

**UNIVERSITY OF NAIROBI**  
**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

**THE INTERNATIONAL CRIMINAL COURT AND SOVEREIGNTY: CASE STUDY OF**  
**KENYA**

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**AUGUST, 2015**

**DECLARATION**

I declare that this project is my original work and has not been submitted to any other institution for an award of a diploma or degree.

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## **DEDICATION**

This work is dedicated to my parents, Charles B. & Lydia Wahome Kiruri and my siblings whose ceaseless comfort gave me strength, courage and faith in the bleakest of days. Merci Beaucoup!

## **ACKNOWLEDGEMENTS**

I highly appreciate the contribution and support received by various individuals for the successful completion of this project. I wish to express my sincere appreciation to my supervisor Mr. Martin Nguru for his academic guidance and value he gave to my study. In addition, I acknowledge the encouragement and inspiration of my lecturers, friends and my colleagues at IDIS who supported me in their own special way.

## **ABSTRACT**

With the Treaty of Westphalia (1648), the notion of sovereignty was born creating the international state system. The rise of international law however, put sovereignty under increased pressure. While significant work exists on sovereignty and international criminal law, the implications of trying a sitting head of state by the ICC has not been explored. The purpose of the study was to evaluate the role of sovereignty and nationalism on ICC's operations and court's ability to try sitting heads of states. This was prompted by the submission of the Kenyan president to the ICC on 8, November 2014. He became the first sitting head of state to do so with undeniable upshots for sovereignty.

The study is significant because it analyzes the role of sovereignty and nationalism on international criminal justice and the changing nature of sovereignty vis-à-vis dependent/developing nations of Africa and elsewhere. The study used Case Study research design and is Exploratory in nature. It utilized both qualitative and quantitative data collected through in-depth interviews and questionnaires. The study focused on Kenya and drew a sample from its cosmopolitan capital, Nairobi.

The findings of the study showed that sovereignty and nationalism play a big role in the day to day operations of the ICC. The court takes up some cases and not others and succeeds in some and not others due to states' activities. The study found that while nations in Africa consider themselves independent and sovereign, they're really not true sovereign states. This is because they are prone and susceptible to major powers and former colonial master's influences.

The study found that that while ICC's intentions are noble, its sole emphasis on African situations has created tension with the AU. Nationalism and Pan-Africanist rhetoric in the continent has led to calls to reform the court. Future studies in this area will focus on Africa's ability to offer domestic and continental wide justice and peace through homegrown institutions, The African Court of Justice and Human Rights being notable here. Ultimately, this study augments understanding of ICC's quest of forestalling grave violations of international criminal law vis-à-vis sovereignty and nationalism.

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## **ABBREVIATIONS**

<b>AU</b>	-	African Union
<b>BIA</b>	-	Bilateral Immunity Agreement
<b>CICC</b>	-	Coalition for International Criminal Court
<b>CIPEV</b>	-	Commission to investigate the Post-Electoral Violence
<b>CNEB</b>	-	Congress of North American Bosniaks
<b>CORD</b>	-	Coalition for Reforms and Democracy
<b>EU</b>	-	European Union
<b>ICC</b>	-	International Criminal Court
<b>ILC</b>	-	International Law Commission
<b>ICJ</b>	-	International Court of Justice
<b>ICTR</b>	-	International Criminal Tribunal for Rwanda
<b>ICTY</b>	-	International Criminal Tribunal for the former Yugoslavia
<b>NGO</b>	-	Non-Governmental Organization
<b>PEV</b>	-	Post Election Violence
<b>RUF</b>	-	Revolutionary United Front
<b>SCSL</b>	-	Special Court for Sierra Leone
<b>UN</b>	-	United Nations
<b>UNSC</b>	-	United Nations Security Council
<b>UNGA</b>	-	United Nations General Assembly
<b>US</b>	-	United States of America
<b>USSR</b>	-	Union of Soviet Socialist Republics

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## CHAPTER ONE

### 1.0 INTRODUCTION TO THE STUDY

#### 1.1 Introduction

The search for universal justice and peace through an International Criminal Court [ICC] has been an on ongoing one. Indeed, the creation of war crime tribunals is not an entirely new concept in international criminal law. The International Criminal Court and its predecessors, War Crimes Tribunals, can trace their origin in the liberalist democratic thought that advocates universal rights beyond cultural and geographic borders.<sup>1</sup> Undoubtedly, the most well-known instances occurred immediately after the Second World War in Germany and Japan. Nuremberg and Tokyo trials were set up to try those who had perpetrated crimes against peace, humanity and war crimes during the Second World War.

While vast literature exists on ICC and Sovereignty, there is a gap in the ICC's role in trying sitting heads of states. Perhaps, this results from the impossibility of it all, or from the fact that not even International Law is immune from political interference. The ICC is the first permanent international entity established with the aim of prosecuting perpetrators of serious and grave violations of International Law relating to war crimes, crimes against humanity and genocide.<sup>2</sup> According to the Rome Statute<sup>3</sup>, the court aims to end impunity for serious crimes of international concern and contribute to their prevention.

#### 1.2 Universal Jurisdiction

It is the view of many human rights defenders and some governments that gross Human Rights violations are crimes that threaten the international community and its violators are a common enemy of the people. Every nation therefore, as an international community member has a right to try and prosecute such cases. The universal jurisdiction principle is founded on the notion that some

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<sup>1</sup>Roberts, Guy. "Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court." *American University International Law Review* 17 (2001): 35 35-77 p.37

<sup>2</sup> Clark, Phil, and Nicholas Waddell. "Courting conflict? Peace, justice and the ICC in Africa." (2008): p. 7

<sup>3</sup> See the Rome Statute of the International Criminal Court Preamble

crimes are so injurious to international wellbeing that states have both the right and responsibility to initiate legal proceedings against those deemed to have been involved irrespective of whence they or their victim hail and regardless of where such crimes were committed.<sup>4</sup>

Universal jurisdiction doctrine permits national courts to prosecute those accused of committing severe crimes against humanity, whether such crimes were carried out within or without a state's borders is irrelevant, and so is the office of the perpetrator, be it that of head of state.<sup>5</sup> The principle allows all states to prosecute those accused of carrying out grave crimes regardless where the crimes were orchestrated. Though the principle had long existed, it gained notoriety in the Augusto Pinochet case. Pinochet, the former Chilean dictator in the 1970s and 1980s relinquished power in 1990. Later in 1998, he went to the United Kingdom on a diplomatic passport for medical reasons. The Spanish government issued an international order of arrest for murder and human rights violations of Spaniards during his presidency. He was consequently detained by the U.K government to be extradited to Spain.

It is however important to note that the ICC is not based on this principle, the Rome statute establishing the ICC explicitly states that the jurisdiction of the ICC lies with the Security Council and state to offer jurisdiction.

### **1. 3 ICC and Kenya**

Just before the 2013 Kenyan general elections, the west warned Kenyans that there would be consequences if they voted Jubilee's party presidential candidate Uhuru Kenyatta and his running mate William Ruto into office. The two politicians were indicted by the International Criminal Court for crimes against humanity, genocide and rape that dominated Kenya's Rift Valley province during the 2007 General elections. Rift Valley, which is vastly inhabited by the Kalenjin, Ruto's ethnic group,

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<sup>4</sup>Princeton Project on Universal Jurisdiction, and Stephen Macedo. *The Princeton principles on universal jurisdiction*. Program in Law and Public Affairs, Princeton University, 2001. p.15

<sup>5</sup> Global Policy Forum <https://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31.html> Accessed March 7, 2015

was at the center of post-election violence (PEV) following presidential results announcement. The clashes resulted in deaths of over 1000 people and displacement of over 600,000 others.<sup>6</sup> The initial response taken by Kenya over the Post-Election Violence was the formation of an Inquiry Commission to investigate the Post-Electoral Violence (CIPEV), this committee was headed by Philip Waki, a former appellate judge and was thus referred to as the Waki Commission.<sup>7</sup>

The Waki Commission worked on a report that was handed to Kofi Annan, the former U.N Secretary General who led an African Union Panel to negotiate a peace deal ending PEV in Kenya. Annan dispensed it to ICC prosecutor Luis Moreno Ocampo in July 2009. The ICC gave Kenya one year to set up a Tribunal to deal with PEV failure to which the ICC would take over the matter from August 2010. After the unsuccessful bid by the Kenyan parliament to set up a Special Tribunal, and numerous delays to give Kenya more time to carry out detailed investigations to accomplish this, Ocampo in 2010 announced summons for six Kenyans.<sup>8</sup> The names included those of Mr. Ruto and Mr. Kenyatta.

During the Kenyan 2013 General elections campaigns, the United States top diplomat for Africa Johnnie Carson made the following statement on 7<sup>th</sup> February 2013 a month before elections. It was in response to the possible ramifications of Mr. Kenyatta becoming Kenya's president with an ongoing trial in The Hague. "Choices have consequences", he cautioned that the world we live in is inherently interconnected and that Kenyans should reconsider possible ramifications of their choices on their state, as pertains to Kenya's economy, the region and the world, "Choices have consequences".<sup>9</sup> Similar sentiments were echoed by the EU and British High Commissioner, Christian Turner. They warned that the EU and the British government would not deal with ICC inductees; any

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<sup>6</sup> Lynch, Gabrielle. "Durable Solution, Help or Hindrance? The Failings and Unintended Implications of Relief and Recovery Efforts for Kenya's Post-election IDPs." *Review of African Political Economy* 36, no. 122 (2009): 604-610. p. 604.

<sup>7</sup> Republic of Kenya, Report of the Commission of Inquiry

<sup>8</sup> See Brown, Stephen, and Chandra LekhaSriram. "The big fish won't fry themselves: Criminal accountability for post-election violence in Kenya." *African Affairs* (2012): ads018. p. 1-17&Lynch, Gabrielle, and MišaZgonec-Rožej. "The ICC intervention in Kenya." *Chatham House Programme Paper AFP/ILP 1* (2013): 2013.

<sup>9</sup>VOA News<http://www.voanews.com/content/us-official-says-kenya-elections-have-consequences/1599063.html> Accessed March 22, 2015

contact with them would be limited to “essential business”.<sup>10</sup> Kofi Annan, the former UN Secretary General warned that when people elect a head of state that can neither travel freely nor be trusted by the international community, it compromises national interests. He was concerned that Mr. Uhuru and Mr. Ruto would not be easily received by other nations; he hoped that Kenyans would understand the implications.<sup>11</sup>

It was expected that Kenyans would heed the warnings, however, as Brown notes, analysts have a tendency to overestimate the efficacy of western influence upon the policies of African states irrespective of the obvious disproportionateness of political, military and economic power.”<sup>12</sup> It would seem that with the west’s key economic and strategic interests in Kenya coupled with the emergence of new significant powers on the horizon, China included, the country is no longer keen on what the west thinks. Indicted Mr. Uhuru was sworn in April 2014 as Kenya’s forth president, 2 months later a debate in the House of Lords emphasized to the British government the importance of enhanced Kenya-British relations.<sup>13</sup> What a quick change of heart? It’s a sharp contrast to the 1970’s, 80s and 90s when Africa had to alter its policies at the whims of International Monetary Fund and World Bank in order to get funds.

Ambassador Carson’s, EU’s, Turner’s and Annan’s comments could be interpreted in several ways. The most obvious being west’s direct hegemonic influence in Kenya. To the Kenyan electorate however, this looked like perpetuation of colonialism and they abjured the idea that an independent state like Kenya could be ordered around on such a sensitive matter. It was perceived as blatant external interference in Kenya’s domestic affairs. A significant proportion of Kenyans considers ICC’s intervention as a deliberate attempt to eliminate the Mr. Uhuru and Ruto from political pursuit rather

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<sup>10</sup> IWPR, <https://iwpr.net/global-voices/diplomats-issue-rare-warning-ahead-kenyan-polls> Accessed March 14, 2015

<sup>11</sup> BBC News Africa, <http://www.bbc.com/news/world-africa-20602232> Accessed March 22, 2015

<sup>12</sup>Hansen, Thomas Obel. "The International Criminal Court and the Legitimacy of Exercise." *Forthcoming in Per Andersen et al.(eds), Law and Legitimacy, DJOEF Publishers* (2014) 43-62 p. 44

<sup>13</sup>Kenya’s 2013 Elections and Emerging Foreign Policy,<http://studies.aljazeera.net/en/reports/2013/06/2013668593465518.htm>Accessed March 12, 2015



than search for justice for the PEV victims.<sup>14</sup> Indeed, the ICC trials were seen by many as a political rather than a judicial process. Mr. Uhuru and Ruto used nationalistic rhetoric portraying their rival Coalition for Reforms and Democracy Party [CORD] as a puppet of the west. It clearly emerged that to some degree, the former Prime Minister Raila Odinga was rejected because of his genuine or alleged collaboration with The Hague to specifically have his fiercest rivals accused.<sup>15</sup> Jubilee Alliance executed a successful campaign employing multiple strategies to effectively change the ubiquitous narratives thereby redefining and reshaping the local considerations and meanings of justice, threat and injustice.<sup>16</sup>

There was another equally significant implication for Mr. Carson's statement, that which deals with sovereignty. The concept of sovereignty is the basis of today's states system which morphed from Westphalia Treaty in 1648. The principle of sovereignty so permeates analysis of world politics that international relations (IR) scholars use it to explain the patterns of organization in the global system.<sup>17</sup> Taken in this sense, one could argue that if Mr. Kenyatta was to win and become president as he did, Kenya's sovereignty would be compromised as he would be required to attend ICC court proceeding. As Kenya's head of state, he represents its sovereignty and under the UN charter on sovereign equality, a state's sovereignty towers above any other entity. Attending ICC proceedings as head of state would have far reaching implications on the anarchical world system as we know it. It'd be the final straw that breaks the camel's back ushering in the era of world government, having rendered sovereigns insignificant in world politics.

It is through these lenses that this paper will attempt to look at the fall out of Kenya's electorates with the western wishes and possible effects of president Uhuru's submission to the ICC

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<sup>14</sup> The Brookings Institute Blog <http://www.brookings.edu/blogs/up-front/posts/2013/03/11-kenya-elections-kimenyi> Accessed March 14, 2015

<sup>15</sup> *ibid*

<sup>16</sup> Lynch, Gabrielle. "Electing the 'Alliance of the Accused': The Success of the Jubilee Alliance in Kenya's Rift Valley." *Journal of Eastern African Studies* 8, no. 1 (2014): 93-114 p.94

<sup>17</sup> Leonard, Eric K. "Discovering the new face of sovereignty: Complementarity and the International Criminal Court." *New Political Science* 27, no. 1 (2005): 87-104.

despite his stepping down as head of state. The paper will thus evaluate the ICC and its perceived assault on traditional sovereignty and nationalistic backlash against the ICC.

#### **1.4 Statement of the Study Problem**

Universality and sovereignty are two diametrically opposed concepts. Sovereignty, a preserve of the nation state, asserts that a sovereign state is the entity over which there is no higher authority. Universality on the other hand tends to ignore a nation's borders and perceives the world as one community unrestrained by borders. Needless to say, the death of sovereign states is extremely slow and universality will take a long time to materialize. The doctrine of sovereign equality enshrined in the UN charter, treats all nation states or sovereigns as equal i.e. none is above the other. There is also no authority/entity above the state in international political theory. The ICC, founded on internationalism has the mandate to try anyone accused of grave crimes regardless of his/her office. Some powerful states including the US, Russia and China are not state members of the ICC, most European countries including Germany and UK however are members.

The ICC aims to bring perpetrators of grievous crimes to book. Its focus is on individual responsibility for collective crimes. Established in 2002 by the Rome statute, the court has 123 members with Africa having the highest percentage of state parties [27%]. ICC aims to promote peace and justice and is based on the principle of universal jurisdiction. This principle is seen to obtrude on state sovereignty. This is particularly so when the ICC appears to be a western tool to punish weaker states who fail to jump at their every whim while it ignores serious crimes committed by powerful states.

The ICC has indicted several heads of states for crimes against humanity, genocide and war crimes, all of them from Africa. Because the Rome statute does not recognize the office of any suspect accused of horrendous crimes, it belittles sovereignty in that heads of states embody to some degree their state's sovereignty. The ICC also has to contend with nationalism which is born of sovereignty

especially when it is seen as supporting the powerful against the weak. This begs the question, what is the role of sovereignty and nationalism in ICC's quest for universal peace and justice? Did Kenya's current sitting head of state (President Uhuru Kenyatta) submission to the ICC on November 8, 2014 undermine Kenya's state sovereignty? What is the effect of ICC on domestic & continental politics and amnesty in Africa?

## **1.5 Objectives of the Study**

### **1.5.1 Overall Objective**

The major objective is to explore the effect of state sovereignty and nationalism on ICC's operations.

### **1.5.2 Other Objectives**

- To evaluate how state sovereignty and the nationalism affect the operations of the ICC.
- To examine if president Uhuru's submission to the ICC undermined Kenya's sovereignty.
- To examine the domestic & continental political and amnesty implications of ICC trials in Africa.

## **1.6 Justifications for the Study**

The study is guided by the following justifications.

### **1.6.1 Academic Justifications**

The debate on sovereignty and universal jurisdiction has been a long running one. While some scholars see sovereignty and the nationalism it breeds as the biggest stumbling block to achieving universal justice, others see the two as different sides of the same coin. The role of ICC especially in Africa where the court has concentrated its efforts is equally contentious. Existing literature on the court and its predecessors, the Nuremberg and Tokyo tribunals, which were formed after the Second World War, and the Yugoslavia and Rwanda tribunals of the 1990s suggests that the Westphalia sovereignty [1648] does carry with it responsibility to observe International Law. This study will show

that sovereignty and nationalism it connotes is still as relevant today notwithstanding intense globalization/internationalization.

The role of ICC in trying sitting heads of states has not been fully explored either because the ICC is still in the nascent stage or because it's almost impossible to achieve. This study will therefore provide an entry point to other scholars who may wish to investigate the issue in future. Further, the study will contribute to existing knowledge on sovereignty and the ICC as well as offer new areas of research.

### **1.6.2 Policy Justifications**

The study will offer policy makers in governments insights on how to approach future treaty and convention commitments. Drawing from Kenya's experience, the study will show that the country's decision to ratify the Rome statute may have been done with no proper consideration or under pressure as it now seeks to pull out of the Rome statute. The study will underscore the importance of carefully studying the implications of such agreements on state's future well-being and cohesion despite external pressure more so from more powerful actors. It will also inform NGOs and other civil society on the dynamics of nationalism on justice, peace, and cohesion.

## **1.7 Literature Review**

### **1.7.1 Introduction**

This section reviews existing literature in the domain of International Law, International Politics, IR and in general political theory. Following the inception of Westphalian state system, states were treated as supreme; they were immunized against external interference. As such states could do as they pleased in the confines of their borders. As International Law developed however, a state's right to do as it pleases within its borders came under increasing scrutiny. Today it is generally accepted that a state's behavior within and without its borders is subject to International Law. Universal human rights declaration and the ICC are some of the present day realities that a state has to contend with in exercising its sovereign power.

Literature in this study will be divided into four sub-sections. First, literature on ICC's roots and its predecessors i.e. Nuremberg and Tokyo Tribunal; Secondly, the relationship between Africa and the ICC; Third, literature on the changing nature of sovereignty over time, and lastly, literature on post-Cold War period and intervention

### **1.7.2 Origins of the ICC**

The genesis of ICC goes way back. Venkata notes that the origins of an international criminal court can be traced back to 1864 in the efforts of Gustave Moynier, International Commission for Red Cross (ICRC) founding member.<sup>18</sup> Other scholars including Bass see the conception of ICC as having existed even earlier. He sees the creation of war crime trials by the U.S and Britain after the Spanish-American war and the Boar war not to mention the treason trials of Bonapartists in 1915 as clear examples.<sup>19</sup> It would thus seem that while the ICC is a 21<sup>st</sup> century institution, its roots are not.

### **1.7.3 Nuremberg and Tokyo Tribunals**

In the aftermath of the Second World War, two war tribunals were set up to hold individuals in Germany and Japan criminally responsible for atrocities committed during the war; these were the Nuremberg and International Military Tribunal for the Far East.<sup>20</sup> The tribunals were set up to hold individuals criminally responsible for war crimes, crimes against humanity and crimes against peace. The two tribunals had the mandate to prosecute perpetrators of critical crimes irrespective of the office they held. Neither the official position of a perpetrator nor the fact that the accused was obeying orders issued by a superior or a government shall be sufficient to shield the accused of responsibility for crimes charged, though such circumstances may influence the punishment handed if justice so befits.<sup>21</sup> The two tribunals were based on the view that only by punishing individuals and not abstract entities like states could International Law be observed.

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<sup>18</sup> R Venkata Rao, All Roads may not lead to Rome: A critique of the New Millennium's International Criminal Court (2001) p. 7-9

<sup>19</sup> Gary, J. "Bass, Stay the Hand of Vengeance." *The Politics of War Crimes Tribunals* (2000) p.1-5

<sup>20</sup> Bergsmo Morten and LING Yan, State sovereignty and International Criminal Court (2012)p.24

<sup>21</sup> Nuremberg Charter, Chapter Six on the Responsibility of the Accused

The creation of these tribunals initiated a UN's proposal to seriously consider the creation of a permanent successor, a criminal court; the campaign however hit a snag during the 1950s, partly due to the Cold War.<sup>22</sup> November 21, 1947 saw the creation of the International Law Commission [ILC] by the U.N. General Assembly (UNGA). The new body was entrusted and tasked by UNGA with drafting the international criminal court statute based on the Code of Crimes against Peace and Security of Mankind, Nuremberg principles and the Genocide Convention Article VI.<sup>23</sup> But the 1950s like the decades to follow was mired in antagonism between the two super powers [Soviet Union and United States]. Two draft statutes were produced by ILC in the 1950s but little interest in the court and progress was observed because of the Cold War tensions.

