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THE EFFECTS OF INTERNATIONAL CRIMINAL COURT (ICC) JURISDICTION ON NATIONAL INTERESTS IN KENYA

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Abstract: **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 seems to have ushered in an epoch of writing history, a new page in diplomacy and international relations among nation states. It is against this backdrop that this paper seeks to examine The effect of ICC Jurisdiction on National Interests in Kenya.**

Keywords: **International criminal Court, jurisdiction, National Interests.**

1. INTRODUCTION

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

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

"A significant and novel feature of the Court is that it was conceived as an instrument for harmonizing national and international criminal justice. Prosecution and punishment of serious offences against human dignity are still entrusted to the national or the territorial State. Territoriality and nationality remain central concepts in the international community, although for all their merits they reflect old values: the bonds of blood and territory (Cassese, 2003)

2. LITERATURE REVIEW

International Criminal Court jurisdiction and National Interests

ICC marks a significant step towards the realization of a new vision of the world community. It shows that economic self-interest, nationalism and the unilateral formulation of one's own interests - or of one's own way of interpreting and

promoting compliance with international standards are no longer the defining characteristics of international dealings in the world community. Where these are still significant, no less crucial are the role of universal values and the need to enforce respect for them through a central body capable of administering justice impartially, on behalf of the whole community thus having universal jurisdiction.(ICC, 2009)

The principle of universal jurisdiction is rooted in the belief that certain crimes, such as, genocide, war crimes, crimes against humanity, "disappearance" and extrajudicial executions. To fulfill this responsibility, more than three-fifths of all states have enacted universal jurisdiction laws (including the Rome statute of the ICC) to ensure that their national courts are able to investigate and prosecute persons suspected of committing these crimes, and to ensure that their country is not used as a "safe haven" to evade justice.(Oxford Journals 2010 : 815-852)

States no longer have unfettered freedom to regulate their relations; peremptory norms now constitute a major stumbling block to that freedom. Even more significantly, States are no longer allowed to make unilateral decisions about how to react to alleged breaches of legal standards by other States. Nor, it follows, are they permitted to employ forcible means for instance, armed reprisals for imposing compliance with those legal standards. The combination of the demise of immunities with the notion of command responsibility whereby the supreme military or civilian authorities of a State may be held criminally liable for crimes perpetrated by their subordinates, if they failed to prevent or repress those crimes marks the end of traditional impunity. (Cassese, 2008).

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

"When does the international community intervene for the sake of protecting populations?"

The international community has the responsibility to prevent mass atrocities with economic, political, and social measures, to react to current crises by diplomatic engagement, more coercive actions, and military intervention as a last resort, and to rebuild by bringing security and justice to the victim population and by finding the root cause of the mass atrocities (Baylis and Smith, 394).

African Union (AU) pioneered the concept that the international community has a responsibility to intervene in crisis situations if the State is failing to protect its population. In the founding charter in 2005, African nations declared that the protection of human and people's rights" would be a principle objective of the –state and that the Union had the right "to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." The AU also adopted the Ezulwini Consensus in 2005, which welcomed RtoP as a tool for the prevention of mass atrocities.(Ian Williams, 2009) International courts do not have the resources or the powers to prosecute all perpetrators of international crimes. Various treaties impose obligations on states to extradite or prosecute a person found in their territory who is suspected of certain specific offences. This obligation is known as aut dedere aut judicare.

For the 'core crimes' of genocide, war crimes and crimes against humanity, there is a treaty-based obligation aut dedere aut judicare only for grave breaches of the Geneva Conventions and Additional Protocol I. For the other core crimes it is questionable whether customary international law imposes such an obligation's The obligation aut dedere aut judicare is distinct from the principle of universal jurisdiction, which provides a basis for prosecution but does not, in itself, imply any obligation to extradite or prosecute. Immunity of state officials, which acts as an obstacle to the exercise by a state of its jurisdiction, could, in practice, preclude the effective application of the obligation to extradite or prosecute. For the core crimes of genocide, war crimes and crimes against humanity a treaty imposing an international obligation on states to extradite or prosecute would help to bring perpetrators to justice.

ICC Jurisdiction and State Treaty Obligations

There are many treaties that impose on states parties to them an obligation to extradite or prosecute a person found in their territory who is suspected of certain specific offences. This obligation is often known by the Latin tag*aut dedere aut judicare*. The treaties cover crimes such as various acts of terrorism, torture, enforced disappearances, corruption and such organized crimes as human trafficking and drugs trafficking. They aim to deal with these offences by national prosecutions, facilitated by cooperation between governments. One example was the long-running attempt by Belgium to persuade Senegal to prosecute Hissène Habré for torture allegedly committed while he was president of Chad, or to

extradite him to Belgium for prosecution there. In proceedings brought by Belgium, the International Court of Justice (the ICJ) discussed the extent of the obligation to extradite or prosecute contained in the UN Convention on Torture, and decided that Senegal should prosecute without further delay or extradite to another country.

