UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

"STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: THE CASE FOR KENYA AND THE ICC (2007 - 2012)"

MONICA KIVUTI

R50/68793/2011

SUPERVISOR:

DR. ANITA KIAMBA

A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE DEGREE OF MASTER OF ARTS IN INTERNATIONAL STUDIES

NOVEMBER, 2013

DECLARATION

DECLARATION BY STUDENT

I, KIVUTI MONICA NJOKI, hereby declare that this research is my original work and has not been presented for any degree or study in any University.

SIGNATURE**……**

DATE……..……

KIVUTI MONICA NJOKI

R50/68793/2011

DECLARATION BY SUPERVISOR

This research has been submitted for examination with my approval as a University Supervisor.

SIGNATURE**……**

DATE……..……

DR. ANITA KIAMBA

DEDICATION

In memory of my late father and hero, Mr. Samuel Kivuti Ngari, who passed on in the sixth month of this jubilee year. Even in death, I firmly believe that I have your fervent support.

ACKNOWLEDGMENTS

I wish to acknowledge the following persons who played key roles in ensuring that this research was undertaken to successful completion:

My supervisor, Dr. Anita Kiamba, for her keen supervision and guidance towards ensuring that I achieve academic excellence throughout this study.

Lecturers at the Institute of Diplomacy and International Studies, University of Nairobi under whose tutelage my career has been well grounded. They include Prof. Maria Nzomo, Prof. Makumi Mwagiru, The late Prof. Olewe Nyunya, Mr. Gerishon Ikiara Dr. Ochieng Kamudhayi, Dr. Waris, Mr. Patrick Maluki, Mr. Nguru and Ms. Waeni Ngoloma.

My sincere appreciation also goes to Mr. Alex Okitoi, MBS, Ministry of Foreign Affairs, for walking through the challenging but rewarding academic journey with me. Your very valuable ideas, challenges and memorable inspiration have immensely shaped my career.

I am also indebted to Mr. John Leonard Mugerwa, Counsellor, Uganda Permanent Mission to the UN who was very resourceful in providing me with literature and refreshing ideas towards this research.

To members of the legal profession, civil society and citizens who participated in the interviews, your valuable feedback greatly aided the outcome of this research.

Finally but very importantly, I sincerely thank my family members, more so my sister Dr. Lucy Kivuti, for cheering me on, my mother, Mrs. Niceta Kivuti for her unwavering moral support and the good will I have from all my other siblings.

ABSTRACT

The exercise of exclusive state sovereignty is generally the preserve of independent states. Since the end of the cold war, the world has experienced a gradual change in the notion of the exercise of state sovereignty and it has departed from that envisaged by the Treaty of Westphalia of 1648. The creation of non state actors in the form of judicial institutions and particularly the International Criminal Court (ICC) has impacted the manner in which some states, particularly in Africa are governed. By operation of international criminal law and universal jurisdiction of the ICC, a state such as The Sudan for instance, has a serving president against whom warrants of arrest have been issued by the ICC for crimes against humanity. His physical access to the world particularly in states which are willing to co-operate with the ICC in effecting the arrest is restricted. The research concludes that there is demonstrated impact of the operation of international criminal law through the International Criminal Court in some of African states' exercise of sovereignty. Absolute sovereignty is therefore not realizable and domestic constitutional security of tenure of heads of states and government as well as other senior states officials cannot shield them from prosecution for crimes against humanity. Attention has been paid to Kenya and ICC cases and this paper seeks to examine whether the entry of the International Criminal Court into the Kenyan jurisdiction in order to try the suspects of the post elections mayhem of between December 2007 and February 2008 has interfered with its sovereign authority. The research is limited to events of between December 2007 and March 2011-from the beginning of post elections violence to indictment of suspects of the violence at the Hague in March 2011.While noting that the country (Kenya) is not on trial but individuals, the study concludes that pursuant to the entry of ICC in Kenya, there has been impact on politics, structures of governance and exercise of exclusive authority and Kenya's international image both positively and negatively. This research concludes that political changes alone cannot be sufficient reason to conclude that Kenya's sovereignty has been substantially undermined. Rather, the rule of law must be upheld and there must be accountability for crimes in the interest of justice.

LIST OF ABBREVIATIONS

AU	African Union
CIPEV	Commission of Inquiry on Post Elections Violence
DRC	Democratic Republic of Congo
ECK	Electoral Commission of Kenya
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ICJ	International Commission of Jurists
ICTJ	International Centre for Transitional Justice
ILC	International Law Commission
KHRC	Kenya Human Rights Commission
LRA	Lords Resistance Army
NARC	National Alliance Rainbow Coalition
LDP	Liberal Democratic Party
NGO	Non Governmental Organization
ODM	Orange Democratic Movement
OTP	Office of the Prosecutor
PNU	Party of National Unity
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

1.1 Introduction

The classic model of state sovereignty which essentially vested states with exclusive and unfettered sovereign authority has undergone transformation since the 16th century; following world events such as the two world wars, formulation of international legislation and creation of international organs and institutions. The evolution has occurred more as the world gradually becomes interconnected economically and in matters of criminal justice and human rights. World War I events which resulted to loss of lives, destruction of property and gross abuse of fundamental human rights brought about the need for international penal processes to eradicate impunity and to ensure lasting order and peace in the world. The clamour to bring to justice cases of abuse of human rights gained ground gradually across the world; attracting even the last expected of states like Turkey which had historically exhibited outrageous behavior towards its citizens and states such as Germany which was known for aggression against other nations.[1]

Debates abound as to whether the principle of sovereign authority of a state is relevant in the contemporary international system. While sovereignty is understood as a platform on which a state exercises power over its citizens, territory and structures, a state cannot escape international scrutiny when power is abused resulting to crimes which affect the human race under the guise of sovereignty. The application of criminal justice to tame

[1] Maogoto J.N, *International Criminal Law and State Sovereignty: Versailles to Rome* (New York: Transnational Publishers 2003) p.33

sovereign excesses when crimes against humanity are committed transcends the existence of customary international law which is the law among nations and not the law governing them and which applies horizontally, meaning that all states conventionally have characteristics of sovereignty and none has supreme authority over the other.[2]

It is on this basis that international judicial mechanisms and institutions were set up to ensure accountability for human rights violations. The exercise of jurisdiction of some of the institutions such as the International Criminal Court (ICC) transcends state sovereignty since its focus is on the interests of humanity as opposed to a particular state or individual. In this context, absolute sovereignty in international parlance is therefore not realizable and the notion that absolute sovereignty can be achieved is a misunderstanding brought about by its theological and political definitions.[3]

The paradox of the existence of shared state sovereignty on the other hand is its capacity to be willfully and conscientiously given away by the state itself.[4] Numerous international treaties and conventions covering issues of criminal justice and which allow jurisdiction across states, for instance the Rome Statute have over the years been ratified by states and their applicability tested. In pursuit of the promotion of fundamental human rights, punishment for grave crimes and in order to ensure deterrence of crimes which aggrieve humanity, non state judicial institutions such as the International Criminal

[2] Shaw M.N., *International Law*, (Cambridge: Cambridge University Press, 6th edition, 2008) p.6
[3] Ivan S., 'State Sovereignty and Globalization: Are Some States More Equal?', *Georgia Journal of International & Comparative Law* Vol.28 (2000) pp 381 & 402
[4] Brian F Havel, *'The Constitution in an Era of Supranational Adjudication'*, North Carolina Law Review, 2000 pp.257, 327

Tribunals for Rwanda (ICTR) and International Criminal Tribunal Yugoslavia (ICTY) were established.

The most perceived demonstration of the shared sovereignty in recent times is the increased involvement of international judicial processes in the governance of post colonial third world states**;** particularly the International Criminal Court (ICC). Kenya, Uganda, Libya, Democratic Republic of Congo (DRC), Sudan, Mali, Central African Republic and Cote d'Ivoire are some of the states in which the ICC has undertaken investigations and prosecutions, irrespective of their sovereignty.

Kenya has acknowledged the role of international law and institutions in three profound ways: Its support of the establishment ICC by ratifying the Rome Statute, The recognition in the 2010 constitution that all general rules of international law and any treaty ratified by Kenya shall form part of the law of Kenya[5] and thirdly the enactment of the International Crimes Act of 2009 However, the events which occurred between 2007 and March 2010 mainly post elections violence, ICC investigations and subsequent indictment of Kenya's high ranking personalities in the ICC created controversy regarding the applicability of international criminal law in independent sovereign states and the viability of the doctrine of complementarity as enshrined in the Rome Statute.[6]

The violent events which occurred in Kenya during the political transition after the December 2007 general elections had implications which have posed challenges for

[5] Article 2 (5) and (6) of the 2010 Kenya constitution.
[6] Article 1of the Rome Statute establishing the ICC of 1998.

Kenya as a state to date. Lives were lost, property destroyed, citizens were displaced and left homeless and subsequently became refugees, the country was polarized along ethinc and political inclinations. The violence tore the country's previous peaceful profile on the world platform. Challenges of civil unrest, ethnic differences and intolerance, broken economy, strained diplomatic relations and criminal liability sprung; causing Kenya to form part global media focus for negative reasons.

In order to deal with the civil and political mayhem and salvage the country from full blown civil war, international intervention was organized by the AU. It appointed a Panel of Eminent Persons and with technical support by the United Nations, the panel facilitated a mediation process between the main presidential competitors at the time, Mwai Kibaki and Raila Odinga. A power sharing arrangement was agreed upon and it entailed creation of the office of the Prime minister and subsequently section 3 of the 1963 constitution was amended to create this office. The Panel of Eminent persons also recommended among other things the formation of a Commission of Inquiry into Post Elections Violence (CPIEV). The CPIEV; after concluding its investigations recommended among other things; the establishment of a domestic judicial mechanism to try the suspects behind the serious crimes committed after the 2007 general elections[7]. The Kenyan parliament showed little interest in forming an internal judicial tribunal as recommended by the CIPEV to try the elections related crimes; preferring instead to have the International Criminal Court to assume this role. This became a turning point for Kenya legally, politically, economically and diplomatically; issues which pose a

[7] Report of the Commission of Inquiry into Post-Election Violence, 2009, Kenya.

challenge to date following the indictment of six high profile Kenyans at the ICC and the impending trials of the current president and his deputy at the ICC.

What sets Kenya's case apart is that for the first time in the history of the International Criminal Court, the prosecutor proceeded to investigate and the Pre-trial Chamber indicted six Kenyans for short term crimes against humanity. The court has a pattern of trying crimes committed over a long period of time running into years such as those committed in Darfur, Democratic Republic of Congo and Northern Uganda among others where millions of lives were lost.

Secondly, the ICC is scheduled to try a sitting president and his deputy for crimes against humanity and elected into office the criminal charges notwithstanding. All the other African heads of states who have faced trial at the ICC were not in office at the time of trial and as shall be discussed in a separate chapter in this research, Kenya's cases will set a precedent in the ICC and the world.

There was political resistance to accountability for the post elections violence crimes being tried by the ICC after the initial six suspects were named by the court's prosecutor; five of whom were high ranking government officials. Once the reality of inviting the ICC jurisdiction sank in, the Kenyan parliament on December 22nd 2010 debated and unanimously passed a motion to have Kenya withdraw its ratification of the Rome Statute and in effect, withdraw from the jurisdiction of the International Criminal Court.[8] This motion was not binding on the ICC as the law does not apply retrospectively and the

[8] "Daily Nation" December 22nd 2010.

2010 constitution[9] does not accommodate retroactivity. Parliament further resolved to amend the law and establish a special High Court division to try post elections violence perpetrators.

This was followed by the diplomatic engagement between the Kenya government and the African states through the vice President at the time, Kalonzo Musyoka in 2011. The aim was to persuade them to support Kenya's quest to have the trials conducted in the country of in Africa and not the Hague. Kenya also filed an application to the ICC to challenge the admissibility of the cases facing the six suspects who bear the greatest responsibility for the 2007 post elections mayhem. The fact that the ICC dismissed Kenya's application and upheld its jurisdiction over the matter raised the issue as to whether the court underestimated Kenya's capacity to investigate and try its own crimes committed during the post elections crisis. The court's main argument was that there was a situation of "inactivity" in Kenya in terms of investigations and prosecution of the post elections violence, more so the high profile personalities who were implicated in the post elections mayhem.

For purposes of this study, the time frame is limited to between December 2007 when violence broke in some sections of the country after the presidential elections results were announced and January 2012, when four Kenyan suspects were indicted before the ICC.

[9] Article 77 (4) of the Constitution of Kenya, 2010.

1.2 Problem Statement

The relevance of the international criminal justice in times of conflict has been put to test in Africa; particularly in the states characterized by protracted conflict and the inability by those states to use or apply existing judicial institutions to prosecute and punish offenders. Majority of the African states have ratified the Rome Statute which substantially binds them to the jurisdiction of the global court of the last resort. With sections of Africa such as Darfur, Eastern Congo, Central African Republic, Mali and northern Uganda witnessing escalation of armed conflict, there has been increased intervention by the international bodies such as the African Union, the United Nations and more profoundly the ICC. The impact of this intervention has seen investigations, indictment and prosecution of individuals culpable for crimes against humanity and genocide, who are all African. This has resulted into the belief that the ICC is biased as its targets are leaders of small, developing and politically inconsequential African countries and not powerful states such as the United States which is not without fault in terms of commission of gross human rights violations especially through the gulf war.

The uniqueness of Kenya's case and the ICC is three fold: Traditionally, the ICC focuses on crimes which not only meet the threshold of the provisions of the Rome Statute but also factors in the period of time the conflict has persisted. The time frame within which crimes against humanity were committed in Kenya was about two months and this parallels decades of conflict in regions in such as Darfur, Democratic Republic of Congo or the northern Uganda among others.

Secondly, while referrals to the ICC by states such as Uganda and DRC were made under pressure by the Office of The Prosecutor (OTP) which through the prosecutor threatened to seek authorization to commence investigations, the Kenya situation was voluntarily handed over to the ICC. There was political will to entertain international criminal trial process in 2009 when the Kenyan legislature voted against establishment of a domestic tribunal to try suspects of the elections violence; without seriously weighing the attendant consequences; both legal, diplomatic and political.

Thirdly, at the time of indictment of the four suspects by the ICC, the current president, Uhuru Kenyatta, had not been elected into office. The fact that he was declared the winner of the 2013 presidential political contest with full knowledge that he was indicted in March 2011 and scheduled to stand trial in the court of the last resort also sets the Kenyan case apart. Never in political history has there been an election of a suspect of crimes against humanity into presidential office and this has created diplomatic awkwardness between Kenya and the western nations; particularly the United States of America and Britain.

By willfully inviting an international legal actor, the ICC, to investigate and commence trials against the suspects of crimes categorized as most serious, did Kenya willfully cede its sovereignty or was it actually compromised by the ratification of the Rome Statute in 2005 which embraced jurisdiction over its internal criminal justice system? By taking steps to retreat from the ICC jurisdiction and petitioning the ICC and African Union to have the trials conducted at home, can the argument that the west has manipulated

Kenya's sovereignty be sustained? Has the involvement of this actor profoundly diminished Kenya's political authority and its capacity to utilize its domestic structures to prosecute crimes? Is Kenya's sovereignty malleable?

1.3 Objectives of the Study

This research paper seeks to cover and address the following issues:

a) Discuss whether there is collision between sovereign interests of a state and its accountability for criminal acts of its citizens with Kenya as the case study.
b) Determine whether or not Kenya's sovereignty, political, legal and international relations have been compromised through the involvement of the International Criminal Court and the pending trials.

1.4 Literature Review

The growth and development of international criminal law has contributed to changes in the exercise of state sovereignty and many scholarly works abound regarding the topic. Some of the key reasons the classical international criminal law has grown is due to the establishment and involvement of non state actors, more so international judicial institutions such as the ICC. There increase of literature surrounding the involvement of international criminal court in Kenya which is an ongoing process and more opinions and scholarly work are expected in the future. While acknowledging the diversity of opinions surrounding this topic, this review will identify areas which may not be covered touching on: The mandatory criminal responsibility of an individual irrespective of constitutional immunity from prosecution; issues surrounding international trial process for crimes over

which a state has original jurisdiction and the emerging contentious issue of ICC's involvement in African states, more so Kenya and whether international criminal prosecutions particularly involving heads of states and governments pose threats or interfere at all with a state's sovereignty.

The themes will be discussed in contexts but the main focus is whether sovereign authority and constitutional immunity from criminal prosecution can stand in the way of international criminal judicial process. Further, the emerging issues regarding effectiveness and impartiality of the ICC as a global court whose jurisdiction impacts on states' sovereignty shall be discussed. Sources of literature include books, journals, websites, magazines and scholarly commentaries whose content is relevant to this research.

1.4.1 Criminal Responsibility Versus State Sovereignty

The contention regarding the role of international criminal justice process in matters of domestic nature of a state is an ongoing debate. The traditional dimensions of state sovereignty range from territoriality, supremacy and the exclusive exercise of supreme authority[10]. Prior to World War II, international law focused on duties and rights of states and was invoked when states were in conflict.[11] However, world events have changed this position to allow for the application of supranational jurisdiction. With the phasing out of the Westphalian notion of sovereignty, universal jurisdiction of international criminal law has taken root so that no state can escape culpability for criminal acts of its

[10] Stanford Encyclopedia of Philosophy, 2010 edition.
[11] American Law Institute, "*Restatement of the Law, Foreign Relations Law of the United States* (1986) Part III pp 144-45 (Introductory Note).

citizens or political leaders. This transcends arguments that a state's sovereignty would be interfered with when safeguarding the safety of humanity and providing redress for victims of grave crimes.

Sovereignty and international criminal law are two sides of one coin but the different languages of interpretation often lead to tension.[12]. This means that there is no widely accepted interpretation of the relationship between the two. Lulu,[13] for instance, posits that the controversy between sovereignty and international criminal law emerges in matters surrounding the crime of aggression, universal jurisdiction and immunity from criminal prosecution of state officials in foreign countries. The definition of crime of aggression has never been universally agreed upon. While the crime has elements of the act of initiating hostilities or invasion by a state over another, the UN 2010 Review Conference defined the crime of aggression to include planning, preparation, initiation or execution by a state an act of force against another state.[14] Owing to the fact that the elements of the crime are such that the ICC has jurisdiction over states even before the crime itself has been committed, the court has to date never acquired jurisdiction until the state parties to the UN vote on the definition of the crime of aggression during the 2017 general assembly by at least a two thirds majority.[15] This therefore validates the tension observed by Morten as aggression is more of an anticipatory issue and it would not be easy to prove that a state intends to aggressively invade another.

