of the United Nations, however, it became clear that the overwhelming majority of states regarded work on the Code as important and urgent. This was expressed inter alia in the vote, 137 to S with 13 abstentions, which kept the Code as a separate agenda item. Many states also explicitly spoke against linking work on the code with the question of an international criminal court if such a move would delay work on the Code. After all, a picture of the substantive criminal law is necessary before decisions regarding the proper procedures for applying it can be made**. Bassiouni, (1999)**

Fears expressed by some members of the ELC that application of the principle of universal criminal jurisdiction to offences against the peace and security of mankind would lead to chaos Art. 5(2) are obviously unfounded. Practice to date has resulted neither in chaos nor double punishment in the prosecution of war crimes and crimes against humanity. On the contrary, the difficulties clearly continue to lie in securing prosecution and just punishment due to lack of effective cooperation among states.(Rome statute 1998)

Again, the objection that states are not prepared to extradite responsible politicians to other countries for punishment if they are accused of offences against peace, war crimes or crimes against humanity is not an argument in favour of an international criminal court To the extent that the objection is relevant, it applies just as much to the creation of an international criminal court as it does to the extension of universal

jurisdiction. The issue does not really concern questions of procedure, but rather whether it is either reasonable or expedient to agree on a rule that can be applied only with difficulty and only through the municipal courts of foreign jurisdictions. Bassiouni, (1999)

This essentially brings us back to the sovereignty question, specifically to the question of the actual content and limits of the sovereignty principle in present day international law. The point is not whether states are prepared to abandon particular rights of sovereignty. It is instead much more the extent to which just punishment of war crimes and crimes against humanity can be refused or obstructed by appealing to sovereignty in present-day international law. This question arises today in relation to many crimes. It applies to particularly heinous forms of environmental pollution, drug-trafficking, and the use of mercenaries as well as to torture and hostage taking. In connection with offences against peace, it essentially arises in relation to the prohibition on the threat or use of force in international relations, as clearly brought out by the Nuremburg trials and the arguments of the defence therein.

The Draft Code of Offences against the Peace and Security of Mankind covers offences directed against the fundamental interests of the international community in peaceful international cooperation. These are offences that threaten, injure or curtail the guaranteeing of the basic principles of present-day international law, particularly the prohibition of force, sovereign equality of all states and the equal rights and rights to self-determination of peoples. Taking the long-term perspective, all states have an interest in preventing and punishing such crimes. The responsibility of individuals for such offences arises "under international law."

That is to say, neither individuals nor their home countries can oppose punishment on grounds that they have acted as a state organ and thus are entitled to claim immunity, nor may they claim immunity on grounds that the act was not punishable by their national law states are to join together to protect particular values through norms of criminal law, punishable conduct must be defined and various methods for implementing penal provisions must be investigated and agreed upon.

As soon as states agree as to the best means of implementing the substantive law, the objection of sovereignty will necessarily fall an individual will no longer be able to avoid punishment by referring to sovereignty, nor will states be able to claim that procedures be prevented or stopped due to a reference to sovereignty. This applies equally with respect to both universal criminal jurisdiction and an international criminal court. To date, states' reluctance to admit universal criminal jurisdiction for particular crimes has been the primary obstacle to the development of international criminal prosecution. There is little willingness to recognize the validity of foreign criminal judgments and to accept general duties of extradition for particular crimes.

In fact, extradition of one's own nationals has as a rule been refused, even where the cases are unambiguously ones of crimes of an international character. In general, states keep punishment of their citizens and the criminal prosecution of offences commit-ted on their territory to themselves. This is evidenced by the laborious and ultimately unsuccessful attempts to apply the *nesbis in idem* principle internationally. Even agreements within the European Community aimed at this objective have not really been effective.

Therefore, an effective implementing mechanism for any code of crimes against the peace and security of mankind must be based on cooperation among states. Thus, states cannot merely agree on the elements of the various individual offences that form a basis for international criminal prosecution; rather, alongside of the substantive law, they must lay down rules for effective cooperation in criminal prosecution, including rules regarding states' obligations to implement the provisions o the Code in national law, mutual rights and duties in criminal prosecution, the preservation of evidence, the right to extradition, and, above all, the means of guaranteeing objective trials and just punishment.

The sovereignty of states must be used to accomplish this urgent task, not to oppose there are substantially better conditions for this today than there were forty-five years ago. Awareness of the existence of universal values, their recognition, and their central importance to peaceful international relations among peoples is far more developed today. This is expressed not only in the recognition of just cogens rules, but also in the distinction states make between international delicts and international crimes and states' increased sense of responsibility to, and renewed respect for, the UN security system.

In addition, the fact that the principle of criminal prosecution or extradition the basis for universal criminal prosecution of war crimes adopted in 1949 for the criminal prosecution of grave breaches of the Geneva Conventions is applied to day in somewhat modified form in all universal agreements on the criminal prosecution of international crimes should not be overlooked. It is important to note that the principle is applied irrespective of whether the agreements involve airplane hijackings, hostage takings, torture or the protection of diplomats.

Thus, what was not possible in 1948 for the Convention against Genocide has in the interim become standing international practice? Moreover, the list of crimes that can no longer be regarded as political crimes for the purpose of extradition, that is, those crimes now falling within the obligation to extradite, is becoming ever longer. This is true even with respect to current US state practice. One simply cannot overlook that where there is a resolve to prosecute international crimes international practice is taking the path of universal criminal jurisdiction of national courts. Referring to this practice, a number of states have recommended that this example be followed in the case of the criminal prosecution of of-fences against the peace and security of mankind too. For example, the spokesman for the Nordic states on the Sixth Committee of the General Assembly pointed to this trend when stating: The international community has on many occasions adopted the approach of an indirect responsibility of the individual through the creation of an extraordinary jurisdiction on the part of states thus the principle of so-called universal jurisdiction.

All these conventions have aimed, not at defining crimes to be dealt with by an International Criminal Court but at intensified international cooperation with a view to ensuring that individuals committing serious offences are brought to justice and, upon conviction by a competent court of national jurisdiction, suffer appropriate penalties. But, if international practice combines recognition of universal criminal jurisdiction with an obligation to cooperate in preservation of evidence and criminal prosecution it is not because it is the optimum variant but because it is a practicable one.

The extension of states' criminal jurisdiction beyond the traditional jurisdictional bases of territory and nationality has become both practice and necessity where crimes against the existence of the state or particularly heinous international crimes are involved. In such cases states recognize the principle of universal jurisdiction because they have an interest in doing so. The increasing awareness of global problems is accompanied by the realization that it is necessary to fight international crimes that endanger all through reinforced international cooperation. At the same time, however, there is a clear recognition that the extension of universal criminal jurisdiction cannot solve all problems. Questions concerning the objectivity and uniformity of criminal prosecution and the harmonization of adjudication among states remain. The amount of weight to be afforded these concerns no doubt differs depending on the crimes and states involved, a fact repeatedly pointed out in debates on measures for implementing the Draft Code of Crimes against Peace and Security of Mankind. These problems are not, however, confined to the area of the Code, but rather arise with respect to all international conventions based on universal criminal jurisdiction. They merely obtain greater political weight in the context of the Code because of the nature of the offences.

In sum, questions relating to sovereignty have consistently overlapped with questions of international criminal jurisdiction in a manner which seemingly suggests that they are mutually exclusive. To get around this, the most recent ILA draft statutes for the creation of an international criminal court provides a list of offences confined to offences listed in existing conventions. It does not, for instance, contain the offence against peace. In addition, the ILA draft provides that the court's jurisdiction be prefaced on the condition that the relevant convention defining the offence has come into force among the states concerned.

Moreover, the ILA draft permits states to restrict the court's competence to one of the conventions mentioned or even to individual offences among those defined in a convention. Additionally, it allows each state to decide, case by case, whether it will bring an accused party before its own courts or else hand the party over to the international criminal court of justice.

Moreover, the jurisdiction of the international criminal court would depend on whether the accused party was a national of a state recognizing the competence of the criminal court, whether the offence had been committed on the territory of such a state, or whether the offender was residing in such a state. Whether an international criminal court reduced to this extent could still meet its function of integration and protection vis-a-vis an international legal order demanding lasting stabilization is extremely questionable. These restrictions evidence, however, the extent to which even advocates of an international criminal court are limited by states' skeptical attitude towards a project of this nature.

Today there is a need to develop international standards aimed at insuring that the peaceful co-existence of states may be protected through criminal law. Over the last twenty years the number of agreements on universal criminal prosecution of international crimes has increased considerably; states now agree that sovereignty neither/entitles states neither to cover up international crimes nor to hide behind the cloak of immunity. We are, however, now faced with the task of developing a means to combine the existing criminal jurisdiction of states with an international mechanism suitable for compensating for the shortcomings of a further extension of universal criminal jurisdiction.

At the same time, we must develop a means of promoting international cooperation in the prosecution of international crimes in such a way as to strengthen the international legal order. To attain this goal we should. Take the existing and functioning criminal jurisdiction of states as a basis and strengthen it through universal application and recognition and through appropriate international cooperation in the preservation of evidence and in the arrest and extradition of offenders. Set up an international criminal court which does not function in place of national justice or in competition with it, but rather provides the possibility for, and has the task of insuring, the objectivity and uniformity of adjudication. To this end it is necessary and sufficient for the international criminal court to be competent to review judicial decisions taken by national courts under the Code of Offences against the Peace and Security of Mankind on application by a state involved, and to take a final decision in the matter.

The international criminal court should also be competent to hand down a binding legal opinion on application by a national court dealing with a case involving application of the Code. In this way, it could act in the interest of the sovereignty of all states and guarantee the functioning of the international legal order. It would limit or eliminate the arbitrary element inherent in national courts and hence the existing weaknesses in the present system of universal criminal jurisdiction. This would help both the implementation of the Code and the protection of states against unjustified interferences in their sovereignty.

As long ago as 1983, when the Committee on International Criminal Jurisdiction discussed the statutes of an international criminal court, some suggested that international criminal court be used “to resolve conflicts in the decisions of national courts”. Such proposals were at the time, as Graven writes, rejected on rather un-convincing grounds.

Today these questions are arising in other circumstances and in a different context. And it is thoroughly worthwhile taking them up, since they are suitable for discussions aimed at developing a realistic model for implementing the Code of Offences against the Peace and Security of Mankind.

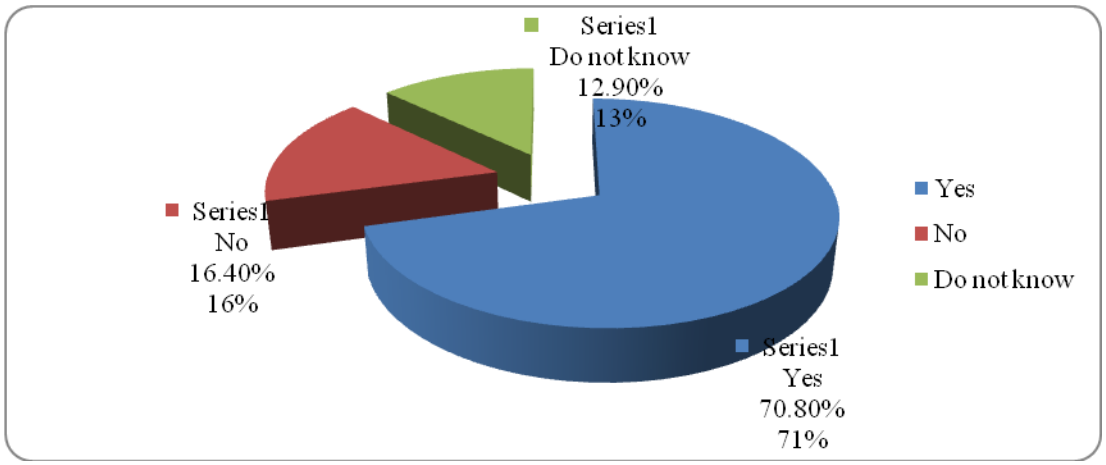
In accordance with the practice of states relating to international crimes, prosecution of crimes against the peace and security of mankind must be predicated on the notion that every state on whose territory a person suspected of having committed such crimes is to be found has the duty to try or extradite that person. The present Article 4 of the Draft Code of Crimes against the Peace and Security of Mankind stands for this proposition. This is in line with the system applied in recent agreements on international offences.

These agreements, however, generally proceed in the opposite direction. They start by specifying the usual bases for criminal jurisdiction and then require states to ensure that they have jurisdiction over the offences concerned, at least in cases where offenders are on their territory and they do not extradite them to another state. This practically guarantees universal criminal jurisdiction, as it is scarcely to be expected that states not directly concerned either through nationality or through the offence itself will have an interest in, or possibility for, criminal prosecution where the offender is not on their territory.

In practice, the area of universal criminal jurisdiction of prime importance is covered by this restricted formula as long as states are obliged to cooperate in areas of information and securing of evidence; and recent treaties provide numerous examples of cooperation in in-formation exchange and securing of evidence. Particular reference should, however, be made.

In this connection to UN General Assembly Resolution 3074 (XXVIII) of 3 December 1973. It summarizes the most important principles that should apply international cooperation in identifying, arresting, extraditing and punishing persons guilty of having committed war crimes and crimes against humanity.

Figure 4.1: ICC Implications on State Sovereignty



Source: Researcher 2016

The respondents were asked whether ICC court jurisdiction had implications on state sovereignty. From the study findings, 69% of the respondents indicated that ICC court jurisdiction have implication on state sovereignty, 15.8% indicated that they did not know while 15.20% indicated that ICC court jurisdiction does not have implication on state sovereignty. Cryer (2005) follows Broomhall and express some doubt that the fundamentals of sovereignty or international law are likely to change. He asks about whether the ICC is really that threatening to sovereignty in the first place. If it is not, then it can hardly be considered likely to transform it. Bassiouni, in his chapter on the ICC in Justice, asserts that: it is not a supranational body, but an international body similar to existing ones. The ICC does no more than what each and every State can do under existing international law. The ICC is therefore an extension of national criminal jurisdiction. Consequently the ICC does not infringe on national sovereignty.

It would appear, therefore, that there is no consensus on the extent to which the ICC represents a fundamental challenge to sovereignty, or requires a reappraisal of the nature of international law. Queries can rightly be expressed about Bassiouni's exclusion of any supranational element in the ICC, but in relation to the law, Bassiouni has a strong point. Although it is true that the International Criminal Court, being both permanent and having a broad jurisdictional reach is institutionally a huge innovation, the drafters at Rome were very careful to ground the developments they were making in pre-existing law. This was because it was certain by the late stages of the Rome conference, if not before, that some states were going to oppose the Rome Statute whatever the outcome.

The drafters were fully aware that such states would seize any parts of the statute in advance of international law as a stick with which to beat the new court should the ICC ever seek to exercise its jurisdiction over them as non-parties. It is notable that this debate is also taking place amongst those who support the International Criminal Court. All the works specifically concentrating on international criminal law reviewed here contain defenses of the ICC against the critiques leveled at it by the US that it violates pre-existing international law.

Interestingly, those authors who assert that the ICC is transformative of the nature of international law may weaken the claim that the ICC is consistent with pre-existing international law. For example, Sadat, in a work that is at once supportive of the ICC, enjoyable and perhaps deliberately provocative, states that: another aspect of establishing the ICC outside of the United Nations system is the possibility that the Rome Conference represented a Constitutional Moment in international lawa decision to equilibrate the constitutional, organic structure of international law, albeit sotto voce.

Various aspects of the Statute and its creation suggest an important shift in the substructure of international law upon which the Court's establishment is premised. Unable to effectuate the change explicitly, through formal amendment of the Charter, the international community, including not only States but global civil society, seized upon imaginative ways to bring about the shifts in constitutional structure necessary to permit international law to respond to the needs of international society and changing times.

In applauding the Rome Statute for this, Sadat concedes too much to the critics of the ICC who say the ICC significantly alters the charter and international law generally. It is more prudent, as James Crawford is in his contribution to the short but substantial Nuremberg, to note that the ICC reflects the fact that international law may have changed slightly (with a greater focus on international criminal law), although not really at the institutional level.

As has already been noted, the relationship between international criminal law and state sovereignty is complex, and perhaps often misunderstood,

> We must accept that international criminal law does affect state sovereignty (the law on crimes against humanity and genocide in particular) by prohibiting behavior perhaps previously outside of the purview of international law . (Bennouna, 2002).

Broomhall comments, the idea that certain acts 'undermine the international community's interest in peace and security and, by their exceptional gravity, "shock the conscience of mankind", and thus are not the concern of one state alone. The obligations under-taken by states parties to the Rome Statute, to cooperate with the Court and to, essentially, submit their judicial processes (or lack thereof) to external oversight also have implications for sovereignty.

However the prevention of international crimes cannot occur without sovereignty. Violations of international criminal law were frequent, for example in Somalia, where there was no government that could control the various factions. It is the same in cases such as Sierra Leone, where rebel forces were fighting a government that is weak and does not control much territory. The state (and its powers) has a protective role that cannot be ignored here, at the very least unless and until the UN or another body chooses to take it over (Nijman, 2004).

Turning more specifically to the ICC, it also bears recalling that creating that body was an exercise of sovereignty. No other entities than states had the authority to create a permanent international criminal court. So the ICC, perhaps paradoxically, also owes its existence to state sovereignty. The grounding of the ICC in the consent of states means, in particular, that the ICC may lawfully exercise jurisdiction over nationals of non-party states when they commit crimes on the territories of consenting states. There is no reason that states cannot determine that crimes committed on their territory or by their nationals are prosecutable by courts acting on their behalf.

In creating the Court, those states have accepted that the ICC may exercise some of their sovereign powers (the right to exercise jurisdiction) in that way. Non-party states have not had their sovereignty limited in any additional way by this concession made by states parties, who have locked themselves into a regime that can take over part of the protective role of the state, by prosecuting offences if the state later becomes unwilling or unable to do so. Admittedly, the rights of the ICC to do so are hedged with conditions protecting sovereignty, most notably, complementarity. Most of the works reviewed here discuss complementarity, and tend to do so well.

However, although some of the authors accept that complementarity was intended to limit the power of the ICC (or, the 'inter-national') over states, the idea behind complementarity can also be seen as a use of state sovereignty for international ends. As Sir Robert Jennings has written in another context, the classical international lawyer's call for a surrender of sovereignty was erroneous. What was and is most urgently needed is not a surrender of sovereignty but a transformation and augmentation of it into new directions by harnessing it, through proper legal devices, to the making of collective decisions, and the taking of effective collective action, over international political problems.

The reason for this is that to be effective, international law needs developed domestic structures like courts and police services. Although Jennings' comments were not written with the ICC expressly in mind, it is an excellent explanation of complementarity. States have decided that international crimes ought to be repressed, and have determined that the most effective way of doing this is by encouraging national efforts at prosecution, i.e., using state sovereignty. Indeed, Philippe Sands, in his contribution to From Nuremberg to the Hague identifies this as one of the advantages of complementarity (at 76–77), as it 'recognizes that national courts will often be the best placed to deal with international crimes', and provides them with an incentive to act. The exercise of legislative and adjudicative jurisdiction is an important part of state sovereignty. What the ICC does is provide a mechanism where states are actually encouraged to use their sovereignty in this way.

This effect is not necessarily limited to states parties. Still, the extent to which the ICC can provide such an incentive is not helped by what a number of the authors here accept: that the cooperation regime for the ICC is not strong, owing to an unwillingness of states to go too far in relation to their perceived sovereign prerogatives. The above point can perhaps be generalized a little more. International criminal law may have the effect of limiting sovereignty through its substantive norms although we will return to this matter later, but it also empowers states in relation to jurisdiction.

This should come as no surprise, as can be seen from the double-structured nature of the argumentation in the Lotus case, and the commentary it inspired. To assert jurisdiction over an action is to exercise a form of sovereignty over it, and where the jurisdiction being asserted is extra territorial, this may cause consternation in the state where the offence occurred. What is at issue is who is to be empowered to exercise sovereignty, the *locus delicti* alone, or other states? International criminal law has traditionally adopted a broad view of extraterritorial jurisdiction. For example, passive personality jurisdiction is generally frowned upon in international law, yet it is unquestionably available in relation to international crimes, (Lotus, 1927).

The broadest jurisdiction granted to states in international law, universal jurisdiction, is granted by international criminal law. As jurisdiction involves one state asserting rights to adjudicate events in (and often involving the officials of) other states, this involves an assertion of sovereignty. Thus international criminal law, by accepting universal jurisdiction and limiting material immunities empowers states, enabling them to expand their sovereign rights to events beyond their borders, through the assertion of such a broad form of jurisdiction. Although most international criminal lawyers would accept that in the case of international crimes this is right, it also shows

that sovereignty is not always the enemy. Without sovereignty there are no courts, and without courts there are no prosecutions. In dealing with universal jurisdiction, however, we also have to take into account the claims that universal jurisdiction is, albeit notionally available to all, in practice a tool of the powerful. This was one of the bases upon which the President of the ICJ, Gilbert Guillaume, opined that to accept universal jurisdiction in absentia would 'be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'.Guillaume's point might be countered with a claim that all states remain, in spite of modern imbalances of power, equally sovereign. Thus legally with equal jurisdictional authority (Consard 2002).

However, as a number of the authors recognize, international criminal law operates in a political, as well as a legal sphere, so practical opportunities to exercise that jurisdiction are not equally distributed. Perhaps most a stringently in relation to national jurisdiction, Broomhall asserts that It would be one thing for France to prosecute a former Head of State of Haiti before its domestic courts, and quite another for the Marshall Islands to prosecute a former President of the United States. If regular enforcement the rule of law is to become even a clearly emergent reality, then supporters of universal jurisdiction will have to propose credible means of addressing the complex decisions and sometimes political value judgments faced by those operating in real world situations.

Mark Lattimer and Philippe Sands (2003), in the very useful introductory chapter of Justice, go further, and also note that it is by no means solely at the national level that political considerations enter the equation outside the courtroom at least, international criminal justice cannot be immune from strategic influences.

It is plain that global and regional politics renders the commitment of some states to international justice more decisive than that of others. This leads to some uncomfortable conclusions: for example, one could speculate that if the Tribunal had issued indictments against NATO personnel over incidents in the Kosovo war, it might have seriously under-mined Western support for the Tribunal and possibly compromised the whole project of inter-national criminal justice, including the International Criminal Court.

This takes us to the fact that sovereign equality is a legal rather than empirical concept. It also takes us to the crux of Broomhall's argument that the rule of law, insofar as it requires 'consistent, impartial practice raises profound difficulties, at least as the international system exists and is likely to develop. He is right that the nature of the international system does not provide an easy welcome for entirely consistent practice, although the situation in relation to selective enforcement may have improved somewhat recently. After all, Belgium, the defendant state in the Arrest Warrant case, is no example of a superpower arbitrarily throwing its weight around.

4.2.9 ICC Jurisdiction Is Determined By Consent of Sovereign States

The extraterritoriality of criminal jurisdiction exercised by any State depends on the cooperation among States to apprehend individuals who are nationals of a requested State but have committed crimes in the requesting State or who are nationals of the requesting State but resident in hiding or otherwise in the requested State. The rationale is that where a crime has been committed, the perpetrator of the crime must not escape trial by virtue of territorial jurisdictional limitation

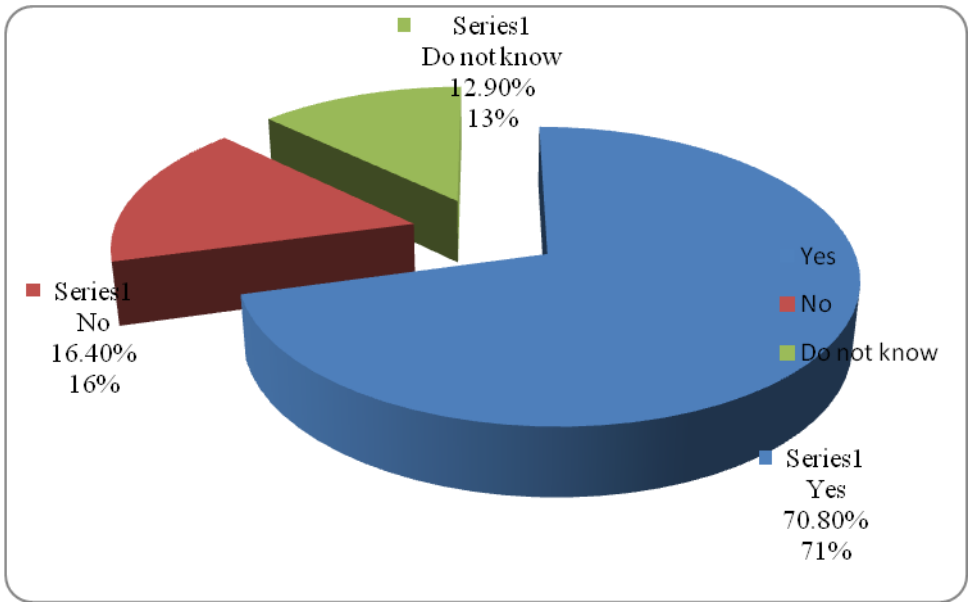


Figure 4.2 ICC Jurisdiction Is Determined By Consent of Sovereign States

The study sought to establish whether ICC jurisdiction is determined by consent of sovereign states. From the findings, majority of the respondents (70.8%) indicated that ICC jurisdiction is determined by consent of sovereign states, 16.4% indicated that ICC jurisdiction is not determined by consent of sovereign states while a few (12.9%) indicated that they did not know. Cooperation among States in criminal matters exists in the form of mutual legal assistance between States. This form of collaboration between States is based on the respect of the sovereignty of States. Jurisdiction is therefore an attribute of a State's sovereignty. It is treaty law that there are jurisdictional limits for courts concerning criminal matters. Criminal jurisdiction of States is primarily exercised on a territorial basis. This means that jurisdiction is primarily limited to crimes that occur in a State's territory and by its nationals under the active personality principle.

4.2.2 Consent dilemma and sovereignty

Since the Statute of the ICC is a treaty, it is only binding on those States that have become party to the treaty. However, in cases where the jurisdiction of the Court is triggered by referral of a situation by the United Nations Security Council, the Statute will be binding on non-State parties Bassiouni (1999). There are other circumstances where the exercise of jurisdiction by the Court may affect the interests of non-State parties, for example where the Court exercises jurisdiction over nationals, including officials, of States that are not party to the Statute. Such prosecutions are possible where the nationals or officials of non-party States commit crimes within the jurisdiction of the Court on the territory of a State party or in circumstances where the United Nations Security Council refers a situation to the Court Art. 12(2) ICC Statute.

Questions have been raised in the negotiation of the amendments relating to aggression as to how the amendments will enter into force for States parties and whether or not States parties will need to consent to the amendment specifically in order for the amendment to apply to them. The is not to seek to resolve the particular debate as to how the amendments should come into force.

> However, I do agree with Sean Murphy that these debates seem to revolve around what appears to be a very clear provision of the Statute and some of the suggestions take a position which is inconsistent with a plain reading of the text. The question as to the procedure by which any amendment regarding aggression will come into force turns on whether Article 121(4) or Article 121(5) of the ICC Statute should apply (Bassiouni (1999).

The statute provides that an amendment shall enter into force for all States Parties one year after seven-eighths of them have ratified or accepted it. This would allow the Statute to become binding on all parties even without the direct consent of that State party. On the other hand, Article 121(5) provides that in the case of amendments to Articles 5-8 (the provisions setting out and defining the crimes), an amendment will

enter into force only for those States Parties which have accepted the amendment. The question then is whether provisions setting out a definition of the crime of aggression and the conditions under which the ICC may exercise jurisdiction over the crime are to be regarded as amendments to Articles 5-8. It is likely that the provisions, if adopted, will be included in provisions which are separate from the existing Articles 5-8(Rome ,statute 1998)..

However, what is nonetheless clear is that the provisions are, in part, amendments with respect to the definition of the crimes subject to the jurisdiction of the Court. Furthermore, the addition of the definition of the crime of aggression and the conditions for the exercise of jurisdiction will require the deletion of Article 5(2) of the original Statute the provision which prevents the Court from exercising jurisdiction over aggression pending the entry into force of the amendments. Art. 5(2) therefore, the text and spirit of Article 121 suggests that it is paragraph 5 that ought to apply. In the period immediately following the adoption and entry into force of the Statute, the argument was made by the United States that the Rome Statute, by purporting to apply to nationals of non-States parties, creates a jurisdiction which violates the sovereign rights of States This argument is at its strongest when it asserts that the parties to the Rome Statute act illegally when they allow the ICC to exercise jurisdiction over the official acts of non-State parties.38 In exercising competence over official acts of non-State parties, the Rome Statute, it may be argued, could be in violation of two principles of general international law which may stand in the way of prosecution of nationals of non-consenting States (Scheffer, 2001).

First, it may be argued that the Statute violates the principle by which international tribunals are not competent to decide disputes between States except where those States have consented to the exercise of jurisdiction over that dispute by the tribunal.

This consent principle of international adjudication ensures that both parties to cases before international tribunals must have accepted the jurisdiction of the tribunal to rule on the case. The principle has also been applied more broadly as the International Court of Justice decided that it is precluded from exercising its jurisdiction where doing so would require adjudication of the legal interests of a third State that was not a party to the case and has not given consent to the Court determining the matter Monetary Gold, (1954). This is known as the *Monetary Gold* principle. Thus, even where the parties to the dispute before the ICJ have consented to the exercise of jurisdiction, that Court has taken the view that the principle of consent requires it to abstain from deciding a case where the legal interests of a non-consenting third State formed the very subject matter (Jackson, 1999).

Secondly, it may be argued that in exercising jurisdiction over the official acts of non-consenting States, the Rome Statute violates the principle that State officials cannot be subject to external jurisdiction in respect of acts which are really acts of the State itself, without the consent of that State Thomas M. Frank, (2001), this second principle is reflected in the immunity *ratione materiae* that international law accords to State officials. Although that immunity is generally accorded to States and their officials from the jurisdiction of foreign States, the principle is also relevant here. This is because the source of the ICC's jurisdiction is often regarded as a delegation of State competence by parties to the treaty. States cannot transfer to the ICC a jurisdiction which they do not themselves possess (Morris, (2003).

Further, since immunity *ratione materiae* is a right belonging to the State which the official represents, where that State is not a party to the treaty that seeks to allow for prosecution, this will amount to a deprivation of the rights of that State, through a treaty it has not consented to This would, of course, contravene the principle in the

Vienna Convention that a treaty is not binding on States without their consent. At first glance, the two rules outlined above may be regarded as different in that the former (the principle of consent/*Monetary Gold* principle) applies to international tribunals whereas the latter (immunity of State official's *ratione materiae*) was originally developed with respect to domestic courts. However, there is actually a close relationship between the two rules (Marc W. Herold, 2002).

In the first place, both rules reflect the necessity of consent of States before disputes involving those states are subjected to international adjudication or dispute settlement. Secondly, both rules are derived from the same general principle of international law, the principles of sovereign equality and independence. Both rules reflect the idea, which is fundamental to international law as currently conceived, that States are not, in principle, subject to the legal authority of other States – at least when States act in the exercise of their sovereign authority.

Furthermore, the principle of independence also means that States are not subject to external obligations or imposition of external authority unless the State has accepted those obligations. Since international organizations and international tribunals are creations of other States, to accept that such organizations or tribunals can exercise authority over States that have not consented to the exercise of such authority would be a violation not only of the principle of independence but also that of sovereign authority.

The relationship between these two apparently separate rules has been recognized by James Crawford, who stated that: although the international law rule prohibiting adjudication against foreign States without their consent may not apply directly to municipal courts, it has much force as an analogy, with respect to matters that it covers (Crawford, 1983).

According to Crawford, the rule requiring State consent for international adjudication "provides strong support by analogy, if not directly, for a rule of foreign State immunity in the rather limited areas governed by that jurisdictional rule." Thus the immunity *ratione materiae* principle in domestic law is really a reflection of the consent based dispute settlement principle in international law and is similar to principle that is reflected with respect to international tribunals. It has been stated by a leading authority that it is a "truism that international judicial jurisdiction is based on and derives from the consent of States."All international tribunals which exercise competence over disputes involving States require the consent of those States. The manner in which consent may be given varies. Limited consent may be given with respect to the particular dispute in question.

Alternatively, a more general form of consent may be given, for example, consent to the exercise of jurisdiction by a tribunal over any dispute arising under a particular treaty or treaties. Even more broad is acceptance of the so called "compulsory jurisdiction" of the International Court of Justice. Where the compulsory jurisdiction of the ICJ is accepted, consent is not limited to particular disputes or treaties but relates to disputes involving that State with any other State that has accepted the same obligation.

In the Monetary Gold case, the International Court of Justice held that the principle requiring the consent of a State before an international tribunal can adjudicate on the rights or responsibilities of that State applies even where the State concerned is not a party to the case before the Court but where the legal interests of that State would form the very subject matter of the decision. That case involved a dispute between Italy on the one hand and the United States, United Kingdom and France on the other. The case involved gold, belonging to Albania, which was held in Italy during World War II and which had been removed by Germany during the war. The issue was whether Italy was entitled to receive the gold and whether it had priority over the UK's claim to ownership. Italy claimed the gold as compensation for wrongs done to Italian nationals by Albania. The ICJ held that;

> though the parties to the case had conferred jurisdiction on the Court, it was unable to exercise that jurisdiction since "it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation The Court held that "to adjudicate upon the international responsibility of Albania without her consent would run counter to a well established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.(ICJ 1952) .

The ICJ applied the Monetary Gold case in the East Timor case, which has significance for the ICC's jurisdiction over aggression because the ICJ abstained from determining a case where, according to the Court, it would have had to pronounce on use of force by a non-consenting third State. In that case, Portugal claimed that Australia's act in entering into a Treaty with Indonesia with respect to resources of an area of the continental off the coast of East Timor was contrary to the right of self-determination of the people of East Timor. Portugal claimed it was acting as administering authority of East Timor despite the fact that it had withdrawn its administration from East Timor in 1975 and that Indonesia had occupied the territory since that time, subsequently incorporating it into its own national territory.

In refusing to decide the case, the Court held that:

> the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty- making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent (ICJ 1975).

The essence of the *Monetary Gold* ruling is that the consent principle applies even in cases where the relevant State is not a party to the proceedings. The ICJ's ruling indicates that an international court should not decide a case in which the court has to make a determination, as a necessary prerequisite to determining the claims before it, on the rights or responsibilities of a State that has not consented to the exercise of jurisdiction. Questions arise as to whether the rule identified in that decision is one which is specific to the ICJ or whether it is a principle of more general applicability which ought to be respected by all international tribunals. Before considering that issue, it is important to return to the question whether the consent principle would, even if it applied to the ICC, be violated by the exercise of jurisdiction by that court over officials of non-consenting States.

In an article published in 2003, Akande argues that:

> Even if one assumes that the Monetary Gold doctrine applies to all international law tribunals, it will not, in most cases, be violated by the exercise of jurisdiction by the ICC over non-parties nationals in respect of official acts done pursuant to the policy of that non-party. It is important to note that the Monetary Gold doctrine does not prevent adjudication over a case simply because that case implicates the interests of non-consenting third parties. Furthermore, there is nothing in the doctrine which requires abstention in any case that may cast doubt on the legality of actions of third States or imply the legal responsibility of those States (Akande, 2003).

As the ICJ noted in the *Monetary Gold* case, the doctrine only applies in cases in which the "legal interests [of a non-consenting third State] would not only be affected by a decision, but would form the very subject matter of the decision." Thus, the doctrine only requires abstention in cases in which the court is required to pronounce upon the rights and responsibilities of the third State in order to decide the case before it. This conclusion was reached because the ICC will not be engaged in making determinations about a State's legal responsibility, nor will it need to do so, in order to convict individual forward crimes, crimes against humanity or genocide.

However, the position is different with respect to aggression. Akande (2003) noted that, depending on the definition of aggression adopted in the ICC Statute, the principle of consent (as reflected in the Monetary Gold case may be implicated more cogently than in the Rome Statute adopted in 1998.61 The time is now ripe to re-examine this issue given that we now have some consensus on the definition of the crime of aggression. Indeed it is essential that parties to the ICC Statute and other States engage with these fundamental questions regarding the application of the consent principle to the ICC. The consent principle is regarded as flowing from the general principle of State independence which is one of the organizing principles of international society of States as currently constituted.

An interviewee underscored the consent of sovereign states and said;

> The discretion among states to consent is driven by the states interests not anything else, Kenya consented with Sudan not to execute the ICC Warrants of arrest against Al Bashir (key informant).

A conferral by States parties to the ICC of a jurisdiction on the Court which requires the Court to adjudicate the legal responsibilities of non-consenting States may signal a significant change in the approach of States towards the application of the principle of independence and towards the authority of international tribunals (and indeed other States) over States. There would be a significant chink in the long standing principle that States are free from the exercise of external authority without the consent of that State Akande, "The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", (2009) 7 *JICJ* 333-352.

4.2.3 Rome statute and consent of state/ non state parties

Article 12 is entitled "Preconditions to the Exercise of Jurisdiction" and provides as follows: A *State* which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following *States* are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; The State of which the person accused of the crime is a national. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that *State* may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9. Thus, the essential basis for the jurisdiction of the ICC is either that the alleged crime took place within the territory of a State Party to the Statute or that the accused is a national of a State Party to the Statute.

In this, the core provisions of jurisdiction under public international law were reflected.3 Article 12 (3) allows for States that are not Parties to the Statute to accept the jurisdiction of the ICC by way of declaration.

Rule 44 of the Rules of Procedure and Evidence requires the Registrar to inform a State making such a declaration that as a consequence of such a declaration, jurisdiction would extend to include crimes referred to in article 5 “of relevance to the situation”. Indeed this essential basis for the exercise of jurisdiction is expressly termed a "pre-condition", that is this question is both logically and constitutionally prior to any other and all else flows from it. Conversely, a finding that the preconditions not fulfilled necessarily concludes the matter.

At no point, it must be stressed, is there any provision allowing for a non-State entity, either directly or indirectly, to accept the jurisdiction of the ICC nor for the Court to exercise its jurisdiction with regard to such an entity through such act of acceptance.

This can be contrasted with situations where the relevant instruments have expressly provided for the status of non-State entities. For example, Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, of 8 June 1977, where express provision was made for the possibility of a non-State entity lodging a declaration with the depositary. A similar example is provided by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, of 10 October 1980.5 Other examples from outside of the international humanitarian law context include the United Nations

Convention on the Law of the Sea, of 10 December 1982, where express provision is made for signature and accession, *inter alia*, "by all territories which enjoy full

internal self-government but have not attained full independence and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters", and the Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which expressly permits such aforementioned non-State entities, as well as "other fishing entities whose vessels fish on the high seas" to become a party. Clearly, when negotiators of international agreements intended for such a possibility of acceptance by non-State entities, they provided for it in expressed and unambiguous language. The legal regime of the principle of complementarity within the International Criminal Court Statute. As J. T. Holmes puts it, 'the implementation of the principle of complementarity generates two practical questions: (1) how does the Court become aware that there are conflicts between the exercising of its jurisdiction over a situation or case .Under the Statutes of the ICTY (Article 9) and the ICTR (Article 8), another version of the complementarity principle was adopted. National courts and the international tribunals were granted concurrent jurisdiction to try international crimes referred to in the Statutes, but in the event of dispute, the Statutes gave primacy to the international tribunals. Preamble para. 10: 'The International Criminal Court shall be complementary to national jurisdictions.' As described in Articles 17 John T. Holmes, Complementarity: National courts versus the ICC (Jones (2002).

The principle of complementarity in the ICC Statute is not a mere statement. It entails a precise legal regime calling for the issue of jurisdiction to be evaluated by applying conditions of both substance and admissibility. First, the complementarity issue can be raised only if the crime falls within the conditions defined in Articles 5 to 8 of the Statute, Art. 12(2) ICC Statute.

Which oblige the ICC to examine substantive aspects of the crime in order to assert jurisdiction over specific case Second, the Statute requires the fulfillment and analysis of several conditions related to admissibility: ‘genuine investigation and prosecution’` unwillingness’ and ‘inability’ to prosecute.

The lack of a genuine national investigation and prosecution should be regarded as the core criterion for the exercise of jurisdiction by the ICC. If an international crime has been genuinely prosecuted and tried, the ICC should not have jurisdiction. However, the question remains of knowing what a ‘genuine prosecution’ is. It can be imagined that ‘genuine’ means real, not faked. This could, however, be subjective if not more clearly framed. For instance, can it be said that the national prosecution is not ‘genuine’ if it takes more time than it would before the ICC? The idea of the promoters of the principle of complementarity was in fact to make sure that international crimes would be effectively prosecuted and punished by states, but the word ‘genuine’ seemed more neutral than ‘effective’ or ‘efficient’. It will be the prosecution’s responsibility to demonstrate a lack of genuine investigation or prosecution. It must be recognized that such an appreciation could remain open to discussion and has to be considered hand in hand with the other conditions of unwillingness and inability.

Unwillingness is quite simple to understand but is more complicated to evaluate. The meaning of ‘unwillingness to act’ was laid down in Article 17.2 of the ICC Statute. Art. 5(2) this provision cites three criteria for determining whether. This limits implementation of the principle of complementarity 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: The crime of genocide; Crimes against humanity; War crimes; the crime of aggression' (Article 5.1). The crime of aggression must be excluded from the Court's jurisdiction for the time being, as it is not yet defined (Article 5.2).Article 17.1 of the ICC Statute provides criteria of admissibility linked to the principle of complementarity. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: 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; The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; The case is not of sufficient gravity to justify further action by the Court.

In some cases there will be no doubt, as the states concerned do not even want to conceal their non-intention to bring some criminals to justice. In other cases, however, a question of threshold will be unavoidable. The Court's responsibility will go as far as discussing all the elements in order to determine whether the unwillingness criterion is met. For instance, the existence of some form of immunity or amnesty could indicate unwillingness to prosecute or try the beneficiaries of those clauses. If a 'presumption of unwillingness' can be established in order to prosecute the perpetrators of such crimes, situations will have to be evaluated on a case-by-case basis, as there are many intermediate situations in which such immunities or pardons are not granted automatically and for any type of crimes.

Inability is defined under Article 17.3 of the ICC Statute Scheffer, "Letter to the Editors", (2001) in more simple terms than unwillingness. It first includes the non-functioning of a judicial system to such an extent that investigations, prosecutions and trials of perpetrators are impossible. As underlined by certain scholars, (Cutler, A. Claire, 2001)

This is a fact-driven situation, since inability can be the result of the physical collapse of the judicial system (no more structures) or the intellectual collapse thereof (no more, or only biased, judges or judicial personnel). Inability also includes situations in which the conclusion of trials is impossible, that is, the judicial system can still function but cannot face the challenge of exceptional circumstances usually resulting from a crisis. Here, too, the threshold will be more difficult to evaluate, but will probably be reached when the number of cases to be heard manifestly exceeds the number with which the judicial system could usually cope in peacetime situations. Article 17.2 of the Rome Statute also provides for two other admissibility criteria (Wedgwood, 2001).

One is quite classic: it is the non *bis in idem* principle, according to which decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice (Scheffer, 2001).

Article 17.3 states, ‘In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’ (Cutler, A. Claire, (2001)Holmes, 29, p. 677.Wedgwood, (2001), Article 17.1 states that The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (e) The case is not of sufficient gravity to justify further action by the Court’.Volume 88 Number 862 June 2006 a person cannot be tried twice for the same crime. This does not call for any particular comment except that, according to the unwillingness criterion, the first trial should not be used by a state as a means to shield the perpetrator of an international crime. The second criterion is the gravity or seriousness of the crime, according to which only the most important crimes should be tried before the ICC. These two conditions seem logical and easy to understand. However, they offer another source of discretionary power to implement the principle of complementarity and shape the criminal policy of the ICC.

While all these criteria still give rise to numerous uncertainties regarding their implementation, they do also give an idea of the possible concrete implementation of the principle of complementarity. More importantly, they illustrate how the ICC would be bound to make certain tests linking the issue of jurisdiction to those of admissibility and substantive law. Even though jurisdiction is independent from other conditions, they must be assessed in combination with it in order to be interpreted and applied. The principle of complementarity within the national criminal system.

The principle of complementarity should not, however, be analyzed only in light of the provisions of the ICC Statute. Each national context must be taken into account, as it will influence the state's ability to exercise its jurisdiction over international crimes. This implies an analysis of national criminal justice systems to evaluate their ability to assert jurisdiction. Three elements should be examined:(i) the technical means offered by the state to prosecute these types of crime; (ii)the working methods of the criminal justice system; and (iii) the procedural rules and rules of evidence applicable to judicial proceedings. Without going into detail, it can logically be assumed that the inherent differences between legal systems will influence the way in which the principle of complementarity will be implemented.

It will therefore not be uniformly applied. This must be acknowledged as a normal interaction between the international and national legal systems and taken into consideration. Although simple to understand in definition, the principle of complementarity reveals its complexity in the confrontation with national systems. Conceived as a means of improving implementation of the principle of universal jurisdiction, the principle of complementarity enshrined in the ICC Statute was designed to transform into reality the prosecution of international crimes too often set aside for want of such means. Yet this must not obscure the remaining challenges and difficulties. Discretionary power is shared between the Prosecutor's office, the Pre-Trial Chamber and possibly the UN Security Council. The role of member states in this debate will probably be limited in case of disagreement.

4.2.4 Consent envisaged in principles of universal jurisdiction and complementarity

The challenges faced by the principles of universal jurisdiction and complementarity. Even though the relationship between the principle of universal jurisdiction and the principle of complementarity can be understood from their definitions, a deeper analysis of their interaction, both theoretical and practical, remains necessary. This should lead to a better assessment of the current situation and allow the exact role to be played by the principle of complementarity in the near future to be evaluated. General acceptance of the principle of universal jurisdiction

Despite its inherent difficulties, the principle of universal jurisdiction remains widely accepted by states owing to the specific nature of international crimes. No state can officially uphold these crimes and the absence of punishment for them. This truly universal consideration is one of the main strengths of the principle. This being said, however, difficulties arise when it comes to its concrete implementation. Its precise meaning is to some extent vague, and its real legal implications continue to be discussed. Can it be deemed equivalent to a general fulfilled? Or does it also include some operational guidelines to be followed by the outside the legal sphere especially through the media or by its inclusion in politics weakened its effectiveness?

Asking these questions shows how necessary it is to situate this principle within a more legal framework in order to determine its normative value. In seeking to identify the origin of universal jurisdiction, three possible sources can be considered: international agreements, international customary law and national law.

International conventions sometimes impose an obligation to prosecute and punish those who have committed international crimes (Amerasinghe, 2003). This is the case in the Geneva Conventions through the notion of grave breaches of international humanitarian law, Monetary Gold, (1954).

The obligation is clearly stated in the conventions and imposes on the contracting state a duty to act (obligation of result), but leaves the state to determine the means to enforce it. This can create some difficulties, search national system is responsible for fulfilling this twofold obligation of both searching for the criminals concerned and bringing them to trial. The inclusion of universal jurisdiction in international conventions provided that no reservations can be made implies that the state has the duty and responsibility to enforce it but offers no guarantee that effective trials and punishments will indeed take place, since national legal systems apply different procedural and evidence rules. Customary international law can also be a source for the recognition of universal jurisdiction when it comes to international crimes.

However, The court just provides for the principle itself and does not necessarily contain precise directives or guidelines for the implementation of universal jurisdiction. This leads to a weaker practical normative constraint for the state, even though theoretically no value distinction should be made between customary and conventional provisions; between the two, there is only a difference of degree of precision in normative terms. Customary international law can be viewed in two ways. It can be seen as a general obligation to which conventions later give concrete effect through more precise obligations (Jackson, 1999).

