ASSAULTING SOVEREIGNTY? THE CASE OF KENYA AND THE INTERNATIONAL CRIMINAL COURT

BY

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AUGUST 2016

DECLARATION

I declare that this research is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

DATED at Nairobi this________day of ____________________ 2016.

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DEDICATION

This thesis is dedicated to the Lord Jesus Christ, my redeemer, whom I have always loved and adored and who has persistently been a fountain of life, health and ideas to me. It is also dedicated to my parents, Samuel and Mildred Ndeda, the ones who bore, bred and gave me an education.

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Although this thesis has but one author, the research work upon which it rests could never have been accomplished without the participation of dozens of people in the course of its preparation.

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ACRONYMS

AJIL – American Journal of International Law

AU – African Union

B.Y.U Journal of Public Law – Brigham Young University Journal of Public Law

DRC – Democratic Republic of Congo

EJIL – European Journal of International Law

GA – General Assembly

Ga. J. Int'l & Comp. L – Georgia Journal of International and Comparative Law

ICC – International Criminal Court

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

ILC – International Law Commission

Int'l J. World Peace – International Journal on World Peace

PCIJ – Permanent Court of International Justice

Rev. of Int'l Studies – Review of International Studies

SAYIL – South African Yearbook of International Law

SC – Security Council

UN – United Nations

LIST OF CASES

1. S.S. Wimbledon (United Kingdom, France and Italy versus Federal Republic of Germany) {1923} PCIJ.

2. S.S. Lotus (France versus Turkey) {1927} PCIJ Series A no 10.

3. Judgment of the Nuremberg International Military Tribunal (1946).

4. Prosecutor versus Dusko Tadić a/k/a 'Dule' (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).

5. Prosecutor versus Dusko Tadić a/k/a 'Dule' (Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).

6. Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo versus Belgium) {2002} ICJ Rep 3.

7. Prosecutor v Omar Hassan Ahmad Al Bashir ('Omar Al Bashir') (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009).

8. Prosecutor v Germain Katanga (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case of 12 June 2009) ICC-01/04-01/07 OA 8 (25 September 2009).

9. Situation in the Republic of Kenya (Request for Authorisation of an Investigation pursuant to Article 15) ICC-01/09 (26 November 2009).

10. Situation in the Republic of Kenya (Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010).

11. Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (Judgment on the Appeal of the Republic of Kenya against the

decision of the Pre – Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the case pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11 OA (30 August 2011).

12. Prosecutor v Ruto, Kosgey & Sang (Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute) ICC-01/09-01/11, (23 January 2012).

13. Prosecutor v Muthaura, Kenyatta & Ali (Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute) ICC- 01/09-02/11 (23 January 2012).

14. Prosecutor v Uhuru Muigai Kenyatta (Decision on the withdrawal of Charges against Mr Kenyatta) ICC-01/09-02/11 (13 March 2015).

15. Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ICC–01/09–01/11.

16. Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC–01/09–02/11.

LIST OF LEGAL INSTRUMENTS

A. International instruments

1. Charter of the United Nations (adopted 24 October 1945) 1 UNTS *XVI.*
2. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) UNTS volume 78 number 1021.
3. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Resolution 217A.
4. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965) UNTS Volume 660.
5. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) UNTS volume 993.
6. International Covenant on Civil and Political Rights (adopted 19 December 1966) UNTS volume 999 number 14668.
7. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (adopted 24 October 1970) U.N. Doc. A/8082.
8. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) UNTS volume 1465 number 24841.
9. Report of the Secretary General, 'An Agenda for Peace – Preventive Diplomacy, Peace – making, and Peace – keeping*'* (1992) UN Doc. A/47/277-S/24111.
10. Rome Statute of the International Criminal Court (adopted 17 July 1998) UNTS volume 2187 number 38544, ISBN No. 92-9227-227-6.

B. Kenyan

1. Government of Kenya, Constitution of the Republic of Kenya, 2010.

CHAPTER ONE

INTRODUCTION

1.1. Background to the Problem.

Nearly 70 years ago, the international community, desiring to cure the wounds of the Second World War undertook a very daring project. For the first time in history, legal mechanisms were established to bring those responsible for war crimes and crimes against humanity to justice using international tribunals created precisely for that reason. The Nuremberg and Tokyo trials were extraordinary, risky, and unique in their time.[1]

Justice Robert Jackson, in his inaugural address at Nuremberg, stated, 'That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason'.[2] The notion of trying the culprits of the war was so novel and contrary to customary practice that it nearly failed to happen. At Yalta, Joseph Stalin proposed that fifty thousand people be executed after the war and Winston Churchill felt that a list of the war criminals be drafted and they should also be killed once identified.[3] The American government however advocated forcefully for the trials to be conducted, not by national courts of either the conquered states or the triumphant states, but by an international court.[4] Ultimately, the allies agreed, and they established proceedings wherein judges thoroughly examined whether the acts of the alleged perpetrators amounted to crimes under international law.[5]

Aside from their novelty, the Nuremberg and Tokyo International Military Tribunals were astounding because though many of the defendants were found guilty, some were

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[1]Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 (3) AJIL 551 <http://www.jstor.org/stable/4091370> accessed 19 May 2015; Stephanie Markovich, 'Balancing State Sovereignty and Human Rights: Are there exceptions in International Law to the immunity rules for state officials?' (2009) Potentia 57 <http://kms1.isn.ethz.ch/serviceengine/Files/ISN/111048/ichaptersection_singledocument/a4cd50d9-3a21-4d45-9051-b46f8240d4b5/en/Chap4.pdf.> accessed 19 May 2015.

[2]Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 (3) AJIL 551 <http://www.jstor.org/stable/4091370> accessed 19 May 2015.

[3]ibid.

[4]ibid 552.

[5]ibid.

acquitted. Thus these tribunals paved the way for the establishment of the International Criminal Court (ICC).[6]

The Rome Statute of the International Criminal Court was adopted on 17th July 1998.[7] Article 1 of the Statute empowered the Court to exercise jurisdiction over persons for the most serious crimes of international concern. The Article also provided that the jurisdiction of the ICC would be complementary to national criminal jurisdictions. The concept of complementarity as regulated by Article 17 (3) of the Statute, entailed that the ICC could gain jurisdiction only when domestic legal systems were unwilling or genuinely unable to carry out an investigation or prosecution of an accused individual. Thus, the ICC gives preference to national courts if they are able to conduct fair trials against perpetrators of international crime on their own. However, Article 17 (3) is not absolute. States do not have an unfettered right to evade the Court's jurisdiction by claiming that they are willing and able to prosecute. In the end, the ICC has authority to supersede national authorities when it becomes apparent that a State is not willing to prosecute an individual.[8]

Further, Article 27 of the Statute provided that official capacity would not exempt a person from criminal responsibility. This position is in contrast with constitutional provisions in many African States which grant Presidents immunity. Idi Amin, and Hissène Habré, in particular committed massive violations of human rights while in power but were sheltered from prosecution before their domestic courts.[9] In recent experience however, national immunity has been lifted in most international instruments

[6]Stephanie Markovich, 'Balancing State Sovereignty and Human Rights: Are there exceptions in International Law to the immunity rules for state officials?' (2009) Potentia 58 <http://kms1.isn.ethz.ch/serviceengine/Files/ISN/111048/ichaptersection_singledocument/a4cd50d9-3a21-4d45-9051-b46f8240d4b5/en/Chap4.pdf.> accessed 19 May 2015.
[7]Alain Pellet, 'Entry into force and amendment of the Statute' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Volume 1, Oxford University Press 2002) 145.
[8]Lee Stone and Max Du Plessis, 'The Concept of Complementarity' in L Stone and M Du Plessis (eds), *The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries* 5 <https://www.issafrica.org/cdromestatute/pages/document.pdf> accessed 19 May 2015.
[9]ibid 7.

dealing with prosecution of international crimes, for example, Charles Taylor was tried at the Special Court for Sierra Leone at The Hague.[10]

In fulfilment of its mandate, the ICC has made attempts to indict culprits of international crimes especially in Africa. Many people across the globe have alluded to the fact that the presence of the ICC tramples on the sovereignty of States.[11]

Kenya signed the Rome Statute on 11th August 1999 and ratified it on 15th March 2005 and further approved the International Crimes Act which domesticated it. In December 2007, Kenya held its general elections, which was mired with inter – communal violence that left over 1,133 Kenyans dead and almost 350,000 people displaced.[12] Due to the delay in beginning criminal prosecutions against the alleged perpetrators of the post-election violence, the ICC prosecutor intervened. He proceeded to begin prosecution proceedings against the alleged perpetrators, among them being His Excellency Mr Uhuru Kenyatta and Mr William Ruto, the President and the Deputy President of the Republic of Kenya respectively.[13]

The Republic of Kenya has been accused severally of failing to comply with the terms of the Rome Statute. Primarily, it is alleged that Kenya frustrated some of the ICC prosecutor's efforts to gather evidence by withholding documents in the name of national security, and some police commissioners also refused to give statements.[14] Further, when the ICC prosecutor declared that he would be proceeding with an investigation against six suspects, Kenya's parliament voted to withdraw from the Rome Statute.[15] Honourable Aden Duale, the National Assembly majority leader, who introduced the motion said,

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[10]Stone and Du Plessis (n 8) 5.

[11]Guy Roberts, David A. Nill, Atul Bharadwaj.

[12]Waki Commission, *Report of the Commission of Inquiry into Post–Election Violence*, 15th October 2008, 327, 362 <http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf> accessed 21 May 2015.

[13]*Situation in the Republic of Kenya* (Request for authorisation of an investigation pursuant to Article 15) ICC-01/09 (26 November 2009) <https://www.icc-cpi.int/iccdocs/doc/doc785972.pdf.> accessed 21 May 2015; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC–01/09–01/11 <https://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf.> accessed 21 May 2015; *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC–01/09–02/11 <https://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf.> accessed 21 May 2015.

[14]Yvonne Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge 2013) 147.

[15]ibid.

'Let us defend the sovereignty of the nation of Kenya.[16] The sovereign state of Kenya, with a functioning judiciary, with a vibrant democracy, one of the best democracies in Africa is under threat.'[17] Though Kenya did not withdraw from the ICC, it lobbied the African Union (AU), and the United Nations (UN) to stop the ICC from proceeding.[18] The main argument was that the sovereignty of Kenya was under attack. There has been very little that has been written on the ICC in Kenya, especially since, this is a new area, and the facts keep unfolding. Thus the issue that arises is whether the presence of the ICC has assaulted the sovereignty of the Republic of Kenya.

1.2. Statement of the Problem.

Not long ago, international law considered relations between a State and its citizens a domestic issue, falling under state sovereignty. Since the 2nd World War however, human rights has been seen as an unavoidable international regime. Consequently the international community has adopted its standards as fundamental to the legitimate behaviour of States in order to limit the cruel consequences of sovereign authority.[19]

As a result of the growth of the human rights regime culminating in the establishment of the ICC, there has been a proliferation of scholarly works either announcing that it is assaulting state sovereignty, or that it is not, or alternatively that sovereignty and protection of human rights are but two sides of the same coin which complement each other.[20] The issue that thus arises is whether the protection of human rights via the ICC assaults sovereignty of States. The intervention of the ICC particularly in Kenya has led to accusations that it has assaulted the sovereignty of Kenya. This study therefore attempts to establish whether the sovereignty of Kenya has been or is being assaulted by the intervention of the ICC in the prosecution of the alleged perpetrators of the 2007 –

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[16]MG Zimeta, 'What Kenya's withdrawal means for the international criminal court' (*The Guardian,* 6 September 2013) <http://www.theguardian.com/commentisfree/2013/sep/06/kenya-withdrawal-icc-credibility> accessed 10 June 2015.

[17]Nicholas Kulish, 'Kenyan Lawmakers Vote to Leave International Court' (*The New York Times,* 5 September 2013) <http://www.nytimes.com/2013/09/06/world/africa/kenyan-lawmakers-vote-to-leave-international-court.html?_r=0> accessed 10 June 2015.

[18]Dutton (n 14) 147.

[19]Michael A. Elliott, 'Human Rights and the Triumph of the Individual in World Culture' (2007) 1(3) Cultural Sociology 344 <http://www.sagepub.com/ballantine2study/articles/Chapter%2016/Elliott.pdf.> accessed 10 June 2015.

[20]Guy Roberts, Robert Cryer, Ebru Coban Ozturk.

2008 post – election violence and determining how human rights can be protected and the sovereignty of Kenya upheld, if at all threatened.

1.3. Theoretical Framework.

There are several theories that can be used to inform the debate of whether the ICCs intervention assaults the sovereignty of Kenya, but for the purposes of this discussion, only the major ones will be highlighted.

1.3.1. Classical sovereignty theory.

This theory of sovereignty was developed in Europe in the 16th Century. The French Thinker Jean Bodin, defined sovereignty as the 'absolute and perpetual power within a state'.[21] His view was that a singular principal authority should exercise limitless power over its people, unconstrained by law.[22]

In Leviathan, Thomas Hobbes theorised that men gave all their powers and strength to one man or an assembly of men.[23] The sovereign according to him wielded absolute authority. Hobbes swept away all limitations of sovereignty by doing away with every right of the people. The result was a multitude so united in one person called a commonwealth or leviathan. The sovereign could not be subjected to any censure or restriction. Further, no external authority could sit in judgment on the State.[24]

Sovereignty for these early thinkers was an essential element of the monarchy, and later the State. It could not be challenged, divided, or restricted. Classical sovereignty was absolute and is seen as an indicator of totalitarian regimes.[25] Scholars, who argue that a State is sovereign and must not be subjected to restraints of international law, ICC in this case, are informed by this school.

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[21]MP Ferreira – Snyman, 'The Evolution of State Sovereignty: A Historical Overview' (2006) 12 (2) Fundamina 5 <http://uir.unisa.ac.za/bitstream/handle/10500/3689/Fundamina%20Snyman.finaal.pdf?sequence=1> accessed 10 September 2015.

[22]Timothy Zick, 'Are the States Sovereign?' (2005) William & Mary Law School Faculty Publications Paper 275, 239 <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1295&context=facpubs> accessed 24 May 2015.

[23]ibid 240.

[24]ibid.

[25]ibid.

1.3.2. Constitutional theory of sovereignty.

Constitutionalist theorists hold that state authority must be limited, though final.[26] Charles Merriam stated that sovereignty had to make friends with constitutional, scientific, and idealistic values.[27] The main features of this theory are that sovereignty can be divided, and that it rests with the Constitution, which apportions power to each level. The bigger difference between the constitutional and classical theories of sovereignty is that in the former sovereignty is not vested in any will.[28]

1.3.3. New Sovereignty theory.

This theory argues that sovereignty is not absolute but a bundle of features and related rights and duties and is characterised in terms of a State's ability to act well within the international system. To put it simply, sovereignty, once exclusive and isolationist has become relational. Sovereignty is thus the vindication of the State's existence as a member of the international system.[29] In a debate such as whether the ICC is assaulting the sovereignty of Kenya, scholars who advocate that a state cannot claim sovereignty and divorce themselves from the international regime are informed by this theory.

1.3.4. Social Construction theory.

This theory postulates that there are portions of the real world that are only facts by human agreement.[30] John Seale, a leading proponent of this theory, distinguished types of facts that order the world. They are: institutional facts, which require human institutions for their existence; and brute facts, which are not dependent on any human opinion.[31]

Social constructionists posit that 'state' and 'sovereignty' are institutional facts. They believe that state sovereignty is a social concept and should not be taken as given, fixed or immutable but an institution that is constantly undergoing change and

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[26]Dusan Pavlovic, 'Rousseau's Theory of Sovereignty' (Master's thesis, Central European University 1997) 5 <http://www.policy.hu/pavlovic/Bibliografija/MA_Rousseau_Sovereignty.pdf.> accessed 19 May 2015.
[27]Atul Bharadwaj, 'International Criminal Court and the Question of Sovereignty' (2003) 27 (1) Strategic Analysis 15 <http://www.idsa.in/system/files/strategicanalysis_atul_0303.pdf.> accessed 27 September 2015.
[28]Pavlovic (n 26) 6.
[29]Zick (n 22) 268.
[30]ibid 270.
[31]ibid.

transformation.[32] Thus, classical sovereignty can be deemed to be constantly changing to encompass new facts. The human rights regime, which has led to the development of the ICC, is one such fact.

