FACULTY OF SOCIAL SCIENCES DEPARTMENT OF POLITICAL AND ADMINISTRATIVE STUDIES

TOPIC

INTERNATIONAL CRIMINAL COURT AND ITS IMPACT ON AFRICA'S SECURITY: A CASE STUDY OF KENYA 2002-2013

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Dedication

This research is dedicated to my beautiful daughters who despite being young have always trusted and believed in me.

My regards go to my friends, colleagues who encouraged me to work hard on this research, especially when I felt like quiting.

To my supervisor who had so much patience in guiding me. Prof Adar, thank you for your support and counsel.

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List of Acronyms

AU	-	African Union
CIPEV	-	Commission of Inquiry on Post Election Violence
DRC	-	Democratic Republic of Congo
GNU	-	Government of National Unity
ICC	-	International Criminal Court
ICJ	-	International Court of Justice
ICL	-	International Criminal Law
IDP	-	Internally displaced person
ITN	-	Insecticide-treated net
KANU	-	Kenya Africa National Union
KNDR	-	Kenya National Dialogue and Reconciliation
LDP	-	Liberal Democratic Party
LRA	-	Lord's Resistance Army
NAK	-	National Alliance of Kenya
NARC	-	National Rainbow Coalition
NGO	-	Non-governmental Organisation
OAS	-	Organisation of African States
OAU	-	Organisation of African Unity
ODM	-	Orange Democratic Movement
PNU	-	Party of National Unity
SADC	-	Southern African Development Community
SC	-	Security Council
UN	-	United Nations
UNSC	-	United Nations Security Council

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Abstract

This study examined the impact of the ICC on Africa's security, with a particular focus on the Kenya case 2002-2013. It was noted that despite its existence, the ICC has failed to provide social justice and security on the continent. The study adopted qualitative desktop in oder to investigate the phenomenon. Data were generated through content analysis of secondary publications.

The study found out that the ICC's independence is in question due to political dynamics in the international system. There are those who accuse the ICC of being overly focused on trying only African leaders, and warn that the Court risks worsening factionalism and ethnic divisions thereby threatening peace and reconciliation efforts. Only through positive engagement can the legitimate concerns of African states and African communities be heard.

Furthermore, it is only through dialogue and negotiation can a better and more effective ICC be appreciated. Unless and until African states toughen their judicial systems to ensure such references to the ICC are a last resort, the Court will continue to be the only credible forum for states emerging from conflict and seeking justice and reconciliation. The study therefore recommends that the ICC should take more steps to address the concerns raised by African leaders, especially about peace versus justice, and issues of immunity of state officials. The question of how to time justice is very crucial so that societies do not suffer more conflicts and atrocities.

CHAPTER 1

INTERNATIONAL CRIMINAL COURT AND ITS IMPACT ON AFRICA'S SECURITY: A CASE STUDY OF KENYA 2002-2013

INTRODUCTORY CONTEXT

1.0 Introduction

The International Criminal Court (ICC, hereinafter used interchangeably with the Court) created by the Rome Statute on 1st July 2002 as a permanent global body is conferred with statutory authority and jurisdiction to operationalize international legal regime specifically meant to protect serious crimes against humanity. The Court is not meant to replace national courts but serves as complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court is governed by the provisions of the Statute (UN, Rome Statute, 1998). The ICC is based in The Hague (Netherlands). The existence of the ICC guides the behaviour of the state parties, particularly leaders pertaining to adherence to international rule of law. Specifically, Article 5 provides that "The Court has jurisdiction in accordance with this Statute with respect to the following crimes: the crime of genocide; crimes against humanity; war crimes; and the crime of aggression" (UN, Rome Statute, 1998).

It should be reiterated that the ICC does not replace the work of national courts, but rather complements them. It only takes up a matter if a country is unwilling or not in a position to prosecute crimes as provided for in the Rome Statute. Its jurisdiction, though *inchoate*, is gradually gaining, albeit with limitations, worldwide validity (Schabas, 2011; Tsilonis, 2019; Politi & Nesi, 2004). This research essay is set out to examine the activities of the ICC and its impact on Africa's security with special reference to Kenya, 2002-2013.

1.1 Background

The search by the ICC for universal justice and peace has been an ongoing one (Tsilonis, 2019). Nonetheless, the structure of international criminal law is not an entirely new concept. According to Banketas and Nash (2007), International Criminal Law (ICL) is the combination of two legal disciplines of international law and domestic criminal law systems. Its life depends on international law sources and processes as it originally comes and eventually determines these sources and processes. Further, its existence is dependent on the sources and processes of international law as it is these sources and processes that initially create it and ultimately define it (Cassese, 2013; Cryer, 2014; Schaak & Slye, 2014).

The ICC and its predecessors, War Crimes Tribunals, may trace the roots of their ideas in democratic liberalism which defends universal rights across cultural and geographical borders (Fassassi, 2014). The most common events were certainly in Germany and Japan immediately after the Second World War. Nuremberg and Tokyo trials were set up to try those who had perpetrated crimes against peace, humanity and war crimes during the Second World War (Bard, 2002; Piccigallo, 2011). Sellars (2010) explains that this was the four-power London Conference held from late June to early August 1945. It was the gathering where the proposal to set up a court to try the captured German leaders by the Allies was officially discussed. The conference nearly collapsed because the American delegate threatened to pull out over the court's location, the delegate from France was against bringing charges of crimes against peace, the British worried over the risk of German counter charges, and the Soviets were unwilling to consent to a definition of aggression. There were frequent misunderstandings between common and civil law delegates, and all were obligated to advance their respective nation's interests. It was only on the final day that the delegates realised that their discussions would provide the conceptual

framework for two great judicial proceedings, one in Nuremberg, and the other in Tokyo (Sellars, 2010).

Although extensive literature is available on the ICC's mandate and operations (Melandri, 2009; Killian, 2008), there is a gap on the ICC's part in trying sitting heads of states, particularly in relation to Kenya. This may be because it is impractical, because International Law is not free from political interference. The ICC is the first international judicial body to prosecute perpetrators of serious violations of international law on crimes against humanity, genocide and war crimes (Roth, Robert, Henzelin & Marc, 2002). The Rome Statute outlines the Court aims as reduction of impunity for grave crimes of international concern and contributes to their prevention.

The existence of the ICC guides the behaviour of leaders pertaining to adherence to the international rule of law, and holding leaders who act with outright disregard to the international rule of law accountable. However, there are challenges such as internal insufficiencies, selective prosecutions, lack of contracting parties' cooperation and limited victim participation (Wilson, 2008). Among others, the role of the ICC is to ensure that the most horrible international crimes, such as crimes against humanity, war crimes and aggression, genocide do not go unpunished and to deter potential perpetrators. As a result, the ICC conveys an important message. As has been explained the ICC does not in any way replace the work of national courts, but rather complements them. It only takes up a matter if a country is unwilling or not in a position to prosecute a criminal offence. Its jurisdiction is claimed to have worldwide validity, though presently it is still restricted in practice (Wilson, 2008). The demise of this Court would be a detrimental set back in the search for international rule of law.

Discussions regarding the adoption of the Rome Statute in 1998 were held when Kenya was under the authoritarian rule of Daniel arap Moi of the Kenya Africa National Union (KANU), whose performance was at an all times low regarding the rule of law, the protection of human rights, freedom of speech and the economy (Adar, 2000; Lugano, 2016). Moi took over following the death of President Jomo Kenyatta in 1978. In 1982 Kenya was transformed from a *de fecto* partie state to a *de jure* party state with KANU as the only official political party. This decision was taken following the 1982 military coup attempt. Kenya remained a one party state until 1992 when multiparty electoral system was introduced following the internal and external pressure. In 2002 KANU was defeated by the opposition party the National Rainbow Coalition led by Mwai Kibaki. [1]Kenya signed the Rome Statute in 1998 due to the pressure from the local and external human rights groups such as International Federation for Human Rights, Kenya Human Rights Commission, Amnesty International and International Commission of Juris-Kenya Section and due to its non-retroactivity principle and had no fear that the ICC would prosecute Moi and his supporters for instigating the violent tribal clashes during the past elections (Lugano, 2016). According to Muthoni (2012), the National Rainbow Coalition (NARC) ousted KANU in December 2002, the party that had governed Kenya since independence in 1963. NARC included Mwai Kibaki's National Alliance Party (NAK) and Raila Odinga's Liberal Democratic Party (LDP) which prior to the general elections had benefited from a huge KANU walk out occasioned by the then President Daniel arap Moi's choice of successor, Uhuru Kenyatta, the son of Kenya's first President, Jomo Kenyatta. In March 2010, the ICC judges accepted the prosecutor's proposal for the launch of an inquiry in Kenya (Muthoni, 2012).

Maina (2014) argues that the ICC judges approved an enquiry on the basis of a comment from the prosecutor rather than a recommendation by state or a UNSC referral. Article 13 (b) of the

Rome Statute stipulates that “a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations” (UN, Rome Statute, 1998). The crimes alluded to in Article 13 (b) are inscribed in Article 5 of the Rome Statute. The investigation related to the 2007-2008 post-election violence in Kenya, in which more than 1000 people were killed, thousands were displaced and a number of other abuses were allegedly committed, including sexual violence. The prosecutor alleged that senior officials organised and instigated wide-ranging abuses. His observations were backed by independent investigations in the violence. The suspects in the first case were linked to Raila Odinga, the leader of the opposition at the time, and Mwai Kibaki, the former president of Kenya (Hansen 2011;Hansen 2011a, Muthoni 2012). In spite of previous support for the ICC's involvement, this caused a backlash in the political class in Kenya. In December 2010, parliamentarians passed law advising Kenya to withdraw from the Court, ignoring the fact that the withdrawal would not exclude the ICC from investigating crimes committed because Kenya ratified the Rome Statute in 1998.

1.2 Statement of the problem

Nyirurugo (2014) argues that presently, there is a great deal of criticism directed at the ICC by African leaders. The criticisms have increased following the indictment of Kenya’s president Uhuru Kenyatta and his deputy, WilliaM Ruto by the Court during the period 2002-2013 (Hansen, 2012).Uhuru Kenyatta and William Ruto were indicted in connection with the 2007-08 post-election ethnic violence which led to the death of 1,200 people. Most African nations are increasingly expressing their displeasure with the operations of the Court and specifically the way it handled the Kenyan cases. The other criticism directed at the ICC by Africa is that the Court has tended to focus almost entirely on African leaders. Hohn (2014) argues that worse

atrocities in other countries have not featured prominently in the Court's agenda. Some critics of the ICC cite many examples that suggest that there are biases in the selection of countries and cases followed up by the Court. Bikundo (2012) argues that, universal justice has tensions within and between fairness and universality. The inconsistency in universality is how the internattional community set up the Court with the ability to cover all the states whether or not it is a member of the Assembly of State Parties. Yet, since its establishment the ICC has focused mainly on the African cases irrespective of what is prevailing in other countries outside the continent. For example, the ICC is accused of being selective by ignoring atrocities and crimes against humanity committed by major world powers including the United States and China (Brendon, et al., 2016). The United States role in Iraq is a typical example. A study that focuses on the implication of the role of the ICC on the African States' security as one of the key problems is needed.

1.3 Research Objectives

The main objective of the research essay was to examine the activities of the ICC in relation to Africa. Examining the activities of the Court would assist in determining its successes and failures.

1.3.1 Specific Objectives

1. To contextualize the development of the Rome Statute and its global legal impact.
2. To establish the ICC's relationship with Africa on the question of impunity.
3. To investigate the implication of the ICC on Africa's security using the Kenyan case study, 2002-2013.

1.4 Research Questions

The main research question as emanating from the main research objective was to answer how the activities of the ICC have impacted African security.The reseacher explored as much available literature as possible in order to sufficiently answer the research questions.

1.4.1 Specific Questions

1. How effective is the ICC's role as a global arbitrator ?
2. What is the relationship between the ICC and Africa on the question of impunity?
3. What implication does the ICC's statutory role have on Africa's security particularly on Kenya's case, 2002-2013?

1.5 Realism: Theoretical Framework for Analysis

Burchill et al. (2001) explain that realism is a term used in many fields in a number of ways. Realism is a theory of International Relations, and is a product of the works of a number of scholars (Donnelly, 2000). According to Donnelly (2000), realism illustrates the limitations on politics that have been imposed by the human nature and the absence of overarching authority in the international system in the form of an international government. Realists believe that collectivity is the essential part of social life and that the only really essential collective player in international relations is the state as the main actor in the international system (Donnelly, 2000).

Political realism is a tradition of study in international relations that stresses the challenge that states face in pursuing power politics of national interest. Political realism or *Realpolitik*, 'power politics', is international relations' most widely recognized theory. This is the only practical meaning of realism that we will focus on in this study. Carr et al. (1946) and Morgenthau (1954)

not only focused on explaining the world out there, but also argued on what states might realistically expect to achieve in the dynamic international political environment. Realists stress political constraints from human selfishness ('egoism') and the absence of international government ('anarchy'), which warrant the primacy of power and security in all political life (Burchill et al., 2001). Rationality and state-centrism are known as core realist principles. The mixture of anarchy and egotism and the imperatives of power politics that result provide the centre of realism (Burchill et al., 2001).

It can be argued that for realists that states are driven to act by the basic instinct of survival and the protection of their sovereignty the key *raison d'etre*, but not by other principles to be pursued in good faith. Global politics is motivated by selfish interest and assumes war under certain circumstances is the solution. It is a known fact that the ICC relies on the cooperation of the state parties in order to fulfil its mandate. This therefore takes us to the question of whether the ICC can deliver justice with its current relationship with the state under investigation, that is, Kenya. Clark (2011) argues that the main obstacles to the effectiveness of the ICC will always be international politics and states' interests, hence confirming the appropriateness of using realist theory in this research essay.

1.6 Significance of the Study

The purpose of this study was to find out the impact of the ICC on Africa's security, with a particular focus on Kenya, 2002-2013. The period 2002-2013 was identified to be relevant for the study for a number of reasons. First, it covers the period, that is, 2002, when the ruling party, KANU was for the first time defeated in elections since 1963. Second, it was the period that the country experienced wide spread ethnic violence instigated by leaders during and after the general elections, particularly in 2007-2008 and 2013 (Materu, 2015; Dercon & Gutierrez-

Romero, 2012). Third, this is the period when the ICC indicted the sitting President, Uhuru Kenyatta and his Deputy William Ruto, putting Kenya's stability and national security in particular in abeyance. Fourth, Mueller (2014) argues that the Kenyan cases were exceptional in that it was the first time that an ICC Prosecutor had charged perpetrators on his own decision, that is, *proprio motu* as permitted under Article 13(c); Article 15; and Article 53 (1) of the Rome Statute. Prior to this Kenyan scenario, the other cases were referred to the Court by the United Nations Security Council (UNSC) or the states themselves. Fifth, it was the first time that the ICC had had to withdraw a case initiated *proprio motu*. These issues, among others, will be examined in the study in relation to Kenya. The findings of the study will contribute to the ICC-cum-Africa epistemological debate.