---

[12] Morten B.& L. Yan, *State Sovereignty and International Criminal Law*, (Beijing, Torkel Opsahl Academic EPublisher, 2012) p.22

[13] Zhou L. "Brief analysis of a few controversial issues in contemporary international criminal law" in Morten Bergsmoand LING Yan (ed), *State Sovereignty and International Criminal Law* (Beijing: Torkel Opsahl Academic EPublisher 2012) p.39

[14] Article 8 of the Rome Statute

[15] Scheffer, D, *"State Parties Approve New Crimes for International Criminal Court"* (ASIL Insight, Wash. D.C.), 2010.

Differences and tension also emerge when invoking sovereign authority of a state to shield state officials who commit atrocities in another country during war from prosecution by arguing that the entry of international trial process would infringe on a sovereign state's authority. Some states such as the United States which has to date not ratified the Rome Statute has effectively shielded its soldiers who have been accused of committing human rights abuse in Iraq from prosecution. When the ad hoc international tribunals such as the ICTY and ICTR were wound up, there was focus on the exercise of national jurisdiction over crimes of international nature even in the face of the universality of criminal jurisdiction in order to encourage not only growth of national judicial trials but to prevent collapse of other out of court redress for crimes.[16] However, this focus which appears to pay homage to the sovereignty of a state over its own judicial matters did not do away with the international community's quest for the establishment of a permanent court since there was no guarantee that there would be no more war or conflict in the world.

The scope and concept of universal jurisdiction of crimes against humanity and a state's sovereignty go hand in hand since international criminal justice by its very nature is a presupposition of sovereign states. States exercise their prerogative to punish and deter crimes through institutions such as courts of law and investigative bodies. International law is formulated by states each with separate sovereign authority and its implementation is dependent on cooperation of sovereign states, effectively making international law and sovereignty an inseparable pair.

[16] Morten B.& L. Yan, p.23

Shaw offers an analysis on sovereignty.[17] According to him, a state needs to maintain its sovereignty both internally and externally. In order to maintain sovereignty externally, it must curve a relationship with other states which are similarly sovereign since no state can stand alone in an increasingly interdependent world. This begets a system of regulations in the form of international laws to regulate the relations between sovereign states which also demonstrates that international law recognizes state sovereignty and the two work hand in hand.

The argument of state sovereignty being an enemy of international criminal law on the other hand is not a strange phenomenon; although it is viewed as mere *realpolitik* used to put bottlenecks on international criminal justice system**.**[18] For international justice to function there must be a legitimate, political and financial environment of honesty which would enable problems to be addressed in order to reach lasting solutions.[19] According to Jennings,[20] it was erroneous to call for the surrender of state sovereignty by the classical lawyers during the Rome statute deliberations. What was needed and still remains a need is to harness, transform and augment sovereignty into new directions. The proper way would be to use sound legal devices, collective decisions and ensuring that collective action over international problems is taken. In essence, Jennings is advocating for complementarity as the viable method of addressing crimes which attract interference

[17] Shaw M. Shaw M.N., *International Law*, (Cambridge: Cambridge University Press, 6th edition, 2008) p.44.
[18] Robert C., "International Criminal Law-vs- State Sovereignty: Another Round?", *The European Journal of International Law,* Vol. 16 no.5, (2006); p.2
[19] Broomhall, Bruce. *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law. (*Oxford: Oxford University Press, 2003) Pp. viii & 215.
[20] Jennings R., 'Sovereignty and International Law', in G. Kreijen *et al.* (eds), *State, Sovereignty and International*
Governance (2002) pp. 30–31.

with a state's sovereignty by having proper structures and mechanisms of prosecution and investigations.

Other than the institutional and procedural aspects of international law which present challenges in the relationship between international criminal law and sovereignty, the substantive international criminal law itself also plays a role in this challenge. On one hand, international criminal law protects state sovereignty particularly through the lens of the crime of aggression. Criminalization of the crime of aggression protects states from armed invasions which would be violation of each other's sovereignty. On the other hand, through the Rome Statute, once the ICC has acquired jurisdiction over a matter in a certain state, this limits such a state's freedom to prosecute its own nationals thereby interfering with a state's sovereignty.[21] Indeed, international criminal law has been said to have schizophrenic tendencies.[22] McCormack[23] adds that the inconsistencies in the application and enforcement of international criminal law are most explicable on the basis of the mentality of "them" and "us". It is demonstrated when states advocate for the prosecution of "others" and at the same time "having an aversion to extract the ugliness of what their own troops have done against the enemy they have come to dehumanize"

[21]Luban, D, *'The Legacies of Nuremberg'* (Oxford University Press: 2008)
[22] Ratner, S. "The Schizophrenias of International Criminal Law' *Texas International Law Journal,* Vol.33 (1998) p.237
[23] McCormack H. "Crimes Against Humanity' in M. Lattimer and P. Sands (eds),*" Justice for Crimes Against Humanity"* (Oxford: Hart, 2003)p.108

A departure from the common interpretation of state sovereignty being involuntarily interfered with is the argument that sovereignty actually includes the liberty of a state to allow into its territory certain kinds of external interferences which have an impact on its governance and by extension its sovereignty.[24] This is well demonstrated economically in the form of global interdependence and co-operation through the participation of state and non state actors. Bretton Wood institutions for instance set conditions upon which they extend loans or grants to borrowing countries more so in terms of expenditure. In as much as a sovereign state would wish to exercise discretion in expenditure of the huge sums of money granted to them, they cannot and are bound by the conditions set by donors which they willingly accept. Indeed, it has been said that from the 20th century, international legal system has undergone significant transformation so that it is slowly changing to international law of cooperation as opposed to remaining international law of co-existence.[25]

Clapham[26] posits that the relationship between sovereignty and international legal order is such that sovereignty cannot be viewed as absolute or unchangeable as this would dim the role of international criminal law. The debate on the relationship between state sovereignty and international law depends on how one chooses to understand the term sovereignty and who should be shielded from prosecution. Sovereignty is a changing notion which adjusts to the gradual development and nature of international law and that

[24] Brian F.,'The Constitution in an Era of Supranational Adjudication', *North Carolina Law Review journal* Vol. 78. (2000); p. 257.
[25] Wolfgang Friedmann, "*The Changing Structure of International Law"* (1964).
[26] Clapman, A. "Introduction" in M. Lattimer and P. Sands (eds),*" Justice for Crimes Against Humanity"* (Oxford:Hart, 2003)p.3

the general belief of non interference with a state's sovereignty raises the important question as to what the rights and duties associated with sovereignty are.

The main arguments arising from this section are that state sovereignty is not absolute and can be voluntarily interfered with by consent of state parties or through the application of international law. When exclusive exercise of sovereign authority is interfered with voluntarily, it is on the basis that states are bound by the need to co-exist and are dependent on each other so that for the sake of their own good, they allow certain non state actors into their internal systems. International criminal law also has grey areas especially through the Rome Statute which seeks gives the ICC universal jurisdiction and at the same time shields states from armed invasions by each other in crimes of aggression.

1.4.2 International Criminal Investigations and Trial Process: Highlights

International criminal judicial process is not a recent phenomenon. From World War I to World War II and post cold war, the international community became increasingly conscious about bringing to justice violators of human rights especially in view of serious crimes committed by the military for instance the NAZI during the war. States formed a number of mechanisms to deal with crimes which posed a threat to the entire humanity and which transcended national jurisdiction. The Nuremberg Military Tribunal of the 1950s was formed as a retribution mechanism for victims of the Second World War. The UN proposed the establishment of a permanent judicial organ to succeed the tribunal but due to the cold war, the process stalled. Two post cold war tribunals were subsequently

established –the International Criminal Tribunal for Yugoslavia (ICTY) in 1993 and International Criminal Tribunal for Rwanda (ICTR) in 1994. Other non permanent tribunals were also set up thereafter to try crimes against humanity committed in Sierra Leone, Cambodia and East Timor.

In order to remedy the inefficiency of ad hoc tribunals, the Rome Statute establishing the International Criminal Court was enacted vide UN Resolution 260 of 1998. There are three instances under the Rome Statute which allow the ICC to exercise its jurisdiction over crimes: with the leave of court, the prosecutor can be authorized to initiate investigations on his own *(proprio motu)* in a state where there is sufficient basis to proceed with investigations of most serious crimes. Secondly, a state party to the statute may refer a matter to the ICC to commence investigations. Thirdly, the UN Security Council can refer a situation to the court for investigations and subsequent prosecution.[27] The ICC's judicial chambers are divided into three: pre-trial division, trial division and the appellate division. Although the prosecutor is empowered to commence investigations, the pre-trial division has prerogative to approve and oversee the pre-trial stages including investigations and confirmation or otherwise charges before it. The pretrial chamber was incorporated in the Statute as a mechanism to keep the powers of the prosecutor in check. This was more so out of concern by states that if the prosecutor's powers were not subjected to scrutiny, there was no guarantee that he would not bring

[27] Article 53 (1) (a), (b) and (c) of the Rome Statute of 1998.

frivolous or politically motivated charges before the court which is expected to exercise impartiality and integrity.[28]

Two legal systems are exercised by the ICC: the French civil law inquisitorial method of prosecution and the English common law adversarial system. The two are practiced especially in the pre-trial division and the office of the prosecutor. The common law system's approach is to first formally charge a suspect before a court when a complaint against the person is made then build a case and gather more evidence against the accused. On the other hand, the civil law system's approach is to first gather evidence against a suspect, evidence which points to both his guilt and innocence then evaluate it first before concluding that the suspect should be formally charged before the court. Under the inquisitorial system, the judges can supervise the prosecution's conduct especially with regard to the veracity of the evidence presented before it. At the ICC level, the pre trial division's judges authorize the prosecutor to commence investigations and exercise their supervisory role over him while he gathers evidence against the accused person.[29] The pre-trial chambers also deals with preliminary trial related issues such as applications determining the jurisdiction of the court, admissibility of evidence, ensuring rights of the accused person are not violated, makes orders for the privacy and protection of witnesses as well as preservation of evidence.[30] International criminal Investigations and trials procedure have evolved since the advent of the cold war and hoc

[28] Olivier Fourmy," Powers of the Pre-Trial Chambers", in A. Cassese, P. Gaeta and J.R.W.D. Jones, *the Rome Statute of the International Criminal Court: a commentary*, (eds) vol. II (2002) p.1210.
[29] Silvia A. Fernández de Gurmendi, "International Law Procedures: The Process of Negotiations", in Roy S. Lee, *the International Criminal Court: the making of the Rome statute: issues, negotiations, results*, (ed) (1999) p.223.
[30] Articles 18(6) and 57(3) of the Rome Statute.

tribunals have been wound up. There is now one permanent court whose application of the main legal regimes of common law and French civil law jointly is aimed at striking a balance and fairness during trial.

1.4.3 Concerns Arising out of Referral of Cases to the ICC

Many states have in the past referred their situations to the ICC for investigations. By July 2009, the ICC prosecutor at the time, Louis Moreno Ocampo, reported that he had received over 8,137 'communications' from over 130 countries.[31] Some of the African countries who made referrals to the ICC include Uganda, Kenya and the Democratic republic of Congo. As at the year 2010, the court had opened investigations in Uganda, Central African Republic, Darfur, Democratic Republic of Congo and Kenya. The perception drawn from the pattern of states and persons who have so far been investigated and charged before the ICC is that the court is bent on prosecuting Africans which has generated concerns.

Stemming from these concerns, it has been said that there exists unspoken truth about international criminal trials as currently practiced. The practical application of the rules of the law by the ICC are partial such that certain personalities from certain countries of origin are unlikely to ever face prosecution for crimes over which the international criminal court has jurisdiction. The reality is that the application of international criminal law is not rooted in the conscience of powerful countries as such. Rather, owing to their superior political and economic statuses, they can violate the law and get away with it.

[31] American Society of International Law, Independent Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement, (*March 2009), p. 18, at http://www.asil.org/files/ASIL-08-Discussion Paper 2. Last accessed on 25.4.2013

International criminal law and justice are therefore regulated by the law of gravity and racism plays a major role.[32]

At the inception and ratification of the Rome Statute, there was good faith and expectations of the impartiality and integrity of the ICC in its investigatory and prosecutorial functions. African states such as Uganda and Democratic Republic of Congo referred their protracted armed conflict cases to the ICC. On the face of it, these states voluntarily and conscientiously resolved to subject their situations to the jurisdiction of the court. However, the referrals were *prima facie* voluntary but in reality, they were made under duress. According to the Human Rights Watch, the referrals to the ICC by Uganda and Democratic Republic of Congo were made after the court prosecutor threatened to seek leave of the court to commence investigations.[33]

The drafters of the Rome statute contemplated that governments would not be enthusiastic to invite or surrender their citizens to the ICC for prosecution and would instead prefer to have them domestically tried. The assumption even before the Rome Statute was signed into law was that the ICC would step in to investigate and prosecute individuals from states that were unwilling to prosecute or were unable to or failed to satisfactorily prosecute perpetrators of egregious crimes.[34] Both DRC and Uganda have judicial capacity to conduct criminal trials and they cannot be said to have been unwilling

[32]" *New African'*, Magazine, Issue No. 515, March 2012. Also at "Defending Charles Taylor" at http://www.bbc.co.uk/news/world-africa-11059821. Last accessed on 30th June 2013.
[33] *Courting History: the Landmark International Criminal Court's First Years*, Human Rights Watch, New York, July 2008, at <http://www.hrw.org/en/reports/2008/07/10/courting-history>, pp. 184-91. Last accessed on 25.4.2013
[34] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN 50th Session, Supplement. No. 22, UN Doc. A/50/22 (1995) paragraph. 47.

or totally failed to conduct investigations and trials. A query was raised as to whether a state like Uganda which has competent judicial institutions would be freely willing to surrender its matter to the ICC and it is arguable that the invitation was preceded by pressure from the prosecutor.[35]

International criminal trials are inherently political as they directly have an impact on the policies and sovereignty of a country, since the ICC for instance has jurisdiction to try most serious crimes which are more often than not committed by either senior government officials who are policy makers or through proxy.[36] Indeed, most of the suspects indicted by the court are high profile government officials for instance, Sudan's president as well as Kenya's president and his deputy who are also policy makers.

While the establishment of the ICC was a profound step in ensuring retribution and punishment for crimes against humanity, referral, trial, imprisoning and punishing offenders may not be the solution to rebuilding nations, infrastructure or institutions such as roads and schools. It may not help in rebuilding trust within societies. In Uganda for instance, ICC intervention is said to have exacerbated the violence in the north and thereby endangering vulnerable groups. The rumour alone of the referral of the Northern Ugandan situation to the ICC and the possibility of warrants of arrest being issued against Joseph Kony of the Lords Resistance Army (LRA) (although later issued) increased

[35] Moy, H.A, "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity", *Harvard Human Rights Journal*, Vol. 19, Harvard University, (2006).p.
[36] Allison M.D., "*Enhancing the Legitimacy and Accountability of Prosecutorial Discretion of the International Criminal Court*" (AM Publishers. J. International 2003) p.510

attacks on civilians even in refugee camps. The LRA was more determined to exert its authority.[37]

1.4.4 Shortcomings of the ICC

After over ten years of existence, the ICC has attracted criticism based on professionalism, impartiality as well as its composition. David Hoile, in his analysis of the International Criminal Court argues that the clear lesson African countries should learn is not to refer their matters to the ICC as it amounts to inviting cancer into their political systems.[38] According to him, the ICC has failed the test of professionalism and credibility including the fact that its judges are not the best legal minds to begin with. He contends that the judges are appointed through back room vote trading, some are appointed as a cozy retirement time passing occupation, with no legal training. He further argues that the ICC's bench comprises politicians, diplomats and other persons who are appointed because their governments fund the ICC substantially. Judge Hans-Paul Kaul, for instance, had been employed by the German Foreign Ministry before his appointment to the ICC as a judge and has no legal training.

The process through which the ICC was established has also been criticized. The Rome Statute was hurriedly put together and within four weeks, the process was completed. The main organs behind the court's establishment and adoption of the Rome Statute were European Non Governmental Organizations (NGOs) who played a key role in ensuring

[37] Allen T. "*Trial Justice: The International Criminal Court and the Lord's Resistance Army"* (Zed Books, London:) 2006. pp.102 and 103.
[38] David Hoile, "The International Criminal Court, Europe's Guantanamo Bay?" *(*Africa Research Centre, 2010) p.6.

that it was discussed on a take-it-or-leave-it basis. There was no provision in the Statute for states to sign the treaty with reservations which is contrary to the objects of the Vienna Convention on the Law of Treaties (VCLT)[39] The ratification process has also been criticized on the basis that with the establishment of a court of an international stature having jurisdiction over sovereign states and individuals, the threshold for its ratification was 60 states only out of the 189 member states of the UN at the time. This was a very thin approval base and should have targeted at least three quarters of the member states to affirm the wide acceptance and confidence in the ICC.

The fact that the United States which is a member state of UN Security Council signed the Rome Treaty but declined to ratify it has been seen as a window to have it excluded from the Courts jurisdiction by virtue of the fact that it is the world's super power. Tim Allen argues that the International Criminal Court is unlikely to ever prosecute the most serious crimes committed by the United States of America's citizens especially during the invasion of Iraq even if it ratifies the Rome Statute. The court would only intervene if the Unites States showed no interest of prosecuting its own citizens domestically which would be highly unlikely.[40]

The functionality of the ICC as a court of last resort was undermined by the comments of its own former prosecutor, Luis Moreno Ocampo who in June 2003 was of the view that the court would function better without holding trials but instead promote the doctrine of

[39] *'New African',* Magazine, Issue No. 515, March 2012.
[40] Allen, Tim, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, (Zed Books, London, 2006) p.21

complementarity.[41] This had the mixed effects of displaying either reluctance or failure by court to carry out its mandate as enshrined in the Rome Statute and when criticized, the court embarked to exercise jurisdiction over poor African countries to demonstrate that it serves the purpose of being called a court of the last resort.