They also believe that sovereignty is relational thus there must be a system of rules within which sovereigns relate with each other. Further, they believe that sovereignty assigns to states specific roles.[33] Law making and criminal prosecutions, is an example of such a role.

Lastly, they believe that sovereignty is constructed out of interaction with other States and the international society they form.[34] Thus the act of States relating and creating international organisations also develops sovereignty. When States met and voted for the establishment of the ICC, it was a construction of sovereignty. They conclude as long as States regard each other as being sovereign, they are.[35] This research is based on the premise that state sovereignty is a human construct and is constantly in a transformation process.

This study is based on the constitutional and social construction theories of sovereignty. The study does not employ the use of the classical and new sovereignty theory because the former indicates totalitarian regimes, which the human rights regime has tried to neutralise, and key aspects of the latter theory are well encapsulated under the social construction theory.

1.4. Literature Review.

The literature dealing with the issues of whether the presence of the ICC is assaulting state sovereignty is not much. The few there are, show a clear contrast of thinking between various scholars. Some scholars argue that indeed the ICC threatens state sovereignty; others argue that it does not, while others refuse to take a definite stand.

[32]Zick (n 22) 271, 277.
[33]ibid 278.
[34]ibid 279.
[35]ibid 281.

Guy Roberts, in his article titled, '*Assault on Sovereignty: the Clear and Present Danger of the New International Criminal Court*,' opposes the idea of an ICC.[36] The article explains that the ICC is fundamentally flawed and will rob nations of their sovereignty. Firstly, he argues that though the concept of complementarity gives precedence to national courts, the ICC is still allowed to take jurisdiction if the State is 'unable' or 'unwilling' to prosecute, or if the proceedings are conducted in a manner that shows lack of intention to bring the accused person to justice.[37] He argues, that the Court will act as a supranational court and become an inevitable participant in the nations legal process because it will create precedent regarding what it considers 'effective' and 'ineffective' domestic trials.[38] Thus either a State accepts its decrees or risk having its cases called up for international criminal prosecutions.[39]

Secondly, he argues that other peculiarities of national criminal jurisdictions could also fall under the inspection and judgment of the ICC. The Court could, for example disregard the protections designed by a State to ensure the rights of its people.[40] Lastly, he argues that a forceful, unaccountable prosecutor in pursuit of his/her own ideas of the law could severely restrict a nation's sovereign rights.[41] He concludes by saying that the Rome Statute represents a danger to national sovereignty because the Court strikes at the heart of nations by taking the power of law making away from individual countries and giving it to an international judiciary.[42] This article is important because it highlights the fact that the complementarity regime is a double edged sword and that the ICC has potential to be intrusive in national affairs. It is noteworthy though; that at the time of Roberts writing the article, the ICC was at its formative stages, and as such some of his allegations may sound presumptuous.

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[36]Guy Roberts, 'Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court' (2001) 17 (1) American University International Law Review 37 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1213&context=auilr> accessed 25 May 2015.
[37]ibid 55.
[38]ibid.
[39]ibid.
[40]ibid.
[41]ibid 59.
[42]ibid 75.

Marlene Wind, in contrast, in her article titled, '*Challenging sovereignty? The USA and the establishment of the International Criminal Court,'* does not draw any conclusion as to whether the ICC challenges state sovereignty.[43] The article analyses the American objections to the ICC and the ideas of sovereignty underlying them. She highlights the objections, the key being, the fact of an independent prosecutor who could begin investigations and prosecutions before the court on his or her own initiative.[44]

She states that when Americans argue that the ICC threatens national sovereignty, they could be right if they are arguing from a traditional positivist understanding of international law.[45] She then compares the USA position and the European conception of sovereignty, and highlights that in Europe, sovereignty would seldom, be used as an excuse to stay out of a European Union policy initiative as it would not be regarded as legitimate.[46] She concludes by saying that it is not possible to firmly conclude on whether the ICC challenges national sovereignty because sovereignty is a social construction and not objective standard.[47] Wind's article suggests that whether the ICC challenges sovereignty is a matter to be determined by whichever school of thought one subscribes to. The problem however, is that she fails to give a firm conclusion on the question.

Allison Marston Danner and Beth Simmons, in their article titled, '*Sovereignty Costs, Credible Commitments, and the International Criminal Court*,' provide another angle to the argument.[48] They introduce the credible commitment theory. This theory suggests that States normally cooperate with the ICC so as to make their commitment credible, and gain some benefit. The commitment made is that they will prevent violation of human rights and this commitment is credible because the Court has a Prosecutor who acts independently of State control. This commitment involves significant sovereignty costs namely ceding domestic control over the investigations and prosecutions of highly

[43]Marlene Wind, 'Challenging Sovereignty? The USA and the establishment of the International Criminal Court' (2009) 2(2) Ethics & Global Politics 101 <https://www.law.upenn.edu/live/files/1519-windchallenging-sovereigntypdf> accessed 26 May 2015.
[44]ibid 83, 86.
[45]ibid 102.
[46]ibid 93.
[47]ibid 101.
[48]Allison Marston Danner and Beth Simmons, 'Sovereignty Costs, Credible Commitments, and the International Criminal Court' Yale Law School Research Paper 2007 <http://www.law.yale.edu/documents/pdf/Faculty/DannerSimmons07.pdf> accessed 25 May 2015.

political crimes.[49]Danner and Simons, like Guy Roberts, further argue that the complementarity regime provides an incomplete protection of sovereignty because a State with excellent accountability mechanisms and the political will to investigate and prosecute will have nothing to fear. However, a State whose mechanism is less robust cannot be sure that their processes will be considered adequate. Lastly, they argue that the most obvious limit to state sovereignty was the decision to establish the ICC to begin with.[50]

Robert Cryer, however, in his article titled, '*International Criminal Law vs State Sovereignty: Another Round*?' proposes that there is more to the relationship between sovereignty and international criminal law than is obvious.[51] He states that there is no consensus on the extent to which the ICC represents a challenge to sovereignty and argues that the relationship between international criminal law and state sovereignty is often misunderstood.[52] He argues that while international criminal law affects sovereignty by prohibiting behaviour previously outside the purview of international law and obligating States to cooperate with the ICC, the prevention of international crimes cannot occur without sovereignty.[53]He also argues that creating the ICC was an exercise of sovereignty as such the ICC owed its existence to sovereignty and in so creating States had accepted that the ICC could exercise some of their sovereign power.[54] This is in contrast with Danner and Simmons, who argue that the most obvious limit to sovereignty was the decision to establish the ICC to begin with.[55]

Furthermore, he states that the ICC is filled with conditions protecting sovereignty such as the complementarity regime. This, he explains can be seen as a use of sovereignty for international ends because States decided that international crimes ought to be repressed, and determined that the most effective way of doing so was by encouraging national

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[49]Danner and Simmons (n 48) 1, 2.
[50]ibid 7, 8.
[51]Robert Cryer, 'International Criminal Law versus State Sovereignty: Another Round?' (2006) 16 (5) EJIL 981 <http://www.ejil.org/pdfs/16/5/333.pdf > accessed 25 May 2015.
[52]ibid 984, 985.
[53]ibid 985.
[54]ibid.
[55]Danner and Simmons (n 48) 8.

efforts at prosecution.[56] He concludes by saying that while too much sovereign power can lead to situations of international crimes such as the Holocaust, so can a lack of it like in the case of Somalia.[57] He further states that the relationship between sovereignty and international criminal law is multifaceted and not easily reducible.[58] His thesis is important because it shows that the ICC and sovereignty can also complement each other. He however fails to recognise that the complementarity regime inhibits sovereignty in as much as it also complements it.

Ebru Coban – Ozturk is an ICC advocate. His article, titled, '*The International Criminal Court, Jurisdiction and the Concept of Sovereignty*,' discusses the jurisdiction of the Court and the criticisms of this jurisdiction.[59] He acknowledges that the ICC restricts national sovereignty in terms of the realist theory, that is, though the State continues to use its jurisdiction for everyone within its country, it shares jurisdiction with the ICC for the crimes of genocide, crimes against humanity and war crimes.[60] He also acknowledges that though the State still possesses its jurisdiction, the ICC is able to exercise jurisdiction in case of delay, lack of trials, or if it is concluded that there was lack of justice at the end of the prosecution process. The ICC is thus an institution above the jurisdiction and hence sovereignty of the State.[61] In spite of all these, he concludes that despite limiting sovereignty of States, the existence of the Court is necessary because of its core function of preventing international crimes.[62]

Laura Van Esterik's article titled, '*The Challenges of the Kenyan Cases at the International Criminal Court*,' agrees with Ozturk's conclusion.[63] She examines why the Kenyan cases at the ICC are crucial for the legitimacy of the Court. She first notes that

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[56]Cryer (n 51) 986.
[57]ibid 1000.
[58]ibid.
[59]Ebru Coban – Ozturk, 'The International Criminal Court, Jurisdiction and the Concept of Sovereignty' (2014) 10 (10) European Scientific Journal 141 <http://eujournal.org/index.php/esj/article/viewFile/3128/2926> accessed 10 June 2015.
[60]ibid 151.
[61]ibid.
[62]ibid 153.
[63]Laura van Esterik, 'The Challenges of the Kenyan cases at the International Criminal Court' (2014) Paper written for American NGO Coalition for the International Criminal Court 5 <http://www.amicc.org/docs/The%20Kenya%20Cases%20at%20the%20International%20Criminal%20Court.pdf> accessed 25 May 2015.

the Kenyan case was the first time the ICC was confronted with trying a sitting Head of State. This resulted in criticism by African States, who argued that the ICC was interfering with African States sovereignty. She states however that the prosecution of President Uhuru Kenyatta was misunderstood as an attack on Kenya.[64] She concludes that the Court is about individuals and not States and that prosecution of sitting Heads of States does not constitute attacks on a State as such, but aim rather to end impunity for individuals responsible for atrocious crimes, who are often shielded from prosecutions due to their high level status.[65]

Michael Reisman, in his article titled, '*Sovereignty and Human Rights in Contemporary International Law*,' brings in the idea of popular sovereignty (sovereignty of the people) as opposed to the sovereignty of the sovereign in support of the ICC.[66] He argues that international law still protects sovereignty, but in its present sense, the object of protection is not the power base of the tyrant but rather the abilities of a population to freely decide about the identities and policies of its governors.[67] He concludes by saying that those who still long for 'the good old days' and continue boasting of sovereignty without connecting it to human rights undermine the same.[68]

Cenap Çakmak, in his article, '*The International Criminal Court in World Politics*,' analyses the effect of the ICC on the exercise of national sovereignty among other issues.[69] He uses the role of the Prosecutor and the complementarity regime for his analysis. He acknowledges the wide discretion granted to the prosecutor and the criticisms of academicians because of its potential of abuse but argues that though the prosecutor is a strong figure, it did not mean that he would misuse his authority.[70] Secondly, he argues that the authority of the Court to exercise its jurisdiction over nationals of non–party States is a challenge to sovereignty and lastly he argues that the

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[64]Esterik (n 63) 1, 2, 4.
[65]ibid 6.
[66]Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 867 <http://digitalcommons.law.yale.edu/fss_papers/872> accessed 25 May 2015.
[67]ibid 872.
[68]ibid 876.
[69]Cenap Çakmak, 'The International Criminal Court in World Politics' (2006) 23(1) Int'l J. World Peace 8 <http://www.jstor.org/stable/20753516> accessed 26 May 2015.
[70]ibid 14.

Court is designed to play a complementary role to national criminal jurisdictions.[71] He concludes that the Prosecutor's role is not designed to undermine national sovereignty, and in any event the States themselves endowed him/her with such power.[72] He also concludes that the Court is designed to force States to take measures to prevent occurrence of the gravest crimes over which it has jurisdiction.[73]

The articles by Çakmak, Reisman and Ozturk are important because despite advocating for the ICC, they also recognise the hardship that it places on sovereignty. Van Esterick, on the other hand, tries to divorce the individual from the State. Her thesis is especially important because it analyses the Kenyan situation, which is the point of reference for this research.

Dire Tladi, in his article, titled, '*The African Union and the International Criminal Court: The battle for the soul of international law*,' analyses the AU decision urging African States not to cooperate with the ICC in effecting the arrest warrant issued against president Al Bashir.[74] The main argument was that the ICC was a threat to the sovereignty of the African people. Tladi argues that to speak of the 'sovereignty of the African continent' was problematic because it ignored the fact that the ICC would only intervene where States were unwilling or unable to genuinely carry out the prosecution.'[75] He does not seem to have any reservations about complementarity like Guy Roberts.

Felix Matchel Kajo, in his thesis titled, '*The Principle of Complementarity vis – a – vis the Kenyan Politics*,' discusses the principle of complementarity with regard to national jurisdiction and the jurisdiction of the ICC.[76] According to him, the jurisdiction of the

[71]Çakmak (n 69) 20, 22.
[72]ibid 18.
[73]ibid 23.
[74]Dire Tladi, 'The African Union and the International Criminal Court: The battle for the soul of International Law' (2009) 34 SAYIL 58 <http:///www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=OCB4QFjAA&url=http%3A%2F%2Fcouncilandcourt.org%2Ffiles%2F2012%2F11%2F11%2FTladi-AU-and-ICC-pdf&ei=3E5HVcizMoT6Uua6gcgH&usg=AFQjCNEU49NPyzueq8TvOe7-GERPUTjseQ&bvm=bv.92291466,d.d24> accessed 20 May 2015.
[75]ibid 67.
[76]Felix Kajo, 'The Principle of Complementarity vis – a – vis The Kenyan Politics' (LLB Thesis, Moi University 2010) 1

ICC is to be complementary to the jurisdiction of States, thus States have the primary responsibility to prosecute alleged perpetrators of international crimes. He also states that the allegations that the ICC as it operates, came to trample the sovereignty of African States is cheap political gossip because the ICC is a respecter of national jurisdictions.[77] He concludes by saying that the Kenyan government should do all it can and aid in good faith the implementation of the Statute with a view to ending impunity for the sake of human rights protection.[78] Kajo, just like Tladi, does not seem to have any reservations about complementarity of the ICC. His thesis is also important because it analyses the Kenyan situation.

The above review is evidence of a gap in literature. While, most authors have analysed the effect of the ICC on state sovereignty, they have only done so generally or with reference to specific countries like the United States of America. The studies done on Kenya are very few. This research tries to bridge that gap.

1.5. Objectives of the Research.

1.5.1. Main objective.

The main objective of this study was to establish whether and how the involvement of the ICC in prosecuting the alleged perpetrators of the 2007 – 2008 post-election violence especially the President and the Deputy President is assaulting the sovereignty of Kenya and to what extent and also to establish ways that the situation can be remedied without negatively affecting redress of human rights violations.

1.5.2. Specific objectives.

The first specific objective was to establish whether Kenya has absolute sovereignty and the limits to this sovereignty. The second was to evaluate how the ICC interfered with Kenya's sovereignty in the prosecution of the alleged perpetrators of the 2007-2008 post-election violence. The third was to examine the perceptions of Kenyans regarding state sovereignty and the presence of the ICC in Kenyan affairs; and the last objective was to

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<http://www.academia.edu/6349861/THE_PRINCIPLE_OF_COMPLEMENTARITY_VIS-A-VIS_THE_KENYAN_POLITICS> accessed 19 May 2015.

[77] Kajo (n 76) 3, 4.

[78] ibid 11.

analyse the ways sovereignty can be upheld while still prosecuting human rights violations.