1.7 Limitations and Delimitations of the Study

According to Simon and Goes (2013), limitations are incidences that arise in a study and beyond the reseacher's control. They limit on how far a study can go and at times with possitive and/or negative ramifications. Every study, regardless of how it is carried out has limitations (Simon & Goes, 2013). A limitation linked with qualitative study is associated with validity and reliability. Due to the fact that qualitative research occurs in the natural setting it is very difficult to replicate the study (Simon & Goes, 2013). The delimination of a study entails characteristics that arise from limitation on the scope of the study through conscious decisions to add or subtract during the development of the study plan (Simon & Goes, 2013). This research essay is limited to the use of secondary data as the researcher did not administer interviews on the subject matter.

However, the extensive desk research of the qualitative data will validate the discussion and conclusions on the impact of ICC on Africa's security (Largan and Morris, 2019; Stewart, 1992). Specifically the study's key focus is on ICC's intervention at a Global level, in Africa, and using

the case study of Kenya, 2002-2013. It was assumed that the available literature will be sufficient to aid the researcher to arrive at the desired outcomes of the study. Inevitably the study may have gaps owing to the methodology used. Because of time limits, the research will largely rely on secondary desk top material available.

1.8 Ethical and Legal Considerations of the Study

In particular when facing the dilemmas and conflicts which emerge from the analysis, proper research involves ethics. Ethics involves what is valid and moral in research project. Scientific fraud or plagiarism means the evidence or data collection processes are falsified. According to Cannie (1998), research ethics can no longer be conceived as a set of rules, but rather as a way to explain how to conduct the whole research. Cannie (1998) further argues that in addition to pro forma issues of informed consent, the implications of these ethical principles extend beyond coercion, the unconscious harm to study participants, avoiding sexual privacy with participants and research workers and the inclusion of specific groups. In fact, ethical behaviour in the context of research involves relations beyond those with whom we engage (Cannie, 1998; Rennik 2018; Oliver, 2010; Israel, 2014). Adhering to ethical values, the researcher analysed and intepreted the data on the topic to ensure conformity to research ethics. The publication of the findings, if it were to occur, would not end the responsibility for ethical relations in research which in many ways can contribute to the objectives of the university. Researchers and students in particular enter into social contracts with society and society can reasonably expect benefits that accrues as a result of the research support.

1.9 Organization of the Study

The study consisted of five chapters. **Chapter One** is the introductory chapter, giving the background of the study, statement of the problem, objectives and research questions, significance of the study, limitations of the study, and realism as a theoretical framework for analysis. The chapter, therefore sets stage for and puts into proper perspective the research essay.

Chapter Two reviewed the existing literature on the ICC particularly in relation to the world, Africa and Kenya. The introductory part reviews literature on the evolution and development of the ICC. The chapter provides a detailed review of literature on the ICC's legal mandate and its implications at the global level and the extent to which it has generated competing debate in Africa associated with mass withdrawal from the Rome Statute. Specifically, the literature review put into proper context this competing epistemological debate by scholars. The purpose of literature review is specifically intended to isolate the *research gap* to be addressed in the study.

Chapter Three presented the methodology of the study. The chapter starts by an introduction. It explained the research design of the study and desktop research. Additionally, it explained document analysis as a method used in the study. Furthermore, the chapter provided the data collection and analysis methods.

Chapter Four of the study puts into perspective the data analysis and findings. The chapter provided a detailed introductory setting in relation to data analysis and findings of the study. The data and findings were analysed in the contexts of the objectives of the study, as well as the research questions. The analysis focused on Africa with special emphasis on the case of Kenya, 2002-2013.

Chapter five provided the summary of the findings, conclusions and recommendations. The chapter begun with an introduction; then it provided the summary of the findings of the study on the role played by Africa as a continent in the formation of the ICC. Additionally, the chapter drew the conclusions by evaluating when the Rome Statute came into force. Lastly, the chapter provided specific recommendations some of which can serve as avenues for further study and research.

1.10 Conclusion

This chapter gave the background to the research, introduced the statement of the problem, and outlined the research objectives and questions. The chapter further presented the significance of the study where it outlined the purpose and justification for using the years 2002-2013 as the period around which the study is focused. The study also dealt with, among other things, the limitations and delimitations; as well as ethical and legal considerations.

CHAPTER 2

LITERATURE REVIEW: COMPETING EPISTEMOLOGICAL DEBATE IN CONTEXT

2.0 Introduction

The previous chapter gave the background of the study, statement of the problem, objectives and research questions, significance of the study, limitations of the study, and realism theoretical framework for analysis and how these are to be contextualised in relation to the ICC, with a special focus on Kenya, 2002-2013. This chapter reviewed literature on the ICC in the context of the world, and Africa. The Kenyan case study was anlysed within the context of Africa.

The chapter started by an introduction and it reviewed literature on the background to the creation of the ICC. Additionally, the chapter provided a detailed literature review on ICC's interaction at the global level, and put into proper contexts the competing epistemological debate in relation to Africa's remaining in and withdrawing from the ICC. Kenya's case was assessed and understood in this Africa-ICC debate. Realism theoretical framework for analysis of how the ICC relates with states was also assessed in the chapter.

2.1 Evolution, Development of the Rome Statute: A Literature Review

In the absence of a superior authority, sovereign states establish regimes that is, "principles, norms, rules and decision making procedures" to regulate their behaviour (Krasner, 1983:1). Thus, this provides a basis upon which states' interests converge in a given area of international system. Legal rules which govern relations between states are referred to as international law. States consider international law as binding upon them as such, this gives the rules the status of law. After the Westphalian state system was created, states as they evolved overtime were

viewed as supreme with absolute sovereignty free from outside interference and intervention (Wahome, 2015).

The ICC came into being on 17 July 1998 through a treaty signed in Rome by 120 states. It came into effect after sixty (60) countries ratified the Court's Statute (hereinafter "the Rome Statute") on 1 July 2002 (Brendon, Pkalya & Maragia, 2016). By ratifying the Rome Statute, states have established the ICC to ensure that the worst crimes committed under international law are punished. Since inception, the ICC has jurisdiction over three forms of crimes: War crimes, Crimes against Humanity, and Genocide. African countries took part in the negotiations of the treaty that formed the ICC and by 2019 constituted the largest single bloc to have ratified the Rome Statute. African countries supported the ICC at the time of its establishment, many seeing it as a possible venue they could make use of, in resolving many of the continent's conflicts (Brendon, et al., 2016). Kenya was among the African countries that took part in the negotiations for the formulation of the ICC. This early optimism, enthusiasm and rallying behind the Court is gradually fading. Moreover a number of African elites, scholars and the African Union (AU) are unhappy that the ICC has focused mostly on punishing African defendants alleged to have committed violations of human rights. The Court as pointed out by some is increasingly centred on factionalism and ethnicity, by carrying out justice selectively, and cautioned that this could frustrate local reconciliation efforts in Africa (Brendon, et al., 2016). Some scholars argue that The Court is open to political pressure by ignoring killings by major world forces including the United States and China (Brendon, et al., 2016). Furthermore, others have argued that the ICC is being used as an agent of regime change and of entrenching neo-colonialism; and that the ICC Prosecutor has undermined the original intention of the Court as one of last resort rather than of first instance (Brendon et al., 2016). According to Brendon et al. (2016), a considerable amount

of the existing literature on the ICC and Africa focuses on the Court's growing pains and failures, as well as offering prescriptions for the Court or arguing for its closure. It is important to highlight that the ICC tries individuals while the International Court of Justice (ICJ), which is the principal judicial organ of the United Nations in charge of the settlement of disputes is responsible for dealing with disputes invloving member states.

2.2 The ICC at the Global Level: A Literature Review

At the global level the significance of the Court is that international law does not only rely on universal rules to protect human kind but also has an instrument for punishing those who breach the rules even if their own state is not willing or not able to do so. There is an argument that the enforcement of international criminal law remains questionable when courts are imposed by strong states on conflict prone societies. The fundamental changes in global governance, power dynamics and economic relations have since the end of the Cold War led to an era in which international law is vital in structures and significant development. An increase in number of international courts and tribunals has marked the universal growth of this century. In short, several areas of international law have been explained and created. Such changes have made international law more complex and have resulted in new challenges in different areas including the settlement of international disputes. Kenya as part of the global village plays a role in the interaction with the ICC at this level.

According to Brower and Brown (2013), countries in transition, whether from authoritarian rule or recovering from war, are regularly faced with the need to address legacies that are polluted by serious violations of international human rights and humanitarian law. Only by addressing the root causes of conflict and in particular by resolving grievances can communities resolve differences, step forward and build a sustainable peace. International law, in addition, calls on

states to investigate and prosecute gross human rights violations and serious violations of International Humanitarian Law, compensate victims, and take action to prevent further violations (Brower & Brown, 2013). According to Glasius (2017), as regards the Statute for an International Criminal Court, the first thing global civil society would achieve was for the Statute and for the Court to be created.

Brower and Brown (2013) echoed a similar sentiment by stating that the first and most important step towards the creation of an integrated universal criminal justice system that would cover anyone in any country was to consent to the Rome Statute. It is difficult to understate the massive complexity of the international legislative moment. Allowing an international body, irrespective of how small a jurisdiction, to investigate and prosecute persons within sovereign states is a major departure from the Westphalian conception of international law (Brower & Brown, 2013). From the above statement, it becomes apparent that the Rome Statute is a significant step forward for its advocates in institutionalizing the universal rule of law, fair trials and access to the due process and fighting injustice in relation to mass atrocities. Brower and Brown (2013) explain that the Rome Statute was a significant departure from the international world order of the previous time for one of its main criticisms: the United States of America. U.S. ties with the ICC were problematic right from the very beginning.

With regard to the substance of the Statute, the most important development is undeniably the prosecutor's right to decide its own cases. This could not have been done without enduring and considerable pressure from Non Governmental Organisations (NGO's) by the admission of the main diplomats involved. A key element in legitimizing the idea of an independent prosecutor, beyond NGOs, was the active involvement of Yugoslav Prosecutors and Rwandan tribunals. The authority of the ICC is troublesome, once the member states ratify it, is yet another

accomplishment that necessarily recognizes the full jurisdiction of the Tribunal for all violations of the law. Intense civil society lobbying has avoided the exclusion from the Statute of war crimes committed in internal conflict situations. In forging rules which balance the need for fair and effective trials against protection, sensitive treatment and the rights of victims and witnesses, a separate 'Victims Rights Group' has played an important role (Glasius, 2017). Some authors like Scheffer (1999) argue that in creating a permanent ICC, the United States has been, and will remain, actively involved. Such a long considered and so important international tribunal will prevent impunity in the national courts of the world's burdened mass murderer. Contrary to the above statement, Stromseth (2019) observes that America has been troubled from the outset by its partnership with the ICC.

While international law making has not been historically a democratic process, national and international diplomats are becoming increasingly aware that more decisions should be democratic, particularly in the international decision-making sector, and in international legislative matters. This idea is connected to political thinkers' more general awareness that, while more states become parliamentary democracy, the advent of globalisation has eroded the substance of democratic participation and choice. This could be described as one of the negative effects of globalisation. Such an equality exists, at least in its General Assembly and, if not in the Security Council, between the members of the United Nations. In this way, the ICC negotiations follow the example of the General Assembly, with all states being entitled to speak and to vote equally. Nevertheless, some countries are obviously more equal than others in reality.

This is not only about influence but also the opportunity to engage in complex multiple negotiations. This part of the chapter showed that at a global level, the ICC contributes to the transparency of international negotiation processes, to greater equality of the participant states,

and to deliberative debate. But is this sufficient for us to conclude that the ICC's involvement at the global level democratises processes of international decision-making? On the issue of the ICC at the global level one can confidently say across Africa and around the world, crimes have been committed. The task is therefore to construct an ICC, capable of responding reasonably and credibly to global demands for effective transparency and impartial justice and not merely on a continental basis.

2.2.1 The ICC, Latin America and the Caribbean states: A Literature Review

Scholars have argued that the formation of the ICC was highly embraced by many, but thereafter seems to have fallen out of favour with many states. Delagrange (2019) supports the view that the ICC formation was embraced by many by arguing that the Latin America and the Caribbean states just like Africa were major contributors to the formation of the ICC. Africa is presently the main client to the ICC as such, Latin America and the Caribbean states can learn something from Africa. The ICC was enacted to address grave human rights violations of such magnitude and barbarity to warrant the response of the international community as a whole.

The ICC represents the principle of individual criminal liability for those answerable for the most serious human rights violations and was intended as a permanent institution to carry out the punishment of such individuals. Apart from morally condeming crimes at the international level the ICC is intended to ensure that countries abide by the rule of law at national and international level.The perceptions of many Latin American and the Caribbean states after their transition to democracy have been that it is very difficult to prosecute convicted human rights violators, not just legally but also economically, socially and psychologically. Delagrange (2009) for example, argues that the tradition of domination towards human rights abuses in Latin America and the Caribbean has affected public attitudes towards the ICC in several respects.

It became apparent that the ICC had a great challenge in achieving its mandate of safe guarding human rights. In the Latin America and the Caribbean, human rights have been eroded by many factors. Delagrange (2009) observes that over the past 20 years, most Latin American and the Caribbean countries were involved in armed conflict or authoritarian rule, contributing to deficiencies in respect for human rights and accountability. While this moral and legal vacuum has led the region to intense political abuse, with forced disappearances, torture and mass summary and extrajudicial executions, most Latin American and Caribbean countries have broken with their autocratic pasts and are now firmly committed to the protection of human rights (Delagrange, 2009). Latin America's past experiences have led to positive reception towards the Court. According to Glasius (2017), great interest in the Court by Latin American and Caribbean states came from their history of living under dictatorships and the challenges of bringing criminals to justice.

Literature has shown that countries' representations in the ICC are mostly determining factors of the relations in a given region. Benyera (2018: 4) states that in terms of state parties to the Rome Statute, "Africa is seconded by Latin America and Caribbean states with 27 representatives as at March 2017".