It can also be seen as an extrapolation of conventional rules so widely accepted that non-party states consent to be bound by the principle as equivalent to a general rule. With regard to universal jurisdiction, this could be the situation of states which refuse to become party to a specific instrument for political reasons, but accept the substance of that principle. Combined rules of international customary law do provide support for the implementation of both universal jurisdiction and the defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in Article. Rule 157:

States have the right to vest universal jurisdiction in their national courts over war crimes' Rule 156, serious violations of international humanitarian law constitute war crimes; Rule 158: states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects; Rule 159: at the end of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes;

Rule 160: statutes of limitation may not apply to war crimes; Rule 161: states must make every effort to co-operate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects(Amerasinghe, 2003) .

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the complementarity principle, but will not provide the state with precise guidelines or a ready made course of action. Universal jurisdiction can also be accepted by states as a voluntary commitment, within their municipal framework, to punish some crimes for which no general international obligation to do so exist. Universal jurisdiction then derives from a national commitment to the international community by one state that is, for instance, not party to certain conventions. To recognize universal jurisdiction in this way can create an asymmetrical obligation for some states. This could be the case of states not party to the ICC Statute, although under no international obligation to do so.

Analysis of the sources of universal jurisdiction would thus appear to show that the principle is not self-sufficient enough to be implemented. It needs both general recognition and measures of implementation, or at least clear obligations to identify the duties of states. In this regard, it would be more accurate to consider that the principle of universal jurisdiction should be completed by legal norms giving precise grounds and designating the conditions or the exact nature of the obligations. This would give rise to multiple grounds for universal jurisdiction, or ‘universal jurisdictions’. Each one would be a means in itself. This splitting of the principle of universal jurisdiction is necessary to create clearer state obligations.

It is not in itself revolutionary to say this, but it could explain why the principle frequently remains so disappointing in practice. However, if international law were to make progress in formulating a concrete definition of those obligations, the discretionary power consubstantial with state sovereignty would still leave an incompressible margin of appreciation when it comes to final implementation of the provisions.

Another aspect often left out of the analysis of universal jurisdiction is its twofold belonging, to both international law and municipal law. Universal obligation entails a first duty for the state to organize and if need be, to amend its own legal system to make the exercise of universal jurisdiction possible by national courts. It must not be forgotten that universal jurisdiction is quite abnormal for national criminal courts, and that it could be difficult for judges to implement it without precise municipal provisions framing or organizing that empowerment. This aspect of universal jurisdiction can in fact impair the whole system or its efficiency if national legislation, most often statutory provisions, is not adopted.

Universal jurisdiction can become and sometimes is a fake principle owing to a total or partial lack of enactment. It can even be problematic when the national constitutional text conflicts with universal jurisdiction obligations, as it could for instance with regard to immunities or the right to grant pardon; these are often included in a general manner and sometimes left to the discretion of the heads of state or government, although there should normally be exceptions where international crimes are concerned. Quite often, however, the clash between international and constitutional obligations does not take place because of the limited overlap of their respective scope. This does not mean that conflict between them cannot exist.

Due to increased cases of impunity and emboldened by the collapse of ideological and philosophical hindrances, international legal systems and norms spread all over human race to cross the rubicon and punish offenders guilty of most heinous crimes on earth hiding behind the veil of sovereignty. This aims to sensitize the world against gross human rights violations through the threat of legal action. The rapid entry of the Rome Statute on July 1, 2002 heralds a new era in international politics. It opens new avenues for the International community to monitor human rights violations within states and bring the delinquent individuals to trial. This is achieved through the consent among sovereign states and onus of protecting and in fact, enhancing their sovereign status now rests more with states than ever before. By upholding the principles of international law within their territories, states can now prevent supranational interventions. This could lead states to value justice over narrow political considerations. James Gowhas identified this shift in the state's primary source of sovereignty from the' will of the people' to its obligations towards maintaining an international equilibrium as 'the revolution in the sovereignty principle.

According a realist paradigm, an Indian jurist Radhabinod Pal, in his landmark dissenting opinion at the Tokyo trials had come up with a verdict' not guilty' in favour of the Japanese. Justice Pal had offered the dissenting note in the year 1948 and had argued that, "so long as the international organization continues at the stage where trials and punishment for crime remain available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and preventive effect."Justice Pal's argument could still be used in 2002, because the hierarchies among nations have not vanished.

In fact, the divide between rich and poor nations in terms of wealth and therefore the power they exert, is continuously widening. One could support the argument that sovereignty which is dissipating from weak nations, without getting destroyed, is finally getting accumulated with big powers.

The power and authority enjoyed by the small nations during the Cold War is diminishing in the age of globalization. The rules of admission to an international club of nation-states are changing. New rules, once again dictated by the Western world, are being floated. In the medieval age, allegiance to Christianity was a prerequisite for entry into the club. The colonial era saw the demarcation of the world into civilized and non civilized colonies. Now, once again, new demarcations based on pre modernity, modernity and post-modernity are beginning to appear. The world is gradually moving towards 'dual sovereignty' or truncated sovereignty ,which, far from being absolute, only gives limited jurisdictional powers to the territorial state in certain specific spheres that are inconsequential to international society. In an interconnected and interdependent post-Cold War world, the choices are becoming limited, as states have become transmitter is of global norms into the national mainstream.

Under such circumstances, it may be better for small and weak nations to pool their sovereignties in international organizations rather than letting their sovereign energies flowing towards a few or rather one powerful player in international politics, since the chances of receiving peace and justice within a larger international organization are much greater than relying on the sole Superpower to deliver justice only through war. Therefore, in deciding the future course of action on strengthening international organizations, rationality rather than realism should guide the policies of weak and small nations. If the state is a notional person, then sovereignty is its spine.

According to neo-realists, the strength of spine economic, military determines the domestic and international standing of the country. However, a constructivist would argue that since no person (state) can keep its spine ramrod straight for long times, therefore, it is the flexibility of the spine, which enables the state to perform and maintain a healthy balance between its domestic and2international obligations. But the moot point is how much a state should bend to ensure that its back doesn't break. Joining international regimes like the ICC may not damage sovereignty to an extent to which it would get affected, if one were forced to enter the global structures created by a global hegemony.

CHAPTER FIVE

THE EFFECTS OF ICC JURISDICTION ON NATIONAL INTERESTS IN KENYA

Chapter five interrogated the effects of ICC jurisdiction on National interests in Kenya. This was imperative in the study so as to fathom circumstances and would be a yardstick to measure and leave rage ICC jurisdiction influence on state sovereignty in Kenya. The findings were sought in a 12 sub titles level approach which included, ICC Cases, Contribution and Promotion of the Rule of Law in Kenya, The ICC jurisdiction complements with states parliamentary legislations, ICC Jurisdiction includes States Willingness to Cooperate, ICC jurisdiction supersedes states and Non states independence, ICC jurisdiction and Preservation of International Peace and Security, ICC Jurisdiction and reparations for victims of international crimes, ICC Jurisdiction has Established Linkages among States, ICC jurisdiction and improvement of the legal systems, ICC jurisdiction and improvement of the legal systems, ICC impact on Governments Policies and Frameworks ,Jurisdiction Application of provisions of laws and procedures ,ICC Jurisdiction and Management of Crimes and ICC Jurisdiction Level of Performance.

5.1 ICC Cases, Contribution and Promotion of the Rule of Law in Kenya

The ICC had in principle gained the mandate to stamp its authority on Kenyan soil when it concerns international crimes. Even if the ICC had legally gained the mandate to investigate crimes of an international nature, Kenya did not have appropriate laws that could define such crimes. In order to be able to deal with crimes of an international nature, Kenya passed legislation that was meant to erase the obstacles and challenges that had been witnessed in the 2007 -2008 post election violence.

The International Crimes Act 2009 was passed into law in January 2009, proceeded by the release of the Waki report. The International Criminal Court's (ICC) indictment of the purported and most culpable individuals behind the post-election violence (PEV) that wrecked Kenya in late 2007 and early 2008 prompted an all too familiar debate about the potential trade-offs between accountability and stability in post-conflict situations. On the one hand, there were those who argue that criminal accountability for the PEV could exacerbate tensions between Kenya's ethnic communities and prevent the country from embarking on a path of reconciliation (Kanyiga & Paisley, 2012).

On the other hand, those who argued that the ICC's prosecution of the top leaders of the PEV is not only morally justified, but also an effective deterrence against future violence in Kenya (Alai & Mue, 2010; Hansen, 2011). The above debate on the ICC's involvement in Kenya reflects the principal 'dilemma' of transitional justice efforts, which arises from the need to balance the two potentially competing imperatives of justice and peace (Hansen, 2011). Brown & Sriram (2012) suggest that the 2007/08 post-election violence in Kenya can be roughly divided into four different categories depending on the group of perpetrators. The first category consists of the spontaneous rioting by Luo ODM supporters, shortly after the Electoral Commission had pronounced Kibaki the winner of the presidential race. The second category encompasses the premeditated attacks in the Rift Valley on Kikuyu community through the use of private militias, largely recruited from the Kalenjin community. The third category refers to ensuing revenge attacks, mainly in Nairobi, Central Province and the Rift Valley, by members of the Kikuyu (especially the cult-like Mungiki militias) against communities perceived to be in favour of the ODM.

Lastly, the fourth category captures the shooting of unarmed demonstrators by state security forces (Brown & Sriram, 2012, p.248). The latter three categories of PEV can be said to constitute crimes against humanity under international criminal law because they were perpetrated in order "to further state or organizational policies" (Alai & Mue, 2010, ICC, 1998, Art. 7.2(a)).

Following intense international pressure and mediation efforts led by Kofi Annan, the leaders of PNU and ODM eventually managed to resolve the constitutional stalemate. They did so by establishing a transitional government of national unity and by creating the new position of Prime Minister for Raila Odinga (ICG, 2012). As in previous instances of PEV in Kenya, the two parties decided to set up a commission of inquiry to investigate the human rights abuses. However, in order to avoid a similar fate as the 'toothless' commissions of the 1990s, the Waki Commission as it became known recommended the establishment of a local special criminal tribunal to bring the main perpetrators of the PEV to justice. Crucially, its final report presented this recommendation in the form of an ultimatum and threatened that:

> If either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Chief Prosecutor of the ICC (ICG,2012,).

The Waki Commission's recommendation to establish a local special tribunal was not implemented for mainly two reasons. Firstly, a local tribunal was opposed by reform-minded parliamentarians who feared that it would be subject to political manipulations and therefore unable to bring the ring-leaders of the PEV to justice.

Secondly, a local tribunal was also opposed by a group of parliamentarians whose primary goal was to avoid accountability because they were themselves implicated in the PEV. This second group around William Ruto (ODM) and Uhuru Kenyatta (PNU) mistakenly assumed that the ICC proceedings – as opposed to domestic proceedings – would take a long time to commence, giving them enough time to increase their bargaining power by participating in the 2013 presidential elections (ICG, 2012). The combined opposition of these two interest groups meant that in early 2009 Kenya's parliament failed to pass the legislation required to establish a local special tribunal for the perpetrators of the PEV (Hansen, 2011).

As a consequence, a sealed envelope containing a list of the main suspects was forwarded to the ICC in July 2009. Shortly afterwards, the ICC's chief prosecutor initiated a *proprio motu* investigation into the Kenyan situation in accordance with Article 15(3) of the Rome Statute (ICC, 1998). This was the first time that the ICC's chief prosecutor invoked his right to initiate an investigation without a prior referral from the UN Security Council or a State Party to the Rome Statute (Kenya Monitor, 2013).

In January 2012 the ICC's Pre-Trial Chamber confirmed criminal charges against four major suspects of the 2007/08 PEV: The two high-ranking Kikuyu PNU politicians Uhuru Kenyatta and Francis Muthaura, and the two ODM supporters William Ruto and Joshua Sang, who are both members of the Kalenjin community The ICC did not prosecute any members of Raila Odinga's Luo community. No persons were found mostly responsible for spontaneous violence, which failed to meet the "organizational" threshold required by the Rome Statute's definition of crimes against humanity (ICC, 1998, Art. 7.2(a)).

The Kenyan government's response to the ICC's indictments was characterized by two strategies aimed at undermining the ICC's accountability efforts. On the one hand, the government launched a diplomatic campaign to obtain a UN Security Council deferral of the Kenyan cases before the ICC this did not succeed.. The argument put forward by the Kenyan government and its supporters in the African Union is that the ICC prosecutions would jeopardize peace in the country and prevent its leaders from adequately dealing with the threat of terrorism emanating from neighboring Somalia (BBC, 2013). This argument closely poses with the claims put forward by proponents of the legal realist approach to transitional justice. On the other hand, the Kenyan government launched an equally unsuccessful legal campaign challenging the admissibility of the cases before the ICC. The Kenyan government argued that the on-going ICC investigations violated the Rome Statute's foundational principle of complementarity because a domestic accountability process has been initiated (Jalloh, 2012). This argument was rejected by the ICC judges on the ground that Kenya has failed to provide evidence showing that:

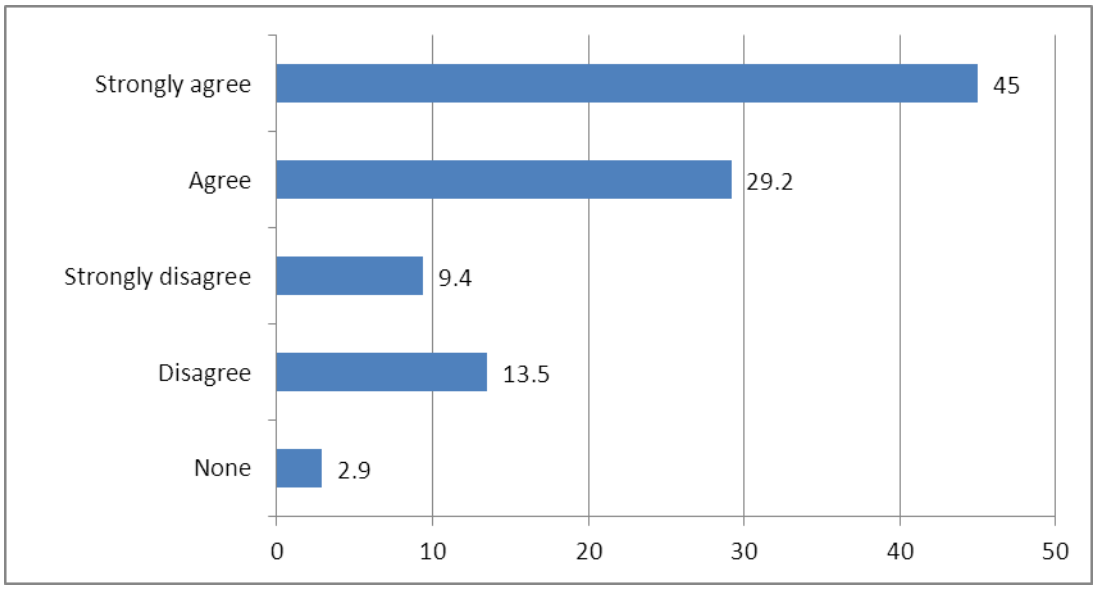
> The national investigations cover the same individuals and substantially the same conduct as alleged in the proceedings before the Court." (Jalloh, 2012).

The International Crimes Act has integrated most of the provisions of the ICC Statute into Kenyan domestic law. It is designed to incorporate the punishment of international crimes such as genocide, crimes against humanity and war crimes. This is seen as a step towards making Kenya legally viable in cooperating with the ICC's processes and functions. Although the Act does not seek to define international crimes, it does refer to the ICC Statute for the ultimate definition of these crimes. It is emphasize that, in interpreting and applying the definition of international crimes, the Kenyan local judiciary is obliged to abide by the elements of international crimes entrenched in Article 9 of the ICC Statute.

This is a formidable move that seeks to bring Kenyan criminal law into uniformity with international law, ultimately enabling Kenyan courts to interpret international criminal law in accordance with the Rome Statute. This also serves to reinforce the changing view that international law is superior to the domestic provisions.

Having imported crucial principles of international criminal law as provided for by the Rome Statute, the Act allows the Kenyan courts to investigate and prosecute international crimes conclusively and legally, and respond effectively to the requests made by the ICC. The Act would provide a forum to address international crimes without any geographical or temporal shortcomings. However, the Act is not applicable in the context of the 2007 /8 post election violence since it was passed more than one year after the atrocities had been committed, and it is not retroactive. Nevertheless, the Act offers a crucial mechanism for dealing with future international crimes

Figure 5.1: ICC Cases Contribution and Promotion of the Rule of Law in Kenya



The respondents were required to indicate their level of agreement with the statement that the ICC cases have contributed positively to promotion of the rule of law in Kenya especially during the 2013 General elections. Figure 5.1 shows that 77 (45%) strongly agreed, 29.2% agreed while 13.5% disagreed over the same statement. The mean score of responses regarding ICC cases and promotion of the rule of law was 3.93 on a 5 point scale which indicate that majority of the respondents agreed with the statements on the assertion that ICC cases have contributed positively to promotion of the rule of law in Kenya. These findings are in line with Okuta (2009), who had observed that before Kenya ratified the Rome Statute of the ICC on 15 March 2005, international crimes were not legally recognized by the national laws. In particular, war crimes, genocide and crimes against humanity were not known to Kenyan law. Upon ratifying the statue, Kenya was now obligated to adhere to both national and international laws.

Determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the International Community as a whole and thus contribute to the prevention of such crimes On 24 September 2012, the United Nations General Assembly held a High-level Meeting on the Rule of Law at the National and International Levels during which numerous delegates spoke about the importance of the International Criminal Court (ICC). In the Declaration adopted at the meeting, States recognized;

> The role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law (UN Secretary-General, 23 August 2004).

The crux of the ICC role lies in enforcing and inducing compliance with specific norms of international law aimed at outlawing and preventing mass violence. Confronted with the extensive perpetration of unspeakable atrocities after the Second World War, the international community articulated an unparalleled call for justice. It sought to put an end to such crimes through, inter alia, the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions and the Nuremberg Principles.

However, in the absence of credible enforcement mechanisms, violations of international humanitarian law continued with glaring impunity. In response, the international community decided to take joint action by creating an interconnected system of international justice to prevent impunity for the worst atrocities known to mankind. On 17 July 1998, this vision materialized when States adopted a multilateral treaty called the Rome Statute of the International Criminal Court, under the auspices of the United Nations. With the entry into force of the Rome Statute on 1 July 2002, the first permanent international criminal court, the ICC, came into being.

The ICC contributes to the fight against impunity and the establishment of the rule of law by ensuring that the most severe crimes do not go unpunished and by promoting respect for international law. The core mandate of the ICC is to act as a court of last resort with the capacity to prosecute individuals for genocide, crimes against humanity and war crimes when national jurisdictions for any reason are unable or unwilling to do so. As of November 2012, the ICC is seized of 14 cases in seven country situations, involving a total of 23 suspects or accused.

Three of the investigations in Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic resulted from referrals made by the States themselves; two situations in Darfur, Sudan and Libya were referred to the ICC Prosecutor by the United Nations Security Council, and the last two investigations in Kenya and Côte d'Ivoire were initiated by the Prosecutor *proprio motu*, with the authorization of the Pre-Trial Chamber of the ICC. In addition, the Prosecutor is currently conducting preliminary examinations into eight situations.

The Rome Statute and the ICC have made particular advances in combating impunity in relation to crimes against children and women. The Rome Statute extensively codifies such acts and requires the organs of the ICC to have particular expertise on violence against women and children. In fact, gender crimes were featured in the vast majority of ICC cases to date.

The ICC's first verdict was issued on 14 March 2012 and the first sentence on 10 July 2012 in the Lubanga case, (Trial Chamber I, 14 March 2012, ICC) where child soldiers under the age of 15 were conscripted, enlisted and used to actively participate in hostilities in the DRC. Charges relating to the use of child soldiers are also featured in several other ICC cases, and the Special Representative of the United Nations Secretary-General for Children and Armed Conflict has assessed that

> These indictments serve as a useful deterrent against child recruitment in situations of armed conflict (PTC I, 2012).

As the then United Nations Secretary-General Kofi Annan stated in 2004, the ICC makes an impact by "putting would-be violators on notice that impunity is not assured (UN Secretary-General, 23 August 2004, S/2004/616, and Para. 49.)

Where tensions arise, announcing publicly that the ICC is following the situation can be a powerful way to warn any potential perpetrators that they could be held liable for their actions. Moreover, it can draw local as well as international attention to the situation and induce the relevant national and other stakeholders to take necessary action to defuse the crisis. Not long ago, a minister from one of the States Parties to the Rome Statute told me that the possibility of an ICC intervention was a major factor that helped prevent large-scale violence in the context of the country's elections.

Even where the ICC's intervention is required, it does not necessarily have to lead to trials before the ICC. An ICC investigation may instead prompt the relevant national authorities to investigate the alleged crimes in an expeditious manner and to prosecute the suspected perpetrators in domestic courts. The ICC reduces impunity not only by punishing perpetrators, but also by allowing victims to participate in the judicial proceedings and to apply for reparations. These are novel, progressive features in international criminal proceedings that empower victims and bring retributive and restorative justice closer together. As of November 2012, the ICC has received more than 12,000 applications for participation in the proceedings, the majority of which have been accepted. Its first decision on reparations for victims was issued on 7 August 2012.

A related and innovative aspect of the Rome Statute system was the creation of the Trust Fund for Victims, which has the dual mandate of implementing court-ordered reparations as well as providing assistance to victims and their families irrespective of judicial decisions. Currently, over 80,000 beneficiaries receive assistance from the Trust Fund and its local and international partners.

In responding to the particular needs of victimized individuals by enabling them to regain their place within their communities and to rebuild sustainable livelihoods, the Trust Fund is becoming an increasingly visible presence on the nexus between justice and development. On the connection between justice and development more broadly (WHO Report 2011).

The Rome Statute created not only a court, but also a new international legal system consisting of the ICC as well as the national jurisdictions of each State Party. Within this system, States have the primary responsibility to investigate and prosecute Rome Statute crimes. In his 2004 report, Mr. Annan noted that "the Court is already having an important impact by serving as a catalyst for enacting national laws against the gravest international crimes". Indeed, the Assembly of States Parties to the Rome Statute has repeatedly stressed the importance of national implementation of the Statute and of strengthening the capacity of national jurisdictions and has considered ways to achieve those goals. Recently, discussions on these issues, under the Rome Statute concept of complementarity, have been multiplied in many forums among a wide range of stakeholders, notably the United Nations, interested States and civil society.

Without the rule of law, impunity reigns. By punishing violations of international legal norms and by promoting adherence to these norms, the ICC and the wider Rome Statute system play an important part in advancing the rule of law, thereby reducing impunity. This role is critical given the nature of the specific norms that the Rome Statute concerns—norms aimed at preventing crimes which threaten the peace, security and well-being of the world (Preamble to the Rome Statute of the ICC).

The acts and omissions which fall under its jurisdiction are so heinous, so destructive, that every effort towards their prevention is worthwhile. Accountability is important not only for the sake of the past, but for the future as well. Where impunity is left unaddressed, it provides fertile ground for the recurrence of conflicts and repetition of violence.

In order to effectively perform its mandate, the ICC needs the support and cooperation of States. The international community has, on multiple occasions, declared its determination to end impunity for the gravest crimes, and cooperation with the ICC is a concrete way to give effect to that objective. As the ICC has no police force of its own, it requires States' cooperation for the enforcement of its orders and is entirely reliant upon them for the execution of its arrest warrants. Unfortunately, several suspects subject to ICC arrest warrants have successfully evaded arrest for many years, defying the international community's attempts to establish the rule of law at the international level. Political will to bring these persons to justice is crucial.

The Rome Statute system has changed the way the world looks at grave crimes under international law. With the arrival of a permanent international court to prosecute such crimes, national jurisdictions have simultaneously been encouraged and empowered to prevent impunity. Contrary to the expectations raised by the ‘peace vs. justice’ debate, the ICC’s accountability efforts have actually contributed to stability in Kenya, rather than exacerbating inter-ethnic tensions. It is argue that the ICC’s intervention had positive impacts on Kenya’s inter-ethnic relations in four different ways; the first two with short-term and the last two with long-term consequences for stability.

Evidently the ICC prosecutions led to a 'union of convenience' between Kikuyu and Kalenjin politicians, thereby decreasing the potential for ethnic conflict in the Rift Valley during the 2013 elections this has also strengthened the coalition of jubilee as a political party in the upcoming 2017 elections . Also the ICC prosecutions effectively deterred political leaders from using 'hate speech' against other ethnic groups in order to mobilize their own constituencies. Further, the ICC's involvement promoted judicial reforms, which will strengthen the rule of law in Kenya in the long run. Lastly, the ICC prosecutions led to a healthy skepticism amongst ordinary Kenyans concerning the relationship between ethnic groups and their political 'kingpins', thereby undermining the potential for mass mobilization based on ethnicity.

5.2 The ICC jurisdiction complements with states parliamentary legislations

The core crimes under international law are crimes against humanity, genocide (which was subsumed in the category of crimes against humanity in Nuremberg, war crimes and, the crime of aggression. In addition, when adopting a national implementing legislation, States parties can go beyond the ICC to reflect more protective definitions that may exist under general international law or other applicable treaties, notably by defining the crimes and principles of criminal responsibility more broadly than in the ICC and certain defenses more narrowly. Furthermore, special attention needs to be taken to incorporate gender-based crimes, innovated by the ICC, into domestic law. Incorporation of the general principles of customary international law applicable to these core crimes under international law, which have a different legal regime from other international and/or transnational crimes:

The irrelevance of domestic criminalization for their prosecution before a competent Tribunal (hence, the principle of legality that applies to these core international crimes differs from the principle of legality that applies to other crimes or offenses), the irrelevance of official capacity (no-immunities), the non-applicability of statutes of limitation or "prescription of crimes", the non applicability of the defense of superiors' order due to the manifest unlawfulness of orders to commit these crimes, with extremely limited exceptions relating to certain war crimes; the applicability of the doctrine of "command responsibility".

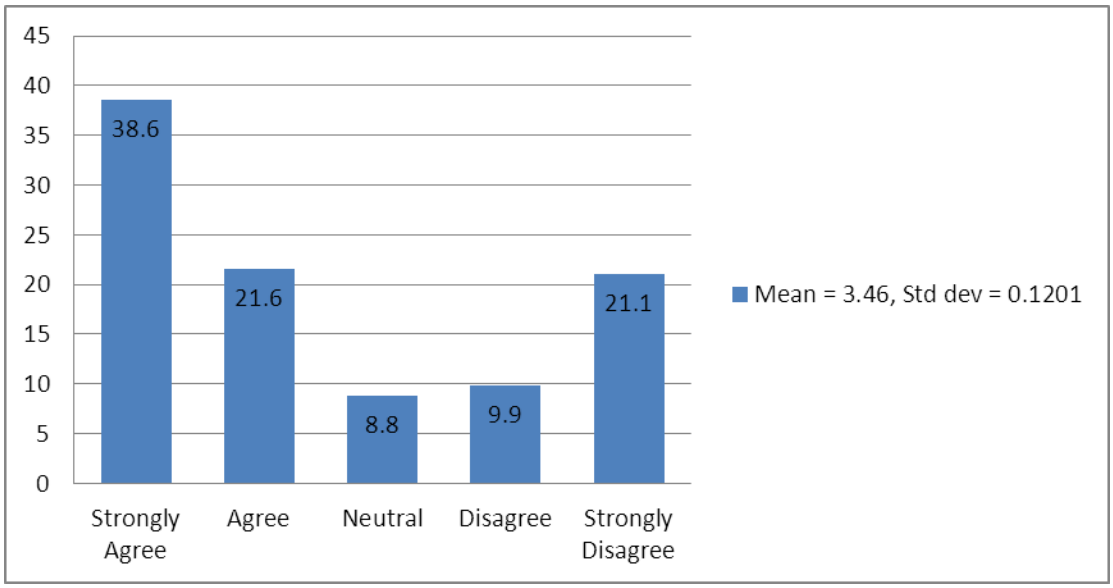
These general principles of law and the definition of the core crimes are the most important components of International Criminal Law, which is the area of International Law that had the most rapid development and consolidation in the last 25 years, since the fall of the Berlin Wall. Nevertheless, the internationalization of justice and the Rule of Law to secure prevention of these atrocity-crimes may not be compared with the phenomenon of globalization that has marked the global economy in the fields of financial transactions, trade and communication. Hence, the domestic implementation of International Criminal Law in general and the ICC in particular are absolutely necessary steps towards the realization of the overall objective of fighting impunity. Incorporation of crimes against the administration of justice that are punishable

The bases for the exercise of jurisdiction are sufficiently broad and effective to minimize the "impunity gap", where possible including the application of the jurisdictional criteria of universal jurisdiction (in line with international law, even if not included in the ICC)

Detailed procedures for cooperation with the Court, Protection of due process and defense rights, Guarantee of victim and witness protection, with specific emphasis on women and children, in accordance with the high standard provided in article 68, paragraph 1 of the Statute. National reparations for victims, Penalties, including accessory penalties such as cessation of functions for government officials (e.g. ineligibility to public office), with maximum penalties possibly in line with those applicable by the ICC for individuals allegedly bearing the greatest responsibility for the most serious conduct. Adequate budgetary, infra-structural and human-resources should be allocated to police/law enforcement and judicial authorities for the carrying out of effective and independent investigations, prosecutions, trials and reparations-proceedings, as well as for the enforcement of detention-sentences.

The Legislation and policies should aim at the reinforcement of the separation of powers and the independence of judges and prosecutors It was observed that implementing legislations is necessary since the ratification of the Statute does not imply automatically the applicability of the substantive provisions of the Statute. Parliamentarians must focus on providing sound legal structures through legislations that would enable states to prosecute international crimes through the national incorporation of crimes under the jurisdiction of the Court (genocide, crimes against humanity, war crimes and the crime of aggression), general principles of law, as defined in part III of the Rome Statute and under customary law (e.g. principle of individual responsibility, irrelevance of official capacity and of amnesties, responsibility of superiors, non-applicability of statutes of limitations. Further the focus group discussion participants applauded the tact and tacit support of the Kenyan National assembly for the push of legislations for domestic implementation an act so strong to confirm state sovereignty

Figure 5.2: The ICC Jurisdiction Complements With States Parliamentary Legislations



Source; Researcher 2016.

The respondents were required to indicate their level of agreement with the statement that the ICC jurisdiction complements with states parliamentary legislations. Figure 5.2 shows that 38.6% strongly agreed, 21.6% agreed while 21.1% strongly disagreed over the same statement. The mean score of responses regarding ICC cases and promotion of the rule of law was 3.46 on a 5 point scale which indicate that majority of the respondents agreed with the statements on the assertion that The ICC jurisdiction complements with states parliamentary legislations.

The majority respondents agreed that there was need to strengthen complementarity by promoting political will for domestic prosecutions through two main approaches: supporting the role of Parliament and individual Parliamentarians in law-making and policy-making. The second is to strengthen the capacity of MPs to represent their constituencies, i.e.

The civilian population, which may include communities affected by the commission of atrocities and victims prepare and adopt legislation that incorporates the definitions of the crimes and general principles under the Rome Statute. The parliament should promote the conclusion of agreements for mutual legal assistance and inter-state cooperation, Launch motions or resolutions that promote the conduct of genuine national investigations and prosecutions.

This could be done by reinforcing and monitoring the application of legislation and encouraging policies to reinforce the investigative and prosecutorial capacities of the State (Prosecutors, investigating judges, investigators, police etc.), including on economic crimes that may be instrumental to the perpetration of Rome Statute crimes. Also promote the development of programs that protect victims, in particular of sexual and gender-based violence, refrain as politicians, committed to the Rule of Law, from interfering in the judicial process against international crimes and take actions that uphold the independent action of judges and prosecutors and protect the independence and impartiality of Judges and Prosecutors, which are essential characteristics of justice.

The legislations must include Deterrent effect: detailed legislation that indicates behavior sought to be avoided allowing the socialization of the fundamental rules governing peaceful coexistence under a legal framework. Protection of the primacy of the national jurisdiction over Rome Statute crimes. The explicit definition of crimes and penalties: a) facilitates the work of Judges and other legal practitioners, b) provides judicial certainty and protection to individuals on which law is applicable, and c) avoids the necessity of adopting laws ex post facto.

Even if legislating on crimes may be highly political, the exercise is worth undertaking as it helps to de-politicize domestic prosecutions and insulate the judicial branches from undue influence, thus, promoting the equal application of the law and the separation of powers. Promote the universal ratification and domestic implementation of the Kampala amendments to the Rome Statute adopted by the 2010 Review Conference, especially those concerning the crime of aggression.

It was observed that, Special attention is required when drafting the implementing legislation to incorporate gender-based crimes into domestic law given that the ICC presents a ground-breaking step in the effort to promote gender justice. Articles 7 and 8 of the Rome Statute define, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence as war crimes and crimes against humanity. At the same time, it is fundamental to ensure also that victims of these crimes have knowledge of their rights and the access to justice at the national level.

Drafting national legislation that implements the Rome Statute in the national legal order is a difficult task, given the complexity of the Statute and the often competing legislative agendas.

The following are States with Legislation incorporating ICC crimes and general principles as of 1 January 2013; Africa(Sub-Saharan) [11] : Burkina Faso, Burundi, Central African Republic ,Comoros, Kenya ,Mali, Mauritius, Niger, Senegal ,South Africa, Uganda;

Americas [8]: Argentina, Canada, Chile, Colombia (partial),Costa Rica (partial),Panama, Trinidad and Tobago, Uruguay;

Asia [3]: Korea (Republic of), Philippines, Timor-Leste;

Europe [28]: Andorra, Belgium, Bosnia-Herzegovina, Croatia, Cyprus, Czech Republic,Denmark,Estonia,Finland,Georgia,Germany,Greece,Iceland,Ireland, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain, the Former Yugoslav Republic of Macedonia, United Kingdom;

Middle East and North Africa [0]

Pacific [4]: Australia, Fiji, New Zealand, Samoa.

Legislation and Domestic Prosecutions

The creation of a system of international jurisdiction rests on the premise that the primary competence and authority to initiate investigations of international crimes rests with States. The Rome Statute recognizes, therefore, that States have the jurisdiction and the primary obligation to investigate, punish, and prevent the core crimes of international concern.

Advantages of National justice proceedings compared to international trials:

They are closer to the victims and affected communities and enable more easily the participation of the victims in the proceedings;

Evidence gathering is also easier given territorial proximity between the investigative and prosecutorial offices and the crime scenes;

National proceedings tend to be faster and less costly;

Enforcement of arrest warrants is easier and less complex.

Ending impunity for these powerful individuals can play a significant role in strengthening a culture of the rule of law and legality without which other phenomena such as corruption, drug trafficking, political violence and other crimes may continue to prosper.

The most serious crimes not only damage the direct victims, but also cause many indirect effects with disastrous consequences for the entire population. According to the 2011 World Development Report of the Word Bank;

The lack of accountability has led to great levels of impunity and repeated cycles of violence situation that can wipe out an entire generation of economic progress. (Art 7).

To fulfill the complementarity principle at the national level, States Parties must not only prosecute those ordering or committing the relevant crimes but also those persons who directly commit them and those who aid and abet their commission, even if these individuals reside outside the territory of the conflict itself.

In full respect of the separation of powers and judicial independence, at both national and international levels, the role of parliament is to provide technical and political assistance to Parliamentarians to promote the Rule of Law and support domestic trials appealing for the prosecution by national authorities not only of those who commit acts of genocide, war crimes and crimes against humanity, but also of business persons who knowingly and willingly finance criminal organizations and militias operating in the conflicts zones .

Countries should have an appropriate legal framework to fight impunity; the parliamentarians must be engaged in creating and sustaining political will in support of measures and policies that would effectively empower the impartial and efficient conduct of investigations, criminal proceedings and other remedies for victims, such as reparation programmes and protection schemes. The creation of a system of international jurisdiction, that the ICC tries to achieve, rests on the premise that the primary competence and authority to initiate investigations of international crimes rests with States national jurisdictions. However the Rome statute recognizes that States have the jurisdiction and the primary obligation to detect, investigate, prosecute and adjudicate the most serious international crimes, both under applicable international law and the ICC.

In the fore going recognition is reflected in the principle of complementarity found in the Preamble, Article 1 and Article 17 of the Rome Statute), which is the foundation of the ICC jurisdiction. Complementarity means that states have the primary obligation to investigate and prosecute those responsible for international crimes, but also that the Court will only intervene when states do not have the genuine will or the capacities to do so. Due to the limited resources of the Court, it is essential that State fulfill this primary responsibility. To this effect, the first and minimal condition enabling States to abide to this obligation of accountability for genocide, crimes against humanity, war crimes and crime of aggression is the existence of legislation that incorporates in their National law the crimes and general principles of law contained in the ICC. During interviews session, a key participant vehemently castigated the move of African Leaders against ICC and pointed out that :

> The domestication of the Rome statute is the primacy of states responsibility to treaty obligations as required in international law (Key informant).

All states parties will therefore need to modify their national law in some way to meet this obligation, even monist States. Indeed, although for "monist" states, the ratification of an international treaty is sufficient to be considered as part of the domestic law, it may not be sufficient to meet the obligations of the ICC and allow in practice judges to apply it in Court as it contains a number of legal obligations that require the adoption of legislative and executive measures, as well as judicial practice, to comply with the overall objective of putting an end to impunity for the most serious crimes of concern to the International Community was a whole.

In addition, there is an entire set of provisions in the ICC that are specifically not self-executing, and which could not in any case be of direct application: those are the provisions on cooperation, under part 9 of the ICC: articles 86, which creates an obligation of result for States to cooperate fully with the ICC and which creates an obligation of conduct for States (ICC,2002).

As of today, only one State has interpreted the Statute as directly applicable in its domestic legal order, but only in respect of a limited sector of its domestic jurisdiction: The Democratic Republic of the Congo (DRC) in respect to its military justice system. Notwithstanding its monistic approach to international legal obligations, the DRC had to enter into an ad hoc framework (bilateral) agreement to secure effective cooperation between its authorities and the ICC. In sum, PGA's experience showed that there is no legal system in the world that can incorporate the ICC norms and standards without adapting its internal system to the requirements of the ICC system.

When States decide to implement fully and effectively the provisions of the ICC in their national law, they immediately achieve two important requisites of the ICC, essential to an effective system of the ICC, and thus to the global fight against impunity: The principle of Complementarity, and the Obligation to cooperate fully with the Court. Additionally, domestic implementation of the crimes and principles of the ICC carries important benefits for the States, such as, An opportunity to strengthen their own criminal justice systems so they can prosecute the ICC crimes themselves.

The international criminal court has a deterrent effect: detailed legislation indicates the behaviors that are sought to be avoided introducing thus an element of predictability: those who are prone to commit international crimes will certainly think twice before committing them due to the risk they face of being prosecuted, arrested and adjudicated, Protection of the primacy of the national jurisdiction over crimes of genocide, crimes against humanity, war crimes and crimes of aggression, and ensures the ultimate objectives of the ICC, namely, the strengthening of the rule of law and the prevention of the most serious international crimes., Effective legislation can also ensure the direct communication and cooperation of national judicial and prosecutorial bodies with their counterparts at the ICC in The Hague, hence providing additional safeguards to protect the independence of organs of justice from risks of interference and manipulation by Executive or legislative organs of States.,

It allows for explicit definitions of crimes and penalties, rather than the simple reference to international conventions, which will, facilitate the work of the judge who shall simply refer to national law, provide judicial certainty and protection to individuals regarding which law is applicable, and avoid the necessity of adopting laws ex post facto that distort the principle of legality.

The definition thus guarantees the respect for the principles of *nulla poena sine lege* and *nullum crimen sine lege,* De politicization: Even if legislating on crimes may be highly political, the exercise is worth undertaking as it helps to de-politicize domestic prosecutions and insulate the judicial branches from undue influence, thus, promoting the equal application of the law and the separation of powers.

National implementing legislation is also an essential tool to depoliticize cooperation of States with the Court, given that effective legislation can ensure the direct communication and cooperation of national judicial and prosecutorial bodies with their counterparts at the ICC in The Hague, hence providing additional safeguards to protect the independence of organs of justice from risks of interference and manipulation by Executive or legislative organs of States, It reinforces the entire judicial system, notably strengthening victims' rights and by ensuring that fair trials are conducted at the national law, not only for international crimes but also for all crimes prosecuted by the relevant State.

The scope of the legislation should be as broad as possible and should incorporate at least some of the following points: Definitions of crimes that are in line with the ICC: the core crimes under international law stem from the Nuremberg Tribunal Statute and Judgment, as well as the Nuremberg principles, reaffirmed in 1946 by the UN General Assembly as part of customary (general) international law binding all States, regardless of their membership in the ICC system.

Even after 12 years after the entry into force of the ICC, many states parties to the ICC have not yet adopted legislations implementing the provisions of the ICC allowing them to fulfill the obligations contained in the ICC, through which States Parties have agreed to cooperate fully with the Court (art. 86, ICC) and to exercise their primary domestic jurisdiction to fight impunity. Moreover, many of those legislations implementing the ICC are incomplete or flawed.

5.3 : ICC Jurisdiction includes States Willingness to Cooperate

Despite the rapid pace of the ratification of the Rome Statute, very few States to date have passed the domestic laws necessary to cooperate with the ICC. However, it is very important that all States Parties adopt comprehensive legislation implementing the obligations under the Rome Statute by the time the ICC is established, likely in 2002. This will allow the Court to begin its work immediately, without being repeatedly frustrated by Switzerland, and the United Kingdom are among the countries that have undertaken ambitious legislative initiatives to ensure their ability to cooperate with the Court when it opens its doors. Canada's ICC legislation, entitled the Crimes against Humanity and War Crimes Act ("Canada Act"),' was adopted on June 29, 2000 and enabled Canada to ratify the Rome Statute on, July 7, 2000.' Switzerland's Federal Law on Co-operation with the International Criminal Court ("Swiss Law")' was adopted on June 22, 2001 and is one of several discrete laws that have been adopted. During the focus group discussion a member said that;

> The ICC depends on members state to cooperate with court in terms of investigations, witness and surrender of the accused to the court premises (Discussant).

It was argued that the general obligation to cooperate under Article 86 of the Rome Statute is not absolute and that exceptions to the general obligation may undermine the regime. It was also noted that the ICC cooperation framework is a mixed model, which involves both a vertical and a horizontal obligation to cooperate. That non-State Parties to the Rome Statute are also able to cooperate with the Court after accepting its jurisdiction was also raised. One example cited was Côte d' voire, which accepted the jurisdiction of the Court in April 2003

The Success of the International Criminal Court is determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. Without this assistance, the ICC will encounter great difficulty conducting its proceedings

According to the principle of complementarity, the Court can only act as a last resort in cases in which national criminal law systems are unwilling or genuinely unable to carry out the investigation or prosecution. The complex system apparently needs more time to be fully accepted and adhered to by all concerned in order to develop its full potential. At the same time, the principle of complementarity creates a curious pair of conflicting forces and hence a dilemma for the Court itself. If states generally discharge their primary duty to prosecute crimes, the Court will not be given anything to do and will have no cases. On the other hand, the Court needs exemplary and successfully handled cases, because the international community and the states parties have the legitimate desire to see concrete evidence that the ICC is a meaningful and useful institution.

A second major limitation is the fact that the Court is one hundred percent dependent on effective criminal cooperation, on the support of states parties. As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely cooperation from states parties.

The founders of the ICC have created a new system of international criminal jurisdiction consisting of two levels which complement each other. The first level is constituted by states and their national criminal law systems. As confirmed by the principle of complementarity as the decisive basis of the Statute, states continue to have the primary duty to exercise their criminal jurisdiction over those responsible for international crimes. The second level is constituted by the International Criminal Court. The Court has jurisdiction over the most serious crimes committed by individuals: genocide, crimes against humanity, war crimes and once defined, aggression. The first three crimes are carefully defined in the Statute to avoid ambiguity or vagueness. Rome Statute does not identify any new categories of crimes, but rather reflects existing conventional and customary international law.

The Statute does not otherwise affect existing arrangements with respect to UN peacekeeping missions since troop-contributing countries retain criminal jurisdiction over their members of such missions.. The International Criminal Court will complement, not supersede, the jurisdiction of national courts. During interview sessions a key informant vehemently stressed that;

> National courts will continue to have priority in investigating and prosecuting crimes within their jurisdiction. Under the principle of complementarity, the ICC will act only when national courts are unable or unwilling to exercise jurisdiction. If a national court is willing and able to exercise its jurisdiction, the ICC cannot intervene and no nationals of that State can be brought before it. (Key informant).

The grounds for admitting a case to the Court are specified in the Statute and the circumstances that govern inability and unwillingness are carefully defined so as to avoid arbitrary decisions. In addition, the accused and interested States, whether they are parties to the Statute or not, may challenge the jurisdiction of the Court or admissibility of the case. They also have a right to appeal any related decision .Under international law, the State in whose territory genocide, war crimes or crimes against humanity have allegedly been committed, or whose nationals are victims of such crimes, has the right to and is often legally obligated to investigate and prosecute persons accused of committing such crimes. The ICC Statute does not violate any principle of treaty law and has not created any entitlements or legal obligations not already existing under international law. The cooperation of a non-State Party is purely voluntary and no legal obligation is imposed on a non-State Party. The ICC Statute provides for special protection of peacekeepers by including among its punishable crimes intentional attacks against personnel, installations, material units or vehicles involved in humanitarian assistance or peacekeeping missions. Such violations constitute war crimes or crimes against humanity under certain circumstances

Table 5.1: ICC Jurisdiction includes States Willingness to Cooperate

	Frequency	Percentage %
Neutral	5	2.9
Disagree	18	10.5
Strongly Disagree	15	8.8
Agree	25	14.6
Strongly agree	108	63.2
Total	171	100

Source: Researcher 2016.

In furtherance of the above assertions, the respondents were required to indicate their level of agreement with the statement that the ICC Jurisdiction includes states willingness to cooperate in apprehending the accused. Table 5.4 shows that (63.2%) strongly agreed, 14.6% agreed, 10.5% disagreed while 8.8% strongly disagreed over the same statement. The responses indicate that majority of the respondents agreed with the statements on the assertion that the ICC Jurisdiction includes states willingness to cooperate in apprehending the accused.

During the focus discussion group sessions, it was observed that the ICC does not possess an enforcement mechanism of its own, which results in a reliance on States and international organizations to cooperate with the Court or the arrest and surrender of accused persons, as well as for other forms of assistance. It was noted that the obligation to cooperate with the ICC under the Rome Statute of the International Criminal Court 1998 (Rome Statute)is a treaty obligation, which only binds State Parties and does not supersede other obligations to third States under other treaties. This was contrasted with the obligation to cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were established by the UN Security Council under Chapter VII of the Charter of the United Nations.

The Rome Statute of the International Criminal Court'("Rome Statute") recognizes the importance of State cooperation to the effective operation of the ICC. An entire Part of the Rome Statute is dedicated to matters of ICC imposed on States Parties' by the Rome Statute in two ways ; a general commitment to cooperate, and an obligation to amend their domestic laws to permit cooperation with the Court. Articles 86 and 88 form the foundation of the obligation on States Parties to cooperate with the ICC. According to Article 86,

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. (Rome statute Art 86).