Decades later, in the early 1990s, similar war tribunals in Yugoslavia and Rwanda (ICTY & ICTR) were formed to try perpetrators of war crimes, genocide and crimes against humanity during those country's civil wars. The temporal nature and the territorial limitation of these tribunals meant that they could not effectively deter severe crimes from occurring again elsewhere. Upon the degeneration of the Soviet Union, a new life was breathed into international criminal court. At the 44<sup>th</sup> U.N. General Assembly in 1989, the Trinidad and Tobago delegation rekindled the idea of instituting an international trial to deal with mounting global danger of transnational drug trafficking.<sup>24</sup> A draft was submitted to UNGA by the ILC in 1994 and two years later, UNGA finally gave a go ahead.

Consequently, a Preparatory Committee was established in 1996 to begin work of creating an international criminal court. The committee presented a proposal of the revised statute in 1998. This draft was arrived at with participation of more Non-Governmental Organizations [NGOs] than states. Over 160 governments sent their delegations to take part in the conference which was also attended by over 200

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<sup>22</sup>David, Hoile. "The International Criminal Court: Europe's Guantanamo Bay." (2010). p. 8

<sup>23</sup>Bharadwaj, Atul. "International Criminal Court and the Question of Sovereignty." *Strategic Analysis* 27, no. 1 (2003): 5-20. p. 7

<sup>24</sup>United Nations, <http://legal.un.org/icc/general/overview.htm> March 11, 2015

NGOs.<sup>25</sup> The resulting draft had numerous incongruities that proved contentious, yet, the delegates decided to assemble a conference later in the month of June 1998 to discuss and approve the statute creating an international criminal court.<sup>26</sup> In 2002, the Rome statute establishing the ICC was ratified by 60 countries creating the first International Criminal Court.

#### **1.7.4 ICC and Africa**

The ICC and its predecessors the ICTY and ICTR have been criticized for focusing on weak powers of Africa and Eastern Europe while ignoring violations by major powers like the US and UK which invaded Iraq without additional mandate of the United Nations, or Israel that has long been accused of committing war crimes in Palestine. The ICC has 22 cases in 9 situations<sup>27</sup> that have been brought before it; the peculiar thing is that they are all from Africa. David Hoile sees the ICC as Europe's Guantanamo Bay; the court has exposed the nastier corollaries of globalization with the apparent exclusive emphasis on Africa.<sup>28</sup> He sees the court as characterized by "judicial failure and imperial arrogance." According to President Paul Kagame of Rwanda, the International Criminal Court (ICC) is the new form of imperialism engineered by the west to dominate the world's poorest countries. The court is observably designed for African and poor countries only.<sup>29</sup>

There has also been the view that the ICC's focus on Africa supports foreign interests like in the case of Sudan where ICC has indicted Sudanese president Omar Al Bashir of Genocide and war crimes. The Israeli government has over the years offered asylum to thousands of Darfur asylum seekers and refugees in bid to cultivate close connections with them, alienate them from their national setting and eventually hearten them to secede from Sudan.<sup>30</sup> ICC's single focus on African state of affairs entreats the question why international criminal justice gaze befalls some regions and peoples

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<sup>25</sup>Coalition for the International Criminal Court <http://www.iccnw.org/?mod=rome> March 17, 2015

<sup>26</sup>International Criminal Court Press release <http://www.un.org/icc/pressrel/1rom22.htm> March 17, 2015

<sup>27</sup>International Criminal Court website [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)

<sup>28</sup>See Supra note 22 at 1

<sup>29</sup>Sudan Tribune <http://www.sudantribune.com/spip.php?article28103> March 15, 2015

<sup>30</sup>Rantawi, A step Forward or Backward <http://www.bitterlemons-international.org/previous.php?opt=1&id=240#982> March 11, 2015

and not others?<sup>31</sup> Others see the court's focus as an indication of the dire human rights situation in Africa. Fatou Bensouda, the Gambian ICC prosecutor has stated that the court has no intention of focusing on Africans only as it will prove with time, however, Africa presently presents the most severe situations.<sup>32</sup> Whichever angle one takes as to the relationship between ICC and Africa, it is unfortunately, clear that politics knows no bounds; it interferes even with International Law.

### 1.7.5 Sovereignty

Sovereignty remains perhaps the most pervasive and equally contentious concepts in international politics. According to Hinsley, the traditional notion of sovereignty was synonymous with final absolute political right in a political entity that exists nowhere else.<sup>33</sup> Recent events especially the creation of the European Union has however, questioned the soundness of such conceptualization of sovereignty.<sup>34</sup> Sovereignty is at the heart of the anarchical world system and as some scholars would argue, forms the basis of international law. No matter the theoretical lenses one views the international system, be it realist, liberalist or conflict, sovereignty pervades all.<sup>35</sup>

Historically, sovereignty has come to mean the locus of utter power and the right to engage in warfare, in addition to being the foundation of the rule of law in international relations and the injunction of making war.<sup>36</sup> The above description sees sovereignty as many different things at the same time. Indeed, scrutiny of sovereignty will more often than not raise more queries than it answers regarding international relations.<sup>37</sup> Sovereignty is the preserve of the state and carries with it the notion of a world divided into independent states that are however, interdependent. Modern sovereignty has evolved from the Peace Treaty of Westphalia (1648) which ended Europe's 30 year war creating the Westphalian International System.

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<sup>31</sup>Waddell Nicholas, Phil Clark, and Mariana Goetz. "Courting Conflict? Justice, Peace and the ICC in Africa." (2008). p. 8

<sup>32</sup>The New York Times [http://www.nytimes.com/2007/02/26/world/africa/26hague.html?\\_r=0](http://www.nytimes.com/2007/02/26/world/africa/26hague.html?_r=0) Accessed March 11, 2015

<sup>33</sup>Hinsley, Francis Harry. *Sovereignty*. CUP Archive, 1986. p. 22-26

<sup>34</sup>Zick, Timothy. "Are the states sovereign?" *Wash. ULQ* 83 (2005): p. 229- 231

<sup>35</sup>See Supra note 17 at 7

<sup>36</sup>Nolte George - *Sovereignty as Responsibility?*

<sup>37</sup>Biersteker, Thomas J., and Cynthia Weber, eds. *State Sovereignty as Social Construct*. Vol. 46. Cambridge University Press, (1996). p.1



The resulting world order has dominated international relations since then as sovereignty has refused to die. Thus, IR scholars have a tendency to view sovereignty as an absolute, stationary and fixed principle and concept.<sup>38</sup> International law and politics scholars continue to debate the nature and centrality of sovereignty up to the present.

Moreover, there are those analysts who see the role of states as being crippled by globalization. Krasner notes that the notion of states being autonomous and independent entities seems to be collapsing under sustained assault from monetary union, NGOs and the Internet.<sup>39</sup> He however, cannot see the death of sovereignty any time soon. The upshots of 9/11 underscored the relevance of the modern state in exercising the right to defend national sovereignty, going to war and dealing with threats to national security.<sup>40</sup> Sovereignty after all is a political entity's outwardly recognized right to use final authority in its affairs.<sup>41</sup>

### **1.7.6 Nature of Sovereignty**

Debate on the nature of sovereignty has long brewed among IR scholars. There is however, agreement that states are the main actors in international relations. Sovereignty can only be claimed by state entities, it's so valued that a newly created state seeks recognition from other sovereigns upon which it attains a legal person status, it crystalizes its citizenship in the international society.<sup>42</sup> Hidemi's analysis of Kelsen/Schmitt dichotomy sees sovereignty as the ultimate political authority in a state, the feature that makes a country an international person, the entirety of international legal liberties a state relishes at any moment.<sup>43</sup>

### **1.7.7 Aspects of Sovereignty**

The Montevideo conference of 1933 outlined the rights and duties of a state. The state being a legal person under International Law must possess permanent population, a distinct territory, a

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<sup>38</sup>Lake, David A. "The New Sovereignty in International Relations1." *International studies review* 5, no. 3 (2003): 303-323

<sup>39</sup>Krasner, Stephen D. *Sovereignty: organized hypocrisy*. Princeton University Press, (1999). p. 32-40

<sup>40</sup>Hansen, Thomas Blom, and Finn Stepputat. "Sovereignty revisited." *Annu. Rev. Anthropol.* 35 (2006): 295-315.

<sup>41</sup>See supra note 37 at 2-10

<sup>42</sup>Robert H. Jackson, *Quasi-states: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press, (1990), p. 39

<sup>43</sup>Suganami, Hidemi. "Understanding Sovereignty through Kelsen/Schmitt." *Review of International Studies* 33, no. 03 (2007): 511-530.

government and ability to go in into relations with states.<sup>44</sup> Traditionally, sovereignty has been conceived as supreme authority in a territory’ – the legitimate power over a specific territory and populace.<sup>45</sup> Sovereignty has two central dimensions, international and internal/domestic sovereignty. Internal sovereignty denotes the right and ability of a country’s government to use control over internal affairs in a defined territory without external/foreign interference.<sup>46</sup> It is the state’s ability to govern legitimately as well as absolutely over territorially demarcated borders that endows such a state with sovereignty.<sup>47</sup> External sovereignty is the recognition of a state by other sovereign states as a member of the international community of states.

### **1.7.8 Westphalian Sovereignty**

Europe’s 30 year old war came to an end in 1648 with the signing of the Treaty of Westphalia. The treaty created the modern state system and entrenched sovereignty in international relations. Westphalian sovereignty has fundamentally been defined as political organization founded on the marginalization of foreign actors in authority structures of a particular territory.’<sup>48</sup> The Westphalian sovereignty has thus been regarded by some IR scholars as being synonymous with non-intervention, the freedom to do as a state pleases within its borders. However this notion has come under increased criticism for being too simplistic and unrealistic.

For instance, the 1923 Wimbledon case led The Permanent Court of International Justice to conclude that sovereignty was simply a state’s liberty within confines of International law.<sup>49</sup> Allan in his work, “Sovereign Statehood” further illustrates the absurdity of this view. His assertion is that anyone with superficial acquaintance of International Law discerns that sovereigns don’t have

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<sup>44</sup> Council on Foreign Relations website <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897> Accessed March 7, 2015

<sup>45</sup> Daniel Philpott, ‘Ideas and the Evolution of Sovereignty’, in Sohail H. Hashmi (ed), *State Sovereignty: Change and Persistence in International Relations* (University Park: The Pennsylvania State University, c1997), p. 19

<sup>46</sup> Samuel M. Makinda, ‘Sovereignty and International Security: Challenges for the United Nations’, *Global Governance*, Vol. 2 (1996), p. 150

<sup>47</sup> See Supra note 17 at 87-104.

<sup>48</sup> See Supra note 39 at 4

<sup>49</sup> Permanent Court of Justice <http://opil.ouplaw.com/view/10.1093/law/icgj/235pcij23.case.1/law-icgj-235pcij23> March 17, 2015

comprehensive domestic autonomy.<sup>50</sup> Sovereignty therefore does connote that a state has the right to exercise authority in its domain but that this right is restricted beyond a certain point by International Law.

The 20<sup>th</sup> century saw sovereignty not only challenged by other states but also international institutions. Global financial bodies like the World Bank [WB] and International Monetary Fund [IMF], have established and normalized practices that challenge Westphalian autonomy.<sup>51</sup> Krasner observes that the two institutions not only set preconditions for offering financial resources to poorer countries but they also require them to make policy changes. Additional onslaught of sovereignty has also come from other entities as Blom points out. 9/11 made it clear that new threat to prevailing world order emanates from forces that were problematic to conceptualize; the threats are ephemeral, exceedingly mobile and decisively global networks.<sup>52</sup>

### **1.7.9 Principle of Self Determination [Popular Sovereignty]**

The end of the two World Wars ushered in popular sovereignty through the principle of self-determination. Under the principle, people have the individual right to determine their future and choose their own fate. Sovereignty is now held by the people. Self-determination, a fundamental principle of International Law is based on customary International Law, it's now widely 'acknowledged as a general principle of law and prominently features in several international treaties.<sup>53</sup> The principle is further reinforced by the U.N Charter International Covenant on Civil and Political Rights referred to as the right of all peoples.

It has aspects of internal and external self-determination with internal being the various political and social rights while external self-determination connotes legal independence or succession of people from a larger political unit. This sovereignty has two dimensions as well and sees the

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<sup>50</sup> Allan James, *Sovereign Statehood: The Basis of International Society* [London: Allen & Unwin, 1986], p. 229.

<sup>51</sup> See Supra note 39 at 34

<sup>52</sup> See Supra note 40 at 296

<sup>53</sup> Legal Information Institute- [https://www.law.cornell.edu/wex/self\\_determination\\_international\\_law](https://www.law.cornell.edu/wex/self_determination_international_law) March 9, 2015

individual citizens and community as the basis of sovereignty. The principle of self-determination as adopted in 1919 at the Paris Peace Conference altered the nature of sovereignty. Based on the fourteen points by President Woodrow Wilson, self-determination became the basis of decolonization in Africa and Asia resulting into new sovereign states.

### **1.7.10 The United Nations System**

Self-determination infiltrated the 20<sup>th</sup> century and was formally introduced in international law. The U.N charter in articles 1 & 55 highlight the principle. Article one states “To develop friendly relations among nations based on respect for the principle of equal rights and **self-determination** of peoples...”<sup>54</sup> key events of the 20<sup>th</sup> century, namely the two World Wars culminated in redefining sovereignty. The UN international system supplanted the Westphalian system guaranteeing political independence, non-intervention and territorial integrity, these norms were enshrined in the newly embraced United Nations Charter instituting new international order.<sup>55</sup>

The U.N charter outlines sovereignty in article 2 where the organization is based on sovereign equality of its members, the charter also emphasizes non-intervention. This was best illustrated in the 1986 Nicaragua vs. the United States case where the International Court of Justice (ICJ), UN’s principal judicial organ ruled that the principle of non-intervention prohibits all states to interpose directly or indirectly in both the internal and external affairs of another State.<sup>56</sup> The relationship between the U.N and sovereignty is however mutual, the organization exists because of sovereign states. As Nolte observes, former Secretary General Kofi Annan in his “In Larger Freedom” report was careful not to link sovereignty with responsibility, the notion of sovereignty as responsibility threatens to sever the branch on which the international organization sits.<sup>57</sup>

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<sup>54</sup> UN Charter <http://www.un.org/en/documents/charter/chapter1.shtml> Accessed March 15, 2015

<sup>55</sup> See Article 2 (1), (4) and (7) of Charter of the United Nations [<http://www.un.org/aboutun/charter/index.html>] Accessed March 3, 2015

<sup>56</sup> Think Africa Press <http://thinkafricapress.com/international-law-africa/sovereignty> March 7, 2015

<sup>57</sup> See Supra note 36 at 392

### 1.7.11 Post-Cold War and Intervention

Much of today's concern with sovereignty is explainable in part by the expiration of the Cold War and the prospects of creating a "New World Order" which continues to question many long-standing assumptions including about state's sovereignty.<sup>58</sup> Biersteker also observes other factors as causing renewed interest in the subject including the disintegration of behemoth states of former Yugoslavia and Soviet Union. Sovereignty has continued to come under increasing pressure from the international community through interventions. Sanctions and humanitarian interventions by use of military force were witnessed in Somalia, Iraq and Yugoslavia and marked the early 1990's.

According to Weber, intervention occurs where a state's practices don't reflect accepted inter subjective norms that define how a sovereign state should behave, intervention in the affairs of the anomalous state by other sovereign sta in such instances is deemed legitimate by the international community.<sup>59</sup> The fluidity of intervention points to the malleability of present day sovereignty and its reliance on the international community. Three instances are today accepted as basis of intervention including instances of failed state, humanitarian intervention and maintenance of peace and security.

To Holzgrefe, humanitarian intervention involves utilizing threats or force transversely a state's borders by either a single or a collection of states to avert extensive and severe violations of fundamental human rights of other people who are not necessarily that state's/states' citizens, this is done without express permission of the interfered state.<sup>60</sup> The U.N charter chapter 39 allows the Security Council to determine intervention on threat to peace basis. The Security Council is mandated to determine existence of threat and breach of peace and aggression, it shall consequently make recommendations or resolve what measures are necessary to uphold or reinstate global peace and

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<sup>58</sup>See Supra note 37 at 1-15

<sup>59</sup>Weber, Cynthia. "Reconsidering statehood: Examining the Sovereignty/Intervention Boundary." *Review of International Studies* 18, no. 03 (1992): 199-216. p. 209

<sup>60</sup>. Holzgrefe, Jeff L., and Robert O. Keohane, eds. *Humanitarian intervention: ethical, legal and political dilemmas*. Cambridge University Press, 2003. p.18

security.<sup>61</sup> Chapter IX of the U.N charter lays out the conditions of stability and well-being necessary for peace. Article 55 highlights the desire to have conditions that promote high standards of living and full employment to advance social economic development.<sup>62</sup> Many failed states cannot provide these conditions. They are plagued by deteriorating growth rates, poor governance, and colossal corruption levels.<sup>63</sup> As a result, they hold a certain appeal to terrorists and international criminals making them a threat to national interests and regional stability.<sup>64</sup>

The Genocide Convention overtly advocates for intervention where grave crimes of genocide are orchestrated. The Genocide Convention Article 1 conflicts with the sovereignty and non-intervention principles that have directed international society from the Peace of Westphalia [1648].<sup>65</sup>

#### **1.7.12 Sovereignty as Social Constructive**

The constructivist view sees sovereignty, like the state system, as socially constructed. Independent States create the institution of sovereignty which in turn shapes state's identity as a sovereign. Constructivism centers on norms and how they shape behavior of actors. The world is the way it is simply because we, the actors of the world, have it so.<sup>66</sup> Thus, this intricate relationship is by no means one way, it's not only agents that make the world, but social environment shapes the agents. Sovereignty is thus an intrinsically social concept, states' entitlements to sovereignty creates a social setting in which they interrelate as members of a global society of states, simultaneously, the mutual acknowledgement of sovereignty claims is equally an imperative element in the making the states themselves.<sup>67</sup> The very nature of sovereignty points to its aforementioned volatility. Due to the socially constructed aspect of our world, it follows that reproduction and reconstruction of all are

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<sup>61</sup> United Nations website <http://www.un.org/en/documents/charter/chapter7.shtml> March 7, 2015

<sup>62</sup> *ibid*

<sup>63</sup> Donald W Potter -State Responsibility, Sovereignty, and Failed States p. 14

<sup>64</sup> *Ibid*

<sup>65</sup> Bell, C. Force, Diplomacy and Norms. In: A. Schnabel and R. Thakur (eds). *Kosovo and the Challenge of Humanitarian*

*Intervention: Selective Indignation, Collective Action, and International Citizenship*. Tokyo: United Nations University Press, 2000, pp.450-451

<sup>66</sup> See *Supra* note 17 at 89

<sup>67</sup> See *Supra* note 37 at 1-10

possible.<sup>68</sup> Sovereignty therefore isn't monolithic as some scholars would have us believe, it evolves as society does according to this approach.

### **1.7.13 Sovereignty as Basis of International Law**

The relationship between sovereignty and international law is a symbiotic one, mutually beneficial to both. This is in sharp contrast to the travesty still held by some international criminal law scholars that sovereignty is the nemesis. They view sovereignty as the progeny of realpolitik frustrating international criminal justice perpetually.<sup>69</sup> This may stem from their unwillingness to recognize that international law is after all the law among states, not above states. Notwithstanding, the relationship between the two is even more complex than meets the eye. Sovereignty affords the foundation of international law to regulate state actions; its abuse is routinely cited as justification for using force in international relations.<sup>70</sup> Indeed it would be very hard to conceive international law without sovereign states that can enforce it domestically and intervene internationally to uphold it.

## **1.8 Theoretical Framework**

### **1.8.1 Idealism/Liberalism**

The study employs the Idealism/Liberalism theory for analysis. Idealism is founded on the perception of human moral principles and interstate dialogue especially through international organization for collective security and good. It sees international organization and international law being key in maintaining order and peace in the world. The theory advocates for human rights and in extension, universal justice. Liberal theory which draws from Idealism promotes values of democracy, popular participation and emphasizes the centrality of ideas. Though the state may claim sovereignty, it must maneuver a multiplicity of other actors who inevitably nibble away at its supreme power. The theory has its core the protection and promotion of human rights, humanitarianism international

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<sup>68</sup>Eric K. Leonard, Discovering the New Face of Sovereignty: Complementarity and the International Criminal Court p.89-96

<sup>69</sup> Robert Cryer-International Criminal Law vs State Sovereignty: Another Round? The European Journal of International Law Vol. 16 no. 5 p.980

<sup>70</sup>See Supra note 37 at 1-15

regimes, conventions and treaties and interdependence. As such it is apt for this study since the state no longer acts in isolation.