The Organisation of American States (OAS) enjoys good relations with the ICC. The OAS has succeeded in promoting international humanitarian law. Delagrange (2009) and Benyera (2018) opine that a number of states in the region approve of the ICC's complementarity scheme as a way to ensure progress and support existing norms of the Inter-American legal system and in the process realign themselves with the international community.

Lack of consistency between the Rome Statute and states' domestic jurisdictions has in most instances been identified by scholars as the cause of friction between parties to the ICC (Delagrange, 2009). Some of the key problems in Latin America and the Caribbean that prevent the complete compliance with the Rome Statute include whether the possibility of life in prison provided for in the Statute poses a constitutional conflict because the constitutions of many countries prohibit life sentences (Delagrange, 2009). Constitutionality problems arise when deciding whether provisions on surrender or transfer to the Court violate prohibitions to extradict nationals of a country, or whether provisions on government immunity hinder the domestic ratification of the Rome Statute. Glasius (2017) argues that despite the fact that the term 'combating impunity' was coined in Latin America, initial experiences with international criminal justice were from South-East Europe and Central Africa, where the law courts were just beginning their work. Having gone through a number of scholarly submissions on the ICC relations with Latin America and the Caribbean states, the next section focuses on Africa-ICC debate.

2.3 The ICC and Africa: A Literature Review

The support that ICC gets within a given region has shown to be vital to its acceptance and success. African states generally supported the ICC at its formation, with many states seeing the Court as a potential useful legal regime and instrument that could solve many of the continent's endless conflicts. The ICC's activities has however raised considerable concern over Africa's association with the ICC (Nsereko, 2010). The competing debate by scholars centre on the arguments as to whether or not the ICC is targeting Africa. Suffice it to say, it is incumbent upon the ICC to prove that it was not setup to solely prosecute Africans. The reluctance by the African Union (AU) to cooperate with the Court in relation to the arrest of the former Sudanese President

Omar Al Bashir, it can be argued, has shown that Africa stands united. The Kenyan cases are relevant in this discussion in that they provide an account of the ICC's prosecutor using its powers to initiate an investigation (Hansen, 2012).

There are a number of continuing questions and assumptions about the position and effect of the ICC on Africa. Member states' pledge to remain loyal to the ICC has been seen to be a determining factor on the success of the Court in various states. Noticeable developments were when the states that had threatened to part ways with the ICC reversed their notifications of withdrawal. The withdrawal notification initiated by the former President of Gambia, Yahya Jammeh, was reversed by his successor Adama Barrow, committing the country to remain in the ICC. Barrow defeated Jammeh in the 2016 presidential elections setting a new dawn in the country and cordial relations with the ICC. South Africa also removed its withdrawal notice from the ICC against legal problems of its judiciary although its future membership in the Court remains uncertain. At the time of writing this research essay in 2020 Burundi remained the only African state to have withdrawn unilaterally from the ICC, a decision that came into force in October 2017. The debate revolving around perceptions and misperceptions of the role of the ICC particularly with respect to the operationalisation and application of its manadate remain contentious in Africa (Kersten, 2018).

According to Kuwali (2017), evaluations of the ties between the ICC and Africa have often lost detail, which have in effect hindered more accurate reflection on the work of the Court throughout the continent. The relationship remains rigid and simplistic, usually with Africa, primarily marked by leaders seeking immunity, resisting a compassionate ICC working for all the victims. This is no way to advance international criminal justice or to further understand the relationship between the Court and the continent. Kuwali (2017) explains that more than two

thirds of AU members are signatories to the Treaty forming the ICC. The Assembly of the AU has however over the years adopted numerous resolutions critical of the ICC and its practice[2]. The ICC has had a strained relationship with certain African countries and the AU.

2.3.1 Engagement with the ICC Advocates: A Literature Review

Scholars differ on the position Africa should take regarding its membership to the ICC. According to Arieff, AnnBrowne, Margesson and Weed (2010), some analysts commended the ICC's African investigation as an important phase in the fight against continental impunity. The Court's supporters condemn all criticism and hope that ICC investigations will gradually build accountability for the world's serious atrocities and lead to the long-term peace and stability of Africa. Citing Kenya as an example on ending impunity, Sriram and Brown (2012) and Hansen (2012; 2011a; 2011b) are of the view that even though the ICC has limited reach it remains the only institution that can be accountable for immense human rights violations in Kenya. It may not completely satisfy most Kenyans' high expectations, in preventing future organized political violence, but can be able to reduce the country's record of complete impunity for top ranking officials (Hansen, 2012). In this respect, Sriram and Brown (2012) and Hansen (2012) opine that it will not only be a great achievement but also reinforces symbolic normative and legal values. Magliveras (2019) also as in the case of Sriram and Brown (2012) and Hansen (2012) state that the ICC remains the only international criminal justice regime from which justice and restoration of justice can be achieved hence withdrawal from the Rome Statute would leave the African people with little protection and by implication reinforce the prevailing impunity common in a number of countries on the continent, Kenya being one of them.

Brendon et al. (2016) echo the same sentiments arguing that the African people will be the most affected by the withdrawal from the ICC than the ICC. Africa needs the ICC due to its highest

incidence of systemic and human rights violations, more than any other continent (Hansen, 2011a; 2011b). Africa showed its loyal support for the ICC from its inception by being the largest bloc to ratify the ICC Rome Statute. The ICC can assist in preventing political forces from continuing terrible crimes. Many Africans are adamant that they want an end to genocide, war crimes and crimes against humanity.

2.3.2 Disengagement with the ICC Advocates: A Literature Review

The role of the ICC in Africa has given rise to concerns on the possible effect of the Court, its perceived bias toward Africa over other regions, its choice of cases and its influence on peace processes through international prosecutions. More and more critics have accused the ICC of potentially placing the resolution of protracted civil wars at risk in search of sometimes abstract justice (Arieff, AnnBrowne, Margesson & Weed, 2010:27). The Kenyan case will help us establish whether the ICC intervention brought any solution to the impunity that existed in the country. Specifically, the debate revolves around the view that the ICC functions are undermining state sovereignty and by extention immunity of sovereign heads of state (Mamdani, 2018; Ainley, 2015; Kersten, 2016; Jalloh & Bantekas, 2017).

The ongoing cases being investigated and prosecuted by the ICC relate to crimes purportedly committed in African countries. Countries from the global south frequently complain about the UN Security Council (UNSC) skewed power relations. The disparity has impacted on the ICC because the Security Council has the right to refer cases to the Court under the ICC Statute (Kuwali, 2017). In relation to Africa, the UNSC is promoting global legal regime influenced by the powerful states in which their impunities as well as those of their allies are not subject to legal jurisdiction (Mamdani, 2018).

The Security Council has responded to some situations, such as Libya and the Sudanese region of Darfur, but not others, such as Israel and Syria (Jalloh, 2017). The fact that the UNSC's two cases are from Africa confirms the possibility of a prejudice against Africa. There are legitimate reasons to continue with certain cases under review or indictment before the ICC. For one thing, Africa has witnessed a large number of atrocities and, statistically speaking, the rate of atrocities committed on the continent should make it a natural target for the ICC. The victims of such crimes seek justice (Kuwali, 2017). According to Kuwali (2017), people who complain about the discrimination tend to be African political leaders, not the victims, who seem almost completely convinced that everyone else is paying attention to their plight somewhere. Intervention by the ICC in post conflict situations, the disengagement advocates argue, undermine reconcilition (Ainley, 2015).

However, there is a real problem that has to do with perception and the need to see the ICC execute its fiduciary duties fairly in order to maintain its authority. The universal expectations of international criminal law are incompatible with a concentration limited to African states, in a world in which many other especially powerful states behave with impunity. The refusal by Archbishop Desmond Tutu of South Africa to be on stage with former British Prime Minister Tony Blair in Johannesburg in 2012, based on the latter's conduct over the Iraq war, drew attention to this strong legal inconsistency with respect to the operation of the ICC. The moral authority of Tutu has helped to show that this problem of perception is quite real. Failure to take this issue seriously gave some African politicians and officials some leverage to argue that the ICC is selectively biased towards Africa. This divert focus from the real difficulty of victims of war crimes and human rights abuses on the continent (Kuwali, 2017).

Kuwali (2017) argues that it is important to remember that because of the *proprio motu* powers of the prosecutor[3], two circumstances have been captured by the ICC: those concerning Côte d'Ivoire and Kenya. After the Kenyan government failed to investigate the situation that prevailed at the time, the prosecutor was authorised by the Pre-trial Chamber to launch an investigation into the Kenyan situation (Hansen, 2012). In Côte d'Ivoire, before becoming a state party, the government willingly accepted the Court's jurisdiction to allow the prosecutor to commence a case there. In four circumstances the states themselves referred the cases before the Court, including Uganda (2003), the Democratic Republic of Congo (DRC-2004), the Central African Republic (2004), Cote d'Ivoire (2010 and 2011), and Mali (2012). The other two cases the Security Council referred to were Libya and Darfur. Kersten (2018) supports the submission by stating that when one looks at perceptions of the effect of the ICC on Africa, they must take into cognisance how African cases were brought before the ICC. Literature has shown that, of the eleven cases before the ICC, five were self-reported; two were the result of a United Nations Security Council (UNSC) referral; and four were *proprio motu*[4] (Jallow, 2011). This indicates the willingness of Africa to cooperate with the ICC. The fundamental problem, however, is that the ICC's investigation do go beyond Africa, prompting the need for disengagement (Ainley, 2015). The consequence is that the Court and its proceedings are Africa-centred and in situations where the UNSC participate in referrals directed at the continent yet some members are not even state parties to the ICC. [5]Some of the explanations for the misunderstandings are in line with popular perceptions, anticipations based on past experiences and often seen in post-colonial lens (Mamdami, 2018). Such ideas legitimize the view that the ICC targeted Africa laying the foundation for the disengagement debate. In the interpretation of the ICC as targeting African countries, the legitimate concerns about the Court often play a key part (Kersten, 2018).

Kuwali (2017) continues to reason that, in view of the fact that the states and the Security Council have referred a number of cases before the Court, the most relevant question, with regard to the prosecutor's perceived bias, may be the inability to examine situations and cases from other parts of the world rather than the investigation of African cases and situations. At the same time, state recommendations should not be seen as broad-based advocacy of international criminal justice. In some situations, African governments forwarded cases for their own political ends to exploit the international criminal justice system. Giving an example, Kuwali (2017) explains that, Uganda's President Yoweri Museveni initiated the involvement of the Court in the Lord's Resistance Army (LRA) cases but is taking a leading role in the AU's campaign against the ICC. He was even more vocal about his disapproval to the ICC than the then Chairman of the AU, Ethiopian Prime Minister Hailemariam Desalegn Boshe, who declared that the organization had opposed the indictment of President Uhuru Kenyatta of Kenya for crimes against humanity and vowed to discuss the matter with the United Nations (Kuwali, 2017). The following section looked at the theoretical framework adopted for the study. Realism theory has been identified to be relevant to the study as it talks about what motivates states to act under given situations.

2.4 Theoretical Framework

Burchill et al. (2001) explain that realism is a term used in many fields in a number of ways. Realism is an approach to international relations, which slowly arises from the work of a variety of scholars who have placed themselves in a distinctive but still diverse style or tradition of analysis and thus have established themselves (Donnelly, 2000). According to Donnelly (2000), realism illustrates the limitations on politics that have been imposed by the human nature and the absence of international government. The realists believe that collectivity is the essential part of

social life and that the only really essential collective player in international relations is the state and does not realise any authority over it (Donnelly, 2000).

Political realism is a tradition of study in international relations that stresses the challenge that states face in pursuing power politics of the national interest. Political realism or *Realpolitik*, 'power politics', is international relations' most widely recognized theory. This is the only practical meaning of realism that we will focus on in this study, it should be recalled that not only did Carr (1946) and Morgenthau's (1954)' interest focused on explaining the world out there, but also argued strongly on what states might realistically expect to achieve in the dynamic international political environment (Burchill et al., 2001). Realists stress the political constraints imposed by human selfishness ("egotism") and the absence of international government ("anarchy"), which warrant the primacy of power and security in all political life (Burchill et al., 2001). Rationality and state-centrism are known as core realist principles. The mixture of anarchy and egotism and the imperatives of power politics that result provide the centre or realism (Burchill et al., 2001)

It became clear from the definition of realism that states are motivated to act by the basic instinct of survival and the protection of their sovereignty, but not by other principles to be pursued in good faith. Global politics is motivated by selfish self-interest and assumes war is the solution. It is a fact that the ICC relies on cooperation of states in order to fulfil its mandate. This therefore took us to the question of whether the ICC can deliver justice with its current relationship with the relevant state parties and in this case, Kenya. Clark (2011) argues that the main obstacles to the effectiveness of the ICC will always be international politics and states' interests, hence confirming the appropriateness of using realist theory in the Kenyan scenario.

The theory of realism explains that states and other international actors are motivated to act by the basic instinct of survival and the protection of their sovereignty, but not by other principles to be pursued in good faith. The above statement is supported by Smith (2004) explaining that structural realists argue that powerful actors force less powerful players to follow human rights standards. The powerful players are also the originators of norms and consequent bodies. Global politics is motivated by selfish self-interest and assumes war is the solution. Smith (2004) further argues that realist theory implies that strong states are influencing weaker states' policies. Under the current international framework, from a military perspective only two powers, the USA and Russia, seem to be capable of such coercion. From economic point of view only the US and China have leverage over the other states. The U.S. conveniently objected to the International Criminal Court's authority, although almost every European Union member has embraced the Court's jurisdiction. If realist assertions are correct, both powers will establish spheres of control and impose policies on weaker states in accordance with their own.

Maina (2014) states that the United States has done everything possible to safeguard its interests by ensuring that none of its citizens is put on trial by ICC. By entering in bilateral agreements with many states, the US also preserves its interests because of its membership in the Security Council. For states that have not ratified the Rome Statute, the only way the ICC could have jurisdiction over them is only if it is a referral by the Security Council, again dominated by the permanent members. The permanent members' decision not to ratify the Rome Statute was for purposes of preserving their self-interests. The civil wars which have devastated and continue to plague the African continent are funded by the world powers (Maina, 2014). Nearly all weapons used in Africa are not manufactured in Africa but are supplied by the world powers who benefit from such internal civil wars and by implication support the status quo. Attempts to interfere

with these historical *déjà vu* are considered by them to be against the prevailing *realpolitik* rules of behaviour which, under certain circumstances, can lead the UNSC right to invoke its referral mandate bringing the ICC's independence into the question (Maina, 2014).