This general requirement is supplemented by further articles of the Rome Statute and the ICC's Rules of Procedure and Evidence that govern specific aspects of cooperation in such contexts as the arrest and surrender of individuals and the collection of evidence. Article 88 obliges States to adopt domestic laws to permit cooperation with the ICC.

International criminal court is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions as witnessed with regard to the principle of complementarity, also in this respect it was the wish of the Court's creators that states' sovereignty should prevail. A third, very grave limitation on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Court, of difficult access, unstable and unsafe. Carrying out investigations in Uganda, the Democratic Republic of the Congo, the Central African Republic or with regard to Darfur entails logistical and technical difficulties, unprecedented problems which no other prosecutor or court is faced with. Another grim reality is the notorious scarcity of financial and other resources available for investigations and other work of the Court. Obviously, there are also other limitations and obstacles. For example, it seems realistic to assume that *"Realpolitik*" and states' interest will continue, in the future, to be important obstacles to the effectiveness of the ICC.

In the apparently eternal struggle between brute force and the rule of law, further disappointments and setbacks seem possible. Steadfastness, stamina and the readiness to weather future difficulties and crises with determination will therefore be indispensable.

5.4 ICC jurisdiction supersedes states and Non states independence

The primary methods of judicial enforcement envisaged by international law are the domestic courts of the state where the human rights violation or international crime occurred and the courts of the state responsible for that violation. To this end, international law imposes obligations on states to prosecute those who have committed international crimes within their territory. Likewise human rights law includes a right to a remedy or to reparation provided by the state that has violated the substantive human right. However, these methods of enforcement of human rights and international criminal law often fail. Domestic law may not incorporate the relevant international human rights norm. International crimes are often committed by state agents as part of state policy, and so governments do not routinely prosecute their own officials engaged in such action (though, as has happened in Latin America, changes of government may bring a change of policy and prosecutions for past official conduct.

All of this has led to what has been described as a culture of impunity which contributes to a climate in which human rights violations persist and are not deterred. In order to counter this culture, there are two other possible for a where judicial enforcement of human rights norms may take place. First, it is possible that such enforcement takes place in international (including regional) courts: such as the human rights tribunals or quasi-judicial bodies dealing with state responsibility or international criminal tribunals dealing with the penal responsibility of individuals.

However, enforcement of human rights norms by such courts is limited, *inter alia*, by the fact that an international court with jurisdiction over the acts in question may not exist. For this reason, some human rights advocates have turned to the second set of for a (other than the domestic court of the state committing the wrong): the domestic courts of other states. For the domestic courts of other states to serve as for a for the transnational enforcement of human rights and international criminal law a number of hurdles will have to be overcome.

Some of these hurdles are practical, such as the difficulty of obtaining evidence in relation to crimes that took place abroad and the lack of motivation on the part of prosecutors in other states to take up cases which have no connection with the country. Other hurdles are those to be found in the domestic law of the state, including jurisdictional limits under domestic criminal law or under the conflict of law rules of the forum doctrines such as forum *non conveniens.*

Table 5.2: The ICC Jurisdiction Supersedes states and Non States Independence

	Frequency	Percentage %
Neutral	36	21.1
Disagree	34	19.9
Strongly Disagree	25	14.6
Agree	39	22.8
Strongly agree	37	21.6
Total	171	100

The respondents were asked to indicate their level of agreement with the statement that the ICC jurisdiction supersedes states and Non states independence.

The Table 5.4 shows that 22.8% of the respondents agreed, 21.6% strongly agreed, 21.1% were neutral, 19.9% disagreed and lastly 14.6% strongly disagreed that the ICC jurisdiction supersedes states and Non states independence. The responses indicate that the respondents were neutral that the ICC jurisdiction supersedes states and Non states independence.

Since the entry into force of the Rome Statute on 1 July 2002, the ICC has jurisdiction over crimes committed by nationals of States that have ratified the ICC statute, as well as over crimes committed on the territory of States that have ratified the treaty. The ICC is designed to complement existing national judicial systems, however, the Court can exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute such crimes. Therefore, the Court also serves as a catalyst to States' investigating and prosecuting such crimes committed either within their territories or by their nationals.

The ICC's jurisdiction is not retroactive, but its very existence serves as a deterrent to future architects of genocide, war crimes and crimes against humanity by sending a strong signal that never again will such acts be met with impunity. Matters can be referred to the Court by a State Party to the Rome Statute, by the Prosecutor, and by the UN Security Council. The Court may then exercise its jurisdiction over the matter if either the State in whose territory the crime was committed, or the State of the nationality of the accused, is a party to the Statute. Non-States Parties may accept the Court's jurisdiction on an ad hoc basis.

When a matter is referred by the Security Council, the Court will have jurisdiction regardless of whether the State concerned is a party to the ICC treaty. Citizens of any country fall within the jurisdiction of the Court under one of the following conditions:

1) the country where the alleged crimes occurred is a State Party to the ICC treaty; 2) that country accepted the ICC's jurisdiction on an ad hoc basis; or 3) the UN Security Council referred the situation to the Court. However, under the principle of complementarity, the Court will act only if the national court of the accused does not initiate investigations and prosecution where appropriate.

However, there are at least two international law hurdles that also have to be overcome. It will have to be established that the foreign state has jurisdiction, as a matter of international law, to prescribe rules for the matter at hand and to subject the issue to adjudication in its courts. Also, where a case is brought in a domestic court against a foreign state or foreign state official or agent, it must be established that the state or its official is not immune from the jurisdiction of the forum. There are recent developments suggesting movement in international law on both of these issues, but the precise contours of the relevant rules are yet to be conclusively determined.

5.5 ICC jurisdiction and Preservation of International Peace and Security.

The United Nations Security Council has a vital role to play in assisting the International Criminal Court (ICC) to ensure that war crimes and crimes against humanity around the world do not go unpunished By maintaining international peace and security, the UN makes all its work more effective, because by keeping the peace, the Organization can focus on solving global issues, instead of resolving conflicts. Hague-based ICC, is an independent international body that is not part of the UN and tries those accused of genocide, crimes against humanity and war crimes. Any of the currently 121 States Parties to the 1998 Rome Statute which set up the ICC can ask its prosecutor to carry out an investigation, a non-State Party can accept its jurisdiction for crimes committed in its territory or by its nationals, and the Council may also refer cases to it.

Its mandate is to try individuals, rather than States. The Council, where it has referred a situation to the Prosecutor, can greatly assist the Court by acting to secure the necessary level of cooperation from Member States (Ban Ki moon 2012).

Unfortunately, recent peace and security challenges in areas where the Organization has a limited presence have tested its ability to maintain the peace. In areas where the UN has a presence, it has increasingly come under attack. The line has become increasingly blurred between criminals and hostile groups and peace spoilers, including extremists with transnational strategies and sophisticated tactics. The breakdown of the State security apparatus in intra-State and inter-communal conflicts now poses tremendous security challenges and tests the Organization's capacity to carry out its mandates and programmes. And the UN, as a relatively soft target, has been the victim of attacks resulting in the tragic loss of life.

With the mounting complexity and growing costs of addressing crisis situations, the imperative of conflict prevention is higher than ever. In its conflict prevention and mediation work, the United Nations continues to face challenges regarding how best to engage with sometimes amorphous movements or fractured armed groups and how to ensure inclusivity. The Organization has strengthened its relationships with regional and sub regional organizations, which play a significant role in fostering conflict prevention and mediation partnerships, in addition to rapid responses to regional crises.

Member States have continued to see the value of United Nations support to electoral processes, with requests for assistance which include technical assistance, the engagement of good offices and support to regional organizations remaining high. Electoral assistance has been provided in challenging security environments, many

under Security Council mandates. There is continued political will to prevent the scourge of conflict-related sexual violence, exemplified by the Declaration of Commitment to End Sexual Violence in Conflict, and the Global Summit to End Sexual Violence in Conflict, in 2014.

The Security Council has also called for sustained monitoring and reporting on the violations affecting children in armed conflict and for perpetrators to be brought to account. The global campaign "Children, Not Soldiers", is aimed at ending and preventing the recruitment and use of children by all national security forces in conflict by 2016.

Member States have demonstrated their continued interest in using peacekeeping and continue to recognize it as an effective and cost-effective tool, without which the human and material costs of conflict and relapse into conflict would be unquestionably higher. Although the environments for United Nations peacekeeping operations have always been challenging, we face today a heightened level and new types of security threat, requiring new approaches and strategies. Peacekeeping operations are being increasingly deployed earlier in the conflict continuum, before any peace or ceasefire agreement.

Creating the political and security space necessary for successful negotiations is crucial. Ensuring that United Nations troops are properly supported and equipped is a high priority. The complexity of contemporary peacekeeping environments requires strengthened partnerships with all stakeholders, including regional and sub regional organizations, the wider United Nations family, international and regional financial institutions and donors, and multilateral and bilateral partners.

Only through such collaboration can we collectively address the international peace and security challenges we face now, and in the coming years. The intertwined nature of the two institutions: the Council with its focus on peace and the ICC with its goal to seek justice.

While the ICC's contribution is through justice, not peacemaking, its mandate is highly relevant to peace as well, the Council's role to ensure that full cooperation from Member States. The worst nightmares of humanity lie at the intersection The ICC and UN respective mandates. When massive crimes against innocent victims threaten international peace and security, both the Council and the ICC have an important role to play. The ICC and the UN Council recognizes a unique avenue for ensuring justice as a crucial element in wider international efforts.

Table 5.3: ICC jurisdiction and Preservation of International Peace and Security

	Frequency	Percentage %
Neutral	5	2.9
Disagree	12	7
Strongly Disagree	16	9.4
Agree	49	28.7
Strongly agree	89	52
Total	**171**	**100**

The respondents were asked to indicate their level of agreement with the statement that the ICC jurisdiction and preservation of international peace and security. Most of the respondents (52%) strongly agreed, also 28.7% agreed. However, 9.4% and 7% strongly disagreed and disagreed respectively over the same statement. The responses indicate that the respondents agreed that the ICC jurisdiction includes preservation of international peace and security

During the focus group discussion participants deliberated on the importance of ICC as a tool of safe guarding international peace and security,

> Those who have been accused of act of impunity i.e. crimes against humanity, genocide, war crimes of aggression ,war crime have faced the wrath of ICC ranging from Charles Taylor ,Radovan, Pinochet ,Lubanga, Ndaganda and others actually ICC bites (discussant).

The argument continues that the adoption of the Rome Statute in 1998 marked the creation of a global criminal justice system. It demonstrated the will of the international community to create a culture of individual criminal accountability by bringing those individuals responsible for committing the most serious crimes known to humanity to justice. It was recognized from the off-set however that the International Criminal Court (the 'ICC' or the 'Court') could not accomplish this alone.

The underlying nature of the ICC being complementary to national criminal justice systems paralleled with the Court's dependence upon universal ratification and preservation of integrity of the Rome Statute necessitated the creation of a system of international cooperation, which is the very crux - and the Achilles heel - of the newly established global criminal justice system. States, civil society, international and regional intergovernmental organizations correspondingly all have an important role to play .In this regard;

> Only if perpetrators of grave crimes are prosecuted and held to account, can there be any hope that future such crimes will be prevented and peace preserved underlining the role that the both bodies can both play in strengthening national capacities to prosecute serious crimes, the Council through its peacekeeping missions, and the ICC through the domestic incorporation of provisions of the Rome Statute. (Ban Ki moon 2012).

The European Union (the 'EU' or the 'Union') has been, and continues to indisputably be, one of the strongest and most consistent supporters of the ICC. This has been confirmed through its technical, financial and institutional support and contributions. The EU's endeavor to consolidate the ICC's effectiveness has entailed the Union to take measures in all three of its Pillars on a wide range of levels, which illustrates the complexity of the case at hand.

The ICCs contribution provides an overview of the EU's approach to international criminal justice, including mechanisms to promote individual criminal accountability such as the ICTY and ICTR. It subsequently provides a basis as to why there was a need for a permanent international criminal court and the variables that determine the Court's effectiveness.

5.6 ICC Jurisdiction and reparations for victims of international crimes

The right to reparation is a well-established principle of international law, both in terms of States inter se, as well as for individual victims. In the oft-cited Chorzow Factory case, the Permanent Court of International Justice held that: it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. It was further held that "reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establishes the situation which would, in all probability have existed if that act had not been committed. The ILC Articles on the Responsibility of States provide that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Accepted forms of reparation to be made between states include restitution, compensation and satisfaction, either singly or in combination, with cessation and guarantees of non-repetition as appropriate, constituting separate consequences of a breach of an international obligation. In the context of reparations, an interviewee stated that;

> If the government does not want a repeat of 2007-2008 post-election violence, compensations must be given to all those who are victims. People must get back their properties and resettle in their homes in Rift valley and other Counties where they were ejected, properties destroyed and even their relatives murdered or maimed (key informant).

With respect to reparation for individuals, human rights law, and to a certain extent international humanitarian law, provides a legal basis for victims' right to a remedy and reparation. Numerous human rights treaties set out States' obligations to investigate and prosecute suspects, but also to protect citizens and afford them remedies and reparation to redress violations. The Universal Declaration of Human Rights states;

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights. (Universal declaration of Human Rights).

The UN Convention Against Torture provides more explicitly for reparation in its article 14(1): Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

The International Covenant on Civil and Political Rights (ICCPR) provides that States Parties must undertake to ensure individuals whose rights are violated under the Covenant shall have an effective remedy. Such remedies shall be determined by a competent judicial, administrative or other authority, which will enforce the remedies granted.

With regard to the obligation to provide reparation, in addition to some explicit provisions in the ICCPR, the Human Rights Committee has developed the normative framework for reparation through its quasi-judicial function, issuing "views" on individual complaints and "observations" on States' submissions through its reporting procedure. It also periodically issues General Comments that interpret the provisions of the International Covenant on Civil and Political Rights The nature of the procedural remedies judicial, administrative or other as well as the relief provided for such violations should accord with the substantive rights violated. For instance, administrative remedies cannot be deemed to constitute adequate and effective remedies in the event of particularly serious violations of human rights In terms of the extent of reparation to be afforded, the Committee established that "although compensation may differ from country to country, adequate compensation excludes purely 'symbolic' amounts of compensation .The Committee has also referred to the duty to provide "appropriate" compensation.

For instance it has ordered that the State pay appropriate compensation for the period of the applicant's detention. With respect to addressing the present situation of victims, compensation is routinely cited as an appropriate measure owed to the victim and his or her family, though restitution or rehabilitation are also stipulated, for instance to ensure that all necessary medical treatment is received.

The Human Rights Committee established an obligation to provide the victim with compensation for physical as well as mental injury and suffering caused by inhuman treatment. Compensation was to be paid to surviving family members for the loss of a deceased relative, but also to family members in their own right for the anguish suffered:

The Human Rights Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The father/mother have a right to know what has happened to their daughter. In these respects the parents too are victims of the violations of the Covenant suffered by their daughter; in particular of Article 7.33 Regional human rights bodies have also developed significant practice in upholding individuals' rights to an effective remedy and reparation, particularly the Inter-American Commission and Inter-American Court of Human Rights.

The Inter-American Court has by far the most developed practice with respect to asserting victims' right to effective remedies and adequate compensation. In the Velázquez Rodriguez case, the Court cited the International Court of Justice's ruling in Chorzow Factory whereby a violation of an international obligation, which results in harm, creates a duty to make adequate reparation. It went on to state that: Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.

As for emotional harm, the Court held that compensation could be awarded under international law, and in particular in the case of human rights violations. The Court cited the Human Rights Committee as repeatedly having called for compensation for violations of the ICCPR. The Court iterated that obligations to investigate facts relating to Velasquez's disappearance punish those responsible and issue a public statement condemning the practice, which had already been pronounced by the Inter-American Commission in this case, continued until they were fully carried out.

The main focus of the decision was monetary compensation however. It set out in some detail the basis for calculating compensation for lost earnings owed to the family as well as compensation for emotional suffering by Velazquez's wife and children. It went on to specify that Honduran inheritance laws need not be followed as the entitlement to the reparation award derived from an international obligation. The Court detailed how the compensation should be disbursed, including the establishment of a trust fund with the Central Bank of Honduras under the most favorable conditions permitted by Honduran banking practice as a means of preserving the sums of money owed to the minor children of Mr. Velasquez.

The jurisprudence of the Inter-American Court has developed since this first judgment. In the 2009 Cotton Fields case, the judgment on Merits, Reparation and Costs, simply states in its Chapter on Reparations, that, "[i]t is a principle of international law that all violations of an international obligation that result in harm include the obligation to ensure adequate reparation. This obligation is regulated by International Law.

The Court has based its decisions on Article 63(1) of the American Convention in this regard. Thirty-seven pages of detailed provisions on reparations follow, with sub-

chapters for issues such as defining the injured party; ensuring identification; trial and punishment of those responsible including officials that committed irregularities; measures of satisfaction including public acts to acknowledge responsibility; measures to ensure non-repetition; compensation; rehabilitation; material harm; emotional and moral harm; and modalities of payment

Table 5.4: ICC Jurisdiction and reparations for victims of international crimes

	Frequency	Percentage %
Neutral	5	2.9
Disagree	12	7
Strongly Disagree	5	2.9
Agree	38	22.2
Strongly agree	111	64.9
Total	**171**	**100**

The respondents were asked to indicate their level of agreement with the statement that ICC Jurisdiction has an increased operational ability, accessibility and reparations for victims of international crimes. The illustration as depicted in the table below shows that, most of the respondents (64.9%) strongly agreed, also 22.2% agreed. However, 7% and 2.9% strongly disagreed and were neutral respectively over the same statement. The responses indicate that the respondents agreed that ICC Jurisdiction has an increased operational ability, accessibility of reparations for victims of international crime

The International Criminal Court (ICC) has a broad and innovative mandate in relation to victims. Where victims' interests are affected, they may participate in ICC proceedings in a manner designed to protect their physical and psychological wellbeing as well as their dignity and privacy. They may present their views and concerns at appropriate stages of proceedings, to a certain extent modeled on the civil law notion of *partie civile*, where civil parties can be enjoined into criminal proceedings with a view to claiming damages. The Rome Statute of the International Criminal Court (ICC Statute) provides that victims in general are to be informed of decisions that concern them, and are entitled to protection and support in relation to their appearance before the Court. In addition, they can be granted legal aid to ensure their representation. In particular the ICC enables victims to claim reparation for harm suffered. A dedicated Trust Fund for Victims is provided for in response to their right to claim reparation, having a dual mandate of implementing reparations awards ordered by the Court and providing assistance outside the scope of reparation. The ability of the ICC to award reparations to victims is a critical component of its overall framework to enable victims' rights. Hailed by the international community as a beacon of justice, the ICC will also be referred to as a model in terms of domestic implementation of victims' rights within the context of complementarity. With its first proceedings well underway, the Court may soon be faced with the prospect of ordering its first reparations awards. This Report is prepared as a means of contributing to the Court's reflection on what reparation means and should mean in the context of mass atrocity.

5.7: ICC Jurisdiction has Established Linkages among States

In November 2007, the ICC's Public Information and Documentation Section (PIDS)/Outreach Unit presented its Outreach Report 2007 to the sixth session of the Assembly of States Parties (ASP). The Outreach Report 2007 (hereafter called the ICC Report) describes activities carried out to implement the Strategic Plan for Outreach of the International Criminal Court (hereafter called the Strategic Plan for Outreach), which had been issued a year earlier.

From an analysis of the ICC Report, the IBA considers that several notable improvements have been made in the Court's outreach strategy and a number of tangible results have been achieved. Firstly, there was a noticeable increase in the budgetary allocation to the PIDS of the Registry. This allocation allowed for increased spending on critical outreach activities.

Secondly, the presence of a dedicated Outreach Unit at the Court allowed for an exponential increase in the volume of outreach activities. In addition the quality of the Court's outreach efforts improved both in terms of variety of audiences reached and tools and material used. It was noted from the ICC Report that the Outreach Unit now enjoys a greater flow of information from the field which enables it to ensure a two-way system of communication and a more participatory approach to outreach. Significantly, the Outreach Unit has engaged in a process of developing indicators to measure its work. Overall, the new tools used by the ICC Outreach Unit appear to be more tailored to the target audience and represent a notable progress in relation to the Unit's ability to engage with local communities.

The ICC Report notes that issues raised by the local populations are also taken into consideration in developing outreach activities. For example, in the aftermath of the stay of proceedings ordered by Trial Chamber I in the case of Thomas Lubanga Dyilo the Outreach Unit collected questions from the local population in order to prepare a thematic information sheet that could address those concerns and prevent misinformation.

Table 5.5: ICC Jurisdiction has Established Linkages among States

	Frequency	Percentage %
Neutral	5	2.9
Disagree	34	19.9
Strongly Disagree	12	7
Agree	69	40.4
Strongly agree	51	29.8
Total	**171**	**100**

The respondents were asked to indicate their level of agreement with the statement that ICC Jurisdiction has established Linkages among States. Table 5.8 shows that 40.4% agreed, 29.8 strongly agreed that ICC Jurisdiction has established linkages among States, and 19.9% disagreed over the same statement. The respondents indicate that the respondents were neutral that ICC Jurisdiction has established Linkages among States

The Outreach Unit appears also to have adopted innovative methods to provide timely feedback to local populations. Media broadcasting now includes weekly interactive radio programmes. In Uganda, the Court facilitates the broadcasting of the so called ‘Mega Lawyer’ radio programme during which listeners can call to ask questions.

In the case of Darfur, the Outreach Unit is using web-based tools which include the creation of interactive windows on online blogs dedicated to the Darfur crisis. Finally, the audio-video products also include an interactive component in the section called 'Demandez a la Cour' through which questions from the public can be collected and recorded to be answered by the Court's officials in The Hague and re-broadcast locally.

In early 2008, the Outreach Unit conducted two participatory workshops. The first was designed to assist the development of the outreach strategy for CAR; the second was aimed at promoting dialogue with key stakeholders towards a revision of the general outreach strategy of the Court. Both workshops were facilitated by an external consultant and conducted using the so-called 'Logical Framework planning technique', a workshop methodology designed to assist in fostering participatory communication among the participants. The first participatory workshop was organized at the beginning of 2008 in Bangui (CAR). Participants included local stakeholders, local non-governmental organizations (NGOs) and the media. The workshop reportedly produced important ideas for the development of the CAR outreach strategy. However, the absence of a field outreach coordinator for CAR has prevented further development of these initiatives. The ICC Outreach Report 2007 conveyed notable progress in relation to outreach. After the Outreach Unit was established in 2007, the volume of activities carried out by the Court grew remarkably. A wider range of outreach activities have been conducted using new outreach tools and information materials. Of note, audio-visual products have been developed in 2008 and are already in use for a number of purposes.

The Outreach Unit has also engaged in an evaluation process which has led to the development of indicators and evaluation methodologies as well as a web-based data management system. The greater engagement and participation of local actors in outreach activities is to be welcomed. The allocation of more resources by the ASP has therefore contributed to tangible results. However, these have not been sufficient to meet fully the needs of the Outreach Unit. There is still much to be done to bring the Court closer to the affected communities. Additionally, new challenges are posed by the increased volume of court activity in The Hague.

The IBA considers that country programming should be strengthened as the effective establishment of a two-way communication system is only possible through fully-staffed field offices. In this regard, the IBA urges the Outreach Unit to complete the recruitment process particularly for the field office in Bangui (CAR). Ongoing challenges are posed by the need to revise the outreach strategy to incorporate lessons learnt in the past year of intense activities. The IBA believes that a solid strategic framework would assist in tackling unforeseeable developments in the proceedings that have greatly challenged outreach to affected communities in the past. The IBA therefore recommends a prompt revision of the Outreach Strategy. The IBA recommends that consideration be given to extending the practice of targeted public information campaigns and strategies following specific and important developments in the proceedings. This would allow local communities to feel more engaged in courtroom events.

The IBA considers that it is important that the term ‘participatory approach’ is clearly and accurately defined to reflect the experience in the field. The Outreach Unit is further encouraged to ensure that this newly defined participatory approach allows for greater input by the local population in the planning and organizing of outreach activities.

5.8 ICC jurisdiction and improvement of the legal systems

Many African countries have not been able to appropriately deal with the atrocities, partly because they lack well-developed legal systems that would help guide the prosecution for grave human rights violations. For example, the Central African Republic’s (CAR) Court of Appeal, the highest judicial body in the country, recognized the inability of domestic courts to effectively investigate and prosecute war criminals, and the Democratic Republic of the Congo’s (DRC) government acknowledged that its legal system was not capable to properly deal with the criminal responsibility relating to the Bogoro massacre. ICC’s investigations and the principle of complementarity, however, have pushed these countries to develop their domestic legal systems in order to prosecute those responsible for atrocities. Hence, regardless of criticism about the Court’s Africa bias, there is at least one good result deriving from the ICC’s concentration on situations in Africa because, through the implementation and practice of complementarity, the ICC appears to have catalyzed the development of domestic legal systems in these countries to address mass atrocities. Many African countries lack the capacity to engage in prosecution of those responsible for grave human rights violations on their own Therefore, impunity in these countries has largely prevailed in an interview session a key informant said that ;

> There is no other continent that has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity (key informant).

It was argued that some countries have explicitly acknowledged their inability to prosecute human rights abuses. For example, the Court of Appeal in CAR recognized the domestic courts' inability to effectively investigate and prosecute war criminals. Furthermore, the DRC's government acknowledged its inability to investigate and prosecute charges related to the Bogoro massacre. For others, a brief look at the history demonstrates the inability. For example, Kenya has suffered cycles of election violence, especially in the 1990's when large-scale violence regularly accompanied its general elections. However, Kenya has not succeeded in bringing those held accountable to justice.

The inability to prosecute perpetrators accused of committing grave human rights violations stems at least partly from lack of resources and expertise. There are numerous factors that have played a role, like limited access to relevant human rights documents, including the difficulties to interpret these documents, lack of adequate case reporting, both domestically and internationally, attitudes of judicial officers and their lack of exposure to international human rights law, and lack of access to justice due to high cost of litigation and political pressures, among others.

The ICC's investigation can have a significant effect in domestic legal system, because of its capability to act as a catalyst for legislative change and the building of capacity in domestic courts. The OTP has also recognized the ICC's potential to act as a catalyst, stating in its Prosecutorial Strategy objectives of 2009-2012 that the preliminary examination phase "offers a first opportunity for the Office to act as a catalyst for national proceedings."

One of the strong forces behind this catalytic effect is the principle of complementarity. Based on the, national courts have a primary right to investigate and prosecute cases of mass atrocities, as both the Preamble and Article 1 state that;

> The ICC's jurisdiction "shall be complementary to national criminal jurisdictions." The ICC has jurisdiction only if the state with original jurisdiction is "unwilling or unable genuinely to carry out the investigation or prosecution.(Rome statute, 2002).

The previous Chief Prosecutor, Luis Moreno-Ocampo, also recognized the importance of complementarity and its potential positive effect on domestic prosecutions and noted that "an absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success (OTP, 2003).

Therefore, national courts are meant to maintain their jurisdiction, absent particularly defined circumstances articulated in Article 17 of the Rome Statute, as when national courts do not fulfill their obligation of trying those accountable. Thus, the principle of complementarity should encourage national governments to undertake prosecution for human rights violations so as to challenge admissibility or even preempt investigations against their nationals by the ICC

In evaluating whether the ICC investigation has made a difference for domestic justice mechanisms in such regard, it will be helpful to look at the steps that the countries have taken to develop their justice mechanisms so as to deal with mass atrocities. Some of the most important factors to consider would be making steps to establish a neutral domestic system by which to try international crimes as defined in the Rome Statute, and to enact domestic legislation to implement the Rome Statute of the ICC into domestic law.

Table 5.6: ICC jurisdiction and improvement of the legal systems

	Frequency	Percentage %
Neutral	10	5.8
Disagree	11	6.4
Strongly Disagree	21	12.3
Agree	51	29.8
Strongly agree	78	45.6
Total	**171**	**99.9**

Source Researcher 2016

The recognition of universal jurisdiction by the state as a principle is not sufficient to make it an operative legal norm. There are basically three necessary steps to get the principle of universal jurisdiction working: the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes. If one of these steps is lacking, then the principle will most probably just remain a pious wish. Several attempts to identify the content and concrete meaning of universal jurisdiction have been made through meetings of experts. In practical terms, the gap between the existence of the principle and its implementation remains quite wide.

From a comparative law perspective, states implement the principle of universality in either a narrow or an extensive manner. The narrow concept enables a person accused of international crimes to be prosecuted only if he or she is available for trial, whereas the broader concept includes the possibility of initiating proceedings in the absence of the person sought or accused trial in abstentia.

This deeply affects the way in which the principle is implemented in actual fact. International law sources often refer to the narrow concept, but the decision to refer to the broader concept is quite often a national choice. However, even though some states such as Belgium or Spain have made some efforts to give concrete effect to the principle of universal jurisdiction by amending their penal code, it has in most cases remained unimplemented, thus more theoretical than practical.

The implementation of the principle of complementarity generates two practical questions: how does the Court become aware that there are conflicts between the exercising of its jurisdiction over a situation or case and the assertion and assumption of jurisdiction by a state? What does the Court do when faced with such a conflict?' The principle of complementarity in the ICC Statute is not a mere statement. It entails a precise legal regime calling for the issue of jurisdiction to be evaluated by applying conditions of both substance and admissibility. (Holmes, et al 2002).

First, the complementarity issue can be raised only if the crime falls within the conditions defined in Articles 5 to 8 of the Statute which oblige the ICC to examine substantive aspects of the crime in order to assert jurisdiction over a specific case. Second, the Statute requires the fulfillment and analysis of several conditions related to admissibility: 'genuine investigation and prosecution' 'unwillingness' and 'inability' to prosecute. The lack of a genuine national investigation and prosecution should be regarded as the core criterion for the exercise of jurisdiction by the ICC. If an international crime has been genuinely prosecuted and tried, the ICC should not have jurisdiction.

However, the question remains of knowing what a ‘genuine prosecution’ is. It can be imagined that ‘genuine’ means real, not faked. This could, however, be subjective if not more clearly framed. For instance, can it be said that the national prosecution is not ‘genuine’ if it takes more time than it would before the ICC? The idea of the promoters of the principle of complementarity was in fact to make sure that international crimes would be effectively prosecuted and punished by states, but the word ‘genuine’ seemed more neutral than ‘effective’ or ‘efficient’. It will be the prosecution’s responsibility to demonstrate a lack of genuine investigation or prosecution. It must be recognized that such an appreciation could remain open to discussion and has to be considered hand in hand with the other conditions of unwillingness and inability. Unwillingness is quite simple to understand but is more complicated to evaluate. The meaning of ‘unwillingness to act’ was laid down in Article 17.2 of the ICC Statute.

This provision cites three criteria for determining whether unwillingness exists: (i) shielding a person from criminal responsibility; (ii) unjustified delay in the proceedings which is inconsistent with the intent to bring the person to justice; and (iii) proceedings not conducted independently or impartially and in a manner inconsistent with bringing the person to justice. These criteria could give a better idea of what unwillingness is, but they also are rather subjective in terms of appreciation.

Consequently, the implementation process will also define their actual content. Unwillingness does, however, show a state’s lack of a positive attitude towards prosecuting and trying perpetrators of international crimes. In some cases there will be no doubt, as the states concerned do not even want to conceal their non-intention to bring some criminals to justice.

In other cases, however, a question of threshold will be unavoidable. The Court's responsibility will go as far as discussing all the elements in order to determine whether the unwillingness criterion is met. For instance, the existence of some form of immunity or amnesty could indicate unwillingness to prosecute or try the beneficiaries of those clauses. If a 'presumption of unwillingness' can be established in order to prosecute the perpetrators of such crimes, situations will have to be evaluated on a case-by-case basis, as there are many intermediate situations in which such immunities or pardons are not granted automatically and for any type of crimes which oblige the ICC to examine substantive aspects of the crime in order to assert jurisdiction over a specific case. Second, the Statute requires the fulfillment and analysis of several conditions related to admissibility: 'genuine investigation and prosecution', 'unwillingness' and 'inability' to prosecute. The lack of a genuine national investigation and prosecution should be regarded as the core criterion for the exercise of jurisdiction by the ICC. If an international crime has been genuinely prosecuted and tried, the ICC should not have jurisdiction.

. The principle of complementarity should not, however, be analyzed only in the light of the provisions of the ICC Statute. Each national context must be taken into account, as it will influence the state's ability to exercise its jurisdiction over international crimes. This implies an analysis of national criminal justice systems to evaluate their ability to assert jurisdiction. Three elements should be examined: (i) the technical means offered by the state to prosecute these types of crime; (ii) the working methods of the criminal justice system; and (iii) the procedural rules and rules of evidence applicable to judicial proceedings. Without going into detail, it can logically be assumed that the inherent differences between legal systems will influence the way in which the principle of complementarity will be implemented.

It will therefore not be uniformly applied. This must be acknowledged as a normal interaction between the international and national legal systems and taken into consideration. Although simple to understand in definition, the principle of complementarity reveals its complexity in the confrontation with national systems. Conceived as a means of improving implementation of the principle of universal jurisdiction, the principle of complementarity enshrined in the ICC Statute was designed to transform into reality the prosecution of international crimes too often set aside for want of such means.

5.9 ICC impact on Governments Policies and Frameworks

The ICC's involvement in Kenya sends a turf signal that entrenched impunity from wealthy and powerful politicians will not be permitted to endure. If national courts are unable or unwilling to prosecute perpetrators of gross electoral violence, the international court can. For a political class used to impunity, this is a likely game changer for how politics are conducted in the country. In the past, elites have orchestrated violence to stop political rallies, prevent opponent's supporters from voting, and as in the 2007-2008 events intimidate rivals. The ICC's first decade has seen broad claims made about the Court's ability to deter the commission of international crimes by government leaders.

At one end, enthusiasts have claimed it has the ability to deter future crimes, and to cause abusive leaders to end their ongoing campaigns of violence against their own people. So the ICC has regularly been posited as a tool capable of ending the commission of international crimes in Sudan, Uganda, Libya, Syria, Myanmar, the Democratic Republic of the Congo and Kenya.

Such claims are not surprising given that the Court's founders themselves highlighted the ICC's deterrent potential, claiming in the preamble of the Rome Statute that ending impunity for perpetrators of atrocity crimes would contribute to the prevention of such crimes.

Skeptics of the Court's deterrent impact, however, have no shortage of examples to back their case that the court has failed to prevent horrendous crimes, even in cases where it is actively investigating or prosecuting. And again, many of the same situations such as Libya, Sudan, Uganda, and the Congo - are cited as examples. These skeptics argue that the very nature of the crimes prosecuted by the International Criminal Court war crimes, crimes against humanity and genocide make them resistant to deterrence through prosecution, and that the record so far suggests that not only do international prosecutions offer little hope of preventing future atrocities; they in fact risk prolonging conflicts. It is argued that national leaders are increasingly aware of the possibility of ICC prosecution, and that this influenced their decision-making calculus, for better or worse. If ICC prosecution factors into a regime or leader's determination to cling to power, it is not unreasonable to conclude that such a fear may also, in certain circumstances, act to curtail abuses and shift the calculus in favour of avoiding war crimes or crimes against humanity.

Though there are plenty of examples in which the threat of criminal prosecution has failed to deter perpetrators of crimes against humanity or atrocities, this does not mean that deterrence has not worked or could not work. Those who argue against deterrence often focus on "specific deterrence", that is, the possibility that prosecutions can deter leaders who have already committed war crimes or crimes against humanity from committing them in the future. But these are, in fact, the very situations where prosecutions are most unlikely to deter.

In such situations, prosecution by the International Criminal Court will more likely represent an existential threat to a ruler, or ruling party, and is thus more likely to cause national leaders to seek to entrench themselves, and hence maintain or even escalate an abusive or criminal campaign in Sudan, where President Bashir's indictment by the ICC has done little to halt attacks on civilians in both Darfur and, more recently, South Kordofan. Instead the focus should be on longer-term legal deterrence and the entrenchment of human rights norms. Over the longer term prosecutions can act to dissuade future generations of leaders from the commission of such crimes. A central difficulty for those seeking to establish a deterrent effect for criminal prosecutions is that while it is easy enough to list cases where deterrence hasn't worked, it's very difficult to identify cases in which it has , a difficulty magnified in an international setting. It is of course a difficulty faced in conflict prevention more broadly. Successful conflict prevention, like successful deterrence, means, in effect, that nothing happens. And it is difficult to prove a counterfactual. But there is significant anecdotal evidence to suggest that the risk of prosecution by the ICC which today is one of the few credible threats faced by leaders of warring parties may influence their calculations and policy choices.

The evidence of behavioral change due to ICC prosecution is twofold. There is evidence to suggest that in some situations, particularly those where conflict is ongoing and where war crimes or crimes against humanity have already occurred, the possibility of international individual criminal prosecution may cause the abusive leader to entrench himself, thereby prolonging the conflict and facilitating the further commission of atrocities. But there are other situations, notably where a leader is not facing an existential threat, where the possibility of an ICC prosecution could tip the cost-benefit scale away from a large scale criminal course of action.

While there was initial criticism of ICC's prosecution in Uganda from civil society actors and others, there is some limited evidence of the prosecutions having a deterrent impact on the leaders of the rebel Lord's Resistance Army. The issue of ICC warrants against LRA commanders in 2005 may have contributed in bringing the LRA to the negotiating table, and helped drive along the peace negotiations. By raising awareness and focusing the attention of the international community, which in turn created a crucial broad base of regional and international support for the fledgling peace process, the ICC's efforts to hold the LRA leadership criminally responsible for its atrocities in northern Uganda not only helped create that momentum but embedded accountability and victims' interests in the structure and vocabulary of the peace process.

Ultimately however, these prosecutions, or the threat of prosecution, may have been an obstacle to the eventual signing of a peace agreement, though doubts remained throughout the process about the commitment of Joseph Kony to a peaceful settlement. In the Democratic Republic of the Congo, home of the ICC's first convict Thomas Lubang Dyilo, there is some evidence that ICC prosecutions are having some impact on the strategic decisions of troop commanders. Media reports suggest a number of ex-combatants have noticed a modification in the behavior of rebel commanders designed to avoid the possibility of ICC prosecution, particularly in Ituri which has been the focus of the ICC's investigative and prosecutorial activities.

The case of Sudan represents perhaps the most challenging case to argue for the deterrent impact of the ICC. The government has proven largely immune not only to ICC pressures, but also those of the Security Council whose repeated resolutions calling for a halt to violence in Darfur have been routinely ignored. For some, Sudan

represents clear evidence that ICC's prosecutions do not, and cannot, have a deterrent effect.

Following the Court's 2009 landmark indictment of President Bashir for war crimes and crimes against humanity in Darfur, the Office of the Prosecutor was almost immediately pilloried for what some saw as not only judicial overreach, but a step that could endanger the fragile peace processes in both Darfur and South Sudan. The government reacted to Bashir's indictment by expelling 13 international aid agencies, including Medecins Sans Frontiers (MDF) and Oxfam, and shutting down Sudanese human rights groups. For many these actions acted to bolster the belief that the government of Sudan would not be swayed, let alone deterred, by the threat of ICC prosecution. The government continues to obstruct any ICC attempts at investigation.

Though the leading inner circle of Bashir's ruling National Congress Party (NCP) proved unresponsive to the threat of prosecution by the ICC and to Security Council ultimatums, there are signs that the government was not entirely immune or indifferent to the international stigmatization associated with such measures. Following the Prosecutor's July 2008 application for an arrest warrant for Bashir, there was a flurry of announcements of renewed peace initiatives and yet another ceasefire declaration.

With regard to more concrete measures, the ICC indictment appears to have had little impact, though this could arguably be attributed more to the fact that the regime, confident most of the condemnation from the Security Council and wider international community would amount to nothing more than empty threats, calculated that continued warfare held the promise of best results – the reticence of the United States, for fear of upsetting the hard-won North-South peace deal, China's

continued oil interests, and the lack of decisive sanctioning action by the Security Council arguably fostered conditions where the regime had more to gain by continuing down a path that involved war crimes and crimes against humanity than it did by dialing back and committing to a genuine peace process.

The Kenyan narrative with the ICC was opened on 2 July 2009, when Kofi Annan transmitted a sealed envelope of names and evidence gathered by the Waki Commission to the ICC prosecutor who, in December 2010 announced the names of six suspects including Uhuru Kenyatta, the deputy Prime Minister, finance minister and son of Kenya's first president, and William Ruto, a former government minister. Political leaders, who had initially argued that only the ICC could provide the requisite independence and impartiality to ensure a fair trial, quickly backtracked. Kenyan politicians have, since the announcement of suspects, repeatedly attempted to block the ICC prosecutions, lobbying to have the case suspended on the basis that it could derail ongoing domestic prosecutions and warning that the ICC process could reignite violence, and arguing that the ICC does not have the proper jurisdiction. However during focus discussion, was observed that concrete evidence of immediate or short-term deterrence resulting from ICC prosecutions by its nature still remains scant, and it is too early to trace any longer-term deterrent effect of ICC prosecutions on Kenya.

One discussant sighed;

> Ruto told them!! (The ICC judges) that the accusations against him were too comic to be true. Ocampo was just a tourist he did not carry out any serious investigations in Kenya .we are an independent state and if anything we are capable of dealing with our own issues. (Discussant)

These attempts to block accountability processes, though primarily rooted in the need to secure domestic support, particularly among certain ethnic groups, could also hint

at a tendency among senior politicians to view prosecution, whether international or domestic, as a threat to their traditional ability to use violence to retain power during elections.

But if there is reason to believe that fear of ICC prosecution factors into a leader's determination to cling onto power, it is not unreasonable to suggest that such a fear may also, in certain circumstances, factor into the cost-benefit analysis of an authoritarian intent on crushing a secessionist or revolutionary movement, ethnic group or the opposition. Anecdotal evidence from states subject to ICC investigations, indictments or prosecutions indicates cause to be hopeful. As the ICC becomes more widely known, and its norms deeper entrenched, there appears to be a growing awareness amongst government, and perhaps more surprisingly rebel leaders, that they too could find themselves in the doc.

Table 5.7: ICC impact on Governments Policies and Frameworks

	Frequency	**Percentage %**
Neutral	11	6.4
Disagree	27	15.8
Strongly Disagree	16	9.4
Agree	54	31.6
Strongly agree	63	36.8
Totals	171	100

The respondents were asked to indicate their level of agreement with the statement that ICC has a positive impact on Governments policies and frameworks. From table 4.9, 36.8% strongly agreed, 31.6% agreed and 6.4% were neutral. However, 15.8%

and 9.4% of the respondents disagreed. The responses indicate that ICC has a positive impact on Governments policies and frameworks.

The ICC's decisions will continue to play a pivotal role in Kenya's political process, especially 2016 general elections given that all the six cases were withdrawn and or terminated The court appears cognizant that the end of the cases will not be viewed by many Kenyans simply as legal decisions and that the timing and termination of proceedings will inevitably have an impact in heightening or tamping down tensions given that there were assertions of witness interference and political meddling in the evidence against the accused persons .

Accordingly The International Criminal Court should recognize that public statements warning suspects and other politicians not to politicize the judicial proceedings, such as Judge Ekaterina Trendafilova's on 5 October 2011 noting that continued hate speech would be considered in the pretrial deliberations, can dampen and deter aggressive ethnic and political rhetoric. While the ICC is still popular, the Kenyan public's approval of its role has been declining, due to deft media engagement by the suspects.

In order to counter misconceptions of the court's decisions, the court and its supporters, including civil society and other friends, should intensify public information and outreach efforts to explain its mandate, workings and process. The Kenyan government must recognize that the fight against political violence and impunity is its responsibility. It needs to close the impunity gap by complementing the ICC process with a parallel national process. It should begin by directing the attorney general to investigate other individuals suspected of involvement in the violence that followed the 2007-2008 elections with a view to carrying out prosecutions in the

domestic courts. The government should also support Dr Willy Mutunga, the chief justice, in his efforts to reform the judiciary and restore public faith of Kenyans in the justice system. One of the main challenges for international policymakers in their efforts to resolve conflicts or reduce human rights abuses is that they often lack effective incentives or sanctions (diplomatic, legal, military or economic) of sufficient credibility to influence the calculations of the warring parties.

But it is possible to construct a framework for elite decision-making that can elucidate how international pressure, including in the form of ICC prosecution, can most influence the decision-making process of domestic leaders. The starting point is the assumption that leaders of governments or of rebel groups wish to either maintain or attain access to domestic power, and that these leaders take rational and goal-oriented decisions.

The important point here is that prosecution of government leaders imposes personal culpability. It poses a threat to power they have already attained, and thus may have greater influence or deterrent impact. If the threat of prosecution for future atrocities is a credible threat, then a government leader will arguably weigh that risk when deciding how to respond to a challenge to their authority, assuming a rational decision-making process. Furthermore, not only are government leaders more likely to have knowledge of the international legal system and the concept of international individual criminal responsibility than an average citizen, they are also arguably more likely to be motivated by rational considerations that allow for the kind of cost-benefit analysis central to any model of deterrence.

Of course, different regime types will react differently to pressure. Certain regimes those which are heavily reliant on patronage networks and payoffs to small ruling

elite are generally more vulnerable to external pressure, particularly economic sanctions. Like economic sanctions, ICC prosecutions can erode the power base of leaders who rely on highly personalized systems of government by increasing the costs of supporting that leader .However the degree to which the ICC can hope to deter will always be hostage to the immediate domestic context autocratic leaders who face an existential threat are unlikely be swayed by the possibility of prosecution, but those with hope of retaining power through non-criminal means are more likely to view the threat of indictment as a disincentive to criminal action. It will only be possible over time to impose a high cost on the use of atrocities to advance political goals when national or international institutions establish a credible and consistent pattern of accountability replacing impunity, and that is the challenge that remains for the Court and its supporters.

5.10 ICC Jurisdiction Application of provisions of laws and procedures

The ICC is located in The Hague in the Netherlands, although it may also sit elsewhere. It has field offices in Uganda, the Democratic Republic of the Congo, the Central African Republic, Ivory Coast and Kenya. There are 122 "States Parties" to the Rome Statute (as of June 2013). The ICC only has jurisdiction over individuals and not armed or criminal groups, States or companies. It is a Court of last resort, acting only where the State is unable or unwilling to investigate crimes itself. While the ICC is mandated to prosecute all perpetrators, no matter what their rank, in practice, it is likely to focus on those who have had a leading role in committing international crimes. While the law limped lamely along, international crimes flourished. The horrors of the twentieth century are many. Acts of mass violence have taken place in so many countries and on so many occasions it is hard to comprehend. According to some estimates, nearly 170 million civilians have been subjected to

genocide, war crimes and Crimes Against Humanity during the past century. The World Wars lead the world community to pledge that “never again” would anything similar occur. But the shocking acts of the Nazis were not isolated incidents, which have been since consigned to history.

Hundreds of thousands and in some cases millions of people have been murdered in, among others in Russia, Cambodia, Vietnam, Sierra Leone, Chile, the Philippines, the Congo, Bangladesh, Uganda, Iraq, Indonesia, East Timor, El Salvador, Burundi, Argentina, Somalia, Chad, Yugoslavia Rwanda, Iraq, Afghanistan Syria and Libya in the second half of the past century.

But what is possibly even sadder is that the world community has witnessed these massacres passively and stood idle and inactive. The result is that in almost every case in history, the dictator/president/head of state/military/leader responsible for carrying out these atrocities – despite in Nuremberg has escaped punishment, justice and even censure. The ICC’s predecessors are primarily the Nuremberg and the Tokyo Tribunals created by the victorious Allies after World War II.

