**Abstract**

The ICC statute pledges that most serious crimes of concern to international community must not go unpunished. The novel mechanism to exert jurisdiction over state parties to the treaty intends to enforce international law to protect human rights. The ICC is a reflection of changing perceptions of how the rule of law relates to larger problems of global inequality. The ICC has been embroiled in criticism that it focuses on criminal cases in Africa and particularly targeting African Leaders. It is further argued that the courts legal prosecutions in African countries could impede political solutions to conflicts and also negate the most sought opportunities for negotiated settlement of disputes hence abrogating the independence of member states in promoting the rule of law on their own as sovereign states.
1. INTRODUCTION

The establishment of the International Criminal Court proclaims that when territorial and national mechanisms fail to secure justice, it is the international community as a whole that must act through a central judicial body, the ICC. The Court is not a substitute for active and efficient national criminal courts. On the contrary, it is intended to constitute a powerful incentive to national courts to institute proceedings against alleged criminals. The ICC only steps in when those national courts prove unwilling or unable to act” (Cryer, 2002:12). There can be no global justice unless the worst of crimes against humanity are subject to the law. In this age more than ever we recognize that the crime of genocide against one people truly is an assault on us all. The establishment of an International Criminal Court was ensuring that humanity’s response was swift (Annan, 2002).

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

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

While no trial ever took place, this represented a significant departure from the traditional view, still held by many today, that a head of state should be immune from prosecution by any state other than his or her own. All that occurred following World War I where some soldiers were taken for national prosecutions in Germany, with the consent of the Allies, suggesting that the political was of the world’s major powers is essential for the enforcement of international humanitarian norms (Bassiouni, 1998). The Brussels Protocol of 1874 was one of the earliest attempts at drafting a code regulating the conduct of armies in the field. While it made no reference to enforcement or any potential consequences of violations of the agreement, it resulted in a group known as the Institute of International Law drafting the “Manual on the Laws of War on Land” in 1880. This document was to become the model for the conventions adopted at The Hague Peace Conferences of 1899 and 1907. (Green, 1997: 68). These conventions represented major advances in international law. Most importantly, the Hague Convention IV adopted in 1907, for the first time referred to liability for breaches of international law. While the Convention simply established state obligations, not personal criminal liability, Article 3 of the 1907 Convention seems to exclude any personal liability: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” The Article 3 provided the first hint of the enforcement of international norms. (Green 1997:72). A state is entrusted by the international community...
to manage its own internal affairs, among which the responsibility to protect its citizens from atrocities, the International Criminal Court represents a step towards a system of international law that reaches beyond state sovereignty. It proclaims the interest of humanity in the principle that those who commit the most serious international crimes should be held accountable. It follows from a new scheme that public interests gradually are taking shape and often prevail over private interests (Cassese, 2003).

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement; through appropriate and necessary means (Rome, 1998). Efforts to suppress armed and sometimes unarmed dissent have in too many cases led to excessive and disproportionate actions by governments, producing in some cases excessive and unwarranted suffering on the part of civilian populations. In a few cases, regimes have launched campaigns of terror on their own populations, sometimes in the name of an ideology; sometimes spurred on by racial, religious or ethnic hatred; and sometimes purely for personal gain or plunder. In other cases they have supported or abetted terror campaigns aimed at other countries which have resulted in major destruction and loss of life. (Kochler, 2001). In Africa the International criminal Court opened its first case in 2004, after Uganda referred the situation of the Lord's Resistance Army to the court. The process of case initiation was through trigger mechanisms that became complex and politically sensitive.


In January 2005, pursuant to Security Council Resolution 1564, the International Commission of Inquiry on Darfur, chaired by Antonio Cassese, recommended that the Council refer the case under Article 13 to the ICC on the grounds of gross violation of international humanitarian law (United Nations, 2005:571-572). The Commission found that, Government forces and militias conducted indiscriminate attacks...on a widespread and systematic basis" amounting to crimes against humanity. Indeed, for the Court to envisage global justice, its relationship with the Security Council must be revised in order to avoid a future situation of "dual justice," as seen in the case of Darfur. However, the Commission did not accuse parties to the conflict of pursuing a policy of genocide. (Ciapi, 2005:591)

Resolution 1593, the case of Darfur became the first situation referred by the Security Council under Article 13 of the Rome Statute, in accordance with Chapter VII of the U.N. Charter. In 2008 and 2009, the prosecutor, submitted an application for an arrest warrant for President Omar Hassan al-Bashir. In 2009 and 2010, the ICC Pre-Trial Chamber I charged Sudan's President with genocide, crimes against humanity, and war crimes). President al-Bashir became the first Head of state indicted by the ICC, discarding official immunity as protection against prosecution (Scheffer, 2002).
On 24 May 2008, Jean-Pierre Bemba, the former Vice-President of the Democratic Republic of the Congo was arrested during a visit to Belgium under a sealed warrant under accusations of war crimes and crimes against humanity committed in CAR. His confirmation of charges hearing, taking place from 12–15 January 2009, resulted in the charges being confirmed on 15 June 2009. His trial began on 22 November 2010 (ICC information page on Bemba. (Retrieved 18 March 2011)

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

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

In 2003 special court of Sierra Leone issued its first indictment for war crimes committed by former rebel leader Foday Sankoh and has military commander Sam Bockarien during 1991-2001 civil war Charles Taylor was also charged for his role in fueling Sierra Leon's viscous civil war. Ad hoc criminal tribunals have been active to prosecute violations of international humanitarian law in former Yugoslavia and Rwanda (Bogodan, 2002). Following (Moreno, 2009) initial announcement of his intention to bring prosecutions against the six suspects, American President Barrack Obama called upon Kenya to cooperate with the ICC.