1.6. Justification of the Study.

This study has been provoked by the need to interrogate whether the ICC is assaulting the sovereignty of the nation of Kenya. The literature above does not give a clear answer as there is simply no consensus. Most of the literature is concerned with whether the ICC is assaulting state sovereignty generally and others with reference to specific States. The literature done on Kenya specifically and even Africa is not much. Furthermore, they do not make specific recommendations. This study discusses the ICC and state sovereignty generally and also particularly in Kenya and make accurate proposals.

1.7. Research questions.

The study was based on several questions:-

1. Does the nation of Kenya have absolute sovereignty? If yes, are there any limits to this sovereignty?
2. How has the ICC in prosecuting the alleged perpetrators of the 2007 – 08 post-election violence interfered with the sovereignty of Kenya?
3. What are the perceptions of Kenyans regarding state sovereignty and the presence of the ICC in Kenyan affairs?
4. Are there ways sovereignty can be upheld and human rights violations still prosecuted?

1.8. Hypothesis.

This research was based on the following assumptions:-

1. The explanations for the development of sovereignty are more complex than would be perceived thus its invocation like for example in the Kenyan case is fraught with ambiguity.

2. The present interpretation of sovereignty has a protagonist relationship with the International Criminal Court therefore Kenya's sovereignty is not being assaulted.

3. The general perception is that Kenya's sovereignty has been interfered with however when sovereignty was first conceived, it located supreme power in a ruler or the state, however at present the concept's beliefs and practices have been reconstructed to complement the development of the human rights regime which led to the development of the ICC.

4. The ICC is a respecter of national jurisdiction as it is complementary to the jurisdiction of States and only steps in when States fail to handle its matters, so States have the primary responsibility to prosecute alleged perpetrators of international crime.

1.9. Research methodology.

This study was based on both primary and secondary sources of data. Primary data collection entailed review of Statutes and undertaking interviews with respondents. The interviews identified what Kenyans thought of the debate between the ICC and sovereignty and established whether the presence of the ICC assaulted the sovereignty of Kenya. The members of the Kenyan National Assembly, Judges, senior lawyers, and academicians were the key respondents in the study and they were particularly chosen based on their understanding and knowledge of the concept of sovereignty. The result was that only ten respondents could be interviewed.[79]

Each respondent had his/her own interview schedule as such they gave independent information. Interview guides were also used to get information and both note taking and tape recording techniques were used to record information. The interviews were also conducted in English as that was the language of choice for all the respondents. The length of the interviews depended on the respondents' interests and what they knew. Some respondents did not give direct answers; rather they preferred to use long explanations to illustrate a point.

Secondary data collection entailed reviewing secondary sources such as books, treatises, journals, working papers, reports, press statements, newspaper articles, and information

[79]Initially I had constructed a list of possible respondents but the list continued to narrow when they could not explain the term sovereignty and therefore relate it effectively to Kenya and the ICC.

from the internet. The study employed a qualitative approach in the collection of the data necessary for the research because it had the potential of providing adequate information for the study and also a lot of the research was theoretical. To achieve this, desk research of secondary data sources was undertaken to establish other views on how the ICC has interfered with the sovereignty of Kenya and what is the best way to remedy the situation.

This work is the result of information obtained from various sources. The conclusions reached here are due to the valuable information obtained during the research.

1.9.1. Research problems experienced.

The first hindrance lay in the fact that sovereignty is a complex subject and many people, lawmakers included did not really know what it was. This frustrated the exercise a bit because the author had to struggle to find respondents who understood what sovereignty was. As a result, there was delay and few respondents could be interviewed.

The second problem was that some people either refused totally to be interviewed or made appointments which they did not fulfil. Lastly, it sometimes proved difficult to draw a line between sovereignty and politics. Often one respondent or another would go a long way to analyse the political situation of Kenya. This meant that a lot of time was wasted.

1.10. Limitations of the study.

This project may become a bit political, which would make me a bit uncomfortable because it is not intended to be so. This limitation however did not render it difficult for me to carry out the research.

1.11. Chapter breakdown.

The study is divided into the following chapters:

Chapter one: Introduction.

The introduction gives a general background of the research topic, area of study and the aims of the research. It will cover the background of the study, statement of the problem, objectives of the study, research questions, theoretical framework, literature review,

justification of the study, hypothesis, research methodology, limitations of the study and the chapter breakdown.

Chapter two: The evolution of the doctrine of sovereignty.

This Chapter examines the evolution of the concept of sovereignty from the traditional view point to its modern day conception. The chapter also explores sovereignty current legal framework.

Chapter three: The ICC question.

This chapter brings in the question of the ICC. It explores the relationship between the ICC and the concept of sovereignty and how this relationship affects Kenya's sovereignty, taking into account the perception of Kenyans concerning the ICC issue and concludes by determining whether the ICC assaults Kenya's sovereignty.

Chapter four: Conclusion and Recommendations

This chapter sums up key conclusions from the preceding chapters. It summarises the conclusions as to the degree to which the ICC is assaulting the sovereignty of Kenya, and the conclusions on the most appropriate methods that the ICC and the sovereignty of Kenya can be balanced. Finally, the Chapter makes recommendations on the way forward.

CHAPTER 2

THE EVOLUTION OF THE DOCTRINE OF SOVEREIGNTY

2.1. Introduction.

Sovereignty is not a modern concept. It was not created by the modern State. In fact, there were no States in the modern sense when it was first conceived.[1] The term has had a long history, and a variety of meanings.[2] It has developed into an international law concept through approximately five centuries of redefinition and modification. Initially, it was a political theory placing supreme power in a State. It has however changed into something else in international law. Nevertheless the present interpretation of sovereignty has aspects of its original meaning.[3]

This chapter traces the development of the concept of sovereignty. It contains two sections. The first section provides a selective retracing of the development of the concept and the second section deals with its current legal framework.

2.2. The evolution of sovereignty.

2.2.1. Mediaeval to nineteenth Century.

The doctrine of sovereignty developed from Aristotle's thesis called *Politics*, Roman law and mediaeval law. Aristotle hypothesized that there had to be a supreme power in the State that could belong to one, a few, or many.[4] According to him, the ruling class consisted of persons who shared in the constitution of the State. They established the constitution which then formed the State. His model of sovereignty purposed to promote the individual's pursuit of greater aims of society in a civic life.[5]

In the Roman Empire, the *populus romanus* (government of the people) was the authority in whose name the magistrates enforced the law.[6] Roman law held that the source of

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[1]Wayne Hudson, 'Fables of Sovereignty' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re – envisioning sovereignty, the end of Westphalia?* (Ashgate 2008) 24.
[2]James Crawford, *The Creation of States in International Law* (Oxford University Press 1979).
[3]John Hilla, 'The Literary effect of Sovereignty in International law' (2008) 14 Widener Law Review 81 <http://widenerlawreview.org/files/2008/10/03-hilla-final.pdf.> accessed 10 June 2015.
[4]C.E. Merriam, *History of the Theory of Sovereignty since Rousseau* (Batoche Books 2001) 5.
[5]Hilla (n 3) 82.
[6]Hudson (n 1) 25.

power lay with the Roman people who gave it to the ruler.[7] Rome transmitted the concept of sovereignty to Byzantium, where the emperor was the lord of the entire world.[8]

In the mediaeval period many forms of sovereignty were recognised. From the 5th to the 15th centuries, the Pope was the *universalis monarchia* (universal king/monarch) exercising the *universale regimen* (universal regimen). They considered princes to be auxiliaries to assist in their government. God was sovereign over the created world and the Pope was sovereign over the church.[9] The concept of sovereignty however failed to develop greatly because of the supremacy of divine and natural law above positive law.[10]

Aristotle's thesis is a mix between classical and constitutional theories of sovereignty. Classical because there had to be supreme power in the State, and constitutional because that power was not vested in a single will but could be shared among individuals. Further, both Aristotle and the Roman Empire introduce the concept of popular sovereignty because they emphasised the individual/people as the ultimate repository of power.

The earliest organised discussion on the concept of sovereignty was made in France by Jean Bodin.[11] He defined sovereignty, as 'the absolute and perpetual power of a commonwealth' or, as later translated, 'the supreme power over citizens and subjects, unrestrained by law'.[12] Sovereignty was absolute but was still answerable to natural and divine laws.[13] According to Bodin, the true sovereign was identified by his definitional powers, such as the power to: declare war and peace; enter into alliances; make appointments to and remove from public office all high officers and others; require subjects to swear loyalty oaths; levy taxes; award privileges; and govern the State's currency, which powers were not to be delegated, for doing so would disclose lack of sovereignty.[14]

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[7]Hilla (n 3) 82, 83.
[8]Hudson (n 1) 25.
[9]ibid.
[10]Merriam (n 4) 6.
[11]ibid 7.
[12]Hilla (n 3) 84.
[13]ibid 85, 86.
[14]ibid 86.

Jean Bodin had rivals. They were François Hotman, and the Monarchomachs. François Hotman located sovereignty in the people and emphasized their right to resist and remove the monarchy.[15] Additionally, the central features of the doctrine of the Monarchomachs was the original and absolute sovereignty of the people, the contractual foundation of government, the fiduciary character of all political power, and the right of the people to resist their leaders whenever found guilty of a breach of trust.[16]

Hugo Grotius conversely stated that sovereignty signified that power whose acts were not subject to the control of another.[17] He further elaborated sovereignty in light of the relationships between States.[18] He insisted on the need of a body forum of positive international law and conceded that sovereign power was capable of division.[19] He stated that sovereignty was still retained even when a State was committed to international pacts, treaties and/or consent based customary international law.[20] Lastly, he rejected the notion that sovereignty may lie with the people.[21]

Meanwhile, there were religious tensions in Europe with the Holy Roman Empire, which reached a breaking point in Prague in 1618 and plunged Europe into a war that lasted thirty years.[22] The conflict concluded in 1648 with the Peace of Westphalia. It ended with the Treaties of Munster, Osnabruck and the Pyrenees.[23] The Treaties accepted that the European body politic become a devolved sovereignty controlled body politic. This simply meant that the local rulers (i.e. dukes, princes, kings) could wield secular sovereign power over the regions they controlled.[24] The Peace of Westphalia accepted the

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[15]Hilla (n 3) 89.
[16]Merriam (n 4) 9.
[17]ibid 11.
[18]Hilla (n 3) 92.
[19]Hudson (n 1) 27.
[20]Hilla (n 3) 91.
[21]ibid 93.
[22]Kelly Gordon, 'The Origins of Westphalian Sovereignty' (Senior Seminar, Western Oregon University, 6 June 2008) 2 <https://www.wou.edu/las/socsci/history/senior_seminar_papers/2008/thesis%2008/Kelly%20Gordon.pdf> accessed 1 July 2015.
[23]MP Ferreira – Snyman, 'The Evolution of State Sovereignty: A Historical Overview' (2006) 12 (2) Fundamina 9 <http://uir.unisa.ac.za/bitstream/handle/10500/3689/Fundamina%20Snyman.finaal.pdf?sequence=1> accessed 10 September 2015.
[24]Winston P. Nagan and Aitza M. Haddad, 'Sovereignty in Theory and Practice' (2012) 13 San Diego Law Journal 446

equality of States as a norm of contemporary international law.[25] The Nation State was regarded as a tool of power, and international law was viewed as law between independent States which were chiefly concerned with promoting their own interests.[26] The Peace of Westphalia is very important in the development of sovereignty because with the creation of the modern State, and the fact that it was an instrument of power, sovereignty became practical, otherwise initially it was just a theoretical concept, as evidenced by the ideas of the above thinkers.

In the 1st half of the 17th century, Thomas Hobbes, came up with the idea of the 'uncommanded commander'.[27] He described a state of nature in which there prevailed a war of all against all, where there was no common power, and where every man's right reached as far as his might.[28] As a result, government arose through a covenant.[29] This covenant involved the citizens transferring all their rights and conferring all their power upon one individual, or an association of men, and creating a multitude so united in a single individual called a leviathan.[30] The leviathan was said to have sovereign power while rest in the State were subjects. The sovereign had among other rights, the power: to prescribe rules and civil laws; of judicature; to make war and declare peace; to punish and reward every subject; and to accord titles of honour. Additionally he did not have to tolerate opposition from his subjects and could also not be killed or reprimanded in any way by his subjects.[31]

At the close of the 17th century, Baron Samuel von Pufendorf's theory dominated Germany.[32] He accepted the contract as the origin of the State but required the conclusion of both an agreement to create a civil society and a further agreement between the people so formed and the government.[33] The sovereignty created by these agreements was the

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<http://worldacademy.org/files/Dubrovnik_Conference/Sovereignty_in_Theory_and_Practice_W.Nagan.pdf> accessed 12 June 2015.

[25] Snyman (n 23) 9.

[26] ibid 10.

[27] Hilla (n 3) 92.

[28] Merriam (n 4) 13.

[29] ibid.

[30] Hilla (n 3) 95.

[31] ibid 95, 96.

[32] Merriam (n 4) 14.

[33] ibid 15.

State's supreme power.[34] This power was indivisible; its acts could not be annulled by any other State organ; and was free from the limitations of human law.[35] According to Pufendorf, the only vital quality of sovereign power was that it be supreme authority in the State. It was not necessary that it be absolute.[36]Absoluteness gave one complete freedom to use his rights as he will, while supremacy simply meant that there was none superior.[37]

At the same time in England, the theory of John Locke was dominant.[38] He explained a state of nature that was imperfectly secured resulting in the establishment of a political society and then a government.[39] Every man then surrendered his natural rights to the political body which then establishes the legislature, which is the supreme political power, the source of law and a representative of the will of the society.[40] According to him, the legislature was sovereign but was subordinate to the political society, thus when the people of the political society were deprived of their rights, they could resume the sovereignty they placed in the legislature.[41]

The next stage was the writings of Jean Jacques Rousseau. He placed sovereign power in the people and described it as being indivisible, infallible and absolute.[42] Immanuel Kant on the other hand stated that a ruler had against his subjects' clear rights and no enforceable duties.[43] According to him, no constitutional limitations could be imposed upon the sovereign.[44] He was also against any recognition of the right of resistance by the people and classified it a high treason. The people according to him had to render obedience to the ruler.[45]

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[34]Merriam (n 4) 15.
[35]ibid.
[36]Hilla (n 3) 98.
[37]Merriam (n 4) 15.
[38]ibid 14.
[39]ibid 16.
[40]ibid.
[41]ibid.
[42]Hilla (n 3) 100; Merriam (n 4) 18.
[43]Merriam (n 4) 24.
[44]ibid.
[45]ibid.

Bodin, Hobbes and Kant can be classified as classical sovereignty theorists because the beginning of their theses is that a sovereign wields unlimited power over his people. Hotman, the Monarchomachs, Pufendorf, Locke and Rousseau, on the other hand can be classified as both new sovereignty theorists and social constructionists because they argue that sovereignty lies with the people. Sovereignty under these two theories is relational meaning that there is a system of rules that guide a State's existence in the international system. Presently, as shall be seen later in the chapter, States must ensure the protection of their people. This is the main pillar upon which the international system rests. It is noteworthy that Hotman, the Monarchomachs and Locke took it further and recognised that the people had the right to resist and take back their sovereignty from the government in case of breach of trust.

The thesis of Hugo Grotius can be classified as a mix between classical sovereignty, new sovereignty and social construction theories because he describes sovereignty as absolute and rejects the notion that that it may lie with the people. He however concedes that sovereignty is capable of division where there is a body of positive international law.

It is significant to note that while some of the aforementioned authors view sovereignty as absolute, others do not. Thus the nature of sovereignty as can be deduced from the above theses is authority to govern whether absolute, shared, limited or constitutional, depending on the interpretation, which may emanate from the people or any other quarter but is personified in the ruler(s), monarchy or State. This study therefore follows that sovereignty is not fixed as evidenced by the above theses but is constantly changing and is constantly subject to different interpretations but has to be in agreement with the constitutional values of any particular State.