These tribunals have been accused of being unfair and merely institutions for “victor’s justice,” but nevertheless they did lay the groundwork for modern international criminal law. They were the first tribunals where violators of international law were held responsible for their crimes. They also recognized individual accountability and rejected historically used defenses based on state sovereignty. These principles of international law recognized in the Nuremberg Charter and Judgments were later affirmed in a resolution by the UN General Assembly.

Where there have been massive and widespread violations, low-level alleged perpetrators, such as police officers or low ranking soldiers, may be best prosecuted and tried before national courts.

Despite the fact that post-election violence from December 2007 to February 2008 took place in many regions of Kenya, as yet only few perpetrators have been held to account. From the outset it is critical to underline that the role of the International Criminal Court (ICC) is complementary to the Kenyan justice system. The primary responsibility in providing justice and reparation to victims of the violence lies with the Kenyan authorities. Understandably, due to the limited progress at the national level in bringing perpetrators to justice, many Kenyans turn to the ICC with high expectations and this can easily lead to frustration.

There are only three instances in which the Prosecutor can intervene: if the United Nations (UN) Security Council refers a "Situation" to the Prosecutor (Darfur and Libya); or - if a State Party voluntarily refers a "Situation" to the Prosecutor (Central African Republic, Democratic Republic of Congo, Uganda, Mali); If the ICC Prosecutor decides to open an investigation using his *proprio motu* power to do so (on his own initiative), such as in Kenya and Ivory Coast. The ICC respects local courts; it is the first international criminal court to recognize that justice should be done at the national level first. The ICC will only judge persons if the national authorities are unable or unwilling to investigate and prosecute persons locally.

The ICC can only investigate crimes under its jurisdiction. It can investigate: - crimes committed on the territory of a State Party (such as Kenya since 15 March 2005); or crimes committed on the territory of a State which has accepted the Court's jurisdiction (Ivory Coast); or crimes committed anywhere by a national of such a

State, if a situation is referred to it by a State party or an investigation is initiated by the Prosecutor *proprio motu;* crimes committed in a Situation "referred" to the Prosecutor by the UN Security Council. The ICC process takes time. For example, Thomas Lubanga, a Congolese rebel leader, was sentenced to more than 6 years after the ICC issued his arrest warrant (though this is currently on appeal). In addition to investigating, prosecuting and punishing perpetrators if found guilty, the ICC may also issue a decision on reparation.

The stages of the proceedings are: Preliminary Examination: In this phase the Prosecutor decides whether or not to open an investigation; - Investigation: The Prosecutor examines facts and evidence, and applies to the Pre-Trial Chamber for an arrest warrant or summons to appear if there are reasonable grounds to believe an individual committed an alleged crime; - Pre-Trial: The Judges will hold a hearing and will confirm charges if there are substantial grounds to believe the alleged crimes were committed, sending the case to trial; - Trial: The judges will hear and evaluate evidence brought by the Prosecutor and Defense.

At the end of this process the accused is either acquitted, or found guilty, and if so, sentenced. If a person is convicted, reparations can be awarded to victims of the crimes for which the accused was found guilty. - Appeal: The decision on guilt, sentence or reparations can be challenged, in which case the decision of the trial stage may be reviewed. At the end of this stage an appeal judgment is given. A similar, more narrowly focused shift can be seen in international politics and the human rights movement, with a growing focus by the international institutions on the conduct of state leaders within their states, a development that would have been unthinkable in

previous centuries where state sovereignty precluded outside interference in the internal affairs of another state. The fact is that prosecutions for war crimes or crimes against humanity are progressively narrowing the space for criminal courses of action that as recently as 60 years ago were deemed beyond the concern of the international community.

The conviction of former Liberian president Charles Taylor, the indictment of Bashir, and the arrests Slobodan Milosevic and Cote d'Ivoire's former president Laurent Gbagbo, all demonstrate that even national leaders who would have once been able to claim state immunity are no longer viewed as immune from international criminal prosecution for war crimes or crimes against humanity. Effective deterrence relies on both normative pressures and material punishment (Kim & Sikkink, 2007)

The ICC through its prosecutions, has the opportunity to contribute to emerging culpability norms that act to limit future atrocity crimes both by making them more costly in terms of a rational public policy choice analysis, and by establishing such crimes as firmly outside the status quo of behavior accepted on the international scale.

Table 5.8: ICC Jurisdiction Application of provisions of laws and procedures

	Frequency	Percentage %
Neutral	10	5.8
Disagree	17	9.9
Strongly Disagree	49	28.8
Agree	38	22.2
Strongly agree	57	33.3
Totals	**171**	**100**

The respondents were asked to indicate their level of agreement with the statement that ICC Jurisdiction applies the provisions of laws and procedures emerging from state parties. From table 4.10, 33.3% strongly agreed, 22.2% agreed that ICC Jurisdiction applies the provisions of laws and procedures emerging from state parties however, 28.8% disagreed over the same statement. The responses indicate that the respondents were neutral that ICC Jurisdiction applies the provisions of laws and procedures emerging from state parties.

The ICC Rules of Procedure and Evidence define the victim as: - An individual having suffered direct or indirect harm as a result of the commission of a crime within the ICC's jurisdiction; and Organizations or institutions having suffered direct harm to property dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes, as a result of the commission of a crime within the ICC's jurisdiction.

Victims are defined in a broad manner. Individuals include direct victims as well as indirect victims such as the family or dependants of the direct victim and "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization". To participate in the proceedings at Pre-Trial or later, victims must show that the harm, injury, loss and damage suffered are related to the charges against the accused.

The harm, both direct and indirect, injury, loss and damage include: - physical harm including making a person unable to bear children; - moral damage resulting in physical, mental and emotional suffering; - material damage, including lost earnings and loss of property; - lost opportunities, including those relating to employment, education, social benefits, social status or legal rights; - costs such as for legal experts,

medical services or social assistance. The ICC Statute and the Rules of Procedure and Evidence recognize a right of victims, under certain conditions, to participate in ICC proceedings. When the personal interests of victims are affected, the ICC may allow victims to present their views and concerns at stages of the proceedings deemed appropriate. However, victims may only do so if it does not affect the rights of the accused and a fair and impartial trial. The Rules of Procedure and Evidence also provide for victims recognized as participants to be informed of the developments in the proceedings which affect their interests.

5.11 ICC Jurisdiction and Management of Crimes

The International Criminal Court (ICC) in The Hague is a treaty-based, international criminal court established to prosecute genocide, crimes against humanity and war crimes. Although the crime of aggression is also listed, the Court's jurisdiction in this regard is subject to a number of procedures which were agreed at the Review Conference of the Rome Statute of the International Criminal Court, convened in Kampala, Uganda from 31 May to 11 June 2011 Nations. It is complementary to national jurisdictions in that it may only proceed with a case where a state is unable or unwilling to investigate or prosecute. The Statute of the Court, known as the Rome Statute, was adopted on 17 July 1998 and entered into force on 1 July 2002. Submission to the jurisdiction of the International Criminal Court entails a partial transfer to the Court of the sovereign power of the State to administer criminal justice On 15 March 2005;

Kenya ratified the ICC Rome Statute. This gave the Court jurisdiction over war crimes, crimes against humanity, and genocide committed by Kenyan nationals or on Kenyan territory after the date of entry into force of the ICC Statute for Kenya (1 June 2005). On 26 November 2009, the ICC Prosecutor requested authorization to open an

investigation in relation to the crimes allegedly committed during the 2007- 2008 post-election violence in Kenya in which around 1,300 people were allegedly killed. This was the first time that the Prosecutor had invoked his powers to begin an investigation at his own instigation, without a referral from the State Party or the United Nations Security Council. On 31 March 2010, the ICC Pre-Trial Chamber II authorized the Prosecutor to open an investigation into alleged crimes against humanity committed between 1 June 2002 and 26 November 2009 (OTP, 2009).

Table 5.9: ICC Jurisdiction and Management of Crimes

	Frequency	Percentage %
Neutral	11	6.4
Disagree	16	9.4
Strongly Disagree	26	15.2
Agree	41	24
Strongly agree	77	45
Totals	**171**	**100**

The respondents were asked to indicate their level of agreement with the statement on the strength of ICC jurisdiction in crime management. Most of the respondents (45%) strongly agreed that ICC Jurisdiction is stronger than National Jurisdictions in management of crimes, also 24% of the respondents agreed while 15.2% disagreed. The responses indicate that the respondents were in agreement that ICC Jurisdiction stronger than national jurisdictions in management of crimes.

In February and March 2011 respectively, the Kenya Government requested the UN Security Council to halt ICC proceedings on Kenya and challenged the admissibility of the cases. It argued that the cases should be dealt with in Kenya rather than before

the ICC. Both initiatives were rejected. On 8 March 2011, Pre-Trial Chamber II summoned Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to appear before the Court, as it found reasonable grounds to believe that they committed the crimes alleged by the Prosecutor. On 7 and 8 April 2008, the six defendants made their initial appearance before the Court in The Hague. Why were some charges declined and when will the trial start.

On 23 January 2012, the ICC Judges declined to confirm the charges against Ali and Kosgey. In Kosgey's case, the Chamber found that the Prosecutor relied on one anonymous and insufficiently corroborated witness. In Ali's case, the Chamber found that there was not sufficient evidence to connect the Kenya Police to attacks carried out in the areas where perceived Orange Democratic Movement supporters resided. The Court confirmed the charges against Muthaura, Kenyatta, Ruto and Sang for alleged crimes against humanity committed during post-election violence in 2007-2008 in Kenya and committed them to trial. On 9 July 2012, Trial Chamber V set the dates for the commencement of the trials in Ruto & Sang and Muthaura & Kenyatta, for 10 and 11 April 2013 respectively. The defendants are not in the custody of the Court. On 7 and 8 March 2013, following a request by the accused, Trial Chamber V postponed the start of the trials.

It set the provisional start of trial to 9 July 2013 in the Muthaura and Kenyatta case and to 28 May 2013 in the Ruto and Sang case. At the time of writing, following a request for postponement by Mr. Ruto, the new date for the Ruto and Sang case had been set for the 10th of September, 2013. On 11 March 2013, the Prosecution notified the Trial Chamber that it was withdrawing all charges against Mr. Muthaura for lack of sufficient evidence. It indicated that it was unable to gather enough evidence in

light of a number of security issues affecting witnesses. On 18 March 2013, the Trial Chamber authorized the Prosecution to withdraw the charges against Mr. Muthaura.

The Prosecutor v. William Samoei Ruto and Joshua Arap Sang Mr. Ruto of the ODM is alleged to be an indirect co-perpetrator of crimes against humanity of murder, forcible transfer, and persecution, allegedly committed against supporters of the PNU. Sang of the ODM is alleged to have contributed to the commission of the crimes. Charges Mr. Ruto is accused of being criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the crimes against humanity of murder (article 7(l)(a)); deportation or forcible transfer of population (article 7(l)(d)); and persecution (article 7(l)(h)) Pre-Trial Chamber II found that there are no substantial grounds to believe that Mr. Sang is an indirect co-perpetrator, because his contribution to the commission of the crimes was not essential. Instead, Sang is accused of having 'otherwise contributed' to the commission of the following crimes against humanity (within the meaning of article 25(3)(d) of the Rome Statute): murder (article 7(l)(a)); deportation or forcible transfer of population (article 7(l)(d)); and persecution (article 7(l)(h)). Alleged crimes (non-exhaustive list) Pre-Trial Chamber II found that there are substantial grounds to believe that:

> Immediately after the announcement of the results of the presidential election and specifically from 30 December 2007 until 16 January 2008, an attack was carried out – following a unified, concerted and predetermined strategy – by different groups of Kalenjin people, in locations including Turbo town, the greater Eldoret area (encompassing Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town, in the Uasin Gishu and Nandi Districts, the Republic of Kenya. The attack allegedly targeted the civilian population, namely the Kikuyu, Kamba and Kisii ethnic groups, which were perceived as Party of National Unity (PNU) supporters. In particular, the violence in the Uasin Gishu District (encompassing Turbo town and the Eldoret area) allegedly resulted in more than 230 people killed, 505 people injured and more than 5,000 people displaced.

In the Nandi District (encompassing Kapsabet town and Nandi Hills town), the attack allegedly ended in the death of at least 7 persons and thousands of persons were forced to seek refuge at Nandi Hills police station and in the surrounding areas. A number of houses and business premises were also looted and burned. Allegedly, there was a plan to punish PNU supporters in the event that• the 2007 presidential elections were rigged, which aimed at expelling them from the Rift Valley, with the ultimate goal of creating a uniform Orange Democratic Movement (ODM) voting bloc.

In order to implement the plan agreed upon, a network of perpetrators has been allegedly established with the purpose of evicting members of the Kikuyu, Kisii, and Kamba communities. The Network was allegedly under responsible command and had an established hierarchy. The network possessed the means to carry out a widespread or systematic attack against the civilian population, as its members had access to and utilized a considerable amount of capital, guns, crude weapons and manpower.

The Prosecutor has submitted that William Ruto provided essential contributions to the implementation of the common plan by way of organizing and coordinating the commission of widespread and systematic attacks that meet the threshold of crimes against humanity, in the absence of which the plan would have been frustrated. William Ruto allegedly: (i) planned and was responsible for the implementation of the common plan in the entire Rift Valley; (ii) created a network of perpetrators to support the implementation of the common plan; (iii) directly negotiated or supervised the purchase of guns and crude weapons; (iv) gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy; and (v) established a rewarding mechanism with fixed amounts of money to be paid to the

perpetrators upon the successful murder of PNU supporters or destruction of their properties.

Joshua Arap Sang, by virtue of his influence in his capacity as a key Kass FM radio broadcaster, allegedly contributed in the implementation of the common plan by: (i) placing his show Lee Nee Eme at the disposal of the organization; (ii) advertising the organization's meetings; (iii) fanning violence by spreading hate messages and explicitly revealing a desire to expel the Kikuyus; and (iv) broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the violent atmosphere.

The Prosecutor v. Uhuru Muigai Kenyatta Mr. Kenyatta of the PNU is alleged to be indirect co-perpetrator of the crimes against humanity of murder, forcible transfer, rape, persecution, and other inhumane acts, allegedly committed against ODM supporters, partly in retaliation against attacks against the PNU supporters. Charges Mr. Kenyatta is accused of being criminally responsible as an indirect co perpetrator pursuant to article 25(3)(a) of the Rome Statute for the crimes against humanity of: murder (article 7(l)(a)); deportation or forcible transfer of population (article 7(l)(d)); rape (article 7(l)(g)); persecution (article 7(l)(h)); and other inhumane acts (article 7(l)(k)).Alleged crimes (non-exhaustive list) Pre-Trial Chamber II found that there are substantial grounds to believe that:

From 24 until 28 January 2008, the Mungiki criminal organization allegedly carried out a widespread and systematic attack against the non -Kikuyu population perceived as supporting the Orange Democratic Movement (ODM) (mostly belonging to Luo, Luhya and Kalenjin ethnic groups) in Nakuru and Naivasha. The attacks in or around Nakuru and Naivasha resulted in a large number of killings, displacement of

thousands of people, rape, severe physical injuries, mental suffering and destruction of property. Between, at least, November 2007 and January 2008, inter alia, Muthaura, Kenyatta and members of the Mungiki, allegedly created a common plan to commit these attacks. According to the alleged plan, it was envisaged at the meetings that the Mungiki would carry out the attack with the purpose of keeping the Party of National Unity (PNU) Information for Victims of Violence power, in exchange for an end to government repression and protection of the Mungiki's interests.

The contribution of Uhuru Muigai Kenyatta to the implementation of the common plan was allegedly essential. More specifically, Mr. Kenyatta's contribution allegedly consisted of providing institutional support, on behalf of the PNU Coalition, to secure: (i) the agreement with the Mungiki for the purpose of the commission of the crimes; and (ii) the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha.

5.12 ICC Jurisdiction Level of Performance

The International Criminal Court (ICC) has, to date, opened cases exclusively in Africa. Cases concerning 25 individuals are open before the Court, pertaining to crimes allegedly committed in six African states: Libya, Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army, LRA), the Democratic Republic of Congo, and the Central African Republic. A 26th case, against a Darfur rebel commander, was dismissed. The ICC Prosecutor has yet to secure any convictions. In addition, the Prosecutor has initiated preliminary examinations a potential precursor to a full investigation in Côte d'Ivoire, Guinea, and Nigeria, along with several countries outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

The Statute of the ICC, also known as the Rome Statute, entered into force on July 1, 2002, and established a permanent, independent Court to investigate and bring to justice individuals who commit war crimes, crimes against humanity, and genocide. As of July 2011, 116 countries including 32 African countries, the largest regional blocks were parties to the Statute. Tunisia was the latest country to have become a party, in June 2011.

The ICC Prosecutor's choice of cases and the perception that the Court has disproportionately focused on Africa have been controversial. The Prosecutor's attempts to prosecute two sitting African heads of state, Sudan's Omar Hassan al Bashir and Libya's Muammar al Gadhaffi were particularly contested, and the African Union decided not to enforce ICC arrest warrants for either leader. Neither Sudan nor Libya is a party to the ICC; in both cases, jurisdiction was granted through a United Nations Security Council resolution. The ICC complements existing national judicial systems and while it will step in only if national courts are unwilling or unable to investigate or prosecute such crimes, the Court may invite national courts to cooperate under an ad hoc agreement. If a State chooses to conclude such an agreement, it would be bound to comply with requests for assistance. Additionally, if the Security Council refers a situation to the ICC that threatens international peace and security, it can use the powers under Chapter VII of the UN Charter to compel non-States Parties to cooperate with the ICC's requests for assistance. Owing to the complementarity principle.

In Kenya it is argued that the relatively peaceful general elections in 2013 were at least partly due to the fact that the Kikuyu and Kalenjin communities united behind the Kenyatta-Ruto joint ticket (ICG, 2013, p.7). Thus, the ICC's accountability efforts not only united Kenyatta and Ruto in their quest for immunity, but also contributed to

forging an alliance between the hitherto antagonistic Kikuyu and Kalenjin communities

In this respect, it is likely that the ICC made a positive contribution towards stability in Kenya especially in the Rift Valley where ethnic tensions between Kikuyu and Kalenjin communities exploded in early 2008. It is, however, important to keep in mind that the stabilizing consequences of the ICC induced union between Kikuyus and Kalenjin are likely to be of an uncertain period.. This is because the alliance of convenience between Kenyatta and Ruto will not necessarily tackle the socio-economic grievances that fuel ethnic competition in Kenya (Hansen, 2013).

ICC prosecutions have also had a short-term stabilizing impact on inter-ethnic tensions in Kenya, through its effective deterrence of 'hate speech'. It is argued that the potential for Kenya's political elite to mobilize their constituencies through ethnically divisive 'hate speech' present the biggest challenge for inter-communal peace in the country It is, difficult to establish precisely to what extent 'hate speech' can precipitate and promote mass atrocities (Hansen, 2011, p.25). However, it seems plausible to suggest that 'hate speech' can have destructive consequences. The Rwandan experience, where "incitement to hatred by RTLM radio was crucial to the success of the 1994 genocide", serves to illustrate this point (Akhavan, 2009). A member of the focus discussion group asserted that;

> The ICC investigations in Kenya significantly reduced the use of 'hate speech' during the 2013 election campaign and therefore had a positive impact on inter-ethnic tensions in the country. (discussant).

Even though there were several lower-level politicians who (again) resorted to the rhetoric of ethnic competition during the campaign for the 2013 elections, the main

candidates Kenyatta, Ruto and Odinga largely abstained from such divisive propaganda (Hansen, 2011; ICG, 2012). This reluctance to resort to 'hate speech' can be seen as a direct consequence of the ICC's involvement in Kenya. During the hearings of Ruto et al. in early April 2011, the presiding judge of the Pre-Trial Chamber II warned the main suspects that the use of "dangerous speeches" would lead the ICC to issue arrest warrants (Musau, 2011).

> It was observed that the warnings had a positive impact on the nature of statements subsequently made by the suspects during the campaign for the 2013 elections (ICG, 2012).

In 2013 general elections, there was a notable change in the language used during the suspect's home-coming' rally shortly after the ICC issued its warning. William Ruto said that:

> They were prepared to carry the cross, but their consolation is that never again shall a Kenyan lose his life or property because of political competition (Hansen, 2011).

Thus, it seems plausible to maintain that the ICC has effectively deterred the use of 'hate speech' during the run-up to the 2013 elections, thereby significantly decreasing the risk of ethnically-motivated violence in Kenya at least in the short term. The ICC interve4ntion in Kenya has to a greater extent added value to the accountability efforts and also had consequences that will decrease the likelihood of PEV in the long term. It also prompted judicial reforms in Kenya and thereby contributed towards the crucial task of ending the 'culture of impunity', which has allowed elites to orchestrate ethnic violence for their own political goals. It is widely acknowledged that Kenya's unaccountable and inefficient criminal justice system is responsible for perpetuating a 'culture of impunity' amongst the country's elite (Bjork & Goebertus, 2011).

This ‘culture of impunity’ has, in turn, encouraged unscrupulous politicians to use ethnic violence as a political weapon against adversaries, knowing that their crimes would go unpunished (Hansen, 2011, p.26). it is plausible that the public opinion’s preoccupation with the ICC trials took pressure off the Kenyan government to undertake needed reforms of the domestic criminal justice system. Hansen (2011) shows how the wish to avoid accountability at The Hague prompted Kenyan politicians to support domestic judicial sector reforms. He quotes one influential MP, Ephraim Maina, as saying that parliament:

> Must now concentrate on enacting laws that will lead to creation of a tenable judicial mechanism and ensure it is in place when the [suspects] return to The Hague. With this, the country will be able to argue for a deferral and transfer of the case home (Hansen, 2011).

Despite the failure of its initial admissibility challenge, the Kenyan government continued to challenge the ICC cases by citing the Rome Statute’s complementarity regime and domestic judicial reform efforts (ICTJ, 2013). Hansen suggested that the linkage between the admissibility challenge and domestic reforms has led to the appointment of a new Chief Justice, Willy Mutunga, who was generally believed to be firmly committed to the rule of law (Hansen, 2013).

In addition, the effort to ‘bring the cases home’ prompted the Kenyan parliament to pass number crucial bills throughout 2011 to reform the judicial system (Hansen, 2011). Particularly noteworthy in this regard are the Judicial Service Act, the Vetting of Judges and Magistrates Act, and the Supreme Court Act, which together were meant to establish the necessary institutional prerequisites to tackle the problems of unaccountability and ineffectiveness in the criminal justice sector (ICTJ, 2013). In the long run, these important ICC induced reforms are likely to help Kenyans in the fight

against the ‘culture of impunity’ that has in the past encouraged unscrupulous leaders to orchestrate ethnic violence against supporters of their adversaries.

The ICC had positive long-term consequences for stability in Kenya in relation to the public debates that were sparked by the ICC prosecutions. The international trials led to a healthy skepticism amongst ordinary Kenyans concerning the relationship between ethnic groups and their political leaders. This skepticism in turn undermined the potential for mass mobilization based on ethnicity. Numerous Kenyan NGOs used the ICC prosecutions as a proof of the inadequacies of their current leaders and as a tool for mobilizing public opinion to oust the political establishment and change the basis on which politicians are elected. The ICC prosecutions imbibed a new thinking; an awakening among Kenyan politicians to move away from ethnicity based towards issue based political loyalties (Bjork & Goebertus, 2011).

The various ICC induced civil society initiatives united under the widely known campaign slogan ‘Don’t be vague, go to The Hague’ in order to push for elite accountability and to educate the public about the ICC proceedings (Brown & Sriram, 2012, Bjork & Goebertus, 2011).

The above-mentioned advocacy efforts to some extent helped to undermine the view amongst ordinary Kenyans that their fate is closely connected to that of their community’s ‘kingpins’ A survey found that an overwhelming 78% of Kenyans support the ICC’s prosecutions of the ringleaders behind the 2007/08 PEV (KNDR, 2011,). Crucially, Kenyans viewed criminal prosecutions as the single-most important way of preventing new ethnically-motivated violence Furthermore, the ICC prosecutions have helped to undermine the long-held perception amongst ordinary

Kenyans that their political leaders are above the law (Hansen, 2011). A member in the focus discussion group noted that;

> During the April 2011 hearings at the ICC, the presiding judge ordered William Ruto to "sit down and be quiet" when he interrupted the court proceedings to challenge the charges brought against him (discussant).

Importantly, this incident at the ICC received significant attention in national media and sent a clear signal to ordinary Kenyans that powerful individuals such as William Ruto would no longer be 'untouchable' (Hansen, 2011). In the long term, it is likely that the above-mentioned ICC-induced changes in Kenyans' views about their political leadership will contribute to a decrease in inter-ethnic violence by de-linking the fate of individual criminal politicians from that of their ethnic communities.

In light of the above it can be concluded that the ICC's accountability efforts in the wake of the 2007/08 post-election violence had a positive impact on inter-ethnic relations in Kenya both in the short term and in the long term. The Kenyan experience gives reason to believe that accountability efforts in the wake of mass atrocities are not only desirable according to the rationale of appropriateness', but can also make sense according to the rationale of consequences'. Nevertheless, it should be kept in mind that these findings do not allow firm conclusions to be drawn about the general performance of international criminal prosecutions on state sovereignty in the wake of mass atrocities. Indeed, the much more ambiguous consequences of ICC interventions in, for example, Uganda or Sudan should warn against making broad generalization based solely on the Kenyan experience (Akhavan, 2009; Rodman, 2008).

Before such firm conclusions about the causal effects of international criminal tribunals can be drawn, a much more systematic and comparative impact assessment across a large number of cases would be necessary. The crux of the ICC role lies in

enforcing and inducing compliance with specific norms of international law aimed at outlawing and preventing mass violence and these positively promoted the level of performance of the ICC jurisdiction in Kenya.

Table 5.10: ICC Jurisdiction Level of Performance

	Frequency	Percentage %
Neutral	28	16.4
Disagree	21	12.3
Strongly Disagree	10	5.8
Agree	49	28.7
Strongly agree	63	36.8
Totals	171	100.0

The respondents were asked to indicate their level of agreement with the statement on the level of performance of ICC jurisdiction. Most of the respondents (36.8%) strongly agreed that ICC Jurisdiction has a widest level of performance since introduction of the Rome statute in 1998, 28.7% agreed and 16.4% of the respondents were neutral over the same statement however, 12.3% strongly disagreed. The score of responses indicate that the respondents were in agreement that ICC Jurisdiction has a widest level of performance. According to the focus group discussion the ICC;

> Has performed well and it should be encouraged given that ,its seems to tame impunity of rogue leaders in Africa (discussant).

In the fore going the participants agreed that the ICC is a fairly young institution, having only been open and active since 2003. Therefore the institution, like the Tribunal courts before it, have to take into account small successes, especially when dealing with doctrine and law that the court achieves in order to evolve its uses and expand its powers through increased efficiency and reduced state opposition. In order

for the court to fully realize its potential, it must show the world that it can be a successful permanent institution in international law with clear standards and goals, as well successful indictments, prosecutions and convictions of heinous war criminals in different parts of the world. Although Kenya is a party to the Court, the government has recently objected to ICC involvement, which some contend could be destabilizing. Congressional interest in the work of the ICC in Africa has arisen in connection with concerns over gross human rights violations on the African continent and beyond, along with broader concerns over ICC jurisdiction and U.S. policy toward the Court.

Obama Administration officials have expressed support for several ICC prosecutions. At the ICC's 2010 review conference in Kampala, Uganda, Obama Administration officials reiterated the United States' intention to provide diplomatic and informational support to ICC prosecutions on a case-by-case basis. The U.S. government is prohibited by law from providing material assistance to the ICC under the American Service members' Protection Act of 2002, or ASPA (P.L. 107-206, Title II). Legislation introduced during the 111th Congress referenced the ICC in connection with several African conflicts and, more broadly, U.S. policy toward, and cooperation with, the Court. The initial successes of the ICC came quickly and have compounded over time, definitely laying a foundation for what could be an extremely efficient and successful judicial entity.

The fact that the Rome Statute passed with such a lopsided victory, despite all of the objections from different sides regarding the semantics of the document, was a major victory in itself. Then, the rapidness of the ratification of the treaty, just four short years after the monumental signing, showed that the need to establish a world criminal court was present. Since the inception of the court, fifty seven additional

nations have joined the court, with more coming all the time. The support for the ICC is definitely growing, especially among the smaller nations of the world, as they view the ICC as a support system to their own domestic judicial institution.

When the outline for an international criminal court was established, it quickly became evident that in order for the court to not only appease the reluctant states, but maximize its usefulness on the international stage, the court had to be complimentary. This role of a complimentary institution maintains the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial.

By limiting the role of the ICC to complimentary, the Rome Statute and the states that are party to the treaty created a last resort institution that will only be utilized if the country is unable or unwilling to prosecute their war criminals. This entails many factors that must each be examined before an indictment or even an investigation is launched by the ICC.

First, is the country's judicial system intact? Many war crimes are committed during times of civil war, or in the recent case of Libya, the civil war often leads to regime change. If a new court is not established, and the state is therefore unable to launch an investigation or hold a court proceeding, then the ICC can step in as a support unit and take over the case. Also, if circumstances arise that invoke a sense of bias for or against a criminal who is being prosecuted, such as the case of President Al-Bashir of Sudan for the crimes committed in Darfur in which his country will never consider indicting him, then the ICC can step in and takeover the case, as they have done.

In order to determine if the state is unwilling the court needs to examine if the proceedings are impartial, if the criminal is being shielded by government lackeys or whether there is an unjustifiable delay in the proceedings. The role of a complimentary court counts as a success because it limits the authority the court possesses, and it enables the states themselves to take the initiative in prosecuting their own criminals.

By limiting the power of the court, the Rome Statute correctly prevented the court from growing into an unrestricted power. Another success of the ICC is the clearly defined roles that the different organs operating within the confines of the Rome Statute have and how they are utilized to the advantage of the court and the international stage, especially the unique role of judges and the use of the appeals process.

First, the court's decision making process is common law, which means that judges, and not a jury, decide the fate of the accused based on legal precedence and knowledge of the law. Although this is contrary to the United States legal system, it definitely has its benefits. The common law practice definitely ensures that the rights of the individual, as well as the palpability of the court are handled by professionals. This is very important with an international forum because of the vast differences between hundreds of judicial systems. A civil law court at the international level is simply not practical. By granting the fate of inductees to the judges, a system of checks and balances has also been included in the Rome Statute and is therefore utilized by the court. The appeals system for the ICC creates an atmosphere of fairness and justice that protects all individuals, from the defendants to the victims, of their alleged crimes.

In the ICC an appeal can not only be granted for guilty verdict, but also an acquittal. This additional appeal gives the prosecutor a second chance to submit additional evidence that may change the determination of the judgment. In creating a system in which the court can interpret international criminal law, it has correctly identified the issue that needs to be addressed in order for the court to blossom and reach its full potential. It will need to create a system in which precedence can be established and therefore common law is correctly carried out.

In 2010, a major breakthrough for the court came into existence which has been viewed not only as a display of the flexibility of the state's party to the Rome Statute, but a necessary addition to the constantly changing international community. The Conference in 2010 in Kampala, Uganda took direction from the UN Security Council a step further and inducted a definition of aggression based on SC Resolution 3314, and added it to genocide, war crimes and crimes against humanity as a list of possible crimes that fall under the umbrella of the ICC. Although Kampala has not been entered into effect as a treaty yet, it cannot take effect until January 1, 2017, this amendment to the Rome Statute showed the flexibility of the court and its states members to adjust to a constantly changing world. Adding aggression to the list of war crimes ensured that despite the solid foundation from the Rome Statute, the ICC was able to add new amendments that would further extend its jurisdiction and ensure international peace.

Another example of this adaptability occurred in 2009 when a Review Conference convened and stated that an amendment should be considered to include terrorism to the list of crimes falling under the ICC's jurisdiction. This document called Annex E, laid out a fairly acceptable definition of terrorism, which has been one of the major stepping stones in the process of including it in international criminal law, and went as

far as to almost recommend that the Rome Statute should include terrorism as another crime added to the list for ICC jurisdiction. Although the steps have not yet been taken to establish an amendment for a new inclusion, the groundwork has been laid, and therefore the idea of including terrorism has been mulled over. This is just another example of the constant flexibility and adaptability of the ICC and the Rome Statute, which is absolutely essential to the success and survival of the court.

Overall the major successes of the court have been almost exclusively on paper and not in the actual prosecuting or sentencing of criminals, which will be discussed in the next section, the legal precedence, general international acceptance and the adaptability of the court form a foundation and pathway for overall success. The success of the court has not yet been completely realized, but the framework is in place and is constantly adapting to the changing world that should ensure the success of the court in the future.

Despite sufficient groundwork for the ICC laid out through the Rome Statute and amended to include aggression at Kampala in 2010, the ICC in many nation's eyes has been a failure. Despite the doors opening and becoming fully functional in 2003, just recently, September 2009, the ICC opened its first case, prosecuting Congolese warlord Thomas Lubanga Dyilo. For nine years the court has sat dormant due to several different reasons. When the ICC first opened its doors, it immediately began investigating various situations, especially in Africa for the crimes it was established to enforce.

The first elected chief prosecutor, Luis Moreno-Ocampo, an Argentine lawyer who gained fame through exposing Argentine corruption in the Trial of the Juntas, was inaugurated in 2003 and opened cases in regions such as Uganda and the Democratic

Republic of Congo. Since that time Ocampo has been widely criticized for his continuous failures and this disappointment has led to reluctance of the states. Although recently, the trial of Thomas Lubanga Dyilo has been completed and the accused has been found guilty of all charges as of March 14, 2012, this event stands on the doorstep of Moreno-Ocampo's departure from the role of Chief Prosecutor. When the ICC was established through the Rome Statute it became evident that the role of the chief prosecutor would be essential to the court's success, and in many ways the successes of the court would mirror the successes of the prosecutor.

This analysis has become accurate, only to the negativity of the court. Moreno-Ocampo's failures are directly linked to the failures of the ICC in its attempt to become a viable force in the stage of international criminal law. Some believe that Moreno-Ocampo's attitude and management style are not conducive to the teamwork required in order to increase the fluidity with which the court is run. Due to the lack of success, the funds wasted and the fact that only one trial has been completed, and that taking over three years with sentencing yet to come, some of the failures of the ICC must fall on the chief prosecutor's shoulders.

Furthermore, when his term comes due in mid-2012, a continued legacy of the Moreno-Ocampo regime will take over duties as the new Chief Prosecutor, Fatou Bensouda, Ocampo's current Chief Deputy, and an extension of his tenure. Although Ms. Bensouda has been in the Ocampo corner for ten years, she is from Gambia, which may diffuse some of the bias discussed below that so scarred the Ocampo regime. Hopefully, Ms. Bensouda can enlist the help of his subordinates instead of isolating them, and ensure that states follow the jurisdictional guidelines of the court. This brings about another flaw or failure of the ICC.

The ICC depends on the cooperation of the states that have ratified it to turn over suspects, and help in the information gathering process to speed up and actually complete fair and efficient trials. Unfortunately for the ICC, this is not always the case. Specifically, many instances have occurred since the inception of the court where the prosecutor has the evidence, the indictment has been issued, but no trial ensues simply because the indicted is not turned over to the ICC for trial. Therefore the suspect remains at large as an international criminal. This is especially the case with Omar Al-Bashir of the Sudan. Due to the lack of cooperation, heads of states indicted, as well as powerful military leaders continue to purge local populations without having to answer to their crimes. Despite ratification of the Rome Statute, the perception of state cooperation and the actuality of it can be vastly different.

This lackadaisical approach by party states continues to frustrate the court and its process. Something must be done to ensure that criminals indicted by the court appear at the court.The final major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security council. As of this text, China has not signed the Rome Statute, and neither the United States nor Russia has ratified it. In fact, as of the Bush Administration actions of 2002, the United States actually unsigned it. This lack of participation certainly hinders the ability to enforce the laws instituted by the court. The lack of U.S. participation especially hinders any palpable advancement of the court. Why does the U.S. not support the court?

While the U.S. does deploy many troops overseas each year, full participation from the U.S. and the other permanent members of the Security Council is essential to the survival and effectiveness of the court. Granted veto power for permanent member status, if any of these three powers considers an indictment contradictory to the

agenda of their nation, they can veto the indictment and allow the crimes and the perpetrator to go on unpunished.

Not only is the U.S. not signing or party to the Rome Statute, they had established a confrontational approach to the Statute under the Bush presidency. The U.S. has over fifty treaties of such, and is therefore undermining the justice and integrity of the court. Now however, the new administration, under President Barack Obama has begun to show some semblance of cooperation to the court and its functions. Although this is a step in the direction of support, the U.S. has not gone as far as signing the Rome Statute, or giving its full-fledged backing. Therefore, the overall lack of Security Council support which still exists, even from the teetering U.S., will need to be resolved in order for the ICC to reach its full potential.

Overall, despite a strong foundation laid out at the Rome Conference, the ICC has had few tangible successes since its inception. Some of this can be attributed to the youth of the court, but much can be realized specifically from the three major flaws previously discussed, the ineptness of the prosecutor's office, the unwillingness of states party to the treaty to cooperate with the wishes of the court, and the lack of support from permanent members of the UN Security Council which holds veto powers over the cases of the ICC. Due to hindrances such as these, the court has struggled to carve out its niche in the world of international criminal law.

In order to ensure the long-term success and stability of the ICC, the failures must be addressed, and the accomplishments must be enlisted as a tool for building. Over the next decade, several adjustments must be made in order to secure a foothold in the global world.

The first thing that needs to be recognized about the ICC is the relative adolescence of the court itself. For many institutions, especially those crossing so many international boundaries, it needs to be expected that time will help evolve and shape the future of the institution. When referring specifically to the infancy of the court it helps to examine the early years of other international judicial institutions such as the ICTY and ICTR. When the ICTY and the ICTR were established in 1993 and 1994 respectively, the groundwork for these two institutions was essentially a revolutionary idea, where as a civil war and specifically crimes committed during those civil wars were being punished on an international level. Many people questioned the authority of the UN Security Council to involve itself and establish a judicial system to deal with domestic disputes. Due to these factors, as well as monetary issues, both of these courts, although established quickly, found it hard to secure their foothold on the international stage.

The ICC has faced many of the same problems early on, and with the broadness of its jurisdiction, some of the problems facing the ICC are compounded by sheer convolution of judicial interaction with so many different states. As it stands right now, one of the main goals for the ICC is to prevent itself from becoming irrelevant. Both the ICTY and ICTR struggled in the early stages, but now both are thriving and have become fully recognized functioning institutions of international judiciary law. This influence has just recently gained prominence, and in order for the ICC to mirror the successes of these tribunals, the key will be patience.

The second short term goal of the ICC, in order to maintain relevance and support, is to ensure the new figurehead, Ms. Bensouda, becomes a charismatic figurehead to be the face of the court for many years to come. Moreno-Ocampo has obviously not fulfilled the exorbitant expectations that were placed directly on his shoulders when

he ascended to the office of chief prosecutor. Despite the intentions of firm policy and pursuant of miscreants, Moreno-Ocampo's record has not withstood the enormous expectations placed on him at the time of his election. Instead he has alienated staff and produced little results, while at times being categorized as abrasive or uncooperative.

The next chief prosecutor needs to be charismatic and assertive while simultaneously working in the confines of the international system. This can be a very fine line to walk. On one hand, the authority of the ICC must be upheld, but on the other it also must be understood that the court uniquely deals with many nations, and the diplomacy involved in receiving full cooperation from the parties of the Rome Statute must be a priority.

In other words, the Prosecutor Bensouda has an enormous task of not only locating and indicting the correct situations and criminals, but also receiving the full cooperation of the states functioning within the treaty. In order to become more efficient and therefore successful, some ground rules must be laid by the ICC and the parties of the Rome Statute to ensure the full support of the states. Due to recent events, especially those pertaining to Omar Al-Bashir and the Darfur conflict have exposed the ICC's weakness on the international stage in regards to persuading states to turn over criminals indicted by the court. The ICC constantly finds itself in a precarious situation, juggling the rules established as a responsibility of the court and the constant interference or agenda of all states, including those states that have ratified and also those that have not ratified the Rome Statute.

In order to ensure the support of the global environment especially the specific parties to the treaty, the next conference needs to reiterate the importance of state cooperation

in the apprehension of ICC fugitives. Consequences for disobedience of the Treaty, and therefore breaking international law, such as economic sanctions or aid reduction from other party nations need to be discussed and perhaps implemented in order to ensure that criminals do not go unapprehended indefinitely. This is simply a small step to reaffirm that states which harbor or fail to apprehend fugitives within the confines of their borders must face consequences in the form of international ridicule, as well as possible trade sanctions or aid reduction.

As Demirdjian affirms, this may be difficult, "despite the binding effect of the general legal framework establishing international courts, cooperation with international courts is a delicate topic and generally speaking, it is a fragile scheme considering the lack of enforcement mechanisms." This statement implies the need for a permanent policing force directly under the umbrella of the ICC. While this idea may have merits, the reality of states willingly granting the court an international police force is unlikely. Despite the fact that the cooperation of states is included in the Statute, not all states interpret this as such. In order to enforce the article a conference needs to be called to reiterate and maybe even amend the Rome Statute to take a firmer stance on state cooperation in the apprehension of the indicted, with possible economic sanctions, or loss of foreign aid as possible consequences for insubordination to the treaty. This scenario seems more likely, and may produce positive results through understanding.

A last short term goal for the ICC will involve the long and arduous task of courting the United States to sign and ratify the treaty in order to receive more support and power, enabling the court to function properly. This will not be a simple process, and therefore the short term goals need to focus on simply bridging the enormous gap

between the ICC and the United States. The first step in this process should be the acceptance of Annex E into the legal framework of the ICC as an amendment.

Considering the U.S.'s "war on terror" the inclusion of terrorism and terrorist acts as defined in Annex E will provide a basis with which may successfully barriers may be broken between the two parties. Terrorism may be the most explosive threat to all global states, and therefore inclusion into court doctrine seems to be the a natural progression. As Van Krieken states, "That, however, does not mean that one should not prepare for adding terrorism to the list of crimes for which the ICC would have jurisdiction." The court must proceed knowing that the inclusion of terrorism under its jurisdiction will not instantly convince the U.S. to sign and ratify the treaty. It may be a small step towards creating an atmosphere of bilateral thinking opening the waves of diplomacy and communication for both parties.

Since the U.S. has gone out of its way to isolate countries through separate treaties even with those party to the Rome Statute, but recently showed some signs of bending toward the jurisdiction of the court, the court must find a way to deter American disapproval of the jurisdiction of the court. Including Annex E as an amendment to the Rome Statute may be the first step in the long courting process of the U.S. and possibly the UN Security Council.

The face of the ICC for the long-term remains extremely convoluted. The willingness to adapt to the wishes of the majority of the permanent members of the UN Security Council remains its most compelling and arduous task. Bridging the gap between powers such as the United States and China will ultimately make or break the court in the long run. In certain circumstances the wishes of these major powers may need to be compromised and included for the court to reach its full potential. This is a fine

line considering the court must also uphold its own authority and integrity. The court needs to broaden its spectrum in regards to intercontinental examination. Currently all of the cases being brought before the court are located in Africa. Now, as some Africans claim bias, the turmoil in Africa is no secret.

While this charge may be unfounded, it is definitely an issue that needs to be addressed. With the election of an African Chief Prosecutor, the court has definitely addressed those intitial concerns. Furthermore, the indictment of war criminals in other parts of the world, for example, Afghanistan, Burma, Honduras or Palestine, the court must make it a priority to shake the label of being a lackey to the West.

These long-term goals, while complicated, must be addressed with concern to the evolution of the court. The goals of the ICC will absolutely need to focus on bringing criminals to justice, successfully prosecuting them, and sentencing them for the crimes committed during times of war. Ultimately without successful prosecution the ICC will continue to face international opposition, and therefore this must be their main priority. The successful prosecution of Lubanga Dyilo is a start. However, in order to continue to receive support and possibly enlist new support, the ICC must complete the task it was established to do, and that is convicting war criminals of the atrocious crimes they have committed. The other short term solutions suggested above will only increase the efficiency and success of the court, but ultimately judgment of the court will lie in the hands of its ability to function cohesively.

Throughout the history and evolution of an international criminal court from World War II on, the need has never been a debatable topic. The need, due to the inevitability of humans acting inhumane towards their fellow man, especially in conflict areas, will always be present. Overall, the ICC needs to be examined in the perspective of its

context. It is an adolescent institution that must function in an international system without full global support and especially lacking in support from major global powers. This can be a very precarious situation to bridge and maintain. However, success will be the foundation of its power. The more successful and justifiable cases that are brought and handled before the ICC, the more that its niche in the international stage will be carved. When this occurs, major powers such as the U.S. and China can ill afford to ignore the criminal court.

In order to do this, the ICC will need to be willing to be flexible, but simultaneously relevant, as well as find a charismatic champion to become the face of the court, and revert back to some of the fantastic foundations from which the Rome Statute was derived. If all of these things can be accomplished, and the ICC can successfully complete cases and see things through to the end, then the importance of the court will only grow exponentially in the global forum.

CHAPTER SIX

ICC JURISDICTION AND RESPONSIBILITY TO PROTECT (R TO P) IN KENYA

Chapter six discussed the findings in the context of responsibility to protect and made conclusions there from with the view to espouse ICC jurisdiction and responsibility to protect in Kenya as part of critical analysis on ICC jurisdiction influencing state sovereignty in Kenya This chapter delved in four levels approach namely ; ICC jurisdictions is not a substitute for national courts, International Criminal Court Jurisdiction prosecutes Individuals who have committed crimes of international concern, State parties to the Rome statute submit totally to the International Criminal Court and State parties to the Rome statute submit totally to the International Criminal Court.

The Responsibility to Protect (R2P) process and the International Criminal Court (ICC) are quite probably the most important innovations in human rights protection for decades. While they are not formally linked, they were developed alongside each other, with similar purposes (to confront atrocity crimes through prevention, protection or prosecution), and were expected to work in tandem to temper international politics and to end impunity. the gradual diffusion of the R2P norm through international governance discourse and institutions following the publication of the ICISS report in 2001, and the entering into force of the Rome Statute that established the ICC in 2002, were judged by many, particularly in UN bureaucracies and the NGO sphere, to be game-changing in their challenge to power politics and state sovereignty. Kofi Annan explained the significance of R2P, after the 2005 World Summit's (limited) endorsement of its principles, as follows: 'Human life, human dignity, human rights raised above even the entrenched concept of State sovereignty.

Global recognition that sovereignty in the twenty-first century entails the responsibility to protect people from fear and want. A global declaration that reinforces the primacy of the rule of law. Despite apparently widespread support for R2P and the ICC, the governance structures of the international community, specifically the United Nations Security

Council (UNSC), and the states that work within them, have failed to bring about meaningful action either to protect those under threat or to prosecute those who have committed atrocities. The ICC and R2P are therefore argued to be in crisis, and the failure of the international community to act according to their principles in the face of suffering on such a scale suggests that they are, at best, in need of substantial reform.