There are some international crimes, however, that are not covered by any treaty requiring states to extradite or prosecute. Genocide, crimes against humanity, war crimes and aggression – the 'core crimes' of international law are within the ICC. There are over 60 multilateral treaties combining extradition and prosecution as alternative courses of action in order to bring suspects to justice. As regards the core crimes the obligation *aut dedere aut judicare* relates only to those war crimes that constitute 'grave breaches' of the Geneva Conventions and Additional Protocol jurisdiction of the ICC and states have obligations to surrender suspects to it. But in relation to the many offenders who are not before that court there are few relevant treaty obligations (Study by the Secretariat, 18 June 2010, UN) (Article 85 of the Additional Protocol I) The Genocide Convention does not incorporate the obligation but does provide that persons charged with genocide are to be tried by a court of the state in the territory of which the crime was committed, or by an international court with jurisdiction. There is therefore no treaty-based obligation *aut dedere aut judicare* for genocide, crimes against humanity and, except in the case of grave breaches, for serious violations of the laws and customs applicable in armed conflicts of an international or non international character. A common feature of the different treaties embodying the obligation to extradite or prosecute is that they impose upon states an obligation to ensure the prosecution of the offender either by extraditing the individual to a state that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute. Beyond that, the provisions greatly vary in their formulation, content and scope, particularly with regard to the conditions for extradition and prosecution, and the relationship between these two possible courses of action. (Article VI of the Genocide Convention)

(Secretariat's Survey2010, :126-150).Customary international law Treaties apply only to those states that are parties to them. But is there an obligation to extradite or prosecute under customary international law, binding on all states? If so, does it apply in respect of all or merely some crimes under international law? It has been argued that the prohibition of certain crimes under international law, including genocide, crimes against humanity and war crimes, derive their authority from a peremptory norm (*jus cogens*) from which no derogation is ever permitted. A violation ofsuch a norm gives rise to a corresponding obligation *erga omnes* – an obligation owed by states to the international community as a whole – either to institute criminal proceedings or to extradite the suspect to another competent state.(Bassiouni ,1999) This view relies on the Trial Chamber's conclusion in the *Furundžija* case in the International Criminal Tribunal for the former Yugoslavia (ICTY)that 'one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.(Prosecutor v. Furundžija ,1998)

This view has been criticized by the argument thatthe *erga omnes* and *jus cogens* nature of the prohibitions do not as such give rise to the formation of customary international law and do not imply the recognition of a customary nature for the obligation to extradite or prosecute. (Raphaël van Steenberghe,2009) Survey of multilateral conventions that may be of relevance for the work of the International Law Commission on the topic: 'The obligation to extradite or prosecute (*aut dedere aut judicare*)', Study by the Secretariat, 18 June 2010, UN Doc.A/CN.4/630, para. 4.

Objective

The objective of this paper is to examine the effects of international criminal court (ICC) jurisdiction on national interests in Kenya

3. STATEMENT OF THE PROBLEM

International criminal lawyers often see sovereignty as the enemy of international criminal law, though frequently failing to discuss in any depth the nature and malleability of sovereignty. Although international criminal law does involve some challenges to sovereignty, it also needs, and in some ways empowers, that sovereignty too. Humanity and the New World Order(Ashgate, 2003).Mark Kersten (2014) debates over whether pursuing international criminal justice is helpful or harmful to peace processes has become a fixture in the realms of international relations and international law. Should justice be pursued in the context of ongoing conflicts? Should it be delayed or shelved altogether? Questions about the International Criminal Court's (ICC) impact center around the dilemma of whether it is helpful or not, to pursue accountability in the context of ongoing or recently concluded conflicts. By indicting active participants in wars, the ICC