The pretrial chamber has been criticized for dictating where investigations should be launched even before the prosecutor makes the formal request which is a breach of procedure and an indication of sinister motive on the part of the court. In March 2009 for instance, one of the ICC judges, Richard Goldstone suggested the indictment of Zimbabwean President Robert Mugabe.[42] For a judge who is ordinarily expected to be impartial to make such utterances, this presupposes bias of the court since the judges themselves are expected to be an embodiment of impartiality, fairness and integrity. This position by the judge can be easily used to support the fact that Africa has been singled out for prosecution and possible convictions especially from the regions where the court has shown particular interest. The ICC prosecutor further in 2008 indicated that he had visited and invited both DRC and Uganda to refer their cases to the court. This negated the impression created that states were actually voluntarily referring their matters to the ICC.[43]

[41] Statement made by the Prosecutor at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the ICC (June16,2003),http://icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3 2673648B4896/143585/030616_moreno_ocampo_english.pdf. Last accessed on 18.06.2013.
[42] "Precedent set for ICC to target Mugabe, says former war crimes prosecutor", *The World Today*, ABC News, 11 March 2009.
[43] "War Crimes Are Everywhere, UK Uses Karadzic to Say, African Focus of Ocampo's ICC Defended", *Inner City Press*, 22 July 2008, at<http://www.innercitypress.com/uk1karadzic072208.html>. Last accessed on 25.4.2013.

1.4.5 Emerging Issues on the Referral of Kenyan Cases to the ICC

During the post elections violence, more than a hundred and thirty three thousand people were killed; three hundred and fifty thousand people were displaced while three thousand five hundred and sixty one were injured.[44] There were also cases of rape, looting and wanton destruction of property. The elections 'losers' were unwilling to seek justice from the domestic courts and it was difficult to establish who had won the elections therefore international intervention was called upon. The Panel of African Eminent Persons chaired by Kofi Anan helped the two main presidential contenders; Mwai Kibaki and Raila Odinga negotiate a power sharing agreement whose outcome was the creation of a grand coalition government to be shared between the President and the Prime Minister. The Panel of Eminent Personalities recommended among other things a Commission of Inquiry into the Post Election Violence (CIPEV) to inquire into the circumstances surrounding the violence and give recommendations. The report concluded that the violence was spontaneous at the beginning then turned into organized and coordinated attacks.[45]

The Commission gave the Kenyan government a period of six months within which to establish a special domestic tribunal in order to prosecute the post elections violence suspects. The timeline was however not met since parliament was reluctant to establish the tribunal and the chairman of the Eminent Persons, Kofi Anan handed over the envelope containing names of the perpetrators of the violence to the ICC prosecutor. The referral of the Kenyan cases to the ICC was deliberate and the opposition to the ICC's

[44] Report of the Commission of Inquiry into Post-Election Violence, Kenya.(2008) pp. 322, 362 & 345.
[45] Ibid.

jurisdiction only began after the names of prominent personalities featured when the OTP released them. The report by the CIPEV indicated that evidence gathered was sufficient to conclude that crimes against humanity were committed.[46] This assertion essentially meant that it was possible to invoke the ICC jurisdiction and Kenya did not resist when the OTP finally took over investigations. The report indicated the complicity of the government in the violence which it denied. However, the fact that both sides of the coalition government adopted the report and resolved to implement it and particularly to establish a special tribunal meant that they accepted that crimes against humanity were committed by followers of both sides of the coalition.[47]

By setting a specific timeline within which to set up a domestic tribunal, the CIPEV deliberately put a threshold to determine whether the political class was willing and committed to conduct thorough investigations within the self set standard. Further, it indirectly put ICC on notice to commence investigations in the event that Kenya failed to undertake the task. Recommendation number five of the CIPEV's report was that failure to enact a statute to establish a special tribunal or if it was established but failed to undertake its mandate, the names of individuals bearing the greatest responsibility for the crimes would be handed over to the OTP. The coalition government acceded to the report with all its contents including this recommendation and in effect, it consciously allowed the ICC's jurisdiction into Kenya.[48]

[46] Report of the Commission of Inquiry into the Post Election Violence (2008) p.17
[47] Global Governance Institute, "*The International Criminal Court and Kenya's Pot Elections Violence*" (GGI Analysis No. 2 of 2011, July 2011) p.7.
[48] ibid

1.4.6 The ICC as a Threat to State Sovereignty

The ICC does represent a shift and a transformation in the practice of international criminal law more so through its universal jurisdiction over crimes including over states which are not signatories to the Rome statute.[49] The creation of the ICC separately from the UN main system was an international law constitutional moment and was in fact a shift from the manner in which all international treaties and statutes were in the past formulated. The Court is premised on the platform of this newness of factoring in the conventional international provisions and extending beyond them especially through the jurisdiction vested in it. The new international constitutional order not only involved states but had the input of global civil society groups whose collective ideas brought about the provisions of the statute to operate in consonance with the changing global times.[50]

One of the key drafters of the Rome Statute Cherif Bassiouni's opinion on the ICC was that it is an international body as opposed to being a supranational body which is an extension of states' municipal jurisdiction and does not infringe on states' sovereignty.[51]

Although the Rome statute appears to have altered conventional international law, the change did not fundamentally overhaul it but rather the practice at the international court itself and unfettered supranational jurisdiction and not at individual state level or

[49] Frédéric M, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', *European Journal of International Law,* Vol. 13, (2001), p. 247.
[50] Nadya Sadat, Leila. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium.* (New York: Transnational, 2002. P79.
[51] Bassiouni, C *"Justice"* p. 181.

institutionally.[52] Leila[53] argues that although the provisions of the Rome statute did not fully yield to the forces of innovation and as expected during the Rome Statute negotiations, they indicate a struggle from the classical international law. There was marked quiet but uneasy revolution which was building up during the Rome negotiations and it brought a transformation of the classical international law. In her opinion, if the violent events in the world are blamed on state sovereignty as a shield, then international governance should not necessarily be looked upon as a superior option since it comprises the very sovereign states. She therefore supports the exclusion of sovereignty as a shield from criminal prosecution which was introduced by the Rome Statute. The incorporation of both civil law and common law in one court is profound. The Rome Statute was drafted alongside pre-existing law although the drafters anticipated opposition of its adoption by some states. The United States for instance was the first to oppose it. At the same time ICC is seen as a transformer and a shift from customary international criminal law, which creates a gap as to what the ICC stands for: new or the old order.

In summary, the interpretation of the relationship between state sovereignty and international criminal law is dependent on the understanding of the scholar. However, what the reviewed literature contends is that state sovereignty as contemporarily practiced is shared through the entry of supranational organs and international law. International law in its substantive nature contains grey areas and a contradiction both in practice and in statute. For instance, while the Rome statute accords the ICC universal jurisdiction, it also outlines elements of the crime of aggression (although not formally

[52] Crawford. J 'The Making of the Rome Statute', in *Nuremberg*, pp. 115–117.
[53] Leila Nadya, "*The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (New York:Transnational Publishers, 2002) p.8

adopted) outlaws armed invasion by a state over another state. This in essence protects state sovereignty with one hand and takes it away with the other.

1.5 Justification of the Study

The capacity of a state to exercise exclusive authority over its territory devoid of intervention from third party actors is an indication of sovereignty. The formulation of customary international law norms is ideally required to take cognizance of the existing individual structures of governance and traditional state sovereignty. States are theoretically and under international law equal since they jointly create international law and are bound by it. One such piece of international legislation enacted by states was the Rome Statute which established the International Criminal Court and vested it with supranational jurisdiction. When a state party willingly invites the ICC's jurisdiction to investigate and try serious crimes but which are of a lesser magnitude compared to those committed in DRC, Sudan or Northern Uganda for instance, would mean that the country is prepared to handle the attendant impacts of the process, some of which are perceived to interfere with its sovereignty and political authority. Diverse arguments have portrayed the court as acting arbitrarily on African states and making its actions unwarranted machinations.

The choice to focus on Kenyan is informed by the events which took place between December 2007 and April 2012; their relevance being that Kenya; the East African hegemony and known for being a relatively peaceful state was faced with the challenge of ethnic and political related mayhem following the outcome of the 2007 general

elections. International intervention of non state actors including international mediators and International Criminal Court in its domestic affairs marked a political and legal turning point for Kenya more so owing to the indictment of six suspects by the ICC in April 2011 and confirmation of charges of four among them in January 2012. The resultant national, regional and global focus on Kenya more so drawn from its strategic geopolitical position and economic importance brought in a popular belief that the west was exercising neocolonialism on Kenya through the ICC. This has had an impact on the manner in which to some extent, state business has in the recent years been conducted.

As earlier on mentioned, the Kenya law making organ, parliament, in 2009 declined to establish a domestic tribunal to prosecute those suspected to be culpable for post elections crimes. The period of six months granted by the CIPEV to establish the tribunal lapsed and the head of the panel of Eminent Persons, Kofi Anan handed over the names of the suspects to the ICC prosecutor for further action. The research aims at making contribution to the jurisprudence that an individual under international criminal law is not immune to criminal responsibility; domestic constitutional immunity from prosecution and sovereign authority of a state notwithstanding. At the same time, the study will contribute useful insights regarding the degree to which involvement of international actors in the affairs of a state can be said to substantially interfere with its sovereignty; with Kenya as the case study.

1.6 Theoretical Framework

In order to analyze the relationship between state sovereignty, international criminal law and non state actors such as the ICC, this research will employ the theory of universalism. Universalists believe in international public order and that international law must comprehensively regulate international society. Such regulation should not be confined to the jurisdiction of a state and it requires co-operation of states. Universalism theory argues that international public order is possible and advisable even through "a logical construct led by reason".[54] The evolution of international criminal justice is demonstrated by the establishment of the international criminal court which applies the universalist concept of international law through the universal jurisdiction conferred on it by the Rome Statute. There has been a debate on universality of public order at the level of international law which has to do with global peace and which is part of the ICC's agenda. This is a universalist approach with a rational basis as well.[55]

Immanuel Kant who is associated with this theory introduced the philosophy of a world republic which is founded on reason and this can be used to contribute to the understanding of public order. According to him, there must be a law which applies to all and the formula for universal law is that one should act *"only according to that maxim whereby you can at the same time will that it should become a universal law"* [56] This means that a rational being might decide to do what is morally permissible as long as in deciding to act, he should do it for reasons that are acceptable to anyone. When human

[54] Dellavalle, Sergio (2010). "Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order". *European Journal of International Law*. (2010) Vol. 21.p. 765.
[55] Richmond, Oliver: "*Peace in International Relations"*. Oxon: Routledge. (2008)
[56] Immanuel Kant, *"Ground Work for Metaphysics of Morals"*(1785) p.30

rights violations occur, the culprits do not act in a manner that is rational or acceptable to anyone thus the need for universal law and order as envisaged by Kant.

States are the most prominent actors in the international system and there is in place international law. However, states have increasingly witnessed declining command of their own destinies owing to the increase of non state actors whose mandates have significant impact beyond state boundaries.[57] This theory applies in this research which explores the emerging issues between international criminal law and state sovereignty the following reasons: In order to achieve universal order as envisaged by Kant, a global judicial organ in the form of permanent International Criminal Court was established. It is vested with universal jurisdiction and it represents a shift from classical international law which is the law among states as its operations do not require authorization by states. Secondly, the ICC directs its authority on an individual who is criminally held liable for crimes and not the state he belongs to. By holding the individual to account for crimes, this acts as deterrence of crimes which affect humanity. The objectives of the exercise of universal power by extension denotes concern for universal dignity of the human race and not merely states.

1.7 Hypotheses

This study presupposes that:

(a) By operation of international criminal law, there must be individual accountability for crimes against humanity. State sovereignty or immunity from prosecution by

[57] K. J. Holsti, *"The Dividing Discipline: Hegemony and Diversity in International Theory"* (London, 1985) p.12

virtue of a person's political or constitutional position should not stand in the way of justice.

(b) Kenya's institutions of governance have undergone changes and reforms since the entry of ICC and this does not necessarily mean that its sovereignty has entirely been eroded.

1.8 Methodology

The method of data collection in this research shall take the form of administering a set of questions to be filled in by seventy respondents. The target population comprises members of the civil society including officials from Kenya Human Rights Commission, (KHRC) International Commission of Jurists (ICJ), and International Centre for Transitional Justice (ICTJ). Members of the legal profession mainly advocates in private practice and from the Attorney General's Chambers and Ministry of Interior Coordination and officials from the ministry of Foreign Affairs are also targeted. Rural dwellers from the Rift Valley, Nyanza, Coast and Western provinces shall randomly be selected. The choice to obtain views from members of the legal fraternity is mainly because the ICC process is largely legal and useful legal insights are expected to be generated, the human rights members have not only useful human rights issues to raise but also useful criticism on issues surrounding the ICC process. In terms of the diplomatic effects on Kenya since the entry of the ICC, the best placed opinion would be from the Foreign affairs office while rural population especially the elderly persons will contribute to help deduce whether there is clear understanding of the ICC process and state sovereignty.

The overall aim shall be to gather and collate of the issues regarding the ICC process in Kenya and whether it has a bearing on the country's sovereignty and political governance pattern between December 2007 and April 2012 then form an opinion thereafter. It shall evaluate whether any views that the respondents shall give would be informed by political prejudices, personal perceptions or objective understanding of the ICC process and whether it has undermined Kenya's sovereignty.

Secondary data shall be obtained from written sources including books, journals, credible publications such as the Report on the Post Elections Violence in Kenya, Kriegler Report, Akiwumi Report, Time, News week, New African and Economist Magazines. Local and international newspapers as well as credible websites shall form sources of information. Resource centres of three institutions: Kenya Human Rights Commission, International Commission of Jurists (ICJ) and International Centre for Transitional Justice (ICTJ) which are major opinion shapers in matters of public policy. Primary data will be instrumental in that the information will be sourced in its original form while secondary data will aid in summary and drawing conclusion.

Data Analysis

Once the questions have been administered and answered by each respondent and returned to the researcher, the responses therein shall be qualitatively analyzed and linked to the findings in the previous chapters in order to draw a conclusion and recommendations thereof.

1.9 Chapter Outline

Chapter one: Introduction. This chapter provides an introduction and background of this research and it covers statement of the research problem, objectives of the study, literature review, justification of the study, theoretical framework, hypothesis, methodology and chapter outline.

Chapter two: State sovereignty and the international criminal prosecutions: emerging issues. This chapter explores the emerging issues on state sovereignty and the international criminal prosecutions. It includes definition of state sovereignty and traces its evolution and further discusses contemporary sovereignty. The historical milestones of the ICC are outlined; arguments in favour of and criticism of its establishment are discussed. Further, the controversy of indicting serving heads of states and immunity from prosecution are delved into.

Chapter three: The case for Kenya and the ICC. The chapter pays particular attention to Kenya and traces the background of the post elections violence which is the reason three Kenyans are facing trial at the ICC. It also discusses the peculiarity of the Kenyan cases before the ICC including the relevant statutory provisions under the Rome Statute and their applicability to the cases. The impact of trials on Kenya's political governance diplomatic relations shall also be highlighted and a conclusion as to whether or not Kenya's sovereignty has been undermined by the ICC process shall be drawn.

Chapter four: analysis of state sovereignty and ICC's intervention in Kenya. This chapter is a presentation of the main findings of the research and data analysis. The

findings which are both in numerical and narrative form Sand are qualitatively analyzed and the issues which stand out the most shall are underscored. The data was collected through administering a set of questions to respondents who are both professionals in their respective disciplines and non professionals from both rural and urban areas.

Chapter five: Conclusions and recommendations. In this chapter conclusions of the research are drawn from all the chapters and recommendations have been made

CHAPTER TWO

STATE SOVEREIGNTY AND THE INTERNATIONAL CRIMINAL PROSECUTIONS: EMERGING ISSUES

2.1 Introduction

This chapter defines state sovereignty, traces its historical development and its contemporary practice. It discusses that owing to the gradual developments and changes in the exercise of state sovereignty, non state actors such as the International Criminal Court (ICC) were established with universal jurisdiction. The historical milestones of the ICC, arguments in favour of its establishment and criticism shall be discussed. Further, based on the provisions of the Rome statute establishing the ICC and the current practice by the court, the issues of immunity from prosecution of heads of states and the controversy surrounding their indictments are also examined. Conclusion has been drawn as to whether international legal process has since the end of cold war impacted on the sovereignty of states, particularly in the developing countries.

2.2 The Concept of State Sovereignty

The understanding, ideas and views of the concept of state sovereignty varies with changing times therefore different people adopt different approaches towards it.[58] The French philosopher Jean Bodin, writing during the French civil war said that if the monarch was strengthened, there would be order and unity throughout France and that there would be no more sectionalism which brought civil war in France. His definition of a state was "a lawful government of several households and their uncommon possessions,

[58] Jennings "Sovereignty and international law" in G. Kreijen (ed) *State, Sovereignty and International Governance* (2002) p.27.

with sovereign power".[59] This meant empowering the king to not only make laws but to also enforce them unrestrained and he was only answerable to God. Tomas Hobbes in defining sovereignty sought to de-concentrate authority from the person of the king and incorporated an abstraction which he called government. He believed in vesting the sovereign with social authority and equating the sovereign with a state. The state was in turn equated to the government which would make and enforce laws.[60] Sovereignty is the power to make laws with no restrictions by a body that is politically superior within a state such that the laws which that body makes must be obeyed by its citizens with attendant consequences in the event of disobedience. In this regard, the unrestricted exercise of state power is key and it may be constitutionally conferred upon an office holder to enjoy.[61] Although there has not been a universally accepted meaning and definition of the term sovereignty, various interpretations of the term have revolved around full and unchallengeable exercise of power by states.