6.1 ICC jurisdictions is not a substitute for National courts

The ICC does not replace national criminal justice systems; rather, it complements them. It can investigate and, where warranted, prosecute and try individuals only if the State concerned does not, cannot or is unwilling genuinely to do so. This might occur where proceedings are unduly delayed or are intended to shield individuals from their criminal responsibility. This is known as the principle of complementarity, under which priority is given to national systems. States retain primary responsibility for trying the perpetrators of the most serious of crimes. The mandate of the Court is to try individuals rather than States, and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court's jurisdiction over the latter are fulfilled. The International Criminal Court's status as a permanent institution governing a vast array of nations is a marked departure from the common practice at

the time of its creation: ad hoc tribunals created by the United Nations Security Council that were permitted to ignore the traditional norms of territorial and personal jurisdiction. This new style of international court has required the adoption of new standards to govern its relation to domestic courts

Table 6.1 ICC jurisdictions is not a substitute for National courts

	Frequency	Percent
None	150	87.7
Disagree	15	8.8
Strongly Disagree	6	3.5
Total	171	100.0

In respect to the statement indicated above 87.7% neither agreed nor disagreed with it, 8.8% disagreed and 3.5% strongly disagreed that The ICC is not a replacement of the national criminal justice systems; rather complements them. It can investigate and, where warranted, prosecute and try individuals only if the State concerned does not, cannot or is unwilling genuinely to do so.

After failed attempts to conduct a criminal investigation of the key perpetrators in Kenya, the matter was referred to the International Criminal Court in The Hague. In 2010, the Prosecutor of the ICC Luis Moreno Ocampo announced that he was seeking summonses for six people: Deputy Prime Minister Uhuru Kenyatta, Industrialization Minister Henry Kosgey, Education Minister William Ruto, Cabinet Secretary Francis Muthaura, radio executive Joshua Arap Sang and former police commissioner Mohammed Hussein Ali all accused of crimes against humanity. The six suspects, known colloquially as the "Ocampo six "were indicted by the ICC's Pre-Trial Chamber II on 8 March 2011 and summoned to appear before the Court.

The government of Kenya and the National Assembly both attempted to stop the ICC process. The government appealed to both the United Nations Security Council and the Court itself regarding the admissibility of the case. The National Assembly voted in favour of removing Kenya as a state party to the Rome Statute, the international treaty which established the ICC. Despite this opposition, the suspects cooperated with the proceedings and attended preliminary hearings in The Hague in April 2011 and confirmation of charges and hearings The Pre-Trial Chamber II confirmed the charges against Kenyatta, Ruto, and Sang and declined to confirm the charges against Ali, Kosgey, and Mathura. On 22 December 2010, a week after the ICC Prosecutor announced the individuals he was seeking to prosecute, the Kenyan National Assembly passed a motion seeking to withdraw Kenya as a State Party to the Rome Statute, the treaty which established the International Criminal Court. The motion, which was introduced by Assembly Member Isaac Ruto had previously been thrown out of the National Assembly by Deputy Speaker Farah Maalim who ruled it was unconstitutional; however an amended version was introduced the following day and passed. During the debate, the Minister for Energy Kiraitu Murungi claimed the ICC was a colonialist, imperialist court This motion did not itself affect Kenya's status as a State Party to the Rome Statute, but rather obliges ministers to move to repeal Kenya's International Crimes Act which ratified the Rome Statute and made necessarily changes to Kenyan's criminal code. In February 2011, Kenya appealed to the United Nations Security Council, asking it to defer the trials at The Hague. Some critics in Kenya have also questioned the constitutionality of the Rome Statute, arguing that it is incompatible with the Constitution of Kenya, which was passed by a referendum in 2010.During the interview session a key informant was quick to point out;

> Kenya is an independent state with its arms of government namely the judiciary, executive and the legislature, there is no one time that any of this

> arms have been proved incompetent through the provisions of the constitution of Kenya 2010, howdare we subject ourselves to that spurious and politically meshed institution called ICC? He paused. (Key informant).

Amidst the political gerrymandering and Legal interpretations and disputations from all and sundry, the Hague based court was determined proceed with the Kenyan cases whatsoever. The Kenyan government's attempt to defer the cases at the ICC by appealing to members of the UN Security Council failed without being voted on however the governments, represented by British lawyers Geoffrey Nice and Rodney Dixon, subsequently applied directly to the Court. The Kenyan government's application to Pre-Trial Chamber II that the two cases were inadmissible was rejected unanimously by the judges Many victims of the post-election violence voiced opposition to the government's stance.

The creation of the International Criminal Court (ICC) an achievement of incredible product of growing international consensus on conceptions of rights. But the ICC as contemplated by the Rome Statute the document that produced the Court and governs its actions The preamble to the Rome Statute of the International Criminal Court calls on signatories to "exercise criminal jurisdiction over those responsible for international crimes" while reassuring states that the Court's jurisdiction will complement, rather than replace, the jurisdiction of national courts The inclusion of this language was necessary for the creation of the Court, as the exercise of jurisdiction by an international organization over a criminal event that occurred within a particular state, no matter how horrific, is often seen as an intrusion upon a state's sovereignty ..

The ICC's admissibility determinations regarding Kenya's 2007 post-election violence have philosophically altered the Court's admissibility regime by requiring states to do more than simply promise to investigate the regime is now characterized,

not by complementarity, but by competition between the Court and states with jurisdictional claims.

The Court's treatment of admissibility and complementarity in the Kenya situation creates a regime favoring the most sophisticated party, where states and the Court are racing to advance investigations and prosecute specific individuals for specific crimes.

The Court created this particular admissibility environment by circumventing the high threshold determinations of sections (a) and (b)of Article 17, Section 1, of the Rome Statute and by utilizing a demanding definition of "investigation" and a high burden of proof the Court fosters a spirit of competition by creating a regime where the further the ICC progresses towards a case, the higher the burden on the state to prove that it is exercising its jurisdiction and, by shifting the burden of proving proper jurisdiction from the Court to the slower investigating party.

6.2 International Criminal Court Jurisdiction Intervenes where a state fails/ unable or unwilling to genuinely carry out investigations or prosecute. Perpetrators of crimes against humanity

International criminal court, its application and enforcement plays out in an environment where law, politics, international relations, diplomacy and justice intersect. It is a playing field that involves many actors' governments, regional organizations, international institutions, victims and civil society. All stakeholders have to work towards the pursuit of international criminal

Justice through two distinct but related processes: cooperation and "positive complementarity". Obligations placed on states parties to ensure cases before the ICC proceed smoothly. States parties are required to establish procedures to facilitate these

obligations and the use of domestic courts as courts of first instance in the prosecution of international crimes. The Rome Statute envisions the role of the ICC as a court prosecuting international criminals only when national jurisdictions are unwilling or unable to do so. This places weighty obligations on states parties to the Rome Statute to undertake such prosecutions. Through the agreement of international conventions and treaties dealing with international crimes; the establishment,

and resultant jurisprudence, of the ICTY and the ICTR; and the coming into force and the establishment of the first permanent international criminal court (ICC) it is clear that the international community has placed a premium on the punishment of international crimes, to the extent that binding obligations on states to combat impunity for international crimes exist under customary and treaty law. These efforts have led to acceptance that genocide, crimes against humanity and war crimes are crimes under customary international law. The process of addressing international crimes is fraught with inherent challenges and political complexities. The international criminal law is one with more proponents than critics, however a variety of objections have been raised and, in some instances, used to justify noncompliance. While the enactment of the Rome Statue represents the international community's acceptance of the need to address international crimes, questions remain as to why international criminal justice is a worthwhile exercise. During the focus discussion group a discussant said;

> The international criminal court was a wise idea but now it has renegaded into a club of Developed countries still with imperial mentality, policing their former colonies in Guise of guarding international peace and security (discussant).

In fact, for a system that has widespread acceptance and uptake among states, CSOs and society at large, there is surprisingly little consensus or even consideration given

as to why there is a need to pursue international criminal justice. Perhaps it is because the need for justice in respect of crimes of the scale and nature of those international criminal law addresses appears self-evident. However, there are a number of reasons why the "why" question is important. For one, as the field expands and resources become stretched particularly in a domestic setting the question of purpose will become important to the allocation of scare resources. Therefore it is necessary to consider the reasons commonly advanced for why we punish international crimes.

One commonly asserted reason for prosecuting international crimes is retribution. During interview sessions a key informant said;

> Perpetrators of these crimes deserve to be punished. Similarly, but from the other side of the equation, is the argument that the victims of such crimes deserve to see justice done. Other explanations for why we punish international crimes focus on the effects such trials can have, such as deterrence (Key informant).

More broadly, many present international criminal justice as a more comprehensive means of addressing the challenges faced by societies emerging from conflict, allowing for the promotion and sometimes re-establishment of respect for rule of law and human rights. Even in wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power. Political climates and fortunes change, and the seemingly invincible leaders of today often become the fugitives of tomorrow. The vigilance of international criminal justice will ensure that their crimes do not fall into oblivion, undermining the prospect of an easy escape or future political rehabilitation (Akhavan, 2001).

International criminal justice can serve as a stabilizing force in a post-conflict setting. It can facilitate disarmament, demobilization and reintegration programmes that need to occur in order to create a stable post-conflict society. Furthermore, it is argued that

international criminal justice has the ability to support peace processes by removing figures that may threaten to undermine these. In a post-conflict environment, a culture of justice is an important political asset in alleviating the temptation for destabilizing practices of vengeance.

Moreover, prosecutions under international criminal justice can act as incentives in peace-building efforts beyond the post-conflict society itself. Such prosecutions demonstrate to political leaders in other countries that there isn't immunity in committing criminal acts. Strengthen Rule of Law. In a post-conflict context, where the political elite have often orchestrated the crimes in question, it is highly unlikely that accountability and rule of law will flourish.

Accountability for international crimes underscores the importance of the rule of law, demonstrating that no one is exempt, providing the foundation for a more peaceful, law-abiding society to emerge. International criminal justice is inseparable from the development of standards of the rule of law in domestic legal practice. It often has the ability to serve as a catalyst for broader system rule of law reform holding fair criminal trials of those who commit atrocities places the issue of individual legal accountability squarely on the national agenda.

These proceedings can be a focal point for networks of local and international non-governmental organizations who advocate for fair justice and accountability under the law. Hybrid and international courts can help empower and build capacity among civil society organizations working on issues of justice and accountability by convening a regular forum to engage with these groups, by offering workshops to local schools and organizations, and by reaching out to populations that might otherwise have limited access to justice or political power. The reasons for pursuing international

criminal justice, like those for securing domestic criminal justice, are varied. And different stakeholders are likely to offer disparate responses and prioritize differently. Undoubtedly, the trials in Nuremberg and Tokyo and the UN ad hoc tribunals of the 1990s were crucial moments in the development of the field. Yet historically domestic prosecutions have had an equally formative influence on the field's development.

As a result of this overemphasis on international developments as defining moments in the field, often insufficient attention is given to the important role played by domestic prosecutions and institutions in establishing the substantive norms, and in enforcing, international criminal law.

In fact, these activities have sometimes been regarded as setbacks in the progression towards "true" international criminal law i.e. the prosecution of international crimes by international courts. Truth be told, for much of the 20th century international criminal law was primarily the concern of domestic courts. In the absence of an international enforcement mechanism for international crimes, the international community resorted to the traditional institutional framework of specific treaties or treaty rules aimed at imposing on states the duty to criminalize the prohibited conducts, and organizing judicial cooperation for their repression. In this way, international law was used as a tool for the co-ordination of the exercise of criminal jurisdiction by states. This has been termed indirect enforcement of international criminal law. This was done primarily through treaty provisions calling for domestic prosecutions of international crimes. For example, the 1948 Genocide Convention contains a provision stating:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have

> jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction (Geneva Convention 1948).

Similarly, all four of the 1949 Geneva Conventions contain similar provisions requiring state parties to;

> "Enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches (Geneva Convention 1949).

Unfortunately, these provisions remained dormant for the most part during the Cold War and it was only the resurgence of the international justice project in the 1990s, and in particular the formalization of the principle of complementarity, that brought the responsibility of states back into focus.

Table 6.2: ICC Jurisdiction Intervenes where a state fails/ unable or unwilling to genuinely carry out investigations or prosecute serious crimes of international concern

YES	53.22%
NO	37.43%
NEUTRAL	9.36%
TOTAL	100%

Majority of the respondents at 53.22% agreed with the assertion that the ICC Jurisdiction intervenes where a state fails/ unable or unwilling to genuinely carry out investigations or prosecute serious crimes of international concern. It was further argued that The ICC prosecutes individuals, not groups or States. Any individual who is alleged to have committed crimes within the jurisdiction of the ICC may be brought before the ICC. In fact, the Office of the Prosecutor's prosecutorial policy is to focus on those who, having regard to the evidence gathered, bear the greatest responsibility for the crimes, and does not take into account any official position that may be held

by the alleged perpetrators. No one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed. Acting as a Head of State or Government, minister or parliamentarian does not exempt anyone from criminal responsibility before the ICC.

> In some circumstances, a person in a position of authority may even be held responsible for crimes committed by those acting under his or her command or orders (Discussant)

Likewise, amnesty cannot be used as a defense before the ICC. As such, it cannot bar the Court from exercising its jurisdiction. During the focus group discussion at Nairobi a discussant put it vividly that;

> The ICC is a judicial institution with an exclusively judicial mandate. It is not subject to political control. As an independent court, its decisions are based on legal criteria and rendered by impartial judges in accordance with the provisions of its founding treaty, the Rome Statute, and other legal texts governing the work of the Court (Discussant).

In view of the above, it was deduced that African countries have made great contributions to the establishment of the Court and influenced the decision to have an independent Office of the Prosecutor. In 1997, the Southern African Development Community (SADC) was very active in supporting the proposed Court and its declaration on the matter was endorsed in February 1998, by the participants of the African Conference meeting in Dakar, Senegal, through the Declaration on the Establishment of the International Criminal Court. At the Rome Conference itself, the most meaningful declarations about the Court were made by Africans. Without African support the Rome Statute might never have been adopted. In fact, Africa is the most heavily represented region in the Court's membership. The trust and support comes not only from the governments, but also from civil society organizations. The Court has also benefited from the professional experience of Africans and a number of Africans occupy high-level positions in all organs of the Court.

The majority of ICC investigations were opened at the request of or after consultation with African governments. Other investigations were opened following a referral by the United Nations Security Council, where African governments are also represented Jurisdiction may be exercised over the nationals of a non-party where the non-party has consented to the exercise of jurisdiction with respect to a particular crime. In either of the first two circumstances, the consent of the state of nationality is not a prerequisite to the exercise of jurisdiction. At least one state that is not party to the Rome Statute the United States (US) has vigorously objected to the possibility that that the ICC may assert jurisdiction over its nationals without its consent. As a result of its opposition to the ICC, the US has sought to use a variety of legal and political tools to ensure that the ICC does not exercise jurisdiction over its nationals. This strategy has included: the enactment of legislation restricting cooperation with the ICC and with states that are parties to the ICC; the conclusion of agreements with other states prohibiting the transfer of US nationals to the ICC; and the adoption of Security Council (SC) resolutions preventing the ICC from exercising jurisdiction over those nationals of non-parties that are involved in UN authorized operations. Section 2 of this article considers the legal objections to the exercise of ICC jurisdiction over non-party nationals. Whether the African states under the auspices of the African Union succeed to pull out of the membership of ICC is a political quest that individual states must tread cautiously because governments are not sovereign because they come and go but states are sovereign

6.3: ICC Jurisdictions and State Responsibility to Protect

Responsibility to protect (R2P) asserts that the primary responsibility of the protection of civilians from genocide, war crimes, crimes against humanity and ethnic cleansing within their borders lies with the state, only when the state is unwilling or unable to

fulfill this responsibility does the responsibility yield to the international community. In exercising this responsibility, the international community must act within a continuum of actions ranging from prevention to reaction to rebuilding.

The responsibility to prevent is the single most important aspect of the RtoP norm, aimed at addressing root and direct causes of conflict that may put human security at risk. The responsibility to react consists of a wide spectrum of measures, including economic, political and diplomatic tools, with the very last resort being military intervention, and only if such intervention meets a stringent set of criteria. The responsibility to rebuild focuses on the recovery, reconstruction and reconciliation of a state; aimed at preventing potential recurrences of humanitarian crises.

The nuances in the principles of the primary and secondary responsibility to protect are not unlike the principle of complementarity upon which the Rome Statute is based. Complementarity holds that national legal systems retain primary responsibility for the investigation and prosecution of Rome Statute crimes; the ICC only assumes jurisdiction when nations are unable or unwilling to hold legitimate proceedings concerning the related offences. Both the ICC and the RtoP reinforce the responsibilities of sovereign nations; similarly the secondary responsibility of the R2P norm--in particular the use of force--can only be exercised (under Chapter VII) when the state involved is unwilling and unable to fulfill their primary responsibility to act. Thus, both the ICC and the R2P norm primarily require cooperation from sovereign states to fulfill their obligation in preventing the worst crimes known to humanity from being committed since the end of the Second World War, an international effort has been undertaken to protect civilians in armed conflict and prevent genocide, crimes against humanity, and war crimes. In 1948 the Convention on the Prevention

and Punishment of the Crime of Genocide was adopted by the United Nations, and entered into force three years later. The Convention was the steppingstone in the international community's attempt to ensure the horrors witnessed during the Holocaust would never occur again.

However, the resounding promise of "Never Again" would prove to be hollow. The end of the 20th Century marked a change in the nature of armed conflict: large inter-state wars were replaced by violent internal conflicts, where the vast majority of casualties are now civilians. The genocides in Cambodia, Rwanda, and Bosnia demonstrated massive failures by the international community to prevent mass atrocities. Thus, near the end of the 1990's there was a recognized need to shift the debate about crisis prevention and response: the security of the community and the individual, not only the state, must be priorities for national and international policies.

The ICC and the R2P norm enjoy a complementary relationship; they work together towards the prevention of crimes against humanity, war crimes and genocide. As recommended by the International Commission on Intervention and State Sovereignty (ICISS), the utilization of judicial remedies whether through national systems or the ICC, is one of the 'reaction mechanisms' within the conception of R2P. This notion is further emphasized in Secretary-General Ban Ki-moon's report, in which he asserts that all states should be party to the Rome Statute and assist the ICC as a vital step in fulfilling the protection responsibilities of the state (Pillar One). As well, Ban highlights the deterrent effect of the ICC in his discussion of timely and decisive responses in which he suggests reminding the perpetrators that their actions are subject to prosecution by the International Criminal Court," may dissuade them from

their course of action. An Interviewee during the interview sessions at one of the foreign missions in Nairobi explained that:

> Responsibility to protect employs the judicial authority of the ICC both as a reactionary tool invoked in response to instances of these crimes, as well as, a means of deterrence so as to prevent these crimes from occurring. In turn, the R2P norm reinforces the complementarity principle of the ICC, in which primary responsibility falls upon sovereign states; as such the R2P norm aids the ICC's quest to end impunity by advocating for states to assume judicial responsibilities (key informant).

Hence, in order for the international community to truly progress towards actualizing the refrain of "never again", a multifaceted approach is required. The international community must act to collectively promote the universal acceptance of the R2P norm, and in addition, states need to support and assist the ICC. Together these components of international law and international relations produce a comprehensive foundation of deterrence and justice, and provide a basis upon which R2P can realize the transition from concept to practice.

While an initial mandate to consider an International Criminal Court was proposed shortly after the founding of the United Nations, political and diplomatic realities stalled its progress. Nevertheless, with the conclusion of the Cold War came reinvigorated calls for the Court, and the events in such places as Rwanda and the Former Yugoslavia accentuated the need. To this effect, the modern conception of the ICC was received with enthusiasm by members of the international community as a serious deterrent to the commission of atrocities.

The ICC has jurisdiction over the acts of individuals, not states. The Rome Statute explicitly indicates that royalty, heads of state, and other officials are not exempt from its jurisdiction; in short, there is no immunity for individuals before the ICC, as demonstrated by the arrest warrant issued for Sudanese president Omar al-Bashir. The organ of the Court charged with investigating and presenting evidence against alleged

offenders is the Office of the Prosecutor (OTP). The OTP can initiate an investigation of situations if one of three conditions are met: i) a State Party to the Rome Statute has referred a situation involving a State also party to the Statute (this includes self-referrals); or, ii) the Prosecutor has applied to and received approval from the judges of the Court to begin an investigation into a situation in a State which is party to the Statute; or, iii) the Security Council has referred the situation to the OTP for investigation, regardless of whether the situation country is a State Party.

The Rome Statute provides new guarantees for justice for women, extends the coverage of gender related crimes such as rape, and includes historic advances in the protection and rights of victims. In particular, the ICC involves victims as an independent third party, as opposed to their traditional role of witnesses for the Prosecution or Defense. The Rome Statute affords important protection to children, including prohibitions against the recruitment of children as soldiers. The first trial heard before the ICC involves indictments against Thomas Lubanga of the DRC for his involvement in the enlistment and conscription of child soldiers under the age of 15 and for the use of these children as active participants in hostilities.

Table 6.3: ICC Jurisdictions and State Responsibility to Protect

Response	Frequency	Percent
Yes	159	93.0
Do not know	12	7.0
Total	**171**	**100.0**

Source Researcher 2016

From the above findings, the deductions arising therefrom are that, with the intervention of the international criminal court per se there emerges the awakening that the state has the responsibility to protect and in doing so then this yields to justice

as a stabilizing force and strengthens the rule of law. It is important to note that domestic prosecutions of international crimes have impacted upon the substantive aspects of the field through the development of custom: both in terms of the existence and nature of particular crimes and their general principles.

The significance of domestic prosecutions is illustrated by the general principles relied upon and developed further by the Nuremberg Tribunal. While it regarded itself as enforcing existing international law, in fact these principles must have originated from domestic antecedents. As such, the significance of the indirect enforcement of international criminal law norms by domestic courts, together with relevant institutional milestones such as Nuremberg and Rome as evidence of both state practice and *opinio juris* in the formation of customary international criminal law cannot be overstated.

The "imbalance" in the attention paid to domestic versus international enforcement is not just historical; it continues to colour perceptions as to how the field is configured today, with international criminal justice presented as justice delivered ideally by international courts and only exceptionally by domestic courts. Notwithstanding that skewed perception, the Rome Statute's "principle of complementarity" places the emphasis precisely the other way around. These "internationalizing impulse "risks misrepresenting the construction of the Rome system in two ways:

First, it creates the false impression that the domestic prosecution of international crimes is a new phenomenon and downplays the responsibility of domestic courts to prosecute these crimes under the principle of "complementarity". Hence, there is the risk that complementarity is not regarded as an organizing principle of the Rome statute but rather as an unfortunate concession to state sovereignty or as a Second, and

more importantly, if too much weight is placed on the ICC as an institution that is not beyond reproach in the application and development of international criminal law, its failings will be projected on to the international legal order as a whole.

This has already happened to some extent in an African context, where there is a tendency to confuse and conflate criticisms of the ICC (or the Security Council, in fact) with criticisms of the ICC generally insofar as Africa is concerned. On June 27, ICC judges issued arrest warrants for Libyan leader Muammar al Gadhafi, his son Sayf al Islam al Gadhafi, and intelligence chief Abdullah al Senussi, having found reasonable grounds to believe that they are responsible for crimes against humanity, including murder and persecution.

The trial of Congolese militia leader Thomas Lubanga Dyilo, in ICC custody since 2006, is expected to bring the Court's first final verdict before year's end. .The six Kenyan suspects sought by the ICC, most of them senior government officials, appeared voluntarily before the Court in April 2011. Charges against them have not yet been confirmed by ICC judges. .In March 2011, ICC judges confirmed war crimes charges sought by the Prosecutor against two Darfur rebel commanders, paving the way for a trial.

On June 23, 2011, the ICC Prosecutor requested authorization from ICC judges to open a formal investigation into war crimes and crimes against humanity following Côte d'Ivoire's disputed presidential run-off vote in November 2010. A U.N. investigation concluded in June that serious violations of human rights and international humanitarian law were committed by different actors, potentially amounting to crimes under ICC jurisdiction. Côte d'Ivoire is not a state party, but its government submitted it to ICC jurisdiction in 2003. The government of newly

inaugurated President Alassane Ouattara has also accepted ICC jurisdiction, and signed a cooperation agreement with the ICC on June 28.

In a nutshell international criminal Law and the application and development of its principles should not be understood as being restricted to the domain of international institutions. Instead, international and national prosecutions, rather than being regarded as alternatives, should be considered to be formally distinct, yet substantively intertwined mechanisms in pursuit of a common goal: the enforcement of international criminal law. A pragmatic compromise driven by scarce resources global security and peace.

6.4: International Criminal Court Jurisdiction prosecutes Individuals who have committed crimes of international concern

The shocking atrocities and war crimes that occurred in Europe and Asia during the Second World War opened the eyes of the world to the need for a strong international body that could prosecute war criminals. The Nuremberg Trials (1945-1948) and Tokyo War Crimes Tribunal (1946-1948) used the power of international law to penalize those responsible for violations of Geneva conventions of war and crimes against humanity.

The trials were temporary and no permanent body was put in place by the newly formed United Nations (UN). More genocide and atrocities occurred in the decades following (Cambodia, Yugoslavia, Uganda and Rwanda) and temporary tribunals were put in place to bring these war criminals to justice (the International Criminal Tribunal for Yugoslavia and International Criminal Tribunal for Rwanda).

These were also temporary tribunals not courts with international jurisdiction to bring war criminals to justice. In 1998, shortly after the horror of genocide in Rwanda, the

UN and a majority of member states agreed to the formation of a permanent world criminal court, the International Criminal Court (ICC).

The ICC's primary mandate is to bring to justice those who commit war crimes but are not put on trial by the home nation. According to the Rome Statute, 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, and shall be complementary to national criminal jurisdictions.

The jurisdiction and functioning of the Court shall be governed by the provisions of the Statute. 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.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6: Genocide

For the purpose of this Statute, "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 7: Crimes against humanity

i. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

b. Murder;

c. Extermination;

d. Enslavement;

e. Deportation or forcible transfer of population;

f. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

g. Torture;

h. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

i. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, 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 Court;

j. Enforced disappearance of persons;

k. The crime of apartheid;

l. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8: War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

i. Willful killing;

ii. Torture or inhuman treatment, including biological experiments;

iii. Willfully causing great suffering, or serious injury to body or health;

iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

vi. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

vii. Unlawful deportation or transfer or unlawful confinement;

viii. Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the

natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her

interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii)Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary

suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

3. Taking of hostages;

4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

b. (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

c. (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9: Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States

Table 6.4: ICC deals with crimes of international concern

YES	87.13%
NO	9.36%
NEUTRAL	3.512%
TOTAL	100%

As from the above collected responses, majority of the members of general public are aware that the ICC handles matter of international concern. A small percentage of 9.36% think that any issue can be taken to ICC for prosecution. Least are those who know not or are not certain about the subject matter. The mandate of the Court is to

try individuals (rather than States), and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely: The crime of genocide, War crimes, crimes against humanity, and The crime of aggression, when the conditions for the exercise of the Court's jurisdiction over the latter are fulfilled.

The Court is not be able to bring to justice every person suspected of committing crimes of concern to the international community. The prosecutorial policy of the Office of the Prosecutor is to focus its investigations and prosecutions on those who, having regard to the evidence gathered, bear the greatest responsibility for such crimes.

Africa and more so Kenya was high on the Court's agenda. This is an important development for those committed to post-conflict peace building. One of the key elements of long-term peace and sustainability is strengthening the rule of law and access to justice. Equally important is developing mechanisms to manage and prevent conflict, and creating accountability in government. In Africa, post-conflict peace building is threatened by the widespread lack of accountability among those responsible for the continent's many violent conflicts that are characterized by torture, rape, murder, and other atrocities.

The pervasive culture of impunity threatens newly established peace processes not only because those responsible for atrocities remain free to commit further acts, but also because impunity fuels a desire for revenge which can lead to further violence. Moreover, public confidence in attempts to establish the rule of law is undermined, as are the chances of establishing meaningful forms of accountable governance. Most African countries, the national judicial systems are often too weak to cope with the

burden of rendering justice for these crimes. 'International crimes' including war crimes, crimes against humanity and genocide are characterized by large numbers of victims and perpetrators, and are often committed with the complicity, if not the active participation, of state structures or political leaders.

This means that the political pressure may be too great for national justice systems to cope with. Successful domestic prosecutions are further limited by political meddling, witness interferences, resource and skills shortages, together with the strain of establishing functional criminal justice systems in countries with little tradition of democracy and the rule of law. When the national justice system is unable or unwilling to investigate or prosecute those responsible, the international community can and should assist. The ICC is one of the most symbolically and practically important tools in this regard. And Africa at least for the time being is where the Court will be kept most busy.

Africa is currently the only continent in the world where the ICC is active. It is the most represented region in the ICC's Assembly of States Parties with 28 countries having ratified the Rome Statute, and generally the continent where international justice is in the making. Ensuring the success of the ICC is important for peace building efforts on the continent. However, the task of reversing the culture of impunity for international crimes cannot simply be devolved to the ICC.

Apart from many African states' well-known resistance to interventions perceived as emanating from or being imposed by the 'West', the ICC faces several challenges, not least of which is the scale of the impunity problem. The ICC's impact in Kenya is be limited by the extent to which Kenya cooperates even though it ratified the Rome Statute and developed complementary National legislation processes that rely equally

on domestic capacity as well as political support among states for ending impunity and for the ICC as an institution.

The process is one that per force must be driven within each state's domestic legislative and executive framework. At the same time, regional support by the African Union for the ICC and its work is an essential ingredient to ensure the political impetus necessary to make the ICC a reality on the African continent. Therefore, the philosophy that underlay the international legal regime is the idea that the success of the ICC's perceptibly difficult task of prosecuting the world's worst crimes will depend to a significant degree on the political will and support of Africa's states and their regional body, the

African Union

6.5 State parties to the Rome statute submit totally to the International Criminal Court

According to the Vienna Convention on the Law of Treaties, a state that has signed but not ratified a treaty is obliged to refrain from acts which would defeat the object and purpose" of the treaty. However, these obligations do not continue if the state makes clear that it does not intend to become a party to the treaty. Three signatory states (Israel, Sudan, and the United States of America) have informed the UN Secretary General that they no longer intend to become parties to the Rome Statute, and as such have no legal obligations arising from their signature.

The states parties to the Rome Statute of the International Criminal Court are those sovereign states that have ratified, or have otherwise become party to, the Rome Statute of the International Criminal Court. The Rome Statute is the treaty that established the International Criminal Court, an international court that has

jurisdiction over certain international crimes, including genocide, crimes against humanity, and war crimes that are committed by nationals of states parties or within the territory of states parties. States parties are legally obligated to co-operate with the Court when it requires, such as in arresting and transferring indicted persons or providing access to evidence and witnesses. States parties are entitled to participate and vote in proceedings of the Assembly of States Parties, which is the Court's governing body. Such proceedings include the election of such officials as judges and the Prosecutor, the approval of the Court's budget, and the adoption of amendments to the Rome Statute.The Rome Statute allows for states to withdraw from the ICC. Withdrawal takes effect one year after notification of the depositary, and has no effect on prosecution that has already started. As of November 2013 no state had withdrawn from the statute.

In June 2009, several African states, including Comoros, Djibouti, and Senegal, called on African states parties to withdraw *en masse* from the statute in protest against allegations that the Court targets Africa, and specifically in response to the indictment of Sudanese President Omar al-Bashir. In September 2013, Kenya's National Assembly passed a motion to withdraw from the ICC in protest against the ICC investigation in Kenya, although no law effecting withdrawal has been proposed. A mass withdrawal from the ICC by African member states in response to the trial of Kenyan authorities was discussed at a special summit of the African Union in October. The summit concluded that serving heads of state should not be put on trial, and that the Kenyan cases should be deferred.

However, the summit did not endorse the proposal for a mass withdrawal due to lack of support for the idea. In November the ICC's Assembly of State Parties responded by agreeing to consider proposed amendments to the Rome Statute to address the

AU's concerns. The Rome Statute obliges states parties to cooperate with the Court in the investigation and prosecution of crimes, including the arrest and surrender of suspects. Part 9 of the Statute requires all states parties to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified in the statute(Rome Statute,2002).

Under the Rome Statute's complementarity principle, the Court only has jurisdiction over cases where the relevant state is unwilling or unable to investigate and, if appropriate, prosecute the case itself. Therefore many states parties have implemented national legislation to provide for the investigation and prosecution of crimes that fall under the jurisdiction of the Court.

Pursuant to article 12(3) of the Rome Statute of the International Criminal Court, a state that is not a party to the Statute may, "by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The state that does so is not a State Party to the Statute, but the Statute is in force for the state as if it had ratified the Statute, only on an *ad hoc* basis. However, a state that lodges an article 12(3) declaration cannot refer a situation to the Court. This means that the Prosecutor can only open an official investigation after a State Party or the United Nations Security Council refers the situation to the Court. Alternatively, the Prosecutor can open an investigation after a Pre-Trial Chamber gives its consent to do so, but only after it is presented with preliminary evidence.

Table 6.5: State parties to the Rome statute submit totally to the International Criminal Court

YES	**59.06%**
NO	30.99%
NEUTRAL	9.94%
TOTAL	**100%**

Majority of the total respondents counting 59, 06% strongly agreed that state parties to the Rome statute submit fully to the instrument. 30%of the total respondent did not agree and only 9.94% disagreed.

In regard to the above, during focus group discussion;

> One discussant wondered why Sovereign states could bind themselves to a treaty that is seen to limit the exercise of freedom and authority of the government and or individual citizens. In the quest to restoration /maintenance of law and order within the state?(discussant)

The states parties to the Rome Statute of the International Criminal Court are those sovereign states that have ratified, or have otherwise become party to, the Rome Statute of the International Criminal Court. The Rome Statute is the treaty that established the International Criminal Court, an international court that has jurisdiction over certain international crimes, including genocide, crimes against humanity, and war crimes that are committed by nationals of states parties or within the territory of states parties. States parties are legally obligated to co-operate with the Court when it requires, such as in arresting and transferring indicted persons or providing access to evidence and witnesses. States parties are entitled to participate and vote in proceedings of the Assembly of States Parties, which is the Court's governing body.

Such proceedings include the election of such officials as judges and the Prosecutor, the approval of the Court's budget, and the adoption of Statute. Pursuant to article 12(3) of the Rome Statute of the International Criminal Court, a state that is not a party to the Statute may, "by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question." The state that does

so is not a State Party to the Statute, but the Statute is in force for the state as if it had ratified the Statute, only on an *ad hoc* basis.

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CHAPTER SEVEN

ICC JURISDICTION ON STATE TREATY OBLIGATIONS IN KENYA.

Chapter seven captured findings and discussions there from, conclusions emerged by assessment of ICC jurisdiction on state treaty obligations divided into 5 level approaches and ICC.The state treaty obligations relate to state parties to the Rome Statute of the International Criminal Court. Those are sovereign states that have ratified, or have otherwise become party to, the Rome Statute of the International Criminal Court. The Rome Statute is the treaty that established the International Criminal Court, an international court that has jurisdiction over certain international crimes, including genocide, crimes against humanity, and war crimes that are committed by nationals of states parties or within the territory of states parties.

States parties are legally obligated to co-operate with the Court when it requires, such as in arresting and transferring indicted persons or providing access to evidence and witnesses. States parties are entitled to participate and vote in proceedings of the Assembly of States Parties, which is the Court's governing body. Such proceedings include the election of such officials as judges and the Prosecutor, the approval of the Court's budget, and the adoption of amendments to the Rome Statute.

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In June 2009, several African states, including Comoros, Djibouti, and Senegal, called on African states parties to withdraw *en masse* from the statute in protest against allegations that the Court targets Africa, and specifically in response to the indictment

of Sudanese President Omar al-Bashir. In September 2013, Kenya's National Assembly passed a motion to withdraw from the ICC in protest against the ICC investigation in Kenya, although no law effecting withdrawal has been proposed

A mass withdrawal from the ICC by African member states in response to the trial of Kenyan authorities was discussed at a special summit of the African Union in October. The summit concluded that serving heads of state should not be put on trial, and that the Kenyan cases should be deferred. However, the summit did not endorse the proposal for a mass withdrawal due to lack of support for the idea. In November the ICC's Assembly of State Parties responded by agreeing to consider proposed amendments to the Rome Statute to address the AU's concerns. More than half of the African states have ratified the Rome Statute of the International Criminal Court. This fact is a likely indication of the perceived weakness, or a lack of faith, in national judicial systems in rendering justice for international crimes, especially where the alleged perpetrators are in power.

However, such wide spread ratification of the Rome Statute is just but the first step. In order to fully comply with their obligations under the statute, member states must draft and give effect to domestic implementation legislation that will encompass the obligations under the Rome Statute into national legal systems. However, such implementation of the Rome Statute is not easy because many African states have formed a poor record of compliance with obligations emanating from treaties that they have ratified. Although Kenya signed the Rome Statute on 11 August 1999, the state did not ratify the treaty until 15 March 2005. This was amid constant pressure by the United States not to ratify the treaty and its subsequent domestication into law. By ratifying the Rome Statute, Kenya became the 98th state party to join the International

Criminal Court of Justice. This signaled a step towards the right direction for Kenya in the fight against impunity for the most heinous international war crimes.

However, under the Rome Statute ratification alone cannot fulfill a state's obligation under the treaty. This is because for Complementarity to apply, member states must draft and give effect to domestic implementation legislation that will encompass the obligations emanating from the Rome Statute into domestic law. There was therefore pressure on Kenya as a member state to enact domestic legislation to implement the Rome Statute. the concept of Complementarity requires that after ratification of the treaty states must implement all of the crimes under the Rome Statute through domestic legislation or by inclusion of all the crimes under the statute into their respective national constitutional documents.16 Kenya chose to comply with its obligations under the Rome Statute by enacting the International Crimes Act of 2008, which will be discussed in the next section, and by way of adopting an approach that makes ratified international law treaties applicable within Kenyan law.

Prior to the Constitution of Kenya 2010, Kenya adopted a dualist approach to the application of international law in Kenya. This was to the effect that international law could not have the force of law within Kenya unless it was domesticated by Parliament through a domesticating legislation. Therefore, for international law treaties ratified by Kenya to apply, Parliament had to pass into law legislation giving effect to the ratified International Law treaty. Unlike in the previous constitution, the Constitution of Kenya 2010 expressly recognizes the general rules of International Law as forming part of the law of Kenya and provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya

This provision effectively converts Kenya from a dualist state to a monist state where it is accepted that there is no separation of international law and domestic law as both are part of a unified system. Article 21 (4) of The Constitution of Kenya 2010enriches the provisions of Article 2 (6) by imposing on the State the obligation to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. Therefore, these two provisions may be interpreted to mean that international law becomes directly applicable by Kenyan courts, regardless of whether parliament has enacted specific implementing legislation to incorporate the international laws in question.

This therefore forms one of the ways that Kenya has implemented the Rome Statute into national law. The International Crimes Act of 2008came into operation on 29 May 2009, by notice published in the official gazette whereby its commencement date is set at 1 January 2009. It is an Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions.

The Act adopts a similar approach to the Rome Statute in criminalizing the crimes of genocide, crimes of aggression, crimes against humanity and war crimes. It further provides that the provisions of the Rome Statute shall have the force of law in Kenya in relation to matters of; making requests by the ICC to Kenya for assistance and conduct for investigation by the prosecutor of the ICC, bringing and determination of proceedings before the ICC, the enforcement in Kenya of sentences of imprisonment or other measures imposed by the ICC.

Section 8of the Act lays down the jurisdiction of the court in trying an alleged criminal under the Act. It provides:

*"*A person who is alleged to have committed an offence under section 6 may be tried and punished in Kenya for that offence if:

(a) The act or omission constituting the offence is alleged to have been committed in Kenya; or

(b) At the time the offence is alleged to have been committed:

i. The person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity;

ii. The person was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state;

iii. The victim of the alleged offence was a Kenyan citizen; or

iv. The victim of the alleged offence was a citizen of a state that was allied with Kenya in an armed conflict; or

(c) The person is, after commission of the offence, present in Kenya"

The power to hear and determine matters pertaining crimes under Section 6 is placed on the High Court of Kenya. The Act further obliges the state under part III to offer assistance to the ICC in relation to arrest and surrender to the ICC of a person in relation to whom the ICC has issued an arrest warrant or given judgment or conviction, facilitation of documents, taking of evidence, identification of persons, protection of victims, execution of searches and seizures and any other types of assistance that is not prohibited by the domestic law As for cooperation with the

International Criminal Court, the Act provides that, should a request for arrest and surrender be received from the ICC, the Executive shall, if satisfied that the request is supported by the information and documents required by Article 91 of the Rome Statute, notify a judge of the High Court so that an arrest warrant is issued. Such arrest warrant may be issued if the judge is satisfied that, *inter alia*, the person is or is suspected of being present in Kenya or may go to Kenya (Section 30 of The International Crimes Act) This provision ensures that the state complies with its obligation created under Article 59of the Rome Statute to fully cooperate with the ICC and provide it with the necessary assistance.

To harmonize the international criminal law applied by the ICC and the domestic criminal law Part V of the Act deals with domestic procedures for other types of cooperation by Kenya to the ICC. Elsewhere in Part VIII protection of national security or third party information, if an issue relating to Kenya's national security interests arises at any stage of any proceedings before the ICC the issue shall be dealt with in the manner provided in Article 72 of the Rome Statute and other provisions therein. Kenya has made tremendous steps in the recent years to fully comply with its obligations under the Rome Statute.

The enactment and adoption of a multilateralist approach to the application of International law treaties under the Constitution of Kenya 2010, together with the drafting and enactment of the International Crimes Act 2008 is enough evidence of the country's achievement in implementing the Rome Statute. However, for such steps to be effective Kenya, must show dedication to enforcing the legislation and setting up structure and institutions so as to achieve the practical realization of justice for international crimes as intended under the Act. In relation to the ICC process in Kenya,

It is argued that whereas the nature of crimes committed in Kenya reached the magnitude of serious crimes under international law and measured to the ICC threshold of international crimes ,sufficient evidence is yet to be adduced to hold those responsible culpable as to cure the lacunae of the Kenyan Hague six whose cases were either terminated or withdrawn.. Intermittently it is argued that it is due to government's inaction and lack of political will in establishing local judicial mechanisms for investigating and prosecuting the perpetrators of the post-election violence that led to the intervention of the ICC. The state should therefore set up structures and judicial mechanisms to deal with future crimes of such magnitude. If this is done therefore, it will go a long way in rebuilding trust on the government by the victims of the violence and further promote confidence on local judicial structures aimed at investigating and prosecuting such crimes.

7.1 ICC Jurisdiction and Prosecution of Offences

Despite the strict limitation of the ICC's jurisdiction, the creation of the Court has generated the idea, and perhaps the ambition, to strengthen the universal criminalization of transnational organized crimes by allowing their prosecution through an international authority, especially in instances when national agencies do not have the ability, capacity, or political will to prosecute or extradite alleged offenders.

The crimes within the jurisdiction of the International Criminal Court are genocide, crimes against humanity and war crimes including offences committed in non-international as well as international armed conflict. The crime of aggression will be included in the court's jurisdiction when an acceptable definition of this offence is agreed. The Rome Statute explicitly provides that the jurisdiction of the International Criminal Court shall be complementary to national criminal jurisdictions. A case is

inadmissible in the International Criminal Court if the case is being genuinely investigated or prosecuted by a state which has jurisdiction over it: article 17 paragraphs 1(a). If a case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, the case also is inadmissible in the International Criminal Court unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute": article 17 paragraphs 1(b).

Table 7.1: ICC Jurisdiction and Prosecution of Offences

	Frequency	Percentage %	Mean	Standard deviation
			3.35	0.1385
Neutral	5	2.9		
Disagree	16	9.4		
Strongly Disagree	40	23.4		
Agree	64	37.4		
Strongly agree	46	26.9		
Totals	**171**	**100**		

The respondents were asked to indicate their level of agreement with the statement on the guarantee that ICC jurisdiction prosecutes and punishes offences. Table 4.13 shows that 37.4% of the respondents agreed that ICC jurisdiction is meant to guarantee the prosecution and punishment of the offenses defined in conventions binding state parties, 37.4% strongly agreed while 23.4% strongly disagreed. Given that the majority of the respondents agreed that the ICC has the mandate to prosecute offenders , it is imperative to appreciate that the Hague based court does not act in isolation rather it conforms to the dictates of the principle of complementarity and territoriality .during the focus group discussion ,one member stated that;

> The ICC is a very powerful independent court whose power and authority is felt right in the bone marrow of those African rulers who still hung on the nasty neocolonial tendencies to structurally plunge their nations in anarchy and hide in sovereignty without regard to recognition of human rights issues (discussant).

There are arguments in judicial and academic circles whether the existing offences under the ICC Statute may, potentially, encompass some transnational organized crimes and whether the Statute should be expanded to include crimes that have been recognized in international treaties. The current system of international criminal law conventions leaves too many loopholes for criminals, it allows for too many concessions which can be made by Signatories, and it has in many instances failed to bring the principal organizers of global criminal operations to justice.

7.2 Prosecution of Criminals and ICC Jurisdiction

While the treaties on transnational organized crime, migrant smuggling, trafficking in persons, arms smuggling etc have created a system for Signatories to deal with alleged perpetrators by either prosecuting or extraditing them, and have established a basic framework for mutual legal assistance and judicial cooperation, perhaps the greatest failure of the existing regime is that it leaves enforcement, prosecution, and punishment of the offences to individual nations. The current system has failed to establish mechanisms that ensure that suspected offenders are indeed arrested, properly charged, investigated, prosecuted, and punished fairly and adequately. It is this reliance on national action which creates the greatest obstacle towards effective action against transnational organized crime and which has created so many safe havens for drug producers and traffickers, money launderers and other suspects.

This is most convincingly demonstrated in the drug industry which is booming in countries such as Afghanistan and Myanmar, or the money laundering that is occurring in many South Pacific and Caribbean nations. The opportunities offered by

globalization have enabled sophisticated criminal organizations to take advantage of the discrepancies in different legal systems and the non-cooperative attitude expressed by many nations.

It is for this reason, that there is a strong argument to centralize powers to investigate, prosecute and punish transnational organized crime in an international agency which complements the activities of national authorities and is activated when those agencies are unable, incapable, or unwilling to intervene. Giving an International Criminal Court jurisdiction over crimes such a narcotic trafficking, migrant smuggling, trafficking in persons, arms smuggling, money laundering and the like will mean greater certainty of arresting, prosecuting, and punishing those who engage in these crimes. The ICC would make international law enforcement more efficient and add another layer of criminal justice; it would provide another forum for prosecution in addition to those established at national levels.

The International Criminal Court is governed by the Rome Statute, which entrusts the Court with a specific and defined jurisdiction and mandate. A fundamental feature of the Rome Statute (articles 12 and 13) is that the Court may only exercise jurisdiction over international crimes if (i) its jurisdiction has been accepted by the State on the territory of which the crime was committed, (ii) its jurisdiction has been accepted by the State of which the person accused is a national, or (iii) the situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter.

The Office of the Prosecutor of the ICC conducts independent and impartial investigations and prosecution of the crimes of genocide, crimes against humanity and war crimes. The Office of the Prosecutor has opened investigations in: Uganda; Democratic Republic of the Congo; Darfur, Sudan; Central African Republic; Kenya;

Libya; Côte d'Ivoire and Mali. The Office is also conducting preliminary examinations relating to the situations in Afghanistan, Colombia, Georgia, Guinea, Honduras, Iraq (alleged abuses by UK forces), Nigeria, Palestine and Ukraine. The ICC does not have the power to formally indict states or to make rulings on state responsibility, but can only exercise its jurisdiction over individuals. However, it has been argued that the exercise of ICC jurisdiction over officials of non-parties would be unlawful in cases in which the person has acted pursuant to the officially approved policy of that state.