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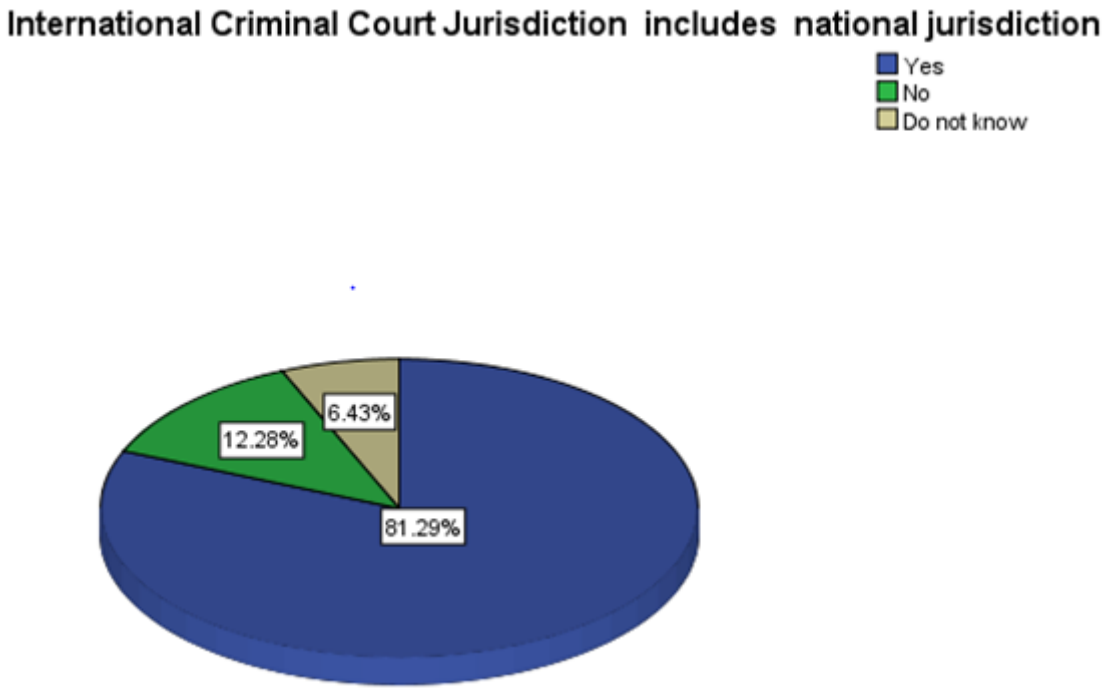
was specifically designed and is increasingly expected to intervene in the context of active conflicts It is also commonplace to hear observers and scholars insist on the need to move beyond the so-called "peace versus justice" debate. But this is misguided. There is no reason to doubt that the tensions and dilemmas of pursuing international criminal justice in the context on ongoing conflicts are real. Likewise, there is no reason to doubt that the project of international criminal justice complicates conflict resolution. It certainly does. The problem is that we still don't know why or how. we are very far away from knowing whether or not, on the whole, ICC interventions are having a positive influence on conflict, peace and justice processes (Kesternin Kenya, 2014). In the Kenyan cases the ICC prosecutions picked on the two most influential men in the politics of the day in Kenya .this were the sitting president and the deputy president. Uhuru Kenyatta is perceived to hold and an epitome of political aggrandizement in the entire kikuyu community at large While William samoei Rutto is seen as the kingpin of the kalenjin community. The duo is ruling the country through formation of a jubilee coalition government. This paper seeks to establish whether the indictment of incumbent the Head of State and the Deputy Head of state concurrently impacts on the state security, state ideology, state economy and culture. Is it then acceptable in international criminal jurisprudence to tamper peace with justice, Punish individuals with a view to end Impunity which punishment will jeopardize states interests and lead to intractable conflicts ?

4. FINDINGS



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

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

"whether international law immunities of States not party to the Statute of the ICC prevent the latter from exercising its jurisdiction over an incumbent Head of State, Head of Government, Foreign Minister and certain other holders of high-ranking office of such a State. Only if this first question is answered in the negative does the second question arise, which

is whether such international law of immunities precludes the ICC from requesting a State Party to arrest and surrender a suspect who falls into one the above-listed categories and who is sought by an arrest warrant issued by the Court".

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 noyau dur of the international legal order.

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".*

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. International criminal law entered a new stage of development. For ten Years, with the experience of international criminal trials growing richer every day and with the changing international situation, certain important theories of international criminal law are being re-evaluated

On 11 June 2010, States Parties of the Rome Statute of the International Criminal Court (hereinafter referred to as the 'Rome Statute') attending the Review Conference adopted by consensus the sixth resolution on the amendments to the crime of aggression. These amendments laid out the definition, conditions for exercising jurisdiction, and elements of the crime of aggression, as well as an understanding of the amendments. After the amendments regarding the crime of aggression were adopted, some scholars experienced a feeling of encouragement, thinking that this had not only realized the long-cherished hope of the international community to establish a common definition for the crime of aggression, but also protected the independence of the International Criminal Court, and established a foundation on which the Court may exercise jurisdiction over crimes of aggression in the future.