In a statement he said: “I urge all of Kenya's leaders, and the people whom they serve, to cooperate fully with the ICC investigation and remain focused on implementation of the reform agenda and the future of your nation. Those found responsible was being held accountable for their crimes as individuals. No community should be singled out for shame or held collectively responsible. Let the accused carry their own burdens – and let us keep in mind that under the ICC process they are innocent until proven guilty. As you move forward, Kenyans can count on the United States as a friend” (Obama, 2010). The Kenyan cases were initiated by the processes of assessing the Prosecutor’s request for authorization to investigate alleged crimes in Kenya, the ICC judges of Pre-Trial Chamber II requested the Prosecutor to provide clarification and additional information. The judges
Gerald Liguyani Majany, Prof. Pontian Godfrey Okoth, Dr. Edmond Were:: Influence Of International Criminal Court Jurisdiction On State Sovereignty In Kenya

requested additional information and clarification with respect to the State and/reorganizational policy under article 7(2) (a) of the Rome Statute and the admissibility within the context of the situation in Kenya, to be provided no later than 3 March 2010. Prosecutor sought authorization from Pre-Trial Chamber II to commence an investigation of the alleged crimes committed within the context of the 2007-2008 post-election violence. The Prosecutor asserted that the alleged crimes appear to constitute crimes against humanity. On 31 March, 2010, the Pre-Trial Chamber II issued its decision authorizing the Prosecutor to commence his investigations into Kenya. Pre-Trial Chamber II assented to the Prosecutor’s request by a two-one majority. The Chamber was mandated to review the conclusion of the Prosecutor by examining the available information, the supporting material as well as the victims’ representations in order to determine whether there is “reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed.” (Bulletin, 2010).

In their review the Chamber Judges considered three factors when making their decision: (i) the Court’s jurisdiction; (ii) admissibility of the case; and (iii) interests of justice. With regards to the question of jurisdiction, the Judges considered whether the following three conditions were satisfied: firstly, did the alleged crime occur within the period set out in Article 11 of the Statute? Essentially, according to Article 11, the Court only has jurisdiction only with respect to crimes committed after the entry into force of the Statute. Secondly, does the alleged crime fall within the category of crimes under Article 5 of the Statute? According to Article 7 acts that would constitute crimes against humanity include murder, rape and other forms of sexual violence, deportation and forcible transfer of population and other inhumane acts. Thirdly, was the crime committed on the territory of a State Party to the Statute or a national of any such commit the crime? After a careful examination of the available information, the majority of the Chamber October 2010 concurred that the requirements regarding jurisdiction were fulfilled and the request was within the jurisdiction of the Court and a crime against humanity had been committed in Kenya (PTC ii2011).

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

Kenya’s government is obliged to cooperate fully with the ICC in investigations and prosecutions of crimes within its jurisdiction. The ICC does not have its own police force and so the cooperation of states is essential to the arrest and surrender of suspects. When a state fails to comply with a request to cooperate, the court may refer the matter to the Assembly of States Parties for further action (ICC article 112 Rome Statute, 2002). The assembly is made up of representatives of all states which are party to the Rome Statute,
and acts as an oversight body for the (ICC Article 112 Rome Statute, 2002). However the intrigues in national and regional and international political circles, alliances in the international arena and theatrics in and out of the ICC ushered an epoch of writing history, a new page in diplomacy and international relations among nation states

2. LITERATURE REVIEW

International criminal law, Africa perspective

The increasingly strained relations between the African Union (AU) and the court led to the head option of list of ‘Recommendations by African States Parties to the ICC ’in November 2009 which ambitiously grapples with some of the most vexing issues of international criminal justice confronted by the court in its inaugural decade. The strong stand support of the ICC that characterized Africa’ earlier position on international criminal justice is less evident today. This change in position tracks broader ‘pushback ’against the ICC on the continent. It is not possible to identify with clarity or certainty the reasons for this apparent change of heart. The vitriolic attack from within Africa and by scholars associated with Africa, How valid are the attacks on the ICC? And in discussing an ICC that Africa wants ,what lessons (if any) might be drawn from the fact that these attacks have been made? The study was explore the literature ,except to note that the Rome Statute is not the only instrument of great inspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon. The very principle of complementarity makes it clear that by domestic prosecutors acting against international criminals, domestic courts ensure the international rule of law through a mutually reinforcing (or complementary) international system of justice.(Cassese,2002).

The Kenyan cases at the ICC were of significant importance to Kenya, a country once referred to as an island of peace in the sub-Saharan Africa. The adherence to the ICC is therefore a real conundrum. ICC was established by governments, but it is not clearly espoused in any given government’s interest. The abstraction of understanding why states would agree to bind their own hands by for swearing certain violent options suggests that under certain circumstances an ICC commitment can contribute to an atmosphere conducive to conflict reduction and peaceful negotiation.

The establishment of the International Criminal Court proclaims that when territorial and national mechanisms fail to secure justice, it is the international community as a whole that must act through a central judicial body, the ICC. The Court is not a substitute for active and efficient national criminal courts. On the contrary, it is intended to constitute a powerful incentive to national courts to institute proceedings against alleged criminals. The ICC only steps in when those national courts prove unwilling or unable to act.(Cryer 2003.;12).The international criminal court is an independent institution that has been established within the bounds of international law as a constitutive of legalization of world politics (Abbot et al., 2000). It originates from state interactions, and leads to the establishment of international institutions and tribunals (Keohane et al., 2000), the...
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embodiment of which are international organizations. International law is manifested in states ‘commitment to agreements and joint decisions reached during interstate interactions. Such interactions need not result into written commitments, hence states’ interactions over the years result into customary international law (Barnett and Fennimore, 2004).