2.2.2. Twentieth and twenty first centuries.

During the 17th, 18th and 19th centuries, Bodin's sovereignty was extended into a concept of unlimited freedom and independence.[46] States thus had the absolute right to define their own competencies. The concept also contained the principles of non-interference in the internal affairs of States by other States or by international law.[47] In a nutshell, States

[46]Snyman (n 23) 10.
[47]ibid 11, 12.

had exclusive jurisdiction over all subjects in their territory, to the exclusion of any other influence.[48]

International law was regarded as a set of voluntary rules found in either treaties or derived from customs. The rules were essentially bilateral and did not go beyond the correlative rights and obligations of its subjects.[49] In the *Lotus case*, the Permanent Court of International Justice (PCIJ) held that, 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law....'[50] The Court further indicated that a sovereign had to consent in order that they may be bound by an international obligation and that limitations upon the sovereignty of States could not be presumed.[51]

The blood soaked legacy of the 20th century however generated impetus for international law to take an active interest in the conduct of the State towards individuals.[52] The idea that a sovereign State had no limits to the exercise of its competence caused people hiding behind the guise of sovereign authority to set in motion events that led to the 1st World War.[53] The devastation caused by the war led to calls for instituting tribunals to try individuals guilty of committing atrocities. This however failed to happen because Germany and Turkey objected arguing that sovereignty over territory and authority would be threatened.[54] Further, American President Woodrow Wilson endorsed the idea of sovereign cooperation by means of a League of Nations.[55] Sovereignty principles still dominated negotiations and the League came out with a paralysis because if any one sovereign objected to a League determination, then the League would be unable to act. The international community thus failed to subject sovereignty to international

[48]Jackson Nyamuya Maogoto, 'Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re – envisioning Sovereignty: the end of Westphalia?* (Ashgate 2008) 211.

[49]Snyman (n 23) 12.

[50]*S.S. Lotus (France versus Turkey)* {1927} PCIJ Series A no 10, 31 <http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf> accessed 30 September 2015.

[51]ibid.

[52]Maogoto (n 48) 213.

[53]Nagan and Haddad (n 24) 454.

[54]Maogoto (n 48) 213, 214.

[55]Nagan and Haddad (n 24) 454.

obligation.[56] This failure, according to some, is one of the reasons that may have contributed to the 2nd World War.[57] It can thus be said that the peoples of the world at that time constructed sovereignty as an absolutist concept that could not under any circumstance be limited or shared or subjected to obligation with devastating effect.

The 2nd World War was conducted in such a way that a sovereign could decide whether to respect the laws of war. Germany for example developed the idea that they were involved in '*total war'*.[58] Further, outside the Nazi atrocities, the development of the authoritarian State particularly in Europe generated massive atrocities often targeted at their own citizens.[59] At the end of the war, there was considerable unease about the abuse of state sovereignty and the horror it generated.[60] There was new resolve to strengthen the force of international obligation and limit the scope of sovereign absolutism. The first move to this end was the Charter of Nuremberg which established the Nuremberg Tribunal. This was an agreement among the Allied Powers that there would be criminal justice for the Axis Powers.[61] During the trial, most of the defendants argued that they were merely following the orders of Hitler. The Tribunal rejected that argument and stated that individuals had international duties which transcended national obligations of obedience imposed by the individual States.[62] The Court also said that behind the veil of the sovereign were human agents of decision making thus courts of laws could penetrate that veil and hold decision makers accountable.[63] The Tribunal established limits to what a government could do, and rejected legal principles of sovereignty that tried to protect defendants from their responsibility for mass murder.[64]

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[56]Nagan and Haddad (n 24) 454.
[57]ibid.
[58]ibid 455.
[59]ibid.
[60]ibid 456.
[61]ibid 456, 466.
[62]*Judgment of the Nuremberg International Military Tribunal* (1946) 56 <http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf> accessed 30 September 2015.
[63]ibid.
[64]Nagan and Haddad (n 24) 456.

The second move was the adoption of the Charter of the UN in the form of a treaty obligation.[65] It defined the scope of sovereignty in terms of jurisdiction of the State over its internal affairs. As a result, sovereignty was primary where matters were exclusive to the domestic jurisdiction of a State however where they triggered elements of international concern, sovereign authority had to shared or constrained by the international community.[66] Thus by establishing both the Nuremberg Tribunal and the Charter, the peoples of the world realised that in order to prevent sovereign absolutism, sovereignty had to be reconstructed.

The enforcement of international criminal law at Nuremberg, and later Tokyo was the first of its kind international adjudication of crimes which extended beyond the scope of a national sovereign.[67] Following the creation of the two tribunals, discussion about establishing a permanent court began. The UN General Assembly (GA) requested the International Law Commission (ILC) to survey the likelihood of establishing a permanent international court.[68] By early 1950s the ILC had produced two draft statutes but the projects were shelved due to the tense political climate of the Cold war.[69] The Cold War period tied the issue of sovereignty to ideological and revolutionary agendas.[70] There were rivalries that threatened to strengthen state sovereignty, as a result the period was characterised by impunity.[71] Despite the impasse of cold war bloc politics, non-governmental organisations increasingly addressed human rights issues.[72] Any further effort towards establishing an international tribunal before 1990 took the form of

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[65]Charter of the United Nations 1945; Bardo Fassbender, 'The United Nations Charter As Constitution of the International Community' (1998) 36 (529*)* Columbia Journal of Transnational Law 531, 568-581 <https://www.academia.edu/11187131/The_United_Nations_Charter_as_Constitution_of_the_International_Community> accessed 10 March 2016; Louis Henkin, 'Human Rights and State Sovereignty' (1994) 25 (31) Ga. J. Int'l & Comp. L. 34 <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1386&context=gjicl> accessed 10 March 2016.

[66]Charter of the United Nations 1945, Art 2(7); Fassbender (n 65) 582-583; Henkin (n 65) 34.

[67]Maogoto (n 48) 217.

[68]Gary T. Dempsey, 'Reasonable Doubt: The Case against the Proposed International Criminal Court' (1998) Cato Policy Analysis No. 311, 3 <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa-311.pdf> accessed 25 February 2016.

[69]ibid.

[70]Maogoto (n 48) 218.

[71]ibid 219.

[72]Daniel Levy and Natan Sznaider, 'Sovereignty Transformed: A Sociology of Human Rights' (2006) 57(4) The British Journal of Sociology 668 <http://www2.mta.ac.il/~natan/soveignty%20transformed.pdf.> accessed 10 January 2016.

continued codification of international crimes.[73] This period for example saw the adoption of the Universal Declaration of Human Rights, the 1948 Genocide Convention, 1966 International Covenants on Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and regional documents such as the European Convention on Human Rights, and the American Declaration on the Rights and Duties of Man.[74] It also saw the emergence of the United Nations Human Rights Committee, and the Inter - American Commission and Court of Human Rights.[75]

In 1989, the UN delegation from Trinidad and Tobago reintroduced the idea of creating an international court to address the issue of international drug trafficking.[76] The GA encouraged the ILC to prepare a draft Statute for the international criminal court.[77] Meanwhile in February 1993, the Security Council (SC) established the International Criminal Tribunal for the Former Yugoslavia (ICTY) to adjudicate cases of war crimes, crimes against humanity, and genocide committed during the conflict in the territory of the former Yugoslavia.[78] This was the first such body to be created since the 2nd World War and was reflective of Nuremberg ethos.[79] The SC also established the International Criminal Tribunal for Rwanda (ICTR) to adjudicate the crimes committed in Rwanda.[80] These adhoc tribunals provided an impetus for the international community to establish the International Criminal Court.[81]

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[73]David A. Nill, 'National Sovereignty: Must it be sacrificed to the International Criminal Court?' (1999) 14 (119) B.Y.U Journal of Public Law 124<https://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBsQFjAAahUKEwiApNyOyIrIAhXKLNsKHZRkCSg&url=http%3A%2F%2Fdigitalcommons.law.byu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1257%26context%3Djpl&usg=AFQjCNGXFZUPQaU7Xc-DU-a3W4lS-9eWGQ&bvm=bv.103073922,d.ZGU>accessed 25 February 2016.

[74]Cenap Çakmak, 'The International Criminal Court in World Politics' (2006) 23(1) Int'l J. World Peace 4 <http://www.jstor.org/stable/20753516> accessed 26 May 2015.

[75]ibid 5.

[76]Dempsey (n 68) 3; Guy Roberts, 'Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court' (2001) 17 (1) American University International Law Review 38 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1213&context=auilr> accessed 25 May 2015.

[77]William A. Schabas, *An Introduction to the International Criminal Court* (2nd edition, Cambridge University Press) 9.

[78]Levy and Sznaider (n 72) 670.

[79]ibid.

[80]Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 (3) AJIL 559 <http://www.jstor.org/stable/4091370> accessed 19 May 2015.

[81]Maogoto (n 48) 219.

The ILC submitted a draft of the ICC Statute to the GA in 1994. In 1996, the GA convened the Preparatory Committee on the Establishment of an International Criminal Court.[82] Two years after, the Committee, submitted a revised draft statute. The GA then convened a conference in June 1998 to negotiate and approve the statute and on 17th July, the Rome Statute of the International Criminal Court was adopted.[83]

The establishment of the ICC is the perfection of a script that began at Nuremberg where the peoples of the world decided that state authority had to be limited to prevent sovereign absolutism. This development has had a profound effect on state sovereignty, because it married sovereignty and international obligation. As a result, there has been an explosion of scholarly works either approvingly announcing sovereignty's decline, demise or transformation, or call into question whether the phenomenon ever existed or mattered in the first place.[84] One author for example argued that the State was no longer a sovereign power issuing commands and that the concept of sovereignty was in the process of disintegration in so far as the idea of public service formed the foundation of modern state theory.[85] He described public service as those activities that the government was bound to perform, which activities displayed both an internal and an external (international) character.[86] He lastly argued that recognition of individual rights determined the direction and limit of public activity.[87]

Another author stated that state sovereignty had to be reduced. He argued that international cooperation required that all States be bound by some minimum requirements of international law without being entitled to claim that their sovereignty allowed them to reject basic international regulations and concluded that the world

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[82]Dempsey (n 68) 3.
[83]Guy Roberts, 'Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court' (2001) 17 (1) American University International Law Review 38 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1213&context=auilr> accessed 25 May 2015; Alain Pellet, 'Entry into force and amendment of the Statute' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Volume 1, Oxford University Press 2002) 145.
[84]Brad R. Roth, 'The Enduring Significance of State Sovereignty' (2004) 56 Florida Law Review 1018 <https://www.law.upenn.edu/live/files/1644-roth-brad-the-enduring-significance-of-state> accessed 24 February 2016.
[85]Duguit quoted in Snyman (n 23) 14.
[86]ibid.
[87]ibid.

community could take over the sovereignty of territories where the national governments had completely failed.[88] Also in 1992, Boutros Boutros Ghali, stated that respect for a State's sovereignty was critical to any shared international progress but that the time of absolute sovereignty had passed as its theory was never matched by reality.[89] Nearly a decade later, Kofi Annan stated that if States set on criminal behaviour knew that frontiers are not absolute defences and that the SC would intervene to stop crimes against humanity, then they would not embark on such a course in expectation of sovereign impunity.[90] Finally Francis Deng argued that sovereign prerogative could no longer validly be asserted by States delinquent in their fundamental responsibilities.[91]

Sovereignty has diminished only to the extent that a State is no longer a sovereign power issuing commands. The above section has shown however that sovereignty is enduring and capable of adjusting, depending on the thoughts, opinions, practices, and culture of the peoples of the world at any particular time. The most notable development of the 21st century is the growth of the human rights regime. Sovereignty has simply been transformed by human institutions that it owes its existence to, to incorporate the human rights regime. It has thus expanded to contain other attributes as shall be seen in the next section.

2.3. Sovereignty's current legal framework.

As noted above, the international criminal system has led to the reconstruction of the concept of sovereignty. Though it is still the most fundamental right a nation can assert, the powers, immunities and privileges of traditional sovereignty are now subject to increased limitations.[92] Further, States are now bound by international human rights and humanitarian instruments.[93] Lastly, sovereignty is now fraught with international

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[88]Henry Schermers cited in John H. Jackson, 'Sovereignty – Modern: A New Approach to an Outdated Concept' (2003) 97 AJIL 787 <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1108&context=facpub> accessed 25 February 2016.
[89]Report of the Secretary-General, 'An Agenda for Peace – Preventive Diplomacy, Peace – making, and Peace – keeping' (1992) UN Doc. A/47/277-S/24111 paragraph 17 <http://www.un-documents.net/a47-277.htm> accessed 25 February 2016.
[90]Kofi Annan quoted in Jackson (n 88) 787.
[91]Francis Deng quoted in Roth (n 84) 1018.
[92]Maogoto (n 48) 212.
[93]ibid.

obligations, one key obligation being that a State must protect its people.[94] This section will discuss modern sovereignty, which is the current legal framework of sovereignty by analysing a few international instruments.

2.3.1. The Charter of the United Nations.

The Charter does not define sovereignty. The term is visible only in the context of sovereign equality.[95] Article 2 (1) provides for the principle of sovereignty equality of all UN member States. All member States are thus equal irrespective of stature.[96] Fassbender however argues that the article gives equality precedence over sovereignty because it relegates the latter to the position of an adjective that merely modifies the noun ‘equality’.[97] Indeed the Charter places more emphasis on equality rather than sovereignty as a State’s right of governance.

The preamble also introduces the terms, ‘We the Peoples of the United Nations determined….’ UN member States are thus sovereign because they are the ultimate source of international authority.[98] Article 1 (2) and (3) further aim to promote international cooperation in solving international problems, and develop friendly relations among nations. This illustrates that sovereignty has become relational. It is now also concerned with relationships between States and their ability to act within international circles. Abram and Antonia Chayes even define sovereignty as status, membership or connection to the rest of the world and the political ability to be an actor in it.[99]

The Charter also provides that for a State to become a member of the UN, they must be peace – loving, must accept the obligations of both the Charter and international law.[100] Further it provides that a State that constantly violates the Charter may be removed from

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[94]Maogoto (n 48) 220.
[95]Nagan and Haddad (n 24) 502.
[96]Snyman (n 23) 21.
[97]Bardo Fassbender, ‘The United Nations Charter As Constitution of the International Community’, (1998) 36 (529*)* Columbia Journal of Transnational Law 582 <https://www.academia.edu/11187131/The_United_Nations_Charter_as_Constitution_of_the_International_Community> accessed 10 March 2016.
[98]Nagan and Haddad (n 24) 461.
[99]Abram Chayes and Antonia Handler Chayes quoted in Carly Nyst, ‘Solidarity in a Disaggregated World: Universal Jurisdiction and the Evolution of Sovereignty’ (2012) 8 Journal of International Law and International Relations 50 <http://www.jilir.org/docs/issues/volume_8/8_3_NYST_FINAL.pdf.> accessed 25 February 2016.
[100]Nagan and Haddad (n 24) 461; Charter of the United Nations 1945, Art 4 (1).

membership.[101] Nagan and Haddad argue that the Charter seeks to advance a good governance–oriented sovereignty and discourage governance that seeks to place sovereignty above Charter obligations.[102]

The Charter also limits States' exclusive right to go to war, and only allows it in the case of self-defence.[103] The Charter thus qualifies Bodin and Hobbes's absolute right to engage in war and divides it by conferring upon the SC security related competences such as the right to decide whether their exists any threat to peace, or act of aggression and make recommendation like military intervention.[104] While these provisions limit classical sovereignty, it is noteworthy that Grotius felt that sovereignty was capable of division and that it was still maintained while a State was committed to international treaties. Suganami also argues that there is nothing wrong with sovereign States concluding any treaty that widened the scope of international cooperation or accorded supranational competences to an overarching body.[105] This is true because sovereignty is also fashioned out of relations between States and the international society that they form. The act of States thus relating and creating international organisations such as the UN develops sovereignty. In the *Wimbledon case*, the PCIJ stated that the right to enter into international agreements was an attribute of state sovereignty, and that a State had not lost its sovereignty just because that it had contracted out various sovereign rights.[106]

The Charter is the constitution of the peoples of the world. It confirms the supreme nature of international law and describes sovereignty within that context. As a result certain aspects of sovereign authority have been limited. Be that as it may, it emphasizes that all its member states are equal as such no State can interfere in the internal affairs of another State. It has also made sovereignty relational by advocating for international cooperation and friendly relations among States. It has also made sovereignty responsible by

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[101]Charter of the United Nations 1945, Art 6.
[102]Nagan and Haddad (n 24) 463.
[103]Charter of the United Nations 1945, Arts 2 (4) and 51.
[104]ibid arts 39, 42.
[105]Hidemi Suganami, 'Understanding Sovereignty through Kelsen/Schmitt' (2007) 33 (3) Rev of Int'al Studies 527 <http://www.jstor.org/stable/40072190> accessed 29 February 2016.
[106]*S.S. Wimbledon (United Kingdom, France and Italy versus Federal Republic of Germany)* {1923} PCIJ, para 35 <http://www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm>_ accessed 10 March 2016.

requiring member States to be peace loving, and to abide by the obligations of the Charter and international law.