However, issues of dispute that arose during the negotiation process cannot be resolved simply because the amendments were adopted. It still needs in-depth analysis to deter-mine whether the amendments will actually serve as a reasonable and effective basis for future trials, and play a role in pursuing those account-able for crimes of aggression, with the goal of maintaining world peace. The potential impact of the amendments on contemporary international politics and the international legal system should not be ignored.

The history of establishing and defining the crime of aggression can be traced back to the formulation of the Treaty of Versailles in 1919. After World War I, representatives of the five victorious nations met at the Palace of Versailles outside Paris to draft the terms of the German Peace Treaty (the 'Treaty of Versailles'), trying to establish an orderly post-war framework as well as hold the criminals initiating wars accountable. A committee to investigate who had started the war and also to enforce punishment of these culprits the committee which was under the leadership of a ten-member council made up of members of the five nations that had come together to draft the Treaty of Versailles stated the following: "All those residing in enemy states, regardless of the seniority of rank, and including the national leadership, as long as they have violated the laws of war or those of customary practice, or have violated humanitarian law, all must be held criminally responsible". The committee divided all types of criminal actions into two basic categories: (1) instigating world war and working in co-ordination with acts of war; (2) violating the laws of war or those of customary

But for various reasons, the efforts to hold those who had committed international crimes accountable were in vain .After World War II, the Nuremberg Tribunal and the International Military Tribunal for the Far East were established to hold war criminals in Germany and Japan accountable for their crimes. Both Tribunals included 'crimes against peace' in the

crimes under their jurisdiction. This was the prototype or formal origin of the crime of aggression. However, the Nuremberg Charter and the Far East Military Tribunal Charter only simply ruled that planning, initiating or carrying out war of aggression constitutes a crime against peace. The two Charters failed to stipulate in detail either the components of wars of aggression or the elements of Crimes against peace. In spite of this, the Nuremberg Tribunal determined that Karl Donitz committed crimes against peace; and the Far East Tribunal found 25 individuals guilty of crimes against peace. The United Nations has committed to end all forms of aggressive war ever since its establishment.

In 1946, the United Nations General Assembly adopted Resolution 95(1), unanimously confirming the principles of international law outlined in the Nuremberg Charter. In 1950, the International Law Commission codified the Principles of the Nuremberg Tribunal based on Resolution 95(1), stating in the sixth principle that crimes against peace "are punishable as crimes under international law", using the same definition contained in the Nuremberg Charter. Following this, the international community continued its ongoing efforts to establish a clear definition of crimes of aggression. But since this was all taking place during the Cold War, the process was slow. After many years of hard work, the U.N. General Assembly adopted Resolution 3314 on 14 December 1974, which included a definition of 'aggression', and also listed certain manifestations of crimes of aggression. But U.N.General Assembly resolutions are not legally binding, and so the given definitions were unable to serve as a legal basis for determining crimes of aggression. After this, international legal academia, including the International Law Commission, continued to search for a possible definition of crimes of aggression with the U.N. General Assembly's Resolution as a starting point. But there was no substantial progress.

In 1998, the Diplomatic Conference to discuss the establishment of the Statute of the International Criminal Court took place in Rome, where crimes of aggression and other crimes such as war crimes, genocide, and crimes against humanity were included in the jurisdiction of the Statue. However, because of irreconcilable differences among the parties on the definition of crimes of aggression as well as the conditions for the Court to have jurisdiction over such crimes, the Conference had no choice but to leave the articles concerning crimes of aggression to be decided at a later date. The Conference only decided that in principle, after the articles in question were established, the Court would be able to exercise jurisdiction over crimes of aggression

After the Rome Statute entered into force in 2002, a Special Working Group on the Crime of Aggression was established, and became a main mechanism for a new round of negotiations on crimes of aggression. Parties became involved in heated debates revolving around such issues as the definition of crimes of aggression, elements of such crimes, conditions for jurisdiction, and the issue of how such articles should enter into force. The amendments pertaining to the crime of aggression as stated in Resolution 6 were finally adopted at the 2010 ICC Review Conference held in Uganda Universal Jurisdiction

Interaction between National and International Criminal Law

No matter in which court it takes place, the prosecution of international crimes often requires application of both national and international law. An internationalized court by definition applies both bodies of law. But national criminal law also plays an important role in the jurisprudence of international courts, even if application of that law itself is not part of their mandate. Mireille Delmas-Marty sets forth with great clarity how the *ad hoc* tribunals have resorted to comparative national law for reasons of interpretation and legitimization. She also signals the pitfalls of this practice, such as the natural inclination of judges to lean disproportionately on legal concepts and