### **1.9 Hypotheses**

- Sovereignty and nationalism hinders the ICC in enforcing international criminal justice.
- The ICC does not have the capacity to try sitting heads of states.
- ICC's activities in Africa neither exacerbate nor resolve conflict in the continent.

### **1.10 Methodology**

This study is exploratory research. Exploratory research is apt for new areas of investigation and seeks to (i) scope the extent of phenomena/problem in question, (ii) generate preliminary hunches on a problem or phenomena and (iii) test the viability of undertaking broader study of phenomena.<sup>71</sup> Exploratory research asks the question “what” which forms the basis of developing hypothesis for further inquiry. The study thus explored the vast existing literature on sovereignty and international criminal court and war crimes tribunals

The study used qualitative methodology relying on qualitative interviews and questionnaires. Qualitative interview entails extensive conversations between researcher and respondents; the researcher guides the conversation to elicit details and depth by use of follow up questions on answers provided.<sup>72</sup>

### **Research Design**

Research design used is Case Study. Case study inquiry examines contemporary phenomena in its real life setting; it is best used where researcher desires to cover contextual conditions. Case study research asks the questions “how” & “why” and does not involve control of behavioral happenings.<sup>73</sup> The design allowed the study to capture comprehensive data from respondents. The study focused on Kenya and other countries where the ICC and its predecessors have played a role.

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<sup>71</sup>Anol Bhattacharjee, *Social Science Research: Principles, Methods, and Practices* (2012) USF *Tampa Bay Open Access Textbooks Collection*. Book 3 p. 6

<sup>72</sup>Rubin, H.J and Ru in, I.S, *Qualitative Interviewing –The Art of Hearing Data*. 2. Edition, Sage Publications (2005), p. 4

<sup>73</sup>Yin, Robert K. *Case study research: Design and methods*. Sage publications, (2013), p. 3-10



**Instruments:** Primary data was acquired using interview guide prepared and used during interviews. Interview guides allow respondents to give more information than they otherwise would. Questionnaires were also used to obtain primary data.

**Respondents:** included reputable scholars, international lawyers and the general public,.

**Sampling procedure:** Respondents were drawn by use of Quota sampling, this sampling is particularly useful when research intends to focus on a particular group (international lawyers & respondents in academia). Its one disadvantage is that it may produce a biased sample which will work in this study as the study partly relies on proper understanding of phenomena.

### **Primary Source of Data**

Primary data came from in-depth interviews and questionnaires administered. The interviews were conducted with 15 International Law and Political Science experts, the experts in both fields were sourced from different institutions. People with master's and undergraduate degree were also interviewed. Questionnaires were administered to 130 people within Nairobi.

### **Secondary Source of Data**

Secondary data was drawn from scholarly books, journals, unpublished works, articles; reports from the UN, intergovernmental and non-governmental organizations, statements from ICC, state and UN officials and articles on the relationship between sovereignty and universal jurisdiction represented by the international criminal court.

### **Data Analysis**

The study employed qualitative data analysis method to analyze primary data.

### **Ethical Issues**

Proper research calls for ethics especially when dealing with dilemmas and conflicts that arise during the study. Ethics draw the line on what is a legitimate and moral procedure of research. Scientific misconduct/plagiarism entails falsifying or distorting data or methods of collecting data and

plagiarizing others works.<sup>74</sup> A researcher must take care so as not to: (i) harm respondents either physically or psychologically (ii) deceive respondents, to overcome this informed consents must always be sought from respondents, (iii) invade respondents privacy by among others probing of intimate personal details that may embarrass the respondents, (iv) compromise confidentiality, confidential information given during research should always be held in confidence and kept off public domain (v) violate anonymity of for example a respondents name which would leave him or her in a compromising situation especially where sensitive information is involved.

### **1.11 Scope and Limitations**

The study vastly looked at countries where the ICC and its predecessors have intervened. Though, few in number, their study did provide important insights. Specifically the study's key focus was on ICC's intervention in Africa, its bid to try sitting heads of states using the case study of Kenya. Inevitably the study may have gaps owing to the methodology used. Because of time limits, the research largely relied on human and material resources available in Kenya.

### **1.12 Chapter Outline**

#### **Chapter One:**

Drawing from existing literature, chapter one broadly introduces the study's historical background, literature review and theoretical framework. The chapter examines some pertinent operational concepts that are employed in the study and provides a brief background that grounds the study in International Law, IR and politics. The chapter gives an overview of how subsequent chapters are organized.

#### **Chapter Two: Overview of the Role of Sovereignty and Nationalism on working of ICC**

The second chapter focuses on the concept of sovereignty and nationalism and their role in hindering or advancing universal jurisdiction. The chapter draws examples globally to highlight how the court is viewed as undermining sovereignty of states and how domestic governments respond.

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<sup>74</sup> Basics of Social Research Qualitative and Quantitative Approaches Pearson Education Inc. (2007) p. 49

### **Chapter Three: Kenya's President Uhuru's Submission to the ICC and Sovereignty Implications**

The third chapter explores possible implications on sovereignty after the first sitting president submitted to the ICC. The chapter seeks to show that though president Uhuru stepped down, his submission to the court had significant ramifications, if only for setting precedence.

### **Chapter Four: Political Implications of ICC's Trials in Africa**

The fourth chapter discusses the role of ICC's prosecutions and trials in shaping domestic politics and amnesty in the continent. The chapter evaluates ICC's efficacy in Africa where traditional norms of forgiveness & inclusion are paramount in attaining peace vis-a-vis orchestration of justice to achieve peace as advanced by the court.

### **Chapter Five: Summary, Recommendation and Further Research**

The last chapter will be the summary. It will have the conclusions of the study, recommendations arising from the study findings and analysis against hypothesis and objectives. It will also suggest areas of further research.

## CHAPTER TWO

### 2.0 OVERVIEW: ROLE OF SOVEREIGNTY AND NATIONALISM ON ICC'S OPERATIONS

#### 2.1 Introduction

The previous chapter broadly introduces the study, provides its background and evaluates key concepts to be employed. The second chapter looks at what effect sovereignty and nationalism have on the working of the ICC. It analyzes the inextricable link between the two and the ICC, the court having been formed by sovereign states. The court's priorities vis-à-vis ongoing and past cases comes up as one reason the institution is losing support especially from African states. Opposition from major powers is also looked at analytically and it emerges as one of the many reasons the court has been ineffective thus far. The chapter also evaluates the source of ICC's support and its upshots.

As noted earlier, despite the transformation of sovereignty from absolute control within one's borders to control of state's boundaries under international law, international criminal law and the ICC are still viewed as obtruding state sovereignty. Whether the view emanates from the fact that some states feel that they have the capacity to conduct criminal proceeding for international crimes without the ICC, or from the fact that major powers including US, China and Russia are not state parties to the ICC, the overarching narrative is that the court and sovereignty are at daggers drawn. As such, the operations of the ICC, being a states' creation and being viewed by some states as undermining sovereignty is in more than one way affected by sovereignty and the nationalism that sovereignty connotes.

The state plays a vitally important role in maintaining international law, in the creation of international regimes, statutes, charters, treaties and adoption of norms. The ICC as a states' creation but with significant contribution from other actors like NGOs is thus likely to suffer from political interference. Since its creation, the ICC has faced divergent challenges in its operations ranging from objection from powerful states, non-cooperation from state members by not fulfilling their obligations,

resistance from nationalism, condemnation by some that it focuses on weaker powers, not to mention lack of support from the Security Council. It however suffices to note that the court has received numerous support from other entities. This chapter critically analyzes the effect of state sovereignty and nationalism on the operations of the ICC. It evaluates diverse countries ranging from the US to the former Yugoslavia, Kenya to Israel and EU to Palestine in addition to other pertinent areas affecting ICC's operations.

The ICC's creation aimed at ending impunity and forestalling serious violation of the International Humanitarian Law.<sup>75</sup> It is the first permanent international entity that seeks to prosecute individuals who orchestrate genocide, crimes against humanity and war crimes.<sup>76</sup> The Hague based court seeks universal justice. Its proponents have pointed out that its predecessors, war crimes tribunals are functional in that they: (a) eliminate aggressive enemy leaders, (b) dissuade war criminals, (c) acclimatize ex-enemy states, (d) individualize blame for serious crimes as opposed to condemning an abstract entity like a state, (e) determine truth pertaining to perpetrated atrocities during wars, and (f) forestall retribution.

Some scholars however, are critical of the attainability of universal justice bearing in mind the complex political dynamics that subsume the international system. Nagel for example succinctly sums this up by stating that we live not in a just world.<sup>77</sup> If indeed our domestic settings are not just, how plausible is universal justice in the multistate international system which is driven by power and self-interests?

The earliest recorded case of war crime prosecution dates as far back as 1262 when Conradin von Hohenstaufen was accused of instigating an unjust war; he was indicted and executed in Naples.<sup>78</sup>

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<sup>75</sup>Strapatsas N, *The European Union and Its Contribution to the Development of the International Criminal Court* (2002) p. 404

<sup>76</sup> Clark, Phil, and Nicholas Waddell. "Courting conflict? Peace, justice and the ICC in Africa." (2008): p. 7

<sup>77</sup> Nagel Thomas, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), 113-147 p. 113

<sup>78</sup>Schuett, Oliver. "The international war crimes tribunal for former Yugoslavia and the Dayton peace agreement: Peace versus justice?." *International Peacekeeping* 4, no. 2 (1997): 91-114.

In the 20<sup>th</sup> century, calls were rife in the 1919 Paris Peace Conference to punish war criminals of the First World War. President Woodrow Wilson was however against Kaiser Wilhelm II punishment and establishment of a global war crimes court. There was also explicit support in the Sevres Treaty of 1920's for the surrender of war criminals by Turkey who were alleged to have slaughtered over one million Armenians, but similarly the Treaty of Lausanne (1923) granted the accused amnesty.<sup>79</sup>

War crimes tribunals became unstoppable in the aftermath of 1945. The Nuremberg and Tokyo international military tribunals prosecuted 22 and 28 war criminals in Germany and Japan respectively after the Second World War. Despite the appeal of international tribunals and courts, states have in the past and presently continue to be wary of giving up their sovereignty by allowing international justice to supplant national courts. In spite of this chary, war crimes punishment remains one of the watershed moments in the New World Order.

As has previously been noted, sovereignty has self-determination as one of its core principles. Self-determination is the people's ability to govern themselves absent external meddling, it's the ability to make their own laws as it suites them and to reject unneeded and unwanted laws.<sup>80</sup> In this regard, the rejection of the ICC, a product of international law, by some sovereign states including U.S, Israel, Iraq, Saudi Arabia and Libya typifies their right to self-determination. The other two permanent members of the Security Council namely China and Russia are yet to ratify the Rome Statute. To these states, the Rome Statute is unneeded in their national life; it would go against their national interests.

Without doubt, ICC like the International Organization is a states' creation. It's hard to imagine the existence of such a court absent deliberate effort by nation states which make the ICC

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<sup>79</sup> Schuett, Oliver. "The international war crimes tribunal for former Yugoslavia and the Dayton peace agreement: Peace versus justice?." *International Peacekeeping* 4, no. 2 (1997): 91-114

<sup>80</sup> Alistair McConnachie: Sovereignty <http://www.sovereignty.org.uk/features/articles/sevensov.html> Accessed April 20, 2015

inextricably intertwined with sovereignty.<sup>81</sup> To be sure, sovereignty greatly influences all aspects of ICC's operations. To begin with, the ICC operates under the complementarity principle which assures national court's relevance, these courts have the first priority to take up cases involving gross violation of international criminal law. The ICC complements national courts and does not seek to replace them, it investigates and prosecutes indicted individuals only when state concerned is either not willing or is unable to do so.<sup>82</sup> In this regard, the ICC observes sovereignty in that it does not supersede a nation's judicial entitlements.

Secondly, the court like its predecessors ICTY and ICTR lacks a police force or a coherent enforcement mechanism which means that it has to depend on state's support to enforce its arrest warrants and to gather needed evidence to make cases against perpetrators. Thirdly its efficacy is greatly reduced by lack of support and barefaced opposition from the hegemon, the US argues that the ICC would nibble away at its sovereignty.<sup>83</sup> These factors will be looked at in detail shortly.

While the ICC entails optional membership, various perspectives will inform an IR scholar that power configuration matters a great deal, and that some state's (hegemons) presence or membership in any international organization is imperative. Major Powers' absence in the League of Nations for example is often cited as one of the organization's inherent weakness. Indeed, the League failed miserably to stop the Second World War unlike its progeny the UN which has avoided systemic turmoil and nuclear annihilation even with the change of polarity upon the Soviet Union implosion due to its universal membership.

Like other international organizations, the ICC is prone to politics which hinders its effectiveness to deter atrocious crimes. In mind here, is its relentless focus on Africa. While Africa has

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<sup>81</sup> Morten B. and Ling Y. State Sovereignty and International Criminal Law, Torkel Opsahl (2012) p. 4-5

<sup>82</sup> See ICC Website Q&A section [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx) accessed may 22, 2015

<sup>83</sup>Ji, Y. "The Politics of Constructing the International Criminal Court, by Michael J. Struett," *Yale Human Rights and Development Journal*: Vol. 12: Iss. 1, Article 7 (2009) p. 281

a long history of civil wars and conflict, it is not the only place where graves crimes are taking place. As of 2014 the court has received over 18 situations yet it has only chosen to pursue the African ones.<sup>84</sup> Out of over 8,000 alleged human rights abuses, the ICC has decided to act on 9 African situations ignoring complaints that might implicate Europeans and North Americans in Iraq, Afghanistan and Gaza.<sup>85</sup>

Due to the absence of the US support, the ICC cannot claim to be truly universal or fair for that matter as perpetrators of war crimes will always point at its selective justice. Many have argued that U.S invasion of Iraq in 2003 amounted to breach of international law as it did so without additional Security Council mandate. If the ICC was truly fair, universal and politics free, it should have inducted US officials involved in the invasion. When Belgium sought to try top ranking US officials if they ever set foot in its soil under the universality principle enshrined in its own constitution in the early 2000s, it was pressured repeal the law by the then Secretary of State Donald Rumsfeld lest it lost the NATO headquarters based in Brussels.<sup>86</sup>

Inasmuch as virtually all countries supported the idea of a permanent International Criminal Court to deal with war crimes wherever they occur, the Rome Statute was out rightly rejected by some states. To compound the objection, it is currently unpopular with a majority of African nations who are state members. Indeed, some like Kenya have already begun the process of pulling out of the Rome Statute. Kenya which ratified the Rome statute in 2005 withdrew from the court in September 2013.<sup>87</sup> The country also tried to rally other African states for a mass withdrawal from the ICC. While Kenya failed to convince them to abandon the court enmass, it succeeded in obtaining support from the

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<sup>84</sup> ICC website, situations and cases [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) accessed May 22, 2015

<sup>85</sup> David Hoile, The International Criminal Court Europe's Guantanamo Bay? (2010) p.5

<sup>86</sup> Human Rights Watch, Belgium: Universal Jurisdiction Law Repealed, <http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed> accessed May 22, 2015

<sup>87</sup> Aljazeera, Kenya parliament votes to withdraw from the ICC <http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html> accessed May 22, 2015



African Union in support of President Uhuru Kenyatta's case deferral.<sup>88</sup> In the aftermath of Kenya's president Uhuru indictment, the African Union voted in June 2014 to grant heads of states and top ranking officials immunity against prosecution by the African Court of Justice and Human Rights, the continent's version of the ICC.<sup>89</sup>

## **2.2 The Complementarity Principle and Universal Jurisdiction**

The ICC though not an organ of the UN was created in the framework of the UN. It was mandated to deal with the most serious crimes through the principle of complementarity, that is, the ICC respects domestic judicial system. The Rome Statute<sup>90</sup> in article 1 states that the court "shall be complementary to national criminal jurisdictions". Complementarity means that the court shall supplement national courts and not seek to replace them. It shall only take up investigations and or prosecutions where domestic courts are either unwilling to bring perpetrators to book or are unable to do so due to institutional weakness.<sup>91</sup> The court therefore gives priority to domestic jurisdiction and does not seek to substitute it. In this sense, the ICC exists and functions not in a universal world government system but in a nation state (sovereign) system.

The notion that sovereignty limits the ICC as opposed to reinforcing it therefore needs careful evaluation in light of this fact. This is in no way denying that sovereign states have undue influence over the courts operations, but merely acknowledging that sovereignty was the basis of the court's inception. Though the court has the powers to exercise jurisdiction on the territory of state members, it can also exercise this right on non-member states with special agreement.<sup>92</sup> The complementarity principle denies the ICC absolute control and discretion on penalties handed down domestically to convicted genocide criminals as this depends on the laws of specific countries.

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<sup>88</sup> BBC, African Union urges ICC to defer Uhuru Kenyatta case <http://www.bbc.com/news/world-africa-24506006> accessed May 22, 2015

<sup>89</sup> The Guardian, African leaders vote themselves immunity from new human rights court <http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court> accessed May 22, 2015

<sup>90</sup> See the Rome Statute of the International Criminal Court

<sup>91</sup> ICC Frequently Asked Questions [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx) accessed May 22, 2015

<sup>92</sup> See supra note 93 at 2

The ICC though not based on Universal Jurisdiction principle seeks to advance global justice like the mentioned principle. Universal jurisdiction is traditional legal principle that allows and or requires states to initiate criminal proceedings in regards to certain crimes regardless of where the crime was committed or the nationality of the perpetrator or the victim.<sup>93</sup> For universal jurisdiction to function effectively, there needs existence of sufficient grounds for universal jurisdiction, clear definition of offence in question and its constitutive elements in addition to national enforcement capacity to exercise jurisdiction over concerned crimes.<sup>94</sup> As such, universal jurisdiction sanctions international crimes trials committed by anybody wherever in the world.<sup>95</sup> This is however easier said than done when the accused is a national of a powerful country as demonstrated by Belgium-US situation.

### **2. 3. Enforcement Mechanism and State Cooperation**

The ICC like the ICTY and ICTR has no autonomous enforcement mechanism and instead has to depend on states' support. The court is dependent on sovereign states good will to pursue accused parties which may not be in the interest of governments due to domestic political dynamics. Thus, governments can withhold decisive assistance needed to investigate and bring suspects to book.<sup>96</sup> Essentially, it is thus inconceivable to have the ICC absent sovereign states, since it's not only a state's creation but also depends on states' support. The process of international justice is suffused into domestic politics of member states as they ultimately impede or expedite the court's operations. International justice is untenable without states' domestic cooperation.<sup>97</sup> While autonomous from the U.N system, the ICC is intricately linked to the U.N Security Council whose support is wanting partly due to the fact that 3 permanent members of the Council are not party to the Rome statute. The

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<sup>93</sup> International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of Universal Jurisdiction in respect of gross human rights offences' (2000) p.2

<sup>94</sup> Xavier Phillippe, *The Principles of Universal Jurisdiction and Complementarity: how do the two principles intermesh?* International Review of the Red Cross, Vol. 68, No. 862 (2006) p. 379

<sup>95</sup> Robinson Mary, 'Foreword' the Princeton Principles on Universal Jurisdiction, Princeton University Press, Princeton, (2001), p. 16

<sup>96</sup> Goldsmith, Jack. "The Self-defeating International Criminal Court." *The University of Chicago Law Review* (2003): 89-104.

<sup>97</sup> Victor Peskin & Mieczysław P. Boduszynski (2003) International justice and domestic politics: post-Tudjman Croatia and the international criminal tribunal for the former Yugoslavia, *Europe-Asia Studies*, 55:7, 1117-1142,

Security Council can enforce a decision by the ICC relating to arrest and prosecution of suspects, but let's not forget that Security Council is also made of sovereign states that are out to advance their interests.

The Pre-trial Chamber on August 27, 2010 informed the Security Council of Omar Al Bashir's (the indicted president of Sudan by the ICC on counts of genocide, war crimes and crimes against humanity in the Darfur region) planned visit to Kenya, Chad and Djibouti so that these states would take deemed appropriate measures.<sup>98</sup> Bashir successfully visited the mentioned countries and was not arrested as the Rome statute requires of state members. To date, the Security Council has taken no action at all on this matter; it can thus be argued that even the Security Council has not guaranteed ICC its judicial cooperation.<sup>99</sup> Sovereignty as is clearly evident hitherto does obstruct ICC's operations.

Regarding state cooperation, the ICC has severally accused states members of not fully cooperating as the Rome statute demands. In withdrawing Mr. Uhuru's case, the ICC prosecutor Fatou Bensouda accused Kenya of withholding vital evidence that was instrumental in prosecuting their president.<sup>100</sup> The prosecutor noted that without this evidence she was not able to sustain a case and that the Kenyan state had consistently refused to avail the data not to mention deaths of key witnesses in the case. Similar scenario was played out in the DRC where prior to giving himself up in 2013, Bosco Ntaganda who had already been indicted by the ICC was seen in 2009 in Ngoma with the then minister of interior together with Congolese military officers, the government even went ahead to state that peace would best obtained if Ntaganda was free.<sup>101</sup>

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<sup>98</sup> Coalition for the International Criminal Court, President Al-Bashir's visit to Kenya, <http://www.iccnw.org/?mod=newsdetail&news=4356> accessed May 22, 2015

<sup>99</sup> Paola Gaeta, "Does President Al Bashir Enjoy Immunity From Arrest?", in *Journal of International Criminal Justice*, vol. 7, May 2009, pp. 315-332.