Under the realist assumptions, international relations is centred on the struggle for power, with nation states as the key actors with inherent rights to pursue their interests in the anarchic international system (Morgentahu, 1985). It is also argued in this school of thought that international organizations and international law are important only if they serve the interests of sovereign states. In other words, international law cannot override municipal law. Specifically, the ethical and moral requirements of a state are fundamental and more inportant than the ethical and moral requirements of the international system (Claude, 1962; Kissinger, 1994).

Maina (2014) argues that since most states are dualists, most African countries have ensured that they do not have domestic legislations in place so that they do not prosecute the perpetrators of crimes as inscribed in the Rome Statute. On the other hand, those with domestic legislations such as Kenya, it would still be impossible to prosecute the perpetrators as they are the ones in power controlling the political system. The African states ' refusal to cooperate with the ICC can be understood in the perspective of *realpolitik.* Moreover, the call by the AU for the deferment of President Uhuru Kenyatta's and President Al Bashir's cases and the amendment of the rules of procedure to their advantage clearly show that the continent is driven by realist conceptions of interests, that is, protection the sovereignty of African states and immunity of the leaders. The role of the ICC therefore, becomes relevant only if it does not contravene the underlying national interests (Maina, 2014).

2.4.1 State Sovereignty vs Rome Statute - ICC

Sovereign states consist of individual human beings and existance of the Court brings relief on to who is obligated under international law norms. This helped us understand the standpoint of Kenya with the ICC as a sovereign state because as per the definition of state sovereignty Kenya should be seen not to depend on any other state but its own constitutional mandate and obligations. The creation of the Court represents an important shift to state sovereignty in the sense that all the states who have ratified the Rome Statute are expected to abide by it. The Rome Statute creates an international judicial authority with enforceable responsibilities. According to Melandri (2009), the principle of complimentarity to national jurisdictions is one of the Court's most distinctive attributes. The Statute does not describe complementarity, but can generally be interpreted as a collection of rules regulating the relationship of the Court with the national jurisdictions. This means that primacy over prosecution is granted to the national courts, and only under instances where the domestic authorities fail to do so can the Court act (Melandri, 2009).

Reasons advanced to explain why it was decided that the Court should have a complementary approach to national courts is multifaceted. It was initially to recognise that national authorities are better placed to collect the required evidence and to arrest suspects. It was deemed inappropriate for the Court to be swamped with cases from around the world, with its limited financial resources and infrastructures. Above all, the concept of complementarity was intended to encourage states to exercise their jurisdiction over international crimes. Last, the principle was considered, mainly, to find a compromise between respect for state sovereignty and the needs of international accountability (Melandri, 2009).

Mills and Bloomfield (2018) state by customary international law, sovereign immunity existed in the UN Charter. This describes that a state cannot be subject to the jurisdiction of foreign courts, and it has two other closely linked immunities within it: diplomatic immunity and immunity of heads of states. Both are based on practical criteria, the requirement for members of a state to travel freely to conduct diplomacy, whereas head of state immunity is often guided by larger conceptual issues such as 'respect for' the constitutional freedom of a state. These two principles are fundamental to the rule of sovereign immunity, which in effect derives directly from sovereignty itself.

Melandri (2009) argues that the formation of the ICC through the multilateral treaty, namely the Rome Statute, to which states have voluntarily become parties, is crucial to remember. Through creation of the Court, states have acknowledged that the ICC may exercise some of their sovereign powers such as the right to exercise jurisdiction on their behalf. The concept of complementarity is a fundamental protection for national authorities to preserve primacy by leaving the ICC with minimal capacity to intervene only in the event of states' refusal to prosecute their own citizens (Melandri, 2009).

2.4.2 State Sovereignty vs Individual Sovereignty-ICC

According to Worth (2004), the new ideology of state sovereignty was seen as empowering and humbling. The historical formation of state sovereignty at the international level represents an effort to mediate the modest and authoritative dimensions of sovereignty in a way that strengthens institutional legitimacy. It was motivating in the sense that through the establishment of social contract, sovereignty was transferred from the king to the state. The international community has recognized sovereignty time after time as a most precious and essential right a nation can hold (Worth, 2004). The concept individual sovereignty will be assessed in the

Kenyan case study to see how far the state went in protecting individual sovereignty of the alleged wrongdoers.

Rosenfeld (2003) explains that the fundamental concept of complementarity contained in the Rome Statute is that the ICC jurisdiction is to be subordinated to national courts and international treaties. When national structures of law are not in existence or not capable of prosecuting wrong doers, the ICC shall exercise its jurisdiction. The right to prosecute crime within its jurisdiction without external intervention is safeguarded in complementarity, while retaining a safety net through the ICC where there are no appropriate outlets for prosecution (Rosenfeld, 2003).

2.4.3 Individual Sovereignty vs Rome Statute-ICC

According to Wilson (2008), the main judicial organ of the United Nations, the International Court of Justice (ICJ), was formed to deal with disputes between states. It has no powers in matters relating to individual criminal liability This operates on the premise that only sanctions can be levied which were defined for the crime at the time it was committed. This finds expression in Article 34(1) of the Charter of the United Nations which states that 'Only States may be parties in cases before the Court,' and Article 22(1) of the ICC Statute which states that 'A person shall not be criminally responsible under this Statute; except where the conduct in question constitutes an offense within the jurisdiction of the Court at the time it takes place" (Rome Statute, 1998). The discussion on Kenyan case will shed light on whether crimes that were committed were or were not within the Court's jurisdiction.

2.4.4 National Interests vs Rome Statute-ICC

National interests should be seen to take protection of human rights into consideration. The Kenyan case is to assess whether or not at the time of the ICC intervention, were the interests of the nation pursued over protection of human rights. There are two distinct purposes to enforce the Rome Statute in domestic law. First, as already stated, the ICC must rely on cooperation of states, particularly its states parties, for it has no own police force capable of enforcing its orders, gathering evidence or arresting suspects (Goldmann, 2005). The Rome Statute therefore, sets out a series of procedures to comply with the ICC by states parties. Article 86 of the Rome Statute stipulates these duties, particularly those concerning the arrest, surrenders and transfer of suspected persons.

Goldmann (2005) argues that consequently, legislation that requires states to quickly enforce the ICC requests is essential. Of course, such obligations do not extend to non-party states, however the ICC may pursue mutual cooperation. This poses the question of the applicability of legal procedures. The key literature gap to be addressed in the study is to assess the impact of the ICC's investigation on Kenya's national security. In other words, what impact did the ICC's investigation have on Kenya's national security? Past studies carried out on the ICC involvement in Kenya have not specifically addressed the issue of national security as it relates to the country.

2.5 Conclusion

The chapter explored the literature related to the study by looking at scholars, practitioners who advocate for the AU and the African state parties to continue with recognition of the role of the ICC and also look at scholars who advocate for the AU's exit from the ICC in order to locate knowledge gaps. The theoretical framework was also presented as the tool of analysis. The next chapter presented the methodology employed in undertaking the study.

CHAPTER 3

RESEARCH METHODOLOGY

3.0 Introduction

The preceding chapter explored the literature related to the study by looking at scholars, practitioners who advocate for the AU and the African state parties to continue with recognition of the role of the ICC and also looked at scholars who advocate for the AU's exitl from the ICC in order to locate knowledge gaps. The theoretical framework was also presented as the tool of analysis. This chapter focuses on the research methodology employed in this study. According to Isaak (1969) as quoted by Obasi (1999: 48) "methodology is the basic principles and assumptions of inquiry". On the other hand, methodology gives a description and analyis of methods by explaination of its limitations and resources. Methods comprise bolts and nuts or data collection mechanisms and technique types, which informs the research process (Obasi, 1999). Remenyi et al. (1998) as cited in Mohajan (2018: 26) also states that "Research methodology indicates the logic of the process used to generate theory that is procedural framework within which the research is conducted". Steps followed and the instruments used to gather data to allow future replication of the study are as outlined in this chapter.

3.1 Research Design

It is imperative for any research essay to have a basis upon which procedures to be followed throughout the research are outlined in order to solve the research problem. Scholars have provided a number of definitions to the meaning of research design, some stating that it is the researcher's overall design for answering the research question or testing the research

hypothesis. According to Broadhurst, Holt, and Doherty, (2012), a research design is a work plan that flows from a research project. The function of a research design is to make sure that we can answer the initial question as unambiguously as possible with the evidence gathered. Obasi (1999: 54) defines research design as a "plan that specifies how data should be collected and analysed".

A research design guides the reseacher in studying research problems, helps the reseacher directs energies in the right direction, assist the reseacher to be on the look out while undertaking the study and guides overall allocation of resources to the study. The use of qualitative method in this study cannot be overstressed as the approach maximises a wide range of specific information that can be obtained by intentionally selecting locations and sources that differ from one to the other. Qualitative study is distinguished by its aims and methods of understanding certain aspects of social life. The intention is to compare and analyse available literature on the subject.

Qualitative method relies on understanding with emphasis on meaning. According to Maxwell (2013), each component of the design may be reconsidered or changed in qualitative analysis during the study as a result of new technologies or changes in some other components. The concept of qualitative analysis is a positive do-it-yourself perspective rather than a ready-made off-the-shelf solution in contrast to quantitative research (Maxwell, 2013).

According to Choy (2014), qualitative approach allows researchers to discover differing perspectives from the views of similar as well as diverse groups of people within a community. The key strength of the qualitative approach to cultural evaluation on the other hand is the ability to investigate fundamental values, beliefs and assumptions. Baxter and Jack (2008) also opine that qualitative studies enable researchers to analyse or explain a phenomenon with a variety of

data sources. This helps the researchers, through dynamic approaches, relationships, cultures or systems, to investigate individuals or organisations, to promote deconstruction and eventual reconstruction of different phenomena. Kabir (2016) and Baxter and Jack (2008) argue that qualitative methodology is used to capture feelings, emotions or particular views and opinions of something and tend to use unstructured methods of data collection to fully explore the topic in order to better understand the given topic or situation.

In order to gain an accurate understanding of how the ICC prosecutes crimes as outlined in the Rome Statute, the researcher appraised himself with the available literature. For instance, Denzin and Lincoln (2002) explained that qualitative research is an interdisciplinary area that involves a wider range of epistemological perspectives, research methods and analysis of human experiences. The qualitative approach generally applies to explorations, to understanding at a more distinct and comprehensive level, to considering the context, to describing the processes or the linkages, or to developing theories.

3.2 Desktop Research

The data was collected by conducting a desktop research to explore secondary data on the topic. This study used documentary sources to provide the relevant study background or context. Documents are considered as tangible material for investigation because of their important role as a source of data and as alternative to questionnaires, interviews or observations. Desktop research is an acceptable literature review method. Zhou and Nunes (2016) explain that this research promotes exploration of long-term socio-economic trends; sampling frame design; identifying the initial, regional and target populations; assessment of sampling methodology; risk analysis of various hazards; and information on possible intervention recommendations. Desktop

research relies on published or pre-existing secondary data for a different purpose to the one they were originally intended for.

Secondary research approaches can be categorised as content analysis, secondary analysis and systematic review. Content analysis focuses mainly on the content of several forms of human communication. Commonly used sources include, for example, government of public documents, scholarly journals, newspapers, books, TV images, websites and paintings (Unachukwu, Kalu, & Ibiam, 2018). This study employed qualitative data analysis method to analyse secondary data.

3.3 Data Collection

Data collection is an important part of a research which is critical in completion of the research. To achieve success in performing the task at hand, data collection is a challenging job that requires dedication and hardwork. Data collection is the process of collecting and evaluating information on variables in a defined systematic manner that allows one to answer specified research questions, test hypotheses, and analyze results (Kabir, 2016). Secondary data is qualitative or quantitative data collected for a reason different from that intended to be used by someone other than the researcher. Johnston (2014) states that secondary data collection is an analysis of data obtained for another key reason by someone else. Coltart, Henwood and Shirani (2013: 274) further explain that "a principle of qualitative secondary analysis on the other hand, is the use of data derived from previous qualitative studies; data originally collected and analysed for other purposes". Using secondary data gave researchers limited time and resources a workable choice. Secondary analysis is a realistic exercise that uses the same fundamental principles of research as primary data studies and has steps that must be taken as any method of research.

Secondary data can be less accurate but remains very important where primary data is inaccessible, it is the easier and less costly way to gather data. A number of secondary data types are available and the most widely used are; literature, census results, government statistics, financial information, organisation's reports and documents (Ellram & Tate, 2016). The sources can be found in the journals, letters and unpublished biographies as well as in autobiographies. Bornat and Winterton (2014: 353) argue that "researchers turn to archived data for diverse reasons".

In this study, secondary data was drawn from, among other soures, books; journals; unpublished works; articles; reports from the UN; intergovernmental and non-governmental organizations; statements from ICC reports; and journal articles on the relationship between ICC and Kenya. The data used in this study provided useful explainatory values needed for addressing the objectives and the research questions, as well as competing epistemological debates on the issue areas.

3.4 Document Analysis

Document analysis is a methodology used to review or evaluate printed and electronic materials (electronic and computer-oriented) and other related documents. Document analysis is commonly used along with other qualitative research methods to support and verify the data (Bowen, 2009). Document analysis provides researchers with efficient ways to weed out unwanted materials available in the internet and other public domains. Document analysis is less costly and helps with accurate inclusion of the exact details drawn from the sources. A thorough search, selection and evaluation of data contained in the gathered materials was undertaken by the researcher in line with the objectives and the research questions. Document analysis helped

in achieving fairness in representation of all the materials gathered in line with the objectives and the research questions.

3.5 Data Analysis

Data analysis entails arranging, structuring and producing meaning. Qualitative data analysis is an interactive and collaborative method. The data were analysed using content analysis. According to Krippendorff and Bock (2008), content analysis is a technique for making inferences by objectively and systematically identifying unique response features and objective identification and use of the same approach to relate trends. Krippendorff and Bock (2008) also argue that content analysis helps reduce and simplify the collected data and in the process allows accurate measuring of results. Above all, this type of analysis allows the researcher to sequence the qualitative data collected in a satisfactory way resulting in the achievement of research objectives and the research questions. There is a strong potential for human error in content analysis, as researchers risk misinterpretation of the data obtained, ultimately giving inaccurate and inconsistent conclusions (Krippendorff & Bock, 2008). Similarly in undertaking this research, data was grouped for ease of analysis and avoidance of human error.