International legal sovereignty refers to a political entity at the international level in the form of a state. A state is treated in the same manner an individual is treated at the national level which means that states are equal internationally and none is superior to the other; just like individuals are equal before the law within their states. The Montevideo Convention on Rights and Duties of States under Article 2 provides that a federal state shall constitute a sole person in the eyes of international law. Domestic sovereignty connotes the capacity of a state to exercise political authority within its territory. Inter-

[59] Columbis & Wolfe, *"Introduction to International Relations"* (New Delhi: Prentice Hall of India, 1981) p.68.
[60] ibid
[61] Fassbender, "Sovereignty and Constitutionalism in International Law" in Walker (ed) *Sovereignty in Transition* (2003) p.115

dependence sovereignty relates to state control. A state has for instance, authority to control what or who passes across its territory such as its air space. Westphalian sovereignty on the other hand is viewed as an institutional arrangement through which political organization and authority is achieved. It is based on exclusive exercise of territorial authority devoid of external interference. It has however been phased out and contemporary sovereignty is shared through the entry of organizations such as the UN and the ICC into domestic affairs of states.

2.3 Evolution of State Sovereignty

The history of state sovereignty can be traced from 1618 when Europe was thrown into thirty years of war after a group of Protestants clashed with catholics over a dispute regarding violation of religious freedom of the protestants. The protestants threw three catholics through a window in revenge, sparking a conflict between the two religious groups which mutated into a full blown war from a minor denominational intolerance spreading throughout Europe for thirty years.

The three decades war mainly involved the French dynasties and the Holy Roman Empire comprising Hungary, Spain, Italy and Belgium. One group of actors in the war were loyalists to the Roman Catholic church led by the Spanish king and the Emperor who fought to assert their authority and that of the Pope to take control of Europe through Christendom. They were members of the Habsburgs dynasty and regarded themselves as Universalists. The second group of actors comprised France, Germany, (more so German princes) Sweden, Denmark and the Dutch Republic who opposed the control of Europe

by the Pope's imperialism and instead preferred the rights of states to exercise their independence.[62] The war mainly revolved around the hegemonic aspirations of one group of actors who sought to exercise supranational authority throughout Europe and another group who opposed this aspiration meant to create a single imperial authority through the papacy and the Roman Catholic Church. It is the only war that in the history of Europe that claimed the greatest number of lives as half of Bohemian and Germans lost their lives as a result of starvation, brutal attacks by soldiers and diseases.[63]

In 1648, the warring actors met in Westphalia Germany and resolved to end the war. The Treaty of Westphalia was thus born. The treaty itself was in two parts: Treaty of Osnabrück between the Holy Roman Empire and the Protestants represented by Sweden on one hand and the Treaty of Münster between the Holy Roman Empire and France. It brought a paradigm shift from individual oriented law to territorial oriented law. The concept of Westphailan state incorporated two main characteristics which define statehood: the unequivocal sovereignty of each state within its geographical territory and a structure to rule the territory with exclusive powers which are not subject to or required to yield to any external authority.[64] While the aspect of territorial authority devoid of subordination and permeability to any external agency is especially important in defining a state, the Westphalian concept limits the authority of a state to geographical boundaries hence the concept of territorial integrity.[65]

---

[62] Sheehan, Michael. *The Balance of Power: History and Theory*. London: Routledge. 1996. ,Evans, Graham, and Jeffrey Newnham. "*The Dictionary of World Politics: A Reference Guide to Concepts, Ideas, and Institutions*." (Hemel, Hempstead: Harvester Wheatsheaf. 1990)
[63] Otto Maria Carpeaux, "*A Literatura Alema*" (The German Literature) (1964) p.21.
[64] James A.C "*Changes in the Westphalian Order:Territory, Public Authority and Sovereignty*" International Studies Review (2000) p.15.
[65] James A.C, p.16

Hans Morgenthau also recognized that one of the fundamental principles of international law well established by the Treaty of Westphalia was that territorial integrity was made the cornerstone of modern state sovereignty.[66] The Treaty of Westphalia also diminished and put to rest the church's attempt to exercise political supremacy and authority. State sovereignty was thereafter more pronounced during the 17th and 18th centuries so that the yardstick for matters surrounding territorial waters for instance, were defined using three miles zone as the standard measurement.[67]

Attempts to overlook the seemingly conclusive concept of state sovereignty created during the 1648 Westphalia Treaty began after the First World War. In 1919, the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties was constituted. The primary purpose was to assign accountability for war crimes especially to the European powers so that heads of states and state officials such as elected representatives or parliamentary or government members were no longer immune from the jurisdiction of international legal process. The traditional practice of shielding heads of states and those in authority from criminal responsibility was cracked by the enactment of the Versailles and Sevres Peace Treaties which provided avenues through which military and civilian excesses were judicially punished. These Treaties provided for criminal liability even for individuals who committed crimes in the name of a state thereby individualizing crimes and ensuring that state sovereignty does not operate as an obstacle to the protection of human rights.

[66] Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. (New York: 6th edition, McGraw-Hill. 1985).p.294
[67] Steinberger, p. 502

2.4. Contemporary State Sovereignty

The gradual widening of the classical concept of state sovereignty is contained in the 1933 Montevideo Convention of Rights and Duties of a State. It broadened its definition by outlining the main components of a state: a defined territory, permanent population, a government and the capacity to enter into relations with other states.[68] Even with ratification by only fourteen member states, contemporary sovereignty and exercise of sovereign authority globally is hinged on the principles in this statute.

The gradual development of customary state sovereignty in broader dimension has also been demonstrated in matters surrounding protection and promotion of fundamental human rights and deterrence of commission of crimes against humanity. When relating with the United Nations for instance, states are bound by its decisions and have to comply even when they do not agree with its resolutions. This means that states lack decisive influence on matters they would otherwise like to be left to decide. For instance, the Sudan is not a signatory to the Rome Statute yet a UN Security Council's resolution to have its serving head of state investigated by the ICC for war crimes was binding on it.

Secondly, in judicial matters, states have generally accepted that their own citizens or other individuals can seek the intervention of international judicial and quasi judicial bodies where there is abuse of human rights or commission of crimes against humanity. Human rights groups can draw the international community's attention in times of conflict.

[68] Article (1) of the Montevideo Convention OF 1933

Thirdly, when there is foreign intervention in a state by the international community in the interests of victims of gross human rights abuse by the ruling class or militia groups, states; even with resistance from the culprits tend to give in to such interventions.[69] Individual state sovereignty is therefore in this regard accountable to a higher norm on the international platform. The exclusive exercise of state sovereignty in contemporary world is not absolute as opposed to what was envisaged in the Treaty of Westphalia. The creation of non state actors such as the United Nations and the International Criminal Court has contributed to this shift.

2.5 International Criminal Court: Main Historical Milestones

The underpinning concept behind the establishment of the ICC through the Rome statute was the doctrine of complementarity; meaning that the court complements or is subsidiary to municipal courts. The desire to have a permanent global criminal court began as early as 1872 when one of the founders of the International Committee of the Red Cross, Gustav Moynier made the proposal as a reaction to the crimes committed during the Franco-Prussian War. The Treaty of Versailles of 1919 also proposed an ad hoc tribunal to try German war criminals after the First World War.[70]

Further, the establishment of an International Criminal Court was informed by the Nuremberg and Tokyo tribunals after the World War II.[71] The trials in Tokyo and

[69] I. Boerefijn and J. E. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinerman* (Mortsel, Belgium: Intersentia, 2008).
[70]Coalition for the International Criminal Court http://www.iccnow.org/?mod=icchistory. Last accessed on 19.06.2013.
[71] Peggy, E.R,*"From Nuremberg to Rome: Establishing Criminal Court and the Need for US Participation" (*University of Detroit Mercy Law Review. 2001),p. 299.

Nuremberg set new and radicalized standards for the approach of international criminal law thereby influencing the post war international community's quest to have similar court but of a permanent nature.[72] Experiences from the ad hoc International Criminal Tribunals of Rwanda and Yugoslavia, Sierra Leone, East Timor and Cambodia greatly informed the formation of a permanent criminal tribunal since these tribunals were temporary and were created as situation response mechanisms with limited jurisdiction. There however continued to occur violations of human rights and commission of most serious crimes in parts of the world such as Congo, Sudan, Uganda and Central African Republic hence the need to establish a permanent international tribunal.

Some of the shortcomings of the temporary Tribunals included the fact that indictments were not immediately followed by trials which has adverse effect on evidence especially if key witnesses die or decline to testify or willingly give false evidence. The ICTR for instance was set up six months after the mass killings in Rwanda while the ICTY is said to have been set up as a public relations tribunal since the commanders of the NATO forces were not willing to avail their troops for trial which afforded them a window to avoid arrests.[73] The ICTR also faced challenges such lack of cooperation by the Rwandan government which viewed its establishment as an act of public relations to conceal the guilt of the international community after failing to stop the mass killings in time in 1994. Logistical and financial hurdles, the fact that Arusha is not well covered by the international media thereby reducing monitoring of the trials posed a great challenge to

[72] Sands, P. "*From Nuremberg to The Hague; the Future of International Criminal Justice"* (Cambridge University Press, Cambridge 2003) p. 12

[73] Allen, Tim, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, (Zed Books, London, 2006)p.10

the ICTR.[74] Before the creation of the ICC through the Rome Statute, there was no single codified guideline on which crimes constituted most serious crimes and enforcement of international law was done by individual countries' municipal courts.

In the 1950s, and out of the need for the establishment of a permanent tribunal, the UN General Assembly asked the International Law Commission (ILC) which is charged with the responsibility of codifying and overseeing progressive development of international law to commence drafting legislation aimed at establishing a permanent international criminal court. The ILC wrote the draft statute but its deliberation and adoption was suspended by the UN General Assembly for the reason that the crime of aggression had not been defined in the draft statute. The cold war era was also setting in which divided the international community and slowed down the process of establishment of the court. The UN General Assembly abandoned the drafting and negotiations and the old state central legal order continued to be in operation. This stunted the momentum of international criminal law that had been inspired by the Nuremberg experience.[75]

In 1990 after the end of the cold war, the idea of a permanent court was again revived so that once and for all, there would be a global central judicial organ to deal with crimes against humanity as opposed to having temporary tribunals. Arthur Robinson, Trinidad and Tobago's president put a motion before the UN General Assembly making a request to have the previous process of establishing a permanent court revisited. His motivation was establishment of an international mechanism to deal with crimes related to drugs

[74] Ibid
[75] Roach, S."*Politicising the International Criminal Court; the Convergence of Politics; Ethics and Law*" (Rowman & Littlefield Publishers, Inc., Lanham 2006).

trafficking across national borders. The idea was received with varied reactions with some states expressing concern at how an international court would impact on and interfere with their sovereignty.[76] The attitude was however renewed to have individual perpetrators of most serious crimes and not just states being subjected to criminal trials. The UN general Assembly instructed the ILC to proceed with the drafting of the statute establishing an international criminal court adding that its jurisdiction was not to be limited to crimes related to drug trafficking alone but all crimes.

The ICC statute's drafting gained momentum in 1993 and 1994 when the ad hoc International Criminal Tribunal for Rwanda and International Criminal Tribunal for Yugoslavia were set up. The establishment of these two tribunals was in consonance with the provisions of the UN Charter under section seven which mandates the UN Security Council to essentially maintain international peace and security. During the Rome conference, provisions of the proposed statute were read out to the state parties present and deliberated and while many states supported the statute by consensus, the United States applied to have a vote taken. Majority of the states, a hundred and twenty in number supported the statute, seven states opposed the adoption of the statute while twenty one states were not represented. Thereafter, states began ratifying the statute. There were delays in signing and ratifying the statute among the states since most of them had to align their municipal criminal legislation in consonance with the ICC Statute

[76]Zacklin, R. 2004, "The Failings of Ad Hoc International Tribunals", *eJournal of International Criminal Justice* Last accessed on 01/07/2013.

and more so to ensure their courts could also exercise universal jurisdiction over the crimes outlined in the statute.[77]

By April 2002, sixty states had ratified the statute and since it provides for adoption upon the sixtieth ratification, it was formally adopted during the UN General Assembly in September 2002. The UN General Assembly further adopted the rules of procedure, mode of adducing evidence and the elements of the crimes outlined in the statute.

The judicial basis for the ICC tribunal borrows heavily from the Nuremberg, ICTR and ICTY experiences; both in practice and principle. The principles of the Nuremberg tribunals as applied renewed the international community's desire to have not only a criminal court but that which was permanent in its existence therefore considerations such as political, geographical and financial were factored into. The ICC has jurisdiction over crimes against humanity, war crimes, genocide and crime of aggression and on the territory state parties to the Rome Statute and non state parties.

2.5.1 Arguments in Favour of Establishment of the ICC

Having established that the previous ad hoc tribunals such as the ICTY and the ICTR only had temporal jurisdiction limited to specific historical events, it was important to finally set up a statutory permanent penal tribunal and vest it with global jurisdiction which transcends any claim of sovereign authority in its operations. It has been argued that ICC has a goal to alleviate adverse political pressure and offer redress for crimes

[77] William A. Schabas, 'The FollowUp to Rome: Preparing for Entry into Force of the International Criminal Court Statute', *Human Rights Law Journal p.* Vol. 20, (1999) p. 157

which affect humanity especially in a given state so that gross human rights abuses are opened to international scrutiny and prosecution.[78] Some crimes undermine the world's interest to remain peaceful and secure such that by nature of their gravity, they "shock the conscience of humanity".[79] Judicial prosecutions not only prescribe punishment for crimes but also act as deterrents of potential commission of crimes. Failure to establish a permanent court; it has been argued, would have had the effect of emboldening militia groups, government officials as well as the military to commit crimes such as those witnessed in Rwanda and East Timor prior to the establishment of the ICC. Continued adjudication of crimes through ad hoc tribunals would not have been effective by virtue of their temporary nature hence the importance of establishing a court with universal jurisdiction.[80]

When war crimes are tried, past hidden atrocities are brought to light which causes the perpetrators to admit liability. Most of the countries struggling with change of repressive regimes to establish democracy may find international criminal tribunals useful, more so the ICC as it is expected to be impartial in dealing with perpetrators of crime and to promote the rule of law. Emerging democracies can therefore derive benefits from strong, impartial tribunals and have past atrocities addressed.[81]

---

[78] Jonathan I. Charney, "Editorial Comment: Progress in International Criminal Law?" *American Journal of International Law*, Vol. 93, (1999), p. 456.
[79] Broomhall, p.10
[80]Chris McMoran, "International War Crimes Tribunals" http://www.beyondintractability.org/bi-essay/int-war-crime-tribunals. Last accessed on June 29th 2013.
[81] Bass, Gary J. "*Stay the Hand of Vengeance: The politics of war crimes tribunals"*. (Princeton: Princeton University Press 2000) p.12

The fact that the ICC indicted and tried the highest political office holders such as Liberia's president Charles Taylor, Cote d'Ivore's president Laurent Gbagbo and former vice president of the Democratic Republic of Congo, Jean-Pierre Bemba, is an indication that no person; irrespective of their constitutional or political status is immune from prosecution. The court through these indictments has pierced the traditional survival tactics by dictatorial regimes of silencing their opponents since they can draw the court's attention to undertake investigations including over those powerful personalities. Charles Taylor's conviction for aiding and abetting war crimes for instance sent a strong message across Liberia particularly to dissuade potential perpetrators of crimes.

The ICC has also opened up an avenue for victims of gross human rights violations such as rape, recruitment of child soldiers and forcible transfer of population to obtain redress and expose the perpetrators. They are no longer expected to remain silent. There is also a trust fund for victims of crimes from whence they and their families are to be monetarily compensated as per Article 79 of the statute. The court imposes fines, orders for seizure of property from culprits and their sale thereof is used to compensate victims. Voluntary groups and generous governments also give towards the fund.

When the ICC assumes jurisdiction over crimes, it has had the effect of triggering judicial reforms in the particular country involved. For instance in Kenya judicial changes have largely been informed by the ICC process so that there has been creation of independent offices of the Chief Justice and a wider court structure which are enshrined in the 2010 constitution.

2.5.2 Emerging Concerns on the Creation of the ICC

The establishment the ICC was not based on consensus by states. During the Rome convention in 1998, there was no consensus by UN member states represented and they split into three factions with different positions: Iran, Libya, Indonesia Iraq and India were opposed to the establishment of the court. China, USA and France favoured its establishment but on condition that the court would only be activated by the UN Security Council. The third group comprising more than forty states including Canada and Germany and other African states rooted for an independent court with an independent prosecutor that was not subjected to the wishes of the Security Council.[82] Subjecting the exercise of jurisdiction of the courts to the UN Security Council would have meant that member states such as the USA would not have been willing to have their citizens prosecuted for most serious crimes especially war related. During the voting at the conference, 21 states abstained while 7 voted against the establishment of the court including China, the United States of America and Yemen.[83]

The fact that there is no code of ethics for the office of the prosecutor has also drawn concerns. Previous tribunals such as the ICTY and ICTR had well laid down codes of conduct for their prosecutors.[84] The ICC's structure is made up of four main organs: the

---

[82] Allen T. "*Trial Justice: The International Criminal Court and the Lord's Resistance Army*" (Zed Books, London:) 2006. p.17.

[83] David Hoile, "The International Criminal Court, Europe's Guantanamo Bay?"*(*Africa Research Centre, 2010) p.10.