According to this argument, the ICC will, in these types of cases, effectively be considering an inter-state dispute about the legality of the acts of the non-party state, without the consent of that state. The application of international criminal law, either by an international court or by a foreign domestic court, necessarily runs the risk that the court will be sitting in judgment over persons who act on behalf of the state. This is because crimes against international law are often committed by persons acting on behalf of the state. In many respects, this is one of the distinguishing features of such crimes. In the case of an international armed conflict, those accused of war crimes will almost invariably be soldiers of a state army or other officials exercising state authority. The gravity and seriousness of international crimes are such that it is often only those with the machinery or apparatus of the state, or state-like bodies that is able to commit such devastation. Since one of the main reasons for an international criminal court is that states often fail to prosecute those who commit international crimes because of the complicity of those in power in that state, it can be easily predicted that there will be prosecutions before the ICC which will raise questions about the legality of the policies and acts of states. This will be most evident in cases in which senior state officials are indicted by the ICC, as well as in cases in which the

state insists that the indicted soldier or official was acting under its authority and asserts the legality of their conduct. Nevertheless the exercise of ICC jurisdiction in such cases is consistent with international law even when such jurisdiction is asserted without the consent of the state on whose behalf the accused has acted.

Table 7.2: Prosecution of Criminals and ICC Jurisdiction

	Frequency	**Percentage %**	**Mean**	**Standard deviation**
			3.837	0.1484
Neutral	17	9.9		
Disagree	16	9.4		
Strongly Disagree	17	9.9		
Agree	49	28.7		
Strongly agree	72	42.1		
Totals	171	100		

The respondents were asked to indicate their level of agreement with the statement on prosecution of crimes and ICC jurisdiction. Most of the respondents (42.1%) strongly agreed that the prosecution of crimes encompassed in the ICC jurisdiction fall under the national jurisdiction of the state, also 28.7% agreed, 9.9% disagreed and 9.9% of the respondents were neutral over the same statement. The mean score of responses was 3.837 on a 5 point scale which indicate that the respondents agreed.

The ICC's founding treaty is open to participation by states. The prosecutor can only investigate and prosecute crimes committed on the territory or by the nationals of states that have joined the ICC statute or which have otherwise accepted the jurisdiction of the ICC through an ad hoc declaration to that effect. Under the Rome Statute, the ICC may nevertheless exercise personal jurisdiction over alleged

perpetrators who are nationals of a State Party, even where territorial jurisdiction is absent. Under the Rome Statute, the primary responsibility for the investigation and prosecution of perpetrators of mass crimes rests, in the first instance, with the national authorities. Even where the Court has jurisdiction, it will not necessarily act. The principle of complementarity provides that certain cases will be inadmissible even though the Court has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution. For example, a case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility. In addition, a case will be inadmissible if it is not of sufficient gravity to justify further action by the Court. One key informant said;

> It is collective duty for all states and indeed global community to respond to the plight of victims whose rights and dignity have been violated everywhere and anywhere in the globe. (Key informant).

(Isis) has committed "crimes of unspeakable cruelty" in Syria and Iraq but the international criminal court (ICC) does not have jurisdiction to open an inquiry the court was unable to prosecute since neither Syria nor Iraq was a member of the court and the United Nations security council has not asked for an investigation. The jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage, (Fatuo Bensouda 2016).

7.3 ICC Jurisdiction and Obligations of Peaceful International Cooperation

As a treaty-based international organization, the ICC is not bound by any national laws. Furthermore, States are not bound to recognize amnesty laws of third States. In particular, since under international law, a national law cannot conflict with a State's

obligations under binding treaties, States Parties of the ICC would not be able to enact or recognize a national amnesty law that conflicted with their obligations to cooperate with the ICC.

The ICC has jurisdiction over a specific and limited set of international crimes: genocide, war crimes and crimes against humanity [and the crime of aggression. States are under a duty to prosecute genocide and grave breaches of international humanitarian law under both treaty law and customary law. Amnesties covering such crimes would therefore not be valid. Furthermore, customary international law entitles all States to prosecute perpetrators of other serious violations of the laws and customs of war and crimes against humanity, making amnesty laws covering such atrocities of questionable legality.

It has been argued that the recognition of the ICC's jurisdiction implies the obligation of the States parties to either prosecute domestically the crimes for which the Court has jurisdiction or to submit the relevant cases to the ICC. Such an obligation would leave practically no room for amnesties or truth commission procedures for crimes covered by the Rome Statute. However, in contrast to the conventions based on the traditional concept to f*aut dedere aut judicare,* the Rome Statute does not include an explicit provision on the obligation to either prosecutor extradite the accused offender. There is merely some reference in the Preamble which affirms that the effective community must be ensured by taking measures at the national level and by enhancing international cooperation The States parties also recalling the Preamble that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. But there is no pro-vision on prosecuting duties by the States parties in the operative part of the Statute. To interpret article 29 this provides that;

> The crimes within the jurisdiction of the Courts hall not be subject to any Statute of limitations "as a substantive obligation to prosecute would clearly go beyond the text of this provision. (Rome statute, Article29).

Importantly co-operation by states with the ICC lies at the heart of all matters relating to ICC proceedings, and thus the fulfillment of the Court's mandate. When in the context of its relationship with the Security Council, the question of cooperation becomes even more acute, both in situations where the Council has made a referral to the Court, and also with regard to the Court's investigations into situations either referred by states parties or initiated *proprio motu*by the Prosecutor. In this context, one member of the focus group discussion said;

> The ICC does not need to advertently convict the accused to a jail term or otherwise for the court to be seen as a competent working instrument. Rather by the fact that the accused persons have appeared before Hague court to answer charges is a very strong statement in international law (discussants).

In the context of the above assertion, it is argued that the authority of Hague based court surmounts that of national laws by requiring individuals of sovereign states to appear before it and answer charges as the case may be. This act of compellation to appear before the court in itself is a warning to other like individuals to be aware and refrain from acts of impunity. This was the scenario in Kenya during the contented 2013 general elections. Even though the cases before the Hague based court have been withdrawn and or terminated , the pangs of international prosecutions still hangs on the shoulders of Kenyans and more so the African leaders . This may explain why most of them would wish to move out of the ICC .It is a template sign that those in position of influence and leadership must watch their steps because duty comes with responsibility to care .The world today is a cosmopolitan village. Where states as major players conscientiously pursue their economic social, political cultural

technological and economic interests within the international legal order there must be a distinction between states and individuals when it comes to the commission of serious crimes of international concern.

States are required to cooperate with the Hague based court in terms of execution of warrants of arrest against the accused, protection of witnesses ,provision of evidence, assist in provision of information in relation to reparations of victims and overly implementing the principle of complementarity in entirety .considering the global reach of the ICC and the activism from most African states against it, some participants stressed that the absence of an obligation to cooperate for states not parties within relevant Security Council resolutions not only provides a wrong signal, but also generates a legal vacuum with practical implications, for instance by reducing the leverage to promote the adoption of implementing legislation in states not parties.

Table 7.*3*: **ICC Jurisdiction and obligations of peaceful international cooperation**

	Frequency	Percentage %	Mean	Standard deviation
			3.629	0.1484
Neutral	11	6.4		
Disagree	11	6.4		
Strongly Disagree	31	18.1		
Agree	55	32.2		
Strongly agree	63	36.8		
Totals	171	99.9		

The respondents were asked to indicate their level of agreement with the statement on ICC Jurisdiction and obligations of peaceful international cooperation. Table 7.3 shows that 36.8% strongly agreed that ICC jurisdiction enhances obligations of peaceful international cooperation that is increasingly having greater influence on the

shape and content of the sovereignty principle, 32.2% agreed while 18.1% strongly disagreed. The mean score of responses was 3.629 on a 5 point scale which indicate that the respondents agreed with the statement.

Even as participants pointed out the outright protests by the AU over the conduct of ICC, the cooperation with the ICC by states is reasonably good, albeit with notable exceptions and problematic procedural issues. In respect of procedural issues, a significant obstacle to efficient and effective cooperation by states is the lack of internal legislative and bureaucratic capacity to facilitate cooperation with the Court. In particular the failure of a significant number of states parties to the Rome Statute to enact effective implementing legislation, although no justification to refuse cooperation, is a significant barrier to practical and effective cooperation.

There is need of continued efforts to be devoted by states parties, civil society and parliamentarians to ensure the adoption of effective legislation. Further the ICC Assembly of States Parties (ASP) has only recently adopted procedures to respond to situations of non-cooperation and the effectiveness of these procedures is yet to be tested given their lack of coerciveness.

These procedures rely mainly on non-negligible yet soft diplomatic measures and the generation of dialogue. They aim to provide predictability and formality, and enhance the involvement of the entire Assembly regarding measures that have been undertaken in the past by the President of the Assembly when he had been warned of instances of non-cooperation. So far, the Assembly has yet to take measures to emphatically address the recent notifications by the Court on non-cooperation by states parties.

It was suggested, particularly in cases of non-cooperation with the Court in relation to Security Council referral situations, that the Council could initiate dialogue with states

in order to understand why cooperation has not occurred. Initiating such a conversation with a view to enhancing understanding by all parties would be enormously helpful when building relationships and cooperation between states and with institutions, such as the Council and the Court. This dialogue would precede calls to cease the non-cooperation and to provide assurances of non-repetition of such failure to cooperate.

7.4 ICC Jurisdiction and Offenses against the Peace and Security of Mankind

In its Judgment, the Nuremberg Tribunal recognized the existence of duties incumbent upon individuals by virtue of international law. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. The Nurnberg Tribunal also recognized that individuals could incur criminal responsibility and be liable to punishment as a consequence of violating their obligations under international law. In this regard, the Nurnberg Tribunal expressly stated that individuals can be punished for violations of international law

The Commission recognized the general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law in Principle I of the Nurnberg Principles. Principle I provide that;

> Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

As indicated in the commentary to this provision, The general rule underlying Principle 1 is that international law may impose duties on individuals directly without any inter-position of internal law This principle was also articulated in article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 also known as 1954 draft Code. The provisions of the code

stipulate that international law applies to crimes against the peace and security of mankind irrespective of the existence of any corresponding national law. The result is the autonomy of international law in the criminal characterization of the types of behavior which constitute crimes against the peace and security of mankind .The said clause states that the characterization, or the absence of characterization, of a particular type of behavior as criminal under national law has no effect on the characterization of that type of behavior as criminal under international law. It is conceivable that a particular type of behavior characterized as a crime against the peace and security of mankind in part two might not be prohibited or might even be imposed by national law.

It is also conceivable that such behavior might be characterized merely as a crime under national law, rather than as a crime against the peace and security of mankind under international law. None of those circumstances could serve as a bar to the characterization of the type of con-duct concerned as criminal under international law. The distinction between characterization as a crime under national law and characterization as a crime under inter-national law is significant since the corresponding legal regimes differ. This distinction has important implications with respect to the *non bis in idem* principle addressed in article 12.

This provision is consistent with the Charter and the Judgment of the Nurnberg Tribunal. The principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime was recognized in the Charter of the Nurnberg Tribunal (art. 6), the Convention on the Prevention and Punishment of the Crime of Genocide The Commission also recognized conspiracy as

a form of participation in a crime against peace in the Nurnberg Principles An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.

Table 7.4: ICC Jurisdiction and offenses against the Peace and Security of Mankind

	Frequency	Percentage %	Mean	Standard deviation
			3.751	0.1484
Neutral	5	2.9		
Disagree	11	6.4		
Strongly Disagree	26	15.2		
Agree	66	38.6		
Strongly agree	63	36.8		
Totals	**171**	**99.9**		

The respondents were asked to indicate their level of agreement with the statement on ICC Jurisdiction and Offenses against the Peace and Security of Mankind Table 7.4 shows that 38.6% agreed, and also 36.8% strongly agreed that there is increased recognition of the fact that offences against the peace and security of mankind are punishable even where they are not treated as crimes under international law, 15.2 disagreed over the same statement and 2.9 were neutral. The mean score of responses was 3.751 on a 5 point scale which indicate that offences against the peace and security of mankind are punishable.

The Charter of the Nurnberg Tribunal expressly referred to the relation-ship between international law and national law with respect to the criminal characterization of particular con-duct only in relation to crimes against humanity. Article 6, subparagraph) of the Charter characterized as crimes against humanity certain types

of conduct "whether or not in violation of the domestic law where perpetrated". In its Judgment, the Nurnberg Tribunal recognized in general terms what is commonly referred to as the supremacy of international criminal law over national law in the context of the obligations of individuals.

In this regard, the Nurernberg Tribunal stated that,

> The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.

The Commission recognized the general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law in Principle II of the Nurnberg Principles which states that the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

It must be pointed out that the clause under consideration concerns only the criminal characterization of certain types of conduct as constituting crimes against the peace and security of mankind. It is without prejudice to national competence in relation to other matters of criminal law or procedure, such as the penalties, evidentiary rules, etc., particularly since national courts are expected to play an important role in the implementation of the Code. The principle of the criminal responsibility of a superior for purposes of the Code applies only to those situations in which the subordinate actually carries out or at least attempts to carry out the order to commit the crime, as indicated by the phrase "which in fact occurs or is attempted". In the first case, the criminal responsibility of a superior is limited to situations in which a subordinate actually carries out the order to commit a crime. This limitation on the criminal

responsibility of a superior for the crimes contained in articles 17 to 20 is a consequence of the limited scope of the Code which covers only those crimes under international law which are of such a character as to threaten international peace and security.

Under the Code, the superior who gives an order to commit a crime which is not carried out would still be subject to the penal or disciplinary measures provided by national law. In the second case, the criminal responsibility of a superior is extended to include situations in which a subordinate attempts and fails to carry out the order to commit a crime since the subordinate would incur criminal responsibility in such a situation it would clearly be a travesty of justice to hold the subordinate responsible for attempting to commit a crime pursuant to the order of his superior while permitting the superior to escape responsibility as a result of the subordinate's failure to success-fully carry out the orders. The principle of individual criminal responsibility under which an individual who orders the commission of a crime is held accountable for that crime

7.2 International treaties and offenses endangering international order

The scope and application of universal jurisdiction must be clearly defined to avoid abuse of the principle, which could endanger international law, order and security universal jurisdiction has become an effective way to combat impunity internationally, and ensure protection of humanity's common values. The principle waives the habitual rules of classical international law and appeal to the criminal justice of States. However the perceived abuse and misuse of indictments by European judges against African leaders, subjecting them to the jurisdiction of European States is arguably contrary to the sovereign equality and independence of States, and evoke memories of imperialism.

State must strive to domesticate legislation that is in tandem with universal jurisdiction in their domestic courts over the most serious international crimes establishing such jurisdiction sends a unified and unequivocal message to perpetrators, and would-be perpetrators, that grave violations of international humanitarian and human rights law would not be tolerated. States should cooperate and be consistent with their international obligations and national practice, provide all means of support to each other, including mutual legal assistance to ensure the expedient and effective investigation and prosecution of individuals responsible for grave crimes. Universal jurisdiction, when applied appropriately, was an important tool in the international community's justice toolbox.

The Rationale and scope of universal jurisdiction forms a basis for jurisdiction over crimes committed abroad that are not covered by any other jurisdictional principle With the aim of ensuring the protection of the fundamental interests of the international community as a whole and preventing impunity, states should establish universal jurisdiction to investigate, prosecute and punish the most serious crimes of concern to the international community as a whole and particularly those defined in the Statute of the International Criminal Court. Universal jurisdiction should not be established for crimes other than those serious crimes of international concern .Future international legal instruments concerning the most serious crimes of concern to the international community should confirm the applicability of universal jurisdiction.

Table 7.5: International treaties and offenses endangering international order

	Frequency	Percentage %	Mean	Standard deviation
			3.745	0.1436
Neutral	15	8.8		
Disagree	28	16.4		
Strongly Disagree	16	9.4		
Agree	37	21.6		
Strongly agree	75	43.8		
Totals	171	100		

The respondents were asked to indicate their level of agreement with the statement on international treaties and offenses endangering international order. Table 7.5 shows that most of the respondents (43.8) strongly agreed that many international treaties provide for universal criminal jurisdiction for offences that endanger the international order, 21.6% agreed while 16.4% and 9.4% disagreed and strongly disagreed over the same statement. A few (8.8%) were neutral. The mean score of responses was 3.745 on a 5 point scale which indicate that international treaties provide for universal criminal jurisdiction for offences that endanger Universal jurisdiction should be exercised with self-restraint.

In regard to the findings it was established that in the exercise of universal jurisdiction a distinction should be made between the different stages of proceedings and all stages of the proceedings the standards of human rights must be complied with. The study found out that Investigation is admissible in absentia hence states can initiate criminal proceedings, conduct an investigation, preserve evidence, issue an indictment, or request extradition. And that the presence of the defendant should be always required for the main proceedings. Therefore, trials in absentia shall not be conducted in cases of universal jurisdiction.

This is a very challenging scenario especially when the indicted is the head of state who is to dispense executive duties to the state and at the same time appear before the court as was the case of Uhuru Kenyatta appearance at the status conference. Uhuru had to step down as president for his Deputy to stand in as an Acting president. During focus group discussion, a member retorted that;

> Uhuru Kenyatta has said that for the sake of protecting the peoples power that the Kenyans have bestowed unto him as president of this country, He has honored the summons to appear before the Hague court as Uhuru Kenyatta but no as the President of Kenya Uhuru Kenyatta respects the sovereignty of the state and that is why he stepped down for his deputy (discussant).

In the context of the above it is argued that universal jurisdictions endanger their states sovereignty and thus a threat to international order. The international community should establish mechanisms in order to determine the most appropriate and effective jurisdiction in cases of conflicts of multiple jurisdictions. In cases of conflicts of jurisdiction amongst states seeking to exercise universal jurisdiction, in accord with the Resolutions of the XVIIth International Congress of Penal Law, the most appropriate state should be determined with a preference to either the custodial state or the state where most of the evidence can be found, taking into account criteria such as the ability of each state to ensure a fair trial and to guarantee the maximum respect for human rights and the potential (un) willingness or (in) ability of such states to conduct the proceedings.

In conformity with the *ne bis in idem* principle, a state wishing to exercise universal jurisdiction shall respect final decisions rendered by the domestic court of another State (or international court) regarding the same acts, unless the underlying proceedings were not conducted independently, impartially, or in accordance with the norms of due process recognized by international law. Universal jurisdiction allows states or international organizations to claim criminal jurisdiction over an accused

person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity. Crimes prosecuted under universal jurisdiction are considered crimes against all, too serious to tolerate jurisdictional arbitrage.The concept of universal jurisdiction is therefore closely linked to the idea that some international norms are *erga omnes*, or owed to the entire world community, as well as the concept of *jus cogens* that certain international law obligations are binding on all states.

According to Amnesty International, a proponent of universal jurisdiction, certain crimes pose so serious a threat to the international community as a whole, that states have a logical and moral duty to prosecute an individual responsible therefore; no place should be a safe haven for those who have committed genocide, crimes against humanity, extrajudicial executions, war crimes, torture and forced disappearances. Universal jurisdiction may be asserted by a particular nation as well as by an international tribunal. The result is the same: individuals become answerable for crimes defined and prosecuted regardless of where they live, or where the conduct occurred; crimes said to be as grievous as to be universally condemned.

Amnesty International argues that since the end of the Second World War over fifteen states have conducted investigations, commenced prosecutions and completed trials based on universal jurisdiction for the crimes or arrested people with a view to extraditing the persons to a state seeking to prosecute them. These states include: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Switzerland, the United Kingdom and the United States.

All states parties to the Convention against Torture and the Inter-American Convention are obliged whenever a person suspected of torture is found in their territory to submit the case to their prosecuting authorities for the purposes of prosecution, or to extradite that person. In addition, it is now widely recognized that states, even those that are not states parties to these treaties, may exercise universal jurisdiction over torture under customary international law.

Opponents, such as Henry Kissinger, who was himself the subject of war crimes charges in Spain,] argue that universal jurisdiction is a breach of each state's sovereignty: all states being equal in sovereignty, as affirmed by the United Nations Charter, widespread agreement that human rights violations and crimes against humanity must be prosecuted has hindered active consideration of the proper role of international courts. Universal jurisdiction risks creating universal tyranny that of judges. According to Kissinger, as a practical matter, since any number of states could set up such universal jurisdiction tribunals, the process could quickly degenerate into politically driven show trials to attempt to place a quasi-judicial stamp on a state's enemies or opponents. This in itself could become a danger to international order

7.6 ICC Jurisdiction promotes National Security and International Cooperation

From a constructivist perspective, the Kenyan state does not enjoy the monopoly of the legitimate use of force and unilateral proclamation of executive rule to maintain law and order, as well as to guarantee internal and external sovereignty in a modern state. One of the hallmarks of state sovereignty in the contemporary international system is the concept of state centrism which unveils national security , national economy national ideology and culture as is the pillars of a nation state and hence it’s a ability to guarantee the security of its citizens and stability of its Nation.(Mueller, 2008) The concept of state security is both fuzzy and problematic, and more so in

Africa given the historical diversity of states as political units with a considerable proportion of them derogating from the Westphalia benchmark. There exist multiple networks of power within and beyond the geo-spatial state boundaries in many African countries with the result that some of the African states have been differently described as weak states, quasi-states, fragile states, pseudo states and shadow states. (Omeje, 2008) the Kenyan state ostensibly fits into the mound of states in Africa categorized as weak or fragile, given the fragmented nature of policing and security domains in the country. Apparently, the Kenyan state, like many in Africa and elsewhere in the developing regions, can scarcely guarantee security for it citizenry.

Table 7.6: National Security and International Cooperation

	Frequency	**Percentage %**	**Mean**	**Standard deviation**
			4.05	0.2062
Neutral	5	2.9		
Disagree	5	2.9		
Strongly Disagree	16	9.4		
Agree	73	42.7		
Strongly agree	72	42.1		
Totals	171	100		

The respondents were asked to indicate their level of agreement with the statement on national security and international cooperation. From the table 4.18, 42.7% of the respondents strongly agreed that national security is at present achievable only by way of international cooperation, 42.1% also agreed. 9.4% of the respondents strongly disagreed over the same statement. The mean score of responses was 4.05 on a 5 point scale which indicate that there must be international cooperation for national security to be achieved.

For a long time, the question of international implementation of criminal law was approached from the viewpoint of the need to prevent possible interference with state sovereignty and not from that of the need for coordinated struggle and cooperation in the fight against international crimes. Thus, states either cited the sovereignty principle as justification for objecting to the extension of universal criminal jurisdiction or as justification for rejecting the establishment of an international criminal court This situation continues to exist today, though in a different fashion; there is increasing recognition that national security is at present achievable only by way of international cooperation. In this context, however, one cannot underestimate the importance of the fact that states are the essential structural elements of today's international legal order, that they represent the effective political organizational form of peoples and that they have particular protective functions which they actually exercise. However compelling the precept of cooperation may be, all states want to insure that other states will not be permitted to use criminal law to interfere with their sovereignty or to achieve goals incompatible with the interests of the international community and peoples' right to self-determination.

To date, the industrially strong Western powers have decisively opposed universal criminal jurisdiction in the context of a code of offences against the peace and security of mankind fearing that they might thereby lose rights of diplomatic protection for their citizens or be forced to recognize criminal judgments of states whose legal systems they do not wish to respect as being of equivalent right. Fundamentally, the Western powers base their position on the principle of sovereignty that is sovereignty *vis a vis* the criminal jurisdiction of other states.

They cite the principle to justify their non-recognition of foreign criminal judgments, their refusal to extradite their own citizens, and their attempts to claim immunity for persons who we reacting as state agents when they committed international crimes. The Western powers do not wish national courts to be empowered to judge the conduct of foreign governments. This essentially means removing recognition of the international nature of the crimes defined in the code. states use the sovereignty principle to justify their objections to the competence of an international criminal court The underlying fear here is that criminal jurisdiction over crimes committed on one's own territory, where the victim is a citizen or national interests are at stake, will be at the mercy of an international system of criminal justice controlled by others.

Thus, although the Soviet Union and other socialist countries emphatically support international cooperation of states to coordinate criminal prosecution of crimes against peace and humanity, from the outset they have repeatedly rejected the creation of an international criminal court as a supra-national institution. Following the example of Nuremburg, they have always advocated the creation of *ad hoc* courts whose competence could be based on the existence of joint national criminal jurisdiction, decisively opposing attempts to create an international criminal court which would have the competence to act side by side, or. in place of national criminal jurisdiction. They have regarded it as impossible for states to hand over their own citizens to an international court for punishment or to refrain from criminal prosecution of offences committed on their territory.

It is, however, noteworthy that they have never objected to universal criminal jurisdiction for grave international crimes, that is, to the notion that other states, or all states, obtain a right to prosecute particularly heinous offences committed on their territory or by their citizens. This is true despite the fact that universal jurisdiction for

grave international crimes can also be regarded as an interference with sovereignty. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect

7.7 ICC Jurisdiction and Implementation of code of crimes against mankind

The identification and prosecution of international offences led to proposals for the creation of a permanent international criminal court early on, most notably after the First World War, when the permanent International Court of Justice was established. Interest was then rekindled after the Second World War, when the Nuremburg and Tokyo international military tribunals were created.

The Tokyo and Nuremburg tribunals were created on the basis of states' criminal Jurisdiction over the main war criminals. The joint exercise of individual jurisdiction undoubtedly had considerable influence on the juridical quality of the trials and the corresponding verdicts, making their probative value indisputable. The Tokyo and Nuremburg tribunals, which amounted to the joint exercise of national criminal justice of first instance on the basis of universally punishable acts, have had a lasting influence on both the definition of the elements of international offences against the peace and security of mankind and on the responsibility of states for international offences.

Due to the cold war, however, utilization of this experience got bogged down. The issues and preoccupations of the 21st century present new and often fundamentally different types of challenges from those that faced the world in 1945, when the United

Nations was founded. As new realities and challenges have emerged, so too have new expectations for action and new standards of conduct in national and international affairs. Since, for example, the terrorist attacks of 11 September 2001 on the World Trade Center and

Pentagon, it has become evident that the war against terrorism the world must now fight one with no contested frontiers and a largely invisible enemy is one like no other war before it. Many new international institutions have been created to meet these changed circumstances. In key respects, however, the mandates and capacity of international institutions have not kept pace with international needs or modern expectations.

Above all, the issue of international intervention for human protection purposes is a clear and compelling example of concerted action urgently being needed to bring international norms and institutions in line with international needs and expectations.. In most cases these conflicts have centered on demands for greater political rights and other political objectives, demands that were in many cases forcibly suppressed during the Cold War. Gone with the end of the Cold War was the artificial and often very brutal check which Cold War politics imposed on the political development of many states and societies especially in the developing world and in the former Eastern Bloc.

In a few cases, regimes have launched campaigns of terror on their own populations, sometimes in the name of an ideology; sometimes spurred on by racial, religious or ethnic hatred; and sometimes purely for personal gain or plunder. In other cases they have supported or abetted terror campaigns aimed at other countries which have resulted in major destruction and loss of life. All this presents the international

community with acute dilemmas. If it stays disengaged, there is the risk of becoming complicit bystanders in massacre, ethnic cleansing, and even genocide. If the international community intervenes, it may or may not be able to mitigate such abuses. But even when it does, intervention sometimes means taking sides in intra-state conflicts. Once it does so, the international community may only be aiding in the further fragmentation of the state system. Interventions in the Balkans did manage to reduce the civilian death toll, but it has yet to produce a stable state order in the region. As both the Kosovo and Bosnian interventions show, even when the goal of international action is, as it should be, protecting ordinary human beings from gross and systematic abuse, it can be difficult to avoid doing rather more harm than good.

Table 7.7: Implementation of code of crimes against mankind

	Frequency	**Percentage %**	**Mean**	**Standard deviation**
			4.05	0.2062
Neutral	5	2.9		
Disagree	5	2.9		
Strongly Disagree	16	9.4		
Agree	73	42.7		
Strongly agree	72	42.1		
Totals	**171**	**100**		

The respondents were asked to indicate their level of agreement with the statement on implementation of code of crimes against mankind. From the table7.7, 42.7% of the respondents strongly agreed implementing mechanism for any code of crimes against the peace and security of mankind must be based on cooperation among states, 42.1% also agreed. 9.4% of the respondents strongly disagreed over the same statement. The mean score of responses was

4.05 on a 5 point scale which indicate that there must be cooperation among states to implement any code of crimes against the peace and security of mankind.

The concept of human security including concern for human rights, but broader than that in its scope has also become an increasingly important element in international law international relations, increasingly providing a conceptual framework for international action. Although the issue is far from uncontroversial, the concept of security is now increasingly recognized to extend to people as well as to states. It is certainly becoming increasingly clear that the human impact of international actions cannot be regarded as collateral to other, but must be a central preoccupation for all concerned. Whether universally popular or not, there is growing recognition worldwide that the protection of human security, including human rights and human dignity, must be one of the fundamental objectives of modern. In a dangerous world marked by overwhelming inequalities of power and resources, sovereignty is for many states their best and sometimes seemingly their only line of defense. But sovereignty is more than just a functional principle of international relations.

For many states and peoples, it is also recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny. In recognition of this, the principle that all states are equally sovereign under international law was established as a cornerstone of the UN Charter (Article 2.1)

In many states, the result of the end of the Cold War has been a new emphasis on democratization, human rights and good governance. But in too many others, the result has been internal war or civil conflict more often than not with ugly political and humanitarian repercussions an unhappy trend of contemporary conflict has been

the increased vulnerability of civilians, often involving their deliberate targeting. Sometimes the permanent displacement of civilian populations has been a primary objective of the conflict; there has also been increasing concern about the deliberate use of systematic rape to provoke exclusion from a group. Efforts to suppress armed (and sometimes unarmed) dissent have in too many cases led to excessive and disproportionate actions by governments, producing in some cases excessive and unwarranted suffering on the part of civilian populations.

The defense of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people. It is acknowledged that sovereignty implies a dual responsibility: externally which includes to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.

7.8 ICC Jurisdiction, Co-operation among States and Justice

That States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them, States shall co-operate with each other in the collection of information and evidence which would help to bring to trial persons against whom there is evidence that they have committed war crimes and crimes against humanity and shall exchange such information.

In a resolution adopted in 2003 on the situation of human rights in the Democratic Republic of the Congo, the UN General Assembly urged all parties to the conflict in

the Democratic Republic of the Congo. To allow free and secure access to all areas so as to permit and support investigations of the presumed serious violations of human rights and international humanitarian law, with a view to bringing those responsible to justice, and to cooperate fully to that end with national and international human rights protection mechanisms to investigate alleged human rights violations and breaches of international humanitarian law in the Democratic Republic of the Congo .Under Article 12 of the Rome Statute, the ICC's jurisdiction originates from state consent, which manifests itself through either territorial or nationality jurisdiction.

Alternatively, the ICC's ultimate and most compelling source of authority may rest, however, in the philosophical natural laws underpinning the relationship between the international community's rights and the correlative duties vested in the states. Where such a relationship exists, the states are under an obligation to uphold and defend not only their citizens' rights but also the rights of the international community at large. This obligation springs from a complex relationship between international crimes, *jus cogens* and obligations *erga omnes* that has developed in customary international law. Where that relationship imposes an affirmative duty on a state to adjudicate, convict and punish violators of international human rights, a state cannot shirk that duty.

Table7.8 ICC Jurisdiction, Co-operation among States and Justice

	Frequency	**Percent**	**Mean**	**Standard deviation**
			3.693	0.1363
Neutral	11	6.4		
Disagree	22	12.9		
Strongly Disagree	22	12.9		

Agree	48	28.1
Strongly Agree	68	39.8
Total	171	100.0

ICC Jurisdiction, Co-operation among States and Justice

The respondents were asked to indicate their level of agreement with the statement on cooperation among States and justice. Table 7.8 illustrates that 39.8% of the respondents strongly agreed that all States are to cooperate with each other on a bilateral or multilateral basis to bring to justice persons responsible for international crimes, 28.1% agreed, 12.9% strongly disagreed and disagreed respectively over the same statement. The mean score of responses was 3.693 on a 5 point scale which indicate that there must be cooperation among states to bring to justice persons responsible for international crimes.

7.9 All states are to cooperate with each other on a bilateral or multilateral basis to bring to justice persons responsible for international crimes.

In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon all the States concerned; To intensify their co-operation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity.

In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly: Firmly convinced of the need for international co-operation in the thorough investigation of war crimes and crimes against humanity … and in bringing about the detection, arrest, extradition and punishment of all war criminals and

persons guilty of crimes against humanity who have not yet been brought to trial or punished,. Further urges all States to co-operate in particular in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity. Affirms that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law In a resolution adopted in 1971 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly requested the UN Commission on Human Rights;

To submit to the General Assembly draft principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. In a resolution adopted in 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly declared that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity , States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

This complex relationship between the international community's 'right to prosecution and the states' duties to comply is not sufficiently protected, however, by consent or territorial based jurisdiction. Instead, universal jurisdiction provides the strongest basis underpinning the ICC's authority, allowing for a more effective and formidable court. Under the Rome Statutes 'principle of complimentarity the authority of the ICC is triggered when a state is unable or unwilling to fulfill its duties to the international community, which demand that the state international criminal offenses subject to universal jurisdiction.

Essentially, this means that the state's duty is discharged to the ICC, under the *jus cogens* and obligations *erga omnes* doctrines of customary international law. Any treaty or agreement violating or impeding that discharge of duty violates customary international law. As of May 2004, ninety-four states had ratified the Rome Statute. The United States is not one of these countries, and has been vociferous in its opposition, expressing strong reservations over the legitimacy of the ICC and its jurisdiction over United States citizens. Less than five years after the Rome Statute authorized the ICC's creation, the United States launched an unprecedented campaign to secure bilateral immunity agreements.

The agreements explicitly exempt United States citizens from the ICC's reach. The United States' efforts to obtain immunity agreements have invigorated the debate over the ICC's legitimacy and underline the importance of the court's jurisdictional basis. Part I of this note defines and identifies international crimes subject to universal jurisdiction and within the scope of the International Criminal Court. Part II discusses a state's duty under recognized doctrines of international law to punish perpetrators of those international crimes and the correlative right held by the international community to expect and demand adjudication. Part III suggests that if a state is

unable or unwilling to prosecute those crimes, the state must discharge that duty to the ICC. Part IV asserts that the United States' bilateral immunity agreements restricting the authority of the ICC contravene the United States' duty to the international community and hence are illegal under *jus cogens*.

The Nuremberg and Tokyo trials were founded on the wish that atrocities similar to those that had taken place during the Second World War would never again recur. In 1948 the U.N. General Assembly adopted a resolution reciting that in the course of development of the international community; there will be an increasing need of an international judicial organ for the trial of certain crimes under international law." Initiatives to create such an institution were taken as early as 1937 by the League of Nations that formulated a convention for the establishment of an international criminal court, but the Cold War led to deadlock in the international community and the matter fell into oblivion. Sadly we realize that the cruelties during World War II were not isolated incidents. Genocide has since Nuremberg taken place in Uganda, in Cambodia, in Rwanda, in Somalia, in Bosnia, in Kosovo in Syria in Iraq in Libya and the list could go on.

Not until the world was shocked by the ethnic cleansing in the former Yugoslavia and the genocide in Rwanda could the UN, no longer paralyzed by the Cold War, take action. In response the Security Council, basing its decisions on Chapter VII of the UN Charter, commissioned two ad hoc international criminal tribunals (the ICTY for the former Yugoslavia and the ICTR for Rwanda) to investigate alleged violations and to bring the perpetrators to justice. Without doubt, these courts have significantly contributed to the development of international criminal law, but they have not been entirely successful. Their biggest problems have been the lack of formal means of enforcement to seize indicted criminals. After the Cold War tensions had dissolved,

the world community showed a renewed interest in creating an international criminal court. On December 4, 1989, the United Nations General Assembly adopted a resolution that instructed the International Law Commission (the ILC) to study the feasibility of the creation of a permanent ICC. Four years later, and obviously pleased with the ILC's report, the General Assembly called on the Commission to commence the process of drafting a statute for the court. This statute was presented in 1994.

The following year a preparatory committee was established to further review the substantive issues regarding the creation of a court based on the ILC report and statute. The aim was to prepare a convention for the ICC that had the prospects of being widely accepted globally. This study deciphered to establish the impact of acceptance of the ICC globally and whether this acceptance bilaterally/and multilaterally means cessation of part of the sovereignty of state parties to an international legal regime as ICC.

Indeed it is argued that the spirited motion of the AU members to scatter the permanent court by their enmasse withdrawal led by Kenya is prove enough that, the Hague based court is a force to reckon with and by extension regime whose authority cannot be wished away by individual states summarily. ICC in this context indeed surges states sovereignty.

The International Criminal Court (ICC) was established by the Rome Statute of the International Criminal Court on 17 July 1998, when 120 states participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court" adopted the statute. This is the first ever permanent, treaty-based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.

The statute sets out the Court's jurisdiction, structure and functions and it provides for its entry into force 60 days after 60 states have ratified or acceded to it. The 60th instrument of ratification was deposited with the Secretary General on 11 April 2002, with ten countries simultaneously deposited their instruments of ratification. Accordingly, the statute entered into force 1 July 2002. Anyone who commits any of the crimes under the statute after this date will be liable for prosecution by the Court

Table 7.9. All states are to cooperate with each other on a bilateral or multilateral basis to bring to justice persons responsible for international crimes.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	None	11	6.4	6.4	6.4
	Disagree	22	12.9	12.9	19.3
	Strongly Disagree	22	12.9	12.9	32.2
	Agree	48	28.1	28.1	60.2
	Strongly Agree	68	39.8	39.8	100.0
	Total	171	100.0	100.0	

The study found out that majority of the total respondents, more than 60% agreed that all states are to cooperate with each other on a bilateral or multilateral basis to bring to justice persons responsible for international crimes. Only12.9% did not agree and a paltry 6.4 % neither agreed nor disagreed.

One hundred and sixty States participated in the United Nations Diplomatic Conference (held in Rome from 15 June to 17 July 1998), which led to the adoption of the Rome Statute of the International Criminal Court. The draft text submitted to the Diplomatic Conference was fraught with competing options, with over 1,400

brackets indicating disagreement on the text. Through working groups, informal negotiations and open debates, a delicately balanced text emerged and a generally agreed solution was found for the many politically sensitive and legally complex issues. The Statute and the Final Act were put forward as a complete "package" for adoption. This package was the product of intense negotiations and judicious compromises designed to reach widespread agreement. The most dissidence came from India and the United States, which both tried to amend the final package.

In each case, a "no-action motion" a procedural device for not considering these amendments was adopted by an overwhelming majority. The package was thus maintained and then agreed on in its entirety by those delegations in attendance, by a vote of 120 in favor and 7 against, with 21 abstentions. Article 125 of the Rome Statute called for the Statute to remain open for signature at the United Nations headquarters until 31 December 2000. On December 31, 2000, the United States, Iran and Israel were the last to sign the Rome Statute, bringing the total number of signatures to 1391. Although many predicted that it would take decades to obtain the 60 ratifications needed for the Statute to entering to force and the Court to be created, this landmark was reached on April 11, 2002, within four years of the adoption of the treaty. The current ratifications are from every region of the world.1 On May 6, 2002, the Bush administration announced in a foreign policy address and letter to UN Secretary-General Kofi Annan that it did not recognize the United States' signature of the Rome Statue, (which occurred during the Clinton presidency,) and had no intention to become party to the Statute.

While there is no express general requirement in the Rome Statute requiring non-States Parties to cooperate, all States, whether parties to the Statute or not, are obliged under existing international law to bring to justice those responsible for genocide,

crimes against humanity and war crimes. If States are incapable of this, they are expected to extradite suspected individuals to a state willing and able to conduct a fair trial. Moreover, in December 1973, the UN General Assembly adopted the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity in Resolution 3074, which declares that all states are to cooperate with each other on a bilateral or multilateral basis to bring to justice persons responsible for these crimes.

The ICC complements existing national judicial systems and while it will step in only if national courts are unwilling or unable to investigate or prosecute such crimes, the Court may invite national courts to undertake an ad hoc agreement. If a State chooses to conclude such an agreement, it would be bound to comply with requests for assistance. Additionally, if the Security Council refers a situation to the ICC that threatens international peace and security, it can use the powers under Chapter VII of the UN Charter to compel non-States Parties to cooperate with the ICC's requests for assistance.

7.10 Is sovereignty viewed as an enemy of international criminal law?

In Africa, the concept of state sovereignty has been complicated by the existence of weak states in terms of the core defining characteristics of a state: functioning government; defined territory; unity, independence and stable population. At its worst, weak states have degenerated further into so-called failed or collapsed states (Mboya, 2009).

Sovereignty has increasingly acquired an added meaning that connotes a change in emphasis from sovereignty as control to sovereignty as responsibility in both its internal and external dimensions. This modern conception of sovereignty is essentially

a UN response to the traditional principle of non-interference in internal affairs of states, which more often than not, may serve to protect an abusive regime in power from being investigated by the international community. Consequently, the modern conception of sovereignty gives the UN the leeway to classify some intra-state activities as threats to international peace and security and thereby warranting international intervention (IDRC, 2008).

Turning more specifically to the ICC, it also bears recalling that creating that body was an exercise of sovereignty. No other entities than states had the authority to create a permanent international criminal court. So the ICC, perhaps paradoxically, also owes its existence to state sovereignty. The grounding of the ICC in the consent of states means, in particular, that the ICC may lawfully exercise jurisdiction over nationals of non-party states when they commit crimes on the territories of consenting states. There is no reason that states cannot determine that crimes committed on their territory or by their nationals are prosecutable by courts acting on their behalf.

In creating the Court, those states have accepted that the ICC may exercise some of their sovereign powers (the right to exercise jurisdiction) in that way. Non-party states have not had their sovereignty limited in any additional way by this concession made by states parties, who have locked themselves into a regime that can take over part of the protective role of the state, by prosecuting offences if the state later becomes unwilling or unable to do so.

Admittedly, the rights of the ICC to do so are hedged with conditions protecting sovereignty, most notably, complementarity. Most of the works reviewed here discuss complementarity, and tend to do so well. However, although some of the authors accept that complementarity was intended to limit the power of the ICC (or, the ‘inter-

national') over states, the idea behind complementarity can also be seen as a use of state sovereignty for international ends As Sir Robert Jennings has written in another context

The classical international lawyer's call for a surrender of sovereignty was erroneous. What was and is most urgently needed is not a surrender of sovereignty but a transformation and augmentation of it into new directions by harnessing it, through proper legal devices, to the making of collective decisions, and the taking of effective collective action, over international political problems.(Jennings, 2002)

The question that then arises at this point is can states, therefore, perform the core functions associated with state sovereignty, in particular the protection of security of their citizens, without the intervention of international actors such as international law enforcement agencies? It could be partly in response to these concerns that the AU's Constitutive Act has watered down, at least in theory, the concept of absolute sovereignty. Among the core concessions include: the right of the Union to intervene in a member state in respect of grave circumstances; the allowance of member states to request intervention from the Union in order to restore peace and order; respect of democratic principles, human rights, the rule of law and good democratic governance (AU, 2000).

State is based upon the foundation of sovereignty, which is defined as "supreme power especially over a body politic; freedom from external control. The idea of state sovereignty dates back as far as the notion of the state itself (Malcolm ,2008).However, the development of international law has slowly weakened the idea of state sovereignty, causing a tension between international law and state sovereignty. This juxtaposition has developed because while the preservation of

peace and state sovereignty was the original concern that led countries to form international law, international law itself has now become a threat to state sovereignty. While international law can be helpful in many ways, it is dangerous because it comes with the price of limiting state sovereignty. Third world and developing countries appear most at risk because they have the least influence in the international arena. The more powerful countries, (such as those on the UN Security Council), are the ones running the show. Therefore, international law is less of a threat to them and more of a tool which they can utilize to strengthen their state (Crawford, 1985).

Also, with diminished state sovereignty, comes less accountability, because the international legal system does not have elected officials and is not as close to the people. , there is the slippery slope argument that slowly, more and more powers are being taken from the states and at what point does it stop. International criminal jurisdiction is not exactly a new phenomenon in international relations, its greatest influence on national politics and by extension international politics may be said to have been in the 20th and 21st Centuries. In particular, the nexus between international law and state sovereignty has become fairly controversial in the recent decades.

Much debate now focuses on the impact of international law on what has conventionally been regarded as indivisible and autonomous state sovereignty. Whereas the phenomenon of sovereignty has received widespread attention from scholars and practitioners of international relations, it however, remains a contested concept. In particular, this relates to the principle of non-interference in affairs that are within the internal jurisdiction of states. This, in turn, brings into sharp focus the nexus between state sovereignty and international law. More often than not, on the one hand states legitimize international law, while on the other hand international law legitimizes states (Matanga, 2009).

The conception of sovereignty as responsibility is said to have a threefold significance: it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promoting their welfare; it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN; and it means that the agents of state are responsible for their actions in terms of commissions and omissions (ICISS, 2001).

Sovereignty adduces the supreme power over citizens and subjects, unrestrained by law would be an instrument to secure and advance the purposes for which the state exists, which, in the main is to protect and enhance Man's physical and moral well-being (Harmon, 1964; Sabine, 1956). On sovereignty, Bruce Broomhall the idea that certain acts 'undermine the international community's interest in peace and security and, by their exceptional gravity, "shock the conscience of mankind" and thus are not the concern of one state alone. The obligations under-taken by states parties to the Rome Statute, to cooperate with the Court and to, essentially, submit their judicial processes or lack thereof to external oversight also have implications for sovereignty.

However the prevention of international crimes cannot occur without sovereignty. Violations of international criminal law were frequent, for example in Somalia, where there was no government that could control the various factions. It is the same in cases such as Sierra Leone, where rebel forces were fighting a government that is weak and does not control much territory. The state (and its powers) has a protective role that cannot be ignored here, at the very least unless and until the UN or another body chooses to take it over (Nijman, 2004)

No other entities than states has the authority to create a permanent international criminal court. So the ICC, perhaps paradoxically, also owes its existence to state

sovereignty. The grounding of the ICC in the consent of states means, in particular, that the ICC may lawfully exercise jurisdiction over nationals of non-party states when they commit crimes on the territories of consenting states. There is no reason that states cannot determine that crimes committed on their territory or by their nationals are prosecutable by courts acting on their behalf. In creating the Court, those states have accepted that the ICC may exercise some of their sovereign powers. By the right to exercise jurisdiction in that way. On-party states have not had their sovereignty limited in any additional way by this concession made by states parties, who have locked themselves into a regime that can take over part of the protective role of the state, by prosecuting offences if the state later becomes unwilling or unable to do so. The complexity of international criminal law's relationship with sovereignty comes through not only in the procedural or institutional aspects of international criminal law. It is also present in substantive international criminal law. Indeed, in at least one instance, substantive international criminal law supports state sovereignty.

David Luban noted that although crimes against humanity limit states freedom of action in relation to their own nationals thus limiting their sovereignty, aggression has a sovereignty protecting role. The prohibition of aggression protects states by criminalizing armed violations of their sovereignty. International criminal law certainly has its 'schizophrenias', such as the distinction between national and international armed conflicts. Lattimer and Philippe put it as;

> The gaps in that protection are sufficiently large to allow much blood to flow in between. Sovereignty has a lot to do with what is, or is not, considered to be part of international criminal law, as the distinction between international and non-international conflicts shows. The boundaries of international criminal law are not apolitical. International criminal law has areas of blindness.(Lattimer,2003).

One of these areas is famine, which is traditionally seen not as a problem of criminal law, or perhaps even law at all, but one of development aid. However, as Alex de Waalhas reported '"to starve" is transitive, itis something people do to each other'.