<sup>100</sup> ICC Press Release of December 05, 2014 [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx) accessed May 22, 2015

<sup>101</sup> Gegout, Catherine. "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace." *Third World Quarterly* 34, no. 5 (2013): 800-818.

## 2.4. Opposition from Major Power (United States)

Though the idea of universal jurisdiction is an attractive one, it runs into problems when those accused of grievous human rights violations are from a major power. The U.S. in particular has opposed the ICC asserting that such a body would be used for political reasons to bring U.S. civilian and military authorities to trial.<sup>102</sup> The opposition of the US to the Rome Statute was least expected and perhaps even surprising. The US up to the crystallization of the Rome statute had been instrumental in the culmination of the court. The US was heavily involved in championing an international criminal court more so in the early 1990s when it was involved militarily in many conflicts, at this time the US would have favored prosecuting individual leaders of enemy states.<sup>103</sup> As a clear example, the Clinton Administration strongly supported the idea of an international court prior to the Rome Conference.<sup>104</sup>

As stated, the opposition by the US to the ICC stems from the fear that the court would infringe on national sovereignty and that it'd be used for political reasons against its citizens. The argument does not hold water seeing that the ICC operates on the principle of complementarity which gives prominence to local courts and only steps in when such courts are unwilling or cannot effectively investigate and prosecute accused perpetrators. The United States opposition became specifically apparent when it indicated that it saw numerous flaws in process of creating the Rome statute more so in the last 48 hours of the conference. The proposals which the US delegation had submitted was largely ignored, instead the treaty was as a result closed door bargaining by an exclusionary cluster of like-minded group.<sup>105</sup> Moreover, the US sought to have a Security Council ICC which was vehemently opposed by the other members. The rationale behind US rejection of the court was that as the

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<sup>102</sup> Global Policy Forum, US Opposition to the International Criminal Court <https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc.html> accessed May 22, 2015

<sup>103</sup> Ji, Yuan. "Book Review: The Politics of Constructing the International Criminal Court, by Michael J. Struett." *Yale Human Rights and Development Law Journal* 12, no. 275 (2009).

<sup>104</sup> Scheffer, David J. "The United States and the International Criminal Court." *American Journal of International Law* (1999): 12-22.

hegemon, it was expected to be involved in multiple humanitarian interventions in the world which would expose its military personnel and officials to undue victimization by the court.<sup>106</sup> Viewed objectively however, it would appear that the United States was concerned more with a political rather than a judicial international criminal court.

## **2.5 Bilateral Immunity Agreements (BIA)**

Article 98 (2) of the Rome Statute<sup>107</sup> allows for non-extradition of accused individuals to the court where an accused is a citizen of another country which has an international agreement with the concerned state. Therefore, where country A and B have a bilateral agreement not to send A's citizens to the ICC without A's consent, the ICC cannot request B to extradite a citizen of A accused of serious crimes unless it seeks surrender of the accused from A. The US did not only oppose the ICC but it also went ahead to neutralize and undermine the court's mandate. This has far reaching consequences for international justice than it would ordinarily seem. As Krasnor notes, the US opposition to the ICC undermines the ability of democracies in transition and fragile states to bring their domestic judicial standards into universal legal standards as pronounced in the Rome statute.<sup>108</sup>

The US has in the years following the establishment of the ICC become active in hindering the effective operation of the court. Immediately after the Rome Statute was established, the Bush administration started approaching countries with the aim of signing Bilateral Immunity Agreements (BIAs). The BIA's which may or may not be reciprocal have no obligation on the part of the US to investigate or prosecute the people in question, they have been seen as contravening international law.<sup>109</sup> The US has used its power to arm-twist weaker states into signing BIA's by denying them

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<sup>106</sup>Scharf, Michael P. *Results of the Rome conference for an international criminal court*. 2000.

<sup>107</sup>Rome Statute of the International Criminal Court Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

<sup>108</sup>Krasnor Emily Undermining international law by opposing the ICC, *Peace Review: A Journal of Social Justice*, 16:3, (2004),p.323-329

<sup>109</sup>Coalition for the International Criminal Court-Overview of United States' Opposition to the International Criminal Court <http://www.iccnw.org/?mod=bia>

military assistance if they don't comply; over 100 countries have signed these kinds of agreements.<sup>110</sup> The U.S has also pressured weaker countries into signing agreements that ensure U.S citizens' immunity from ICC in those countries as a precondition for accessing American aid.<sup>111</sup> Not all signings have been constitutionally recognized by concerned states. By 2006 the US State Department had approximately 102 concluded agreements, out of which only 21 had been ratified by parliaments of concerned states.<sup>112</sup>

## 2.6 European Union and ICC

Unlike the US which opposes the ICC, the EU has been a staunch supporter of the court since its inception. While the Rome statute is not binding to the EU, the union's interests are best enhanced by ratification of the treaty by all its member states.<sup>113</sup> So far all but one member of the EU have ratified the Rome treaty.<sup>114</sup> The EU had strongly supported the ICC establishment and had worked tirelessly over the years, it funded organizations that advocated for its creation, presently, Europe as a whole has a common position to this effect.<sup>115</sup>

The ICC is not the only body that the EU has backed; it was one of the strongest supporters of ICTY in 1993 and ICTR in 1994 both in terms of finance and operations.<sup>116</sup> Europe's support of the court continues to date and has emerged as one of the divisive factors between the US and the EU. Objectively speaking it's unimaginable to have the ICC without Europe's support. The form the ICC drew from Rome was distinctly European; the court by any measure is a European Union project.<sup>117</sup> The 60 ratifications required for the creation of the court were obtained due to Europe's support. In his

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<sup>110</sup> Ibid.

<sup>111</sup> Wylie, Lana. "The United States, the International Criminal Court, and Bilateral Immunity Agreements: Explaining the Resistance of Weak States and Consequences for American Foreign Policy" [http://www.allacademic.com/meta/p69961\\_index.html](http://www.allacademic.com/meta/p69961_index.html). Accessed May 22, 2015

<sup>112</sup> ICC Now, Status of Bilateral Immunity Agreements (BIAs), [http://www.iccnw.org/documents/CICCFBS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFBS_BIAstatus_current.pdf). Accessed May 20, 2015

<sup>113</sup> See supra note 76

<sup>114</sup> European Commission External Relations, The international Criminal Court & the Fight Against Impunity [http://ec.europa.eu/external\\_relations/human\\_rights/icc/](http://ec.europa.eu/external_relations/human_rights/icc/) Accessed may 20, 2015

<sup>115</sup> Chris Patten, *Not Quite the Diplomat*, Penguin Books, London, (2006), p.309.

<sup>116</sup> Wouters J The Creation of a Global Criminal Justice System: The European Union and the International Criminal Court (2009) p. 6

<sup>117</sup> Rosenthal, John, "A Lawless Global Court: How the International Criminal Court Undermines the U.N. System", *Policy Review*, Hoover Institution, Stanford University, (2004).

address to the European Parliament, the then president of the ICC, Judge Sang-Hyun Song noted that the European parliament was particularly instrumental in the creation of the court; it mobilized forces that fashioned the ICC.<sup>118</sup>

The process of EU formation has undoubtedly meant loss of sovereignty to some degree of its member states. Perhaps this partly explains why the EU is the strongest ICC supporter. Another reason could be that the horrors of the two major world wars took place in Europe which predisposes Europeans to support such a court to ensure such events do not recur. The EU's commitment to the court is unmistakable; it seeks to cooperate with the court to prevent crimes under ICC jurisdiction putting an end to impunity by holding perpetrators accountable.<sup>119</sup> The EU has adopted a common position on the ICC which supports the effective running of the international court and to advance its universal backing.

The EU does this through political dialogue, making support statements in multilateral bodies like the UN to spread knowledge of ICC rules and principals and by assisting countries that may possess political will to ratify the Rome statute but lack expert or financial capacity. In a bid to encourage widespread implementation and ratification of the Rome statute, the EU presidencies have targeted over 110 countries and international organizations since ICC's inception in 2002 by carrying out demarches (275 in total) which translates into around 60 per year.<sup>120</sup>

## **2.7 EU Financial Support**

The EU has demonstrated its commitment to international justice through financial support to Countries and other international organizations that promote international justice. It supported Rwanda in bringing healing to the country after the 1994 genocide which led to the creation of ICTR. The EU through the European Development Fund (EDF) financed the operations of the ICTY significantly

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<sup>118</sup>Song, Sang-Hyun, "International Criminal Court and the European Union: Challenges for the Promotion of International Justice and the Fight against Impunity", 2009 (200) p. 5

<sup>120</sup> Ibid. 10

from year 2000-2008.<sup>121</sup> This support has continued and from 2008 and 2013 EDF allocated 290 million Euros to Rwanda.<sup>122</sup> The EU through budget line B&-707 supported operations of international criminal tribunals in former Yugoslavia and Rwanda and the formation of the ICC, overall EUR 3.3 was designated for these activities.<sup>123</sup> The budget line financed among others, training of staff in area of gender mainstreaming.

It's the undue funding of the ICC by the EU that has led some observers to note that the power configuration of the court is driven by deep pockets. The four biggest funders of the ICC including Italy, Britain, France, and Germany dominate the court and control its power as they do the power of the EU.<sup>124</sup>

## 2.8 Palestine-Israel and the ICC

Palestinians have long endured human rights violations under Israeli occupation. The status of Palestine for the longest time has not been that of a state which meant that it could not have joined the ICC to pursue war crimes committed by Israel. In July 23, 2003 Israel dropped a one-tonne bomb on an apartment housing Hamas Leader Salah Shehada in Gaza killing him and other 15 civilians.<sup>125</sup> This was widely touted by many as the first war crime since the establishment of the ICC, but without recognition of Palestine no action was taken.

The Palestinian leadership is partly to blame for this state of affairs as well. The Palestinian authority has severally sacrificed legal opportunities to force Israel's compliance with the international humanitarian law choosing instead access to international funding and political expediency.<sup>126</sup> The Palestinian authority in 1999 choose to postpone a meeting of 103 out of the 188 signatories of the

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<sup>121</sup> Davis, Laura. "The European Union and Transitional Justice." *Initiative for Peacebuilding* (2010): 7, p. 81

<sup>122</sup> EU Geographic Partnership,

[http://ec.europa.eu/development/geographical/regionscountries/countries/country\\_profile.cfm?cid=rw&type=short&lng=en](http://ec.europa.eu/development/geographical/regionscountries/countries/country_profile.cfm?cid=rw&type=short&lng=en) Accessed may 22, 2015

<sup>123</sup> European Commission, European Initiative for Democracy and Human Rights, <https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?ADSSChck=1380592331213&do=publi.getDoc&documentId=23185&pubID=110281>. Accessed May 22, 2015

<sup>124</sup> New Africa Magazine, Europe, Masters behind the ICC,

[http://webcache.googleusercontent.com/search?q=cache:Yc6O\\_JqpXtgJ:https://webgate.ec.europa.eu/europeaid/online-services/index.cfm%3FADSSChck%3D1380592331213%26do%3Dpubli.getDoc%26documentId%3D23185%26pubID%3D110281+&cd=1&hl=en&ct=clnk](http://webcache.googleusercontent.com/search?q=cache:Yc6O_JqpXtgJ:https://webgate.ec.europa.eu/europeaid/online-services/index.cfm%3FADSSChck%3D1380592331213%26do%3Dpubli.getDoc%26documentId%3D23185%26pubID%3D110281+&cd=1&hl=en&ct=clnk) Accessed may 22, 2015

<sup>125</sup> King-Irani, Laurie. "Exiled to a liminal legal zone: are we all Palestinians now?." *Third World Quarterly* 27, no. 5 (2006): 923-936.

<sup>126</sup> *ibid*



1949 Geneva Convention aimed at pressuring Israel to comply with international law in exchange for a US led campaign aimed at avoiding quarrels with the incoming Ehud Barak's administration.

Following continued blatant violations of international law by Israel, the Palestinian authority in 2011 sought to internalize the conflict by joining international treaties and organizations. It made application to UN membership, acquiesced accession to Geneva Conventions, United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Health Organization.<sup>127</sup> Back in 2009, the government of Palestine had lodged a declaration allowing the ICC jurisdiction to look at violations committed after the inception of the court July 1, 2002.<sup>128</sup> However, since the ICC does not operate on the universal jurisdiction principle and can only rely on the UN Security Council and states for jurisdiction, the situation in Palestine festers. UNESCO and over 100 countries have recognized Palestine as a state while the General assembly gave Palestine an observer status.

Israel opposed the Rome statute during the Rome conference and is thus not a member. The ICC despite being set up to end impunity is severely constrained by its very nature. Going to the Security Council to have jurisdiction in Palestine would be an automatic failure as the hegemon would veto such moves to protect Israel its strongest ally. It is not entirely clear why an update released by the office of the prosecutor of the ICC designated Palestine as not being a state notwithstanding that by then it was a member of UNESCO, a UN organization whose members comprise states. Palestine on January 2 2015 acceded to the Rome Statute through depositing its accession instrument with the UN Secretary General. Accordingly Fatou Bensouda, Prosecutor of the ICC opened preliminary examination of Palestine situation.<sup>129</sup>

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<sup>127</sup> Azarov, Valentina. "An international legal demarche for human rights? Perils and prospects of the Palestinian UN bid." *The International Journal of Human Rights* 18, no. 4-5 (2014): 527-544.

<sup>128</sup> The Office of the Prosecutor Situation in Palestine p. 1

<sup>129</sup> ICC, the Situation in Palestine, [http://www.icc-cpi.int/EN\\_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx](http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx) Accessed may 22, 2015

## 2.9 Non-Governmental Organizations (NGOs) and ICC

Non-Governmental Organizations (NGOs) had a central role to play in the formation of ICC and its predecessors. The ubiquity of NGOs in the Rome conference remains one of the enduring sites of the process of forming an international criminal court.<sup>130</sup> The conference had 236 NGOs with a combined workforce of 450 who though were not in the negotiation table, made the biggest delegation<sup>131</sup> During the Rome Conference, multitudes of activists drawn from United Nation's NGOs delivered aggressive advocacy to national governments in support of the court.<sup>132</sup> NGOs had a pivotal role to play in supporting the ICC during its nascent days by: Setting the agenda, facilitating ratification of the Rome statute by member states, providing organizational expertise and by supporting persistent development of the court.<sup>133</sup> The role of NGOs was so prominent that some critics of the ICC have rightly pointed out that the Rome statute was created by more NGOs than nation states. As a matter of fact, a few NGOs came together in 1995 to form NGO Coalition for an International Criminal Court (CICC) which now comprises in excess of 2,500 NGOs globally united by the support for international criminal court.<sup>134</sup>

To be sure, NGO's involvement in the ICC was not limited to its nascent years. They continue to exert pressure to the court to take up investigations where violation of international criminal law is deemed to have occurred. Indeed, they were instrumental in calling for the ICC to look into Sudan, Kenya and Israeli-Palestinian cases.

## 2.10 ICC and Nationalistic Backlash

Nationalism which in its basic sense presages love for one's country has a significant role in the functioning of the ICC. Nationalism has in its description dual aspects of attitude towards national

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<sup>130</sup>Rivkin, David B and Lee A. Casey. "The rocky shoals of international law." *The National Interest* (2000): 35-45.

<sup>131</sup>Strapatsas, Nicolaos. "The European Union and its Contribution to the Development of the International Criminal Court." *RDU* 33 (2002): 399-399.

<sup>132</sup> The New American The ICC's "Philanthropists": The Usual Suspects, <http://www.thenewamerican.com/usnews/foreign-policy/item/1494-the-iccs-philanthropists-the-usual-suspects> Accessed May 22, 2015

<sup>133</sup> Barrow K. The Role of NGOs in the Establishment of the International Criminal Court (2004) p. 16

<sup>134</sup> Global Policy Forum, NGOs and the International Criminal Court <https://www.globalpolicy.org/ngos-and-the-international-criminal-court.html> accessed may 22, 2015

identity and the actions taken by members of a nation to attain or maintain their self-determination.<sup>135</sup> The love and loyalty for one's country has undeniably caused individuals to indulge in horrendous crimes in violation of international law. The Nazi regime in Germany responsible for orchestrating mass atrocities no doubt had aspects of nationalism at its core. Ward sees dysfunctional nationalism as the source of horrors that have plagued mankind's history.<sup>136</sup> Nationalism has been one of the most serious challenges facing criminal war crimes tribunals and presently the ICC. The inherent universality the two institutions imply appears as imposition of their will on sovereign peoples who fully understand their right to self-determination. Consequently, inevitably, they have been met with a certain degree of resistance.

Nationalism is linked to normal human feelings; it's about human emotions, attachment to a place, community, language, country and the cynicism of stagers, and abhorrence of oppressors.<sup>137</sup> Nationalism brings to mind images of brutality and violence, the French and American revolutions are thus associated with suffering and destruction despite the fact that they gave rise to the modern democratic states. Bloody war of independence from the Spaniards and Portuguese are synonymous with South American history, indeed many see National Socialism and Hutu radical nationalism as the essence of the Holocaust and Rwandan genocide.<sup>138</sup>

Others have viewed nationalism as inherently violent, this comes from the perceived fact that humans are naturally violent and inescapably attached to their nation, and as such they are predisposed to use violence where competing national interests arise. But this view has been challenged by recent scholarly work that instead sees nationalism as a historical contingent. New studies show that nationalism is a phenomenon of the last 3 centuries and could never exist in empires, composite

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<sup>135</sup> Miscevic Nenad Nationalism The Stanford Encyclopedia of Philosophy (2014)

<sup>136</sup> I. Ward, *Justice, Humanity and the New World Order* (2003), p. 18.

<sup>137</sup> Ben Israel, Hedva. "Talmon on Nationalism." *History of European Ideas* 34, no. 2 (2008): 189-196.

<sup>138</sup> Siniša Malešević Is Nationalism Intrinsically Violent?, *Nationalism and Ethnic Politics*, 19:1, (2013) 12-37, 13

kingdoms or city states as these ancestors of the nation state used cultural differences in a vertical sense.<sup>139</sup>

Shaw observes that without the apparatus of the state including the military and the police with the contribution of political parties, intelligence services and paramilitary to organize and execute genocides, genocide could never occur, absent modern state.<sup>140</sup> According to Roberts<sup>141</sup> the efficacy of the ICC and its predecessors is faced with the reality that to deal with nationalistic backlash encountered in rehabilitating a conquered enemy state requires decisive military commitments. In addition, changing public attitudes towards their defeated leader needs to show leader's stupidity and weakness; it should also deflate leader's prestige and humiliate them by having them standing accused in the docks. This however only works in situations where there is national wide demonization of a leaders philosophy e.g. Germans opposition to Nazism. Otherwise, attempts to reform a former enemy state is perceived as punitive and is likely to arouse opposition to such an attempt.

## **2.11 Victor's Justice and Nationalism**

The question of victor's justice permeates international criminal tribunals and courts. Nuremberg and Tokyo trials epitomized selective justice, they were meant to punish the defeated axis only, oblivious of the dire crimes that the allies had committed in bombing civilian targets in Japan and Europe.<sup>142</sup> The Nuremberg Tribunals were created by the victors to prosecute the losers.<sup>143</sup> The two tribunals stoked heated debate with proponents citing the horrendous crimes committed by Japan and Germany as deserving legal remedy to advance international law. Detractors however, were less enthusiastic pointing to the numerous legal shortcomings and the selective manner justice was sought.

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<sup>139</sup>Ibid at 20

<sup>140</sup>Shaw, Martin. *War and Genocide: Organized killing in modern society* Cambridge, (2003) p.10

<sup>141</sup>Roberts, Guy. "Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court." *American University International Law Review* 17, no. 1 (2001): 35-77.

<sup>142</sup>Robertson, Geoffrey. *Crimes against Humanity: The Struggle for Global Justice* the New Press, 2006.

<sup>143</sup>Adams E. War is A Crime .org, 'Were the Nuremberg Tribunals Only Victors Justice?' <http://warisacrime.org/content/were-nuremberg-tribunals-only-victors-justice> accessed May 26, 2015

In particular, criticism has been directed to jurisdiction, selectivity and retroactivity.<sup>144</sup> Retroactivity skepticism has to do with newly introduced crimes of crimes against peace and crimes against humanity.<sup>145</sup> The crimes against peace in particular stirred up the most controversy due to the *illumcrimen sine lege* (no crime without law) and *nullapoena sine lege* (no punishment without law) law principles. Generally, crimes by aggressors more often than not overshadow crimes committed by the victims. To ensure that justice was meted to all victims of war crimes no matter which side they were on, the ICTY and ICTR were to be completely partial. This was emphasized by the then US secretary of state, Madeline Albright who said that the two tribunals would not be perpetuating victor's justice.<sup>146</sup> The fact that the both ICTY and ICTR were a UN creation exonerated them from victor's justice in the sense that the organization was more credible than the alliance which was a party to the Second World War.