[84] International Criminal Tribunal for Rwanda, Standards of Professional Conduct for Prosecution Counsel, Prosecutor's Regulation No. 2 (1999), http://www.unictr.org/Portals/0/English/Legal/Prosecutor/reg_05.pdf; U.N. International Criminal Tribunal for the Former Yugoslavia, Standards of Professional Conduct for Prosecution Counsel, Regulation No. 2 (Sept. 14, 1999), available at http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf-Last accessed on 30th June 2013

Presidency, chambers, office of the prosecutor and the registry. The Office of the Prosecutor (OTP) is responsible for "receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.[85] The ICC has formulated codes of ethics for its judges and defense counsel but the OTP has no formal code of ethics. This has left room for misconduct on the part of the prosecutor who is also the embodiment of the entire prosecution division; even with the ambiguous provisions of the Statute that the prosecutor should "act independently as a separate organ of the Court". The first ICC prosecutor's conduct has been criticized especially regarding his pronouncements and grasp of issues surrounding international trials. A case in point is that of Tomas Lubanga wherein the ICC judges ordered his release as the prosecutor failed to disclose to the defence evidence of exculpatory nature. Further, the court ruled against a fair trial to Lubanga the justification for his detention no longer existed.[86]

The ICC has also been criticized for conducting itself as a political entity as opposed to an impartial international judicial body. The OTP's decision to launch investigations in Congo, Central African Republic, Sudan and Uganda appears to follow the Unites States' influence and relations in these states. In Uganda for instance, the court sought after the Joseph Kony's Lord's Resistance Army yet there are linkages of the militia group's operations with the president Yoweri Museveni led government whose officials have also been linked with gross human rights violations. In the Congo case, the ICC selectively chose to prosecute Congolese army officers and political personnel and left out the army

[85] Article 42 (1) of the Rome Statute.
[86] David Hoile, "The International Criminal Court, Europe's Guantanamo Bay?"*(*Africa Research Centre, 2010).p.80

generals commanded by both Rwanda and Uganda who are known to be allies of the United States and trade partners especially in minerals derived from the war torn Eastern Congo region. This selectivity has greatly changed the face of the ICC so that it dons an image of political impunity and political patronage.[87]

Criminal tribunals usually fall short of alleviating the underlying causes of conflict which gives rise to their establishment in the first place. They end up setting groups apart; individuals get demonized and diminish the prospects of peace.[88] The preference of truth justice and reconciliation commissions has seen countries such as South Africa under adopt this mode of conflict resolution for apartheid conflict as opposed to criminal trials.

Funding of the ICC is heavily linked to the European Union and has an impact on the credibility of its pattern of investigations and prosecution. Its operations are substantially determined by its financing. The court is funded in a similar manner as the UN-by member states. However, the amount in funding is determined by factors such as the economic capacity of a state with a maximum amount per state being 22% of the court's budget whose 2013 estimate is 109 million Euros.[89] However, in 2009, more than 50% of the court's budget was raised by the European Union which is economically powerful with a common currency and features similar to those of an independent state. It is therefore impossible to delink the court's allegiance to the west since it is them who substantially determine its survival.

---

[87] Mahmood Mamdani, *"Saviours and Survivors: Darfur, Politics and the War on Terror"* (Cape Town:HSRC Press,2009) p.283

[88] Tutu, Desmond M." *No Future Without Forgiveness*" (New York: Doubleday, 1999)

[89] "The African Paper", July 5th 2013. Available at http://theafricapaper.com/2013/07/05/iccs-funders-seek-greater-efficiency/. Last accessed on 25.08.2013.

2.6 The Challenge of Immunity from Prosecution of Heads of States

For centuries, international law was purely applicable to states only and imposed upon them duties and obligations. Under customary international law, it is commonly accepted that some state officials such as heads of states and governments; by virtue of the offices they hold are immune in certain circumstances from the jurisdiction of foreign courts over and above the immunity they enjoy under their municipal jurisdictions. This is in order to facilitate peaceful conduct of relations between states especially with increased global co-operation.[90] However, the Nuremberg trials introduced a change of this conventional practice of states exclusively having international legal personality so that individuals were made personally responsible for crimes and crimes against humanity.[91]

Article 27 (2) of the Rome Statute provides unambiguously that international or domestic immunities or special procedural rules will not prevent the Court from exercising jurisdiction over any person. By signing and ratifying the Rome statute with this provision, states collectively agreed not to invoke immunity to shield its citizens from prosecution before the international criminal court. Article 98 of the statute stipulates the obligations assumed by state parties especially regarding the surrender to the court of indicted persons. There is strictly no immunity of any person from prosecution. Additionally, the doctrine of universal jurisdiction asserts that some crimes are so serious

[90] Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" *The European Journal of International Law* EJIL;Vol. 21 (2011) p.5
[91] Yitiha, S.*"Immunity and International Criminal Law"* (Aldershot, Hants, England, Burlington, VT: Ashgate2004) p.67

that the perpetrators should not evade prosecution by hiding behind sacrosanct nature of state or national frontier or the veil of immunity. [92]

Members of the bench in the Nuremberg hearings were emphatic that under international law, crimes are not committed by abstract entities but by human beings which allows international law to be enforced against the person as opposed to the state.[93] The prominence of this position was seen in 1999 during the indictment of Yugoslavian President Slobadan Milosevic who was the serving president during the conflict between Bosnia and Yugoslavia. The ICTY formally indicted Milosevic for war crimes. This was followed by his arrest and extradition to the Hague where he faced trial at the ICTY since attempts to prosecute him within his country failed. This principle of non immunity was borrowed and enshrined not only in the Rome statute but also applied previously during the trials at the ICTR which saw the conviction of Jean Kambanda, Rwanda's former head of government.[94]

2.7 Controversy of Indicating a Serving Head of State

The 1961 Vienna Convention on International Relations outlines the tenets of diplomatic immunity but the Convention is not explicit on the immunity of a head of state from

[92] Henry Kissinger, "Does America Need a Foreign Policy? Toward a Diplomacy for 21st Century" New York: Simon & Schuster, (2001).
[93] Atul Bharadwaj "International criminal court and the Question of Sovereignty" (Institute for Defence Studies and Analyses, Strategic Analysis, Vol. 27, No. 1, Jan-Mar 2003) available at http://idsa.in/system/files/strategicanalysis_atul_0303.pdf. Last accssed on 11th July 2013.
[94] Michael J.K, *"Nowhere To Hide, Defeat of the Sovereign Immunity Defence for the Crimes of Genocide and Trials of Slobadan Milosevic and Saddam Hussein"* (Peter Lang Publishing inc: New York, 2005) p.69

prosecution.[95] There are traditionally two forms of immunity attributable to heads of states by virtue of the offices they hold: R*ationae personae* which provides for the inviolability of a head of state while in office which means he is immune from prosecution by foreign courts. The second form of immunity, *Rationae materiae* protects a head of state from prosecution even after leaving office. This in effect shields a former head of state from culpability for previous state actions and ensures that other states do not take opportunity to influence each other to hit back at a former head of state for actions committed against any state while in office. If this doctrine were to be strictly applied, heads of state who commit crimes while in office directly or by proxy would get away with impunity.

On one hand, the Vienna Convention on the Law of Treaties of 1969 provides that states or third parties cannot be bound by Treaties they have not ratified[96]. On the other hand, pursuant to Article 27 of the Rome statute, the statute "shall apply equally to all persons with out any distinction based on official capacity". This provision appears to diminish that of the Vienna Convention Treaty in view of the universal jurisdiction of the ICC as stipulated in the Rome statute thereby creating controversy.

Practically, controversy has been demonstrated a number of indictments by the ICC and precedents that have been set by international trials. On one hand, in March 2005, the UN Security Council referred the Darfur conflict in Sudan, which is not a state party to the

[95] Lucas Buzzard, "Holding an Arsonist's Feet to the Fire? - "The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar al-Bashir," *American University International Law Review* Vol. 24. (2009) p. 907.
[96] Article 34 of the Vienna Convention on the Law of Treaties of 1969.

Rome Statute, to the office of the prosecutor for investigations. Two years later in 2007, warrants of arrest were issued against two Sudan's high ranking officials-a minister and a leader of government who were linked to the *Janjaweed* militia group associated with gross atrocities. Although the Sudan government declined to surrender the two to the court, this triggered further investigations by the office of the prosecutor against president Bashir.[97] After the investigations, the pretrial chamber was satisfied that president Bashir was under article 25(3) (a) criminally responsible as a direct or indirect perpetrator or co-perpetrator of crimes against humanity, war crimes and genocide. The Sudanese government under his leadership was accused of having mobilized the *janjaweed* militia to commit systematic and widespread acts of pillaging, rape and forcible transfer of population against civilians.[98]

In issuing the arrest order, the ICC's pretrial chamber held that "that customary international law creates an exception to the immunity of a head of state when international courts seek his arrest for the commission of international crimes. According to the court, "there has been an increase in head of state prosecutions by international courts in the last decade initiating international prosecutions against Heads of States which gained widespread recognition as accepted practice."[99] It was the court's position that since World War I, immunity of heads of state was always resisted before international courts. Since ICC had been in existence for nine years at the time of indicting president Bashir, and also considering that at the time, a hundred and twenty

[97] Omer Yousif Elegab, "Indicting the Sudanese President by the ICC: Resolution 1593 Revisited," *International Journal of Human Rights* Vol 13, (2009) pp.17 and 20
[98] Ibid
[99] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09 paragraph43. Available at http://www.legal tools.org/doc/476812/. Last accessed on 7.07.2013.

states had ratified the Rome statute, it in effect meant that any immunity states may have had from prosecution was waived by the ratification and application of the statute. However, there cannot be said the widespread prosecutions of heads of states was witnessed since the court itself had not successfully prosecuted or convicted any head of state.

President Charles Taylor similarly was indicted while in office. The UN Security Council established a Special Court for Sierra Leone (SCSL) to conduct investigations into the war crimes committed during the clashes in Sierra Leone. There were reasonable grounds to indict Taylor of gross human rights violations according to the court and in 2003, he was indicted but went into exile in Nigeria whereafter he was arrested in 2006 and extradited to the ICC to face trial. He was subsequently convicted and jailed for 50 years.

Controversially, international courts; with regard to immunity from prosecution have not followed a systematic line of reasoning. For instance, the International Court of Justice held that it was illegal for Belgium to indict Congo's foreign minister who was still in office as that amounted to failure by the Belgium government to respect the immunity from criminal prosecution which arose by virtue of the Minister's political office.[100] This court applied the doctrine of *ratione personae.* Conversely, the Special Court for Sierra Leone set a precedent that Charles Taylor could not invoke customary immunity from criminal prosecution because the court itself was "part of machineries of international justice". The SCSL in arriving at the decision argued that it was given mandate by UN

[100] Omer Yousif Elegab, "Indicting the Sudanese President by the ICC: Resolution 1593 Revisited," *International Journal of Human Rights* Vol 13, (2009) p. 915

Security Council under chapter VII to have jurisdiction over all crimes committed in Sierra Leone.

The indictment of president Bashir while in office contrasts both the situations in Yugoslavia and Liberia and the courts applied double standards. Slobadan Milosevic was not in full control of power in Yogoslavia at the time of indictment since his military had been overpowered by NATO forces. He in effect had no power to wield and this made it easy for his arrest though he died of a heart attack while on trial. Charles Taylor was not apprehended and arrested while in power. At the time of his arrest, he had fled to Nigeria and was no longer serving as head of state.

In both Yugoslavia and Liberia cases, the arrests of Slobadan Milosevic and Charles Taylor had no potential to spark fresh wars since both were not sitting presidents at the respective times. Sudan's president is still in power and there is possibility of conflict should he be arrested. This is more so owing to the recurrent Arab spring in the Arab world, the fact that Sudan is predominantly an Arab-Islamic state and is not a state party to the Rome Statute and investigations into the Darfur war were sanctioned by a UN resolution.

The ICC through these indictments has been trying to introduce its interpretation of the Rome Statute into customary international law which adds into the controversy of indictment of heads of states. The "widespread recognition" of denying heads of states "recognition" as observed by the ICC's pre trial chambers when indicting president

Bashir should be taken with a pich of salt as it may not be the correct position after all.[101] The involvement of ICC in the indictment of presidents Laurent Gbagbo, Bashir and Muammar Gaddaffi was after the UN Security Council's referral. The only serving president among them is president Bashir since Taylor and Gaddafi had been ousted from power at the time of indictment. Can president Bashir's case alone be termed as "widespread"? By indicating that 120 states had waived the right of their heads of states to invoke immunity, the court was in other words saying that this has now become state practice but by merely signing the Statute, this did not necessarily set a precedent to become a rule of customary international law.[102] The International Court of Justice's statute defines customary law as "evidence of a general practice accepted as law".[103] A custom is determined through states' general practice over time and their acceptance of such a custom as law.[104]

The following major issues emerge from this chapter: The classical exercise of state sovereignty as envisaged in the Treaty of Westphalia has no place in the contemporary world since the emergence of international non state actors which have cross border jurisdiction. The exercise state sovereignty is therefore not absolute. The International Criminal Court was established to try most serious crimes of genocide, crimes against humanity, genocide and the crime of aggression. It has made positive contributions to international criminal justice including prosecution of most serious crimes' suspects such

[101] Morten B.& L. Yan, *State Sovereignty and International Criminal Law*, (Beijing, Torkel Opsahl Academic EPublisher, 2012) p. 83.
[102] Ibid.
[103] Article 38 (1) (b) of the International Court of Justice Statute.
[104] Yoram Dinstein, "*The Conduct of Hostilities under the Law of International Armed Conflict*",(Cambridge: Cambridge University Press, 2004) p.5

as former heads of states like Charles Taylor. This has sent a message across the world that a person's political status does not shield them from the legal process. In Kenya, it has triggered judicial reforms including establishment of independent offices such as that of the chief justice through the 2010 constitution.

On the other hand, the establishment of ICC has been criticized including the fact that it was not established by consensus, there is no code of ethics for the prosecutor and its manipulation by the west who are its main funders.In terms of its exercise of universal jurisdiction, the court has demonstrated its authority by issuing warrants of arrest to a serving head of state (Sudan's president), indicted former heads of state (Liberia's Charles Taylor and Cote d'Ivore's Laurent Gbagbo) and is scheduled to try Kenya's president and his deputy in late 2013. A precedent has been set that even a head of state cannot invoke immunity from prosecution to stall the due process of the law and neither can a country claim that its sovereignty is undermined by the ICC since its empowered by the Rome Statute to exercise universal jurisdiction.

CHAPTER THREE

THE CASE FOR KENYA AND THE ICC

3.1 Introduction

This chapter presents a case study of Kenya and the ICC's jurisdiction in its territory by tracing background of the post elections violence and events leading to the handing over of Kenyan cases to the ICC. It shall further discuss the peculiarity of Kenyan cases, mirror them against relevant provisions of the Rome statute to deduce whether or they qualify to be heard by the ICC. By so doing and noting that two of the persons facing trial-the current serving president and his deputy at the ICC are now main policy makers, a finding shall be made as to whether or not the exercise of state sovereignty has been undermined and if it is now exercised differently from it was before the ICC came in.

3.2. Post Elections Violence: Background of the Conflict

In December 2007, Kenya held general elections and the outcome of the presidential polls sparked off unprecedented violence in some sections of the country. The declaration of Mwai Kibaki as the winner of the elections by the Electoral Commission of Kenya at the time was rejected by a section of the population; mainly drawn from supporters of his main competitor, Raila Odinga of the Orange Democratic Movement Party; on account of stolen votes. This was followed by civil unrest across the Rift Valley, Nyanza, Nairobi, Western and Coast provinces and within a short time it mutated into bloody ethnic mayhem. Roads were blocked by gangs, property was destroyed, hundreds of thousands of people were forcefully evicted from their farms and became homeless while others were killed and raped in the mayhem.

On the face of it, the violence was triggered by the outcome of the elections but there were other underlying factors which are mainly power struggle among tribes (ethnicity) and land related conflict.[105] During the British colonial rule, the white settlers alienated and forcefully acquired large parcels of land, more so the fertile land commonly referred to as the white highlands. The remaining land was left to and managed by the community with no documentary evidence of ownership but land use rights were recognized by the community. Upon attaining independence, the new Kenya government embarked on re-distribution of the land (white highlands) formerly occupied by the white settlers in the rift valley and other regions. The rift valley province is indigenously a Kalenjin and Maasai ethnic communities region while the ethnic origin of the Kikuyu community is central Kenya. A large number of Kikuyu community members were allocated land in the rift valley which sowed seeds of anger as they (the Kikuyu) were viewed as outsiders who illegitimately benefited from 'Kalenjin land' by virtue of the fact that the time, the President was Jomo Kenyatta who was a member of the Kikuyu community. Other tribes allocated land at the time in the rift valley included the Abaluhya and a small number of the Luo some of whom had been employed as labourers in the white farms. The unwritten law on community land ownership and regulations were ignored during the re-distribution. Deep rooted grievances have since that time remained unresolved which led to ethnic friction more so in the rift valley province.

[105] Takashi Y., Yuki T., & Gitau R. " *Haki Yetu (Its Our Right): Determinants of Post-Election Violence in Kenya" (*National Graduate Institute for Policy Studies: Tokyo, Japan, September 2010) Discussion paper 10-20 p. 1

Past political transitions in Kenya were characterized by tribal and political divisions since the introduction of multipartysim in the early 1990s and some experts posited that Kenya was not immune to an outbreak of conflict and possibly civil during general elections.[106] Even before the 2007 post elections violence, tribal clashes in the rift valley province with the land issue at the core of the conflict occurred during 1992 and 1997 general elections. The struggle for multipartysm and general elections in Kenya in the 1990s elicited conflict between the supporters of President Moi at the time and those communities which were perceived to be supporters of opposition to Moi's rule. These were the Kikuyu, Luo, Luhya and Kisii communities.[107] The violence began in 1991 before the 1992 general elections and continued till 1994 leaving about 300,000 persons internally displaced and 1500 dead[108].

During the 1997 general elections, ethnic conflict broke out again this time spreading to the coast province. The underlying issues were not only land related but also political calculations of silencing opposition to the leadership of president Moi. The violence was organized and at the instigation of politicians who supported Moi.[109] Although the issue of land was profiled as the main cause of the eruption of violence, the Justice Akiwumi Commission which had been set up to investigate into the causes of the clashes in the rift

---

[106] Kimenyi, M. & Njuguna N., "Sporadic Ethnic Violence:Why Has Kenya Not Experienced a Full blown Civil War? in P. Collier & N.Sambanis (eds) *Understanding Civil War* (Washington DC: World Bank, 2005) Vol. 1:Africa, p.125

107 Kenya National Commission on Human Rights "On the Brink of the Precipice: A Human Rights Account of Kenya's Post‐2007 Election Violence" Preliminary Edition, (2008) para.45.

[108] National Christian Council of Kenya [NCCK], "*The* Cursed Arrow: A Report on Organised Violence Against
Democracy in Kenya (Nairobi: 1992)

[109] Report of the Judicial Commission appointed to Inquire into the Tribal Clashes in Kenya (Nairobi: 1999).

valley dismissed this argument as the root cause of violence contending that the clashes were mainly triggered by the thirst for political power. The Commission found that for many decades, the various ethnic communities peacefully co-existed in the rift valley province until the advent of multiparty democracy when a strategy of displacing and killing opposers of the single party rule was used in order to keep them away from voting for the opposition.