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

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

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

This implies the coexistence and co-constitution of the legal and the political in international affairs. Coexistence implies that both the political and the legal are inseparable in international relations, they are concurrent. Co-constitution here implies that both international law and international relations are bedfellows; politics gives rise to law and law regulates politics. Thus legalization of world politics is apolitical process that defines international relations while politics needs to be played within legal confines; else it is seen as violation of the law. Legalization is done by establishing institutional features characterized by obligation (where states and other international actors are bound by a commitment or a set of commitments); precision [the clear definition of required conduct, and authorization of such conduct]; and delegation (the granting of authority to third
parties “to implement, interpret and apply the rules; to resolve disputes; and (possibly) to make further rules] (Abbot et al., 2000).

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

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

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

3. THE CONCEPT ICC AND STATE SOVEREIGNTY

In the 19th century the English jurist John Austin (1790–1859) developed the concept of sovereignty by investigating who exercises sovereignty in the name of the people or of the state; he concluded that sovereignty is vested in a nation’s parliament. A parliament, he argued, is a supreme organ that enacts laws binding upon everybody else but that is not itself bound by the laws and could change these laws at will. This description, however, fitted only a particular system of government, such as the one that prevailed in Great Britain during the 19th century. Austin’s notion of legislative sovereignty did not entirely fit the American situation. The Constitution of the United States, the fundamental law of the federal union, did not endow the national legislature with supreme power but imposed important restrictions upon it. A further complication was added when the Supreme Court of the United States asserted successfully in Marbury v. Madison (1803) its right to declare laws unconstitutional through a procedure called judicial review. Although this development did not lead to judicial sovereignty, it seemed to vest the sovereign power in the fundamental document itself, the Constitution. This system of constitutional sovereignty was made more complex by the fact that the authority to propose changes in the Constitution and to approve them was vested not only in Congress but also in states and in special conventions called for that purpose. Thus, it could be argued that sovereignty continued to reside in the states or in the people, who retained all powers not delegated to the United States by the Constitution or expressly prohibited by it under the
terms of the Constitution’s Tenth Amendment. Consequently, the claims by advocates of states’ rights that states continued to be sovereign were bolstered by the difficulty of finding a sole repository of sovereignty in a complex federal structure; and the concept of dual sovereignty of both the union and the component units found a theoretical basis. Even if the competing theory of popular sovereignty the theory that vested sovereignty in the people of the United States was accepted, it still might be argued that this sovereignty need not be exercised on behalf of the people solely by the national government but could be divided on a functional basis between the federal and state authorities. Another assault from within on the doctrine of state sovereignty was made in the 20th century by those political scientists (e.g., Léon Duguit, Hugo Krabbe, and Harold J. Laski) who developed the theory of pluralistic sovereignty (pluralism) exercised by various political, economic, social, and religious groups that dominate the government of each state. According to this doctrine, sovereignty in each society does not reside in any particular place but shifts constantly from one group (or alliance of groups) to another. The pluralistic theory further contended that the state is but one of many examples of social solidarity and possesses no special authority in comparison to other components of society.

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

(Krasner, 2000) identifies the following four ways in which the term sovereignty is commonly used: Domestic sovereignty, which refers to the organization of political authority within a state and the level of control enjoyed by a state. Inter dependence sovereignty, which is concerned with the question of control, for example, the ability of a state to control movements across its own borders. International legal sovereignty, which is concerned with establishing the status of a political entity in the international system. The state is treated at the international level similarly to the individual at the national level. Westphalia sovereignty, which is understood as an institutional arrangement for organizing political life and is based on two principles, namely territoriality and the exclusion of external factors from domestic structures of authority. Westphalia sovereignty is violated when external factors influence or determine the domestic authority structures. This form of sovereignty can be compromised through intervention as well as through invitation, when a state voluntarily subjects internal authority structures to external constraints. Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein (Holmes, 1988.).
The principle of sovereign equality of states is enshrined in Article 2.1 of the UN Charter. Internally, sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the state. Generally, however, the authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.

A condition of any one state's sovereignty is a corresponding obligation to respect every other state's sovereignty: the norm of non-intervention is enshrined in Article 2.7 of the UN Charter. A sovereign state is empowered in international law to exercise exclusive and total jurisdiction within its territorial borders. Other states have the corresponding duty not to intervene in the internal affairs of a sovereign state. If that duty is violated, the victim state has the further right to defend its territorial integrity and political independence. In the era of decolonization, the sovereign equality of states and the correlative norm of non-intervention received its most emphatic affirmation from the newly independent states (Danner, 2006).

At the same time, while intervention for human protection purposes was extremely rare, during the Cold War years state practice reflected the unwillingness of many countries to give up the use of intervention for political or other purposes as an instrument of policy. Leaders on both sides of the ideological divide intervened in support of friendly against local populations, while also supporting rebel movements and other opposition causes in states to which they were ideologically opposed. None were prepared to rule out a priori the use of force in another country in order to rescue nationals who were trapped and threatened there.

The Westphalia treaties of 1648 established this principle as a cornerstone for international order. (Koskenniemi gental civilizer) The state is entrusted by the international community to manage its own internal affairs, among which the responsibility to protect its citizens from atrocities. African states do have a worry on their sovereignty and state sovereignty has and continues to be placed at the top of their bilateral and multilateral diplomacy, which is a departure from the rest of the international community where the state is viewed as an instrument in the service of its people (Annan 1999). State sovereignty in the African continent is regarded above that of the individuals and this is due to the focus on the apparatus that runs the country and the power that is laid on the sovereign (Samkange 2002).