Selective justice proponents realistically point out that it's better than no justice at all. These scholars see the truth in the impossibility of having a court that could treat the powerful and the weak as equals. To some extent, this view does hold water, though uniform justice sounds desirable in theory, achieving it is a different ball game altogether. It would be wonderful to have a court that could exercise justice in equal measure to the weak and powerful states to end impunity, but attainment of such comprehensive impartiality may never materialize.<sup>147</sup> Indeed, international justice like international law finds itself greatly influenced by great powers. Overall, moral based institutions are prone to reflect the beliefs of the current prevailing great powers as opposed to reflecting the general shared global values.<sup>148</sup> Similarly some have questioned the efficacy of global

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<sup>144</sup>Sellars Kirsten, Imperfect Justice at Nuremberg and Tokyo, *The European Journal of International Law*, Vol. 21 no. 4 (2011) p. 1089

<sup>145</sup>Mettraux, *The Nuremberg Trial and the Modern Principles of International Criminal Law* (1947), p. 227

<sup>146</sup>Scharf, Michael P. *Balkan justice: The story behind the first international war crimes trial since Nuremberg*. Carolina Academic Pr, (1997).

<sup>147</sup>Gay Bass, *Stay the Hand of Justice: The Politics of War Crimes Tribunals*, (2002), p 329-333

<sup>148</sup>Bull, Hedley. "The Anarchical Society: A Study of World Order." *World Politics* (1977), 304

justice institutions in delivery of global justice. The global tribunals have done more to hinder attainment of justice than to promote it.<sup>149</sup>

## 2.12 Nationalism in the Former Yugoslavia

The creation of ICYT on 25<sup>th</sup> May 1993 through a unanimous Security Council Resolution 827 came two years before the end of the war. Its mandate was to try the people who had orchestrated grievous international humanitarian law violations in the former Yugoslavia since 1991.<sup>150</sup> ICTY mandate was to prosecute war criminals and offer justice to victims. In essence it was meant to hold individuals criminally responsible for collective crimes so that groups could not be blamed for such heinous crimes.

Ratko Mladic the former Bosnian Serb military leader and Bosnian Serb Army [VRS] commander was accused of orchestrating the Srebrenica genocide in Sarajevo 1995.<sup>151</sup> The Srebrenica massacre killed about 7,500 men and boys in the Bosnian town. Mladic was arrested on May 28, 2011 after 16 years on the run and five days later he was extradited to the ICTY in The Hague.<sup>152</sup> Following his arrest, spontaneous demonstrations took place in Belgrade the Serbian capital and approximately 10,000 of his nationalist's supporters took to the Republic Square saying that the government had committed treason by arresting him.<sup>153</sup> Additional 3000 supporters demonstrated in Bosnia to assert that he was not only their savior but also their protector in the civil war.<sup>154</sup>

Notwithstanding, these demonstrations were smaller and less pronounced than previous show of Serbian nationalism.<sup>155</sup> In her address of the Security Council, Carla Del Ponte, prosecutor of the ICTY on 15 December 2006 expressed her frustration with Serbian government for harboring Mladic

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<sup>149</sup>Graubart Jonathan Rendering Global Criminal Law an Instrument of Power: Pragmatic Legalism and Global Tribunals, *Journal of Human Rights*, 9:4, 412

<sup>150</sup>International Criminal Tribunal for the former Yugoslavia [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) April 14, 2015

<sup>151</sup>International Tribunal for the Former Yugoslavia <http://www.icty.org/sid/10678> Accessed April 14, 2015

<sup>152</sup>The British Broadcasting Corporation <http://www.bbc.com/news/world-europe-13561407> accessed May 18, 2015

<sup>153</sup>Leoni A. The Hague Justice Portal, *The Arrest of RatkoMladic and its Consequences for the Process of Admission of Serbian to the EU* <http://www.haguejusticeportal.net/index.php?id=12838> accessed May 33, 2015

<sup>154</sup>British Broadcasting Corporation <http://www.bbc.co.uk/news/world-europe-13589771> April 14, 2015

<sup>155</sup>Mendez J.E. *The Arrest of RatkoMladic and Its Impact on International Justice*, p. 90

and called for stronger message to be passed to Serbia and Bosnia Herzegovina to deliver the fugitives Karadzic and Mladic.<sup>156</sup> The Serbian state was seriously hunting down Mladic while he continued to glee in military salary and annuity.<sup>157</sup>

Though the ICTY has existed for over a decade and a half, it has not managed to root out the nefarious nationalism that led to ethnic cleansing in the former Yugoslavia. Vojislav Seselji, a Serbian nationalist, politician and an accused war criminal by the ICTY after being released last December on humanitarian ground due to his failing health told a rally in Belgrade that absent a greater Serbia, his Serbian Radical Party had no point in existing.<sup>158</sup> Such bold remarks from someone still undergoing trial for atrocious crimes point to the ubiquitous ineffectiveness of intervention and the fragile nature of ethnic relations in that region decades after ICTY formation. Indeed, less than two decades after the Yugoslavian civil war, the international community appears to have forgotten painful lessons drawn from Serbian nationalism that totally ignores the region's stability.<sup>159</sup>

The Congress of North American Bosniaks (CNAB) highlights the nationalistic backlash of the ICTY. VukJeremic, a former Serbian Foreign Affairs Minister and the present president of the UN General Assembly has sought to organize a conference to assess the role of International Criminal Justice in Reconciliation. CNAB see this as a blatant attempt to take vengeance on the ICTY for its prosecutions of war criminals in the former Yugoslavia, undermine ICTY's continuing role and endorse revisionist history.<sup>160</sup>

### **2.13 ICC and Nationalism in Kenya**

Similarly, nationalistic backlash towards the ICC has also been observed in Kenya. Far to the consternation of international observers though not surprising to many Kenyans, Mr. Uhuru and Ruto

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<sup>156</sup> Carla Del Ponte Address to the Security council on the International Criminal Tribunal for the former Yugoslavia [http://www.icty.org/x/file/Press/PR\\_attachments/p1137e-annex.htm](http://www.icty.org/x/file/Press/PR_attachments/p1137e-annex.htm) (2006)

<sup>157</sup> Balkan Witness: Articles on Serbian Nationalism and Serbian Anti-nationalism <http://balkanwitness.glypx.com/serbiannationalism.htm> accessed May 22, 2015

<sup>158</sup> SETimes [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2014/12/08/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2014/12/08/feature-01) April 14, 2015

<sup>159</sup> The Congress of North American Bosniaks (CNAB) <http://www.bosniak.org/press-release-regarding-dangerous-serbian-nationalist-rhetoric-and-attacks-on-victims-of-genocide-in-bosnia-and-herzegovina/> accessed March 12, 2015

<sup>160</sup> *ibid*

employed nationalist rhetoric rooted in the view that the ICC victimizes Africa and that it dishonorably targeted their two communities, Kalenjin and kikuyu.<sup>161</sup> Mr. Kenyatta accused the ICC of meddling in Kenya's domestic affairs gaining him nationalist support among the electorate during the 2013 presidential elections.<sup>162</sup> Nationalistic rhetoric garnered more force when the US, Britain, and the European Union made it clear before Kenya's 2013 general elections that their policy could not permit them to meet with people indicted at the Hague based ICC save for "essential" matters.<sup>163</sup> According to Abdullahi Halakhe a Horn of Africa analyst, the nationalistic rhetoric was a contradiction which no one dared expose to the multitude that was unaware of its object<sup>164</sup> He continues to note that The Uhuru-Ruto campaign used nationalist rhetoric demonizing the ICC as an international conspiracy and people gladly consumed it without making sense of the motives behind it.

The nationalistic support behind the two inducted individuals, Uhuru Kenyatta and William Ruto does underscore an important point regarding ICC and international law in general. That international law to some extent embodies imposition of western type liberal thought to other communities with divergent values and traditions.<sup>165</sup>

## **2.14 Summary**

The ICC having been formed by states with the participation of NGOs relies heavily on states. The members of the court are states, the personnel of the court are drawn from various states, its funding is done largely by states, and it depends on the Security Council for non-state member referrals. It's inconceivable thus not to expect the court to be heavily influenced by sovereignty. NGOs though not having the same sovereign status of a state have had a big influence on the court. They are

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<sup>161</sup> Crisis Group Policy Briefing no.94, Kenya after elections p.8

<sup>162</sup> British Broadcasting Corporation ICC drops Uhuru Kenyatta charges for Kenya ethnic violence, <http://www.bbc.com/news/world-africa-30347019> accessed may 20, 2015

<sup>163</sup> The Christian Science Monitor, <http://www.csmonitor.com/World/Africa/2013/0310/Indicted-abroad-for-crimes-Kenya-s-new-leaders-pose-diplomatic-dilemma> March 17, 2015

<sup>164</sup> *ibid*

<sup>165</sup> Butt Daniel, "Victors Justice? Historic Injustice and the Legitimacy of International Law, Legitimacy, Justice and Public International Law, Cambridge University Press, 2009 p. 20



the champions of human rights, humanitarian law and international criminal law and thus their participation in the court affairs is given. Overall, the ICC seems to suffer more damage from sovereignty than the benefits sovereignty accrues to it.

## **CHAPTER THREE**

### **3.0 KENYA'S PRESIDENT UHURU'S SUBMISSION TO THE ICC AND SOVEREIGNTY IMPLICATIONS**

#### **3.1 Introduction**

The preceding chapter presented an in-depth analysis of the role of sovereignty and nationalism on the working of the ICC. It observed that the ICC being a states' creation cannot really operate autonomous of sovereign states. As a result, world politics largely affects the court leading some observers to conclude that it's a court of the powerful meant to dominate the weak. The court's sole focus on Africa has only served to reinforce this belief eliciting disdain and non compliance by member states in the continent. The absence of the three permanent members of the Security Council; China, US, and Russia has diminished the court's status internationally. Nationalism, a trait of sovereignty was observed as inhibiting the court's quest for global justice in no small way.

This chapter will assess sovereignty implications of the first ever submission of a sitting head of state to the ICC in connection to the 2007-2008 electro violence in Kenya. The chapter will try to ascertain if Mr. Kenyatta's submission to the ICC on October 8, 2014 undermined Kenya's sovereignty. The submission was unprecedented and was seen as ICC's initiation, the final triumph of internationalism over sovereignty. As the sitting head of state, the presidency represents a degree of sovereignty bestowed on the office holder by the citizens. Under the principle of state sovereignty, no state can subject another state to foreign jurisdiction without prior consent of the accused state. This and the doctrine of sovereign equality has ensured that the multistate system survives. Under customary international law, states and heads of states have immunity against prosecution. With the evolution of international law however, sovereignty and immunity are no longer absolute.

### 3.2 Head of State Prosecution

The conception of sovereignty in 1648 connoted a state's right to absolute authority over its territory without external interference. Initially, the state and the head of state were synonymous, both immune from any jurisdiction as epitomized by the French King Louis XIV and his famous statement "L'état c'est moi."<sup>166</sup> There was no distinction between sovereign state and head of state immunity as many countries did not see the need of such distinction, public and private acts of head of state and states were considered to enjoy absolute immunity.<sup>167</sup> With the rise of restrictive sovereign immunity, which distinguishes public from private acts, states recognized that differentiating between head of state and state immunity was important and as such the two are now distinct entities. States have since reconsidered the degree to which functional necessity and sovereign equality necessitates head of state immunity more so against violation of jus cogens/peremptory norms. Indeed, states now agree that absolute head of state immunity would seriously constrain bringing to justice violators of international criminal law.<sup>168</sup>

World over, independent states have heads of state. In some monarchies, monarchs are the sovereign power while in republics and democratic nations the people are sovereign and the president is but their representative.<sup>169</sup> As such, while the office of the president does not insinuate absolute sovereignty, it's symbolic of a state's sovereignty. The president goes beyond a state's personification; s/he embodies and represents that state's sovereign power.<sup>170</sup> Under the sovereign equality principle on which the current international organization is founded therefore, a sovereign state cannot be subjected to the legal process of another.

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<sup>166</sup> Ian Sinclair, "The Law of Sovereign Immunity: Recent Developments", (1980-II) 167 RdC 113, p.198

<sup>167</sup> Peter Malanczuk, "Akehurst's Modern Introduction to International Law" 7th ed. (1997), 118

<sup>168</sup> Hari M. Osofsky, Domesticating International Criminal Law: Bringing Human Rights Violators to Justice, 107 YALE Law Journal 191,(1997) 206

<sup>169</sup> Sir Watts Arthur Max Planck Encyclopedia of Public International Law, Oxford Public International Law (2010)

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418?prd=EPIL> Accessed August 9, 2015

<sup>170</sup> Sir Watts Arthur Max Planck Encyclopedia of Public International Law, Oxford Public International Law (2010)

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418?prd=EPIL> Accessed August 9, 2015

The head of state immunity has its origins from when sovereign immunity and a state's ruler were regarded as one and the same thing.<sup>171</sup> While the head of state is no longer equal to the state, heads of states have immunity under customary international law. Head of state immunity can be viewed as attaining the dual goal of sovereign and diplomatic immunity, it recognizes that the head of state is the symbol of his/her states' sovereignty and independence in addition to making sure that s/he is not in no way inhibited from carrying out his/her diplomatic duty.<sup>172</sup>

The rise of international criminal law embodied in the various war crimes and military tribunals has eroded head of state immunity. The Rome statute Article 27 (1) states...does not recognize the official capacity, head of state or not, of anyone accused of serious international crimes.<sup>173</sup> To emphasize the erosion, an interesting case was observed in the US in the late 1980s and early 1990s. Manuel Noriega, the defacto leader of Panama was arrested by American forces at the Vatican embassy in Panama where he had sought political asylum after Guillermo Endara, the democratically elected president announced the formation of a government. Endara sought American assistance to remove Noriega, who was the then Commander-in-Chief of Panama Defense Forces from power.<sup>174</sup> On December 20<sup>th</sup> 1989, the Bush administration sent over 11,000 forces to argument the 13,000 strong American force already in Panama in an Operation 'Just Cause' to arrest Noriega.<sup>175</sup>

Earlier in February 14<sup>th</sup> 1988, a federal grand jury in Florida indicted Noriega with 12 counts of criminal enterprise, engagement in violation of racketeering and drug laws of the US while he was still the commander of Panama Defense forces.<sup>176</sup> He was alleged to have involvement in international criminal groups that imported cocaine and cocaine manufacturing equipment to the US. Noriega claimed head of state immunity which the court rejected on the basis that his activities were private

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<sup>171</sup> Jerrold L. Mallory, Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings, 86 Colum. L. Rev. (1986) 169, 170

<sup>172</sup> Tunks Michael A. Diplomats or Defendants? Defining the Future of Heads of State Immunity (2000) p. 654

<sup>173</sup> See Rome Statue Article 27(1)

<sup>174</sup> Conley Willam J, Operations "Just Cause" and "Promote Liberty" The Implications of Military Operation toher Tan War, Small War Journals (2001) p. 8-15

<sup>175</sup> Cole, Ronald H. Operation Just Cause, The Planning and Execution of Joint Operations in Pananama February 1988-January 1990 p. 27-42

<sup>176</sup> OpenJurist, 117 F. 3d 1206 - United States v. Noriega <http://openjurist.org/117/f3d/1206> Accessed August 16, 2015

and meant to enrich Noriega, in addition to the fact that he was not the recognized leader of Panama and that Panama did not request such immunity on his behalf.

Similarly, Charles Taylor, the former Liberian President from August 2, 1997 to August 11, 2003 is now serving a 50 years jail term in the a UK prison for war crimes and crimes against humanity.<sup>177</sup> He was sentenced by the Special Court for Sierra Leone (SCSL) on April 26, 2012, and was the first former head of state to face verdict since the Nuremberg trials by an international court for grave violation of international law.<sup>178</sup> Taylor was accused of arming and supporting the Sierra Leone's Revolutionary United Front (RUF) rebel group which invaded Sierra Leone in 1991 from Liberia with the aim of overthrowing the incumbent government that had ruled since 1968.<sup>179</sup> The RUF was known for its atrocities including amputating limbs of its victims, prevalent sexual violence against children and women, recruitment of child soldiers, its campaign brought untold suffering to Sierra Leoneans from 1991-2002.

Taylor was convicted for 11 counts, five of war crimes including looting, murder cruel treatment, terrorizing citizens and violation of personal dignity, five of crimes against humanity including enslavement, rape, sexual slavery, mutilating, murder and beating and one count of graves violation of humanitarian law for child soldier recruitment.<sup>180</sup> Taylor was indicted by SCSL on march 7, 2003 while he was still the president of Liberia and his bid to claim head of state immunity as the crimes were committed while he was in office was rejected.

### **3.3 President Uhuru's Submission to the ICC and Sovereignty Implications**

The findings as illustrated below do not link president Uhuru's submission to the ICC with erosion of Kenya's sovereignty. 15 respondents were interviewed, 40% of them strongly disagreed

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<sup>177</sup> Open Society, The Trial of Charles Taylor by The Special Court for Sierra Leone: The Appeal Judgment

[http://www.opensocietyfoundations.org/sites/default/files/charles-taylor-appeal-brief-20130924\\_0.pdf](http://www.opensocietyfoundations.org/sites/default/files/charles-taylor-appeal-brief-20130924_0.pdf) Accessed August 16, 2015

<sup>178</sup> Human Rights Watch, "Even a 'Big Man' Must Face Justice" 2012, p. 6

<sup>179</sup> Global Witness, The Charles Taylor War Crimes Trial 'A Global Witness briefing on a dictator, blood diamonds and timber, and two countries in recovery (2012) p.1

<sup>180</sup> Open Society Foundation, The Trial of Charles Taylor before the Special Court for Sierra Leone: The Appeal Judgement (2003)

<https://www.opensocietyfoundations.org/briefing-papers/trial-charles-taylor-special-court-sierra-leone-appeal-judgment> Accessed August 16, 2015

with the statement that President Uhuru’s submission to the ICC undermined Kenya’s sovereignty while 60% disagreed. This confirms several things about sovereignty discussed below.

### 3.4 Changing Nature of Sovereignty, Sovereign Immunity and Head of State Immunity

As noted, the concept of sovereignty has changed over time since its crystallization back in 1648 with the signing of the Westphalia treaty. “No, it did not undermine Kenya’s sovereignty in any way, you have to remember that the notion of sovereignty has changed overtime and being the head of state does not make one an absolute ruler anymore. Besides, the assertion that dependent/developing states like Kenya have sovereignty is a little farfetched. Today, only powerful states can truly claim to have sovereignty, dependent states still behave according to the desires of their current and former masters who wield immense influence over their affairs.”<sup>181</sup>

**Table 3.0 Fallout of Kenya’s President Uhuru’s Submission to the ICC**

In the table below the initials SD means Strongly Disagree, D means Disagree, A means Agree, SA means Strongly Agree and NS means Not Sure.

Description	Responses				
	SD (1)	D(2)	A(3)	SA(4)	NS(5)
1. Kenya’s Head of State Mr. Uhuru Kenyatta undermine Kenya’s sovereignty by submitting to the ICC on October 8, 2014	6 (40%)	9 (60%)	0 (0%)	0 (0%)	0 (0%)
2. Kenya’s president Uhuru submission to the ICC undermine the concept of sovereignty	2 (13.3%)	7 (46.7%)	3 (20%)	2 (13.3%)	0 (0%)
3. Kenya exhausted all the available options to prevent its head of state submitting to the ICC and undermining its sovereignty	0 (0%)	0 (0%)	7 (46.6%)	8 (53.3)	0 (0%)
4. Kenya did not leverage on Rome statute	13	2	0	0	0

<sup>181</sup> Interview with Dr. Henry Amandi, Lecturer University of Nairobi, Department of Political Science and Public Administration on July 28, 2015

article 98 (2) on Bilateral Immunity Agreement which the US tried and failed to arm-twist Kenya to sign back in 2003	(86.6%)	(13.3%)	(0%)	(0%)	(0%)
5. Kenya should have reconsidered its decision and sign the BIA with US on reciprocal basis to enable its head of state travel freely to US even without submitting to the ICC?	4 (26.6%)	11 (73.3%)	0 (0%)	0 (0%)	0 (0%)
6. Kenya being strategically to the west could have refused to comply with ICC's demands to have its head of state submit to the court and gotten away with it?	4 26.6%)	8 53.3%)	3 (20%)	0 (0%)	0 (0%)
7. Was President Uhuru's stepping down as head of state technically irrelevant as it was still reported that the first sitting to appear before the ICC?	1 (6.7%)	1 (6.7%)	9 (60%)	4 (26.7%)	0 (0%)
8. Kenya was perceived negatively internationally being the first state to have its sitting president submits before the ICC?	0 (0%)	12 (80%)	2 13.3%	1 (6.7%)	0 (0%)
9. Did statement by US top diplomat Johnny Carson and the European Union about "Choices have Consequences" before Kenya's general elections amount to affront on sovereignty and external interference of Kenya's internal affairs?	0 (0%)	10 (66.7%)	4 (26.7%)	1 (6.6%)	0 (0%)
10. The president appearance before the ICC compromised Kenya's sovereignty because he did not seek mandate from the people beforehand?	3 (20%)	12 (80%)	0 (0%)	0 (0%)	0 (0%)

**Source: Author (2015)**

This view is consistent with that of other analysts who argue that sovereignty which denoted absolute authority over territory is now subject to international law. Steinberger points out that, modern day sovereignty in international law conceives a state as not subject to any governmental, judicial or executive jurisdiction of a foreign state or foreign law with the exception of international law.<sup>182</sup> International law restricts states behavior and in effect sovereignty, this was witnessed with the ruling of the East African Court of Justice to forbid Tanzania's construction bid of the Serengeti highway which environmentalists opposed notwithstanding that the construction was to be in Tanzanian territory.<sup>183</sup> As such sovereignty has evolved overtime from its absolute nature to a more dissolved concept.