2.3.2. Supplementary international instruments.

One of the key international instruments that clarify the scope of sovereignty and international concern is the Universal Declaration of Human Rights. The Declaration is not a legal instrument, and has no binding force. It was generated at a time when the peoples of the world acknowledged the sins of the Holocaust and decided to take steps to ensure that they were never to be repeated.[107] The Declaration also supplied the vital provisions found in the: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; Convention on the Prevention and Punishment of the Crime of Genocide of 1948; International Covenant on Economic, Social, and Cultural Rights of 1966; International Covenant on Civil and Political Rights of 1966; and International Covenant on the Elimination of All Forms of Racial Discrimination of 1966.[108] States under these Instruments have the key responsibility of implementing the international principles and legal rules intended to protect universal human rights.[109] These Covenants place a duty upon sovereign States to protect the human rights of their peoples.

Another instrument is the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. This Declaration is based on the foundational principles of international constitutionalism found in the Charter.[110] It strengthens sovereignty by limiting interference with the internal operations of a State but also insists that the rules that limit inappropriate State relations are in reality a positive duty under international law to cooperate in promoting friendly relations.[111] One author stated that the Declaration may

[107]Father Robert Araujo, 'Sovereignty, Human Rights, and Self – Determination: The Meaning of International Law' (2000) 24 (5) Fordham International Law Journal 1478 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1770&context=ilj> accessed 1 March 2016.
[108]ibid 1478, 1479.
[109]ibid 1479.
[110]United Nations General Assembly, 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations' (24 October 1970) U.N. Doc. A/8082 <http://www.un-documents.net/a25r2625.htm> accessed 25 April 2016.
[111]Nagan and Haddad (n 24) 468.

be an effort to codify the concept of sovereignty under the rule of law.[112] This instrument promotes state sovereignty but also tries to constrain the absolutist behaviour of States, thus proving that the peoples of the world still believe in the importance of sovereignty.

In a nutshell, state sovereignty has transformed to incorporate the human rights regime. State conduct is no longer immune from international scrutiny[113] as such States are endowed with international obligations, and are bound by international human rights and humanitarian instruments. Further, as shall be seen in the next chapter, in case of occurrence of continuous violations of peremptory norms, the State's exclusive right to exercise criminal jurisdiction over its citizens' transfers to the international community.[114] Lastly sovereignty no longer consists of freedom of States to act independently, but in membership in good standing in the international regime.[115] In this way, sovereignty is also relational.

Further, sovereignty is capable of division. A State still maintains its sovereignty when it is committed to international treaties. The only difference is that, due to the thoughts, practices and culture of the peoples of the world in the 21st century, focus has moved from the power base of the ruler to the protection of the ruled. Some States have followed this trend and constitutionalised international law obligations. Kenya for example, while recognising the sovereignty of its people, has incorporated the rules of international law, and all treaties or conventions ratified by it into the laws of Kenya.[116] It has gone further to recognise and protect the human rights and fundamental freedoms of its people.[117] Kenya's sovereignty thus rests and is guided by its constitution which has apportioned international law, treaties and conventions ratified by Kenya a place in the laws of the land.

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[112]Nagan and Haddad (n 24) 468.
[113]Maogoto (n 48) 219, 222.
[114]ibid 217.
[115]Antonio F. Perez, 'Who killed Sovereignty – or: Changing Norms concerning Sovereignty in International Law' (1996) 14 (2) Wisconsin International Law Journal 474 <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1256&context=scholar> accessed 30 June 2015.
[116]Constitution of Kenya 2010, Arts 1(1), 2(5), 2(6); The Constitution of Kenya 2010 was promulgated through Legal Notice Number 133 of 27.08.2010 published in Kenya Gazette Supplement number 56.
[117]Constitution of Kenya 2010, Chapter 4.

2.4. Conclusion.

The construction of sovereignty in the time of Jean Bodin up to the 19th century is different from its construction in the 20th and 21st century. Sovereignty has transformed because of the practices and culture of the peoples of the world. This construction is often misunderstood such that its invocation, for example like in the Kenyan case by Kenyan politicians, is unclear and ambiguous. Thus in analysing whether the presence of the ICC assaults the sovereignty of Kenya, the research will rely on the constitutional values of the Kenyan people and modern sovereignty, which has been constructed from the social construction of the human rights regime.

The protection of human rights is the pillar upon which the international system rests. States must thus ensure the protection of their peoples, and prevent human rights atrocities, or else be accountable to the international community. States can, therefore, no longer claim absolute sovereignty.

CHAPTER 3

THE ICC QUESTION

3.1. Introduction.

The formation of the ICC opened doors to questions regarding its influence on national sovereignty.[1] Its creation was necessitated by three trends: the evolution of violence, the media, and increased sensitivity to human rights.[2] War had evolved into a pattern where armies used any advantage, to gain the upper hand. Media awareness increased as a result leading to an increased awareness of human rights which generated the will to create change without regard to national boundaries.[3]

The move to create the ICC was hailed by some. Kofi Annan, the former Secretary General of the UN, for example saw it as a big step forward in the march towards universal human rights and the rule of law.[4] There were others however who raised sovereignty concerns. United States Senator John Ashcroft stated that the ICC struck at the core of sovereignty by taking the power to define crimes and punishment from States, and transferring it to international bureaucrats.[5] The same concerns have been raised in the Kenyan situation.[6]

Kenya became a party to the Rome Statute on 11th August 1999 after signing the Treaty. The involvement of the ICC in Kenya however began after the 2007 – 2008 post-election violence when the creation of a Special Tribunal failed. The Waki Commission which

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[1]David A. Nill, 'National Sovereignty: Must it be sacrificed to the International Criminal Court?' (1999) 14 (119) B.Y.U Journal of Public Law 120 <https://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBsQFjAAahUKEwiApNyOyIrIAhXKLNsKHZRkCSg&url=http%3A%2F%2Fdigitalcommons.law.byu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1257%26context%3Djpl&usg=AFQjCNGXFZUPQaU7Xc-DU-a3W4lS-9eWGQ&bvm=bv.103073922,d.ZGU>accessed 25 February 2016.

[2]ibid.

[3]ibid.

[4]Marlene Wind, 'Challenging Sovereignty? The USA and the establishment of the International Criminal Court' (2009) 2(2) Ethics & Global Politics 84 <https://www.law.upenn.edu/live/files/1519-windchallenging-sovereigntypdf> accessed 26 May 2015.

[5]ibid.

[6]MG Zimeta, 'What Kenya's withdrawal means for the international criminal court' (*The Guardian,* 6 September 2013) <http://www.theguardian.com/commentisfree/2013/sep/06/kenya-withdrawal-icc-credibility> accessed 10 June 2015; Nicholas Kulish, 'Kenyan Lawmakers Vote to Leave International Court' (*The New York Times,* 5 September 2013) <http://www.nytimes.com/2013/09/06/world/africa/kenyan-lawmakers-vote-to-leave-international-court.html?_r=0> accessed 10 June 2015.

investigated the circumstances surrounding the crisis found that, the pattern of violence in some areas showed planning and organisation by politicians, and businessmen.[7] It recommended that a Tribunal which would apply Kenyan law be established to try the culprits of the post-election violence, in default of which, the list with the names of the said culprits be forwarded to the ICC Prosecutor.[8]

The Special Tribunal Bill was defeated in the Kenyan Parliament.[9] Thereafter because of numerous delays and unfulfilled promises by the Kenyan government that they would initiate national proceedings, the Panel of Eminent African Personalities forwarded the envelope containing the names of the alleged culprits to the ICC Prosecutor.[10] On 5th November 2009, the Prosecutor informed the President of the ICC that he intended to seek authorization to investigate the Kenyan situation pursuant to Article 15(3) of the Rome Statute.[11] The request was assigned to Pre – Trial Chamber II where two of the three judges granted it.[12] In December of 2010, the ICC Prosecutor named six suspects, five of them prominent government officials.[13] On 23rd January 2012, Pre – Trial Chamber II confirmed charges against four of the initial six suspects, William Ruto, Joshua Sang, Uhuru Kenyatta, and Francis Muthaura.[14] Since then, there have been several developments. Primarily, Uhuru Kenyatta and William Ruto became President

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[7]Waki Commission, *Report of the Commission of Inquiry into Post–Election Violence*, 15th October 2008, vii, 347 <http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf> accessed 21 May 2015.

[8]ibid 472, 473.

[9]International Crisis Group, ‘*Kenya: Impact of the ICC Proceedings*’ Nairobi/Brussels, Africa Briefing No 84 (9 January 2012), 8 <http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/kenya/B084%20Kenya%20----%20Impact%20of%20the%20ICC%20Proceedings.pdf.> accessed 10 September 2015.

[10]ibid.

[11]ibid.

[12] *Situation in the Republic of Kenya* (Request for Authorisation of an Investigation Pursuant to Article 15) ICC-01/09 (26 November 2009) <https://www.icc-cpi.int/iccdocs/doc/doc785972.pdf> accessed 5 March 2016; *Situation in the Republic of Kenya* (Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) <https://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> accessed 5 March 2016.

[13]The International Centre for Transitional Justice, ‘Prosecuting International and Other Serious Crimes in Kenya’ ICTJ Briefing (April 2013) 2 <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf.> accessed 21 September 2015.

[14]*Prosecutor v Ruto, Kosgey & Sang* (Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute) ICC-01/09-01/11 (Jan. 23, 2012) <https://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> accessed 10 March 2016; *Prosecutor v Muthaura, Kenyatta & Ali* (Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (Jan. 23, 2012) <https://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> accessed 10 March 2016.

and Deputy President of Kenya respectively. Secondly, the cases against them both have since been withdrawn.[15] The intervention of the ICC in Kenya has led to calls for African States to withdraw from the Rome Statute. In fact during the 2016 AU Summit in Ethiopia, President Kenyatta urged African States to refuse to be in a system that had no regard for the sovereignty of nations.[16]

This chapter will explore the relationship between the ICC and the concept of sovereignty and how this relationship affects Kenya's sovereignty, taking into account the perception of Kenyans concerning the ICC issue and will conclude by determining whether the ICC assaults Kenya's sovereignty.

3.2. The relationship between the ICC and the concept of sovereignty.

The relationship between the ICC and sovereignty is complex because as already noted sovereignty is not a fixed concept. It is a concept with many possible meanings. In other words, sovereignty is a social construction with an array of effects on how States view their own interests.[17] Additionally, the diverse connotations of the concept have consequences for the type of threats a State sees to its sovereignty[18] because not all members of the world community define sovereignty the same way. For Americans for instance, sovereignty devolves from the people. Other nations perceive it as a national right belonging to governments.[19] The Constitution of Kenya for example, in Article 1, vests all sovereign power in the people of Kenya. This power, it says may be exercised by the people directly or through their democratically elected representatives.

In addition, within any given State, people perceive sovereignty differently. In Kenya for example, several interviews were conducted and each respondent had his/her own

[15]*Prosecutor v Uhuru Muigai Kenyatta* (Decision on the withdrawal of Charges against Mr Kenyatta) ICC-01/09-02/11 (13 March 2015) <https://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf> accessed 10 March 2016; International Criminal Court, 'Ruto and Sang case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future' Press Release ICC-CPI-20160405-PR1205 (*International Criminal Court*, 5 April 2016) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1205.aspx> accessed 30 April 2016.

[16]PSCU, 'Africa Union adopts President Uhuru's proposal for mass withdrawal from the ICC' (*Standard Digital,* 1 February 2016) <http://www.standardmedia.co.ke/article/2000190043/au-adopts-president-uhuru-s-proposal-for-mass-withdrawal-from-icc> accessed 11 March 2016.

[17]Wind (n 4) 85.

[18]ibid.

[19]Nill (n 1) 130.

conception of sovereignty. One respondent defined sovereignty as the power and autonomy of a State over its subjects, which power was to be exercised without outside interference. This power, according to him, was vested in the people of Kenya, and exercised through their elected leaders. He further stated that the legal consequences of sovereignty were that a State had power to make its own laws, but that that power was subject to international law hence if a State had signed a treaty that chipped sovereignty, then that State had to respect that treaty.[20]

Another respondent stated that sovereignty involved questions of immunity, the laws that govern a nation, and the application of international law. He stated that the legal consequences of sovereignty were that a nation was able to, among other things, manage its own affairs without external interference, develop laws and prosecute crime. He further vested the sovereignty of Kenya in the State.[21]

Yet another respondent defined sovereignty as the authority of a State to govern itself and its subjects without the interference of any external authority or State. He vested the sovereignty of Kenya in the people who handed that power to the arms of government. He however asserted that a State's power to punish crime was not absolute because when it came to crimes that concerned humanity as a whole, jurisdiction could then be exercised by a supranational judicial body.[22]

The fourth respondent stated that within the boundaries of States, sovereignty was the exercise of the republic (i.e. the people) to the exclusion of any interference or control from another body. He stated that the legal consequences of sovereignty were that a State was able to determine its affairs of governance without external interference, and relate with other sovereigns on the basis of sovereign equality. He vested sovereignty in the people of Kenya.[23]

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[20]Interview with IK, Member of Parliament and Lawyer by profession (University of Nairobi Parklands Campus, 22nd July 2015).
[21]Interview with JKS, a puisne Judge (Kenol – Kobil Petrol Station, Parklands, 3rd August 2015).
[22]Interview with GO, a practicing lawyer (Ogetto, Otachi & Company Advocates, Ambassador Court, Milimani Road, 29th August 2015).
[23]Interview with MWB, a practicing lawyer (Ochieng', Onyango, Ohaga & Kibet Advocates offices, Garden House Annex, 3rd floor, 1st Ngong Avenue, 27th August 2015).

The fifth respondent defined sovereignty as a State's ability to have its own political, legal and administrative set ups without the interference of another State or body. She stated that the legal consequences of sovereignty were that a State was able to recognize, practice, protect and enforce its political, social, human and economic rights. She further vested sovereignty of Kenya in the State arguing that though the Constitution vested sovereignty in the people, that sovereignty was exercised by the State because state officers did not have to go back to the people and request any authorization for their acts or their opinions concerning governance.[24]

Another respondent defined sovereignty as the ability of a State to prescribe, adjudicate and enforce its laws governing all activities and persons within its territory. He vested sovereignty in the State and argued that sovereignty was not absolute because no State is an island as such it can sometimes cede its competence to an international organ.[25] Yet another argued that sovereignty was akin to independence to the extent that a State was able to pursue independent policies committed to political economic and social reforms within the State, and at the same time being able to selectively relate with other nations. He further vested sovereignty in the people.[26]

Another respondent defined sovereignty simply as the independence of a State to deal with her own issues without external interference. She argued however that no State was an island, as such States are able to group together to deal with certain issues in their relation with each other.[27] It is thus not possible for States to collectively claim that their sovereignty is being assaulted by the ICC, because each State is informed by its own culture, practice, and people as embodied in their Constitutions. No two constitutions are similar. Kenya's sovereignty is guided by its own Constitution which describes the people of Kenya as the sovereigns.