Prior to the general elections of 2007, the ruling party; National Rainbow Coalition (NARC) which was formed through cooperation of the main opposition parties- the Democratic Party (DP), FORD Kenya, National Democratic Party (NDP) and Liberal Democratic Party (LDP) among others jointly won 2002 general election ousting the previous regime under the leadership of Daniel Moi. At the time of coming together to form NARC, the party leaders had executed a memorandum of understanding that upon winning the elections, they would share cabinet posts equally, undertake constitutional reforms and amend the 1963 independence constitution to both create the office of the prime minister and reduce presidential powers.

When President Mwai Kibaki took over office after his land mark win of the 2002 general elections, the pre-elections agreement and the promised constitutional reforms stalled and with time, the ruling NARC bond collapsed. The 1963 constitution was later redrafted and subjected to a referendum in 2005 but the new constitution was not adopted as majority of the population rejected the draft by a majority of 57 per cent. The final draft published by the Attorney General at the time largely differed with the original draft

agreed upon.[110] The main contention was that the president was still vested with all executive power and there was therefore no distinction between the 2005 draft and the independence constitution. The referendum outcome was more motivated by political persuasions than objectivity as those who were inclined to the Kibaki faction were beaten by those opposing the draft led by Raila Odinga. Clear political and ideological divisions began after the referendum more so owing to upcoming general elections later in 2007[111].

The Orange Democratic Movement (ODM) party was born after the 2005 referendum. (During the referendum, the sign used to signify support of the draft constitution was a banana and an orange to signify opposition to the draft hence the ODM party was crafted on this basis). Following the referendum outcome, opposition towards Kibaki leadership gained momentum with the ODM party having marshalling a number of small parties to form opposition in and out of parliament. By 2007 general elections, the two former political allies, Raila Odinga of ODM party and Mwai Kibaki of Party of National Union (PNU) turned into political rivals, fiercely competing against each other for the country's chief executive's post. The political perception at this time was that PNU faction led by Kibaki was represented political and economic interests of the Kikuyu community and the larger central Kenya while ODM party led by Odinga was said to represent everyone else.[112]

---

[110] The preliminary Report of the Committee of Experts on constitutional review issued on the publication of the harmonized draft (November 17th 2009) p. 12.

[111] International Crisis Group *"Kenya: Impact of ICC Proceedings"* Africa Briefing No. 84, Nairobi: (January 9th 2012) p.3. Available at http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/kenya/B084. Last accessed on 23.08.2013

[112] Institute for Security Studies "*The International Criminal Cases in Kenya: origin and impact"* (Pretoria, South Africa: August 2012) Issue No.237 p.3

The pre elections campaigns particularly in the rift valley and coast provinces in 2007 were characterized by constant reminders and incitement by politicians that the Kalenjin land had been stolen by 'foreigners' (mostly the Kikuyu community) which rekindled the deep seated land ownership conflict. They (politicians) promised the electorate that once Odinga took over power, they would drive out all the Kikuyu people from the rift valley and re-distribute land to the indigenous people who were rightly entitled to own it. This, coupled with the vice of deep seated tribalism triggered the violence.[113]

The media, more so vernacular stations provided platform for spreading sensational messages which also fuelled ethnic intolerance and hatred. Mr.Joshua Sang for instance; a radio broadcaster though Kass FM, a Kalenjin language radio station was identified by the OTP as one of the people who used the media to spread tribal hate and bore great responsibility for the post elections mayhem. Other vernacular radio stations were also accused of playing a role in inciting the public against each other along ethnic lines especially Kikuyu FM stations but during the hearings conducted by the CIPEV, Kass FM was particularly pointed out as having been used to incite and spread negative ethnicity in rift valley province.[114]

On the evening of December 30th 2007, the Electoral Commission of Kenya (ECK) at the time chaired by Mr. Samuel Kivuitu declared that Mwai Kibaki had won the elections with 46.4 per cent closely followed by Raila Odinga who had won 44.1 per cent. Mwai

[113] Takashi Y., Yuki T., & Gitau R. " *Haki Yetu (Its Our Right): Determinants of Post-Election Violence in Kenya" (*National Graduate Institute for Policy Studies: Tokyo, Japan, September 2010) Discussion paper 10-20 p.7
[114] Report of the Commission of Inquiry into Post Election Violence (CIPEV) Chapter 8, p.306 .

Kibaki was immediately sworn into office. The reaction to the announcement was eruption of violence in the Rift valley, Nyanza, Western, Coast and Nairobi provinces. The violence was particularly targeted at the members of the ethnic community to which Mwai Kibaki belongs; the Kikuyu. Other areas affected by the mayhem include Molo, Kuresoi, Mount Elgon region and slum areas in major towns including Nairobi, Kisumu, Mombasa Nakuru and Naivasha.

The violence occurred in two phases: there were initial direct attacks in late December 2007 and retaliatory attacks in 2008. The retaliatory attacks profoundly occurred in Naivasha after a group said to be members of the Mungiki militia burnt to death an entire family of Luo ethnic community and threatened to kill in the same way other communities who were enemies of the Kikuyu tribe in revenge. In the end, apart from the widespread looting, destruction of property and rape, more than 133,000 people were killed in the violence, 350,000 were internally displaced while 3,561 were injured.[115] The commission investigating the causes of post elections violence concluded that the mayhem was triggered by land and inequality, unemployment more so of the youth, personalization of the presidential power as well as use of political violence especially through incitement by politicians.

The Commission of Inquiry into Post Election Violence (CIPEV) was formed with a mandate to investigate facts and circumstances of surrounding the violence under the chairmanship of Justice Phillip Waki. The report was released on October 15th 2008 and Kenya was given a time frame of six months by the Panel of Eminent Persons within

[115] Report of the Commission of Inquiry into Post-Election Violence, Kenya.(2008) pp. 322, 362 & 345.

which to establish a tribunal to try the perpetrators of the violence. The period was extended to nine months but the bill to establish the special tribunal was defeated owing to actions of two diametrically opposed groups in parliament, factionalism in the grand coalition government which pulled in different directions whose interest was to win the next general elections and not ending impunity[116]. The matter was sensationally referred to the ICC for investigations and further action which resulted in the indictment of six Kenyan suspects who bore the greatest responsibility for the violence-Uhuru Kenyatta, William Ruto, Mohammed Ali, Henry Kosgey, Joshua Sang and Francis Muthaura.

3.3. Peculiarity of the Kenyan ICC Cases

The Kenyan cases have their peculiar characteristics which raises fundamental questions as to whether or not they qualify to be heard and determined by the ICC. The ICC prosecutor, after receiving the CIPEV report drew the conclusion that crimes against humanity were committed and that the Kenyan situation warranted investigations and by extension the jurisdiction of the ICC. The two phases of attacks on December 29th 2007 and retaliatory attacks in January 2008 were carried out by gangs of youth, who had the support of powerful individuals from the political affiliations and business people all whom were associated with the two main political factions. The unprecedented post elections violence of 2007 was described as the "most destructive violence ever experience in Kenya".[117]

[116] International Crisis Group *"Kenya: Impact of ICC Proceedings"* Africa Briefing No. 84, Nairobi: (January 9th 2012) p.7. Available at http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/kenya/B084. Last accessed on 23.08.2013

[117] Report of the Commission of Inquiry into the Post Election Violence (2008) executive summary p.vii

According to the charge sheets before the ICC, the current Kenyan president, Uhuru Kenyatta is facing charges of crimes against humanity (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[118]) comprising murder under (article 7(l) (a)), deportation or forcible transfer of population (article 7(l) (d)), rape (article 7(l) (g)), persecution (articles 7(l) (h))and other inhumane acts (article 7(l) (k)). The Deputy President, William Ruto and radio Joshua Sang are facing similar charges of crimes against humanity comprising murder under (article 7(l) (a)), deportation or forcible transfer of population (article 7(l) (d)) persecution (article 7(l) (h))

Three main factors which flag out the peculiarity of the Kenyan cases before the ICC are as follows: To begin with, whether the charges the suspects are facing meet the threshold of crimes against humanity: "Crimes against humanity" is a term which does not have conclusive definition in legal academia and in authoritative or persuasive commentary[119]. Unlike the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention of 1948) there is no single statute formulated towards crimes against humanity in which there would be a conclusive definition.

Several international legal instruments have defined crimes against humanity. The Nuremberg Charter defines crimes against humanity to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious

[118] Article 7 of the Rome Statute
[119] M. Cherif Bassiouni, "*Crimes Against Humanity": The Need for a Specialized Convention"* Vol.31 Column. J. Transnat'l L. (1994) pp. 457 and 458

grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[120]" The ICTR and ICTY statutes define crimes against humanity as defined generally in the Nuremberg Charter save that they include the crimes of imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts.[121]

The Rome Statute, in addition to all other statutes in defining what constitutes crimes against humanity includes crimes of sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[122]

From the CIPEV report released by the Waki Commission, crimes of rape, (sexual violence) murder, persecution and more profoundly forcible transfer of population which

[120] Part 6 (c)
[121] Article 3 of International Criminal Tribunal for Rwanda and Article 5 of the International Criminal Tribunal for Yugoslavia.
[122] Article 7 (1) of the Rome statute of 1998

gave rise to internally displaced persons were committed.[123] Additionally, the scope and scale of crimes against humanity committed in Kenya met the required threshold under Article 7 of the Rome statute. Under this article, the crimes must be systematic, widespread and be directed against a target civilian population knowingly. The crimes include murder, extermination, forcible transfer of population and rape among others. All these crimes were confirmed by the CIPEV as having occurred a d it can therefore be concluded that the post elections violence cases in Kenya qualify as crimes against humanity. Notably, Kenyan cases; just like Libya's are categorized by the ICC as crimes against humanity; outside the usual crimes of protracted armed conflict previously tried by the court or whose investigations have been ordered. The short timeframe within which the commission of crimes against humanity occurred in Kenya is also a distinguishing factor.

Secondly, whether a case can be made out of Article 27 on immunity from prosecution to shield the current president from being tried. The immunities and privileges ordinarily enjoyed by heads of states and other high ranking government officers are safeguarded in domestic laws but are expressly excluded in the Rome Statute. The ICC usually holds responsible individuals who bear the greatest responsibility to the commission of the most serious crimes and more often than not, those individuals have trappings of power and in charge of superior and influential positions in governments including heads of state. The question which arises in view of the contents of Article 27 is whether the ICC can be said to properly exercise its jurisdiction over an elected sitting president and his deputy and try them in a foreign country. Can the ICC set a precedent by setting aside the

[123] Report of the Commission of Inquiry into Post-Election Violence, Kenya.(2008) pp. 237, 271, 304.

waiver of immunity regarding the Kenyan president? If the ICC for the first time in its history proceeds to try a sitting president and his deputy, is it arguable that by doing so, it would be exercising its jurisdiction exorbitantly? In criminal law, a court is deemed to exert exorbitant jurisdiction when it asserts it unreasonably, unfairly and excessively over an accused person. Courts of powerful states with political agenda are associated with this practice.[124] The operation of the Rome statute in Kenya has not been said to be excessive or unreasonable as it was ratified voluntarily through the regime treaty making process giving the ICC power to deny immunity from prosecution to all persons including heads of states.

On the other hand, the court has indicated its intentions to proceed with the trials since it is seized of the matter as empowered by the Rome statute. In that case, no amount of opposition even by the African Union would stop it from arresting and detaining the Kenyan suspects if it deems fit and reasonable to do so. Lack of cooperation with the court would for instance lead to such measures.

Thirdly, the applicability of the doctrine of complementarity in Kenya's cases: After the ICC's pretrial Chambers summoned six suspects to answer to charges of crimes against humanity in March 2010, Kenya filed an application to challenge the jurisdiction of the court over its cases and the prayers in the application was for the court to find them inadmissible. The arguments were based on the fact that Kenya was investigating the

[124]Madeleine Morris '*High Crimes and Misconceptions: The ICC and Non Party States'* .Law and Contemporary Problems Vol 13. Found at www.law.duke.edu/journals/64LCP . Last accessed on 29.07.2013

circumstances surrounding the post elections violence and that it was initiating judicial reforms in order to conduct trials at home. The application was dismissed and an appeal was lodged in the Appeals Chamber on the grounds the Pre-trial Chamber's decision had serious legal, factual and procedural errors.[125]

The objects of Article 17 (a) of the Rome statute was put under test at the appeal stage of the Kenyan cases. Under article 17 (1) (a) to (d), the court is has power to declare a case inadmissible before it if the matter is under investigations or is being prosecuted by a state with jurisdiction over it or if a state is genuinely unable or unwilling to carry out investigations or prosecution, or if a state has investigated but fails to prosecute the person concerned or if the person concerned has been tried of a similar offence or if the case is of insufficient gravity to justify further action by the court. The issues of law raised by the defence case were that the court misconstrued the provisions of article 17 by failing to consider that Kenya was conducting investigations into the post elections violence. Secondly, the Pre Trial Chamber erred in its interpretation of the threshold applied in determining admissibility of cases: that of *"same conduct, same person"*[126]. This principle rules out duplicity of conducting simultaneous investigations on the same person over the same offence.

In terms of jurisdiction, Kenya, which is a state party to the ICC had original jurisdiction and capacity to try its own cases. After all, the complementarity principle accords a state

[125] Prosecutor –vs- Muthaura , Kenyatta & Mohamed Ali. Available at http://www.icc cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx. Last accessed on 20.07.2013

[126] Chernor C.J, "Kenya versus the ICC Prosecutor" *Harvard International Law Journal"* Vol. 53 (August 2012) p.230

the first priority to retain control over its investigations and trials. The presumption in this regard is that in the absence of overwhelming evidence to deny a state that first priority, a state's right to prosecute should not be displaced by the ICC. Further, a state has discretion to exercise a reasonable degree of flexibility regarding whom and when to prosecute therefore Kenya would have been allowed a period of time within which to put its house in order instead of rushing the trials.

The prosecution's response to the appeal was that Article 17 was meant to address conflict of jurisdiction where both the court and a state exercise concurrent jurisdiction over the same individual. The appeals chamber by majority opinion concluded that even with the state having first priority, there was a clear distinction between "inquiry" and "investigations". Kenya was merely arguing that it was investigating the crimes based on inquiry or intentions to do so therefore there were no concurrent investigations; more so in relation to the specific persons facing the charges. Further, the mere preparation to undertake investigations and not investigations proper was insufficient to justify inadmissibility of the cases.[127]

The only dissenting opinion from the bench was by Judge Anita Ulacka who was of the opinion that the appeals chamber went into unduly length to define "investigation", failed to give Kenya, as a sovereign state first priority to investigate and hence hastened the proceedings with glaring factual and weighty issues.[128]

[127]Charles Chernor Jalloh, "Kenya versus the ICC Prosecutor" *Harvard International Law Journal"* Vol. 53 (August 2012, p. 232
[128] Ibid

Even after dismissal of the appeal, Kenya still sought a twelve months deferral of the ICC trials by sending an to the UN Security Council based on Article 16 of the Rome Statute which provides for deferral for a period of twelve months through a UN resolution. By approaching the issue through the UN Security Council, the expectation was that in the same way the Council can order investigations under Article 16, it has powers to ask the court to make the deferral order. The deferral according to the Kenya government at the time was necessary to avert potential threat to peace and security in Kenya and the region, more so owing to the general elections which were expected to take place in December 2012.[129]

After the request was made, the Orange Democratic Party followed the Aide-Memoire with a letter urging the UN Security Council not to allow deferral of the cases since they posed no threat to peace and security and that in fact, failure to bring to justice the suspects posed grave danger to Kenya's internal peace and security and also that a trial at home would be manipulated.[130] Nevertheless, the Council met and held an informal dialogue with the Kenyan delegation led by the Kenyan head of the Permanent Mission to the UN. In the end, the Council members failed to agree on the matter.[131] The status therefore remains the same: that trials shall proceed.

[129] Aide.memoire "Kenya's Reform Agenda and Engagement with the International Criminal Court" 8th February 2011.
[130] Nyong'o, Peter, "Petition to the members of the UN Security Council regarding the Kenyan cases at the ICC" March 11th 2011. Available at www.standardmedia.co.ke/downloads/ODM_statement_to_UN_security_council.pdf. Last accessed on 1st August 2013
[131] UN Security Council President Nestor Osorio, "Press Statement on the request of Kenya for deferral under Article 16 of the Rome Statute of the International Criminal Court (s/2011/201) 8th April 2011. Available at www.unmultimedia.org. Last accessed on 1st August 2013.

3.4. Impact of ICC Prosecutions on Kenya

Broadly speaking, the impact of the ICC process in Kenya can be assessed by examining it from the following angles: The legal angle involves examining whether issues of justice, deterrence and complementarity have been positively or adversely affected and if so, to what extent. Retribution, politics and sovereignty are other angles from which the impact can be assessed. Under Article 25 (1) and (2) of the Rome statute, the International Criminal Court has jurisdiction over natural persons who shall be held individually liable for crimes; the basis on which the current president, his deputy and one other person shall be tried at the ICC. The process has had implications both legal and political.

The Kenyan political shape after the January 2012 indictments was influenced through political alliances and calculations were based on Pre Trial Chamber's indictment of two presidential contenders. There was a clear political divide between supporters of the joint candidacy of Uhuru Kenyatta and William Ruto who expressed their ambition to run for political office and those who opposed them as being tainted with crimes. Political contestations and outfits such as the "KKK" formed by Kenyatta, Ruto and Musyoka which were loosely interpreted to mean an alliance of three ethnic communities-Kikuyu, Kamba and Kalenjin, the "G7" mainly comprised of youthful politicians who supported the ICC suspects were impacted by the ICC indictments. For Kenyatta and Ruto, their passion to run for political office was grounded on the fact that the Kenya constitution did not bar them to vie for merely being suspects.