The African systems of government have subjugated their role to protect the rights of the individuals and instead they are the ones in violation of these rights (Burja 2008). African Union represents the institutionalization of Pan-Africanism. The AU was created to ensure good governance and the rule of law (AU 2000, Preamble). The AU shall defend the sovereignty, territorial integrity and independence of its Member States” (AU 2000, Article 3). The AU’s objectives include the promotion of African states sovereignty as well as the promotion of human rights within its member states. The AU has the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave
circumstances, namely war crimes, genocide and crimes against humanity. (AU 2000, Article 4).

4. OBJECTIVE
The objective of this paper is to assess the Influence of ICC jurisdiction on state sovereignty in Kenya.

5. STATEMENT OF THE PROBLEM
Whereas the international criminal court is viewed as a potential contributor to lasting global peace and stability, the perception that the Court has focused on Africa, and more so, the Prosecutor’s choice of cases have been controversial among leaders in the continent and the world at large. Globalization, ‘demands that one should radically rethink in politics and take a fresh look at the institutions which act as transmission belts for sentiments and ideals, at the legal systems that are supposed to be an expression of them, and at the jurisprudential conceptions within which these same sentiments and ideals are clothed’.( Ward, 2003).

Majority of Africans leaders under the auspices of African union joined together to question the moral integrity and legality of the ICC jurisdiction. Some argued that the court is opting for political expediency instead of the universal justice spelled out in the Rome Statute. Others blatantly accused the ICC for targeting Africa. Unfortunately, the ICC is yet to adequately and effectively allay the fears of African leaders and convince them that the court’s work is based exclusively on the belief that the most serious crimes of concern to the international community as a whole must not go unpunished and not on political and other unrelated considerations. The international criminal court prosecutions, which targeted the upper echelons of political power, are seen as an extremely sensitive issue in Kenya. These cases have had very powerful socio-political implications on the country’s stability and inter-ethnic relations. Analysis of the court’s jurisdiction influence on sovereignty of the Kenyan state has not yet been ascertained. It is in this backdrop that this paper investigates the Influence of International criminal court’s jurisdiction on state sovereignty in Kenya.

6. FINDINGS
State sovereignty and international criminal justice are in other words two faces of one coin. But they are minted to speak a different language, to different constituencies, and this can lead to conceptual tension. Professor Claus Kress describes how the international law of immunities is in fashion, having been at the heart of two recent judgments of the International Court of Justice, being the subject of two recent resolutions adopted by the Institute de Droit. He discusses two closely related questions in proceedings before the International Criminal Court. The first question is:

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

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

During the focus discussion group one member concluded that; International criminal law in the strict sense comes at a price with respect to the stability of inter-State relations”, but that “this price is worth paying, provided that the scope of application of substantive international criminal law strictly will not be diluted, but remains confined to the conduct that constitutes a fundamental assault to the nature of the international legal order. (Discussant).

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

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

The study has established that international law is applicable to a limitless jurisdiction and this is an absolute form of universal jurisdiction (‘universal jurisdiction in absentia’) that is free of conditions such as link points. However, the establishment of universal jurisdiction should be limited to situations clearly allowed by international law, and should also be limited by international law. In essence absolute universal jurisdiction is permissible, in international law, and should be exercised only over prescribed crimes such as terrorism and piracy, and should not be universally exercised over other crimes in all accounts the study overly contends that there is a very strong relationship between ICC jurisdiction and state sovereignty.

Table 1: International Criminal Court Jurisdiction includes national jurisdiction

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Yes</td>
<td>81.29%</td>
</tr>
<tr>
<td>No</td>
<td>12.28%</td>
</tr>
<tr>
<td>Neutral</td>
<td>6.43%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100%</td>
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</tbody>
</table>

Source: Data, Researcher 2016

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

We (government) signed and ratified the Rome statute, the act that created the ICC at the Hague. Why are we whining over this clear matter? He paused. In fact, our parliamentarians said “don’t be vague; let’s go to Hague” (key informant). From the above, it can be deduced that the international criminal jurisdiction and national criminal jurisdictions are in tandem yet according to principles of sovereignty in international law, a nation has jurisdiction over crimes committed within its territory, which refers to the ‘principle of territory’. Besides this, under certain circumstances, a nation also has jurisdiction based on the nationality of the suspect (‘positive principle of territory’), the nationality of the victim (‘negative principle of territory’) or the nation’s security or other important interests (‘protective principle of territory’). Whereas the sovereignty of each nation is equal, every nation may decide to exercise jurisdiction based on the principles of territory or the individual or national interests.