The relationship between the ICC and sovereignty is also complex because the creation of the ICC was an act of sovereignty. The ICC is an interstate entity created by States

[24]Interview with CK, a Magistrate (Judiciary, Milimani Law Courts, Nairobi, 8th September 2015).
[25]Interview with PFS, a Law Lecturer (University of Nairobi, Parklands Campus, 20th July 2016).
[26]Interview with GO, a Legal analyst (Jaramogi Oginga Odinga University of Science and Technology, Assembly Hall, Bondo, 12th July 2016).
[27]Interview with CJ, a Lecturer (Milimani Hotel, Kisumu, 22nd July 2016).

exercising their sovereignty in a process that adhered to the principle of equality of nations.[28] Furthermore as noted in chapter 2, the act of States relating and creating international organisations such as the UN, or for present purposes the ICC develops sovereignty. Thus, the creation of the ICC would not have been possible without sovereignty. It is therefore important to interrogate this relationship because whilst the ICC is a product of the legal process, sovereignty is a political creation with legal consequences, as evidenced by the opinions of some of the respondents.

3.3. The provisions of the Rome Statute on sovereignty.

The Rome Statute contains provisions that relate both literally and impliedly to sovereignty. These provisions direct States to share authority over its citizens with the ICC but do not involve any official transfer of sovereignty.[29] This section is divided into several subtopics: jurisdiction of the ICC; the principle of complementarity; the powers of the Prosecutor; interpretative powers of the Court; and official capacity.

3.3.1. Jurisdiction of the ICC.

The ICC derives its jurisdiction from the Rome Statute.[30] Jurisdiction in this section will be discussed in light of two aspects, crimes and referral mechanisms.

A. Crimes.

The ICC is empowered to exercise jurisdiction over ‘persons’ for the most serious crimes of international concern.[31] This raises sovereignty issues because the individual and not the State becomes subject to the jurisdiction of the Court.[32] The danger is that first nations are unlikely to risk allowing their nationals to be tried by judges possibly from enemy States.[33] One of the respondents argued that the ICC assaulted Kenya’s sovereignty because citizens of Kenya were being tried in a foreign nation.[34] Secondly, nations that would cede jurisdiction over their citizens may face the temptation of

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[28]IK interview (22nd July 2015).
[29]Atul Bharadwaj, ‘International Criminal Court and the Question of Sovereignty’ (2003) 27 (1) Strategic Analysis 14 <http://www.idsa.in/system/files/strategicanalysis_atul_0303.pdf.> accessed 27 September 2015.
[30]Rome Statute of the International Criminal Court 1998, Arts 1, 5(1).
[31]ibid, Article 1.
[32]Nill (n 1) 131.
[33]ibid.
[34]JKS interview (3rd August 2015).

allowing jurisdiction only when it was convenient.[35] The ICC for example opened investigations into situations, following receipt of self–referrals from Uganda (2003), and the Democratic Republic of Congo (2004).[36] Ordinarily self-referrals would not raise eyebrows however it is noteworthy that these two nations had active conflicts in their territories at the time.[37] For this reason it is easy to assume that the leadership of these Nations referred the conflicts to the ICC in order to be rid of their opponents. This would not be an objective exercise of sovereignty but an abuse of it.[38]

The ICC is also empowered to exercise jurisdiction over both States that are a party to the Rome Statute and those that are not. Under Article 12, the ICC may exercise its jurisdiction if either the State on whose territory the crime occurred or the State of which the person accused of the crime is a national. A non–party State's national therefore falls under the competence of the Prosecutor.[39] This may pose a danger to national sovereignty because the ICC is a treaty based Court with the authority to indict individuals, sentence them and impose obligations of cooperation upon that are a party to it. Normally only State parties to a treaty should be bound by its terms. Article 12 reduces the need for ratification of the treaty.[40]

The jurisdiction of the ICC does not assault the sovereignty of Kenya for several reasons. First, States cannot be made accountable for international crimes. Behind the State are human agents thus Kenya is not on trial before the ICC. International Criminal Law vide Article 25 (2) of the Rome Statute developed the notion of individual criminal responsibility because it is individuals and not States that commit international crimes.[41] The article provides that persons who commit crimes within the jurisdiction of the Court

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[35]Nill (n 1) 131.

[36]Mark Kersten, 'Justice in Conflict: The ICC in Libya and Northern Uganda' (PHD thesis, The London School of Economics and Political Science 2014) 20 <http://etheses.lse.ac.uk/3147/1/Kersten_Justice_in_Conflict.pdf.> accessed 6 March 2016.

[37]ibid.

[38]GO interview (29th August 2015).

[39]Cenap Çakmak, 'The International Criminal Court in World Politics' (2006) 23(1) Int'l J. World Peace 20 <http://www.jstor.org/stable/20753516> accessed 26 May 2015.

[40]David J. Scheffer, 'The United States and the International Criminal Court' (1999) 93 (1) AJIL 18 <http://www.umass.edu/legal/Benavides/Fall2005/397G/Readings%20Legal%20397%20G/13%20David%20J.%20Scheffer.pdf.> accessed 29 December 2015.

[41]Jack Brian Ong'anya, 'The Fallacy of Sovereignty before the ICC – The Kenyan Experience' (Africa Law Times, 21 November 2014) <http://africalawtimes.com/the-fallacy-of-sovereignty-before-the-icc-the-kenyan-experience/.> accessed 25 July 2016.

would be individually responsible and liable for punishment. There is nothing wrong therefore with individuals being subjected to the Court's jurisdiction where the particular State failed to subject those people to its jurisdiction in the first place. As aforementioned, the numerous delays and unfulfilled promises by the Kenyan government that they would begin national proceedings prompted action by the ICC Prosecutor.[42] The circumstances were therefore ripe for the ICC jurisdiction to come in.

Secondly, as per Article 2 (6) of the Constitution of Kenya, the Rome Statute of the ICC forms part of the Laws of Kenya.[43] The Kenyan sovereigns accepted that the Rome Statute form part of their laws and constitutionalized it; as such it cannot assault Kenya's sovereignty. Lastly, the fact that a State is not a party to the Rome Statute does not exempt it from its responsibility under international law to protect its citizens from human rights violations. The current social construction of sovereignty thus agrees with the ICC in that all perpetrators, whether from party or non-party States to the Rome Statute must be made accountable for failing in their international obligations to protect their citizens and prevent human rights violations against them.

B. Referral mechanisms.

The ICC can exercise its jurisdiction in three circumstances. It may do so where a matter is referred to it by a State Party to the Rome Statute or by the SC.[44] It may also do so where the Prosecutor has commenced an investigation *proprio motu* (on his own motion).[45] The latter is discussed substantively under the powers of the Prosecutor.

As noted above, State parties to the Statute may refer situations of international crime to the Prosecutor. These crimes must not necessarily have been committed in their territory or involve their nationals. It is sufficient if they are committed in the territory of another State party or by a national of that other State party.[46] Non – party States which have

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[42]International Crisis Group (n 9) 8.

[43]The article provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Kenya is a signatory to the Rome Statute, and as such it forms part of the law of Kenya.

[44]Rome Statute of the International Criminal Court 1998, Art 13.

[45]ibid Art 15.

[46]Daniel D. Ntanda Nsereko, 'Triggering the Jurisdiction of the International Criminal Court' (2004) 4 African Human Rights Law Journal 266 <http://www.corteidh.or.cr/tablas/R21558.pdf.> accessed 26 December 2015.

made declarations under article 12 (3) are also allowed to refer matters to the Prosecutor. However the right of a State that is not a party to the Statute is limited to crimes committed either within their territory or by their nationals.[47]

State referrals are advantageous because the Prosecutor need not seek the authorisation of the pre – trial chamber and is assured of the cooperation of the referring State.[48] They however raise sovereignty concerns, particularly self-referrals. The leadership of a referring State may refer certain matters to the Prosecutor in order to be rid of their opponents. This is not an objective exercise of sovereignty.

The SC on the other hand, may refer situations to the Prosecutor when it is acting under Chapter VII of the Charter.[49] The advantage of such referrals is that they bind States regardless of whether they parties to the Statute or have accepted the Court's jurisdiction.[50] As per Article 25 of the Charter, such States must accept and carry out the decisions of the SC. This may however raise sovereignty concerns. In the case of SC referrals, there are no jurisdictional conditions. Once the Council adopts a Resolution allowing the Prosecutor to investigate the situation in question, the Court is granted universal jurisdiction over those crimes.[51] It thus reduces the need for ratification of a Treaty[52] by imposing obligation on States which are not even party to the Rome Statute.

One author argues that the ICC is an independent judicial body governed by the Rome Statute when acting on referral by a State party or under the Prosecutor's independent authority. He adds though that when acting under an SC referral, it becomes a judicial organ of the UN, subject to the prosecutorial discretion of the SC.[53] Granting the SC such power is, according to Bharadwaj, an assault on sovereign equality because it implies that

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[47]Nsereko (n 46).
[48]ibid 267.
[49]Rome Statute of the International Criminal Court 1998, art 13(b); Chapter VII of the Charter of the UN relate to the measures that the SC may take with respect to threats of the peace, breaches of the peace and acts of aggression.
[50]Nsereko (n 46) 268.
[51]Çakmak (n 39) 20.
[52]ibid.
[53]George P. Fletcher and Jens David Ohlin, 'The ICC – Two Courts in One?' (2006) 4 Journal of International Criminal Justice 429.

the five permanent members of the SC do not commit international crimes.[54] It implies further that the concept of sovereignty has levels depending on the might of States.[55]

Allowing members of the SC to refer matters to the ICC Prosecutor is indeed an assault on sovereign equality. However in the case of gross violation of human rights, sovereign equality should not be an issue. Sovereignty guides both the relationship between States and the relationship between a State and its people. There must therefore be rules that govern said relationships. Thus in the case of human rights violations in a particular State, it should not matter who triggers the jurisdiction of the Court.

3.3.2. The principle of Complementarity.

The exercise of criminal jurisdiction is a central aspect of sovereignty and under general international law States have a right to exercise this jurisdiction over acts done in their territories.[56] The general rule is that if a crime is committed in a State by a citizen of that State, the State has jurisdiction to try those citizens.[57] In fact, the ICTY in the *Tadić case* held that the State had standing to challenge the jurisdiction of the ad hoc tribunal on the grounds that it infringed on state sovereignty.[58]

The complementarity regime embodies the principle that a national court's criminal jurisdiction takes precedence over the jurisdiction of the ICC.[59] Paragraph 6 of the Preamble recognizes the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. Further, paragraph 10 and Article 1 provide that the Court will be complementary to national criminal jurisdiction. Moreover Article

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[54]Bharadwaj (n 29) 6.
[55]ibid.
[56]Marcus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 Max Planck Yearbook of United Nations Law 595 <http://www.mpil.de/files/pdf3/mpunyb_benzing_7.pdf> accessed 29 December 2015.
[57]GO interview (29th August 2015).
[58]*Prosecutor versus Dusko Tadić a/k/a 'Dule'* (Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT–94–1–AR72 (2 October 1995) para 88 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=48aa9ea72.> accessed 29 December 2015.
[59]Guy Roberts, 'Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court' (2001) 17 (1) American University International Law Review 54 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1213&context=auilr> accessed 25 May 2015.

17 empowers the Court to declare a case inadmissible where the case is being investigated by a State which has jurisdiction over it and/or where the case has been investigated by a State and that State has decided not to prosecute the person concerned. Seemingly therefore national courts are to remain the primary venue for trying cases of mass atrocities.[60] This is the rule, while the exercise of jurisdiction by the ICC is the exception thus when a State is investigating or trying persons, the ICC has no business.[61] Furthermore, the State has the authority to decide not to prosecute. In fact, if most judicial systems are able to address the crimes prescribed by the Statute, then the Court will only be necessary where a national judicial system breaks down.[62] Complementarity therefore respects national jurisdictions.[63]

The complementarity regime was intended to: protect and preserve sovereignty of both State parties and third parties; and to encourage States to exercise their jurisdiction thus making enforcement of international criminal law more effective.[64] The principle is however double edged and may assault sovereignty because it takes away the possibility of State parties to remain inactive.[65] Further, Article 17 of the Rome Statute gives and takes with one hand. A case will be admissible if the State is unwilling or unable genuinely to carry out the investigations or prosecution, or if the decision not to prosecute ensued from the unwillingness or inability of the State genuinely to prosecute. Unwillingness is to be determined by the Court, where the proceedings are undertaken in order to shield a person from criminal responsibility, or where there is unjustified delay in the proceedings and/or where the proceedings are not being conducted independently or impartially.[66] Regarding inability, the Court must consider whether the State is unable to obtain the accused or the necessary evidence and testimony, or is otherwise unable to

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[60]Katharine A. Marshall, 'Prevention and Complementarity in the International Criminal Court: A Positive Approach,' (2010) 17 (2) Human Rights Brief 22 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1116&context=hrbrief> accessed 10 September 2015.
[61]GO interview (29th August 2015).
[62]Roberts (n 59) 57.
[63]JKS interview (3rd August 2015).
[64]Benzing (n 56) 596.
[65]ibid 599.
[66]Rome Statute of the International Criminal Court 1998, Arts 17 (2), 20 (3).

carry out its proceedings due to a total or substantial collapse or unavailability of its national judicial system.[67]

The main issue plaguing the complementarity regime is that the Rome Statute provides its framework but lacks the detail about its use in practice.[68] The Appeals Chamber in the *Katanga case* held that, when determining admissibility, the Court had to first look to whether there were on-going investigations or trials, or whether the State had conducted such investigations in the past. If one or both of those things had occurred then the Court could look to questions of unwillingness or inability.[69] It therefore falls to the Court to fill in many gaps left by the Rome Statute.

This lack of framework may lead to an assault on sovereignty because firstly, the ICC may become a 'supreme court' of national legal systems in its attempts to determine a State's unwillingness or inability.[70] As a result, it may become a participant in a State's legal process by reviewing decisions of its courts and setting precedents regarding what it considers 'effective' and 'ineffective' domestic criminal trials.[71] The problem with allowing such a scenario is that the Statute provides no standard for judging its own terms.[72] Lastly, other features of national criminal systems such as the protections fashioned by a State for the protection of its people may fall under ICC scrutiny and judgment.[73]

As noted earlier, national courts remaining the primary avenue for trying cases of mass atrocities is the rule, while the jurisdiction of the ICC is the exception. Therefore, when the jurisdiction of the ICC takes effect, it denotes that the State in question was unwilling and/or unable to effect investigations and prosecutions. The Appeals Chamber in the *Prosecutor versus Muthaura, Kenyatta, and Ali* in dismissing the appeal filed by the

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[67]Rome Statute of the International Criminal Court 1998, Art 17(3).
[68]Marshall (n 60) 22.
[69]*Prosecutor v. Germain Katanga* (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case of 12 June 2009) ICC-01/04-01/07 OA 8 (25 September 2009) para 78 <http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf.> accessed 15 September 2015.
[70]Roberts (n 59) 55.
[71]ibid.
[72]Nill (n 1) 144.
[73]Roberts (n 59) 55.

Government of Kenya challenging the admissibility of the cases before the Court stated that though article 17 (1) (a) to (c) of the Statute favoured national jurisdictions, it did so only to the extent that there actually was, or had been, investigations and/or prosecutions at the national level.[74] It further stated that if the suspect or conduct had not been investigated by the national jurisdiction, there was no legal basis for the Court to find the case inadmissible.[75] The intervention of the ICC in Kenya thus denoted that Kenya's system was found to be unable and unwilling. One of the respondents argued that the prosecution by the ICC in Kenya was necessary and that the ICC had actually strictly observed the provisions for domestic mechanisms exhaustion. He further argued that crimes encapsulated under Articles 5 of the Rome Statute were normally occasioned within the context or facilitated by sitting governments and it was thus inconceivable to imagine that those leaders would punish themselves.[76] Another respondent stated that the circumstances in Kenya were actually available for the ICC to intervene. He argued that Kenya was a signatory to the Rome Statute and was thus required to have known the definitions of various types of crime, the trigger mechanisms and the points at which the ICC process kicks into motion. He admitted that the ICC assaulted the sovereignty of Kenya but that it was the fault of Kenya to begin with, as Kenya could have enforced its own laws and provided the necessary remedies.[77]

One of the other respondents stated that the ICC was attacking the sovereignty of Kenya, and that by deciding that Kenya was unable and unwilling, the ICC stood in judgment over a member State. He further argued that when a State admitted having difficulty trying certain crimes, and had rather the ICC dealt with it, that State had forfeited that sovereign right. This, according to him, was not so in the Kenyan situation.[78]

Sovereignty assigns to a State, power to make laws and facilitate criminal prosecution in its territory, thus it cannot be denied that by taking over the criminal jurisdiction of a

[74] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (*Judgment on the Appeal of the Republic of Kenya against the decision of the Pre – Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the case pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11 OA (30 August 2011) par 43 <https://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf> accessed 12 March 2016.
[75] ibid.
[76] MB interview (27th August 2015).
[77] JKS interview (3rd August 2015).
[78] GO interview (29th August 2015).