The observation by Dr. Amandi brings up another interesting question of sovereignty vis-a-vis former colonial territories or developing nations. Does sovereignty apply to some states and not others? A closer evaluation would predispose one to so conclude. US leading the other western nations has created behemoth multinationals which now direct state policy in African states such that it's absurd to talk of these states as independent or possessing sovereignty.<sup>184</sup> As pertains to the legality of president Uhuru's action, the submission of the president was in line with Kenyan law. "A look at the Kenyan constitution section 2(5) and 2(6) stipulates that treaties that Kenya is party to form part of domestic law. The Rome statutes thus become part of the Kenyan law and as such the presidency being an office under the supreme law was legally obliged to comply with the obligations of Rome statute."<sup>185</sup> Specifically, the new Kenyan constitution article 2(5) states that

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<sup>182</sup>H Steinberger, 'Sovereignty', in Max Planck Institute for Comparative Public Law and International Law, Encyclopedia for Public International Law, vol 10 (North Holland, 1987) 414.

World Encyclopedia (Oxford University Press, 2008) sovereignty

More: <http://nationalunitygovernment.org/general-principles-sovereignty-non-lawyers>

<sup>183</sup> The East African Court of Justice decision on Serengeti Highway <http://eacj.org/?p=2221> Accessed August 14, 2015

<sup>184</sup> Glenn, John. "Imperial governance, sovereignty and the management of chronic instability in Africa." *Third World Quarterly* 35, no. 8 (2014): 1476-1495

<sup>185</sup> Interview with Dr. Ajwang Owour, Senior Lecturer Faculty of Law Mount Kenya University on June 19, 2015



“General rules of international law shall form part of this constitution” while article 2(6) indicates that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.”<sup>186</sup>

While the first Kenyan constitution (1963) was dualist in nature, the new one (2010) is monist.<sup>187</sup>

Of course this also brings up the question of state and head of state immunity which are meant to protect survival of the state and the international system. The two are clearly provided for under customary international law and ensure that states and heads of states are not subjected to foreign judicial proceedings. Indeed, sovereign state immunity and head of state immunity were traditionally considered to be one and the same thing.<sup>188</sup> Initially, many countries did not distinguish between sovereign and head of state immunity, public and private acts of head of state and states were considered to enjoy absolute immunity.<sup>189</sup> The rules of sovereign immunity relate to the degree to which a certain state may claim freedom from jurisdiction of external or foreign state’s courts.<sup>190</sup> The tradition in international law has always been that states had the absolute immunity, implying that no state can go on trial absent its prior consent. The rationale behind the idea is that all sovereign states are equal, it thus followed that subjecting a state to another’s courts would out rightly undermine sovereign equality. This however has changed overtime as countries engaged more in commerce and has been replaced by restrictive sovereign immunity.

Under restrictive sovereign immunity, a state preserves its immunity for its public official acts, where private acts like commerce are concerned however; it may be subjected to a foreign court

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<sup>186</sup> See Chapter 2 of Kenya’s new constitution Promulgated on August 27, 2010

<sup>187</sup> See Oluoch Asher “incorporating Transnational Norms in the constitution of Kenya the place of international law in the legal system of Kenya International Journal of Humanities and Social Science vol 3 and Justice Alfred Mavedvenge Comparing the role of International Law in Kenya and South Africa Cornell international Law Journal online p101

<sup>188</sup> Shobha Varughese George, Head-of-State Immunity in the United States Courts: Still Confused After All These Years, 64 Fordham L. Rev. 1051 (1995), p. 1056

<sup>189</sup> Peter Malanczuk, “Akehurst’s Modern Introduction to International Law” 7th ed. (1997), 118 118–19

<sup>190</sup> Ibid

jurisdiction.<sup>191</sup> The shift was a reflection of increased states interactions and changing role of state from predominantly public acts to private commercial activities. Restrictive sovereign immunity thus allowed inclusion of commerce without undermining the principle of sovereign equality. Accordingly, one is bound to ask why President Uhuru as the head of state did not claim head of state immunity to preserve Kenya's sovereignty. Well the reason is simple; he was accused of violating a peremptory norm for which there can be no derogation and claim of immunity.

### **3.5 Kenya's Limited Non Compliance Options**

The study sought to find out what available options Kenya had and could leverage to avoid being the first country to have its sitting head of state submit to the ICC which has implications for its sovereignty. According to the findings (see table 3.0), a majority of respondents agreed that Kenya exhausted all available options to ensure its head of state did not submit to the court. 47% agreed with the statement while 53 strongly agreed with it. It was clear that Kenya signed the Rome statute and in so doing agreed to fulfill the obligations set out in the statute. It could now not seek to escape its responsibility because it had an obligation which it was quite cognizant of while giving Mr. Uhuru the mandate to become head of state. Moreover, "While powerful states may get away with committing unlawful acts like the well-known torture of terror suspects, they are in the minority. There is general consensus that international law like domestic law works as a majority of people and states follow laid out rules. It'd really be impossible to expect all to follow laws all the time. Needless to say, Kenya is a small power and it was almost guaranteed that it could not get away with non-compliance"<sup>192</sup>

Kenya made an application to the UNSC in November 2013 to have the cases against its president and deputy president deferred in accordance to article 16 of Rome statute, despite US, UK and French misgivings Kenya pushed for a vote and as could be expected, it lost.<sup>193</sup> Kenya galvanized

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<sup>191</sup> Jerrold L. Mallory, Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings, 86 Colum. L. Rev. (1986) 173

<sup>192</sup> Interview with Dr. Ajwang Owour, Senior Lecturer Faculty of Law Mount Kenya University on June 19, 2015

<sup>193</sup> Kersten Mark, Kenya and the ICC Coming to Head? <http://justiceinconflict.org/2013/11/19/kenya-and-the-icc-coming-to-a-head/> Accessed August 15, 2015

the AU's support to shield sitting heads of states from prosecution by amending article 27 which again was a failure.<sup>194</sup> Respondents gave the immense benefits accruing from the head of state submission making the decision a prudent. "Looking back now, submission was possibly the best action Kenya took. The president's charisma enabled him to play clever politics so that the west was an ally rather than a foe which in some sense led to the collapse of the case. Had Kenya taken another route, it's not entirely clear where things could be right now, but it's almost certain to say that it'd be worse for Kenya and for its head of state."<sup>195</sup>

Bilateral Immunity Agreements as provided for by article 98(2) of Rome statute are the avenue that states can use to ensure those accused of violating international criminal law are not handed over to the court prior to their state's consent. America has used the provision widely but Kenya refused to sign BIA with America.<sup>196</sup> The study asked respondents if Kenya should have reconsidered the decision in a bid to save face. The majority (73%) disagreed while 26% strongly disagreed. Kenya refused to sign the BIA with the US and it's highly unlikely that the US would now accept to have a reciprocal BIA with Kenya to suite Kenya's interests, if anything states act to protect their own and not other's interests. It behooves one to remember that the US is the hegemon and as such must seem to uphold and not undermine international law. "Signing a BIA with Kenya to enable Kenya escape its international obligations would not be in America's interests."<sup>197</sup> Moreover, it emerged from the study that the majority of respondents thought that it was not in the interest of Kenya to be labeled as a violator of international law. Doing so would have diminished its influence in the region and led to its eventual economic decline. It's quite likely that such attempts would have miserably failed as no state wants to be an oddball.

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<sup>194</sup> The Globe and Mail, African Union Demands ICC Exempt Leaders from Prosecution <http://www.theglobeandmail.com/news/world/african-union-demands-icc-to-protect-leaders-from-prosecution/article14850866/> Accessed August 15, 2015

<sup>195</sup> Interview with Mbaisi Eugene, Political Science Graduate on June 23, 2015

<sup>196</sup> Coalition for the International Criminal Court, Status of US Bilateral Immunity Agreements (BIAs)

<sup>197</sup> Interview with John Okul, Editor at Intellectus Consultancy and Post Graduate Student in Political Science on June 27, 2015

### 3.6 Kenya's Perception Internationally

The study also set out to find how Kenya was perceived internationally having been the first country to have its sitting head of state subjected to ICC which ordinarily would mean loss of sovereignty. Asked if Kenya was viewed negatively, a majority of respondents (80%) disagreed while 13% agreed and 7 % strongly agreed. This indicates that the move by the president was positively received. "The perception was twofold, on one side, it was one marked by surprise, many did not really believe that the head of state would be true to his word, the promises he made during his election campaign. The experience with the Sudanese president Al Bashir made it unlikely that Mr. Uhuru would submit to the court once in power"<sup>198</sup>.

His action portrayed Kenya's rule of law and cast him as an accountable leader. Respondents alluded to the fact that the president makes trips to foreign countries and this could have been interpreted as one those trips. Additionally, Kenya demonstrated it's under rule of law and has maintained its hegemony in East Africa. "On the other hand however, there was disappointment within and without the African Union. It must be said that the AU ceaselessly campaigned to have the trials not take place, it became apparent that despite the sheer number of African states, Africa has little if not no influence at all in international arena. This dealt a serious blow to the AU's malnourished political muscle."<sup>199</sup>

There was also the view that Kenya had failed internally to come up with a local mechanism to try the six suspects which point to a political and judicial weakness. "Kenya was viewed as an irresponsible state in the sense that it subjected its sitting head of state to a foreign legal process."<sup>200</sup> In the first place, the fact that Kenya cleared individuals who were inducted for violation of international criminal law to run for the country's top office puzzled many. The perception was not a pleasant one.

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<sup>198</sup> Interview with Carol Gichohi Political Science and Public Administration Lecturer at Karatina University on July 23,

<sup>199</sup> Idem

<sup>200</sup> Interview with Dr. George Katete, Lecturer University of Nairobi Department of Political Science and Public Administration on August 3, 2015

“In France where I happened to have been during the height of the matter, satirists had a field day following Mr. Kenyatta’s clearance by the high court to run for presidency. Kenyans were portrayed as wild animals; people could not understand how someone with such serious allegations in an international court could be allowed to run for the highest office notwithstanding Kenya’s constitution provisions on integrity.”<sup>201</sup> The perception was that Kenyans disregarded their own constitution more so chapter four on integrity. The country also displayed its institutional weakness due to the fact that it had to take an international court to try accused perpetrators of PEV.

“Additionally, the country came across as a weak state which has no influence in international matters.”<sup>202</sup> It’s quite difficult to imagine that a member of the UN Security Council would have its sitting head of state subjected to the ICC or any other foreign court for that matter. Indeed, 3 members of the Security Council are not even member state and the US has claimed that joining the court would encroach on its sovereignty.

### **3.7 Kenya’s Geopolitics**

The study sought to find out if Kenya’s strategic location would have preempted president Uhuru’s submission to the ICC and maintained its sovereignty. 27% of the respondents strongly disagreed and 53% disagreed. Only 20% of the respondents agreed indicating that Kenya really had to meet its obligations under international law. “There is no denying that Kenya is strategically important. That does not however mean that a prevailing head of state at any time is indispensable. As has been observed in the past, the west gets its interests using whichever means regardless of consequences. The US involvement in the Latin America by getting rid of heads of state it deemed unfavorable to its foreign policy and replacing them with dictators is well known. In Africa, Congo and Liberia represents what happens when a leader tries to oppose western interests. Patrice Lumumba was assassinated, and Charles Taylor who was accused of atrocious crimes is doing time in a British

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<sup>201</sup> Interview with John Okul, Editor at Intellectus Consultancy and Post Graduate Student in Political Science on June 27, 2015

<sup>202</sup> See Supra note 201

jail. To the rest of the world, Africa has always been a place to source slaves, raw materials and markets for products. That would explain why Africa has no voice internationally.”<sup>203</sup>

There was also the view that Kenya being a member state of the Rome statute was expected to meet its obligations. Kenya’s hegemony in the East African region was at stake as typified by US president Obama snubbing Kenya during his African tour immediately after winning reelection. The reason for giving Kenya a cold shoulder was cited as the continuing cases facing the Kenya’s president and his deputy.<sup>204</sup> It became apparent that the west could use other more cooperative allies in the region if Kenya did not toe the line. The view among those respondents who agreed with the statement (20%) is that Kenya did not fully comprehend its strategic advantage. “Kenya is indeed strategic and prior to the 2007-2008 PEV was the most stable power in the region. It’s precisely for this reason that we did not witness west’s aggressive effort to pursue the case as the implications would have been destabilizing. Due to the geopolitical importance of Kenya, its instability would destabilize the wider East African region with reverberations being felt as far as the relatively unstable DRC.”<sup>205</sup>

Kenya’s decision to elect an ICC inductee as its head of state had consequences including travel advisories issued against visiting Kenya by UK and US governments. A closer look at what was happening in Mombasa and other tourist destinations in the country does paint a rather disturbing picture. Hotels are closing down, laying off workers and consequently hurting farmers who supply them with food. The net effect could however be detrimental to west’s interests as youths who lost jobs in the tourism industry due to travel advisories could take up radicalization and violent extremism.<sup>206</sup> “The recent activity being witnessed where investors are now flowing into the country and the Kenyan president is busy with overseas travel to represent the country is a result of Kenya’s compliance to the

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<sup>203</sup> Interview with Dr. Kariuki Muigua, Lecturer University of Nairobi School of Law on July, 30 2015

<sup>204</sup> Brown, Stephen, and Rosalind Raddatz. "Dire consequences or empty threats? Western pressure for peace, justice and democracy in Kenya." *Journal of Eastern African Studies* 8, no. 1 (2014): 43-62.

<sup>205</sup> Interview with Dr. George Katete, Lecturer University of Nairobi Department of Political Science and Public Administration on August 3, 2015

<sup>206</sup> The New York Times, A Catch-22 in Kenya: Western Terrorism Alerts May Fuel Terrorism [http://www.nytimes.com/2015/02/24/world/africa/as-tourism-sags-on-kenyan-coast-terrorists-could-lure-the-unemployed.html?\\_r=0](http://www.nytimes.com/2015/02/24/world/africa/as-tourism-sags-on-kenyan-coast-terrorists-could-lure-the-unemployed.html?_r=0) Accessed August 15, 2015

ICC late last year. Al Bashir may still be free to travel but there are some places he cannot travel to because he would be arrested, to be sure, Sudan's compliance would have left the country better off as investors would be flowing in unlike now where they avoid it."<sup>207</sup> As Gitobu Imanyara, a Kenyan lawyer and former legislature noted, the president's refusal to attend his hearing would have ruined Kenya's economy.<sup>208</sup>

It emerged that perhaps Kenya's centrality in war on terror in neighboring Somalia, its market economy and productive work force ultimately hastened the collapse of the case; otherwise the court would have made significant gains as witnessed elsewhere in Africa. It must be remembered that the US and UK have various interests and installations not to mention citizens in the country that they needed to protect. Risking stability was just not an option. Kenya seems not to have been aware of this or choose not to have taken such an assertive path which to some would have consolidated its hegemony. Sudan on the other hand knows that the rest of the world needs its oil and thus has been reluctant to comply with the court. It has also emerged that Bashir does have a vital role to play in the Darfur peace process.

The former French president Nicholas Sarkozy was criticized for having met Bashir in Doha back in 2008 after ICC indicted the Sudanese president, Sarkozy alluded that Bashir had a role to play in ending the conflict.<sup>209</sup> Indeed, it was always apparent that France UK and the US exhibited ambiguousness vis-a-vis ICC cases in Sudan, Libya and Kenya, the French were ready to halt ICC action in Sudan in exchange for peace, the UK did not see Bashir's indictment as helping the peace

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<sup>207</sup> See Supra 182

<sup>208</sup> The Guardian, Kenyan President Uhuru to step down from office to attend ICC, <http://www.theguardian.com/world/2014/oct/06/kenyan-president-uhuru-kenyatta-attend-international-criminal-court> Accessed August 16, 2015

<sup>209</sup> WikiLeaks, Public Library of US Diplomacy [https://www.wikileaks.org/plusd/cables/08PARIS2252\\_a.html](https://www.wikileaks.org/plusd/cables/08PARIS2252_a.html) Accessed August 15, 2015

process and the only action it promised to Kenyans if they elected Uhuru Kenyatta was to minimize contact to essentials.<sup>210</sup>

### **3.8 Western External Interference in Kenya's Internal Matters and Sovereignty**

The statements made by the west in response to Mr. Uhuru and Ruto running for the top two offices in Kenya during Kenya's 2013 elections were interpreted by some as blatant interference with Kenya's sovereignty. The study asked respondents if the statement choices have consequences by US top African diplomat Mr. Carson and EU's statement that it would have minimal contact with Kenya if Uhuru and Ruto were elected amounted to domestic interference. 67% of the respondents disagreed, 26% agreed and 7% strongly agreed. This shows the perception among the majority of the respondents was that the statements did not interfere with Kenya's domestic matters nor undermine Kenya's sovereignty.

As alluded to, the Kenya constitution makes any treaty the country is party to part of domestic law and also requires public office holders to have integrity. "Legally, the US and the EU had basis to give the warnings seeing that Kenya's own constitution states that anybody associated with violation of national and in extension international law is not fit to hold public office."<sup>211</sup> Here were two people who were adversely mentioned with involvement in politically motivated violence and had somehow been cleared to run for the top two offices in the land. The west was simply pointing to the fact that having such people run a government would negatively affect Kenya as a state.

"The statements can be seen as interference though they were supposedly meant to nudge Kenya towards desired values. It has to be said that the kind of values espoused by the west leave a lot to be desired. Democracy which is synonymous with change of head of state after every five or ten years clearly does not happen in the UK. America which is founded on democracy only ended racial

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<sup>210</sup> Gegout, Catherine. "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace." *Third World Quarterly* 34, no. 5 (2013): 800-818.

<sup>211</sup> See supra note 201



segregation in the 1960s and still had the confederate flag flying until a few weeks ago hundreds of years after Abraham Lincoln.”<sup>212</sup> Moreover, the United States continues to interfere with the domestic matters of other states to date in the name of promoting democracy and human rights.<sup>213</sup>

On a political level, respondents who agreed with the statement indicated that there was direct internal interference in Kenya’s affairs by the west. In the US for instance, Jendayi Frazer the former US Assistant Secretary of State for African Affairs under President Bush was critical of west’s distance towards Mr. Uhuru Kenyatta hinting at a Democrat-Republican tussle. Kenya is critically important for the west as a partner in fighting terrorism, as an economic hub where American multinationals including Ford and GE are based as well as being a diplomatic capital for regional conflicts including South Sudan.<sup>214</sup>

### **3.9 Relevance of President Uhuru’s Stepping Down and Public Mandate**

The study set out to establish the relevance of president Uhuru’s stepping down as the head of state to attend ICC hearings and whether he should have sought public mandate to do so. Respondents were asked if Mr. Uhuru’s action of stepping down was relevant. 7% of respondents strongly disagreed, 7% disagreed, 60% agreed and 26% strongly agreed. The results show that a majority of respondents saw the stepping down of the president as unnecessary, more of political than legal. This is consistent with the how the media reported the action as the first sitting head of state appears before the ICC.<sup>215</sup> The respondents saw the move as a clever political maneuver meant to consolidate Uhuru’s nationalist and pan Africanist campaign he adopted after coming to power. The ICC had always stated

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<sup>212</sup> See Supra note 204

<sup>213</sup> Rizwan Naseer, Musarat Amin, Balance of Power: A Theoretical explanation and Its Relevance in Contemporary Era *Berkeley Journal of Social Sciences Vol. 1, No. 10*, 2011 p. 3

<sup>214</sup> Jendayi Frazer former United States Assistant Secretary of State for African Affairs on west’s distance towards Uhuru Kenyatta. [http://www.pbs.org/newshour/bb/africa-jan-june13-kenya2\\_03-11/](http://www.pbs.org/newshour/bb/africa-jan-june13-kenya2_03-11/) Accessed August 13, 2015

<sup>215</sup> See the Guardian, <http://www.theguardian.com/world/2014/oct/08/kenya-uhuru-kenyatta-head-of-state-icc-hague> Aljazeera <http://www.aljazeera.com/news/africa/2014/10/kenyatta-netherlands-hague-face-icc-charges-201410802514574650.html> Business Insider <http://www.businessinsider.com/afp-kenyatta-becomes-first-president-to-appear-before-icc-2014-10> inter alia Accessed August 16, 2015

that it treated Mr. Kenyatta as a private citizen and would not address him as president of Kenya.<sup>216</sup> Furthermore, when the head of state is absent the deputy head of state fills his shoes.

The study also sought to find out if the president should have sought public mandate to go to The Hague as doing so would compromise Kenya's sovereignty which belongs to the people. 20% of the respondents strongly disagreed and 80% disagreed. The reason given for this view is that the president already had the mandate from the people by the virtual of his election. Additionally, the president does not seek the people's mandate before going to every other foreign trip. Respondents noted that this was much like the Almond-Lippmann consensus, which while it was recanted; the Kenyan case didn't really require a referendum. The public knew that Mr. Uhuru would have to go to The Hague even before they elected him head of state. This in its self is a go ahead and needed not be reaffirmed.

### **3.10 Summary**

The chapter sought to establish if president Uhuru's submission to the ICC undermined sovereignty. The action was the first instance for a sitting head of state to attend ICC hearings and as such marked a significant milestone in international law and politics. The study found that while Kenya as a country may claim to be an independent and sovereign state, it's actually not. Like many other former colonial territories in Africa and elsewhere, its behavior is largely dependent on the major powers of the world and former colonial masters. Kenya cannot claim sovereignty and as a consequence no sovereignty was undermined by the president's actions. Had the same action be done by a head of a major power then the implications would have been monumental.