Therefore, under these circumstances, any nation who exercises its jurisdiction purely out of its own will, regardless of the opinions and propositions of other nations, may offend the sovereignty of other nations. This is in breach of the principle of equality of sovereign nations, and may cause conflicts between nations. The assertion that ICC jurisdiction and...
national criminal jurisdictions are congruent is to emphasise on the whole idea of establishing an international criminal court was based on an ideal of justice, on the conviction that when faced with heinous crimes that affect the international community, impunity is unacceptable. Now if all national criminal jurisdictions were effective, efficient and just, as well as able to deal with such crimes, no international court would be necessary. National courts are responsible for the prosecution of those perpetrators not prosecuted by the ICC. The ICC investigates and prosecutes only if states or national courts are unable or unwilling to do so. Kenyan authorities have an obligation under international law to provide effective remedies to victims of serious violations of human rights committed in the 2007-8 post-election violence; and reparation when crimes were committed by state agents or when the State failed to prevent certain crimes committed by private citizens. When the Kenyan Government challenged the admissibility of the Kenyan cases before the ICC, the Pre-Trial Chamber ruled that there was no “concrete evidence of on-going proceedings before national judges” against the accused. To date only few alleged perpetrators were brought to justice before Kenyan courts. The Kenyan Office of the Director of Public Prosecutions has reportedly initiated new investigations into at least 6,000 cases involving alleged low and mid-level perpetrators. A task force to review those cases was set up in February 2012. However, in August 2012, the task force concluded that most PEV cases were unsuitable for prosecution due to a lack of evidence. A discussant in focus discussion group on the above was very categorical and in-depth as one member of the group earmarked Kenya government at that time failed to arrest and prosecutes the perpetrators of international crimes, committed during the 2007-2008 post-election violence. How can the purported criminals of yesteryears, now the government of today, convict themselves by submitting to ICC what is deemed to be evidence of finality? This argument ignites and is a microcosm of the study. It is endeared in constructivism theory as Michael Barnett articulates constructivist international relations theories as being concerned with how ideas define international structure, how this structure defines the interests and identities of states and how states and non-state actors reproduce this structure. (Sikkink, K., 2011).

The key tenet of constructivism is the belief that "International politics is shaped by persuasive ideas, collective values, culture, and social identities Constructivism argues that international reality is socially constructed by cognitive structures which give meaning to the material world. States, like people, are insecure in proportion to the extent of their freedom. If freedom is wanted, insecurity must be accepted. Organizations that establish relations of authority and control may increase security as they decrease freedom. If might does not make right, whether among people or states, then some institution or agency has intervened to lift them out of nature’s realm. The more influential the agency, the stronger the desire to control it becomes. In contrast, units in an anarchic order act for their own sakes and not for the sake of preserving an organization and furthering their fortunes within it. Force is used for one’s own interest. In the absence of organization, people or states are free to leave one another alone. Even when they do not
do so, they are better able, in the absence of the politics of the organization, to concentrate on the politics of the problem and to aim for a minimum agreement that will permit their separate existence rather than a maximum agreement for the sake of maintaining unity. If might decides, then bloody struggles over right can more easily be avoided. (Walt, 1998)

This was well orchestrated by shuttle diplomacy by Kenya government officials to the united nation as and also to the assembly of state parties at the African union summit in Addis Ababa.

Table 2: International criminal Court Jurisdiction is a transformation of states treaty obligations.

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<th>Response</th>
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<tbody>
<tr>
<td>Yes</td>
<td>70.18%</td>
</tr>
<tr>
<td>No</td>
<td>22.81%</td>
</tr>
<tr>
<td>Neutral</td>
<td>7.02%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100%</td>
</tr>
</tbody>
</table>

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

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

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

However, these responsibilities should be seen within the broader context of the global human rights norms. The Charter of the United Nations is the embodiment of the international political and moral code and Article IX calls for the promotion of higher standards of living, conditions of economic and social progress and development, and respect for human rights and fundamental freedoms which encapsulates the international consensus and articulates best-practice international behavior.
The Universal Declaration of Human Rights was the first international pronouncement of the human rights norm and places freedom, justice and peace in the world in the Inherent dignity and equal and inalienable rights of all humans. The subsequent International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights further enhanced the ideal of free human beings enjoying civil and political freedom. The June 2000 Ministerial Conference on “A Community of Democracies” and a non-governmental conference on “World Forum on Democracy” reaffirmed the developing and developed countries’ commitment to common democratic values and standards. It is these Charters, Covenants and other International Treaties that establishes the foundation for a state’s responsibilities to its citizens. (Newman, E. (2004).

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

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

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

This solution was not uncontroversial within the Commission, especially for those who saw it as a source of conflicts of jurisdiction that may lead to paralysis and injustice. Some members therefore supported the idea of the ICC having exclusive jurisdiction, which would eliminate possible conflicts of jurisdiction between it and domestic courts. In this context it is important to note that some members of the Commission emphasized that the principle of sovereignty was no longer considered to be an absolute principle as in classic international law (Arsanjani, Mahnoush H., 1999)

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

7.2 Complementarily principle espoused in state treaty obligations.

Complementarily principle is to be found in many different forms throughout the Court’s procedure, and even in the investigation phase to be carried out by the Prosecutor. First of all, the introduction to the complementary character of the Court was spelled out and emphasized in the Preamble, Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions. This statement is supplemented by the preceding paragraphs, which establish the grounds for complementarily and the manner in which it should be understood: international crimes shock the conscience of humanity, threaten the peace, security and wellbeing of the world, and should not go unpunished; States have the main responsibility for taking the required measures to avoid impunity; and an international criminal court is needed, for the sake of present and future generations, to guard them against the most serious crimes of concern to the international community as a whole. (Robert Jackson, 1999)

The above assertions were emphasized during a focus discussion group where a participant remarked that the constitution of Kenya 2010 has domesticated the Rome statute and in the foregoing the Kenyan leadership and the populace at large are obligated to the ICC jurisdiction

The Rome Statute contains in Article 1 explains the essence of establishing the Court’s jurisdiction: An international Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions” (Rome statute 2002).