State with regard to international crime, the ICC places hardships on the sovereignty of that State. The crimes encapsulated under Article 5 of the Rome Statute concern humanity as a whole, and the human rights regime, has determined these crimes must be prevented. Thus while, the ICC places hardships on the sovereignty of Kenya, it is with the permission of the sovereigns. Kenya had an exclusive right to begin criminal proceedings against the culprits of the post-election violence. As a State party to the Rome Statute, it ought to have realised that if it did not, then the jurisdiction of the ICC would take effect. Therefore, by taking over the criminal jurisdiction of Kenya, the ICC did not assault the sovereignty of Kenya.

3.3.3. The powers of the Prosecutor.

The Prosecutor is the only person charged with the duty of initiating investigations into alleged crimes and prosecuting the same.[79] This he/she may do on his/her own motion or upon referral by either a State party to the Statute or the SC.[80]

The Statute endows the Prosecutor with great leeway in initiating investigations.[81] He/she may seek information from any source that he/she '*deems appropriate*' and if he/she feels there is '*reasonable basis*' to proceed with the investigation then he/she must submit a request for authorisation to the Pre Trial Chamber, if the matter was initiated *proprio motu*.[82] This leeway, it has been argued, is so enormous and poses a threat to national sovereignty because the terms '*reasonable basis*' and '*deems appropriate*' are low bars to investigation thus making the Prosecutor's discretion quite broad.[83] Secondly, a Chinese representative, who had taken part in the Rome Conference, stated that allowing the Prosecutor the right to initiate investigations placed state sovereignty on the subjective decisions of an individual.[84] An aggressive Prosecutor therefore, in pursuit of his or her own ideas of the law, can severely hamper the legitimate conduct of foreign relations, alter customary international law, and even further restrict a State's sovereign rights.[85]

[79]Çakmak (n 39) 14.
[80]The Rome Statute of the International Criminal Court, Articles 13(a), 13(b) and 15(1).
[81]Nill (n 1) 147.
[82]The Rome Statute of the International Criminal Court, Articles 15(2) and 15(3).
[83]Çakmak (n 39) 14; Nill (n 1) 147.
[84]Çakmak (n 39) 14.
[85]Roberts (n 59) 59.

One respondent argued in reference to the Kenyan situation that the Prosecutor actually insisted on initiating investigations and would not relinquish prosecution of the cases even after Kenya had adopted a new Constitution, and had created new institutions and systems such as the Supreme Court and the Office of the Director of Public Prosecutions. He concluded that the ICC was a rogue institution because it had residual power but was going above those powers.[86]

Third, criminal investigations tend to be intrusive into the domestic affairs of a State therefore for a Prosecutor to begin investigations *proprio motu* in that State's territory, against the wishes of that State, may amount to a diminution of state sovereignty.[87] As a result, States may fail to cooperate with the Prosecutor, and the proceedings would ultimately fail.[88] Kenya for example, has been accused severally of frustrating some of the Prosecutor's efforts to gather evidence.[89] One respondent however stated that the ICC was forcing the Republic of Kenya into a defensive position of lack of cooperation as a way of seeing how far it can go in creating precedence.[90]

Further, an independent Prosecutor who is not accountable to a superior political authority is likely to abuse his powers and commence proceedings that were wholly unfounded[91] and as a result assault sovereignty. Justice Louise Arbour, former Prosecutor for both the Yugoslav and the Rwanda Tribunals, however stated that, 'if unfounded charges are laid, the accused will be acquitted. But if persons guilty of crimes within the Statute are out of reach of the Prosecutor, the very purpose of the Statute will be defeated.'[92]

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[86]GO interview (29th August 2015).
[87]Nsereko (n 46) 263.
[88]ibid.
[89]Yvonne Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge 2013) 147.
[90]GO interview (29th August 2015).
[91]Nsereko (n 46) 264.
[92]United Nations International Criminal Tribunal for the Former Yugoslavia, *Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court*, press release 8 December 1997 <http://www.icty.org/en/press/prosecutor-international-tribunals-former-yugoslavia-and-rwanda-international-permanent-court> accessed 10 March 2016.

One great concern during the Rome Conference was the power of the Prosecutor to initiate an investigation without any kind of supervision.[93] The Pre – Trial Chamber seems to perform a supervisory role because the Prosecutor must submit to it a request for authorisation in case of a *proprio motu* investigation.[94] However, its refusal to authorize the same cannot deter the Prosecutor from presenting a subsequent request based on new facts or evidence regarding the same situation.[95] Therefore a stubborn Prosecutor, supported by individuals or groups, may pursue a particular individual or group until the Pre – Trial Chamber authorises the investigation.[96] In discussing the Kenyan situation, one of the respondents argued that the Prosecutor should not have intervened because the scale and organisation of events was not such as to warrant ICC intervention.[97] He made reference to the dissenting opinion of Judge Hans – Peter Kaul who had stated that there were potential negative implications and risks of a gradual downscaling of crimes against humanity towards serious ordinary crimes which would infringe on state sovereignty.[98]

Further, private entities such as NGOs are classified as legitimate sources of information for the Prosecutor.[99] It is risky to allow NGOs to become sources of information because the political leanings of the Prosecutor may become involved in the decision to investigate.[100] Further, the Prosecutor may investigate, or refuse to investigate depending on his/her ideological kinship with the referring group as a result there will be no effective screening against prosecutions that are politically motivated.[101] Regarding the Kenyan situation, one respondent stated that the ICC involvement in Kenya was in order, but expressed dissatisfaction with the process by which the Prosecutor came up with the

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[93]Nill (n 1) 147.
[94]Rome Statute of the International Criminal Court 1998, Article 15(3).
[95]ibid art 15(5).
[96]Nill (n 1) 146.
[97]GO interview (29th August 2015).
[98]*Situation in the Republic of Kenya (*Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) para 10 <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf.> accessed 20 September 2015.
[99]Rome Statute of the International Criminal Court 1998, Art 15 (2).
[100]Nill (n 1) 145.
[101]ibid.

six suspects. She felt that the ICC should not have relied on institutions which were known to be affiliated to particular political parties.[102]

The main issue that has pervaded arguments concerning the Prosecutor is his *proprio motu* powers of investigations, which if abused may assault state sovereignty. However having a Prosecutor with *proprio motu* powers is necessary because States are unlikely to file complaints against each other either due to fear of straining relations, or fear of terrorist reprisals, or a lack of moral authority, realising that they also have skeletons that they would not want exposed.[103] Further, the SC cannot also always be trusted to refer matters to the Prosecutor. In 1998, a UN team assigned to investigate claims of carnages in the Democratic Republic of Congo established that Rwandan troops committed crimes against humanity during the campaign that put Laurent Kabila of the DRC in power. The team recommended that these crimes be referred to the Prosecutor but the SC for undisclosed reasons chose not to pursue the matter.[104] If therefore, the Prosecutor were to be left to wait for referrals then the Court would remain inactive.[105] Besides, by becoming a party to the Statute, States impliedly surrender some degree of their sovereignty and freedom of action to the Prosecutor, because just like any other treaty, the Rome Statute imposes restrictions on some aspects of sovereignty.[106] The ICTY underscored this when it stated that:

> It would be a travesty of law and a betrayal of the universal need for justice should the concept of state sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as protection for those who trample underfoot the most elementary rights of humanity.[107]

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[102]CK interview (8th September 2015).
[103]Nsereko (n 46) 264.
[104]ibid.
[105]ibid 265.
[106]ibid.
[107]*Prosecutor versus Dusko Tadić a/k/a 'Dule'* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT–94–1–AR72 (2 October 1995) para 58 <http://webcache.googleusercontent.com/search?q=cache:45zgwWrrtfMJ:http://www.icty.org/x/cases/tadic/acdec/en/51002.htm%2BProsecutor+versus+Dusko+Tadi%C4%87+a/k/a+%E2%80%98Dule%E2%80%99+(Case+No+IT+%E2%80%93+94+%E2%80%93+1+%E2%80%93+AR72),+Decision+on+the+Defence+Motion+for+Interlocutory+Appeal+on+Jurisdiction,+2+October+1995+pdf&hl=en-KE&biw&bih&gbv=2&&ct=clnk> accessed 29 December 2015.

Therefore if a State signed a treaty chipping sovereignty, then that State had to respect that treaty. Kenya signed the Rome Statute, and has to abide by it.[108] In any event, leaders may change but their acts bind successive governments. The President of Kenya who signed the Rome Statute must have considered Kenya's sovereignty. If sovereignty was not an issue then, then it should not be now.[109] Kenya could have as well refused to sign the Rome Statute like America did.[110] The sovereignty issues being raised in the Kenyan situation now thus appear to be self-serving.[111]

Besides, the Court itself plays a supervisory role over the Prosecutor to ensure that he does not exceed his powers. The Trial Chamber for example in *Prosecutor versus Kenyatta*, refused to grant the Prosecutor a further adjournment, after having granted several in the past, and directed her to file a notice indicating withdrawal of the charges or showing that the evidence had improved to a degree that justified proceeding to trial.[112] This shows that the Court is on its toes to ensure that those on trial are treated fairly, and are not subjected to unreasonably lengthy and baseless trials.

As noted above, many accusations have been levelled against the ICC with regard to the powers of the Prosecutor. It is true that the said powers are daunting, it is still necessary to have such a powerful Prosecutor. If the Prosecutor were to wait for referrals from State parties and the SC, then the purposes of the ICC would be defeated. Secondly, the ICC is not subject to Kenya, as such, it cannot relinquish the cases before it, at Kenya's whim especially since Kenya had time to initiate national proceedings and it did not. In any event, by becoming a party to the Statute and making the Rome Statute part of the laws of Kenya, Kenya impliedly surrendered some degree of its sovereign rights to the Prosecutor. Thus, the powers of the Prosecutor have not assaulted Kenya's sovereignty.

Sovereignty is a status or membership in the international society. As such, there must be a system of rules that guide relationships between sovereign States. It should not matter

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[108] IK interview (22nd July 2015).
[109] CJ Interview (22nd July 2016).
[110] PFS Interview (20th July 2016).
[111] Interview with JNB, a Law Lecturer (University of Nairobi, Parklands Campus, Nairobi, 22nd July 2016).
[112] *Prosecutor v Uhuru Muigai Kenyatta* (Decision on Prosecutor's Application for Further Adjournment) ICC-01/09-02/11 (3 December 2014) <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-981> accessed 22 July 2016.

therefore who triggers the jurisdiction of the Court in case of human rights violations in a State. The violence that took place during the post-election crisis in Kenya was egregious thus it should not matter that the Prosecutor initiated investigations *proprio motu*.

3.3.4. Interpretative powers of the Court.

The Rome Statute allows the Court wide interpretative powers to determine the law.[113] Article 119 provides that the Court would settle any dispute concerning its judicial functions. The effect of this is that through its judgments, the Court may serve as final arbiter of law and force social changes on a nation. State practice may thus be declared illegal based on decisions approving the practices of other States and the preferences of judges.[114] Furthermore, there is no provision for appeal from the judgments of the Court to any other body. If then the ICC misuses its power, the defendant would have no legal remedy.[115] The ICC would therefore exercise the most fundamental sovereign power of government i.e. the administration of criminal justice and the rights of individuals before the court will depend entirely upon its will whether good or bad.[116]

It is highly unlikely that the ICC may become powerful through its broad interpretative powers. The Court has jurisdiction only with regard to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. It is thus unlikely that the Court would force social changes or exercise power of government outside these four crimes. In any event, even if it did, it would only be in so far as to protect human rights and enforce international obligations, which is the pillar upon which the international regime stands.

3.3.5. Official Capacity.

In international law, certain State officials are entitled to immunity from criminal prosecutions in the territory of another State. This is founded on the principles of state sovereignty and sovereign equality. Naturally, among those entitled to immunity are

[113]Roberts (n 59) 69.
[114]ibid.
[115]ibid 71.
[116]ibid 72.

Heads of States, whose position is crucial to the structure and functioning of the State.[117] Kenya for example has laws, and elected and appointed leaders, and the President is the unifying factor.[118]

Heads of States are endowed with both functional and personal immunity under customary international law. Functional immunity shields state officials from acts done whilst performing an official function or on behalf of the State.[119] Personal immunity, on the other hand, protects principal officials on account of their office, in order to guarantee their proper functioning in the international realm, without the danger of their being subject to a foreign jurisdiction.[120] Numerous constitutional provisions in Africa still accord Presidents immunity from criminal proceedings. Article 143 of the Constitution of Kenya, for example, accords the President immunity from both criminal and civil proceedings while still in office.

The push for recognition of international criminal responsibility for violations of human rights led to erosion of these immunities. Following the 1945 London Agreement that established the International Military Tribunal, the development of the international criminal tribunals leading up to the ICC has been characterised by statutory provisions disallowing Heads of States from hiding behind the armour of functional immunity when charged with international crimes.[121] With regard to personal immunity, the *ICJ* in the *Arrest Warrant Case* stated that personal immunity would not bar criminal prosecutions: within that official's own state; where the representing State waives immunity; where that official ceases to hold his office; and most importantly for present purposes, before certain international criminal courts.[122]

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[117]Michiel Blommestijn and Cedric Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al – Bashir' (2010) Leuven Centre for Global Governance Studies Working Paper No. 48, 11 <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp41-50/wp48.pdf.> accessed 29 December 2015.
[118]JKS interview (3rd August 2015).
[119]Blommestijn and Ryngaert (n 117) 11.
[120]ibid.
[121]ibid.
[122]*Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo versus Belgium)* {2002} ICJ Rep 3 para 61 <https://www.ilsa.org/jessup/jessup08/basicmats/icjcongo.pdf> accessed 1 January 2016.

The Rome Statute's main provision dealing with immunity is Article 27. Article 27 (1) provides that official capacity as Head of State or Government, member of Government or parliament, elected representative and/government official would not discharge a person from criminal responsibility or be used as a ground for reduction of sentence. This article establishes that both functional immunity and national legislation sheltering state officials with immunity for official acts cannot be used to avoid responsibility or mitigate punishment.[123] Additionally Article 27 (2) provides that all immunities attached to the official capacity of a person would not bar the Court from exercising its jurisdiction over that person. This article addresses personal immunities.[124]

Both articles read together make it clear that the Statute works to remove all immunities held by all individuals before the ICC.[125] This applies to even non – party States. In the *Bashir* case, the Court held that Omar Al Bashir's position as Head of a State which was not a party to the Statute had no effect on the jurisdiction of the Court over that case.[126]

When the ICC process kicks in, the veil of sovereignty is lifted.[127] In the Kenyan case, this is further accentuated by Article 143 (4) of the Constitution which states that immunity of the President would not cover crimes for which he/she may be prosecuted under any treaty that Kenya is a party to and which forbids such immunity. Thus under the Rome Statute, the President and Deputy President cannot claim any immunity from prosecution with regard to international crime. They are estopped. The President being a unifying factor, the common *mwananchi* wondered whether Kenya was truly sovereign because its leaders were being '*paraded*' in another country for trial.[128] It is noteworthy however at the time of the material perpetration of the atrocities in Kenya, the current

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[123]Blommestijn and Ryngaert (n 117) 11.
[124]ibid.
[125]ibid.
[126]*Prosecutor versus Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) para 41 <http://webcache.googleusercontent.com/search?q=cache:6Sr_WV7dl6IJ:https://www.icc-cpi.int/iccdocs/doc/doc639096.pdf%2BInternational+Criminal+Court,+The+Prosecutor+versus+Omar+Hassan+Ahmad+Al+Bashir+(%E2%80%98Omar+Al+Bashir%E2%80%99)+Pre+%E2%80%93+Trial+Chamber+1,+Decision+on+the+Prosecutions+Application+for+a+Warrant+of+Arrest+against+Omar+Hassan+Ahmad+Al+Bashir,+No.+ICC-02/05-01/09-3,+4th+March+2009,&hl=en-KE&biw&bih&gbv=2&&ct=clnk> accessed 1 January 2016.
[127]JKS interview (3rd August 2015).
[128]ibid.