Jurisprudence from their own legal system. National courts also necessarily resort to a combination of national and international law. Most legal systems incorporate (parts of) international law by reference, not least in the field of ICL. But even where they do not, international law is often used by national courts to interpret, and sometimes correct or supplement, corresponding national legislation. The extent to which international law can remedy lacunae and harmonize inconsistencies in national law is of great practical importance, since no national law is flawless in its regulation of international crimes. While the current wave of ICC implementing legislation has considerably improved many national laws, deficiencies and incongruities in national implementation will remain a structural feature of ICL, if only because the process of progressive criminalization under customary international law resists complete and timely implementation The quest for accountability in international crimes produces complex processes of interaction. Criminal courts interact with counterparts on different levels, as well as with other courts and other bodies such as truth commissions. The division of labor between all these actors, the consistency and uniformity of their work and the thorough use of the output of other courts are central issues in enhancing the legitimacy and efficiency of International criminal justice.

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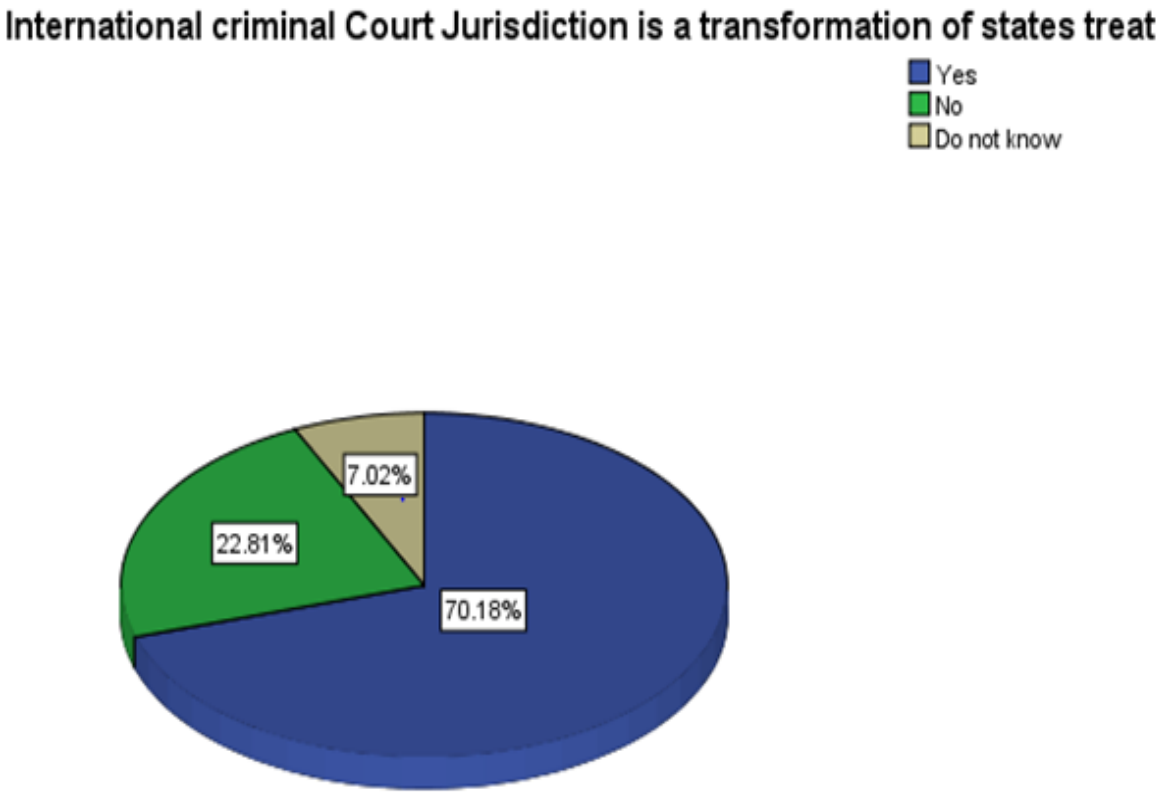

70.18%ofthe respondents agreed that international criminal court jurisdiction is a transformation of states treaty obligations The concept of state responsibility in this context refers to the responsibility of sovereign states to deliver a range of political goods and services to its citizens. Rotberg 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, orfailed.14 The state's most important function is the provision of security. This means creating a safe and secure environment and developing legitimate and effective security institutions. In particular, the state is required to prevent cross border invasions and loss of territory; to eliminate domestic threats or attacks on the national order; to prevent crime; and to enable its citizens to resolve their disputes with the state and their fellow citizens. Another major political good is to address the need to create legitimate effective political and administrative institutions and participatory processes and ensuring the active and open participation of civil society in the formulation of the state's government and policies. Other political goods supplied by states include medical and health care, schools and educational instruction, roads, railways, harbours and other physical infrastructure, a money and banking system, a beneficial fiscal and institutional context in which citizens can pursue personal entrepreneurial goals, and methods of regulating the sharing of the environmental commons.15 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. Thus Safeguarding National Interests impermeably.