3.5.1 Ethical and Legal Considerations

In particular when facing the dilemmas and conflicts which emerge from the analysis, proper research involves ethics. Ethics form what is a valid and moral research method. This concerns moral principles that should be taken into account by the researchers throughout the study. According to Woolham (2011), most professional associations have established guidelines, practice codes, principles or statements that guide their daily activities. Scientific fraud or plagiarism means the evidence or data collection processes are falsified. Ethical concerns are important, not only in basic research, but in the use of secondary data sets, since the collection of

sources and the analysis should be fair and free from biaseness. Maxwell (2013) argues that ethical concerns are increasingly recognized as important in qualitative study, as well as for ethical purposes, as fundamental to the study. Kabir (2016) opines that it is essential to obey the ethical norms in research which prohibits the researcher against fabricating, falsifying, or misrepresenting research data but which promotes the truth and avoid error. Moreover, according to Kabir (2016), ethical standards support the ethics that are important in collaborative work such as trust, accountability, mutual respect, and fairness. Ethics are considered to protect intellectual property interests while encouraging collaboration. On the other hand, Cannie (1998) argues that research ethics can no longer be conceived as a set of rules, but rather as a way to explain how to conduct the whole research. In fact, ethical behaviour in the context of research involves relations beyond those with whom we engage (Cannie, 1998). The researcher carried out the research with integrity and did not at any point misinterpret or manipulate the existing secondary data on the topic to ensure conformity to research ethics. The publication of the findings will not end the responsibility for ethical relations in research and can also be shown to extend one's obligation beyond the borders of the university. Researchers enter into a social contract with society and society can reasonably expect benefits in exchange for our research support.

3.6 Conclusion

This chapter outlined the methodology used to investigate the ICC relations with the global, regional, and country levels, with Kenya as the focal case study. The methodology applied in this research essay centres on desktop research and to this end detailed perusal, verification and interpretation of the data are paramount taking cognizance of the objectives and the research questions of the study. Reliance on desktop research does not in any way minimize the

importance attached to the study but like in any other research of this magnitide, lay the groundwork for further debate on the subject.

CHAPTER 4

DATA ANALYSIS AND RESEACH FINDINGS

4.0 Introduction

This chapter presented the results and research findings in line with the set out objectives and the research questions. Specifically, the operational research questions to be analyzed were underpinned as follows: a) How effective is the ICC's role as a global arbitrator? b) What is the relationship between the ICC and Africa on the question of impunity? and c) What implication does the ICC's statutory role have on Africa's security particularly on the Kenya's case, 2002-2013? To achieve this, the chapter looked at the political dynamics in Kenya where ethnicity constitutes a key influential factor of violence (Lynch, 2011; Becher, 2016). The chapter further examined, *inter alia*, the involvement of the ICC in Africa, with particular reference to Kenya, 2002-2013; the role of civil society organizations (CSOs) and non-governmental organizations (NGOs).

4.1 Ethnic Centred Politics and Electoral Process in Kenya, 2002-2013

Ethnic identity has been central in political mobilisation over the years in Kenya's post-independence history. Its development has evolved with time and the context in which it has been applied. It is noted that despite the advancement achieved through democracy in Kenya, particularly during the multiparty democratic dispensation of the 1990s and the 2010 new constitutional promulgation, violence and ethnic-driven electoral process remain obstacles to peace, stability and national security. Specifically, political parties are influenced by and shaped along ethnic lines, which by implication defines how politicians succeed and retain power (Lynch, 2011). Since gaining independence, sovereignty and international legal personality in

1963, Kenya has attempted to institute good governance in order to promote peace and unity among its citizens. However, the practice has been that those who assume political power, have by and large, continued with the practice of channeling resources towards their own communities (Becher, 2016). Acording to Osamba (2001:39), "the entire social formation in Kenya is characterised by a violent struggle, which is increasingly assuming explosive ethno-centric dimensions. The result has been extensive economic destruction and antagonistic inter-ethnic relations".

The events leading to the 2007 elections witnessed stiff competition between two former political allies Raila Odinga and Mwai Kibaki. According to Muthoni (2012), Raila Odinga formed the Orange Democratic Movement (ODM) in 2007 to contest for the presidency in that year's general elections. His National Rainbow Coalition (NARC) former political counterpart, Mwai Kibaki also established Party of National Unity (PNU) and both parties promoted their manifestos as political parties and campaigned for national support. The PNU stood for economic and political aspirations of the Kikuyu, an ethnic group in Central Kenya. Okowa (2015) states that for years in Kenya, certain positions were attained through one's ethnic identity. "For example, for ten years under former President Mwai Kibaki's regime, the Ministry of Finance was always headed by a member of his ethnic group, Kikuyu, and by extension, more than 50% of the employees in the ministry were Kikuyus sending messages of cronyism and favouritism within the state Treasury"(Okowa, 2015:87). The ethnicity card was seen to be prevalent during the announcement of the election results where Mwai Kibaki was announced the winner of a contested presidential election. Hohn (2014:567) explains that "supporters of Raila Odinga, who were predominantly Luo, targeted Kibaki's Kikuyu followers, driving them from their land and their homes and shops."

Kikuyu youth gangs retaliated, with the help of the outlawed Mungiki sect, and attacked Luo and Kalenjin settlements and houses. The violence resulted in over one thousand deaths and more than three hundred thousand displaced persons (Hohn, 2014). According to Murunga and Nasang'o (2007:68), "Mungiki is a Kikuyu word that has its etymological root in the word Muingi, meaning masses of people." Mungiki denotes a mass movement. The Immigration and Refugee Board of Canada (2007) describes the Mungiki as a sect that was formed in the 1980s comprising Kenya's dominent ethnic group, the Kikuyu, intended for self defence purposes. During the period and beyond, a number of organised criminal gangs were identified to be operating in Kenya with some of them utilized by politicians against their political rivals. Table 4.0 provides information on criminal groups that were identified to be in existence, principal area of operation and the main type of criminal activities.

Table 4.0: Organised Criminal Gangs and Criminal Activities[x]

Ser	Name of Criminal Gang	Principal Area of Operation	Main type of Criminal activities
1	Mungiki	Central Province, Nairobi	Extortion, illegal levies, violence, hire for revenge, executions
2	Sungu Sungu	Kisii, Nyamira	Expulsion of offenders, hire for revenge, body guards, security, settlement of disputes, executions, illegal detention.
3	Mombasa Republican Council	Kwale, Ukunda, Mombasa, Kilifi	Illegal oathing, violence, promoting hatred, extortion, threats of eviction, secession
4	Jeshi La Embakasi	Embakasi Constituency	Hire by politicians for illegal activities
5	42 Brothers	Emuhaya, Ebukasami, Luanda Maseno	Burglary, drugs, theft, violence, murder, hire as body guards, extortion
6	Al Shabaab	Eastleigh, North Eastern	Human trafficking, trafficking of weapons, terrorist activities
7	Kamjeshi	Nairobi Eastlands (Nairobi)	Extortion, public service transport
8	Jeshi La Mzee	Kangemi (Nairobi)	Hire for politicians as body guards, campaigners
9	Baghdad Boys	Kisumu	Extortion, hire by politicians, body guards campaigners
10	Angola Msumbiji	Butere, Khwisero	Cattle rustling, burglary, murder, hire by business politicians for protection or intimidate opponents
11	Taliban	Central, Kayole, Dandora	Extortion, illegal levies, murder, hire by

		(Nairobi)	politicians
12	Kenya Youth Alliance	Nairobi	Burglary, extortion
13	Shigololi	Emuhaya	Robbery, burglary
14	Sabaot Land Defence Force	Mt. Elgon	Murder, extortions, evictions
15	Kamkunji Boys	Kamkunji area (Nairobi)	Hire by politicians for campaign and body guards
16	Munyipi	Mathare	Extortion
17	Damy	Dalas (Mombasa)	Burglary, robbery
18	Funga File	Mombasa	Burglary, theft
19	40 Brothers	Emuhaya, Lwanda	Burglary, theft, drugs
20	Congo By Force	Kisauni	Burglary, pick pocketing
21	Kaya Bombo	Kwale, Kilifi	Eviction, extortion
22	Tia Nazi	Kilifi	Burglery, extortion
23	Sri Lanka	Kisii, Kisumu	Robbery ,Burglary
24	Nuyuki	Mombasa	Burglary
25	Charo Shutu	Malindi	Robbery ,Burglary
26	Kimya	Mombasa	Burglery, extortion
27	Bad Squad	Kisii, Mombasa, Kisauni	Burglery, extortion
28	Super Power	Eastleigh (Nairobi)	Theft, burglery
29	Chinkororo	Kisii, Nyamira	Murder, defence
30	Amachuma	Kisii, Nyamira	Murder, defence
31	Nubians	Kibera (Nairobi)	Protection of Nubian community
32	Kalenjin Warriors of 1992	Molo	Eviction, murder, livestock rustling
33	Kibera Battalion	Kibera (Nairobi)	Extortion, hire by politicians, violence
34	Kumi Kumi	Kisii	Extortion
35	Bamba 40	Kisii	Robbery ,Burglary
36	Loma oyan	Garissa Town	Pick pocketing, robbery on the streets and dark alleys
37	Haki L Kuishi	Khwisero	Burglary, theft
38	Land Lord	Khwisero	Burglary, theft
39	Mafia	Luanda, Emuhaya	Drug trafficking, theft
40	Down Town	Luanda, Emusire, Kombewa	Stealing motorcycles, power saw engines
41	Waka Waka	Maseno Hills	Drugs, pick pocketing, attacking mouners at night
42	Al Qaeda	Maseno Hills	Drug trafficking, planting of drugs
43	Siafu	Kibera (Nairobi)	Extortion, provide security mobilse people to attend political rallies, resolve inter personal disputes, provide water, electricity illegally
44	Kamukunji pressure group	Kibera (Nairobi)	Extortion, provide security mobilse people to attend political rallies, resolve disputes, provide water, electricity illegally
45	Yes we can	Kibera (Nairobi)	Extortion, provide security mobilse people to attend political rallies, resolve disputes, provide water, electricity illegally
46	J-10	Kibera (Nairobi)	Extortion, provide security mobilse

			people to attend political rallies, resolve disputes, provide water, electricity illegally

Source: www.root publications Organized-Criminal-Gangs-in-Kenya.pdf 2012. Accessed 21 July 2020

Key
It should be noted that this list is neither exhaustive nor arranged according to the importance of the groups.

As Table 4.0 indicates, most of the 46 criminal gangs operating in Kenya though some are/were region based but are largely centred in Nairobi. While some criminal gangs, for example, Kamjeshi, Kenya Youth Alliance, and 40 Brothers, Nuyuki engage in purely acts of criminality such as drugs, extortion, robbery and theft others combine criminality with violence, both ethnic and political. Criminal gangs that combine criminality with violence include, among others, Mungiki, Sungu Sungu, and Mombasa Republic Council. Arguably, it is criminal gangs in this category that continue to pose the biggest threat to peace, national unity and democracy in Kenya. It is criminal gangs in this second group that perpetrated the majority of the election violence that resulted in the killings and displacement of hundreds of thousands of people. Furthermore and particularly for this study, it is the activities of criminal gangs in the second category that also prompted the intervention of the ICC in Kenya.

The ICC's involvement in Kenya was triggered because of the underlying systemic issues in Kenya. The Commission of Inquiry into Post-Election Violence (CIPEV), dubbed Waki Commission, chaired by Judge Philip Waki of the Court of Appeal of Kenya, recommended in its 2008 report, among other things, that the Government of Kenya should establish a Special Tribunal to try the suspects. The Waki Commission also recommended that if the Kenya Government fails to establish the Special Tribunal then the report would be handed over to the

ICC for purposes of its direct involvement in the investigation of the issues pertaining to the post-election violence.The Waki Commission specified in the report that the Special Tribunal was to have both national and international characters. Specifically, the experts were to be drawn from Kenya and the international community. The next step was for Kenya's Parliament to pass a law establishing the Special Tribunal. However, Kenya Parliament failed on a number of ocassions to establish the Special Tribunal (Brown & Sriram 2012). The reluctance on the part of Kenya's parliament and the government in general influenced the ICC's intervention in Kenya invoking Article 15 of the Rome Statute. Article 15 of the Statute provides that " the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court" (UNGA, Rome Statute 1998). It should be noted that at the time when the Prosecutor initiated the investigations the Government of National Unity (GNU) had been established Mwai Kibaki as the President and Raila Odinga the Prime Minister. The key suspects invesigated and eventually indicted by the ICC Prosecutor Luis Moreno Ocampo included Uhuru Kenyatta (Deputy Prime Minister), William Ruto (Education Minister), Henry Kosgey (Industrialisation Minister), Francis Muthaura (Cabinet Secretary), Mohammed Hussein Ali (Former Police Commissioner), and Joshua Arap Sang (Radio Executive). The trials spilled over into Uhuru Kenyatta's Presidency in 2013. President Kenyatta became the first head of state to be tried by the ICC following his connection with the 2007-08 post-election ethnic violence which led to the death of 1,200 people . The direct involvement of the ICC to investigate the post-election violence and its ramifications thereof by and large touched on Kenya's sovereignty and national security, the gap which this research essay has attempted to address. Specifically, it is to assess the implication of the ICC's investigation in Kenya and its impact on the country's national security.

The cases of internally displaced persons (IDPs) covered in this research essay were victims of the 1992, 1997, 2002 and 2007 elections. Although the phenomenon has been a recurring event at every election in Kenya, the 2007 incident attracted international attention and intervention in view of the magnitude of the violence and damages reported, including loss of lives. The violence was triggered by the dispute over the results of the presidential election. Table 4.1 indicates that during the 2002-2007 elections in Kenya violence occured leading to displacement of people, with the year 2007 registering over 660,000. For the purpose of this research, the years of interest will be 2002 and 2007 as they fall within the scope of the study.

Table 4.1: Displacement Due to Political Violence

Election Year	1992	1997	2002	2007
No. of IDPs	300,000	150,000	20,000	663,921

Table 4.1 shows variations in terms of the number of IDPs in Kenya, with the victims of 2007 election violence showing the greatest number. As already mentioned, the majority of the violence were perpetrated by organised criminal gangs.

Despite the fact that displacement is a common thing in some geographic regions, the crisis that followed the 2007 disputed presidential election results was large in magnitude and scope, in that its effect spread over six provinces in the country out of the eight, affected the poor and middle-class neighbourhoods in both rural and urban areas (Kamungi, 2013). Table 4.2 presents the geographic distribution of IDPs according to provinces and the number of households and individuals affected.