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<sup>216</sup> The Herald, How Kenyatta Scored Big Against ICC, <http://www.herald.co.zw/how-kenyatta-scored-big-against-icc/> Accessed August 16, 2015

## CHAPTER FOUR

### **4.0 POLITICAL IMPLICATIONS OF ICC TRIALS IN AFRICA**

#### **4.1 Introduction**

The previous chapter analyzed Kenya's president Uhuru's submission to the ICC vis-à-vis Kenya's sovereignty. The findings of chapter III leads the study to conclude that this action did not undermine Kenya's sovereignty. This is because the concept of sovereignty cannot be said to apply to developing countries like Kenya and because its definition has changed over time. This chapter addresses the political upshots of ICC trials in Africa. Specifically it will draw from the first sitting head of state submission to the ICC.

The Hague based ICC became the first international court to prosecute individuals accused of grievous violation of international criminal law back in 2002 with the ratification of the Rome statute. The ICC has focused on Africa where it notes excessive violations of international criminal law, this has led some to question its impartiality. This chapter evaluates the fall out of Kenya's president Uhuru submission to the ICC and the domestic and continental political and related amnesty questions it raises in Africa. While Uhuru is not the first sitting head of state to be indicted by the court, his submission to the ICC had impacts that continue to be felt today more so among Africans for divergent reasons.

#### **4.2 Analysis of the Political and Amnesty Fall out of ICC's Intervention in Africa**

Questionnaires were issued in the Kenyan capital, Nairobi. The location was chosen because of its cosmopolitan nature and would capture all demographics in terms of ethnicity, level of education, social status. The aim was to evaluate the attitudinal response towards the role of ICC in Africa generally and in Kenya specifically. Questionnaires were used with a sample of 130 individuals aged 18 and above. Out of the 130 questionnaires sent out 82 of them were duly filled giving a response rate of 63%. The response rate was thus sufficient to conduct data analysis and the findings were analyzed as follows. The data is presented in graphs, charts and tables and interpretation is provided.

### 4.3 General Information

Below are respondent's gender, age and educational background information.

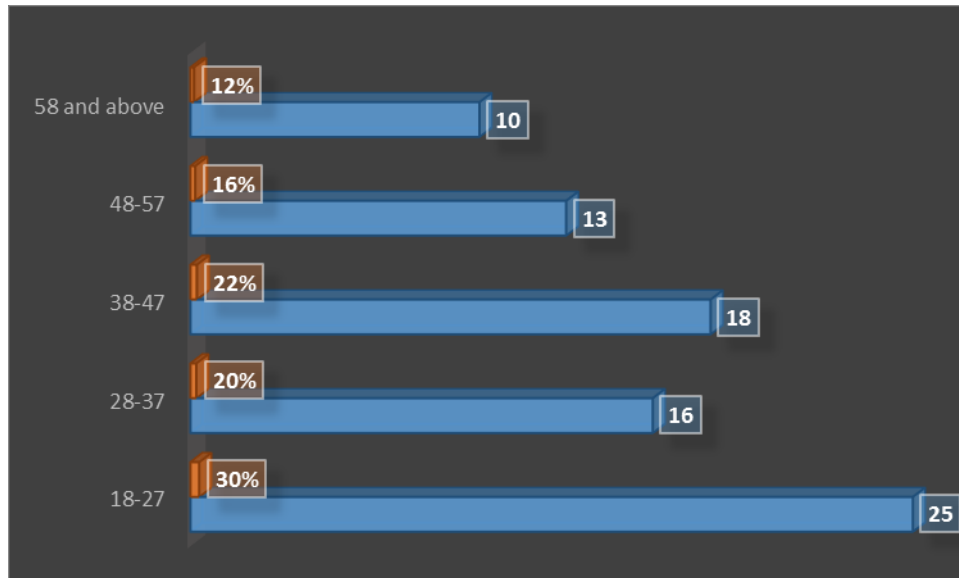
**Table 4.1 Proportion of Respondents by Gender**

	Frequency	Percentage
Male	48	59%
Female	34	41%

**Source: Author (2015)**

The sample had a male and female category with 35% of respondents being female and 65% being male. The disproportionate of the sample in terms of sex alludes to the fact that males were more interested in the political dimension of the study.

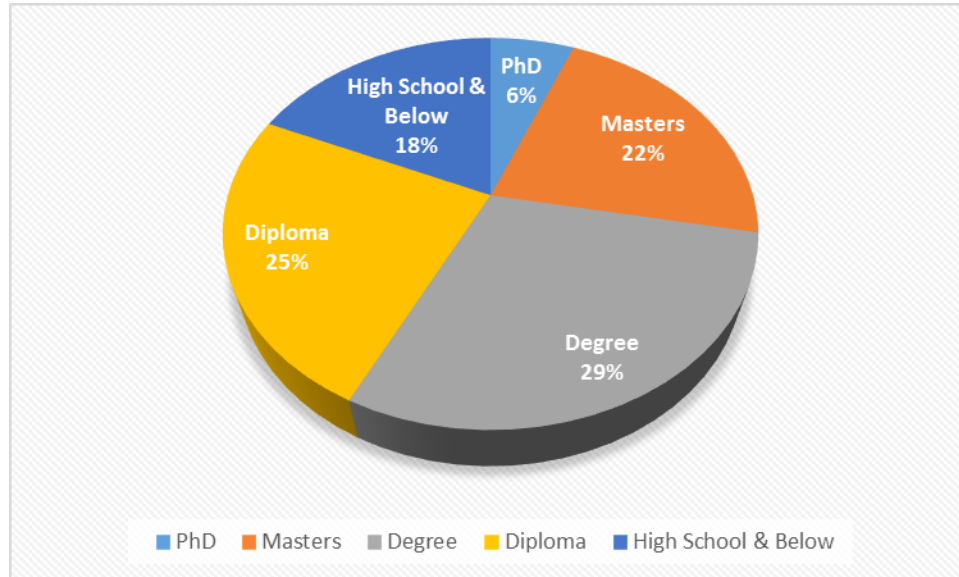
**Figure 4.1 Percentage Age of Respondents**



**Source: Author (2015)**

The findings indicate that respondents between 18 and 27 years were more interested with the topic than those in the 28-37 age bracket and indeed more than any other age group. Respondents above 58 years showed the least interest in the study.

**Figure 4.2 Respondent's Educational Background**



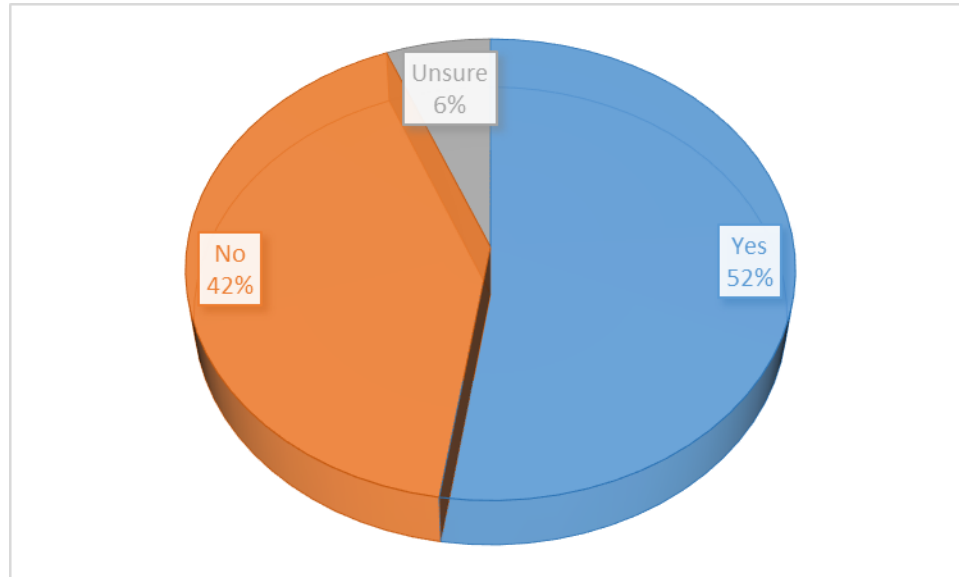
**Source: Author (2015)**

Majority of respondents involved in the study had tertiary education (82%). 18% had High School education as the highest level of education attained, 25% had Diploma education, 30% had Bachelor's Degree, 17% had master's Degree, and 10% had PhD. The findings indicate that respondents with Bachelors and Masters Degrees had higher response rates compared to those with high school and diploma levels.

#### **4.4 The ICC as a Political Rather than Judicial Body**

According to table 4.2 a majority of respondents (52%) believed that the ICC is a political body rather than a judicial one. The proportion of respondents who believe that the Hague based court is judicial was 42% while 6% were unsure. The study found that more men compared to women think that the international court is a political body. The belief was more pronounced with respondents below 40 years. The top reason given by respondents for this view is that the ICC six suspects who were identified were really not the people responsible for the violence since none of them was running for presidency in 2007-2008 general elections. The second reason why there is little judicial confidence of the ICC is the collapse of the cases and rampant allegations of coached witnesses.

**Figure 4.3 ICC as a Political Rather than Judicial Body**



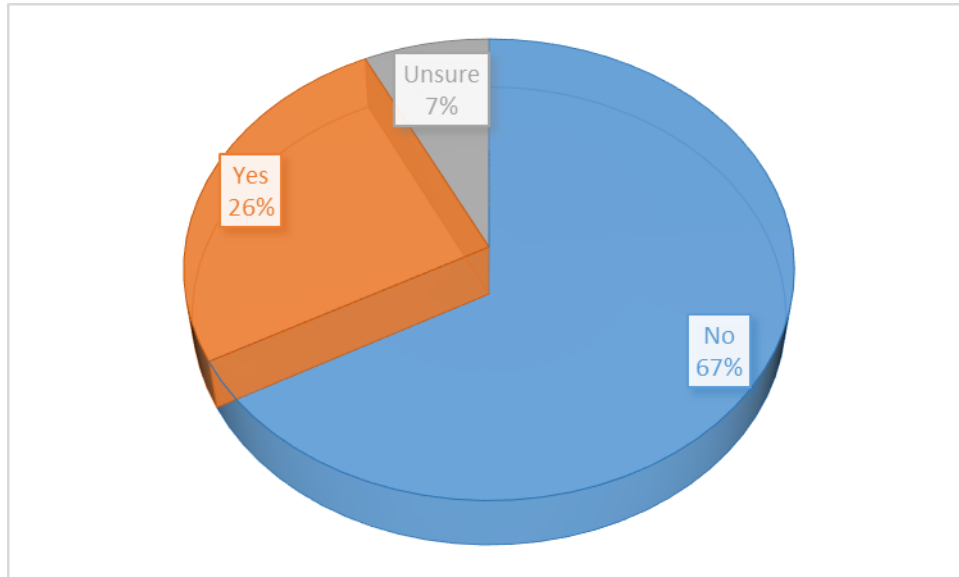
**Source: Author (2015)**

Coming on the third place was the fact that president Uhuru's case had collapsed, this was seen as a political move not to destabilize the country and the sub region. Other reasons advanced for this view was the fact that Africa has been the sole focus of the court because it's weak, the vast support the ICC receives from the EU which makes it vulnerable to Europe's influence and finally its staffing which reflects contributions of state parties.

#### **4.5 ICC and Conflicts in Africa**

The study asked respondents if The ICC exacerbates conflict in Africa by being remote to African context of forgiveness to achieve peace rather than its pursuit of justice to attain peace. 67% of responded did not believe that the court aggravates conflict in Africa. 26% agreed that the courts pursuit of justice undermined peace efforts while 7% of respondents were unsure. The response by gender showed that more females compared to males think that the court does not exacerbate conflict. Among the respondents who think that the court exacerbates conflict gave the case of Uganda and the Lord's Resistance Army which could have abandoned its brutal campaign had it been promised forgiveness and integration in the national army.

**Figure 4.4 ICC Exacerbates Conflict in Africa**



**Source: Author (2015)**

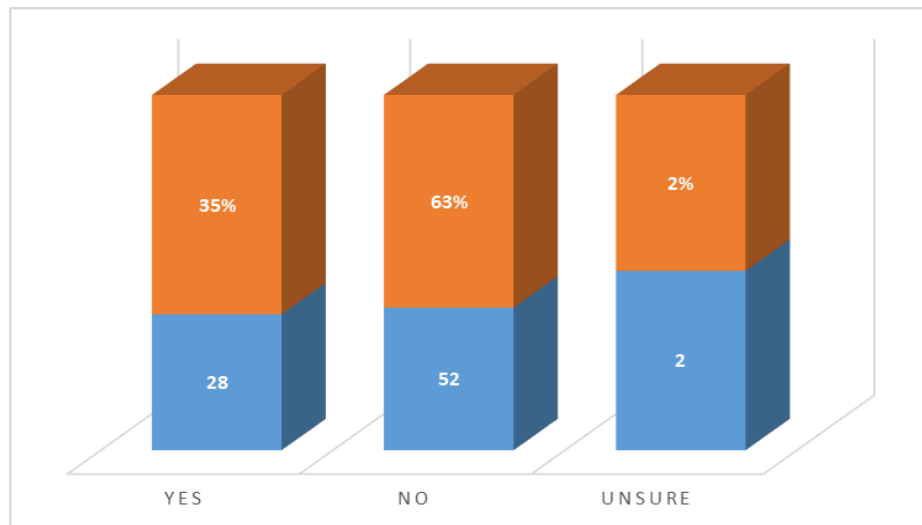
The Truth and Reconciliation Commission formed after the fall of apartheid was advanced to support the view that amnesty does work in Africa, similarly Rwanda also came up as an example where amnesty and reconciliation works. On the contrary, the Democratic Republic of Congo came up as evidence of how ICC diminishes conflict with the capture and prosecution of key rebel leaders. M23, the rebel function in the Democratic Republic of Congo which abandoned amnesty and returned to the bush was given as a key reason why justice and not amnesty should be pursued. The rebel group is no more after the surrender of its leader and eventual extradition to face charges at the ICC. There was also the view that the ICC does not address the core issues of conflict which makes it unlikely that it can effectively end conflicts. One challenge the ICC faces is that there is a mistaken notion that creating war crime tribunals and international criminal court will address underlying problems of society which are the causes of conflict that causes human rights violations.

#### **4.6 ICC as a Court to Punish the Weak (Africa)**

The study sought to find out the perception that the ICC was a western court meant to punish weak Africa. According to the findings 63% of respondents did not think that the court targets Africa

or any other weak country compared to 35% who thought that the court is biased to Africa and 2% who were not sure. Demographically, respondents in the 18-27 age brackets exhibited the biggest proportion of those who thought the court unfairly targets Africa compared to the above 58 years age group.

**Figure 4.5 ICC as a Court to Punish the Weak (Africa)**



**Source: Author (2015)**

The reason given by the majority of respondents, those who didn't think the court targets Africa is the fact that Africa has had the highest cases of armed conflict in the last 5 decades. The ICC therefore has basis in intervening in Africa to stop grave violation of international criminal law. African leaders also came up as greedy self-serving lot who practice impunity to hold to power.

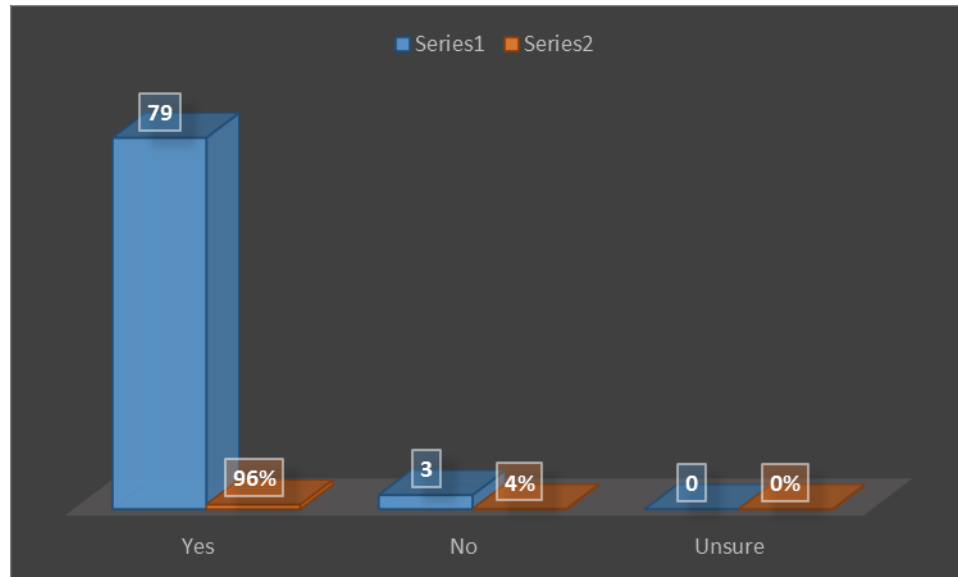
ICC therefore was seen as the savior of the ordinary Africans who have little in way of resisting impunity. The respondents who thought the court is a tool for the powerful gave the examples of US Guantanamo Bay and Israel's activities in the Palestinian territory where gross violations have and continue to take place. International criminal law is highly skewed and has focused on Africa where the ICC investigations and prosecutions have taken place while effective action against Sri Lanka & Georgia war crimes for example is conspicuously missing.



#### 4.7 The ICC and Peaceful 2013 General Elections in Kenya

The study sought to determine if the ICC was responsible for the relatively peaceful 2013 Kenyan General elections.

**Figure 4.6 ICC's Role in Peaceful Kenya's 2013 Elections**



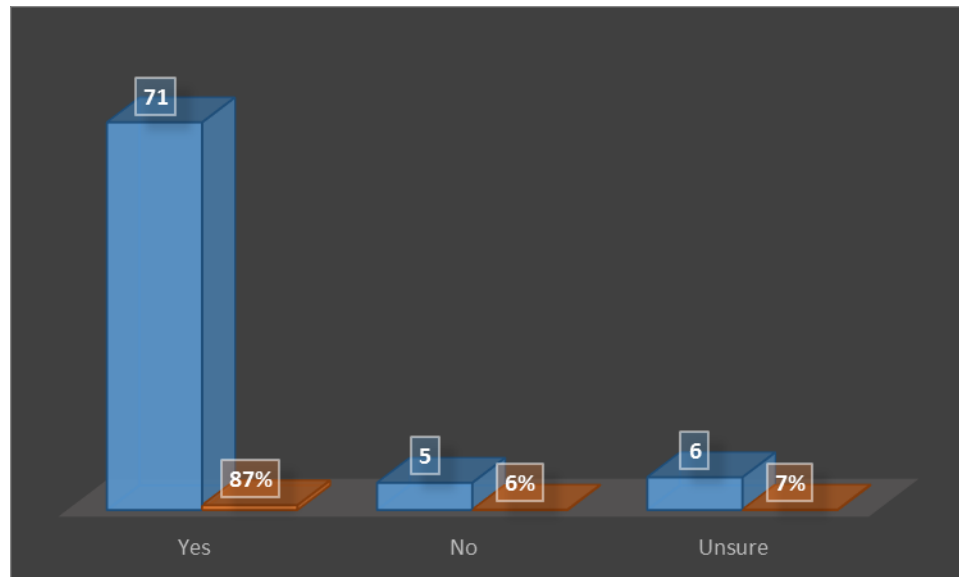
**Source: Author (2015)**

96% of the respondents agreed that the ICC was a big factor in the peaceful elections as it reduced the violence associated with general elections in the country, 4% of the respondents did not associate the ICC with peaceful 2013 General elections but attributed it to political maturity of Kenyan democracy 2 decades after its introduction. Respondent observed that politicians vying for seats were more restrained and did not play the ethnic card associated with the PEV and elections in general.

#### 4.8 The ICC's Inability to Prosecute the Mighty (Sitting Heads of States)

The fallout of the withdrawal of President Uhuru's case by the ICC prosecutor, Fatou Bensouda raised serious questions about the ICC ability to enforce its mandate. As a result the study sought to find out what attitudes respondents had towards the courts ability to effectively prosecute sitting heads of states. 87% of respondents agreed that the court lacks the capacity to successfully prosecute a sitting head of state while 6% disagreed with the statement. 7% were not sure.

**Figure 4.7 ICC Inability to Prosecute the Mighty (Sitting Heads of States)**



**Source: Author (2015)**

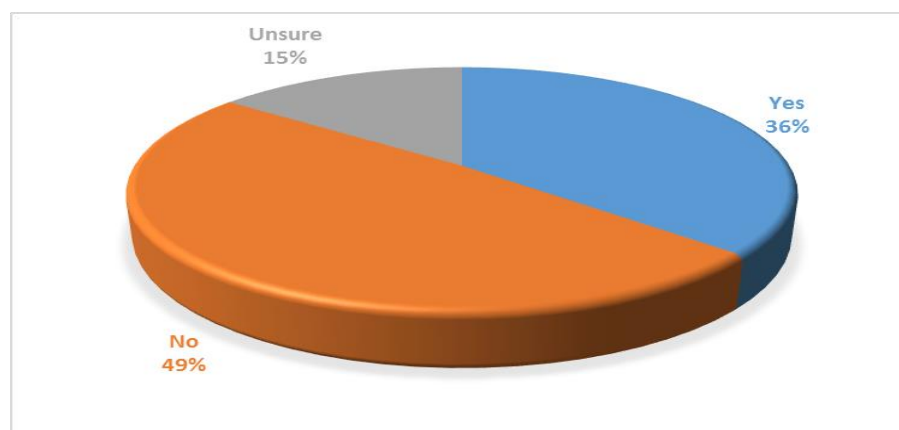
From the findings it becomes clear that while the court has been around for over a decade, it lacks the mechanism to go after the powerful. Respondents noted that the court could not succeed in investigating a sitting head of state since the court needs support from a government which being led by the accused, makes it unlikely it'd cooperate and provide crucial evidence. The 6% of responded who did not take this view gave the reason that there was no case against the president in the first place making the whole affair flawed. These respondents did not see so much the inability of the ICC to prosecute sitting heads of states as the stumbling block, but rather the court's politically motivated manner in which it operates.