Despite an upturn in interest in using criminal law, and the fact that some humanly created famines may come under the definitions of crimes against humanity and genocide, international criminal law proscriptions remain inadequate to respond even to famines that are the result of intentional human decision making Ian Ward connotes

It should always be remembered, is as potent in its absence as its presence. The fact that international criminal law is not a body of law that has fallen from on high fully formed, but is the outcome of political contestation seems to have been recognized by a number of the works under consideration. of states, individually and collectively is subject to diverse extra-legal influences, the process of international criminalization will always be less orderly than its conceptual.

This is absolutely correct, the modern discussion on whether or not terrorism is an international crime, for example, reflects contestation over where at the national or international levelsuch actions ought to be punished, and in other situations, whether criminal law is the appropriate model to adopt. This political contestation over the substance of international criminal law is clearly in evidence in Rome.

Broomhall notes, the decision in relation to the ICC that the crimes had to be spelt out in considerable detail was not solely because of an abstract commitment to a systematic presentation of international criminal law, but 'also resulted from the awareness of governments that they were designing an institution that could possibly bring indictments against even their highest-ranking officials

Table 7.10 Is sovereignty viewed as an enemy of international criminal law?

Response	Percentage
Yes	63.74%
No	29.82%
Neutral	6.44%
Total	**100%**

With regards to the above,, majority of the total respondents making up63%indeed agreed that sovereignty is viewed as an enemy of international criminal law.29.82%were of a divergent view while 6.44%abstained from commenting . In this context, it is argued that citizenship could only be viewed in terms of subjection to a sovereign. The sovereign possesses sovereign power that is without limit or condition, inalienable and not subject to prescription, and unrestrained by law because the sovereign is the source of law (Sabine, 1956:345).

International criminal law scholars see *s*overeignty as the sibling of realpolitik, thwarting international criminal justice. When sovereignty appears in international criminal law scholarship, it commonly comes clothed in hat and cape. A whiff of Sulphur permeates the air. Generally, international criminal law scholars see sovereignty as the enemy. It is seen as the sibling of *realpolitik*, thwarting international criminal justice at every turn.

Although this may sometimes be an adequate description of reality, the relationship between sovereignty and international criminal law is more complex, and we are beginning to see this coming through in more sophisticated international criminal law scholarship. Indeed the books reviewed here can be seen as belonging to the second wave of post-Cold War international criminal law scholarship. They also represent a more highly developed, worldly-wise approach

The principle of sovereignty came into play with the formation of the modern nation-state following the Westphalia Treaties of 1648 that sought to bring an end to the rampant intra-European wars. In essence, the treaties established the supremacy of the sovereign authority of the state within a system of independent and equal units. The core elements of state sovereignty were later codified in the 1933 Montevideo Convention on the Rights and Duties of States as including the possession of a permanent population, a defined territory, and a functioning government (IDRC, 2008).

State sovereignty, understood as the legal status bestowed on a state by international law to decide and act without intrusions from other sovereign states, was, inherited by the post-1945 system of international relations enshrined in the United Nations Charter. This traditional conception of sovereignty emphasized much on both internal sovereignty (supreme control of the state over its domestic affairs) and external sovereignty (the international legal recognition bestowed on a state by other states). As a matter of fact, sovereignty became closely identified with the principle of non-interference in affairs that are within the domestic jurisdiction of a state (ICISS, 2001; IDRC, 2008).

Viewed from this perspective, arguments by the United States government that the Rome Statute violates the sovereign rights of non-state parties have little merit, as the principles of the ICC statute are well in line with the traditional state sovereignty norms that are the foundation of international law. The essential impact on non-state parties' sovereignty is that nationals of such states who commit crimes on the territory of states party to the ICC statute could potentially be punished for their crimes before the international court.

However, under the traditional rules of international law, nationals of a foreign state are normally subject to the laws of the state where they are traveling. Consequently, to the extent that the establishment of the International Criminal Court creates obligations for non-state parties, it does so in a way that is perfectly consistent with the foundational international law norm of state sovereignty. States that consent to become parties to the Rome Statute of the International Criminal Court do engage in a significant redefinition of their sovereign rights and responsibilities, but they do so in a way that is consistent with the gradual evolution of the concept of state sovereignty over the centuries.

Therefore, the establishment of the International Criminal Court does not radically undermine the concept of state sovereignty; instead, it modifies sovereignty norms in a direction that promises to permit the continued utility of the concept for international law in the twenty-first century.

The above argument accedes with Werner and others that sovereignty is a conceptual category of international law whose specific content changes over time through the discursive practices of states.

State sovereignty is not a descriptive concept which stands for (‘mirrors’) a pre-given state of affairs and which can be measured and counted in an objective way. The very fact that collapsed states still count as sovereign states in international law suggests otherwise. Rather than being a representation of a state of affairs, state sovereignty is a claim to authority; a claim which has been institutionalized, defined and redefined within the framework of international law.(Wouter, Werner2004).

This perspective is at odds with the view that sovereignty is an actual political characteristic of independent political entities that have de fact political autonomy. In

such a view, international law simply takes note of that empirical situation. The discourse of international law has substantiated the conceptual category of sovereignty. The existence of a body of law based on the principle of the independence of sovereign states has legitimized and institutionalized the existence of political forms that claim the status of sovereign states. Moreover, the particular bundle of rights and duties that sovereign states claim to possess as a result of qualifying for legal sovereign status has changed considerably over time.

Sovereignty provides the basis in international law for claims for state actions, and its violation is routinely invoked as a justification for the use of force in international relations' Sovereignty, therefore, is an inherently social concept. States' claims to sovereignty construct a social environment in which they can interact as an international society of states, while at the sometime the mutual recognition of claims to sovereignty is an important element in the construction of states themselves. (Biersteker ,Weber,1996)

Michael Byers notes the fiction of legal equality masks significant differences in a state's actual power, and those power differences suggest that states have differing abilities to influence the content of international law.17Byers argues that powerful states tend to be more engaged in the international system and, therefore, their acts have a disproportionate impact on the evolution of customary international law. Additionally, they tend to maintain larger diplomatic corps that give them added influence in bilateral and multilateral treaty drafting (Byers 1999).

Majority of the African leaders still believe that the international criminal court is a blur to the African states and only out to advance colonial tendencies for self-gain.

thus the African clout muzzled its member together under the auspices of the African Union against the Hague based court as it is as a colloquium of imperial regimes

7.11. Does sovereignty constitute International legal order, which defines the basic rights and duties of states?

Sovereignty is understood in jurisprudence as the full right and power of a governing body to govern itself without any interference from outside sources or bodies. In political theory, sovereignty is a substantive term designating supreme authority over some polity. It is a basic principle underlying the dominant Westphalian model of state foundation. As such, it then clearly constitutes international legal order of which directly defines basic rights and duties of states. Sovereignty is well defined and its elements or constitutions well stated out. The aspects are:

Domestic sovereignty is actual control over a state exercised by an authority organized within this state, Interdependence sovereignty deals with actual control of movement across state's borders, assuming the borders exist, International legal sovereignty formal recognition by other sovereign states, Westphalia sovereignty is lack of other authority over state other than the domestic authority examples of such other authorities could be a non-domestic church, a non-domestic political organization, or any other external agent.. Historically, individuals were not recognized as subjects of international law, and it was assumed that only states, not individuals, had rights and obligations under international criminal law. Chinese writers on international law have recently reiterated this view, claiming that international law gives no status to individuals on Chinese territory to claim rights against the state. However, this argument has been widely criticized as being the obvious manipulation of international law by totalitarian states to preserve its own absolute power.

Moreover, in the twentieth century, the view that individuals have both rights and obligations under international law has gained widespread acceptance.24Indeed, since international law, like any legal system, is ultimately a standard for human behavior, it would seem to be a logical necessity that it would regulate individual human conduct, even if the formal constitution of international law is premised on specific acts undertaken by states as corporate entities. International Criminal Law as a field rests upon the reality that states have deliberately created rights and duties for individuals under international treaties and customs. The International Criminal Court is a direct challenge to traditional conceptions of state sovereignty because it creates a supranational judicial authority with the power to rule whether or not particular uses of force by state officials are criminal and sanction able violations of international law.

This means that the court, and not states alone, will have the authority to help determine what constitutes a legal use of force. Of course, the notion that states have a monopoly on the legitimate use of force within their territory is central to the legal concept of sovereignty. That circumstance is not undermined by the establishment of the International Criminal Court, because the court does not constitute any new authority with police power. However, states that ratify the statute give the court a role in determining which particular uses of force are legitimate

Table 7.11. Does sovereignty constitute International legal order, which defines the basic rights and duties of states?

Response	Percentage
Yes	87.72%
No	2.92%
Neutral	9.36%
Total	**100%**

Basing the argument from the above data and responses, , conclusion can be drawn that sovereignty well discerns the basic rights and duties of a state as also the levels of injustice are low and they rarely occur as per our respondents. The respondents also argued that the ICC jurisdiction is far much better than national jurisdiction as human rights are fully observed as seen in previous cases. Consequently, the legal privileges of sovereignty are altered by the International Criminal Court court's establishment. In effect, states that are parties to the ICC statute limit their own autonomy in determining whether or not the conduct of their public officials comports with obligations that states have adopted to limit their use of force. The primary effect of the ICC on member states' sovereign rights is to create an important institutional incentive for member states to prosecute genocide, war crimes, or crimes against humanity when they occur on the states territory. Since the ICC only has jurisdiction if states fail to prosecute themselves, the existence of the court puts pressure on states to exercise their own criminal jurisdiction over these crimes. In the absence of the ICC, other things being equal, states would have more latitude to decide for themselves whether or not it was politically desirable to prosecute these types of cases. Of course, states had already accepted the legal obligation to punish or extradite for genocide, if they ratified the 1948 Genocide Convention, and grave breaches of the war crimes law, if they ratified the Geneva Conventions of 1949.

What is new about the ICC is that it threatens to proceed with international enforcement of these crimes if states fail to punish. In effect, the ICC promises to uphold a certain minimal standard of compliance with the requirement on states to punish violations of international criminal law. This can be viewed as recognizing the

rights of the citizens of states to be free from victimization as a result of crimes recognized under international criminal law. As such, it is a modification of the meaning of state sovereignty. Of course, in some cases, states will be glad to shift

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7.12 .Is the ICC jurisdiction an extension of national criminal jurisdiction?

The Rome Statute (paragraph 10 of the Preamble and article 1) explicitly provides that the jurisdiction of the International Criminal Court "shall be complementary to

national criminal jurisdictions". A case is inadmissible in the International Criminal Court if the case is being genuinely investigated or prosecuted by a state which has jurisdiction over it: article 17 paragraph 1(a). If a case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, the case also is inadmissible in the International Criminal Court "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute": article 17 paragraph 1(b).

Other provisions of the Rome Statute include, Individual criminal responsibility (article 25)In respect of the crimes within the court's jurisdiction (genocide, crimes against humanity, war crimes and, perhaps in the future, the crime of aggression), the court shall have jurisdiction over "natural persons" (article 25 paragraph 1). Any person who commits a crime within the court's jurisdiction "shall be individually responsible and liable for punishment" (article 25 paragraph 2). However, the provisions of the statute relating to individual criminal responsibility do not affect the responsibility of states under international law (article 25 paragraph 4). And Irrelevance of official capacity (article 27) in the context of criminal proceedings in an international court, any immunity which might have barred the prosecution of the alleged offender in a national criminal jurisdiction is irrelevant. 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 elected representative or a government official 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. It shall also apply to Immunities or special procedural rules which may attach to the official capacity of a

person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The study observed that the principle of universal jurisdiction relies on national authorities to enforce international prohibitions, pivotal decisions are expected to reflect domestic decision-makers' positions as to the interests of justice, the national interest and other criteria. It was argued that in many States, the legal system lacks the means to investigate or prosecute on the basis of universal jurisdiction. Indeed, many legal systems do not define the term "crimes" that can be prosecuted under the principle and continue to apply domestic criminal law. This view was witnessed in Kenya after the 2007-2008 post-election violence where the Kenyan politicians in an orchestrated euphoric ode, don't be vague lets go to Hague dampened the effort that could have championed the establishment and strengthening of the national criminal justice system to handle effectively international crimes .Even then Kenya legislated ,The International Crimes Act, 2008An Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions.

7.12. ICC jurisdiction an extension of national criminal jurisdiction

Response	**Percentage**
Yes	75.44%
No	18.13%
Neutral	6.43%
Total	100%

Majority of the respondents argued that ICC is a court, just like the national criminal jurisdiction but with added features that make it as a resort of the national jurisdiction as it operates under minimal, if any, interference from the environment unlike national jurisdiction where occurrence of justice may be hindered by many activities within it. The crimes within the jurisdiction of the International Criminal Court are genocide, crimes against humanity and war crimes (including offences committed in non-international as well as international armed conflict). The crime of aggression was be included in the court's jurisdiction when an acceptable definition of this offence is agreed. The Rome Statute (paragraph 10 of the Preamble and article 1) explicitly provides that the jurisdiction of the International Criminal Court "shall be complementary to national criminal jurisdictions". A case is inadmissible in the International Criminal Court if the case is being genuinely investigated or prosecuted by a state which has jurisdiction over it: article 17 paragraph 1(a). If a case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, the case also is inadmissible in the International Criminal Court "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute": article 17 paragraph 1(b).From the above history and view, it is clear that the ICC jurisdiction is effected where national criminal jurisdiction tends to be encumbered by the task hence ICCs extension.

7.13. Do state parties cooperate and submit their judicial processes to the ICC jurisdiction?

States must first consent to become a party to the Statute by ratifying or acceding to it. Once it is a party, it accepts the Court's jurisdiction. This automatic jurisdiction represents a major advance in international law because in the past, the acceptance of jurisdiction has, in most cases, been subject to additional State consent. In the case of

war crimes, a State may withdraw its consent for seven years. However, this does not affect the Court's jurisdiction when it is conferred by the Security Council The Court's jurisdiction will not be retroactive. It can only address crimes committed after the entry into force of the Statute and the establishment of the court.

The Court may exercise its jurisdiction over a specific case when either the State in whose territory the crime was committed, or the State of the nationality of the accused, is a party to the Statute. Non-party States may also accept the Court's jurisdiction on a case-by-case basis. The Court will also have jurisdiction over cases referred to it by the Security Council whether or not the State concerned is a party to the Statute

Table 7.13. State parties cooperate and submit their judicial processes to the ICC jurisdiction

Response	**Percentage**
Yes	46.20%
No	41.52%
Neutral	12.28%
Total	**100%**

As effective as it should, we cannot settle to one of the choices to define member states, From the above responses, conclusion can be drawn that state cooperation isn't guaranteed though its probability is still higher. It all depends on individual states and their own view on ICC and their case at hand. With all other factors held constant, such as political interference and ideologies, states do cooperate but since no ideal case occurs, the former is on the forefront hindering states cooperation in ICC jurisdiction. The Court does not have its own police force. Accordingly, it relies on State co-operation, which is essential to the arrest and surrender of suspects. According to the Rome Statute, States Parties shall cooperate fully with the Court

in its investigation and prosecution of crimeswithin the jurisdiction of the Court.

From previous manifestations, it is well observed that some states do fully cooperate; others partially cooperate while some don't cooperate. Since it is still functioning, though not

7.14. Does the grounding of the ICC jurisdiction in the consent of states mean in particular, that the ICC may lawfully exercise jurisdiction over nationals of state and non-party states parties?

It is clear that parties to the ICC possess a territorial criminal jurisdiction over nationals of non-parties where those non-party nationals commit a crime within the territory of the ICC party. Likewise, in cases in which an alleged crime is subject to universal jurisdiction under international law, an ICC party that has custody over the perpetrator would ordinarily be entitled to prosecute him irrespective of his/her nationality. Consent of the state of nationality of the accused would not be required in either case for the exercise of state jurisdiction. The power of the ICC to try nationals of non-parties where they commit crimes on the territory of a party constitutes a delegation to the ICC of the criminal jurisdiction possessed by ICC parties because the Court is given the power to act only in cases where the parties could have acted individually.

It is argued that ICC legitimizes its jurisdiction over the nationals of non-party states under Article 12 of the Rome Treaty. Given the unique nature of the core crimes within the ICCs subject matter jurisdiction, however, the universal basis is also relevant. This is not to imply that the ICC may exercise universal jurisdiction in the sense that it is empowered to prosecute non-party nationals without a referral by the Security Council or the consent of the state in which the crime was committed. The delegates in Rome decided against so broad a jurisdictional reach. But where the

territorial state gives its consent (as expressed by ratifying or acceding to the Rome Treaty or by special consent on a case-by-case basis), in addition to the principle of territoriality, the ICC has a legitimate interest on the basis of the universal nature of the crimes to prosecute the nationals of non-party states. In this limited context, the jurisdiction of the ICC can be deemed to be based concurrently on the universal and territorial bases of jurisdiction. Universal jurisdiction provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim. While other bases of jurisdiction require connections between the prosecuting state and the offense, the perpetrator, or the victim, the universality principle assumes that every state has a sufficient interest in exercising jurisdiction to combat egregious offenses that states universally have condemned. Scheffer,(1999) has said that the foundations for the argument that the universality principle permits the ICC to lawfully exercise jurisdiction over the nationals of non-party states “are paper thin, "and Morris (1999) argues that the “universal jurisdiction theory . . . faces a number of difficulties

According to Philippe Kirsch,(1999). The Chairman of the Rome Diplomatic Conference, three options were considered with respect to the exercise of the ICCs jurisdiction. The first option was a German proposal providing automatic jurisdiction over the core crimes in the court’s statute, which enjoyed strong support. The second option, which also garnered wide support, was a Korean proposal that provided jurisdiction if any of four states were party to the court's statute: the territorial state, the state of nationality of the accused, the state of nationality of the victim, or the state with custody of the accused. The third option, proposed by the United States, would require the consent of the State of nationality of the offender as a precondition for the

exercise of jurisdiction over war crimes and crimes against humanity, but not for genocide. This option enjoyed very little support (Kirsch & Holmes 1999)

Table 7.14. The grounding of the ICC jurisdiction in the consent of states mean in particular, that the ICC may lawfully exercise jurisdiction over nationals of state and non-party states parties

Response	Percentage
Yes	57.31%
No	29.82%
Neutral	12.87%
Total	**100%**

The main question that arises is whether the parties to the ICC Statute have the right to delegate their criminal jurisdiction to an international tribunal without the consent of the state of nationality of the accused person. The view that such delegations of jurisdiction are unlawful rests upon two related arguments. First it is argued that delegations of criminal jurisdiction by states are generally impermissible without the consent of the state of nationality of the accused. Alternatively, it is argued, that even if delegations of judicial jurisdiction by one state to another are permissible, such a delegation to an international tribunal is unprecedented. Neither of these arguments are persuasive to be fully concluded and that's the reason behind occurrence of more than a quarter, (29.82%) of the respondents against the above subject matter. However, more than half of the respondents argue in favor of the subject above stated and with democracy and facts giving a similar suggestion, we may deem that the grounding of the ICC jurisdiction in the consent of states mean in particular, that the ICC may lawfully exercise jurisdiction over nationals of state and non-party states parties.

7.15 How does international criminal court exercise its jurisdiction in execution of its mandate on the sovereign of state and non-state parties?

The central legal implication for states that have not ratified the Rome Statute is that their nationals could be tried by the ICC if they commit crimes encompassed by the ICC within the territory of a state that has ratified the Rome Statute.83Additionally, non-state parties' could be tried through the Security Council mechanism, even with respect to events that happen on the territory of a non-state party.

This legal situation that United Nations member states faced prior to the establishment of the ICC. As a matter of power politics, the ICC may command more authority to bring suspects to justice than would be the case with municipal legal systems of many less powerful states. As a result, the ICC may make deliberate political action by states to shield persons from accountability more difficult. However, the view that the ICC statute creates new legal obligations for non-state parties cannot be sustained. To the extent that the Court may have an impact on the exercise of non-state parties' sovereign rights, it does so in a way that is perfectly consistent with existing international law.

By creating an individual standard of accountability for violations of the laws of war, the International Criminal Court potentially places meaningful restrictions on the way states can employ organized violence. The four classes of crimes over norms that restrict the way in which states can exercise the use of force .It does this by forcing state officials to consider the possible legal repercussions should the force be deemed inappropriate by outside legal authorities. Historically, this fact was seen as the major political stumbling block to the establishment of a permanent ICC.

The establishment of the International Criminal Court also places restrictions on a state's ability to determine for itself whether or not particular acts qualify as war crimes, crimes against humanity, or genocide. The absence of a clearly specified international criminal code has also been seen as a major stumbling block to prosecuting international crimes in a court of law. Of course, there is no recognized legislative body in the international law criminalize specific acts, but whether or not those crimes were sufficiently specified so as to make them enforceable in a court of law was debated before the establishment of the ICC.

States have traditionally exercised a great deal of control over the content of international law, including the ability to determine in large part through custom what is considered a war crime and what is not. The traditional sources of international law are primarily controlled by state governments. Article 38 of the Statute of the International Court of Justice formally recognizes four sources of international law: treaties, custom, general principles of law, and the commentary of judicial decisions or leading publicists on international law.

Sovereign states have control over the first two sources, since states conclude treaties and custom refers explicitly to the practice of states. As a result, states have traditionally exercised a great deal of control over the content of international law, including the ability to determine in large part through custom what is considered a war crime and what is not. Since the general principles of law are essentially constant over time, and the role of commentary is a subsidiary one that is parasitic on the actual behavior of states, states historically have exercised a virtual monopoly on the actual legislation of international law. Within the last century, the doctrine that only sovereign states can be the authors of international law has come under challenge.

To the extent that the resolutions of international organizations and decisions of international administrative bodies can have binding effects in law, at times by means of parliamentary style voting, as in the Security Council, or the General Assembly, or other international bodies, this introduces an element in the source of law that is not directly controlled by states.

Even so, states do exercise some influence here, because the state governments choose the representatives of such international organizations. Judicial bodies can also play a role by offering authoritative interpretations on ill-defined areas of the law. While the ICJ is limited in this respect by Article, which proscribes the precedential value for the World Court's decisions, other international and domestic courts, including Nuremberg, the ICTY and the ICTR are not so limited. The ICC, as a permanent judicial body, has the potential to exercise considerable influence over the content of international criminal law, and the ICC's decisions will have precedential value, at least for future cases heard under the statute itself.

Table 7.15. International criminal court exercises its jurisdiction in execution of its mandate on the sovereign of state and non-state parties?

Response	**Percentage**
Yes	71.93%
No	11.70%
Neutral	16.37%
Total	**100%**

The study established respondents ,at73.93%agreed that International criminal court exercised its jurisdiction in execution its mandate on the sovereign of state and non-state parties only11.70%disagreed and16.37% declined to respond .in view of the above ,It is argued that the primary mandate of the Hague based court is to try those

individuals with the highest responsibility in commission of serious crimes of international concern but not states .thus whether state parties or non-state parties, the court shall go for those persons in their individual capacity as long as the offices committed measure to the thresh hold of international crimes. The ICC gets into its jurisdiction upon state request made through the Prosecutors office .Any State Party to the Rome Statute can request the Office of the Prosecutor to carry out an investigation.

A State not party to the Statute can also accept the jurisdiction of the ICC with respect to crimes committed in its territory or by one of its nationals, and request the Office of the Prosecutor to carry out an investigation. The United Nations Security Council may also refer a situation to the Court.

The Prosecutor determines whether, in his or her opinion, the Court has jurisdiction with respect to the alleged crimes. Following a thorough analysis of the available information, the Prosecution decides whether there is a reasonable basis to proceed with an investigation. Thus, it must establish whether the crime of genocide, crimes against humanity or war crimes may have been committed and, if so, whether they were committed after 1st July 2002.

The Prosecution must also ascertain whether any national authorities are conducting a genuine investigation or trial of the alleged perpetrators of the crimes. Lastly, it must notify the States Parties and other States which may have jurisdiction of its intention to initiate an investigation. (Scheffer,2000)

Critical legal theorists have noted that international law, like virtually all legal orders, is not inherently fair in its application precisely because power plays a role in the development and application of the law. According to a crucial rule of international

law, states cannot be obligated to obey a treaty unless it agrees to so obligate itself. Diane Amman has argued forcefully that the ICC creates "non-consensual" legal jurisdiction in a way that violates the principle that treaties are not binding on non-signatory states.

The governments of the United States, China, and India have also complained that the ICC Statute impinges unfairly on their sovereign rights. As Amman rightly points out, it is essential to the quasi- democratic legitimacy of international law that states cannot be made to accept international legal obligations except through their own consent. Careful analysis shows however that the Rome Statute is not guilty of creating new legal obligations for non-state parties. The legal impact of the ICC's establishment on the citizens of non-state parties is that there is one additional forum in which they may be tried for war crimes, crime against humanity, and genocide

Such persons could already have been tried in the courts of a foreign state if they committed those crimes in that state before the establishment of the ICC. In many cases, they could have been subject to trial in a foreign state court even for acts committed in their home state under universal jurisdiction rules. (Fowler, 2001)

As a legal matter, it seems there is little difference between individuals being held responsible for violations of municipal law in states they visit versus being held responsible for violations of international law in states they visit. The traditional rules of international law have long maintained that states have the jurisdiction to prosecute foreigners for conduct on their territory.

As many advocates of the ICC have pointed out, there is no logical reason why such states should be barred from cooperating by a multilateral treaty to punish conduct which each of them had a clear right to punish individually. Amman argues that this

transfer of jurisdiction from national legal systems to a supranational court is illegitimate (Emer de Vattel 1995).

The central line of reasoning is that ICC jurisdiction is substantially different from one state transferring its territorial judicial authority to another state. Here the argument relies on the fact that many states have been reluctant to grant such authority in the context of European judicial cooperation.

However, arguing that states have been reluctant for political reasons to engage in this practice is not the same thing as arguing that there is a well-recognized rule of international law that disallows the practice. Amman goes on to argue that the ICC is different from states exercising jurisdiction over crimes on their territory individually because ICC decisions are much more likely to have precedent-setting effects. She cites as evidence of this, the decision by the Court of Appeals for the Ninth Circuit in Doe I vs. Unocal, wherein the judges relied in part on a legal standard developed by the UN ad hoc criminal tribunals. (Amann, 2004).

However, it is simply incorrect to consider this as an imposition on American sovereignty. The judges in the American court were not compelled to follow the international precedent in this case. Instead, they chose to do so. In so doing, they were exercising U.S. sovereign rights, by voluntarily complying with emerging international standards. This is a consensual acceptance of the legitimacy of international norms, not an imposition by a supranational court that is compelled against the will of a state Sovereign. If the ICC develops into a globally respected judicial institution, there is every reason to believe it will issue decisions interpreting the laws of war in ways that diverse legal scholars will find persuasive. The ICC may indeed have a definitive impact on shaping the legal enforcement norms concerning

these international crimes. Politically this undoubtedly weakens the ability of the United States and other great powers to shape the development of these international norms to their own liking.

This fact is at the core of some of the opposition to the court within the US Government. Of course, the United States can resist normative developments that occur at the ICC and limit their tendency to be enshrined in Customary International Law by consistently objecting to the ICC's practice. This is undoubtedly part of the unstated logic behind the campaign of the Bush Administration to belittle the ICC at every available turn. But the precedent setting effects of the ICC could always be resisted by US judges if they desire. The Rome Statute clearly states that its contents cannot "be interpreted;

As limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute.(Rome statute).This gives sufficient latitude to municipal judges to reach their own interpretations of provisions of international humanitarian law even if they are at odds with rulings by ICC judges. All of this means that the complaints that the ICC creates unfair legal effects on non-state parties, through precedent or some other mechanism are really not substantial.

One important change in the legal rights of sovereign states that ratify the Rome Statute of the International Criminal Court is that they grant significant authority to the Court's prosecutor and judges to determine whether or not particular actions carried out by individuals constitute violations of international humanitarian law.

As a consequence, the establishment of the Court shifts real legal control from the great powers towards this newly constituted international judiciary. Since military powers historically defined the application of international criminal law standards to

their own soldiers, personnel, and citizens, they exercised enormous discretion over the practical definition of the crimes mentioned under the Geneva Protocols of 1949 or the Genocide Convention. If the judges of the ICC are fair and professional in their application of the standards, this development could weaken the argument that international law ultimately is a legal system that serves the interest of only the most powerful states that participate in the international legal system.

It is argued that the existence of the Court potentially impacts the citizens of non-state parties. However, it does so in a way that does not substantially change their legal rights. As a practical matter however, it increases the likelihood of prosecution because it establishes a court with considerable independence from outside political forces.

Because the ICC is a supranational institution, it will not be subject to the same diplomatic pressures as the courts of less-powerful states. This is the real source of the hostility toward the ICC's impact on non-state parties and it really is not a legal complaint. Rather, it is a political one. The establishment of the ICC may very well lessen the capacity of powerful states to use extra-legal political pressure to block the prosecution of persons accused of ICC crimes when they see such prosecutions as contrary to their national interests. This is an objection to the ICC's political impact on (some) sovereign states de fact autonomy. It is not a reasonable legal objection to the ICC's impact on transforming the legal concept of state sovereignty. **T**he ICC's involvement in Sudan was prompted by the UN Security Council since Sudan is not a member of the ICC by virtue of not having ratified the Rome Statute.

The establishment of the International Commission of Inquiry on Darfur (Resolution 1564) by the UN in September, 2004, marked the beginning of investigations in

Sudan. By January 2005, the Commission was virtually through with its investigations and thus pulling in the ICC. Through its own investigations, the ICC is convinced that there is a reasonable ground to hold responsible Sudanese top political leadership for crimes against humanity, war crimes and genocide

The ICC has had case on Kenya's 2007 post-election violence; the Darfur conflict in Sudan; civil conflict in the eastern parts of the Democratic Republic of Congo; conflict in the Central African Republic (CAR); the Lord's Resistance Army's activities in Uganda; the recent civil war-like in Libya pitted the "rebel" forces against the now toppled regime of Muammar Gaddafi; and the near civil war in Ivory Coast caused by the disputed election results by Gbagbo is currently behind bars at the ICC detention unit. (Daily Nation, January 24, 2012)While Kenya, CAR, and DRC are state parties to the ICC, Sudan and Libya are not. As such, the cases of Sudan and Libya have been referred to the ICC by the UN Security Council (Arieff, et al., 2011).

7.16. Does ICC jurisdiction include substantive and procedural international criminal law which supports state sovereignty?

The relationship between international criminal law and state sovereignty is complex, and perhaps often misunderstood. We must accept that international criminal law does affect state sovereignty (the law on crimes against humanity and genocide in particular) by prohibiting behavior perhaps previously outside of the purview of international law. Or, as Bruce Broomhall comments, the idea that certain acts 'undermine the international community's interest in peace and security and, by their exceptional gravity, "shock the conscience of mankind" and thus are not the concern of one state alone. The obligations undertaken by states parties to the Rome Statute, to cooperate with the Court and to, essentially, submit their judicial processes (or lack thereof) to external oversight also have implications for sovereignty.

However the prevention of international crimes cannot occur without sovereignty. Violations of international criminal law were frequent, for example in Somalia, where there was no government that could control the various factions. It is the same in cases such as Sierra Leone, where rebel forces were fighting a government that is weak and does not control much territory. The state (and its powers) has a protective role that cannot be ignored here at the very least unless and until the UN or another body chooses to take it over

Turning more specifically to the ICC, it also bears recalling that creating that body was an exercise of sovereignty. No other entities than states had the authority to create a permanent international criminal court. So the ICC, perhaps paradoxically, also owes its existence to state sovereignty. The grounding of the ICC in the consent of states means, in particular, that the ICC may lawfully exercise jurisdiction over nationals of non-party states when they commit crimes on the territories of consenting states. There is no reason that states cannot determine that crimes committed on their territory or by their nationals are prosecutable by courts acting on their behalf.

Table 7.16. Does ICC jurisdiction include substantive and procedural international criminal law which supports state sovereignty?

Response	**Percentage**
Yes	74.85%
No	15.21%
Neutral	9.94%
Total	**100%**

Majority of the total respondents with 74.85% agreed that ICC jurisdiction includes substantive and procedural international criminal law which supports state sovereignty.15.21%disagreed and 9.94% declined to respond .in view of the above it is deduced that Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the Statute. Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute, as provided for in article 51, in particular, paragraphs 4 and 5.

In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute. The Rules of Procedure and Evidence of the International Criminal Court do not affect the procedural rules for any national court or legal system for the purpose of national proceedings. The Rules of Procedure and Evidence are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002.

On initiation of investigations under the rules of procedure, an investigation may be commenced either by the Security Council, pursuant to Chapter VII of the UN Charter, by a State Party or by the prosecutor acting under the *proprio moto* power .The prosecutor's ability to initiate an investigation ex officio is set out in Article 15, but there are significant restrictions and oversight relating to the exercise of this purview. The *proprio motu* jurisdiction is limited by the principle of complementarity. 'Complementarity' is a fundamental principle on which the functioning of the ICC is based. Under the Rome Statute, the ICC can only exercise

its jurisdiction where the State Party of which the accused is a national, is unable or unwilling to prosecute.

Hence the term ‘complementarity’, which makes the ICC a Court of last resort For instance, where a Kenyan national is accused, then the ICC will only have jurisdiction over the crime where there is an unwillingness or incompetence of Kenyan judicial institutions to prosecute

The reason this principle came into existence was the fear on the part of many prospective States party that the ICC would become a supra-national criminal court and would result in countries losing domestic control of criminal prosecutions. Moreover, if desirous of initiating an investigation without a Security Council or State Party referral, under Article 15, the prosecutor must first apply to the Pre-Trial Chamber for a ruling on admissibility. Notification is required for any states that might normally have jurisdiction over the offence, regardless of whether they are a party to the Statute.

This provision was proposed by the United States and was accepted by many signatory states with great reluctance as a compromise necessary to ensure the existence of the independent prosecutor. Thus, the prosecutor must defer unless the Pre-Trial Chamber agrees that the state or states with national jurisdiction are not genuinely able or willing to carry out their own proceedings. The state or states concerned also have the right to appeal the Pre-Trial Chamber’s decision. Article 16 of the Rome Statute provides for the deferral of investigations or prosecutions for a period of one year at the direction of the Security Council.

This deferral power is renewable and, theoretically, could result in an indefinite postponement of ICC proceedings and, with the passage of time, less likelihood of

conviction Despite this oversight power lying in the hands of a small minority of the world's nations, some critics have suggested that Article 16 does not go far enough and in fact undercuts the role of the Permanent Members of the Security Counsel by requiring an affirmative vote to stop the prosecutor. The Security Council only has the power to allow an investigation or prosecution to continue, but not to stop one.

Conversely, others have expressed fears that the Security Council's deferral power could eviscerate the independence of the prosecutor and the Court. The procedure for initiation by the prosecutor of proceedings is provided for under Rule46 of the ICC Rules of Procedure and Evidence (RPE) where information is submitted under article 15, paragraph 1, or where oral or written testimony is received pursuant to article 15, paragraph 2of the Rome Statute. The Prosecutor is bound to protect the confidentiality of information and testimony received and to take any other necessary measures, pursuant to his or her duties under the Statute.

In creating the Court, those states have accepted that the ICC may exercise some of their sovereign powers (the right to exercise jurisdiction) in that way. Non-party states have not had their sovereignty limited in any additional way by this concession made by states parties, who have locked themselves into a regime that can take over part of the protective role of the state, by prosecuting offences if the state later becomes unwilling or unable to do so.

Though all wars expose its participants to unique horrors, World WarII brought the world atrocities of historic proportions. Jews were murdered by the millions throughout Europe in furtherance of Hitler's master plan of a Europe purged of what he deemed to be racially inferior stock. In addition, Japanese soldiers visited horrors

upon captured soldiers that often included execution, decapitation of the dead, and cannibalism.

The Japanese Government created corps of foreign sexual slaves for the wanton use of their armed forces. Yet; today it is difficult to imagine a modern war between the United States, Germany, and Japan. Western Europe has known its longest period of peace in its long and bloody history. Japan has transitioned to democracy, shed her militant culture, and notwithstanding her recent economic setbacks, remains one of the most efficient and robust economies on earth. On the strategic front, Germany sits with the United States as unequal voting member at NATO, and serves with American troops in com- bat operations abroad. Japan is a significant American ally in the Pacific (O'Neal, 1996)

This dramatic shift can provide lessons to help secure the successful resolution of hostilities in tomorrow's wars. Many factors set the stage for a series of successful transitions. These transitions were first from war to peace, followed by cooperation in the reconstruction, and ultimately a transition toward a political and economic alliance. The re-establishment and the development of respect for the rule of law and democracy in Germany and Japan was paramount to the reconciliation of the former belligerents and their transformation into future Allies. American jurisprudence recognizes numerous theories for bringing to justice those who violate criminal laws.

These theories include: punishment of the wrongdoer, rehabilitation of the wrongdoer, protection of society from the wrongdoer, specific deterrence of the wrongdoer, and general deterrence of the class of wrongdoers in question. These theories are the basis of part substantive law as observed in the international legal order substantive law establishes goals of motivations; military courts the goal of the preservation of good

order and discipline in the armed forces. These goals are equally important considerations when seeking the prosecution and punishment of those who violate the laws of war. Circumstances surrounding the prosecution of war criminals, however, may require the addition of goals that eclipse those sought by traditional systems of justice.

These goals include complementing and encouraging respect for the rule of law, encouragement of democratization, and reconciliation of the belligerents. Consideration of these goals is crucial in developing the appropriate international forums for the prosecution of serious crimes of international concern .In some cases, these ultimate goals may overshadow the traditional purposes of the criminal justice system.

CHAPTER EIGHT

SUMMARY CONCLUSIONS AND RECOMMENDATION

An investigation of international criminal court jurisdiction influencing state sovereignty dwelled on the meaning and critical interpretation of key areas as reflected n the findings of the study the main concepts which emerged from this study are .national interests/national jurisdiction , common interests of mankind , state centrism , international legal order , international criminal jurisdiction , international

peace and security , justice and peace , right to protect mankind, New World Order , sovereignty with responsibility ,treaty obligations, complementarity , universal jurisdiction , international law and international criminal law. The study discussed this concepts and made informed deductions on International criminal court jurisdiction influencing state sovereignty in Kenya

The main argument of the study is shrouded in the paradoxes of international criminal court jurisdiction, a procedural and substantive international legal order legitimizes states on one hand and on the other, states legitimizing international legal institutions by signing and ratifying or otherwise the Rome statute. The grounding character of the modern state is nuanced in sovereignty with responsibility. The concept of sovereignty has received somewhat of a surge of attention in recent years. Debates over the prospectus of modernity, and its normative implications have come under mounting scrutiny. Since the end of the cold war, the international political system has been organized around the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and preservation of existing boundaries, and observation of human rights issues and yet these ideals have been violated frequently by individuals purporting to exercise power in preservation of law order and security. Instead the states run in anarchy and a complete state of lawlessness as was witnessed in Kenya during 2007/2008 post-election violence.

The main thesis of the study is that what is known as the sovereign state model has established itself as the cornerstone of the international system in international relations. The relationship between international criminal court jurisdiction and state sovereignty has been seen to challenge not only the state itself, but also regional and global security and diplomatic relations throughout history. The legal principle of

international criminal court jurisdiction is of fundamental importance in the state sovereignty in Kenya.

8.1 The Summary and Conclusions of the Study Findings

The summary conclusions of findings are organized according to the four specific objectives of the study each specific objective is further divided into subtopics. The overall conclusion is based on the General objective This enabled the researcher to maximize on the findings in terms of in-depth understanding and feedback on part of the respondents.

8.2 Nexus between ICC jurisdiction and state sovereignty

International criminal court exercises Universal jurisdiction which is a legal principle that has evolved in order to overcome jurisdictional gaps in the international legal order.

It is intended to ensure that those responsible for international crimes which include genocide, crimes against humanity, grave breaches of the Geneva Conventions, and torture are brought to justice. Universal jurisdiction is primarily enacted when States with a more traditional jurisdictional nexus to the crime (related, inter alia, to the place of commission, or the perpetrator's nationality) prove unable or unwilling to genuinely investigate and prosecute: when their legal system is inadequate, or when it is used to shield the accused from justice. As such universal jurisdiction does not represent an attempt to interfere with the legitimate affairs of the State; it is enacted as a last resort. Significantly, it is the horrific nature of international crimes which establish the basis of universal jurisdiction.

These crimes are considered so grave that they offend the international community as a whole; as such, it is in the interest of each and every State that those accused of such

crimes be investigated and prosecuted.' The Principle and Practice of Universal Jurisdiction' traces the evolution of universal jurisdiction, analyzing its underlying motivation, and the relevant post-Second World War jurisprudence. It highlights the goals associated with international criminal prosecutions, particularly as these relate to combating impunity, promoting deterrence, and ensuring victims' rights to an effective judicial remedy. It is concluded that universal jurisdiction constitutes an essential, long-established component of international law.

In light of the widespread requirement that States prove themselves unable or unwilling genuinely to investigate and prosecute those suspected of international crimes prior to resort to universal jurisdiction, the requirements of international law with respect to the effective administration of justice are presented and analyzed.

8.2.1 International Criminal Court Jurisdiction includes national jurisdiction

Nations, scholars, NGOs and civil society groups agree that universal jurisdiction rely the principle of sovereignty. This was illustrated by The Permanent Court of International Justice affirmation of the sovereign principle in the Lotus case, saying that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition. The application of this principle an outgrowth of the Lotus case which established the theoretical foundation of extraterritorial jurisdiction.

The second is that there exists the 'obligation *erga omnes'* or the 'common interests of mankind. Therefore there is a necessity to exercise jurisdiction over cases that infringe on the common interests of the international community. The third is the necessity towards countering criminal activity, to ensure that criminal activity does not go unpunished and avoid allowing criminals to ride above the law.

In 1998, the Diplomatic Conference to discuss the establishment of the Statute of the International Criminal Court took place in Rome, where crimes of aggression and other crimes such as war crimes, genocide, and crimes against humanity were included in the jurisdiction of the Statue The rapid development of international criminal law (ICL) has prompted a veritable avalanche of academic works in addition to numerous textbooks and works on substantive and procedural law. There is a growing body of literature on the three different levels of international criminal law enforcement: the International Criminal Court (ICC) and ad hoc tribunals, internationalized or hybrid criminal courts and the role of national legal systems in repressing international crimes.

The above confirms the findings that 81.29% of the respondents agreed that the ICC jurisdiction includes national jurisdiction a paltry 12.28% did not agree and a negligible 6.63% neither agreed nor disagreed with the questionnaire .the findings of the study reveals that a significant number of people were informed of the close relationship between the international criminal court and the national jurisdiction.

People are aware that if the national courts fail to adjudicate on matters of international crimes, then the international court takes over crimes. Among different groups 81.29%of the respondents agreed that the International Criminal Court Jurisdiction includes national jurisdiction but paltry 12.28% of the respondents denied the relationship. The ICC jurisdiction is one component of a regime comprised of states that have the duty to advance international criminal justice alongside or as a complement to the ICC, acting as domestic international criminal courts in respect of ICC crimes. (Max du Plessis et al, 2013).

8.2.2 International criminal court jurisdiction is more efficient and cohesive, than National laws.

The responsibility of sovereign states to deliver a range of political goods and services to its citizens. The state's most important function is the provision of security. This means creating a safe and secure environment and developing legitimate and effective security institutions. In particular, the state is required to prevent cross border invasions and loss of territory; to eliminate domestic threats or attacks on the national order; to prevent crime; and to enable its citizens to resolve their disputes with the state and their fellow citizens. Another major political good is to address the need to create legitimate effective political and administrative institutions and participatory processes and ensuring the active and open participation of civil society in the formulation of the state's government and policies.

Other political goods supplied by states include medical and health care, schools and educational instruction, roads, railways, harbors and other physical infrastructure, money and banking system, a beneficial fiscal and institutional context in which citizens can pursue personal entrepreneurial goals, and methods of regulating the sharing of the environmental concerns. With regards to ICC Jurisdiction as a transformation of states treaty obligations the conclusion deduced from the findings is informed by the principle of sovereignty with responsibility.

The participants discussed methods by which to strengthen state treaty obligations and it was recognized that compliance approach is system applied by those States that demonstrate political willingness to cooperate with the Court at the outset this is done vie the domestication of the Rome statute into the national laws indeed it was established that Kenya has domesticated the Rome Statute in the constitution of Kenya 2010.

.Kenya is deemed to manage the international crimes by legislating a number of laws to collaborate with the ICC. Thus managerial compliance by states. Managerial compliance is the 'softer' side of encouraging compliance with international treaties, using methods and tools, including capacity building and developing networks between criminal justice actors at the national and international levels. The managerial compliance approach, which seeks to assist States to overcome the challenges faced when cooperating with the Court, adapts the incentives offered to the circumstances of the particular State. In Kenya this has been achieved by the involvement of both the state and non-state actors such as the Kenya national human rights commission, the transparency international, the law society of Kenya, professionals, the judiciary, legislature, media, executive and others however the preceding events of the government of Kenya and the concomitant African union stance depicts ICC Jurisdiction as a transformation of states treaty obligations is double jeopardy. This is a conundrum assertive of states sovereign powers to establish ICC on one hand and on the other, states wash away the spirit and the latter of Rome statute in the very name of state sovereignty.

Intermittently the perceived notion of the "victor's justice" still reigns stealthily holding on the sleeves of sovereignty. States no longer engage in endearing justice but are interested in tampering justice with peace .States shall not assume the full operation of treaties if by adhering to this very instruments is a threat to the security and stability of the state. In order to shift the political attitude of governments, more forceful measures including financial measures can also be adopted by an individual State or a group of States acting collectively.

The need for effective national implementing legislation was again raised by participants in this regard, in which it was observed that the issue of securing

cooperation is magnified where State or non-State Parties do not have adequate – or any – legislation at the domestic level. With regards to International Criminal Court Jurisdiction pre-empting the jurisprudence of sovereignty. It is argued that Sovereignty is the most extensive form of jurisdiction under international law. It denotes full and unchallengeable power over apiece of territory and all the persons from time to time therein. The sovereignty of states, therefore, continues to be limited by, for example, the internationalization and universalization of human rights.

Although state sovereignty is a fundamental principle of international law, the idea of absolute sovereignty is in many respects an outdated concept in modern international law and there are various factors contributing to its erosion. As a result of especially globalization, there is a growing trend of interdependence and co-operation between states.

Thus globalization in essence has limited the principle of sovereignty. However in as much as states proclaim sovereignty, in situations where states are compelled to accede to the ICC jurisdiction, and where domestic legislation does not provide for cooperation with the international criminal court, an effect national legislation shall and ought to be passed.

The study concluded that international criminal court jurisdiction is indeed as a result of close cooperation among states in international law. The need for full cooperation as a prerequisite for the effective functioning of the ICC was emphasized by participants throughout discussions. In this context, it was observed by one participant that the Agreement between the International Criminal Court and the European Union on Cooperation and Assistance entered into force in 2006.

It was further noted that the EU has made several statements condemning instances of non-cooperation at meetings of the Assembly of States Parties and continues to work with Member States to ensure that measures are taken at the national level to improve procedures at the international level. It was equally recognized, however, that international and regional organizations need to strike a difficult balance when eliminating non-essential contact with accused persons: they must isolate a person or a government without simultaneously isolating their own organization or its Member States. Whereas the assembly of state parties under the auspices of the African union made a resolution against cooperating with the ICC, The study concluded that the thought of the African states pulling out of ICC in mass was ill conceived. This is because every state signed the Rome statute singularly and also even when governments of the day muscle efforts to move out of the ICC, the fact that governments come and go but states remain subsist.