Table 4.2: Geographic Distribution of IDPs Following the 2007 Post-Election Violence

Province	Households	No. of Individuals
Nyanza	24,981	118,547
Western	12,385	58,677
Rift Valley	84,947	408,631
Central	10,092	46,959
Eastern	1,438	6,769
Coast	1,241	4,774
North Eastern	26	148
Nairobi	5,349	19,416
Total	140,459	663,921

Source: https://www.brookings.edu/wp-content/uploads/2016/06/IDP-Municipal-Authorities-Kenya-May-2013-FINAL.pdf. Accessed 22 July 2020.

Table 4.2 shows that Rift Valley, the region from William Ruto and the Kalenjins are based was the worst affected province in terms of IDPs following the 2007 post-election violence in the country. Table 4.2 indicates that the Rift Valley Province, 84, 947 households and 408, 631 people were affected respectively. Besides the activities of organised criminal gangs, the Kalenjins' attack on Kikuyus and PNU supporters based in the Rift Valley region contributed to the high number of IDPs in the province (Adeagbo & Iyi, 2011). Specifically, the attacks on the Kikuyus resulted into the retaliatory measures by the Kikuyus against the Kalenjins. As Table 4.2 indicates, the second most affected province was Nyanza, where 24, 981 households and 118,547 persons were displaced. Northeastern Province was reported to be the least affected province with 26 households and 148 individuals displaced.

Although the issue of internal displacement of persons was largely attributed to election violence, other government policies such as conservation of water catchments and illegal encroachment on protected lands also led to the displacement of people. Kamungi (2013) for example, states that the government drove many people from gazetted government forests in the Rift Valley and Central provinces, which contributed to internal displacement of persons.

There are certain perceived previleges that come with political power which then become drivers for most ethnic groups in Africa including Kenya to access political power. This on its own becomes a motivator for political parties and individual ethnic groups to take control of the state if they win elections. Ethnic identities are commonly manipulated for economic and political gains mainly due to the desire to control the state and its resources. This phenomenon has been noted to be common in African politics, including Kenya. Table 4.3 illustrates the role of ethnic-driven electoral process in Kenyan politics, with particular reference to the performance of the three major presidential candidates, that is, Mwai Kibaki, Uhuru Kenyatta and Simeon Nyachae, in terms of vote won by provinces in 2002 Presidential election. Simeon Nyachae hails from Nyanza Province while both Mwai Kibaki and Uhuru Kenyatta are from the Central Province. Mwai Kibaki of National Rainbow Coalition (NARC) received overwhelming support from the opposition and won the presidential elections against President Daniel arap Moi's hand-picked Uhuru Kenyatta of Kenya African National Union (KANU). Table 4.3 indicates that Nyachae faired well in his home province, Nyanza, than the rest of the provinces.

Table 4.3: Kenya Presidential-election 2002

Regions	**Uhuru Kenyatta**	**Mwai Kibaki**	**Simeon Nyachae**
Total	30.6%	62.3%	6.5%
Central Province	27.4%	71.8%	0.4%
Coast Province	28.3%	65.9%	5.2%
Eastern Province	23.6%	75.4%	0.6%
Nairobi Province	20.7%	76.8%	2.2%
North Eastern Province	65.6%	34.0%	0.1%
Nyanza Province	6.5%	60.2%	32.1%

Rift Valley Province	53.6%	42.1%	4.0%
Western Province	19.3%	78.5%	1.4%

Source: https://www.electoralgeography.com.2002 . Accessed July 21, 2020.

Table 4.3 shows that Mwai Kibaki won 62.3% of the total vote and also won in six other provinces except the North Eastern Province and Rift Valley, where Uhuru Kenyatta, the runner up won. Uhuru Kenyatta faired well in President Moi's home base, the Rift Valley. Considering that the two major contenders, that is, Kibaki and Kenyatta, hail from the same ethnic group, Kikuyus, some observers have attributed Kibaki's victory to his party's ability to galvanize several ethnic groups under one political organisation (Karume, 2003; Kisaka & Nyadera, 2019). Kisaka and Nyadera (2019) describe NARC as a club of ethnic groups which had seen strength in their collective numbers but were not tied by a single ideology.

The role of ethnicity in Kenyan politics also manifested clearly during 2007 election as depicted in Table 4.4.

Table 4.4: Political Party Membership and Ethnic Support

Elections in Kenya 2007			
ODM (& Allies)		PNU (& Allies)	
Ethnic Group	Percentage (%)	Ethnic Group	Percentage
Luo	28	Kikuyu	41.2
Luhya	24	Embu/Meu	2.2
Kamba	7.0	Luhya	9.8
Somalia	6.8	Somali	7.2

Kalenjin	5.1	Kamba	6.7
Kisii	5.0	Kalenjin	4.6
Other ethnicities	23.7	Other Ethnicities	18.3
724 Respondents		461 Respondents	

Source: Afro Barometer (2016). Accessed 21 July 2020

Table 4.4 shows that ethnicity was and continues to be an essential determining factor for party membership in Kenya, even after the formation of two dominant political parties–ODM and PNU. For example, Table 4.4 indicates that the Kikuyu formed the bulk of PNU membership, constituting 41.2%. On the other hand, for the ODM, the Luo and Luhya, together constituted the majority of the party membership, with 28% and 24% respectively. This shows that each of the party drew significant support from the ethnic background of the party leader.

As in 2002 election, ethnic identities and considerations also played crucial roles during 2013 Presidential election between Uhuru Kenyatta and Raila Odinga as the major contenders. This is exemplified in the support for candidates as illustrated in Table 4.5.

Table 4.5: Support for Presumed Ethnic Candidate by Kenyan Province

Province (Presumed ethnic candidate)	Diaspora respondents infotrak Poll Sept 2012	In-country respondents Infotrak Poll Oct 2012
Eastern (Kalonzo Musyoka)	13%	33%
Central (Uhuru Kenyatta)	24%	66%
Rift Valley (William Ruto)	8%	29%
Nyanza (Raila Odinga)	66%	66%
Western (Musalia Mudavadi)	12%	44%

Source: https://www.cairn.info/journal-afrique-contemporaine-2015. Accessed 21 July 2020.

NOTE: The former Coast, Northeastern, and Nairobi provinces are excluded because there was no clear presumed ethnic candidate.

As shown in Table 4.5, the support for each candidate in 2013 presidential election was province based. Specifically, the support for the candidates was drawn largely from their ethnic groups in the provinces. For example, Table 4.5 indicates that 66% of Kenyans from Nyanza Province, both in the country and in the diaspora supported Raila Odinga for president. Similarly, 66% of Kenyans in the country and 24% in diaspora from the Central Province preferred Uhuru Kenyatta as the presidential candidate. The same pattern of support was also shown for Kalonzo Musyoka (Eastern Province), Willian Ruto (Rift Valley) and Musalia Mudavadi (Western Province). These results clearly depict ethnicity is a fundamental intervening variable in Kenyan politics.

Tables 4.0 - 4.5, it can be argued provide an illustration of the relationship between party affiliation, ethnicity, and voting patterns in Kenyan politics for the years under discussion, 2002-2013. Consequently, one can infer that ethnicity and its corollary ethnic violence play key roles in Kenyan politics. Kenya's political landscape therefore, provides an important perspective in which the effectiveness and statutory relevance of the ICC come into play in this study. In this case, the victims of the political violence expected social justice and closure emanating from the statutory mandate of the ICC as a Court of justice. The key for this study is the role and the ramifications thereof the ICC played in relation to Kenya's national security.

4.2 The ICC Involvement in Kenya: The Internal Actors' Perspectives

The role of civil society organizations (CSOs) and that of the international non-governmental organizations (INGOs) in African politics cannot be overemphasised as they provide platforms through which citizens can engage their governments and other state actors. Okowa (2015:87)

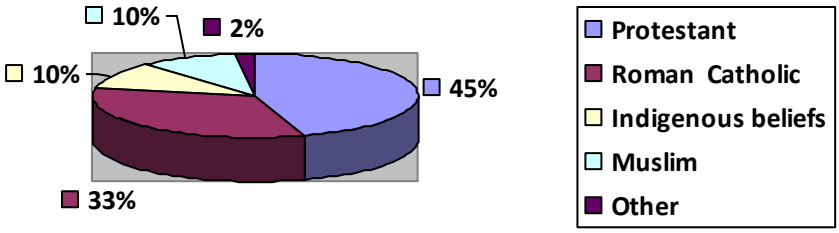
defines civil society as “an informal sphere of engagement that is real and active but unstructured by virtue of being independent from the establishments – governments and or the private sector”. Okowa (2015) further explains that Kenyan politicians took advantage of the conflicting views amongst the civil society to further spread ethnic politicization. Political ethnicity in Kenya can be linked to the rise in ethnic favouritism and marginalization within government institutional structures which results in low inter-ethnic collaboration at the local and national levels (Okowa 2015). The Kenyans for Peace and With Truth and Justice (KPTJ) provided a platform for governance and CSOs to advocate for criminal accountability for the 2007/8 post-election violence and institutional reforms (Lugano, 2017). Radley (2008) opines that the civil society has a fair share of its own challenges. Despite Kenya’s civil society being very active, the government remains the final arbiter in legislative and political decision making processes.

Churches and faith-based organisations have been the most important and influential elements of the civil society in Kenya. The dominance of churches in CSOs’ activities can be attributed to the fact that Kenya is predominantly a Christian state (see Figure 4.0). However, with regards to the 2007 violence, religious groups were implicated for contributing to the violence, as well as for failing to live upto their responsibilities to the society. Kilonzo (2009) observes that the participation of religious groups in peace-building efforts at the initial stage was minimal. The reason for the hesitancy was that in the run-up to the 2007 general elections, several religious groups were seen as being openly partisan along ethnic lines. For example, the media reported on ‘prophesies’ by leaders of various Christian churches regarding who would win the presidential elections. The churches also had their preferred presidential candidates, according to geographical and ethnic boundaries (Kilonzo, 2009). Similarly, in Mombasa, an area dominated by Muslims, they campaigned for their fellow Muslim candidates. As a result, when the violence

erupted, the religious groups could not rise above political partisanship to counter the tide of violence (Kilonzo 2009). They also failed to put up a strong condemnation of the violence largely instigated by certain political leaders (Kilonzo, 2009).

However, despite the shortcomings, the churches and religious groups played some positive roles toward the peacebuilding efforts. For example, the National Council of Churches of Kenya (NCCK) and the Inter- Religious Forum (IRF) established three committees to address spiritual concerns, humanitarian needs, and political matters (Mwaura & Martinon, 2010). These initiatives contributed significantly in alleviating the pains, suffering and animosity prevaling among different ethnic groups in the country. The role of churches in Kenyan politics predates the 2007 event. As Tartarini (2015) notes, Kenyans like other Africans uphold their spirituality and value their faith and cultural practices. According to Mwaura and Martinon (2010), churches and the civil society were in the forefront in the quest for democracy enlargement and constitutional change as far back as 1990s. The efforts continued through Daniel Arap Moi's presidency and that of Mwai Kibaki culminating in national referendum in November 2005 and eventual constitutional promulgation in 2010.

Figure 4.0: Kenya's Religious Demographics



Source: https://www.files.ethz.ch/isn/20975/RP_06_6.pdf. Accessed 22July 2020.

According to Figure 4.0, 45% of the Kenyan population are Protestants, 33% are Catholics, while Muslim and Indigenous beliefs each account for 10% of the population. Of significance for this study and as Mwaura and Martinon (2010) argue, the church played useful roles in conflict resolution initiatives during electoral crises.

4.3 The ICC Involvement in Kenya: The External Actors' Perspectives

Regional and international actors responded promptly to the Kenyan government's failure to protect civilians. Hansen and Sriram (2015:4) remark that "the post-election violence (PEV) received significant international attention". Laibuta (2014) reinforces this by submitting that at the peak of the post-election unrest the AU Chairperson at the time, John Kufuor visited Kenya with the approval of the two main political parties, the ODM (on behalf of the opposition) and the Party of National Unity (PNU, representing the government that had been sworn into power) to try and restore calm, leading to the appointment of the Panel of Eminent African Personalities to mediate the crisis. The Panel comprised of the former UN Secretary-General Kofi Annan, the

former President of Tanzania Benjamin Mkapa, President John Kufour of Ghana, Nobel Peace Laureate Archbishop Desmond Tutu (South Africa), and Graça Machel, former first ladies of Mozambique and South Africa. Five members of the two major parties also took part. Hansen and Sriram (2015) opine that the AU Panel was supported by, among others, major international players such as the European Union and the United States. The support culminated in the establishment of what became known as the Kenyan National Dialogue and Reconciliation (KNDR). Two primary responsibilities were confered on the KNDR. The First is to bring about a political resolution in order to end the violence; and the second is to find ways and means of bringing the belligerent parties in organised talks for purposes of addressing structural problems in Kenya associated with electoral violence (Hansen & Sriram, 2015).

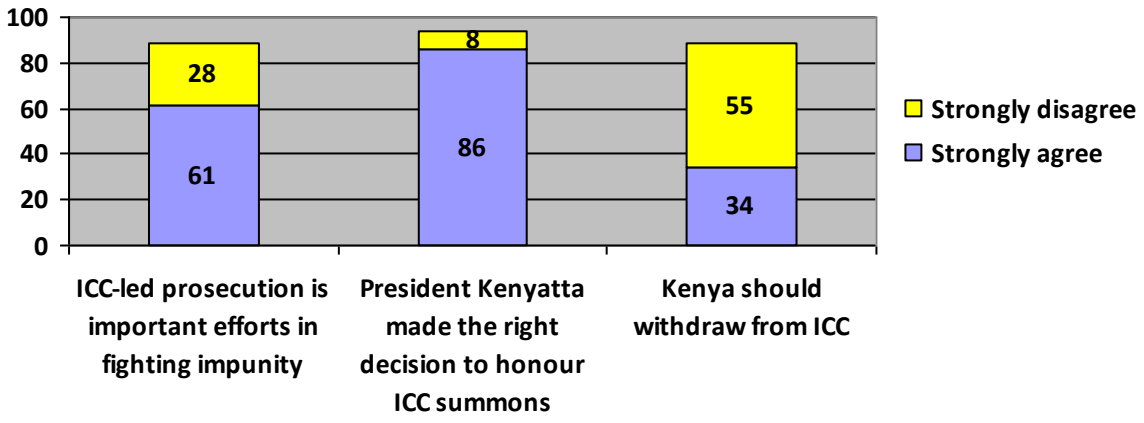
Consequently, on 28 February 2008, Kibaki and Odinga signed a power-sharing agreement whereby Kibaki would remain president and Odinga would assume the newly created post of prime minister. The agreement stipulated that the composition of the coalition government should reflect the parties' relative power in parliament (Hansen & Sriram, 2015:4). According to Laibuta (2014:9), "the intervention of the AU Chairperson in Kenya was a precursor to a ceasefire in the post-election violence, and set the stage for the mediated process that led to the constitution-building process". Ethnic violence threatened not only stability in the country but also Kenya's sovereignty.