There was potential ethnic rhetoric and hate speech more so in the build up to the 2013 general elections especially coming from political rallies following the indictments. The ICC bench also foresaw this. Subsequently, the Pre Trial Chamber President, Ekaterina Trendafilova issued a warning saying that the court's decision would be arrived at impartially and independently based on the evidence presented to it in order to serve justice to all and further forbid the suspects from making utterances regarding the pending trials or matters before the court.[132]

In terms of sovereignty, the Kenya government is constitutionally made up of three organs: the Executive, the Legislature and the Judiciary. The exercise of state sovereignty before August 27th 2010 was under the 1963 constitution which created state organs whose operations were regulated by subsidiary legislation. Most of the statutory provisions were and are still weak and they provided an avenue for exploitation by politicians and organs such as the police force during the post elections crisis. The old constitution for example allowed for the use of armed force not only in instances when life was in jeopardy but also to protect property. This was unnecessary in a contemporary world and was exploited by the police and politicians and increased impunity.[133] Under the old constitutional order, the Judiciary failed or rarely prosecuted cases involving influential personalities. The most common step taken was to establish commissions of inquiry which were mere attempts to deflect public attention. In some cases, the Commissions were disbanded even before they could complete their work for instance

[132] "African Review" magazine, 5th October 2011.
[133] Commission of Inquiry into Post Election Violence (CIPEV) report page 419.

the 1990 Commission of Inquiry into the Death of Dr. Robert Ouko.[134] Owing to the lack of confidence in the state organs particularly the judiciary, post elections violence cases were referred to the ICC. Initially, the ICC process was popular with most of the Kenyan public but its approval ratings by the Kenyan public has considerably declined more so after constant media engagements with the suspects and their political supporters whose sentiments albeit indirect, were negative regarding the ICC.[135]

On one hand, the events which have taken between the referral and indictments have led to a popular belief that the west through the ICC is exercising neocolonialism on Kenya. This is more so owing to a number of factors. For instance, the fact that Kenya cannot invoke state sovereignty or constitutional immunity to oppose arrests, surrender or prosecution of its own post elections violence suspects facing trial at the ICC is the first step toward accepting that its sovereignty is not absolute after all. Kenya is obligated to fully co-operate with the ICC which essentially means that the current president and his deputy who are accused of orchestrating the post elections violence are answerable to another jurisdiction apart from the electorate. Kenya as a state is not on trial but the president and his deputy are an embodiment of state sovereignty and the state as a whole. The ICC process has subdued them by virtue of operation of international criminal law so much so that they will not continuously or at least directly discharge their official duties towards over 40 million citizens during their respective trial periods.

[134] Kenya Human Rights Commission "*Lest We Forget: The Faces of Impunity in Kenya"* (2011), p. 3.
[135] International Crisis Group "*Kenya: Impact of ICC Proceedings"* Africa Briefing No. 84, Nairobi: (January 9th 2012) p.2. Available at http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/kenya/B084. Last accessed on 23.08.2013

Under the 2010 Kenya constitution, the president and vice president have been vested with executive functions. The president is the head of government, commander in Chief of the Defence forces, is the chairman of the National Security Council and he is also required among other executive responsibilities safeguard the country's sovereignty.[136] If at any stage of the proceedings the ICC arrests both the president and his deputy, president for instance, there would be a leadership void in leadership politically although and constitutionally, the speaker of the National Assembly is third in command in the pecking order in the event of the absence of both leaders. This leads to the question as to whether the ICC can be said to take cognizance of Kenya's political rights, freedoms and democracy, noting that the cases threaten to consume the time, effort and responsibilities that the president and his deputy have been tasked with by Kenyans. The answer lies in the equal treatment of all suspects irrespective of their political positions as enshrined in the Rome Statute. It has been commented that the ICC's main aim in the Kenyan cases is to advance the career interests of a handful of jurists and academics, and to enrich international law jurisprudence. [137] This does not change the legal position regarding its mandate although based on the concerns raised in the previous chapter regarding the ICC, the court's credibility cannot be termed as watertight.

On the other hand Kenya is a signatory to the Rome Statute establishing the International Criminal Court which was ratified with full knowledge of its provisions and the fact that the court exercises universal jurisdiction with no provision for immunity from prosecution. International intervention into the post elections crisis through the Kenya

[136] Article 131(1) (a) and (c), (2) (b) of the Kenya 2010 constitution.
[137] Daily Nation, Monday May 20th 2013.

National Dialogue and Reconciliation forum gave rise to the Commission of Inquiry into the Post Elections Violence (CIPEV) and parliament failed to establish a domestic tribunal to try the orchestrators of the violence. While past reports Commissions of Commissions of Inquiries were either not acted upon or disbanded before completing their mandate, the CIPEV was an exception. Unlike past politically driven commissions, it had goodwill from the public, diplomats and human rights groups and was internationally driven therefore its credibility was high. The Waki Report was credited for correctly identifying flaws in the previous Commissions.[138]

Through its recommendations, legislation such as International Crimes Act and Witness Protection Act were fast tracked and became Acts of Parliament. Comprehensive reform of the Police Service was another key recommendation in the CIPEV's report[139] which has led to the establishment of bodies such as the Police Commission. The 2010 Kenya constitution provides that sovereign authority is vested in the people of Kenya and shall be exercised through their democratically elected representatives. Constitutionally, the sovereign power is delegated to the three organs of the state, Legislature, Judiciary and the Executive[140]. If reforms in the state organs and their subsidiaries have been achieved on the one hand and on the other, two personalities in the executive have been charged with crimes against humanity and are answerable to the ICC, it can be concluded that this does not necessarily mean that Kenya has totally lost its sovereign authority.

[138] International Crisis Group, ibid.
[139] Report of the Commission of Inquiry into Post-Election Violence, Kenya, (2008) recommendation number 2 p.487.
[140] Article 1 (1), (2) and (3) (a) to (c) of the 2010 Kenyan constitution, 2010.

CHAPTER FOUR

ANALYSIS OF STATE SOVEREIGNTY AND ICC'S INTERVENTION IN KENYA

4.1 Introduction

In chapter two, emerging issues on state sovereignty, the International Criminal Court, its importance and shortcomings and the challenges surrounding indictment and prosecution of serving heads of states and governments were discussed. The chapter concluded that state sovereignty is not absolute; that individual political or constitutional position does not render one immune from prosecution by the global court which is vested with universal jurisdiction under the Rome Statute. Chapter three focused on Kenya and assessed the ICC impact. The genesis of post elections violence was traced, peculiarity of the Kenyan cases before the ICC was discussed including whether the international criminal indictments and pending trials have impacted on Kenya's sovereignty. This was informed by the pending trials of the sitting head of state and his deputy; who are embodiments of state authority, were indicted by the ICC in March 2011 and are scheduled to be tried by the court in late 2013. It was concluded that though the ICC intervention impacted negatively on Kenya's international image, the positive outcome intervention are more outstanding especially through the creation of structures and independent institutions in the 2010 constitution.

This chapter undertakes an analysis of the research in line with the objectives of the study. The analysis is drawn from the findings of the previous chapters and mirrored

against the primary information collected through responses in the set of questions administered as outlined in the research methodology.

4.2 Kenya's Sovereignty and the ICC Trials

It has been established in chapter two that state sovereignty is not absolute and states have an obligation to other entities such as the UN and ICC. Sovereign authority has been tested and tried and has shifted from classical understanding of its exclusivity. This change can be likened to Tomas Kuhn's scientific analysis in which he postulates how a dominant theory may be altered through a period of revolution to usher in another and that an alternate theory will competitively replace a previously existing one; hence ushering in a paradigm shift.[141] It cannot therefore be ruled out based on Kuhn's analysis that the contemporary international system has potential to undergo further changes in future as political developments in the world continue to emerge. In the same way the Rome Statute was enacted, the international community may predictably find further need to formulate, amend or repeal existing legislation for instance to either introduce immunity from prosecution of heads of states at the ICC or introduce conditional waiver of such immunity. This would mean abolishing individual criminal responsibility while a person is in office and would perhaps validate the United States' Secretary of State, Robert Lansing who at the end of World War I declined to have leaders of Turkey, German and Austrian prosecuted on the basis that sovereign leaders were immune from prosecution and that "the essence of state sovereignty is the absence of responsibility".[142]

---

[141] Kuhn, Thomas S. *"The Structure of Scientific Revolutions"* (3rd edition, Chicago, IL: University of Chicago Press, 1996.) pp. 40, 41, 52 and 175.

[142] Donald W. Potter, "*State Responsibility, Sovereignty and Failed States"*(Paper presented in a workshop on 29th September to 1st October at the Australasian Political Studies Association Conference, University of

While ruling out the possibility of exclusive sovereign authority, it is important to appreciate that the international system would be anarchic if there was no aspect of sovereignty at all. Having a remnant of sovereign authority, more so territorially gives a state identity and recognition. This research does not conclude that there is absolutely no state sovereignty but rather it is not exclusively exercised.

A number of issues are drawn touching on the notion that Kenya's sovereignty has been undermined by the ICC following the indictment of suspects at the Hague based court. From the information gathered through questionnaires, there is the general belief that Kenya is on trial as opposed to individuals and that in fact; it should not be a member of the ICC to begin with. This opinion stems from the general belief that criminal trials at the international level are essentially politically motivated and that the ICC is a tool used against Kenyans by the west to undermine Kenya's independence. This is an indication that politics has played a key role in shaping opinions as opposed to the provisions of the Rome Statute that there is no immunity from criminal prosecution of any individual. Kenya as a country is not on trial. However, those facing trial are its citizens who reflect the country's image abroad and more so by virtue of their political and constitutional positions.

Based on the universalism theory, there must be international public international order. Kenya is part of the international society and cannot be singled out or its leaders exempted from the operation of international law which makes all people and states

---

Adelaide). Available at https://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf. Last accessed on 11.09.2013

equal.[143] Even if Kenya was not a signatory to the Rome Statute, the UNSC would if necessary, still order investigations by the OTP into crimes against humanity if committed like in the case of The Sudan. In essence, no state or individual can operate in isolation from the international community.

Secondly, the impact of the ICC intervention on governance and politics in Kenya stood out. Politically, following the indictment of four persons by the ICC, (later reduced to three as one case involving Ambassador Francis Muthaura was dismissed in early 2013), political alliances in preparation for the 2012 general elections were tailored alongside the PTC's decision to indict among others two top politicians who had decided to run for presidential office. The fact that the ICC's intervention in Kenya was as a result of a political process seemed to inform the respondent's reasons to link it exclusively to politics as opposed to perceiving it as an institution of justice. In 2009 and before the envelope containing the names of suspects was opened by the OTP, the ICC was popular in Kenya. However, its public support has since the indictment waned. This is owing to partisan media coverage which created the impression that the Kenyans' cases before the ICC are weak for lack of sufficient evidence and are politically driven. Political leaders seized the opportunity after the indictment to lap it up, play victims, whip emotions and spread propaganda in their quest to manipulate voter demographics by positioning themselves as community heroes with intentions of defending their communities. The ICC popularity among Kenyans dropped from 60% to less than 40% by early 2013.[144]

[143] Article 2 of the Universal Declaration of Human Rights of 1948
[144] *"Economist"* Magazine, September 7th 2013.

The ICC's castigation that it has not taken any action against crimes outside Africa was also widely used by Kenyan politicians to cast doubt on its credibility and impartiality.

What has constantly been overlooked by both the political class and non politicians as revealed through majority of the responses is the fact that the plight of political violence victims has been overlooked by concerns over politicians' innocence or otherwise. Only officials from the human rights organizations' responses touched on the rights of the victims as opposed to concentrating on accused persons. Their concern is mainly that failure to bring to justice not only the ICC suspects but also all other perpetrators and letting them bask in impunity defeats the very purpose of the judicial mechanisms both home and abroad.

In terms of governance, the findings in chapter three were that the country's governance is not dependent on the ICC. The perception that the manner in which government of Kenya is exercised is purely political was common among respondents and this stemmed mainly from their political ideologies and affiliations which has taken root even among some legal practitioners. It is widely believed that governance has been undermined by the ICC trials although not many respondents were able to compartmentalize what has been undermined. Governance means "the process of decision-making and the process by which decisions are implemented (or not implemented)".[145] The supreme legislative law making mandate is vested in parliament under the 2010 constitution and the process undergoes stages before a bill is assented by the head of state into law. The process is

[145] United Nations Economic and Social Commission for Asia and the Pacific "*What is good governance?*". http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf. Last accessed on 11.9.2013.

therefore all inclusive. It cannot be said that in the event of the head of state and his deputy's physical absence, governance will grind to a halt. In the current advent of information technology, it would still be possible to consult and deliberate issues and the constitution does not demand the physical presence of any person involved in governance. Although this is unconventional, it can nevertheless be adopted if circumstances demand so.

By responding that the ICC prosecutions have played a major role in dividing Kenyans ethnically, it means the respondents had been swayed by the politics surrounding the trials. The formation of some political parties and alliances alongside support and opposition to the ICC in the build up to 2013 general elections deepened ethnic divisions.

The issue of complementarity attracted mixed opinions especially by the members of the legal fraternity who responded to the set of questions. This was based on the summary dismissal of Kenya's application challenging admissibility of the cases before the ICC which is also discussed in chapter three. On one hand, Kenya's argument was that national first right to conduct prosecutions was guaranteed almost by default unless there was compelling evidence to rebut this assurance as enshrined in the Rome Statute. The summary dismissal of the application by the pretrial and appeal chambers was a major setback.[146] The appeals chamber on the other hand summarily dismissed the application on the basis that the mere intention to commence investigations and undertake judicial reforms was not persuasive enough to compel the ICC to cease being seized of the matter.

[146] Charles C.J., "Kenya versus the ICC Prosecutor" *Harvard International Law Journal"* Vol. 53 (August 2012, p. 232 Charles Chernor Jalloh, "Kenya versus the ICC Prosecutor" *Harvard International Law Journal"* Vol. 53 (August 2012) p. 235

Kenya appeared to stretch the inadmissibility of the cases too far while the court adopted a "straight jacketed" interpretation of Article 17 of the Rome Statute. It set high and unrealistic standards which pose potential judicial of rejection of future legitimate application by states to prosecute their nationals.[147]

By declining to entertain Kenya's arguments, the effect was that the ICC lost a chance to apply the doctrine flexibly positively; setting a worrying precedent. It dampened the very basis of complementarity which is essentially a burden sharing doctrine. Kenya had a self imposed time limit within which it would have set in motion prosecutions. If the ICC had given Kenya a chance to fulfill its undertaking; even if on condition that it would monitor the trials and that failure to prosecute would cause the cases to revert back to it, then the court would have applied positive complementarity. It would have encouraged national ownership of responsibility and perhaps reduce the notion that it is adopting a hard-line stand on African cases. Kevin[148]also opines that the interpretation of principle of complementarity should be to encourage and not discourage states from prosecuting crimes of international nature similarly to ordinary crimes. Although the court's rationale for dismissing Kenya's application cannot be said to have lacked legal jurisprudence, it should have included the spirit of the law and looked at the broader picture of Kenyan prosecuting a larger number of suspects at home even if under the watchful eye of the international community.

[147] Ibid
[148] Kevin J.H. "A Sentense-based theory of complementarity," *Harvard International Law Journal"* Vol. 53 (2012) p. 201.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This paper sought to examine the relationship between state sovereignty and international criminal law using Kenya's involvement with the ICC as the case study. The objectives were to interrogate whether sovereign interests of a state, more so Kenya's, have been impacted by criminal prosecution at the ICC and if so, to what extent. The sum total is that the entry of ICC has sovereignty and moral authority of the political leadership; more so the presidency have been influenced. Further, the proceedings have impacted deterrence of crimes, complementarity as well as retributive justice. The impact has been both positive and adverse and the findings are analyzed in details in this chapter and recommendations have been made.

5.2 Conclusions

This research was premised on the hypotheses that there must be individual accountability for criminal acts by virtue of operation of international criminal law and that the entry of the ICC into Kenya's jurisdiction does not necessarily translate into erosion of its sovereign authority in its entirety. Respondents mainly drawn from the legal profession were of the opinion that Kenya should maintain its membership to ICC as it is proof that it respects the rule of law. The ICC itself is a deterrent institution and through prosecution of permanent personalities, there has not been a repeat of crimes against humanity as happened in 2007. For the first time, senior leaders were arraigned in an international foreign court and the proceedings have not been thwarted by public

opinions, politics or resistance even by the African Union. This is a clear departure from previous impunity with which cases involving high profile cases fizzled out especially through commissions of inquiries and is a message that the universal application of criminal law remains unchanged. However, criminal justice mechanism alone cannot serve as a deterrent to future crimes. The ICC so far is in the process of dealing with a small fraction of the bigger challenge since social justice, ethnicity, land reforms implementation and national cohesion are not the prerogative of the ICC and until these challenges are conclusively addressed, there is possibility of recurrence of political mobilization along ethnic lines which is breeding ground for a repeat of political violence.[149]

The effect of the ICC indictments on diplomatic relations and the legal regime was viewed by most respondents as not a huge obstacle. The foreign ministry officials off the record felt that there should be deliberate efforts by the ministry in liaison with other state organs and ministries to strengthen diplomatic relations with all countries through meaningful and productive engagements. In terms of domestic legal regime, the system has undergone positive milestones and should work towards enhancing capacity to try even grave crimes such as those bring tried by the ICC. For starters, a special court should be established to conduct trials for all other suspects involved in the post elections mayhem. The trials before the ICC are there by virtue of political reasons not necessarily that the Kenyan courts cannot handle the matters. In fact, the ICC process has contributed greatly to the overhaul and reforms in the Kenyan judiciary.

[149] Institute for Security Studies "*The International Criminal Cases in Kenya: origin and impact"* (Pretoria, South Africa: August 2012) Issue No.237 p.17

The theory of universalism has been validated as it has been established in the study that the universal application of international criminal law through the ICC cuts across borders and states' municipal law so there can be world order.