The study found out that the international criminal court as a creature of the Rome statute has the prerequisites to the exercise of jurisdiction, however, this depend greatly on the willingness of all states parties concerned in the prosecution to cooperate with the Court. The Statute of the ICC in this context has been examined from the viewpoint of treaty law, qua a multilateral international treaty substantively and procedurally to be effective the ICC depends not only on widespread ratification of the Rome Statute, but also on states parties complying fully with their treaty obligations. For almost every state this will require some change to national law. Of course the degree to which new law will be necessary to implement a state party’s Rome Statute obligations will depend on its existing laws and legal system. Given the necessity for implementing law, there has been a concerted effort, at the national, sub-regional and regional levels to ensure that effective implementing law is made by all ratifying states.
Human Rights Watch (2011) considers the adoption of the Rome Statute to have been a watershed in the development of an effective international criminal justice system in which there are no safe havens for those who commit the worst international crimes. The drafters of the Rome Statute had high expectations that the ICC will “put an end to impunity for the perpetrators of [these crimes] and contribute to [their] prevention”. However, Human Rights Watch believes that it is equally important that states parties make their ratification meaningful through effective national implementing law that enables them to meet their principal obligation under the Rome Statute, namely cooperating with and assisting the ICC. It is presumed that all states parties will need to modify their national law in some way to meet this obligation. The full cooperation of states parties is needed for the ICC to function effectively. States parties will be relied on to assist the ICC at every stage of its investigations and prosecutions. The ICC will not have its own police force or prisons so states will be required, on behalf of the ICC, to arrest and surrender suspects, interview witnesses, provide information and evidence to the ICC, agree to take persons sentenced to prison for the term of their imprisonment and provide any other assistance sought by the ICC. For this reason it is crucial that states parties have national laws and procedures in place to ensure that they can fully and expeditiously meet requests for cooperation and assistance from the ICC.

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

In many countries international treaties need to be incorporated into domestic law by specific implementing legislation (dualist countries). However, in other states, referred to as “monist”, the mere ratification of an international treaty is sufficient for the treaty to be part of the law of the land. Many civil law countries are monist, while those countries with a common law tradition tend to be dualist. Typically, the constitutions of monist states provide that international treaties that are binding on the state have constitutional status and take precedence over ordinary laws in the hierarchy of national norms. For this reason, it is often argued that these countries do not need to implement treaties as they are already part of national law. However, as the Rome Statute has the potential to impact on a wide range of national laws, including constitutional provisions and criminal substantive and procedural law, relying solely on automatic incorporation into national law may not
be sufficient to meet the Rome Statute treaty obligations. Specific national laws, especially relating to substantive and procedural criminal law, should be enacted. Because of the importance of the Rome Statute and the reliance of the ICC on the timely cooperation of states parties, Human Rights Watch urges “monist” states to make an exception for the Rome Statute. By implementing the Rome Statute into national law, they will ensure that the relevant authorities are able to cooperate fully with the ICC, that the offences against the administration of justice by the ICC are punishable under law in national courts and that the ICC crimes can be prosecuted in national courts. It is in light of the above argumentations that the study explores a strong relationship between ICC jurisdiction and state sovereignty through state treaty obligations.

Table 3: International Criminal Court Jurisdiction pre-empts the jurisprudence of Sovereignty.

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<thead>
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<th>Response</th>
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<tbody>
<tr>
<td>Yes</td>
<td>60.23%</td>
</tr>
<tr>
<td>No</td>
<td>29.82%</td>
</tr>
<tr>
<td>Neutral</td>
<td>9.94%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
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Source: Data, Researcher 2016

60.23% of the respondents agreed that ICC jurisdiction pre-empts the jurisprudence of state sovereignty while 29.82% disagreed with the same and 9.94 declined to comment the findings of the study are clearly expressing the Preamble of the Rome Statute of the International Criminal Court ‘and article 1 that refer to the International Criminal Court (ICC) as an international institution that "shall be complementary to national criminal jurisdiction. This complementary relationship between the ICC and national criminal jurisdictions means that, as opposed to the two Adhoc Tribunals. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) the ICC does not have primary jurisdiction over national authorities,” but plays a subsidiary role and supplements the domestic investigation and prosecution of the most serious crimes of international concern,(Mil. L. Rev. (2001),The Court is only meant to act when domestic authorities fail to take the necessary steps in the investigation and prosecution of crimes enumerated under Article 5 of the Statute. The Statute does not explicitly use or define the term “complementarity” as such; however, the term has been adopted by many negotiators of the Statute, and later on by commentators to refer to the entirety of norms governing the complementary relationship between the ICC and national jurisdictions, (Triffterer, O. (2008).

Article 17 establishes the substantive rules that constitute the principle of complementarity. The Statute defines the question of complementarity appertaining to the admissibility of a case rather than to the jurisdiction of the Court. As is the case with other international judicial institutions, such as the ICJ or human rights courts, the issues of admissibility and jurisdiction in the sense of competence in the pending case have to be distinguished, even though both concepts are closely related. (Cf. G. Fitzmaurice,
1986) The Court cannot exercise the jurisdiction that it has if a case is inadmissible. Thus, the principle of complementarity does not affect the existence of jurisdiction of the Court as such, but regulates when this jurisdiction may be exercised by the Courts (J. Crawford, 2003).

Seen like this, the heading of article 12 of the Statute is strictly speaking a misnomer, since it does not concern the exercise of jurisdiction, but the existence of it, Article 17 thus functions as a barrier to the exercise of jurisdiction. The Rule of Procedure and Evidence of the ICC recognize this by providing that the Court shall rule on any challenge to its jurisdiction first before dealing with matters of admissibility complementarity as discussed in the above, forms the legal anatomy of ICC jurisdiction and state sovereignty. In concurring with the above, during the interview session one interviewee reiterated: The historiography of ICC holds the sanctity of statehood as enshrine in the principle of sovereignty by compounding sovereignty with responsibility in states .this has opened a new chapter in the approach of international criminal law and international relations. (Key informant).