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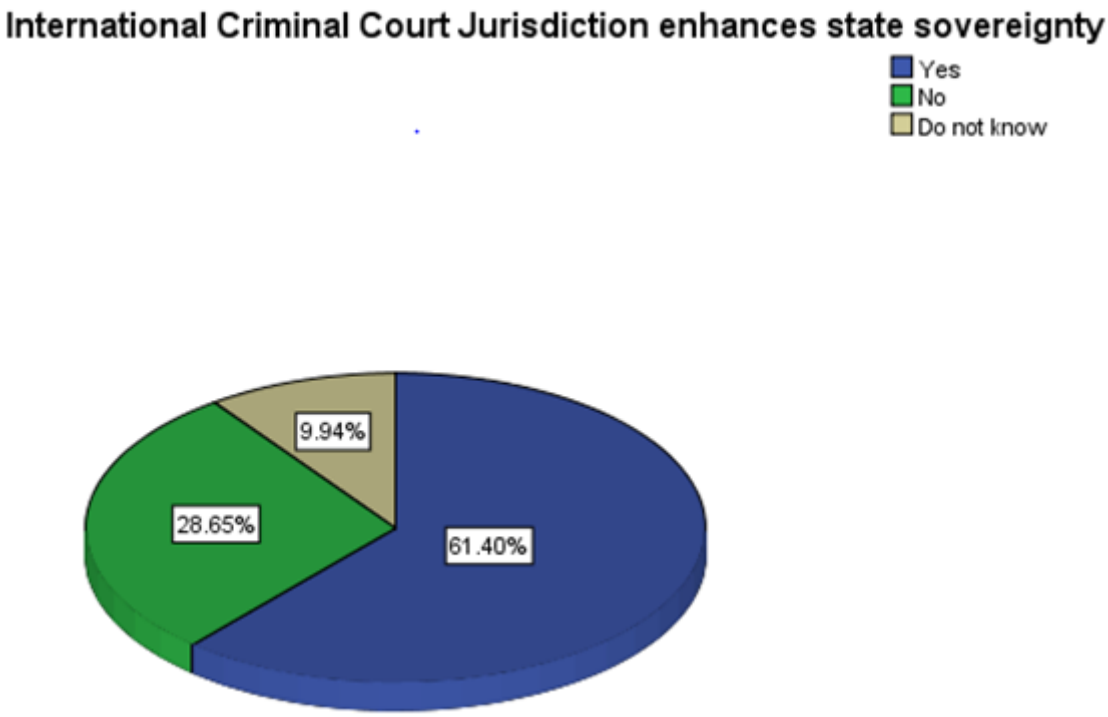


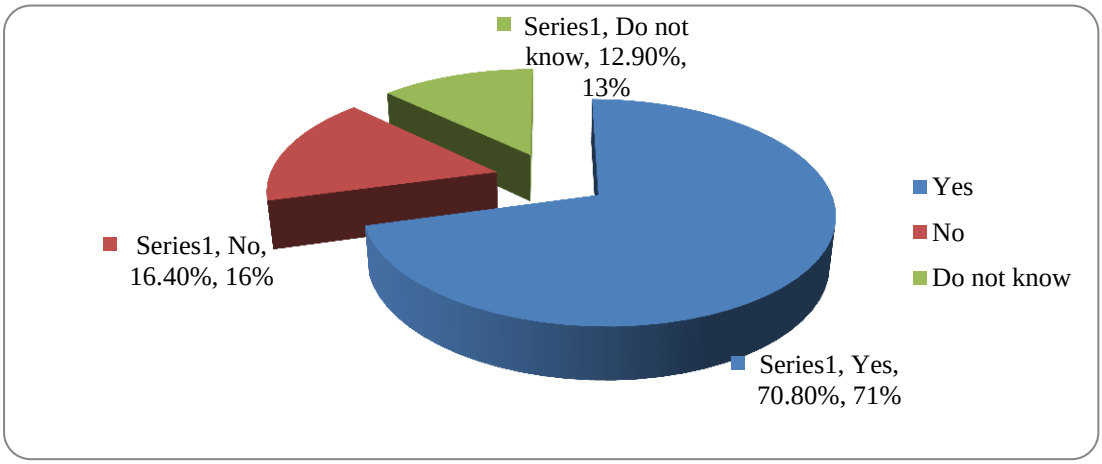
The responsibility of states is to deliver political goods – security, health and education ,economic opportunity, good governance, law and order, and fundamental infrastructure requirements (transport and communications). States fail when they are no longer willing or able to carry out these functions. One of the problems in dealing with failed states is in defining exactly who and what they are. State failure need not be reserved for cases of complete state collapse, either into civil war or anarchy but can also be understood as a process involving the weakening of a state's capacity to meet its responsibilities. Taking this further it may be beneficial to consider state failure as a spectrum which ranges from weak or failing states through failed states to collapsed or non-states. In this case a failed state is one that meets a specific set of conditions and excludes states that only meet some of the criteria which can then be classed as weak or failing states depending on the extent of their decline1. By using a state's responsibilities a model can be developed that enables states to be defined and categorized as weak, failing or failed, so that the international community can determine which states no longer meet their sovereign obligations and need support or intervention The traditional philosophy of "sovereignty as a right", that has held sway since the Treaty of Westphalia in 1648, has been that a country's internal affairs are its own affair and that other states do not intervene unless it threatens them, or breaches a treaty, or triggers an obligation of alliance. This is illustrated by United States Secretary of State Robert Lansing who when declining to pursue action against the leaders of Germany, Austria and Turkey at the conclusion of World War I for what would now be known as "crimes against humanity" said "the essence of sovereignty is the absence of responsibility". Reflecting the view of the time he said sovereign leaders should be immune from prosecution and that the United States could only judge those violations that were committed against American persons or property.