As discussed in Chapter 2, the competing epistemological debate surrounding the need for the ICC's involvement in Kenya closed the ranks of the AU. The advocates of African solutions to African problems viewed the the intervention of the ICC as a neo-colonial and hegemonic tool which is used by the Western countries as a tool to project their interests on the continent. On the other hand, pro-western African leaders whose world view are driven by liberal conceptions

regarded the ICC as the only viable option amenable for the eradication persistent and institutionalised impunity on Africa (Hansen & Sriram 2016). The ICC as a global arbitrator found itself in this centrifugal and centripetal competing viewpoints in Africa.

A survey by the AfroBarometer indicates that the majority of Kenyan citizens share the views of the AU member states and leaders supporting the ICC's role in the country (Figure 4.1).

Figure 4.1: Kenyans' Perceptions on the ICC's Intervention

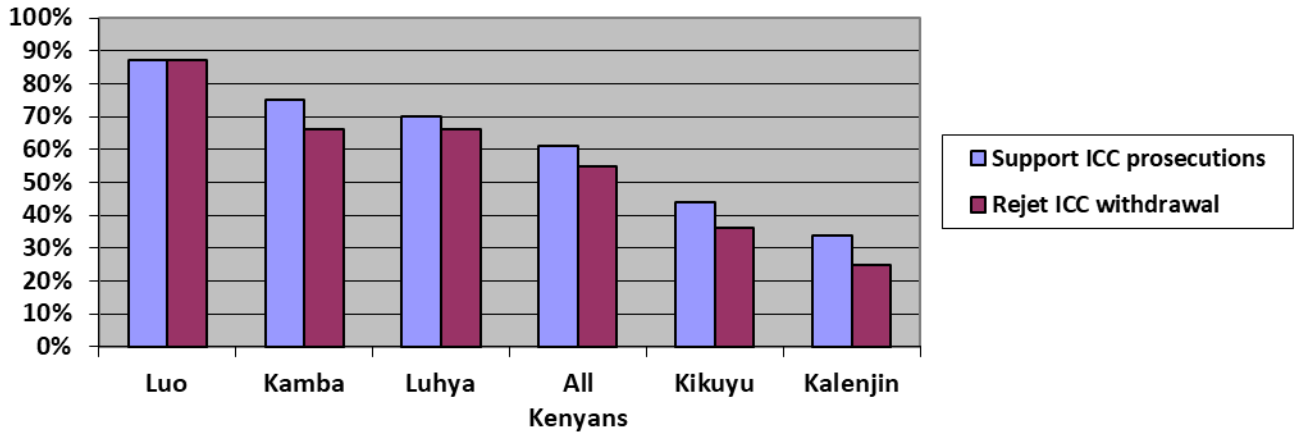


Source: https://afrobarometer.org/sites/default/files/publications (Accessed 21 July 2020)

As Figure 4.1 shows, 61% of the respondents supported the ICC's intervention in Kenya. Specifically those supporting the ICC's role argued that it has the statutory and mandate to play a useful role necessary for the elimination impunity in the country. Figure 4.1 also indicates that only 28% of Kenyans interviewed disagreed with the role of the ICC in the country. Similarly, overwhelming majority of Kenyans interviewed, that is, 86% agreed that President Uhuru Kenyatta made the right decision to honour the ICC summons. On the question of the withdrawal from the Rome Statute and by implication the ICC, 55% disagreed that Kenya should withdraw from the ICC with 34% supporting withdrawal as the viable option.

Analyzed in the context of ethnicity, the debate in Kenya about the role of the ICC revealed a different and an interesting scenario. Specifically, the support reflected variations according to the ethnic groups (see Figure 4.2).

Figure 4.2: Support for ICC in Kenya by Ethnic Group



Source:
https://afrobarometer.org/sites/default/files/publications . Accessed 21 July 2020.

Figure 4.2 indicates that the Luos, Kambas, and Luhyas supported the role of the ICC in Kenya by over 80%, 75%, and 70% respectively. On the other hand, the support by the Kikuyus (Kenyatta's ethnic group) and Kalenjins (Ruto's ethnic group) ranged between 40% to 20% respectively. Figure 4.2 also shows a relatively similar trend on the question of rejection of Kenya's withdrawal from the ICC. Furthermore, the study found out that there were those who believed that the ICC should have respected Kenyan people's choice of leaders as they are the ones who voted both Kenyatta and Ruto into power.

In light of these findings, the ICC's success in undertaking its mandate in any country rests on the public support of its member countries to create a conducive working climate. Kenyans were divided in the aftermath of the political violence. There are those who backed those in position of

power and those who backed the victims. The role of the ICC in this study therefore was viewed with a focus on its ability and effectiveness to provide the victims with justice, since there was no trust in the state institutions. The fact that many political leaders who perpetrated violence were not punished at least as of 2013 to some extent suggests ICC's ineffectiveness as a competent Court. One of the key shortcomings of the ICC is that it has to rely on the goodwill and cooperation of state parties.

The ICC as an international arbitrator within the international community had a duty to provide social justice to the victims of violence. Its intervention in Kenya remained clouded with controversy as the leadership in Kenya though acquiesced to cooperate but by and large remained ambivalent. It has been observed that the ICC intervened after it became apparent that the Kenyan police did not investigate the political violence (Höhn, 2014; Helfer, & Showalter, 2017; Sriram, & Brown, 2012).

It is pertinent to note that the intervention by the ICC in Kenya was triggered by the post-election violence that emanated from the disputed 2007 Presidential election, where both Mwai Kibaki of PNU and Raila Odinga of ODM claimed victory. Tensions erupted into riots, fighting, acts of rape and assault, and bloodshed. It is estimated that 1,133 people were kiiled during the violence while approximately 350,000 were displaced from their homes, and property worth billions of shillings destroyed through arson and other forms of attacks (Report of the Truth, Justice and Reconciliation Commission of Kenya, 2013). Uhuru Kenyatta and William Ruto were indicted in connection with the 2007-08 post-election ethnic violence mentioned above After several weeks of violence, President Mwai Kibaki and Raila Odinga agreed to implement a number of measures to end the crisis. One of such was the formation of a coalition government comprising all the parties in the disputed election. The second was the establishment of a Truth, Justice and

Reconciliation Commission (TJRC). According to Hansen and Sriram (2015:5), "Kibaki and Odinga also formally agreed to establish several mechanisms aimed at addressing the legacies of Kenya's political violence, most notably a criminal justice process, the Truth, Justice and Reconciliation Commission (TJRC) and a constitutional review process". This on its own was a welcome development to see the two leaders agreeing on some form of mechanism aimed at addressing the violence.

The involvement of former heads of states and prominent personalities in the mediation process one would argue that, it is Africa finding African solutions to African problems. The presence of the former President of Tanzania, Benjamin Mkapa signified the importance of geographical factor as he is farmiliar with Kenyan politics and other principal actors. It can also be observed that Graça Machel-Mandela on the other hand, gave the team a feminine presence at vital stages of the mediation process. Upon realising that the tribunal was not established, the ICC officially opened an enquiry on the Kenyan situation on 31 March 2010 (Hansen & Sriram, 2015). According to Hohn (2014:570) "establishing the Waki Commission appeared to be a sincere attempt to identify those most responsible for the violence. However, Kenya has a tradition of setting up commissions of inquiry after atrocities but fail to implement their recommendations".

In some ways, the involvement of ICC really was a fresh start. It marked a turn away from corrupt and dysfunctional domestic courts and an approach to political violence distinct from the ineffective investigation commissions (Hohn, 2014). Some observers advanced that no investigations have been carried out regarding post-election violence in Kenya and crimes have gone uncharged, because the investigations were substandard and the police were not willing to investigate as most crimes, particularly violation or defilement, are committed by the police and the military (Human Rights Watch, 2011; Materu, 2015). Suffice it to say, it can correctly be

observed that there has not been any political will to prosecute the perpetrators of violence after elections. Even though there was an attempt on the part of the Kenyan government to create a commission of enquiry to investigate circumstances surrounding the violence, however, lack of political will complemented by the failure to implement the recommendations of the commission drew in the ICC as a player in the scenario.

Kenyan CSOs such as Kenyan Red Cross Society (KRCS), Action Aid Kenya, Christian Aid, the Norwegian Refugee Council played key roles in responding to violence that followed the 2007 election, in terms of providing emergency services. Several NGOs were also involved in reconciliation and peace initiatives, as well as in pursuit of justice for victims (Materu, 2015). It can be argued that the NGOs played crucial roles in the Kenyan politics and will continue to have impact in shaping the future political arena even though the government remains the final authority in legislative and political decision making process.

However, it is difficult to detach NGOs from the dynamics of international politics. In most cases, these actors represent the interests of their home countries (Materu 2015). Therefore, the independence of the ICC is always put to test when there is a need to separate its independence from the sponsor countries. This is the reason why African leaders have always had misgivings about the independence of the ICC given the involvement of Western sponsored civil society groups. In light of this, the key question therefore remains whether the ICC is able to provide peace and closure in Africa given the complexities of international politics.

4.3 The Impact of ICC's Intervention on Kenya's National Security, 2002-2013

As already been discussed, sovereignty of a state is underpinned on the premise that a state is independent and that its sovereignty is inviolable and not subject to infringement by external

actors. To this end, it is the cardinal and sovereign responsibility of a state to protect its own citizens, the sovereigns. The competing epistemological debates surrounding the ICC's involvement in Kenya, particularly the inherent implications thereof on the country's national security revolves around these two competing conceptions. Specifically, it is centred on the question of reconciling and operationalising the conception of *sovereignty* at state and individual (citizen) levels in relation to justice which is supposed to be accorded the victims of PEV in Kenya.

The concept of sovereignty has both political and legal meanings and derives its conceptions from social contract, underpinning John Locke and Jean Jacques Rousseau philosophical roots. For John Locke, the purpose of the law established by any government is to protect the natural rights and liberties of its citizens. In other words, it is this social contract which if upheld by the government validates, institutionalizes and legitimizes the law. According to the Lockean conception, in the absence of this cardinal responsibility to protect attached to the social contract, the laws by implication become invalid. Jean Jacques-Rousseau on the other hand draws our attention on rights, liberties, freedom and equality of individuals, thus making people's sovereignty the key in his social contract theory. One of the key statutory mandates of the ICC in Article 7(1) provides in part the protection of individuals in relation to crimes against humanity, which include, among others, murder, extermination, deportation, torture, rape, and slavery (UNGA, Rome Statute 1998).

When examined in tandem with the role of the ICC, that is, state sovereignty and the ICC on the one hand and individual (read citizen) sovereignty and the ICC on the other, the state would in most cases emphasise more of its rights and independence to exist without interference. The intervention by the ICC in Kenya, therefore, must be interpreted and understood in this context.

In otherwords, states will aquiesce to the ICC's involvement if its sovereignty and national security is not threatened in the name of adherence to international norms and justice. The leadership in Kenya permitted the ICC to intervene in its internal affairs but with guided reservations. First, the leadership was not willing to permit witnesses to testify against the suspects. Secondly, having earlier failed to enact laws to establish a national tribunal to deal with the post-elections violelnce and instead welcomed the option of ICC'intervetion in the country, the Kenya National Assembly reversed its decision on the matter. Specifically, parliament and the government viewed the ICC as a threat to Kenya's national security (Mwangi, 2016; Brown & Sriram 2012).

The ambivalence exhibited by the government of Kenya and the reluctance of parliament to accommodate the ICC's role in the country because of sovereignty resonates with the key operational research question and the main objective of the study. Specifically, this study is meant to investigate the implication of the ICC on Africa's security using the Kenyan case study, 2002-2013. The operational question is: what implication does the ICC's statutory role have on Africa's security particularly on Kenya's case, 2002-2013? The reluctance by Kenya to accommodate the ICC's role and instead invoked its sovereignty and national security rights reinforce the realist conception discussed extensively in Chapter 2 in this research essay and used as the key theoretical framework. Kenya's unwillingness to openly allow the ICC to investigate the post-election violence is consistent with ethical values attached to realism. One of the central tenets of realism is that the ethical values of a state are independent from the ethical values of the international system (Nardin, 1992; Chldress, 2011). The ICC legal regime represents the international system centred ideals of liberal institutionalism and as such its involvement in

Kenya was against the state's national values and by implication its *raison d'etre*. In otherwords where international law is in conflict with the national interest of a state, the state's interest is bound to prevail. Mearsheimer (2001:5) views international institutions in terms of "a set of rules that stipulate the ways in which states should cooperate and compete with each other". Young (2000) also argues that the fact that these rules are usually agreed to and negotiated by states constituting mutual agreement of higher norms, accepting operationalization of the same rules sometimes is negated by sovereignty. Although the rules are usually incorporated into a formal organisation, organisations on their own cannot compel states to obey the rules they created (Mearsheimer, 2001).

Adherence to global rules of behaviour, according to realists, is mapped in *realpolitik* conceptions. Kenya is not an exception to these *realpolik* national security driven conceptions. Even though Kenya ratified the Rome statute in 2005, the issue of soverengty and national security remained a *conditio sine qua non vis-a-vis* cooperation with the ICC. To many African leaders the ICC remains a "brutal arena where states look for opportunities to take advantage of each other, and therefore have no reason to trust each other" (Mearsheimer, 1994-95:6).

As discussed in Chapter 2, irrespective of being state parties to the Rome Statute a number of the the African contries have exhibited their reluctance in supporting the role of the ICC.