The Statute establishing the ICC is an international, multilateral treaty. According to article 31 of the Vienna Convention on the Law of Treaties, provisions of a treaty shall be interpreted, inter alia, with regard to its object and purpose. In order to understand the principle of complementarity and to facilitate and structure the interpretation of the different provisions that define the concept substantively and procedurally, it seems pertinent to enquire about the rationale of complete complementarity. The most apparent underlying interest that the complementarity regime of the Court is designed to protect and serve is the sovereignty both of State parties and third states (Nord. J. Int'l L. 69 (2000), under general international law, states have the right to exercise criminal jurisdiction over acts within their jurisdiction.

The exercise of criminal jurisdiction can indeed be said to be a central aspect of sovereignty itself(Brownlie, 1998) whereas it is the right of states to exercise criminal jurisdiction over crimes contained in the Statute, the preamble of the Rome statute refers to the duty of every state not limited to States parties to exercise its criminal jurisdiction over those responsible for international crimes A purpose of the complementarity principle may thus be to ensure that states abide by that duty, either by prosecuting the alleged perpetrators themselves, or by providing for an international prosecution in case of their failure to do so. The declaratory wording of the Preamble may suggest that this duty precedes the coming into force of the Statute ("recalling that it is the duty").(D.Sarooshi, (1999), While such a duty unquestionably exists with regard to some international crimes, it is questionable whether it covers all crimes in their different facets under the Statute, especially as regards crimes against humanity." Be that as it may, it is clear that the principle of complementarity was designed to allow for the prosecution of such crimes at the international level where national systems are not doing what is necessary to avoid impunity and to deter a future commission of crimes. Moreover, and independent from the existence of a duty to prosecute, the complementarity regime is surely designed to
encourage states to exercise their jurisdiction and thus make the system of international criminal law enforcement more effective.

The interest of the international community in the effective prosecution of international crimes and the endeavour to put an end to impunity, the deterrence of the future commission of such crimes is a practical engagement among states and state parties. The primary concern of the Statute, and specifically the complementarity principle, is thus to strike an adequate balance between this interest and state sovereignty however states from the global south frequently complain of skewed power relations. Among the questions addressed are whether the ICC is guilty of selective prosecution of cases originating in Africa, why the AU is so critical of the ICC and how its attitude has evolved over the years and how the ICC constrained by the customary international law doctrine of head-of-state immunity. In 2008, the AU reacted to the increased use of universal jurisdiction in European states by adopting a resolution denouncing certain Western governments and courts for abusing the doctrine of universal jurisdiction and urging states not to cooperate with any Western government that issued warrants of arrest against African officials and personalities in its name. The watershed moment for the AU’s relationship with the ICC came in March 2009, following the issuance of the first arrest warrant for President Omar al Bashir of Sudan (Human Rights Watch (2010).

For states parties to the Rome Statute, this transformed it from a ‘paper commitment’ with no real consequences into a very real commitment with potentially serious consequences. An interviewee retorted: The issuance of warrants of arrest against Al Bashir is a pronouncement by the ICC that it is not business as usual, leaders must be warned, gone are the days of arbitrary rule, abuse of power and impunity. This is an era of sovereignty and responsibility among states.

The Bashir arrest warrant caused the relationship between the ICC and the AU to deteriorate for two reasons. First, members of the AU felt that the issuance of the arrest warrant was an impediment to the organization’s regional efforts to foster peace and reconciliation processes in Sudan, and that the ICC failed to appreciate the effect that its actions were having on these efforts. Secondly, diplomatic umbrage was taken over the indictment of a sitting head of state, which sparked a debate over whether the Rome Statute can legitimately extinguish diplomatic immunity in states that are not parties to it, such as Sudan. The AU’s opposition to the ICC has created a legal conflict for states that are parties to both institutions; different governments have chosen to resolve it in different ways. For instance, when President Jacob Zuma was due to be inaugurated in South Africa, invitations were sent out to all African heads of state, including President Bashir. As a party to the Rome Statute, South Africa would be required to arrest President Bashir, if he attended the event. Overnight this created a diplomatic scandal that was very difficult for South Africa to deal with.
After two or three days’ silence from the South African government on the issue, civil society representatives threatened to request declaratory relief from a court that if President Bashir were to arrive in South Africa there would be an arrest warrant issued for him. The government eventually took the position that it would be under an obligation to arrest Bashir if he arrived in South Africa, and the Sudanese president did not attend the inauguration. South Africa’s position that it is bound by the Rome Statute has been clear and consistent since then. But it is likely that many other African states faced with a similar choice would side with the AU, not the ICC.

In October 2011, when Binguwa Mutharika was Malawi’s president, Bashir attended a for the Common Market for Eastern and Southern African States summit in that country. Malawi issued a formal memorandum in support of its decision to host Bashir, in which it relied on (i) the AU’s resolution, passed in response to President Bashir’s arrest warrant, urging states not to cooperate with the ICC, (ii) the customary international law doctrine of head-of-state immunity and (iii) the fact that Sudan was not a party to the Rome Statute and could therefore not be bound by its suspension of immunity, to demonstrate that it was not under obligation to arrest him. Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, However, in June 2012 the current President of Malawi, Joyce Banda, refused to allow Bashir to attend an AU meeting in Malawi, forcing the organizers to move the meeting just three weeks before it was before it was scheduled .In 2011, the National Transitional Council (NTC) in Libya allowed Bashir to visit Tripoli but, surprisingly, NATO states made no attempts to intervene in the matter. Indeed, Bashir was the first foreign head of state to visit the NTC in Libya after the fall of the Gaddafi regime, as the Sudanese president provided assistance to the rebels in Benghazi as ‘payback’ for Gaddafi’s assistance to rebels in Sudan’s Darfur region. The fact that Libya is not a party to the Rome Statute partly explains the NTC’s failure to arrest Bashir, but it does not explain why NATO member states like the United States and the United Kingdom who undoubtedly had a moral responsibility to do something failed to intervene.