On the other hand, "sovereignty as a responsibility" requires that states provide the appropriate standard of political goods and services to ensure the protection and wellbeing of their citizens. If they refuse assistance there is a responsibility by the international community to react. This creates a dual characteristic to sovereignty; an internal component which relates to the state and its relationship to its people, and an external component which manages the relationships between states.

There are many other concepts of sovereignty between these two extremes. Robert Jackson refers to positive and negative sovereignty and the concept of "quasi-states". That is, states that lack the capacity to support themselves without outside assistance, or to contribute to the international order but who are legally recognized through membership of the United Nations. Stephen Krasner argues that the Westphalia model of sovereignty based on the principles of autonomy and territory, has never been an accurate description of many of the entities called states, since breaches of the model have been an enduring characteristic of the international environment because there is nothing to prevent them.

Afghanistan and Somalia have demonstrated the danger of the phenomena failing or failed state The question for the international community to establish how to correctly respond and who to determine the response, even if there is an agreement as to the nature of the problem, and of appropriate objectives. This is due to the principles of territoriality and state centrism that are deep rooted in the international systems and norms. The adoption by the international community of the concept of "state responsibility" facilitates a model to identify where assistance is required in the spirit of enhancing international peace and security while upholding state sovereignty.

International criminal Court Jurisdiction has implications on National interests



Source; Data, researcher; 2016

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

It would appear, therefore, that there is no consensus on the extent to which the ICC represents a fundamental challenge to sovereignty, or requires a reappraisal of the nature of international law. Queries can rightly be expressed about Bassiouni's exclusion of any supranational element in the ICC, but in relation to the law, Bassiouni has a strong point. Although it is true that the International Criminal Court, being both permanent and having a broad jurisdictional reach is institutionally a huge innovation, the drafters at Rome were very careful to ground the developments they were making in pre-existing law. This was because it was certain by the late stages of the Rome conference, if not before, that some states were going to oppose the Rome Statute whatever the outcome. The drafters were fully aware that such states would seize any parts of the statute in advance of international law as a stick with which to beat the new court should the ICC ever seek to exercise its jurisdiction over them as non-parties. It is notable that this debate is also taking place amongst those who support the International Criminal Court. All the works specifically concentrating on international criminal law reviewed here contain defences of the ICC against the critiques leveled at it by the US that it violates pre-existing international law.

Interestingly, those authors who assert that the ICC is transformative of the nature of international law may weaken the claim that the ICC is consistent with pre-existing international law. For example, Sadat, in a work that is at once supportive of the ICC, enjoyable and perhaps deliberately provocative, states that: another aspect of establishing the ICC outside of the United Nations system is the possibility that the Rome Conference represented a Constitutional Moment in international law a decision to equilibrate the constitutional, organic structure of international law, albeit sotto voce. Various aspects of the Statute and its creation suggest an important shift in the substructure of international law upon which the Court's establishment is premised. Unable to effectuate the change explicitly, through formal amendment of the

Charter, the international community, including not only States but global civil society, seized upon imaginative ways to bring about the shifts in constitutional structure necessary to permit international law to respond to the needs of international society and changing times.