Table 4.6 State Parties to the Rome Statute[X]

COUNTRY	DATE OF SIGNATURE	DATE OF RATIFICATION
Algeria	28 December 2000	Not Yet Ratified
Angola	07 October 1998	Not Yet Ratified
Benin	24 September 1999	22 January 2002
Botswana	08 September 2000	08 September 2000
Burkina Faso	30 November 1998	16 April 2004
Burundi	13 July 1999	21 September 2004
Cameroon	17 July 1998	Not Yet Ratified
Central African Republic	07 December 1999	03 October 2001
Chad	20 October 1999	01 November 2006
Comoros	22 September 2000	01 November 2006
Congo	22 September 2000	18 August 2006
Cote d'Ivoire	30 November 1998	15 February 2013
Democratic Republic of Congo	08 September 2000	11 April 2002
Djibouti	07 October 1998	05 November 2002
Egypt	26 December 2000	Not Yet Ratified
Eritrea	07 October 1998	Not Yet Ratified
Gabon	22 December 1998	20 September 2000
Gambia	04 December 1998	28 June 2002
Ghana	18 July 1998	20 December 1999
Guinea	07 September 2000	14 July 2003
Guinea-Bissau	12 September 2000	Not Yet Ratified
Kenya	11 August 1999	15 March 2005
Lesotho	30 November 1998	06 September 2000
Liberia	17 July 1998	22 September 2004
Madagascar	18 July 1998	14 March 2008
Malawi	02 March 1999	19 September 2002
Mali	17 July 1998	16 August 2000
Mauritius	11 November 1998	05 March 2002
Morocco	08 September 2000	Not Yet Ratified
Mozambique	28 December 2000	Not Yet Ratified
Namibia	27 October 1998	25 June 2002
Niger	17 July 1998	11 April 2002
Nigeria	01 June 2000	27 September 2001
Senegal	18 July 1998	02 February 1999
Seychelles	28 December 2000	10 August 2010
Sierra Leone	17 October 1998	15 September 2000
South Africa	17 July 1998	27 November 2000
Sudan	08 September 2000	Not Yet Ratified
Tunisia	Did Not Sign	24 June 2011
Uganda	17 March 1999	14 June 2002
Tanzania	29 December 2000	20 August 2002
Zambia	17 July 1998	13 November 2002
Zimbabwe	17 July 1998	Not Yet Ratified

Key: [x] Table 4.6 covers the period from 1998-2013.

Source:

https://treaties.un.org/pages/ViewDetails.aspx?src=ND&mtdsg-no=XVIII-10&chapter=18&lang=ec Accessed 04 August 2020

Table 4.6 shows that by 2013, 34 African countries, Kenya included, had ratified the Rome Statute. This enthusiasm with the issue of ratification notwithstanding, most of the African countries have since their ratification of the treaty remained skeptical about the ICC's role in the continent. As much as international institutions are created at the backdrop of peace and international cooperation, competition among states is always a prevalent feature. In otherwords states always plan deliberately about how to survive in the international system, a terrain of competing state and non-state actors. However, many African states and other less developed countries (LDCs) have little influence on some of the organisations in which they play constructive roles in developing and establishing. Those against the international institutions such as the ICC would argue that the institutions are dominated by influencial states. Mearsheimer (2001) observes that the most powerful states in the system create and shape these organisations so that they can maintain their share of world power. Exhibiting ambivalence as Kenya has done *vis-à-vis* the ICC can be understood in this context.

4.4 Conclusion

The data presented and analysed in this chapter has highlighted the challenges and implications associated with external actor's involvement in resolution of domestic conflicts. The ICC's intervention in Kenya following the widespread violence that erupted after the disputed 2007 presidential election has provided further insights on this issue. States under international law claim and enjoy sovereignty, which precludes foreign interference in domestic politics. Conversely, by virtue of being a party to the Rome Statute, Kenya agrees that the ICC may investigate, prosecute and try individuals accused of offences that might constitute genocide, war crimes and crimes against humanity committed in the territory of Kenya, or by Kenyan nationals (Lynch & Roze, 2013). Thus, striking a balance between the concept of sovereignty and demand

for justice for victims of crime has always posed a big problem between states and international actors. This was also the case of the ICC in Kenya.

An analysis of the ICC's intervention in Kenya shows that the Court was not able to achieve any meaningful results, in terms of punishing perpetrators of the violence and securing justice for victims. Several factors contribute to this failure. The first is the issue of sovereignty and national security of Kenya. The second is the issue of ethnicity which has permeated politics in Kenya, hanmpering meaningful investigatory duties conferred on the ICC by the Rome Statute. The third was the skepticism surrounding the independence of the ICC from the sponsor countries. This point needs to be reiterated because it underpins one of the main reasons why African leaders though ratifying the treaty overwhelmingly (Table 4.6) have always had misgivings about the independence and let alone impartiality of the ICC on issues involving African states. Suffice it to say, the ICC's ability to achieve its statutory mandate meaningfully in any country rests on public support and the cooperation of affected state parties to create a conducive environment for its operational functions. As has been explained in this chapter, Kenyans were divided in their support for the ICC. There were those who backed the people in power and those who supported victims and were against impunity (Lugano, 2017).

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter provides the conclusion and summary of the research conducted to examine the impact of ICC's role in Africa with a special focus on its inherent ramifications on Kenya's sovereignty and national security, 2002-2013. The study has addressed the key operational questions and the objectives set out in the research essay. In addition, the chapter highlights the major achievement of the research with regards to ICC's intervention on Kenya's sovereignty and national security. Lastly, this chapter also offers recommendations which in the considered opinion of the researcher constitute potential avenues for further research, as well as areas of policy for stakeholders.

As stated in Chapter 1, the study was designed to answer three key operational questions, that is, a) how effective is the ICC's role as a global arbitrator? b) What is the relationship between the ICC and Africa on the question of impunity? c) What implication does the ICC's statutory role have on Africa's security, particularly on Kenya's case, 2002-2013? These operational research questions were analyzed in tandem with specific objectives namely a) To contextualize the development of the Rome Statute and its global legal impact, b) To establish the ICC's relationship with Africa on the question of impunity, and c) To investigate the implication of the ICC on Africa's security using the Kenyan case, 2002-2013.

5.1 Summary of the Findings in Relation to the Operational Research Questions and Objectives Major Findings

In order to achieve the purpose of the study, data were gathered and analyzed in relation to the internal actors namely, the civil society organizations (CSOs), the external actors, that is, the non-governmental organizations as well the impact of the ICC on Africa's sovereignty, particularly its impact on Kenya's national security.

The findings on the first research question and the accompanying objective revealed that the ICC has not been effective as a global arbitrator. Several factors contribute to the ineffectiveness. The research revealed that some the influential states like the United States and Russia, for example, have not ratified the Rome Statute. This implies that gross human rights violations and violations of international law committed by these powerful states may not or cannot be prosecuted by the ICC (Olugbuo, 2014; Trahan, 2020; Yavas, 2016). Specifically, as members of the United Nations Security Council (UNSC), they have the right under the United Nations (UN) Charter to veto any resolution relating to war crimes or crimes against humanity committed by them or their allies. In other words, the ICC lacks universal jurisdiction on states with regards to the enforcement of international criminal law (Clarke & Koulen, 2014). Secondly, the findings indicate that the ICC lacks independence in the sense that some countries that perpetrated gross human rights violations and crimes against their citizens and/or other nationals were never tried even though they were member states yet African leaders are in a number of occasion subjected to investigations by the ICC (Iyi, 2019; Olugbuo, 2014). This is not to argue that impunity committed by the African leaders is justifiable but that ICC's role should be centred on a fair international legal principle. Thirdly, the ICC has no police force to enforce its orders, but relies on the good will of the state parties.

What is the relationship between the ICC and Africa on the question of impunity?

The relationship between African leaders and the ICC, according to the findings of this study is characterized by partial acceptance and distrust. While some states see the Court as a potential useful legal instrument that could solve/address impunity and many of the continent's endless conflicts, others view it as an institution setup to solely prosecute Africans. This explains the reluctance by African states to arrest the former Sudanese President, Omar Al Bashir when the Court ordered his arrest in connection with atrocities committed by his regime in the Darfur region. In a nut shell, the ICC has had a strained relationship with several African countries and the AU. This strained relationship resulted in withdrawal or threat of withdrawal by some African states including South Africa, Gambia, Burundi, etc.

The findings in relation to research question and objective two revealed that the role of the ICC's operational functions in Africa are generally received with a lot of criticisms and ambivalence by the African leader. Many African states, including Kenya view the ICC's intervention on states in the continent as an encroachment on their sovereignty and national security (Iyi, 2019; Asaala, 2017). The concept of sovereignty is premised on the state's independence of which the African states view largely as sacrosanct. Suffice it to say, the African states are willing to support the ICC if their sovereignties are not threatened in the name of international norms and justice (Angie & Chimni 2003; Eslava & Pahuja, 2012).

In relation to the research question and objective three the ICC's intervention in Kenya has both negative and positive implications on the country's national security. On the negative side, the study established that the leadership in Kenya was more concerned with the issues of state sovereignty and national security than crimes against humanity. The study also established that the intervention neither achieved genuine peace nor justice for victims of the violence (Hansen,

2012; Hansen, 2011). The perpetrators of the violence remained largely untouched and have continued to occupy high positions of authority in the government suggesting that the ICC failed in its statutory mandate to address the issue of crimes against humanity in Kenya. On the positive side, Lynch and Rožej (2013) have observed that the ICC's intervention in many ways shaped the internal politics by influencing political alliances ahead of the 2013 presidential elections in Kenya. It is worth noting that, Kenyatta and his running mate and co-accused William Ruto were on the opposite of the political divide during the 2007 elections, with Kenyatta and Ruto supporting Kibaki (PNU) and Odinga (ODM) respectively. The political alliance between Uhuru Kenyatta and his running mate William Ruto during the 2013 elections in Kenya paved the way for cordial relations between their ethnic groups, the Kikuyu and Kalenjin.

5.2 Conclusions

This study has highlighted the challenges and implications associated with the internal and the external actor's involvement in resolution of domestic conflicts. The ICC's intervention in Kenya following the widespread violence that erupted after the disputed 2007 presidential election has provided further insights on this issue. States under international law claim and enjoy sovereignty, which precludes foreign interference in domestic politics. Conversely, by virtue of being a party to the Rome Statute, sovereign states, Kenya included agree, albeit with ambivalence, that the Court (ICC) may investigate, prosecute and try individuals accused of offences that might constitute genocide, war crimes and crimes against humanity committed in their territories, or by their nationals (Lynch & Roze, 2013). To this end, striking a balance between the concept of sovereignty and demand for justice for victims of crime has always laid the groundwork for competing viewpoints between sovereign states and the other international actors. The ICC's intervention in Kenya must be understood in this broad context.

As has been demonstrated in this research essay the ICC's intervention in Kenya shows that the Court was not able to achieve any meaningful results with respect to punishing perpetrators of the violence and securing justice for victims (Hansen, 2011; Hansen, 2012). It needs to be reiterated that several factors contribute to this failure namely the issue of sovereignty and national security, as well as ethno-centric praxes. These factors, among others, undermine the ability of the ICC to perform its statutory mandate in Africa, Kenya included.

5.3 Recommendations

This section presents the recommendations of the study. The recommendations are aimed at making the ICC an effective Court for promoting international justice and respect for humanitarian laws.

1. The AU should encourage all its fifty-four (54) member states to commit itself to its obligations on the Rome Statute. This will assist in reducing human rights violations and protracted conflicts that characterize the continent.
2. The AU should put pressure on the member states that withdrew from the organization such as Burundi to rejoin Rome Statute. This is important as it will help to promote good governance, reduce abuses associated with power and ultimately reduce impunity.
3. The AU should urge all UN member states to ratify the Rome treaty. This will enable the ICC to be effective as a global arbitrator with regards to enforcing international criminal law and international humanitarian law. In addition, it will assist to reduce human rights violation perpetrated by powerful states.
4. The AU member states should affirm the organisation's commitment to get rid of impunity and ensure responsibility for perpetrators of crimes against humanity, war crimes and genocide. This will not only help to prevent crimes but will also deter others

from committing more in the future. In addition, this will help to make leaders accountable for their actions.

5. Africa needs to deal with impunity by implementing reforms in its institutions such as the Judiciary, police and civil service. This will help to ensure that perpetrators of crimes and human rights violations do not escape justice.
6. Kenya should strengthen its witness protection laws. Witness protection is crucial for effective administration of justice, especially on cases involving state officials and powerful elites. The current situation does not guarantee adequate protection of witnesses as demonstrated by the ICC's cases against Kenyan leaders where many witnesses declined to testify before the Court due to safety concerns.
7. The ICC should assert its independence and fairness in its handling of cases of human rights violations and international crimes to win the trust and support of member states especially those from Africa, who view the organization as an agent of imperialism and propagation of Western agenda. In this way it would prove itself as an effective Court of law.
8. Furthermore, the ICC should take more steps to address the concerns raised by African leaders, especially about peace versus justice, and issues of immunity of state officials. The question of how to time justice is very crucial so that societies do not suffer more conflicts and more atrocities.

Endnotes

[1] For more details on human rights abuses under the presidency of Daniel arap Moi, see for example, Adar, Korwa G (2000). "The Internal and External Contexts of Human Rights Practice in Kenya: Daniel arap Moi's Operational Code**"**, *African Sociological Review*, 4(1): 74-96; Adar, Korwa G (1999). "Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Staff Union (UASU)", *Human Rights Quarterly*, 21(1): 179-206; Adar, Korwa G and Munyae, Isaac (2001). "Human Rights Abuse in Kenya Under Daniel arap Moi, 1978-2001**"**, *African Studies Quarterly*, 5(1) (Winter):1-16. Http://web.africa.ufl.edu/asq/v5/v5i1a1.htm. Accessed 08 April, 2020; and Oloka-Onyango, J (1990). "Police Powers, Human Rights, and the State in Kenya and Uganda: A Comparative Analysis". *Third World Legal Studies* 9(1): 1-36.

[2] Questions of criticism labelled against the ICC as stated by Du Plessis et al. (2013, p.2) are among others: whether the ICC is at fault of selective prosecution of cases originating in Africa; why the AU is not comfortable with the ICC and how its attitude has evolved over the years; how is the ICC constrained by the customary international law doctrine of head-of-state immunity; the extent to which the prosecution of Kenya's president and deputy president pose a real challenge to the ICC's authority; the problem of witness protection before the ICC; the principle of complementarity in the African context; the AU's attempt to establish a regional court to try international crimes; and finally, the road ahead and whether it is likely that the AU will ever permit the ICC to open a liaison office in Addis Ababa.

[3] Kafayat (2004). (The **Prosecutor's Proprio Motu Power** in Context and in Practice. Under Article 15 of the Rome Statute, the **Prosecutor** has the authority to initiate an investigation **proprio motu** on the basis of 'information on crimes within the jurisdiction of the Court).

[4] in the will of the prosecutor himself

[5] Kersten, W. (2018). *Building Bridges and Reaching Compromise: Constructive Engagement in the Africa ICC Relationship.* WAYAMO FOUNDATION ON POLICY REPORT.

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