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

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

The difficulty arises in respect of states that are not parties to the Rome Statute, such as Sudan. There are a variety of views on this issue. It has been argued that in this situation, it is irrelevant that Sudan is not a state party because the case was referred by a Security Council resolution, which is are binding on all UN member states. In 2012 the AU Assembly asked the AU Commission to consider whether it would be possible to request an advisory opinion from the International Court of Justice (ICJ) on the question of immunity. The question of immunity raises important, unresolved questions. Are the cases against President Kenyatta and Deputy President Ruto so sensitive throughout Africa as to pose a real challenge to the court’s authority? In May 2013, the Kenyan government successfully lobbied AU members to adopt a resolution calling for the cases to be referred to Kenya for national proceedings to be taken, rather than being left to the ICC. The resolution was supported by all states except Botswana.

The resolution regrets that the AU request to the Security Council to use its powers under Article 16 of the Rome Statute to seek a deferral of the Bashir case was not acted upon. It reaffirms that country such as Chad, which previously welcomed Bashir, did so in conformity with the decision of the AU Assembly and therefore should not be penalized. It also stresses the need for international justice to be conducted in a transparent and fair manner in order to avoid any perception of double standards, and ‘expresses concern at the threat that the indictment(s) may pose to the on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in Kenya, but also in the Region’. And, finally, the resolution 12 In order to do this, it would be necessary to petition States through UN General Assembly (GA) to file the request because the AU has no standing before the ICJ. An alternative currently being mooted in social media is whether the Assembly of State Parties, via the GA, could request an advisory opinion from the ICJ.13 Decision on International Jurisdiction, Justice and the International Criminal court (ICC).

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

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

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

Fourth, there was an attempt to move the AU members to withdraw from their treaty obligations under the Rome Statute, though from the text of the resolution it appears that the attempt has failed for now. It is not clear that there is any legal basis for the AU to require its members to withdrawal from their treaty obligations that were entered into voluntarily and on an individual basis. The resolution ends by asking the AU Commission to organize brainstorming session as part of the 50 Anniversary discussion on the broad areas of International Criminal Justice System, Peace, Justice and Reconciliation as well as the impact/actions of the ICC in Africa, in order not only to inform the ICC process, but also to seek ways of strengthening African mechanisms to deal with African challenges and problems.

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

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

The study concluded that, ICC Jurisdiction is typically understood in relation to territory or nationality. This conceptualization complements a global order of separate sovereign states, each enjoying the power to judge within its territory and to create law for its citizens.

In Kenya, the perpetrators of crimes against humanity, the modern enemy of all mankind claimed to act in the name of the National Interests and within the national jurisdiction i.e. the use of custodial forces, the executive order and even political innuendos used by the government of the day. By contrast, the trials involving the Kenyans at the Hague entailed the ability to judge offenders who had no connection to the state as an entity.

Sitting in judgment at the Hague cases were about individuals not the Kenyan state. Decoupled from territory and nationality, the exercise of universal jurisdiction raises the question of whether it undermines a global order of sovereign states by allowing some state to reach into the affairs of another under the auspices of international criminal regime such as the ICC. This question is underscored by the crimes that, in the twentieth century, were found to give rise to universal jurisdiction, such as crimes against humanity that, in one common formulation, “shock the conscience” of mankind. Indeed in in view of the above, Kenya’s sovereignty was ceded to some extent when the Head of state and his deputy were indicted of international crimes namely crimes against humanity.

On one level, using international law to build the will and capacity of states to act domestically offers great opportunities to enhance the effectiveness of the international legal system. National governments will have new incentives to act. Domestic institutions will grow stronger, and can be harnessed in pursuit of international objectives. States can thus respond to transnational threats more effectively and efficiently. Yet each of the new functions of the international system suggested here backstopping, strengthening, and compelling is a double-edged sword.

Backstopping national institutions can be counterproductive to degree states may defer to an international forum as a less politically and financially costly alternative to national action. Well-intentioned efforts to help, often through NGOs as well as international institutions; can end up weakening local government actors by siphoning off both funds and personnel. The process of strengthening domestic institutions, if not properly designed and implemented, can also squeeze out local domestic capacity.

Finally, and most dangerously, by compelling national action, the international legal system may undermine local democratic processes and prevent domestic experimentation with alternate approaches. The most significant danger inherent in these new functions of international law, however, lies in the potential of national governments to co-opt the force of international law to serve their own objectives. One of the modern limits to Westphalian concepts of sovereignty is the obligations imposed by international law particularly human rights law on the conduct of states toward their own citizens. Yet, by strengthening state capacity, international law may actually make states more effective at the very repression and abuse that interference challenge seeks to overcome. Similarly,
by compelling state action, international law may give national governments new license to undertake major reform agenda as is in Kenya in the Judiciary, police service and Elections reforms.

8. REFERENCES

[1] Jackson, Robert, (1987)., Atul Bharadwaj is Research Fellow at IDSA. An alumnus of the National Defence Academy, Pune, he was commissioned in the executive branch of the Indian Navy.