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

As has already been noted, the relationship between international criminal law and state sovereignty is complex, and perhaps often misunderstood. Bennouna (2002), We must accept that international criminal law does affect state sovereignty (the law on crimes against humanity and genocide in particular) by prohibiting behavior perhaps previously outside of the purview of international law. Or, as Bruce Broomhall comments, the idea that certain acts 'undermine the international community's interest in peace and security and, by their exceptional gravity, "shock the conscience of mankind", and thus are not the concern of one state alone. The obligations under-taken by states parties to the Rome Statute, to cooperate with the Court and to, essentially, submit their judicial processes (or lack thereof) to external oversight also have implications for sovereignty.

However the prevention of international crimes cannot occur without sovereignty. Violations of international criminal law were frequent, for example in Somalia, where there was no government that could control the various factions. It is the same in cases such as Sierra Leone, where rebel forces were fighting a government that is weak and does not control much territory. The state (and its powers) has a protective role that cannot be ignored here, at the very least unless and until the UN or another body chooses to take it over J. E. Nijman, (2004). Turning more specifically to the ICC, it also bears recalling that creating that body was an exercise of sovereignty. No other entities than states had the authority to create a permanent international criminal court. So the ICC, perhaps paradoxically, also owes its existence to state sovereignty. The grounding of the ICC in the consent of states means, in particular, that the ICC may lawfully exercise jurisdiction over nationals of non-party states when they commit crimes on the territories of consenting states. There is no reason that states cannot determine that crimes committed on their territory or by their nationals are prosecutable by courts acting on their behalf.

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

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

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

This effect is not necessarily limited to states parties. Still, the extent to which the ICC can provide such an incentive is not helped by what a number of the authors here accept: that the cooperation regime for the ICC is not strong, owing to an

unwillingness of states to go too far in relation to their perceived sovereign prerogatives. The above point can perhaps be generalized a little more. International criminal law may have the effect of limiting sovereignty through its substantive norms (although we will return to this matter later), but it also empowers states in relation to jurisdiction. This should come as no surprise, as can be seen from the double-structured nature of the argumentation in the Lotus case, and the commentary it inspired. To assert jurisdiction over an action is to exercise a form of sovereignty over it, and where the jurisdiction being asserted is extra territorial, this may cause consternation in the state where the offence occurred. What is at issue is who is to be empowered to exercise sovereignty, the locus delicti alone, or other states? International criminal law has traditionally adopted a broad view of extraterritorial jurisdiction. For example, passive personality jurisdiction is generally frowned upon in international law, yet it is unquestionably available in relation to international crimes, Lotus (1927).

The broadest jurisdiction granted to states in international law, universal jurisdiction, is granted by international criminal law. As jurisdiction involves one state asserting rights to adjudicate events in (and often involving the officials of) other states, this involves an assertion of sovereignty. Thus international criminal law, by accepting universal jurisdiction and limiting material immunities empowers states, enabling them to expand their sovereign rights to events beyond their borders, through the assertion of such a broad form of jurisdiction. Although most international criminal lawyers would accept that in the case of international crimes this is right, it also shows that sovereignty is not always the enemy. Without sovereignty there are no courts, and without courts there are no prosecutions. In dealing with universal jurisdiction, however, we also have to take into account the claims that universal jurisdiction is, albeit notionally available to all, in practice a tool of the powerful. This was one of the bases upon which the President of the ICJ, Gilbert Guillaume, opined that to accept universal jurisdiction in absentia would 'be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'.

Guillaume's point might be countered with a claim that all states remain, in spite of modern imbalances of power, equally sovereign, Consard (2002) thus legally with equal jurisdictional authority. However, as a number of the authors recognize, international criminal law operates in a political, as well as a legal sphere, so practical opportunities to exercise that jurisdiction are not equally distributed. Perhaps most a stringently in relation to national jurisdiction, Broomhall asserts that It would be one thing for France to prosecute a former Head of State of Haiti before its domestic courts, and quite another for the Marshall Islands to prosecute a former President of the United States. If regular enforcement the rule of law is to become even a clearly emergent reality, then supporters of universal jurisdiction will have to propose credible means of addressing the complex decisions and (sometimes political) value judgments faced by those operating in real world situations.

5. CONCLUSION

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 entail the ability to judge offenders who have no connection to the state as an entity sitting in judgment .the Hague cases are about individuals not the Kenyan state. Decoupled from territory and nationality, the exercise of universal jurisdiction raises the question of whether it undermines a global order of sovereign states by allowing some state to reach into the affairs of another under the auspices of the UNSC. This question is underscored by the crimes that, in the twentieth century, were found to give rise to universal jurisdiction, such as crimes against humanity that, in one common formulation, "shock the conscience" of mankind. There is an apparent tension between a global order of state sovereignty and the exercise of universal jurisdiction that either promises to curb sovereign abuses or threatens to conceal imperial meddling behind a judicial façade.

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