President and his Deputy had not attained those posts. That they had become President and Deputy President was an incidental issue.[129] According to one respondent, the ICC could therefore not stop prosecution because they had become President and Deputy President.[130]

While another respondent agreed that Honourables Uhuru Kenyatta and William Ruto had not become the President and the Deputy President when the ICC first set out to intervene, he argued that the residual sovereign right was vested in the people of Kenya, who elected the two. He therefore concluded that Kenya should be allowed to deal with the matters because it is able and willing to do so.[131]

The crimes of genocide, crimes against humanity, war crimes and the crime of aggression are normally occasioned within the context of sitting governments. The immunity provisions of the Rome Statute thus seek to ensure that leaders cannot hide behind the shield of sovereignty. If the President and his Deputy had been allowed to claim immunity, then every other President in the world would demand that right, and the purposes of the Rome Statute which is to put an end to sovereign impunity would be defeated. While it is true that the immunity provisions place hardships on the President and his Deputy, they do not assault Kenya's sovereignty because Kenya is a party to the Statute and therefore bound by it terms. Further, the constitution of Kenya has made the Rome Statute part of the laws of Kenya.

The ICCs intervention in the Kenyan situation has been misconstrued as an attack on the sovereignty of Kenya. One likely reason for this is that the President and his Deputy are the embodiment of state sovereignty[132] having been elected by the people, who are the sovereigns. The ICC process indeed subdued them to the extent that they were unable to continuously discharge their official duties during their respective trial periods. However, the trials did not undermine governance in Kenya in any way. The law making process

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[129]MB interview (27th August 2015).
[130]ibid.
[131]GO interview (29th August 2015).
[132]Monica Kivuti, 'State Sovereignty and International Criminal Law: The Case for Kenya and the ICC (2007 - 2012)' (LLM Thesis, University of Nairobi 2013) 78.

for example which is executed by Parliament did not stall.[133] Laws were still being passed. Governance therefore did not grind to a halt.[134] The ICC has thus not assaulted Kenya's sovereignty.

The debate as to whether the ICC is assaulting Kenya's sovereignty is peculiar for the reason that the Republic of Kenya signed and ratified the Rome Statute long before the ICC ever set its sight on Kenya. It further via the Constitution apportioned it a place in the laws of the land. All this while, nobody was heard trumpeting the term 'sovereignty.' It only came to the fore after Uhuru Kenyatta and William Ruto became President and Deputy President of Kenya. The question that thus arises is whether the ICC is really assaulting Kenya's sovereignty or those who are claiming that it is are merely doing so out of a misguided understanding of sovereignty or of self-interest in a bid to protect themselves. Under modern sovereignty, the Republic of Kenya has obligations under international law to protect its own people. That it failed to protect its citizens, and that the Prosecutor of the ICC intervened, does not amount to an assault on sovereignty, for the simple reason that Kenya gave the ICC residual power over itself.

3.4. Conclusion.

This chapter set out to explore the relationship between the ICC and sovereignty with a view to establishing whether the ICC assaulted the sovereignty of Kenya. The chapter was based on the constitutional and social construction theories of sovereignty. According to these theories, the ICC does not assault the sovereignty of Kenya. Firstly under modern sovereignty which is the result of the social construction process, the protection of human rights and dignities holds forte. The ICC is thus the result of the development of the human rights regime, and would not have been possible without sovereignty. Sovereign States met and determined that human rights were to be protected, established the ICC and accorded it supranational competencies. Thus the ICC and sovereignty have a protagonist relationship. Further, the Republic of Kenya is a State party to the Rome Statute. By becoming thus, it impliedly surrendered some degree of sovereignty to the ICC.

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[133]Kivuti (n 132) 84.
[134]ibid.

Secondly, States cannot jointly claim that their sovereignty is being assaulted by the ICC, because each State is informed by its own Constitution. Kenya's sovereignty rests with its Constitution. As per the Constitution of Kenya, the Rome Statute forms part of the laws of Kenya. Further, it recognises the human rights and fundamental freedoms of its people, and in line with this refuses to extend the immunity of the President to cover international crimes.

Regarding the specific accusations levelled against the ICC especially by some of the interviewees, it cannot be denied that the ICC places hardships on Kenya's sovereignty, because Kenya lost its exclusive right to exercise its criminal jurisdiction over its citizens. Yet it is noteworthy that Kenya is not on trial before the ICC. The ICC is only exercising jurisdiction over the persons believed to have caused the post-election violence, and not Kenya as a State. Further the ICC did not hijack Kenya's jurisdiction but only intervened because of the delay and the fear that the perpetrators may go scot free. Kenya as a State party to the Rome Statute ought to have realised that if it did not prosecute the alleged perpetrators, then the ICC would come in. Also since the jurisdiction of the ICC already took effect, it cannot relinquish the cases before it at Kenya's whim. It is a supranational body and is not subject to Kenya.

Further, the powers of the Prosecutor are indeed daunting, yet the alternative of having a weak Prosecutor would defeat the purposes of the ICC. Further, the ICC has jurisdiction only with regard to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. It is thus unlikely that the Court would force social changes or exercise power of government outside these four crimes and even if it did, it would only be in so far as to protect human rights and enforce international obligations, which is why it was created. Furthermore, while it is indeed true that allowing the SC referral powers places a strain on sovereign equality of States, this should not be an issue in the case of violation of human rights. It should not matter who triggers the jurisdiction of the Court in such a case. Lastly, the crimes of genocide, war crimes, crimes against humanity, and the crime of aggression are normally occasioned within the framework of sitting governments. The immunity provisions of the Rome Statute are very important because

they ensure that leaders cannot hide behind the shield of sovereignty. If there were no immunity provisions, then the purposes of the ICC would be defeated.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS.

4.1. Conclusion.

Right from the start we have been examining the debate between sovereignty and the ICC from the lenses of the constitutional and social construction theories of sovereignty so as to understand whether and how the involvement of the ICC in prosecuting the alleged perpetrators of the 2007 – 2008 post-election violence especially the President and the Deputy President is assaulting the sovereignty of Kenya and to what extent.

In the preceding chapters we have noted that sovereignty is not a modern concept, yet it is enduring and capable of adjusting. Nearly 500 years of its deconstruction and reconstruction has aided its expansion from a simple concept that placed absolute authority in a leader to a concept that encompasses numerous other attributes. This process is a social phenomenon and has been influenced by certain important events such as the Peace of Westphalia, and the World Wars which led to the development of the human rights regime. As a result sovereignty has been reconstructed within the context of international law. State authority has been limited, and sovereignty has been married with international obligations. While States retain their sovereignty in that no external authority can interfere with their internal functioning, they have obligations they must fulfil. They must be peace-loving and must protect the human rights and dignities of their people. Sovereignty is also relational and is concerned with promoting international cooperation and friendly relations among States on the basis of sovereign equality. In the 21st century States cannot invoke classical sovereignty. Kenya thus does not have absolute sovereignty. While no external authority can interfere in its internal functioning, Kenya has to be peace loving and must protect the human rights and dignities of its people.

We also note that the ICC was created to limit the excesses of sovereign absolutism by punishing perpetrators of international crime. This would not have been possible without sovereignty as such the ICC and sovereignty have a protagonist relationship. A State therefore does not lose its sovereignty because it gave out some of its sovereign rights or accorded international institutions supranational competencies. We note further that

States cannot collectively claim that their sovereignty is being assaulted because each State is informed by its own constitution. We note that when discussing Kenya, the bottom line is what its Constitution says. Kenya's sovereignty has made friends with constitutional values. It is provided for and rests with its Constitution. The very same Constitution apportions the Rome Statute as part of the laws of Kenya. This coupled with the fact that Kenya is a party to the Rome Statute shows that the ICC cannot assault Kenya's sovereignty. It has never been shown that Kenya was coerced, forced or deceived into becoming a party to the Rome Statute. Further Kenya still retains its sovereignty while it is committed to the Rome Statute. We also note that leaders may change but their acts bind successive governments thus if sovereignty was not an issue when Kenya signed the Rome Statute, then it should not be an issue now.

In chapter 3 we see the accusations that have been levelled against the ICC because of its jurisdiction, complementarity regime, powers of the Prosecutor, interpretative powers and refusal to accept official capacity arguments. These provisions place hardships on Kenya because it has lost exclusive right to exercise its criminal jurisdiction, yet these hardships do not amount to an assault on sovereignty. Kenya is not on trial before the ICC. The ICC is simply trying individual Kenyan citizens, and not Kenya as a State. Further the ICC did not hijack Kenya's jurisdiction. The Prosecutor decided to intervene once it became clear that Kenya would not since a lot of time had passed. Furthermore the ICC is not subject to Kenya and cannot be expected to relinquish the cases before it at Kenya's whim.

Regarding the ICCs ability to exercise jurisdiction over non-party States, that a State is not a party to the Statute does not exempt it from its responsibility under international law to protect its citizens from human rights violations. All perpetrators of international crimes whether from party or non-party States to the Statute must be made accountable for failing in their international obligations. Further the principle of complementarity was meant to protect national sovereignty, but also to ensure that States took their responsibility to punish perpetrators of international crimes seriously. States are therefore aware that if they do not exercise their criminal jurisdiction with regard to international crime then, then the ICC would take over that jurisdiction. We see that though this principle lacks framework, it is not detrimental and can be remedied. It is not such as to

assault Kenya’s sovereignty. In addition, the powers of the Prosecutor are daunting and likely to be abused or misused. Yet it is still necessary to have such a powerful Prosecutor because a weak one would defeat the purposes of the Court.

Further in case of gross violation of human rights, it should not matter who triggers the jurisdiction of the Court. Arguments on sovereign equality should hence not arise. Furthermore it is highly unlikely that the ICC may become powerful and force social changes or exercise power of government because of its broad interpretative powers since its only jurisdiction over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. Even if it did, it would only be in so far as to protect human rights and enforce international obligations.

Further the immunity provisions of the Rome Statute seek to ensure that leaders cannot hide behind the shield of sovereignty with regard to international crimes. These provisions place hardships on Kenya’s sovereignty but do not assault it. If there were no immunity provisions, then the purposes of the ICC would be defeated. Every other President in the world would also claim immunity, and the result would be gross impunity and violation of human rights. Lastly, the ICC process did not in any way tamper with governance in Kenya. The ICC therefore does not assault Kenya’s sovereignty.

At present sovereignty cannot be used as an excuse to escape the jurisdiction of the ICC. It would simply not be legitimate. Sovereignty has been redefined to confer upon States rights but also duties towards its citizens and international law.

4.2. Recommendations.

African leaders and particularly Kenyan leaders need to be clear on whose interests they are working for. Is it the interest of the people to whom sovereignty belongs or the interest of the African leaders whose predecessors have been known to commit atrocities, and injustices against their own people? If indeed they are working for the interests of their people, then sovereignty concerns should not come up. Modern sovereignty is concerned with the protection of the people. There is thus need to investigate the type of leaders in Africa and establish if they have the support of their people with regard to the

ICC issue. In line with this, the government of Kenya should perform civic education and make its citizens aware of human rights so that they will be able to appreciate the operations of the ICC. Many Kenyans do not as yet understand the importance of the ICC because they have been misled by their leaders to believe that it assaults the sovereignty of Kenya. Further the very leaders who are misleading them do not even know what sovereignty really is. Kenyans should thus be made to understand that the ICC and sovereignty complement each other, and that at present sovereignty is concerned with protection of their human rights and dignities. They should also be made to realize that Kenya is not on trial before the ICC rather that the ICC seeks to try individuals who are guilty of international crime.

Mechanisms need to be put in place to ensure that the Constitution of Kenya cannot be manipulated and that Kenyan leaders honour it. What would be the use of a Constitution when a leader can uphazardly wake up and lobby that it be amended to serve his/her own interests? Or when they wake up and decide to leave the Rome Statute simply because they have been caught up? It means simply that the Constitution is subject to manipulation, in which case, it becomes useless. Mechanisms need to be put in place to prevent this manipulation.

Kenyan leaders should also encourage other African States to appreciate the operations of the ICC and realise that its mandate is to prosecute international crime and not to interfere in any way with their systems. With the support of African States, the ICC will be able to end sovereign impunity.

The Kenyan government should also strengthen its justice system so that in future, it will be able to address prosecution of international crime on its own. In this way, the sovereignty of Kenya will be upheld and human rights violations prosecuted. The government could for example develop the judiciary and ensure that it is independent and free from manipulation both in theory and in practice, undertake to develop judicial archiving, and witness and victim protection. The government should also create capacity building forums in international criminal law for lawyers, prosecutors and judges, so that they can better appreciate the operations of the ICC and know what is expected of them.

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APPENDICES

Appendix 1: Interview Guide.

To be filled by the interviewer

Interview location (country and city):____

Date: ________ day of __________________ 2015.

Place of interview:

____

Section A: Preliminary

Good morning/afternoon/evening. My name is Rowena Stella Ndeda. I am doing my Master of Laws (LLM) at the University of Nairobi and this survey is part of my research project titled, 'Assaulting Sovereignty? Kenya and the International Criminal Court.' The research looks at whether the sovereignty of Kenya has been assaulted or attacked by the International Criminal Court's involvement in prosecuting the alleged perpetrators of the 2007-2008 post-election violence especially the current President and Deputy President. The research traces the evolution of the doctrine of sovereignty, and explores how the ICC has affected this doctrine both generally and in Kenya particularly and makes recommendations. I am therefore greatly humbled to invite you to be a participant in this study. All your responses herein shall be kept confidential and shall never be used for any other purpose other than this research.

Section B: Respondent's Personal Information

Respondent's Name (and Title): ____

Ministry/authority: ____

Position: ____

Contact Address: ____

Telephone: ____

Do you consent to doing this interview? ____________________________________

Should the Interviewer refer to you by name in the final research work? _________

Respondent: I hereby certify that the above personal details are correct and true to the best of my knowledge.

Date: ____________________________ Sign: _________________________________

QUESTIONS

1. What is your understanding of the term 'sovereignty'?
2. What legal consequences would you attach to the concept of sovereignty?
3. In Kenya, to whom is sovereignty vested?
4. So, how do you think sovereignty manifests itself in Kenya?
5. What are your thoughts concerning the ICCs involvement in prosecuting the alleged perpetrators of the 2007-2008 post-election violence especially the current President and Deputy President?
6. Does the ICCs involvement affect Kenya's sovereignty, whether negatively, positively or not at all? Explain.
7. If indeed there has been an assault on sovereignty, what in your opinion could have been done to prevent the same?

8. Can you say that the ICC is an excuse to totally vacate the notion of sovereignty and equality of nations?
9. What are your recommendations?
10. Are you in defence of sovereignty over the ICC or in defence of the ICC over sovereignty?

INTERVIEWER: I HEREBY certify that this interview has been carried out by me according to the instructions of my supervisor and the University Of Nairobi requirements, and has been checked for accuracy and completeness.
Name: ________________________ Signature: __________________________

SUPERVISOR: I HEREBY certify that this survey was conducted by the above mentioned supervisee under my instructions as supervisor and that any information collected has been approved to be correct and relevant in the study.
Name: ________________________ Signature: __________________________