In light thereof, because refusal to cooperate with the ICC not only undermines its work, but also often involves the violation of a legal obligation. It was observed that consistency and timeliness is important when responding to non-cooperation because situations in which States refuse to cooperate can quickly escalate.

The study concluded the international criminal court jurisdiction enhances and or has implications on state sovereignty in the event the consultations ensue between national authorities and the ICC; the requirement to take into account different legal cultures becomes imperative. National legal authorities embrace different values on which they base their domestic investigations and prosecutions. The collaboration between Rwandan authorities and the ICTR was cited as an example.

It was submitted that domestic and international judges espoused different views on the objectives of these trials the international judges at the ICTR were principally concerned with the development of an international case law, the national judges at the same tribunal with capacity-building and the Gacaca court system with developing a better understanding of the conflict among the local population and ensuring accountability for the atrocities committed. In this context, it was observed that the manner in which a court understands its own role affects its relationship with other tribunals and, in particular, cooperation *inter se*. There is consequently the need for continuous interaction between international and domestic courts in order that both might better understand what each aims to achieve through its proceedings on the contrary the ongoing Kenyan cases are of a different approach. Kenya has put in place judicial mechanism to address international crimes. However more is still to be done to hold accountable those culpable of 2007-2008 post-election violence. It was largely agreed that providing support and particularly military assistance to one party is not necessarily the most effective approach to securing arrests and surrender. Rather, it was suggested by a number of participants that groups of States ought to work together with the territorial State by offering the necessary expertise so that the latter might conduct enforcement operations on its own territory.

It was also generally recognized among participants that the support of influential non-State Parties particularly the United States of America is essential to the Court's international cooperation regime. For example, a number of participants expressed support for withholding non-humanitarian aid from States that refuse to cooperate with the international criminal court.

Majority of the total population of participants concluded that International Criminal Court jurisdiction is determined by consent of sovereign states. Treaties must be

published at the national level to enter into force in the domestic sphere It is a domestic issue whether or not embarrassing pronouncements by an international tribunal or court, or the desire to have a strong position *vis-à-vis* the issue of complementarity, was cause sufficient political pressure at the national level to prompt a revision and amendment of national standardsto be more in accord with the international standards. National governments are not obligated to do so, but political pressures may prompt them to do so.

8.3 The effects of ICC jurisdiction on national interest in Kenya

There are a number of different ways in which the ICC process has had an impact in Kenya both positive and negative as enunciated by the study. The effect of ICC jurisdiction on national interests in Kenya is cumulative of the underlying in-depth discussions as postulated in the findings of the study. This includes;

8.3.1Justice, Deterrence and Complementarity

The central questions considered here were whether the ICC's proceedings regarding the commission of alleged crimes against humanity during the post-elections violence have mattered. In other words, have these proceedings influenced issues of justice, deterrence and complementarity and judicial order in Kenya and, if so, in what ways and with what consequences?

8.3.2 Criminal and retributive justice

Kenyans want legal accountability for the post-elections violence, and that Kenyans continue to believe that the ICC is the best avenue for achieving it. Never before have Kenyans seen such senior public servants and senior politicians facing formal legal proceedings that have not fizzled out or been thwarted aimed at bringing them to account. These key developments, in and of itself, significant in Kenyans' quest to

end a culture of impunity that has crippled the country's economic and political development for decades. Public expectations of the ICC trials may be too high at least in terms of the degree of justice that they may secure for the many victims of the post elections violence, if not in terms of the positive consequences of these proceedings on Kenya's domestic criminal justice system. Out of the many suspected instigators and perpetrators of the violence, only four people are currently the subject of international criminal proceedings.

This is in KNCHR and the CIPEV of many high-level politicians and public servants also requiring investigation as planners, instigators and/or financiers with a view to potential prosecution. Furthermore, when the 'lower level 'perpetrators are taken into consideration as well, figures for suspected perpetrators number in the thousands, with little if any prospect of them ever facing criminal justice proceedings and of their victims ever accessing justice

8.3.3 Restorative justice

Although the ICC is advanced in its provisions for victim participation in court proceedings and reparations, the ICC process in Kenya could have stimulated more momentum and leverage for victims in this regard than has been the case to date. Indeed, more public attention hasbeen given to the criminal proceedings against the six (now two) suspects than to the fact that they are directly or indirectly responsible for some of the adverse material conditions in which approximately half a million Kenyans now find themselves.

The impact of the violence on victims remains profound to this day. The loss of family members (and sometimes their incomes) cannot be reversed. Of those victims that were subsistence farmers, not all have been able to return to their land, citing

continued security concerns. Nor have they received compensation for this situation. Even those victims who were not subsistence farmers such as small and medium size business owners – who were renting homes and business premises in areas affected by the violence now either cannot or are unwilling to return to them, resulting in a loss of livelihood for many of them also.

Furthermore, many victims continue to suffer from ongoing physical and/or psychological trauma. Many victims have registered for participation and possible reparations in respect of both cases before the ICC. If awarded – and this depends on whether the accused are convicted any compensation or other form of reparations may take many years in coming, and even then, the ICC Victims' Reparations Fund may not have sufficient funds to bring the relief that victims need.

To date, neither the OTP nor the legal counsels for the victims have sought orders for the accused to declare and have their assets frozen for the purpose of reparations. Presumably this was happen now that it is clear which charges have been confirmed in respect of which ICC proceedings are fundamentally important, from a restorative justice perspective they are unlikely to impact significantly if at all on the material needs of many victims.

8.3.4 Deterrence

The deterrent benefits of effective criminal justice proceedings have been regularly noted by the ICC as well as states parties to the Rome Statute and intermediaries that engage with the court. The ICC's primary value is thus its potential deterrent effect. Whether the ICC was achieve this in the Kenyan situation, however, remains to be seen. It is true that underlying all the frantic moves by the Kenyan government, in particular its executive branch and Parliament, has been a sense of outrage and shock

at the determined efforts to hold some of its members legally accountable for the commission of such serious crimes. Such efforts are certainly a novelty in Kenya

8.3.5 Complementarity and the Criminal Justice System

The Rome Statute specifies that the ICC serves as a court of last resort and as such is expected to have a positive impact on domestic criminal justice systems by complementing rather than replacing these systems. This is the principle of 'complementarity'. With respect to Kenya's criminal justice system, it is clear that the ICC's engagement with Kenya has helped bring about some positive changes which strengthen the rule of law, most notably in the judiciary at the level of adjudication. The recent judicial reforms are significant particularly the vetting of the judges sand the magistrates.

They have added fresh momentum to the on-going process of judicial reform, much of which arises from recommendations of the Task Force on Judicial Reforms that was established before the post-elections violence but which concluded its work in the aftermath of the violence. Although some of these developments have been underpinned by questionable motivations notably attempts by the Kenyan government to evade ICC proceedings rather than to strengthen the rule of law in Kenya for its own sake this does not detract from the positive steps made.

Post-Crisis Reforms and Preventative Effort.

a) Adoption of a new constitution (2010)

b) Internal Reforms and Implementation of Preventative Steps

Electoral Procedures

Pursuant to the stipulations of the August 2010 constitution, the Independent Electoral and Boundaries Commission (IEBC) was formed and tasked with overseeing implementation of a variety of electoral reforms, as well as the monitoring of elections and dissemination of important information to the Kenyan populace, such as new registration processes and logistical details for polling centers on election day. Other IEBC mandates include ensuring credible, free and fair elections. To this end, the IEBC conducts and supervises referenda and elections, the registration of voters, the regulation of political parties, voter education, the settlement of electoral disputes, and modernization and reformation of the electoral process and its systems.

Additional important electoral reforms included the reorganization of Kenyan geographical regions into 47 distinct counties, each with a governor, senator, district Assembly and a mandatory seat allocated for the representation of women. Other new requirements stipulate that any presidential candidate must secure at least half of the popular vote in the general election, as well as at least 25% of the vote in 24 of the 47 districts. This requirement was meant to mitigate the ethnically and geographically-centered politics of the past by necessitating a wider base of support that cuts across traditional ethnic, geographic and political cleavages.

Police and Security Sector Reform

As it was reported that the police were responsible for one third of the killings during the

2007/08 crisis, significant reforms were needed to train the police to ensure such crimes did not reoccur and that human rights were upheld. As such, in 2011 the parliament passed two police reform bills: the first bill combined the previously separate Kenya Police and Administration Police under one governing structure to strengthen capacity and accountability, as well as established a civilian National Police Service commission to recruit and train police, with the capacity to also hold disciplinary proceedings. The second bill established civilian oversight authority to handle complaints and ensure accountability.

Despite efforts to catalyze changes in the police and security sector, reforms were slow to begin. Initially, the government undertook the establishment of an ambitious framework which the International Center for Policy and Conflict in Africa noted in 2013 was meant to "establish and elaborate an effective system of democratic regulation and oversight of security services." Yet, as Amnesty International highlighted in their 2013 report entitled Police Reform in Kenya: "A Drop in the Ocean" the framework was not fully implemented, and the capacity of security personnel remains an inherent problem. In light of the apparent lack of accountability for the 2007/08 post-election violence, Amnesty International stated in the aforementioned report that steps were taken to cover up and politically manipulate cases against security personnel. Consequently, Human Rights Watch reported in their February 2013 press release entitled Kenya: Ensure Violence Free Polls, that Kenyans "view the police as ineffective and corrupt."

The ICC Investigation Moves Forward (2010 – 2012)

As the Kenyan government pursued domestic reforms and efforts to prevent a reoccurrence of violence, the Prosecutor of the ICC moved ahead with the investigation into potential crimes committed during the 2007/2008 post-electoral crisis. On 31 March

2010, the request to commence an official investigation submitted by the Prosecutor was authorized by the ICC Pretrial Chamber, thus clearing the way forward for the investigation. The Kenyan government challenged the ICC's jurisdiction on 31 March 2011, arguing that the new constitution opened up the possibility for national pursuits of justice. However, the ICC rejected the Kenyan admissibility challenge due to a lack of evidence of a genuine and capable national legal process. On 23 January 2012, Pre-Trial Chamber II (PTC II) of the International Criminal Court confirmed the charges of crimes against humanity against four of the Ocampo Six. The first case is against government's Uhuru Kenyatta and Francis Muthaura, and the second against William Ruto and Joshua Sang. Meanwhile, the ICC announced they were dropping the cases against Henry Kosgey (ODM's Deputy Party Leader and Chairman) and Mohammed Ali (former Police Chief) due to insufficient evidence.

The Electoral Campaign and the Presidential Election (2012 – 2013)

Amidst massive efforts to overhaul and reform the Kenyan political and governmental landscape and an ongoing investigation at the ICC, campaigning for the 2013 presidential elections was taking place. As candidates vied for support, two prominent figures – Uhuru Kenyatta and William Ruto – who hailed from historically contentious ethnic groups, decided to join forces and consolidate the power of their respective constituencies.

Kenyatta hails from the Kikuyu and Ruto from the Kalenjin ethnic groups, which had committed gross human rights violations and attacks against one another during the 2007/2008 clashes and had been long-time adversaries in the Rift Valley over land rights and other grievances. Kenyatta and Ruto formed a joint-ticket under the Jubilee Coalition and positioned themselves opposite the standing Prime Minister, Raila Odinga, who headed the Coalition of Reform and Democracy (CORD). This development inevitably

led to the ICC investigation becoming a central campaign issue and an exceptionally divisive one.

The Kenyatta-Odinga contest was viewed as the primary competition in the race, as the two factions incorporated most major ethnic, political and geographic constituencies between them. As FIDA noted in their February 2013 press release entitled Run up to Kenya's 2013 General Elections, both camps emphasized and exploited these cleavages among the Kenyan populace during the campaign season.

a) The ICC and the Campaign

The charges against Kenyatta and Ruto were and still are controversial among Kenyans, and the presidential election was seen by many as a referendum on the ICC. Initially, there was some doubt as to whether or not Kenyatta and Ruto were legally permitted to run for office due to newly-designed and implemented requirements based on good character and integrity, which many believed disqualified two people facing charges of crimes against humanity.

The Bureau of International Reporting reported that public support for the ICC charges had dipped to 54% amidst the campaign, during which time, according to International Crisis Group in their May 2013 report Kenya After the Elections, the ICC charges were used by some to construct a narrative of discrimination and persecution against African leaders and against specific ethnic groups.

b) The Election

As the 4 March 2013 elections approached, international attention turned to Kenya and early steps were taken to maintain the integrity of the election and enhance security. The focus on Kenya emanated from civil society, regional organizations and governmental

actors, as the prevention of a relapse into violence became a key objective for many stakeholders. Several civil society and intergovernmental organizations dispatched teams to assist with and oversee the March 2013 polls. As monitoring is crucial to determining election results, the Carter Center, the Citizens' Coalition for Electoral Democracy in Uganda, the Elections Observation Group, as well as intergovernmental organizations including the East African Community and African Union announced delegations to observe and monitor the elections of 4 March 2013.

UN officials and agencies were also active in voicing their concern and support for the 2013 elections to run peacefully. UN Secretary General Ban Ki-moon called upon all leaders to "abide by legal mechanisms and to send a clear message to supporters that violence of any kind would be unacceptable." Mr. Adama Dieng, the UN Special Adviser on the Prevention of Genocide, traveled in February 2013 to Nairobi, where he spoke to the Kenyan authorities about the responsibility to protect citizens by preventing violence and strengthening the capacity to respond if necessary. Dieng also recognized the improvements, including measures such as the National Cohesion and Integration Commission to check hate speech.

The UN Office of the Prevention of Genocide and the Responsibility to Protect, in coordination with the International Conference on the Great Lakes Region, also held a five-day workshop during Mr. Dieng's trip on RtoP and the prevention of inter-communal violence to support Kenya's National Committee on the Prevention of Genocide. Additionally, the Office for the Coordination of Humanitarian Affairs formed a humanitarian contingency and, with the Special Rapporteur on the human rights of internally displaced persons, urged both national and international actors to coordinate efforts in emergency preparedness and to prevent massive displacement.

Despite discontent over the ICC charges and the persistent, albeit decreased, use of ethnic identity and traditional animosities throughout the campaign, the elections, held on 4 March 2013, proceeded relatively peacefully. There were reports of intermittent clashes on a small scale in certain areas, such as the Tana River Delta, but overall the polls were declared relatively peaceful, free and fair, particularly when juxtaposed with the 2007/2008 elections.

In advance of the voting, there was a consensus that neither Kenyatta nor Odinga, who had clearly established themselves as the front-runners, would garner the necessary majority of the vote needed to secure the presidency. A run-off was expected and plans had been made for that eventuality. As it turned out, Kenyatta garnered 50.07% of the vote, narrowly achieving the majority threshold. The results were immediately contested by Odinga and other contenders, who leveled charges of fraud and electoral irregularities.

In a welcome change from the 2007 elections, Odinga took his complaints regarding the electoral results to Kenya's Supreme Court. The results were confirmed by the IEBC on 9 March and the Kenyan Supreme Court later corroborated the IEBC decision, dismissing the claims made by opposition groups. A joint statement was released by election monitors from the European Union, African Union, Carter Center and other monitoring groups stating that despite some confirmed irregularities and discrepancies, the election was overall legitimate and that the various monitoring groups supported the results. Although Odinga expressed 'dismay' at the Court's decision, he maintained that his "belief in constitutionalism remain[ed] supreme". His response to the results and ruling – along with Kenyan's newfound trust in the judicial system – were crucial to avoiding violence, and were praised by the international community.

Developments since the Elections

a) Background on the trials before the ICC

On 8 March 2013, just four days after the election, the ICC announced that the trial of Uhuru Kenyatta would commence on 9 July 2013 and that the trial for Ruto and Sang would begin in late-May of 2013. These trial dates were further delayed as the ICC announced in early-June 2013 that the proceedings for Ruto and Sang would be pushed back to 10 September 2013. Following the same pattern, the Court announced on 20 June 2013 that the trial of Kenyatta would be pushed back to 12 November 2013.

Ruto, Sang and Kenyatta filed motions against the requirement to participate in proceedings in person at The Hague, as this would significantly impede their ability to fulfill respective public office duties, and motioned to move the trials in a city closer to home, such as Arusha, Tanzania. While the Chief Prosecutor Fatou Bensouda initially voiced reservations to Kenyatta's and Ruto and Sang's requests of holding the entire trial in either Tanzania or Kenya, she still left the possibility open of holding portions of the trial elsewhere. On 18 June, the judges granted Ruto permission to participate in-absentia for the trial and advised that it be partially held in Tanzania and Kenya; however, Bensouda appealed this decision on 24 June 2013.

On 2 May 2013, Kenya's UN ambassador sent an official letter to the Security Council calling for the UNSC to not only defer the case, but to terminate it altogether, arguing that it posed a threat to international peace and security. While the UNSC is able to defer ICC cases for up to 12 months in accordance with Article 16 of the Rome Statute, the UNSC does not have the authority to terminate cases on behalf of the Court. Kenyan officials, including Ruto, were quick to distance themselves from the letter, noting the governments

continued willingness to cooperate with the Court. Nonetheless, the UNSC held an informal dialogue with Kenya on the ICC issue on 23 May 2013, though it did not move to defer the proceedings.

b) Start of the Trials and Subsequent Requests For Deferral

The Ruto and Sang trial officially opened on 10 September 2013, with both leaders pleading not guilty. A few days after the trial began, the shooting at Westgate Mall in Nairobi, which lasted from 21 to 24 September, led to Kenyatta being granted a request to excuse himself from being present the entirety of his trial proceedings, so that he could attend to matters of national security. Ruto was also excused for a period of time in order to respond to the aftermath of the crisis, but was ultimately required to return to The Hague one week later.

The relationship between the government of Kenya and the ICC grew even more strained in the following days. For example, the Kenyatta trial had been originally scheduled to commence on 12 November 2013. However, on 21 October, a few days after Kenyatta was granted a leave of absence, the AU and the Kenyan government asked the UNSC to consider a one-year ICC deferral on both the Ruto and Kenyatta cases. This request grew out of an extraordinary summit the AU held on 12 October 2013, in which the AU also contemplated the possibility of withdrawing from the ICC completely, and Kenyatta accused the Court of "race-hunting."

After discussing the possibility of further delaying Kenyatta's trial, the UNSC ultimately rejected the AU's request on 15 November, with seven member states voting in favor, and the remaining eight abstaining. On its own, however, the ICC did agree to postpone Kenyatta's trial until 5 February 2014, so as to give the defense enough time to prepare its

case and allow the prosecutors the opportunity to examine new evidence.

Not deterred by the UNSC's rejection of an ICC deferral, the AU announced on 18 November its intentions to seek an amendment to the Rome Statute that would give sitting heads of state immunity from prosecution at the ICC, thereby circumventing the decision to deny a one-year deferral. This, along with a number of other amendments, was immediately opposed by several NGOs. At the 2013 ICC Assembly of State Parties (ASP) Conference, which concluded on 27 November, this and other suggested revisions to the Rome Statute were officially voted down. In the meantime, the Ruto and Sang trial resumed hearings on 21 November 2013. When the Court adjourned on November 29 for December break, it had heard from nine witnesses.

On 19 December 2013, Prosecutor Bensouda called for a delay in the Kenyatta trial, citing a need to gather new evidence following the withdrawal of two key witnesses. In response, the ICC announced on 23 January 2014 that it would hold a status conference on 5 February – formerly the start date for the trial. At this time, the court would hear the prosecutor's request for a 3-month adjournment, and the President's previously confidential request for the case to be terminated 'on the grounds of insufficiency of evidence'.

At the African Union Summit in late-January 2014, opposition to the ICC took a back seat to the crises in South Sudan and the Central African Republic. The AU did, however, express 'disappointment' in the UNSC's refusal to defer the trials, and urge members to 'speak with one voice' against the prosecution of sitting presidents. Kenyatta also thanked the AU for their support in approaching the UNSC. In early February, comments made by the former ICC Prosecutor Luis Moreno-Ocampo further strained relations between Kenya and the ICC. His revelation that foreign diplomats had asked him to prevent Ruto

and Kenyatta from running in the 2013 elections led Kenyan MPs to call for termination of the 'politically motivated' ICC cases. Speaking at the status conference on 5 February 2014, prosecutors argued that the exhaustion of their available leads made Kenyatta's financial records documents that might reveal whether he funded post-election violence crucial to the case. The prosecution accused Kenyatta's defense team of obstruction, a charge his lawyers deny. Meanwhile, the trial of Ruto and Sang continued into March, with Ruto accused of making 'coded' demands for ethnic killing. In February and March 2014, much debate centered over Bensouda's application to subpoena witnesses, prompted by the withdrawal of seven prosecution witnesses in 2013 in a country characterized by widespread witness intimidation.

The Kenyan Attorney General maintains that compelling witnesses to testify would violate both the Rome Statute and Kenyan Constitution, while the victims' lawyer argues this is not the case. The prosecution submitted evidence of 'intimidation, bribery and other improper influence' on 17 February. At the time of writing, the ICC had not ruled on either the continuation of the Kenyatta case or the witness summons.

c) Civil Society Advocacy Regarding the Trials Before the ICC

Many Kenyan civil society organizations have stood firm in their support of the ICC and the need to hold to account those responsible for the commission of atrocities in 2007 and 2008. Kenyans for Peace with Truth and Justice (KPTJ), a coalition of over 30 Kenyan and East African legal, human rights and other civil society organizations; as well as individual Kenyan citizens, opposed the Kenyan UN ambassador's letter to the Security Council on the 17 of May 2013 in a letter to several UN national missions and Security Council member states.

Since the ICC's decision to hold trials for Kenyatta and Ruto in particular, various members of civil society have voiced support for these prosecutions. For example, in January 2011, the East Africa Law Society (EALS) issued a statement condemning any action on the part of the Kenyan government that would obstruct the ICC's efforts to seek justice for the victims of the post-elections violence. In September 2013, the National Association of Human Rights Activists announced its plans to hold a national conference to garner Kenyan civil society support for the ICC.

Weeks ahead of the Extraordinary Summit of the AU on 11 and 12 October 2013, Human Rights Watch (HRW) sent a letter supported by more than 160 civil society organizations based or with offices in African countries to foreign ministers who would be traveling to the Summit, asking these leaders to support the ICC and to refuse to condone any motions to withdraw from the Court.

In addition, the International Justice Project (IJP) and Pan-African Lawyers Union (PALU) convened a meeting of civil society experts in mid-October 2013, asking the AU to continue to support the Court. In November 2013, during the ASP, the African Centre for Open Governance (Africog) criticized Kenya's efforts to amend the Rome Statute and grant immunity to sitting heads of state. Africog had also drafted a letter sent to the UN Security Council, in which the coalition of organizations signed therein stated their disapproval of the Kenyan government's ICC deferral request.

In the wake of the 2014 African Union Summit, African civil society continued its protest against AU members' opposition to the ICC. They were particularly critical of Kenya's role, with the International Commission of Jurists Kenya calling the actions of the government 'disrespectful to African citizens and the victims of serious crimes'. Kenneth Roth, Director of HRW, echoed this sentiment, writing that Kenyatta had 'conveniently

interpreted his narrow victory as a mandate to ignore the legitimate demands for justice of the victims'. The organization further criticized Kenyatta and Ruto for 'deploying all the resources of the state toward stopping their prosecution' in the HRW World Report 2014. Since Kenyatta's election, the Kenyan government has been cracking down on civil society and the media.

The study concluded that the continued cases against the two Kenyans at the Hague based court were agonizing to the Kenya populace. However chief judge, Chile Eboe Osuji of Nigeria, declared a mistrial "due to a troubling incidence of witness interference and intolerable political meddling. He alleged that While Mr. Ruto agreed to stand trial, the Kenyan government steadfastly resisted cooperating with the tribunal. The decision marked another setback for the court and ending a long, tortuous case that tangled Kenya's relations with the West and rearranged Kenyan politics.

A divided panel decided, 2 to 1, to vacate the case against Mr. Ruto and a prominent radio host, Joshua Arap Sang. The two men were charged with crimes against humanity in connection with the 2007-8 postelection chaos in Kenya that left more than 1,200 people dead and many others wounded or raped, and forced about 600,000 to flee.

It was observed that even as all the cases at the ICC collapsed ,the victors have their justice ,the victims are in an array of the defeated and vanquished , Kenya is still on the precipice of anarchy unless the country evokes a continuous Narrative of National peace and reconciliation, national healing , address the plight of all the victims of post-election violence and address the kriegler report, the civil society and Kenya national human rights reports the National council of churches of Kenya reports Agenda four (waki report) to the latter . The government has so far attempted but yet to fully address long-standing ethnic rivalry over land and resources and ethnic inequalities. The police service

though revamped restructured and vetted, and remains one of the most corrupt state institutions in the eyes of the majority of Kenyans. Even the judiciary is not yet out of the woods despite judicial reforms witnessed in the recent past, worse still are the corruption scandals that have rocked most of the supreme court judges. In the past year, the economy has grown slower than expected, and the population has become increasingly pessimistic about future growth. Whoever leads Kenya in the coming decades will have much more to do, ICC jurisdiction notwithstanding.

8.4 ICC Jurisdiction and State Responsibility To Protect (RtoP) in Kenya.

The study established that Responsibility to Protect (R2P) process and the International Criminal

Court (ICC) are the most important innovations in human rights. Whereas ICC jurisdiction and responsibility to protect as are not formally linked, they work alongside each other, with similar purposes to confront atrocity crimes through prevention, protection or prosecution, and were expected to work in tandem to temper international politics and to end impunity.

Indeed, the gradual diffusion of the R2P norm through international governance discourse and institutions following the publication of the ICISS report in 2001, and the entering into force

of the Rome Statute that established the ICC in 2002, were judged by many, particularly in UN bureaucracies and the NGO sphere, to be game-changing in their challenge to power politics and state sovereignty. Kofi Annan explained the significance of R2P, after the 2005 World Summit's endorsement of its principles, as follows:

> Human life, human dignity, human rights raised above even the entrenched concept of State sovereignty. Global recognition that sovereignty in the twenty-first century entails the responsibility to protect people from fear and want. A global declaration that reinforces the primacy of the rule of law. (Koffi Anan 2005).

Human Rights Watch was equally celebratory when the ICC came into being:' The International Criminal Court is potentially the most important human rights institution created in 50 years. It was be the court where the Saddams, Pol Pots and Pinochet of the future are held to account.' But any notion that these twin institutions have brought progress in human rights protection has recently suffered significant setback as the study concludes. The ICC and R2P conceived of as ways to supplement or circumvent state power in order to protect populations within states, have done little, if anything, to assist the civilians who have been caught up or targeted in civil wars in, for instance, Syria and Sri Lanka Iraq and Libya. However the study noted that the ICC jurisdiction has far reaching effects on Kenya with respect to responsibility to protect.

The government has since the inception of the Kenyan Hague cases showed commitment to address impunity. the government has put in place legal mechanisms and structures to handle international crimes , strengthened the judiciary , set up commissions to adjudicate on issues of incitement to chaos, regulation of the media , introduced punitive legislative measures against instigation to political violence and

introduced both national and local initiatives to champion peace ,harmony and security amongst the citizenry.

It was noted that despite apparently widespread support for ICC Jurisdiction and R2P, the governance structures of the international community, specifically the United Nations Security Council (UNSC), and the states that work within them, have failed to bring about meaningful action either to protect those under threat or to prosecute those who have committed atrocities the UNSC was described as a club of the '' mighty and powerful but not above the vagaries of international politics'' who only act in protection of their interests.

It is within the Council's power both to authorize intervention under the auspices of R2P and also to refer non-states parties such as Syria to the ICC, yet Russia and China have prevented such action through vetoes and threats to veto UNSC resolutions. Russia's protection of the Assad government is a key problem, as is China's reluctance to breach norms of state sovereignty under just about any circumstances, but the blame for failures over Syria also lies with the P3, which are seen to be too keen to use R2P and the ICC jurisdiction for their own ends.

The ICC jurisdiction and R2P are therefore argued to be in crisis, and the failure of the international community to act according to their principles in the face of suffering on such a large scale suggests that they are, at best, in need of substantial reform. In the foregoing the study concluded that the ICC jurisdiction and the R2P in Kenya do not have a link at all since Kenya as a sovereign state must exercise its mandate responsibly to protect its citizens at all costs and ICC should only be a court of last resort

With regards to ICC jurisdiction on state treaty obligations, the study concluded that, The ICC complements existing national judicial systems and while it was step in only if national courts are unwilling or unable to investigate or prosecute such crimes, the Court may invite national courts to cooperate under an ad hoc agreement. If a State chooses to conclude such an agreement, it would be bound to comply with requests for assistance.

Additionally it was observed that, if the Security Council refers a situation to the ICC that threatens international peace and security, it can use the powers under Chapter VII of theUN Charter to compel non-States Parties to cooperate with the ICC's requests for assistance. It was unanimously concluded that Kenya as a sovereign State has a responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing (mass atrocities).

Further the study established that the Kenyan government manifestly failed to protect its citizens from mass atrocities during the 2007 /2008 post-election violence. Since no peaceful measures were working, the international community, courtesy of the signing and ratification of the ICC by Kenya, had the responsibility to intervene at first diplomatically, if the violence continued then more coercively, and as a last resort, with military force. The intervention by the international community into the domestic affairs of states to a greater extent abrogates the principle of state sovereignty

8.5 Overall conclusion

Whereas states are major players in international relations in the guise of sovereignty, the power of exercising sovereign authority is not the preserve of an individual state

rather it is subject to legalization order of international regimes that assert meaning to hegemonic institutions in international relations. It is in this breath that the impact of international criminal court jurisdiction on sovereign states is undoubtedly introgenious, dialectic and yet profane in Kenya. International criminal court jurisdiction is typically understood in relation to territory or nationality. This conceptualization complements a global order of separate sovereign states, each enjoying the power to judge within its territory and to create law for its citizens.

In Kenya, the perpetrators of crimes against humanity, the modern enemy of all mankind allegedly claimed to acted in the name of the National Interests and within the national jurisdiction i.e. the use of custodial forces, the executive orders and even political innuendos, schemes and machinations by their cronies in governments of the day to perpetuate impunity.

By contrast, the trials involving the Kenyans at the Hague entailed the ability to judge offenders who have no connection to the state as an entity sitting in judgment .the Hague cases were about individuals not the Kenyan state. Decoupled from territory and nationality, the exercise of universal jurisdiction raises the question of whether it undermines a global order of sovereign states by allowing some state to reach into the affairs of another under the auspices of the UNSC. This question is underscored by the crimes that, in the twentieth century, were found to give rise to universal jurisdiction, such as crimes against humanity that, in one common formulation, "shock the conscience" of mankind.

On one level, using international law to build the will and capacity of states to act domestically offers great opportunities to enhance the effectiveness of the international legal system. National governments will have new incentives to act.

Domestic institutions will grow stronger, and can be harnessed in pursuit of international objectives. States can thus respond to transnational threats more effectively and efficiently. Yet each of the new functions of the international system suggested that; backstopping, strengthening, and compelling is a double-edged sword. Backstopping national institutions can be counterproductive to degree states may defer to an international forum as a less politically and financially costly alternative to national action. Well-intentioned efforts to help, often through NGOs as well as international institutions; can end up weakening local government actors by siphoning off both funds and personnel. The process of strengthening domestic institutions, if not properly designed and implemented, can also squeeze out local domestic capacity.

Finally, and most dangerously, by compelling national action, the international legal system may undermine local democratic processes and prevent domestic experimentation with alternate approaches. The most significant danger inherent in these new functions of international law, however, lies in the potential of national governments to co-opt the force of international law to serve their own objectives.

One of the modern limits to Westphalian concepts of sovereignty is the obligations imposed by international law particularly human rights law on the conduct of states toward their own citizens. Yet, by strengthening state capacity, international law may actually make states more effective at the very repression and abuse the interference challenge seeks to overcome. Similarly, by compelling state action, international law may give national governments new license to undertake.

Otherwise illegal or unjust policies. Where critical values such as human rights and state security are seen to be in conflict, international legal compulsion of policies that favor one value may come at the expense of the other. This tension is particularly

problematic where a repressive regime is able to use compulsion at the international level as a cover or an excuse to undertake its own domestic policies that may undermine legitimate opposition groups and violate citizens' rights.

Nowhere is this danger more apparent than in the legal compulsion of counter-terrorism activity

.Mary Robinson, former U.N. high commissioner for human rights, observes: "Repressive new laws and detention practices have been introduced in a significant number of countries, all broadly justified by the new international war on terrorism."87 Similarly, Kim Scheppele has documented the number of exceptions to international and domestic legal protections that states have invoked under the cover of fighting terrorism. Among the worst offenders, according to

Human Rights First, are Tanzania, Indonesia, Russia, Pakistan, and Uzbekistan, each of which has undertaken "draconian anti-terrorism laws" that compromise human rights and strengthen the

hand of government vis-à-vis opposition groups.89If these new purposes of international law are to be both effective and just, the goal must be to maximize the benefits of the backstopping, strengthening, and compelling functions while avoiding the dangers evident in the counter-terrorism case. The theoretical base of these new functions of international law is that domestic institutions can be used to further international legal objectives. Yet these same institutions can become sources of abuse by national governments.

The challenge, then, is to design rules that will harness the strengths of well-functioning domestic institutions while targeting and restricting the reach of abusive

ones. One way of making such distinctions is for international law to consider directly the quality of domestic institutions.

States with robust and independent institutions, strong constitutional frameworks, transparent political processes, and embedded systems of checks and balances are least likely to appropriate international law for their own purposes and engage or abuse their newfound power. In these states, domestic legal protections and other institutions within the national government can prevent abuse or counter-balance the strength of other institutions. Abuses will still occur in states with good institutional frameworks; however, the assumption built into institutions like the ICC is that when abuses do occur in a well-governed state, that state's own domestic system will provide an internal correction mechanism.

It is these states with independent and transparent domestic institutions that should be most receptive to the new functions of the international legal system. European states, at least, largely bear out this prediction. The problem, of course, is that it is often the states that lack institutional independence and embedded checks and balances that are most in need of capacity-building or compulsion to address threats and challenges at home before they spread.

Where international law does target such states, international rules, regimes, and institutions will have to be designed to address both the capacity and quality of domestic governance. Checks and balances will have to be embedded into the system itself, pushing not only for particular substantive outcomes, but also for legitimate domestic processes to achieve those goals. Similarly, international regimes themselves will have to balance a range of competing values such as human rights and national security rather than focus on one particular goal when compelling state action. There

is an apparent tension between a global order of state sovereignty and the exercise of universal jurisdiction that either promises to curb sovereign abuses or threatens to conceal imperial meddling behind a judicial façade.

8.6 Recommendations

The study recommends that there is need for Kenya and other African state of an otherwise view to continue cooperation with the ICC process and Support the development of comprehensive Programmes of restorative justice for all victims of the post elections violence, including the restoration of any land and property still in the hands of others and resettlement of both internally displaced persons and internally integrated persons. Compensation for lost properties, emphasis on national healing through national dialogue , truth justice and reconciliation mechanisms , shun tribal/ethnic divides, regulate media reports punitive action against those engaged in corrupt practices , prayer and tolerance for one another and addressing Agenda four in the Waki report, The commission investigating post-election violence (CIPEV),The reports on the Human rights Watch ,the civil Society's reports on post-election violence , the National council of churches of Kenya (NCCK) ,Reports on post-election violence and the Kenya national dialogue and reconciliation (KNDR) .

It was also recommended that Kenyan Parliament pass legislations to strengthen the investigative and prosecutorial offices dealing with international crimes. The parliament should legislate on the establishment of a Special Tribunal to investigate and charge all suspected financiers, instigators, planners and perpetrators of the post-election violence. The government to establish a process to monitor the possible incitement of political violence along ethnic lines in the lead up to all general elections, government to institutionalize credible and independent complaints, investigations and enforcement processes for breaches of relevant constitutional

provisions and laws,. Intensify equality, anti-discrimination and land programmes, and initiate/inculcate a sense of nationhood to the Kenyan populace through devolved cultural and welfare projects, introducing new curricular approaches in both schools tailored towards civic education ,life skills patriotism and wealth creation oriented learning

Although the ICC process has introduced certain challenges, it presents an important opportunity for reforms. The process is laying the groundwork for fighting impunity and ensuring that people account for their actions. Although some political leaders are unified in their efforts to oppose the ICC process, the ordinary people are not with them. They perceive the ICC process as the last resort in fighting impunity and getting justice for victims.

However, Kenyans still look forward to having a local judicial process capable and competent to try high level, middle and lower level perpetrators Kenyans believe that with good governance free from parochial ethnic enclaves, enmasse corrupt political class and illiterate literates the sun shines and Kenya arise. There is want for justice for victims of post-election violence. The government must speed up and resettle all those who were displaced and or lost their property during the post-election violence

There is a need then to begin establishing a framework to try the perpetrators of post-election violence since the ICC has not found any of the suspects earlier indicted by the court as in the moment culpable of offences that occurred in Kenya in 2007-2008 post-election violence. In an international legal order sometimes decisions are driven by national interests than those international values and interests and in which the use of power to enforce the law remains in the hands of very few states, a consistent legal

enforcement as occurs on the municipal level is unlikely. This, coupled with the fact that insistence on accountability leads to the uninterrupted assumption of power by individuals wanted for the most heinous crimes against humanity, renders the hostility of international justice enthusiasts towards the use of amnesties to ensure the removal of political spoilers and prevention of further crimes morally unsustainable.

It was also observed that. new challenges had materialized in the world today which could not feasibly be solved by any single country. The international community could succeed in addressing the challenges of terrorism and climate change only through inclusive processes that abided by universally applicable laws. Even though the ICC was instituted to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community and to contribute to the prevention of these crimes, its lack of enforcement powers threatens to undermine its ability to achieve its institutional goals and to contribute to the furtherance of international criminal justice.

More so it was recommended that upholding multilateralism was not just desirable; it was the only responsible course of action. The existing order is being corroded by disrespect for the international legal instruments, flawed legal systems and procedures poor governance that stressed the use of force and even to some extent state sponsored violence, old-fashioned notions of spheres of influence coined in tribal or ethnic dimensions and misplaced concepts of morality and governance. In addition, such considerations provide the much-required opportunity to treat the constituents of societies subject to conflict not as inert actors who are in perpetual wait for an "international community" to rescue them but as active participants in shaping the future of their post-conflict societies.

There is hope, however, in the multilateral frameworks for cooperation such as the African union, regional initiatives such as the EAC, ECOWAS SDDC ASEAN BRICS G20, Human Rights council and the Peace Building Commissions. As regards peace and security, the world has to update its structure of governance and it is urgent to ponder the high price of inaction, reflect on history and reaffirm a strong commitment to international legal systems.

The study recommends that there are areas on international criminal court jurisdiction and state sovereignty that are in dire need of theorizing;

i. Whether regional blocks such as the AU can influence and or change the state treaty obligations in rather political forums so as to adduce that state sovereignty is tamed by geopolitics as opposed to treaty law.

ii. Whether the indictment of senior government officials and or the sitting heads of state by the ICC is indeed a threat to the common good of statehood. Hence is the restructuring of the Rome Statute crucial?

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Henry Kissinger

Prof kress and the rest I have sent you

APPENDICES

APPENDIX 1: RESEARCH QUESTIONNAIRE

Dear Respondents,

I am called Gerald Liguyani Majany student of Doctor of philosophy in International Relations and Diplomacy studies at Masinde Muliro University of

Science and Technology (MMUST) carrying out a research; Title, International Criminal Court Jurisdiction influencing State Sovereignty in Kenya

I kindly request you to respond to the questions as here attached. I assure you that your response to the questions and any information you give to me shall be treated with utmost confidentiality and used for academic purpose only.

Kindly answer the questions honestly by writing your responses in the space provided and by putting a tick at the appropriate likert scale corresponding to the appropriate statement the likert scale items are as follows :-

(5) Strongly Agree (4) Agree (3) Disagree (2) Strongly Disagree (1) None

SA A D SD N

Do not write your name, the answered questionnaire and information shall be kept confidential

RESPONDENTS PROFILE

General Information

Name of the county …….

Name of the institution …….

Location Of The Institution……..

What is your Gender and Age

(M)

(F)

Which Division do you belong to

civil/ public servant [ ]

private practitioner [ ]

religious minister [ ]

student/lecturer [ ]

embassy/diplomat [ ]

civil society, NGOs/INGOs [ ]

business community [ ]

others [ ]

What is your level of education

Certificate level [ ]

Diploma level [ ]

Under graduate [ ]

Post graduate [ ]

Post doctorate [ ]

(5) What is your domicile?

Kenyan…… [ ]

Other(s)…… [ ]

(6)How long have you been In Kenya?

1-2 Years [ ]

3-5 years [ ]

6-7 years [ ]

More than 7 years [ ]

SECTION A

THE NEXUS BETWEEN INTERNATIONAL CRIMINAL COURT JURISDICTION AND STATE SOVEREIGNTY IN KENYA

Answer the Questions Honestly By Writing Your Responses in the Space Provide

International Criminal Court Jurisdiction includes national jurisdiction

Yes
How……
……

……
……

No
Why……
……

International criminal court jurisdiction is more efficient and cohesive, than National laws.

Yes

How……

……
……

No

Why……

……
……

International criminal Court Jurisdiction is a transformation of states treaty obligations.

Yes

How……

……
……

No

Why……

……
……

International Criminal Court Jurisdiction pre empts the jurisprudence of sovereignty.

Yes

How……

……
……

No

Why……

……
……

International Criminal court Jurisdiction Is the co-existence of cooperation to international law by states

Yes

How……

……
……

No

Why……

……
……

International Criminal Court Jurisdiction enhances state sovereignty

Yes

How……

……
……

No

Why……

……
……

International criminal Court Jurisdiction has implications on state sovereignty.

Yes

How……

……
……

No

Why……

……
……

International Criminal Court jurisdiction is determined by consent of sovereign states.

Yes

How……

……
……

No

Why……

……
……

SECTION B

THE EFFECTS OF ICC JURISDICTION ON NATIONAL INTERESTS IN KENYA

Please indicate the extent to which you strongly agree, agree, and strongly disagree and none by writing only the Number of the option for each of the items or statements indicated on the table below.

TICK THE APPROPRIATE OPTION

Strongly Agree	Agree	Strongly Disagree	Disagree	None
SA	A	SD	D	N
5	4	3	2	1

NO	ITEM	5	4	3	2	1
1-	The ICC cases have contributed positively to promotion of the rule of law in Kenya especially during the 2013 General elections					
2-	THE ICC jurisdiction complements with states parliamentary legislations					
3	ICC Jurisdiction includes states willingness to cooperate in apprehending the accused.					
4	ICC Jurisdiction Supersedes States and Non States Independence					
5	ICC jurisdiction Is Very Essential For Preservation Of International Peace And Security.					
6	ICC jurisdiction provides an effective working legal mechanism to check and punish crimes of international concern					
7	ICC Jurisdiction has an increased operational ability, accessibility and reparations for victims of international crimes..					
8	ICC jurisdiction has established linkages among states					
9	ICC jurisdiction provides opportunity for states to build up and improve their legal systems					
10	ICC has a positive impact on Governments policies and frameworks.					
11	ICC Jurisdiction applies the provisions of laws and					

	procedures emerging from state parties.					
12	ICC Jurisdiction Is More Stronger Than National Jurisdictions In Management Of Crimes.					
13	ICC Jurisdiction Has A Widest Level Of Performance Since Introduction Of The Rome Statute In 1998					

SECTION C

ICC JURISDICTION AND RESPONSIBILITY TO PROTECT (R TO P) IN KENYA

ICC jurisdiction is not a substitute for National courts

Yes

How……
……

……
……No

Why……
……

International Criminal Court Jurisdiction Intervenes where a state fails/ unable or unwilling to genuinely carry out investigations or prosecute. perpetrators of crimes against humanity.

Yes

How……
……

No

Why……
……

International Criminal Court jurisdiction helps to end impunity for the perpetrators of the most serious crimes of concern to its international community.

Yes

How……
……

No

Why……
……

State parties to the Rome Statute submit totally to the International Criminal Court Jurisdiction.

Yes

How……
……

No

Why……
……

Non State Parties are subject to the International Criminal Court Jurisdiction.

Yes

How……
……

No

Why……
……

International Criminal Court Jurisdiction prosecutes Individuals who have committed crimes of international concern.

Yes

How……
……

No

Why……
……

SECTION D

PART I

TICK THE APPROPRIATE OPTION

Strongly Agree	Agree	Strongly Disagree	Disagree	None
SA	A	SD	D	N
5	4	3	2	1

ICC JURISDICTION ON TREATY OBLIGATIONS IN KENYA.

NO	ITEM	5	4	3	2	1
1	ICC jurisdiction is meant to guarantee the Prosecution and punishment of the offences defined in conventions binding state parties.					
2	The prosecution of crimes encompassed in the ICC jurisdiction fall under the national jurisdiction of the state					
3	ICC Jurisdiction Enhances Obligations Of Peaceful International Cooperation That Is Increasingly Having Greater Influence On The Shape And content Of The Sovereignty Principle,					
4	There is increased recognition of the fact that offences against the peace and security of mankind are punishable even where they are not treated as crimes under international law					
5	Many international treaties provide for universal criminal jurisdiction for offences that endanger the international order					
6	National security is at present achievable only by way of international cooperation.					
7	Implementing mechanism for any code of crimes against the peace and security of mankind must be based on cooperation among states					
8	States, whether parties to the Rome Statute or not, are obliged under existing international law to bring to justice those responsible for genocide, crimes against humanity and war crimes					
9	All States Are To Cooperate With Each Other On A Bilateral Or Multilateral Basis To Bring To Justice Persons Responsible For international crimes.					

SECTION D

PART II

10 Is sovereignty viewed as an enemy of international criminal law?

11. Does sovereignty constitute International legal order, which defines the basic rights and duties of states?

12. Is the ICC jurisdiction an extension of national criminal jurisdiction?

13. Do state parties cooperate and submit their judicial processes to the ICC jurisdiction?

14. Does the grounding of the ICC jurisdiction in the consent of states mean in particular, that the ICC may lawfully exercise jurisdiction over nationals of state and non-party states parties?

15. How does international criminal court exercise its jurisdiction in execution of its mandate on the sovereign of state and non state parties?

16. Does ICC jurisdiction include substantive and procedural international criminal law which supports state sovereignty?

APPENDIX II: FOCUS DISCUSSION GROUP SCHEDULE

In your opinion how has international criminal court jurisdiction affected Kenya?

Explain/assess the relationship between international criminal court jurisdiction and national law.

Do you agree or disagree with the perception that the international court is targeting Africa leaders?

What alternatives structure would you suggest as a replacement for the international criminal court for Africa states?

Who are the stake holders and actors of international criminal court? Explain their role in international peace and security.

What challenges does international criminal court jurisdiction face in Kenya and how can they be addressed?

What major interventions do you suggest for international criminal court jurisdiction in Kenya?

APPENDIX III: INTERVIEW SCHDULE FOR KEY INFORMANTS

1. Explain the importance if ICC jurisdiction.
2. To what extent does the ICC Jurisdiction address the justice for victims of crimes against humanity?
3. Would you say the ICC Jurisdiction is internally or externally oriented?
4. What challenges does ICC Jurisdiction in Kenya face, and how these challenges can be addressed?

5. What major interventions has the government of Kenya undertaken between 2008-2016 to address international crimes of grave concern?

APPENDIX IV:AUTHORITY LETTER

APPENDIX V:RESEARCH PERMIT