#### **4.9 Uhuru's Indictment by the ICC Undermining International Criminal Law in Africa**

One of the more profound results of president Uhuru's indictment by the ICC was the move by the Kenyan parliament to start the process of withdrawing from the Rome statute and in Africa, the move by the African heads of states adopting a protocol that guarantees sitting heads of state inviolability and immunity from prosecution in the African Court of Justice and Human Rights. The

study asked respondents if indictment and consequent submission of president Uhuru undermined international criminal law in light of the above.

**Figure 4.8: President Uhuru’s Submission to the ICC Undermined International Criminal Law in Africa**



**Source: Author (2015)**

According to the above data, 36% of the respondents indicated that the indictment did undermine international criminal law in Kenya and Africa, 49% did not think the fallout undermined criminal law while 15% were unsure. The response given by the majority of respondents is that peremptory norms cannot be violated without consequences. There was also the view that withdrawing out of the ICC is a process that takes time, it's not even guaranteed that Kenya will officially pull out.

Respondents also indicated that the fact that the AU did not pull out of the ICC enmass shows that nothing much really changed; all that talk was just playing politics. Respondents who saw the indictment as undermining international criminal law in the continent gave the evidence of the AU's Malabo protocol of July 2014 which ensured immunity of African sitting heads of states and senior government officials in the African Court of Justice and Human Rights.

#### **4.9.1 Hierarchy of Norms and Jus Cogens in International Law**

In studying the hierarchy of norms in international law, it behooves one to acknowledge that unlike the domestic law where there is clear cut constitutional authority, international law is the polar

opposite.<sup>217</sup> There is no hierarchical system with which to rank international tribunals and courts in International law like we have magistrate, high courts, courts of appeals and supreme courts domestically. Judicial decisions and writings are subordinate to general principles of law which occupy the third position after customs and treaty.<sup>218</sup>

The distinction however as to which ranks higher than which between custom and treaty is more complex. Normally, treaties codify or replace prevailing customs but it also suffices to state that treaties may become absolute and be replaced by new customs.<sup>219</sup> Equally significant to be cognizant of, is the outranking of some customs and treaties over others. Rules of Jus Cogens and erga omnes fall in this category. There is need though to distinguish between the two. Bassiouni<sup>220</sup> clearly differentiates them as follows

“*Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus cogens*.”

It can thus be argued that the protocol cannot prevent other bodies including the UN, UNSC and ICC from taking action against African heads of states violating international criminal law.

The decision by the AU to adopt the protocol shielding African heads of states is unprecedented and was viewed as a serious blow towards fighting impunity in the continent; the decision was met with intense criticism from the civil society.<sup>221</sup>

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<sup>217</sup> Malcom Shaw International Law 6<sup>th</sup> edition p. 123

<sup>218</sup> *ibid*

<sup>219</sup> R. Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’, BYIL, (1965–6) , p. 275.

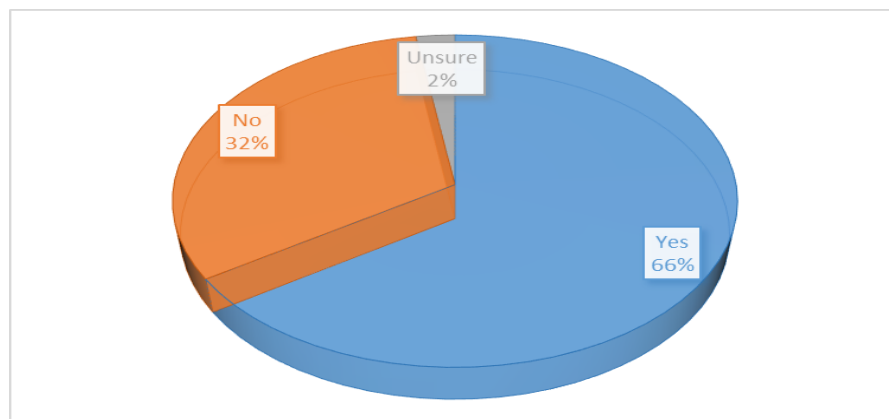
<sup>220</sup> Bassiouni Cherif M, International Crimes: Jus Cogens and Obligatio Erga Omnes, (1997) p. 64 Bassiouni is a Professor of Law, and President, International Human Rights Law Institute, DePaul University; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences; Former Chairman, United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the former Yugoslavia.

<sup>221</sup> Human Rights Watch, Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Humans Rights. <https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and> Accessed August 17, 2015

#### 4.10 ICC's Credibility Loss among Kenyans and Africans

The study sought to find out if there has been declining credibility of ICC owing to the collapse of the Kenyan cases it's pursuing. This came from the view that the collapse of the cases will inevitably diminish its ability to give justice to PEV victims who suffered war crimes, crimes against humanity and genocide. Respondents were asked if the court has lost credibility in Kenya and in extension, Africa. 66% of the respondents agreed that the court had lost significant credibility, 32% did not think that the credibility of the court had waned while 2% were not sure. The findings indicate that a majority, (66%) of the respondents see the court as having failed to deliver what it was mandated to do as opposed to the minority, (32%) who saw the court as the only alternative to Africa's poor judicial and legal structures.

**Figure 4.9 ICC Credibility Loss in Africa**



**Source: Author (2015)**

Those who thought that the court had not lost credibility stated that there was no alternative in Africa which could bring perpetrators of serious international crimes to book. They noted that even Africa's own version of the ICC; the African Court of Justice was already under assault from selfish African leaders. This view is consistent with the outcry witness after the Malabo protocol to grant

African heads of immunity in the African court of justice.<sup>222</sup> The respondents who thought that the court had lost credibility pointed to the fact that neither the ICC nor the Kenyan government had prosecuted any senior or mid-level perpetrators of the PEV. Accordingly, the once shining ICC in the eyes of many Kenyans as an impartial actor in justice delivery is now seen as having failed the victims of the PEV.<sup>223</sup> For 39% of respondents, the successful prosecutions and convictions of Thomas Lubanga Dyilo and Germain Katanga is evidence that the court is still credible.

#### **4.11 Summary**

The findings of this chapter point to an erosion of confidence in the way the ICC is perceived by respondents. There was no doubt that the ICC had a lot of support in Kenya and elsewhere at its creation back in 2002. It was hailed by many states, NGOs and other civil society organizations as a savior of the weak from the powerful aggression. In Kenya, there was unmistakable support for the court when the ICC took up the PEV cases. The ICC has since dropped all but one of the six cases it had initially begun related to the PEV. The western warnings about Kenya's choice in the 2013 general elections saw the popularity of the court among the populace plummet. Kenya's efforts to garner support to change the Rome statute in the AU and the refusal by the ICC to delay president's Uhuru's cases brought the AU together to face a common enemy (ICC). The result is diminishing confidence of the court in African states and the populace.

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<sup>222</sup> International Justice resource Center, African Union Approves Immunity For Government Officials in Amendment to the African Court of Justice and Human Rights Statute <http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/> Accessed August 17, 2015

<sup>223</sup> Goldston James, Kenyatta failure deals blow to ICC , Aljazeera <http://america.aljazeera.com/opinions/2014/12/uhuru-kenyatta-crimesagainsthumanityinternationalcriminalcourt.html> Accessed August 17, 2015

## CHAPTER FIVE

### 5.0 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

This study sought to establish the relationship between sovereignty and the ICC. It had three objectives as follows. (i) To evaluate how state sovereignty and nationalism affect the operations of the ICC, (ii) To examine if president Uhuru's submission to the ICC undermined Kenya's sovereignty, and (iii) To examine the domestic political and amnesty implications of ICC trials in Africa. The study was guided by the following hypotheses (i) Sovereignty and nationalism hinder the work of the ICC in enforcing international criminal justice, (ii) The ICC does not have the capacity to try sitting heads of states, (iii) ICC's activities in Africa neither exacerbate nor resolves conflict in the continent. The hypotheses were analyzed using the Idealist/Liberalist theoretical framework.

The creation of the multistate system following the signing of the treaty of Westphalia in 1648 introduced the notion of sovereignty. Sovereignty implied that states were free to exercise authority in particular territories without external interference from other states. Initially the heads of states were equated to the state and enjoyed inviolability and immunity from public and private actions. With the rise and subsequent development of international law however, state and head of state immunity now differentiates between public and private acts of states and head of states and private acts are not guaranteed immunity. There has therefore been clipping of sovereignty and states are now obliged to act in accordance with international law even for actions carried out in their territory.

#### 5.2 Summary

The ICC which epitomizes the significance of international law was created in 2002 following the Rome Statute coming into force, it's mandated to prosecute individuals accused of grievous violation of international law. It does not recognize the official capacity of an accused which gives it mandate to prosecute heads of states, even sitting ones. This is seen by some as going against the very notion of sovereignty on which the international system is founded. Though it has mandate to

prosecute sitting heads of states accused of violating international criminal law, it has never been able to do so in its relatively short life.

The Sudanese president Omar al Bashir was indicted by the court in 2008 and a warrant of arrest issued against him. Though member states are obliged to arrest him when he visits, this has never happened though he frequently travels to countries that are state parties to the Rome statute. President Uhuru was also indicted in 2009 before he became the Kenyan president. During his campaign for the presidency in 2013, he promised to attend the courts hearing, abide by the rule of law and meet Kenya's international obligations. His submission to the court in 2014 and his subsequent exoneration raised some serious questions on sovereignty and the ability of ICC to prosecute sitting heads of states.

The ICC is a product of states with significant contribution of NGOs, as such The Hague based court heavily relies on states. For starters, states comprise the members of ICC; the court derives its personnel from states while its funding majorly comes from states not to mention that the ICC also relies on The Security Council for non-state member referrals. It follows therefore that the international court cannot escape sovereignty influences. Sovereign states are not the only actors that wield influence over the ICC, NGOs though not sovereigns significantly influence what the court does and does not get involved in. NGOs champion human rights, international humanitarian and criminal laws and as such their involvement in the court's affairs is almost given. Generally, the ICC seems to agonize more from sovereignty than benefit from it.

In light of recent events, one question that comes up is whether president Uhuru's submission to the ICC undermined sovereignty. His appearance before the court which was the very first instance by a sitting head of state marked a momentous milestone in international law and politics. The findings of this study show that while Kenya as a member of the international community claims independence



and sovereignty, it's not in reality. Like a vast majority of former colonial and developing countries, its conduct largely depends on the wishes of world's major powers and those of former colonizers. Consequently, Kenya cannot really claim sovereignty and as such, none was infringed by its president's submission to the ICC. This would however not have been the case had president Uhuru been the head of state of a major world power, then; the fallout would have been monumental!

To be sure, the study determined that Kenya's sovereignty was not undermined because Kenya as a state cannot really claim to be a sovereign state. Like other developing countries in Africa, Asia and South America, it is still heavily influenced by its former colonial power and the west in general. The findings also brought up another issue to do with the ability of the ICC to prosecute sitting heads of states in accordance with its mandate. It emerged that while the ICC had good intentions, its capacity to prosecute the powerful is questionable. Its role in Africa where it has concentrated its efforts is equally controversial.

This could in part explain the visible erosion of ICC support and confidence by the Kenyan populace. The court enjoyed colossal support in Kenya and Africa upon its creation in 2002 as evidenced by the huge number of African countries that ratified the Rome statute. The court was seen by NGOs and the civil society in general as the defender of the weak against the aggression of the mighty. When the ICC took up the PEV cases, it was seen as a deliverer of justice to the hundreds of thousands of internally displaced people in Kenya. The trust in the ICC ability to offer justice begun to wane with its decision to drop four out of the original six cases it had taken up. It later dropped Mr. Uhuru's case in 2014 remaining with only one case of the original six cases it was investigating.

During the 2013 Kenyan general elections, the court's popularity among Kenyans nosedived. Politics had a big role to play in this. Warnings given to the Kenyan electorate during this particular general election by the west was perceived by some as interference in Kenya's domestic affairs. After

President Uhuru took power, Kenya sought the support of the AU to alter the Rome statute and have president Uhuru's case delayed with no avail. This led to declining support for the ICC in Africa only falling short of enmass withdrawal from the Rome statute by AU's member states. It also galvanized AU to fight a common enemy leading to inter alia, the AU's resolution not to prosecute serving heads of states and other top ranking officials in government in the African Court of Justice in 2014.

### **5.3 Conclusions**

This study sought to explore the relationship between ICC and sovereignty. To come to a comprehensive conclusion, it behooves the author to check if the objectives were met. The first objective was to evaluate the role of sovereignty and nationalism in the operations of the ICC. The findings of chapter II showed that sovereignty and nationalism have a big role to play in the operations of the ICC. The ICC being a state creation cannot thus escape state influence and political overtones. The court is funded by states and depends on states' machinery for apprehending inductees and providing evidence. Nationalism which affects how states are governed has an equally significant role in ICC's operations.

The second objective of the study was to examine if Kenya's president Uhuru's submission to the ICC undermined Kenya's sovereignty. The findings of chapter III showed that the president's submission to the court did not undermine Kenya's sovereignty. It emerged that Kenya as a dependent state cannot really claim to have sovereignty. Its actions are to a large extent aligned to the wishes of more powerful states. The findings also found that though a head of state symbolizes a state's sovereignty, even the state is bound by international law as such a head of state cannot claim immunity for violation of jus cogens.

Lastly the study sought to examine the political and amnesty implications of ongoing and concluded ICC trials. The findings showed that the ICC has lost significant credibility in the decade or so it has been in existence. Its mandate to prosecute anyone regardless of the official capacity seems to

have hit unexpected snags. The findings alluded to the fact that the ICC does not yet have the capability to deliver justice and peace however well intentioned it is. The political interference of the court more so by the powerful states has led to erosion of people's confidence on its ability to deliver and defend the weak from the powerful.

#### **5.4 Recommendations**

Though African states generally gained independence over 5 decades ago, they cannot claim to be truly independent. This is because they still largely depend on their former colonizers for policy, aid, direction and markets. They need to stop relying on former colonial masters and other powerful states and forge their own path as demonstrated by the Asian Tigers. Unless they get out of the neo colonial domination, they cannot claim to be sovereign states with equal stature in the international affairs. African heads of states need to chart a way forward for the continent by concentrating their efforts to development and not scheming how to hold on power. Indeed bad leadership has made Africa the most conflict prone continent as dissatisfied citizens are easily influenced to take up arms in search of credible leadership. Africa thus needs to sort out these intertwined problems to avoid the negative focus given to it by international criminal court and international community.

While the ICC marks a significant step towards increased accountability and extinction of war crimes, crimes against humanity and genocide, it needs to evaluate itself. The court needs to make serious reforms to enable it become the body it was envisioned to be. Reforms could see major powers like US China and Russia join in; this could greatly raise its credibility. It needs to come up with mechanisms that can ensure that it can go even after powerful sitting heads of states and prosecute them successfully. Equally, the court should not cower in pursuing justice inside the borders of major powers of the world. This is the only way it can attain credibility and support from other nations, more so the less powerful ones.

State parties to the Rome statute and the Security Council need to fulfill their obligations if serious international crimes are to be checked. The political interference in the court which has seen it follow African situations only while turning a blind eye to other serious violations elsewhere ought to be decisively addressed. The relationship between the ICC and the UN especially should be revisited to ensure that members who fund both organizations do not exert undue influence on the court's operations.

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## APPENDIX 1: INTERVIEW GUIDE

Dear Respondent,

My name is Kiruri Wahome a Master of Arts in International Studies student at the Institute of Diplomacy and International Studies (IDIS), University of Nairobi. I am doing a research project titled, “**THE INTERNATIONAL CRIMINAL COURT AND SOVEREIGNTY: CASE STUDY OF KENYA**” and hence collecting data for the same. This interview focuses on issues around the ICC case against Kenya’s head of state and its possible ramifications.

Thanks in advance for your participation.

### PART I: BIO DATA.

1. Sex:  Male  Female

2. Age:  18-27  28-37  38- 47  48-57 58 and above

3. Highest level of education attained:

Certificate  Diploma  Degree  Masters

Doctorate  Other (specify) \_\_\_\_\_

4. **Profession:**

i)  Political Science Expert.

**Specialization:**

International Politics  International Relations  Political Science

Other (specify) \_\_\_\_\_

ii)  International Law Expert.

**Specialization:**

International law  Human Rights  Foreign Policy

Other (specify) \_\_\_\_\_

**PART II: RESEARCH QUESTIONS.**

1. Kenya and President Uhuru's submission to the ICC as the first sitting head of state was perceived negatively internationally.

Strongly agree  Agree  Neutral  Disagree  Strongly disagree

Please explain

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2. President Uhuru's submission to the ICC undermined Kenya's sovereignty.

Strongly agree  Agree  Neutral  Disagree  Strongly disagree

Please explain

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3. President Uhuru failed to leverage on Rome statute article 98(2) non extradition clause to maintain Kenya's sovereignty.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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4. Mr. Uhuru should have sought to sign reciprocal bilateral immunity agreement with US to neutralize ICC's obligations and uphold Kenya's sovereignty.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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5. Choices have Consequences statement by US diplomat for Africa Johnny Carson was US interfering amounted to interfering of Kenya's domestic affairs by the US.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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6. The president should not have gone to Hague because Kenya is strategically important to the west and therefore no actions would have been taken against his failure.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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7. As the first sitting head of state to appear in ICC president Uhuru's action undermined the concept of Westphalian sovereignty.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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8. The president could have used other avenues not to attend the hearing in order to safeguard Kenya's sovereignty.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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9. Stepping down as the head of state was irrelevant as Mr. Uhuru was technically the president of Kenya and therefore bowed Kenya's sovereignty to ICC.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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10. Kenya's sovereignty was compromised because he did not seek mandate from people who entrusted him with Kenya's sovereignty.

Strongly agree [ ]    Agree [ ]    Neutral [ ]    Disagree [ ]    Strongly disagree [ ]

Please explain

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**Thank You for Your Time**

## APPENDIX 1I: QUESTIONNAIRE

Dear Respondent,

My name is Kiruri Wahome a Master of Arts in International Studies student at the Institute of Diplomacy and International Studies (IDIS), University of Nairobi. I am doing a research project titled, **“THE INTERNATIONAL CRIMINAL COURT AND SOVEREIGNTY: CASE STUDY OF KENYA”** and hence collecting data for the same. This questionnaire focuses on issues around the ICC case against Kenya’s head of state and its possible ramifications. The information you will provide in this questionnaire will be treated with extreme confidentiality and it will be strictly utilized only for academic purposes of this research.

Thanks in advance for your participation.

### PART I: BIO DATA.

Please tick the most suitable response.

1. Sex:  Male             Female

2. Age:  18-27             28-37             38- 47             48-57    58 and above

3. Highest level of education attained:

Certificate  Diploma  Degree  Masters

Doctorate  Other (specify) \_\_\_\_\_

4. **Profession:** \_\_\_\_\_



**PART II: RESEARCH QUESTIONS.**

1. Do you think the ICC is a political rather than a judicial body?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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(b) Now that Kenya has normal relations with UK do you think the west is not interested in justice but rather in pursuit of their interests?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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2. The EU, US and UK caution to Kenyans not to vote an ICC inducted head of state amounted to violation of non-intervention principle?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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3. ICC exacerbates conflict in Africa by being remote to the peace before justice approach which is entrenched in Africa e.g. forgiving perpetrators of crimes against humanity, genocide, and war crimes through truth and reconciliation commissions and by its resolute pursuit of justice to attain peace?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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4. ICC unfairly targets and punishes weak/African countries?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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5. ICC was responsible for Kenya's relatively peaceful 2013 General elections?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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6. Though ICC has mandate to prosecute anyone, it has no capacity to successfully prosecute the mighty/sitting heads of states as demonstrated by president Uhuru's case?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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7. President Uhuru ICC indictment and submission undermined international law in Africa due Kenya's bid to withdraw from Rome statute and AU's heads of states' resolution not to prosecute African heads of states and senior government officials in the African Court of Justice and Human Rights?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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8. ICC's role and credibility in Africa and specifically Kenya has significantly reduced after Uhuru Kenyatta's and Kenyan cases?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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9. President Uhuru ICC indictment and submission undermined international law in Africa due Kenya's bid to withdraw from Rome statute and AU's heads of states' resolution not to

prosecute African heads of states and senior government officials in the African Court of Justice and Human Rights?

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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10. Africa Union action to discard trying heads states in African court of justice and human rights undermined international criminal law.

Yes [ ]

No [ ]

Not Sure [ ]

Please explain

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**Thank You for Your Time**