It has been established in the research that state sovereignty is not absolute owing to the entry of non state actors into sovereign states with or without the states' consent. The relationship between state sovereignty and international criminal law is complex more so with the entry of non state actors in the post cold war era. It has been established in this research that there is more than meets the eye in the relationship between the two in terms of legal theory and the legal applicability of that international law globally. State sovereignty has diversified since the 1648 Peace Treaty of Westphalia to accommodate non state actors and this is the contemporary position. By operation of international law, more so the Rome Treaty, individuals as well as states cannot claim immunity from prosecution or sovereign authority over crimes for which the ICC has jurisdiction. This

Kenya's situation before the ICC has its peculiarities, namely that the referral to ICC was voluntarily made since there were competing interests in parliament and political class who did not envisage the long term impact of the ICC process. The misconception that the trials would take decades to be concluded and thereby delay justice turned out to be a fallacy. ICC has a pattern of conducting trials running into years such as the trial of DRC's Tomas Lubanga whose trial took six years to be concluded[150]; as well as that of

[150] AMICC "Deconstructing Lubanga, the ICC's first case: the trial and conviction of Thomas Lubanga Dyilo". Available at http://www.amicc.org/docs/Deconstructing_Lubanga.pdf. Last accessed on 25.08.2013

Charles Taylor's trial also took six years to conclude[151]. Kenya's cases appear to have been fast tracked so that in slightly over two year since indictment in April 2011 and confirmation of charges in January 2012, hearing dates have been set and the time frame within which the cases will be conducted is unknown but it cannot be ruled out that it may be shorter. The lesson learnt in this regard is that there is need to separate political ambitions from the process of the law. If the political class had not flip flopped on the establishment of a domestic tribunal instead of the infamous "lets not be vague, lets go to Hague" chorus, if there was credibility and confidence in the judicial institutions, Kenyans would not be facing international justice over which they have no control.

For the first time in ICC's history, it is scheduled to try an elected president and his deputy who are in office and who were indicted in April 2011 and charges their confirmed in January 2012. There is no legal provision which can shield the two from prosecution and Kenya's cases will set a precedent in the court. Having observed that Kenya's democracy was for a long time tainted with impunity the cases before the ICC are best placed to be tried there. The stage at which the Kenyan cases are is of no return and the law must therefore take its course. Besides, to date, the judiciary has not established a special high court division to try all other post elections violence which is a demonstration that it has not reformed sufficiently to be entrusted with the cases before the ICC.

[151] http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx. Last accessed on 25.08.2013.

The 2010 constitution established independent offices, organs and institutions which to a large extent was informed by the lessons learnt through the post elections mayhem and the ICC process. This was a positive move and since the people of Kenya are vested with sovereignty which is exercised by state organs. The gradual reforms of such organs cannot be said to take away state sovereignty.

The ICC has had considerable influence in Kenya which has partly informed the political governance. The political jockeying and alliances formed after the pre-trial chamber indicted six Kenyans were largely influenced by the ICC process. This is also supported by the responses in chapter four. The process also fuelled ethnic polarization with perception that the court failed to include as suspects persons from certain communities who are believed to have played a role in orchestrating the post election violence.[152] Indeed, the ICC's warning on October 5th 2011 that suspects were forbidden from making public statements on the judicial proceedings were aimed at dampening and deterring political and ethnic rhetoric but the effect was converse: ethnic divisions deepened. While these are not positive contributions by the ICC, the politics about ICC should be substantiated from pertinent facts: the aftermath of the 2007 general elections left hundreds of victims awaiting justice. It is up to Kenyan to recognize that it is its full responsibility to fight and deter political violence and impunity. There are still sticking grievances of economic inequality and land issues which have been piling up over

[152]Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, *"Progress in implementation of the Constitution and other reforms, Review Report"*, (October 2011) p. 53.

decades and which were unleashed by the eruption of the post elections mayhem.[153] This should not be left to fade off and justice should be seen to be done in the long.

5.3 Recommendations

The skepticism of the mission of the ICC is both statutory and factual. While it is true that only Africans have been charged by the court, it is upon African leaders to undertake internal reforms if they wish to keep the west and the ICC from their domestic affairs which has largely been viewed as a way of undermining their sovereign authority. The longevity of a person's reign as president and his style of governance particularly if it infringes democratic space leads to disquiet and a breakout of unrest which culminates into full blown violence. As a result, the necessary intervention by the international community more so from the west including involvement of the ICC is perceived as neocolonialism. This would not be the case if power is not personalized and institutions which are supposed to exercise checks and balances on political power are not eroded.

With regard to Kenya's cases before the ICC which appear to be at a point of no return in terms of being prosecuted back home, the Kenyan government should open a parallel legal mechanism to try all other post elections violence suspects and supplement the ICC instead of merely maintaining that Kenya's sovereignty has been undermined. Prosecuting three suspects alone at the ICC is not enough while there are other victims who expect justice for rape, loss of property, physical and psychological abuse as a result

[153] Donald Rothschild, "Ethnic Inequalities in Kenya", *Journal of Modern African Studies* (1969), vol. 7, p. 689

of the post elections bloodshed. The fact that the victims still live and meet with known perpetrators and this may cause a build up of future crisis. The suspects identified by the Kenya National Commission of Human Rights should be prosecuted therefore there is need to establish a credible, impartial and independent special high court division to try perpetrators of the violence. It should apply the International Crimes Act of 2009 and meet international prosecution standards. By establishing a court and trying the remaining suspects, this will go a long way in deterring future political violence.

The ICC on the other hand is a global institution which does not operate like any domestic court and is expected to conduct itself with the highest level of international standards. Although it is said to be fraught with logistical and political challenges, it must be seen to be impartial more so regarding the seemingly selective investigations in only one continent. It should open investigations in other parts of the world where human rights abuses have occurred including Syria.

The ICC should rethink the application of complementarity under Article 17. The Rome statute envisaged the ICC as a secondary or complementary court and in the spirit and not necessarily letter of the law, it should adopt the approach used by the ICTR which referred some high ranking trials to the Rwandese municipal courts for trial with a claw back condition where there are grounds to believe that the trial would be fair. The case of Prosecutor versus Jean Uwinkindi for instance was referred by ICTR to Rwanda for trial.[154] This would contribute to the growth of municipal legal systems through setting of

[154] Available at http://www.unictr.org/Portals/0/Case/English/Uwinkindi/decisions/110628.pdf. Last accessed on 10.09.2013

precedents by courts. Additionally, by allowing flexibility of this principle so that states are allowed to take charge of their own burdens and generate their own solutions to crimes, it will fundamentally play a role in improving individual states' judicial institutions and triggering reforms.

Reforms in the ICC especially regarding the OTP should be undertaken. As raised in chapter three, the Prosecutor acts on his discretion, there is no mechanism in place to check any excessive use of that discretion of his office. In order to regain public confidence in the ICC, the prosecutor should be made accountable to another organ to apply checks and balances against excessive use of statutory authority.

BIBLIOGRAPHY

Books

Allen, Tim, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, (Zed Books, London, 2006).

Allison M.D., "*Enhancing the Legitimacy and Accountability of Prosecutorial Discretion of the International Criminal Court*" (2003) AM. J.INT'L

Bass, Gary J. "*Stay the Hand of Vengeance: The politics of war crimes tribunals"*. (Princeton: Princeton University Press 2000).

Charles Kegley, "*World Politics: Trend and Transformation"* (2008).

Clapman, A. "Introduction" in M. Lattimer and P. Sands (eds),*" Justice for Crimes Against Humanity"*(2003).

Columbis & Wolfe, *"Introduction to International Relations"* (New Delhi: Prentice Hall of India, 1981).

David Hoile, *"The International Criminal Court, Europe's Guantanamo Bay?* (Africa Research Centre, 2010).

Evans, Graham, and Jeffrey Newnham. "*The Dictionary of World Politics: A Reference Guide to Concepts, Ideas, and Institutions*." (Hemel, Hempstead: Harvester Wheatsheaf. 1990).

Fassbender, "*Sovereignty and Constitutionalism in International Law*" in Walker (ed) Sovereignty in Transition (2003).

Henry Kissinger, "Does America Need a Foreign Policy? Toward a Diplomacy for 21st Century" New York: Simon & Schuster, (2001).

James A.C "*Changes in the Westphalian Order:Territory, Public Authority and Sovereignty"* (International Studies Review 2000).

Jennings "Sovereignty and international law" in Kreijen (ed) *State, Sovereignty and International Governance* (2002).

Joshua S. Goldstein "*International Relations*" (6th edition 2010).

Kimenyi, M. & Njuguna N., "Sporadic Ethnic Violence:Why Has Kenya Not Experienced a Full blown Civil War? in P. Collier & N.Sambanis (eds) *Understanding Civil War* (Washington DC: World Bank, 2005) Vol. 1:Africa

Kuhn, Thomas S. *"The Structure of Scientific Revolutions"* (3rd edition, Chicago, IL: University of Chicago Press, 1996).

Luban, D, *'The Legacies of Nuremberg'* (Oxford University Press: 2008).

M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, Vol.31 Column. J. (Transnat'l L.1994).

Maogoto J.N, *International Criminal Law and State Sovereignty: Versailles to Rome* (New York: Transnational Publishers 2003).

Mahmood Mamdani, *"Saviours and* Survivors*: Darfur, Politics and the War on Terror"* (Cape Town:HSRC Press,2009)

McCormack H. "Crimes Against Humanity' in M. Lattimer and P. Sands (eds),*" Justice for Crimes Against Humanity"* (Oxford: Hart, 2003).

Michael J.K, *"Nowhere To Hide, Defeat of the Sovereign Immunity Defence for the Crimes of Genocide and Trials of Slobadan Milosevic and Saddam Hussein"* (Peter Lang Publishing inc: New York, 2005).

Morten B.& L. Yan, *State Sovereignty and International Criminal Law*, (Beijing, Torkel Opsahl Academic EPublisher, 2012) .

Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. (New York: 6th edition, McGraw-Hill. 1985).

Olivier Fourmy," Powers of the Pre-Trial Chambers", in A. Cassese, P. Gaeta and J.R.W.D. Jones, *the Rome Statute of the International Criminal Court: a commentary*, (eds) vol. II (2002).

Otto Maria Carpeaux, A Literatura Alemã (The German Literature) (1964).

Peggy E. R., *From Nuremberg to Rome: Establishing Criminal Court and the Need for US Participation" (*University of Detroit Mercy Law Review. 2001).

Richmond, Oliver: "*Peace in International Relations"*. Oxon: Routledge. (2008).

Roach, S. *"Politicising the International Criminal Court; the Convergence of Politics; Ethics and Law"* (Rowman & Littlefield Publishers, Inc., Lanham). 2006.

Sands, P. *"From Nuremberg to The Hague; the Future of International Criminal Justice"* (Cambridge University Press, Cambridge 2003).

Scheffer, D, *"State Parties Approve New Crimes for International Criminal Court"* (ASIL Insight, Washington. D.C. 2010).

Shaw M.N., *International Law*, (Cambridge: Cambridge University Press, 6th edition, 2008).

Sheehan, Michael. *The Balance of Power: History and Theory*. (London: Routledge. 1996).

Silvia A. Fernández de Gurmendi, "International Law Procedures: The Process of Negotiations", in Roy S. Lee, *the International Criminal Court: the making of the Rome statute: issues, negotiations, results*, (ed) (1999).

Stanford Encyclopedia of Philosophy, 2010 edition.

Steinberger, H, "Sovereignty", in Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, Vol. IV (Amsterdam: Elsvier, 2000).

Wolfgang Friedmann, *The Changing Structure of International Law* (1964).

Yitiha, S. "*Immunity and International Criminal Law"* (Aldershot, Hants, England, and Burlington, VT: Ashgate 2004).

Yoram Dinstein, "*The Conduct of Hostilities under the Law of International Armed Conflict"*,(Cambridge: Cambridge University Press, 2004).

Journals

Brian F.,'The Constitution in an Era of Supranational Adjudication', *North Carolina Law Review journal* Vol. 78. (2000).

Charles Chermor Jalloh, "Kenya versus the ICC Prosecutor" *Harvard International Law Journal"* Vol. 53 (August 2012).

Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" *The European Journal of International Law* Vol. 21, (2011).

Dellavalle, Sergio (2010). "Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order". *European Journal of International Law*. (2010) Vol. 21.

Frédéric Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', *European Journal of International Law* Vol. 13, (2001).

Ivan Simonovic, 'State Sovereignty and Globalization: Are Some States More Equal?', *Georgia Journal of International & Comparative Law,* Vol. 28, (2000).

Jonathan I. Charney, "Editorial Comment: Progress in International Criminal Law?" *American Journal of International Law,* Vol. 93, (1999).

Kevin J.H. "A Sentense-Based Theory of Complementarity," *Harvard International Law Journal"* Vol. 53 (2012).

Lucas Buzzard, "Holding an Arsonist's Feet to the Fire? - "The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar al-Bashir," *American University International Law Review* Vol. 24. (2009).

Moy, H.A, "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity", *Harvard Human Rights Journal*, Vol. 19, Harvard University, (2006).

Nadya Sadat, Leila. "*The International Criminal Court and the Transformation of International Law: Justice for the New Millennium"*. (New York: Transnational, 2002).

Omer Yousif Elegab, "Indicting the Sudanese President by the ICC: Resolution 1593 Revisited," *International Journal of Human Rights* Vol.13 (2009).

Robert C., International Criminal Law-vs- State Sovereignty: Another Round?, *The European Journal of International Law,* Vol. 16 no.5,(2006).

William A. Schabas, 'The Follow Up to Rome: Preparing for Entry into Force of the International Criminal Court Statute', *Human Rights Law Journal*, (1999).

Documents

Aide.memoire "Kenya's Reform Agenda and Engagement with the International Criminal Court" 8th February 2011.

Reports

Global Governance Institute, "*The International Criminal Court and Kenya's Pot Elections Violence"* (GGI Analysis No. 2 of 2011, July 2011) p.7 Global Governance Institute, "*The International Criminal Court and Kenya's Pot Elections Violence"* (GGI Analysis No. 2 of 2011, July 2011).

Institute for Security Studies "*The International Criminal Cases in Kenya: origin and impact"* (Pretoria, South Africa: August 2012) Issue No.237.

Kenya National Commission on Human Rights "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence" Preliminary Edition, (2008).

Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, "Progress in implementation of the Constitution and other reforms, Review Report", (October 2011).

Kenya Human Rights Commission "*Lest We Forget: The Faces of Impunity in Kenya"* (2011).

Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN 50th Session, Supplement. No. 22, UN Doc. A/50/22 (1995).

Report of the Commission of Inquiry into Post-Election Violence, 2008.

UN Resolution 260 of 1948.

Periodicals

New African', Issue No. 515, March 2012.

New African', Issue No. 518, June 2012.

African Review 5th October 2011

The Economist" September 7th 2013.

Websites

AMICC "Deconstructing Lubanga, the ICC's first case: the trial and conviction of Thomas Lubanga Dyilo". Available at http://www.amicc.org/docs/ Deconstructing_Lubanga.pdf

AMICC "Deconstructing lubanga, the ICC's first case: the trial and conviction of Thomas Lubanga Dyilo". Available at http://www.amicc.org/docs/ Deconstructing_Lubanga.pdf. Last accessed on 25.08.2013.

Courting History: the Landmark International Criminal Court's First Years, Human Rights Watch, New York, July 2008. Last accessed on 25.4.2013.

Chris McMoran, "International War Crimes Tribunals" http://www.beyondintractability.org/bi-essay/int-war-crime-tribunals. Last accessed on June 29th 2013.

International Crisis Group report "*Kenya: Impact of ICC Proceedings"* Africa Briefing No. 84,Nairobi: (January 9th 2012) p.7. Available at http://www. crisisgroup org/~/media/Files/africa/horn-of-africa/kenya/B084

Madeleine Morris '*High Crimes and Misconceptions: The ICC and Non Party States'* .Law and Contemporary Problems Vol 13. Found at www.law.duke.edu/journals /64LCP . Last accessed on 29.07.2013

Nyong'o, Peter, "Petition to the members of the UN Security Council regarding the Kenyan cases at the ICC" March 11th 2011. Available at www.standardmedia co.ke/downloads/ODM_statement_to_UN_security_council.pdf. Last accessed on 1st August 2013

Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 available at http://www.legal tools.org/doc/476812/. Last accessed on 7.07.2013.

*TheWorldToday,*ABCNews,11March2009athttp://www.abc.net.au/worldtoday/content/2008/s2513325.htm. Last accessed on 25.4.2013.

UN Security Council President Nestor Osorio, "Press Statement on the request of Kenya for deferral under Article 16 of the Rome Statute of the International Criminal Court (s/2011/201) 8th April 2011. Available at www.unmultimedia.org. Last accessed on 1st August 2013.

U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement, March2009,http://www.asil.org/files/ASIL-08-Disc Paper2. Last accessed on 25.4.2013.

War Crimes Are Everywhere, UK Uses Karadzic to Say, African Focus of Ocampo's ICCDefended",*InnerCityPress*,22July2008,at<http://www.innercitypress.com/uk1karadzic072208.html>. Last accessed on 25.4.2013.

http://icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E32673648B4896/143585/030616_moreno_ocampo_english.pdf. Last accessed on 18.06.2013.

http://www.iccnow.org/?mod=icchistory

Prosecutor –vs- Muthaura , Kenyatta & Mohamed Ali. Available at http://www.icc cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx

United Nations Economic and Social Commission for Asia and the Pacific *"What is good governance?"*.

http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf

http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx

https://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf

Statutes

International Crimes Act, Kenya 2009

Kenya Constitution of 2010

The Rome Statute of 1998

Treaty of Westphalia of 1648

Universal Declaration of Human Rights of 1948

Vienna Convention on International Relations-1961

Vienna Convention on the Law of Treaties of 1969

Montevideo Convention of Rights and Duties of States of 1933

UN Charter

Conference papers

Richard Goldstone, *"Crimes against Humanity-Forgetting the victims"* Ernest Jones Lecture, the Institute of Psychoanalysis, London, 25th September 2001)

Takashi Y., Yuki T., & Gitau R. "Haki *Yetu (Its Our Right): Determinants of Post-Election Violence in Kenya" (*National Graduate Institute for Policy Studies: Tokyo, Japan, September 2010) Discussion paper 10-20

Donald W. Potter, "*State Responsibility, Sovereignty and Failed States"*(Paper presented in a workshop on 29th September to 1st October at the Australasian Political Studies Association Conference, University of Adelaide)