



THE UNIVERSITY OF NAIROBI
SCHOOL OF LAW

A CRITICAL ANALYSIS OF THE UNITED NATIONS SECURITY COUNCIL'S POWERS
OF DEFERRAL AND ENFORCEMENT UNDER THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT: A CASE STUDY OF KENYA

SUBMITTED BY: DANN EZEKIEL MWANGI

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SUPERVISOR: Dr. AGNES MEROKA

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DECLARATION

I, **DANN EZEKIEL MWANGI**, do hereby declare that this thesis is my original work and that it has not been submitted for examination for an award of a degree at any other university and that where other sources of information have been utilized, they have been properly acknowledged.

Signed:.....

Date:.....

DANN EZEKIEL MWANGI

This thesis has been submitted for examination with my approval as the University's Supervisor.

Signed:.....

Date.....

DR. AGNES MEROKA

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ABBREVIATIONS

AG	Attorney General
ASP	Assembly of States Parties
AU	Africa Union
CAH	Crimes Against Humanity
CAR	Central Africa Republic
CIPEV	Commission of Inquiry into the Post-Election Violence
DRC	Democratic Republic of Congo
HRW	Human Right Watch
ICC	International Criminal Court
ICID	International Commission of Inquiry into Darfur
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
ILC	International Law Commission
KNDR	Kenya National Dialogue and Reconciliation
LRV	Legal Representative of the Victims
LTC	Libya Transitional Council
NGO	Non-governmental organization
ODM	Orange Democratic Movement
OPCD	Office of Public Counsel for Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PEV	Post-Election Violence
PNU	Party of National Unity
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
TC	Trial Chamber
TWAIL	Third World Approaches to International Law
UNSC	United Nations Security Council
UN	United Nations
UNGA	United Nations General Assembly
US	United States of America

LIST OF CASES

1. *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11
2. *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11
3. *The Prosecutor v., Uhuru Muigai Kenyatta*, ICC-01/09-02/11
4. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11
5. *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06
6. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07
7. *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10
8. *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08
9. *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/07
10. *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09
11. *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09
12. *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09
13. *The Prosecutor v. Saif Al-Islam and Abdullah Al-Sennusi*, ICC-01/11-01/11

LIST OF CONVENTIONS/TREATIES/LEGISLATIONS

1. *Charter of the United Nations*, signed on 26th June 1945.
2. *Convention on the Prevention and Punishment of the Crime of Genocide*, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. (Entered into force on 12th January 1951).
3. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968), (*entered into force* Nov. 11, 1970).
4. *International Covenant on Civil and Political Rights* Adopted on 12th December 1966, U.N. DOC A/6316 (1966) (*entered into force* on 23 March 1976).
5. *International Covenant on Economic and Social Cultural Rights* adopted on 12th Dec 1966 U.N.T. S 171 (*entered into force* on 3rd January 1976). *Genocide Convention Act of 1949, Act no.27 of 1949 as amended*.
6. *International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence*, U.N. Doc. ITR/3/REV.1 (1995), (*entered into force* 29 June 1995).
7. Kenyan 2008, *International Crimes Act*.
8. *Rome Statute of the International Criminal Court*, approved on July 17th 1998 2187 U.N.T.S. 90 (*entered into force* 1st July 2002).
9. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).
10. *Statute of the International Tribunal for Rwanda*, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).
11. *The International Criminal Court, Rule of Evidence and Procedure*. U.N. Doc. PCNICC/2000/1/Add.1 (2000).
12. Uganda Legal Notice No. 10 of 2011, *The High Court (International Crimes Division) Practice Directions*, 2011.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The International Criminal Court (ICC) is a permanent supranational court that was established by the Rome statute of the ICC that came into force on 1st July 2002. It was established with the sole aim of ending impunity for the perpetrators of crimes and atrocities that deeply shock the conscience of humanity¹. The court has the jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crimes of aggression².

However, the court does not exercise primary jurisdiction of these crimes but only complements national jurisdiction. Under article 17 (1) of its statute, it only takes up a situation if a state that has jurisdiction over the matter is unwilling or unable to genuinely carry out the investigation or prosecution³. So far, the court has handled 23 cases drawn from 9 situations.⁴

Article 24 (1) of the Charter of the United Nation (UN) bestows the United Nations Security Council (UNSC) with the primary responsibility of maintaining international peace and security in the world⁵. Further, the UNSC was bestowed by the drafters of the ICC's statute with the powers to defer and refer cases in the ICC and also to undertake some enforcement measures in the ICC judicial processes⁶. So far, UNSC has referred Libya and Sudan to the ICC⁷ but failed to refer Syria.⁸ It has passed two deferral resolutions. At the same time, the UNSC has not undertaken any enforcement measures against Kenya and other countries for hosting President Al Bashir of Sudan.

¹ Rome Statute (1998); UN Doc A/CONF 183/9 para 2.

² Ibid art 5.

³ Kevin Jon Heller, 'The Shadow side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process.' (2006) vol 10 Criminal Law Forum 1-4

⁴ International Criminal Court, 'Situations under investigations'

<<https://www.icc-cpi.int/pages/situations.aspx?ln=en>> accessed 7 October 2016.

⁵ Stefan Talmon 'The Security Council as World Legislature' (2005) vol 99 American Journal of International Law 179-181.

⁶ Rome statute (n1), arts 13 (c), 16 and 87 (7).

⁷ UN S/RES/1970 (2011), para 4.

⁸ United Nations <<http://www.un.org/press/en/2014/sc11407.doc.htm>> accessed 21 September 2015.

On the matter of deferral, the UNSC, on 12th July 2002, adopted Resolution 1422 of 2002.⁹ This resolution ‘requested’ the ICC to refrain from initiating investigations or prosecutions over the UN peacekeepers from states not party to the Rome Statute, for actions or omissions that may arise after the adoption of the resolution which may amount to international crimes¹⁰. The resolution was adopted at the behest of the United States, which had threatened, in June 2002, to veto the renewal of the mandate of the UN Mission in Bosnia and Herzegovina, in addition to vetoing all future peacekeeping operations, unless its servicemen were granted immunity from ICC jurisdiction.¹¹ However, it was contentious and thus faced various criticisms. Some countries argued that it amounted to an indirect attempt to modify the Rome Statute, without amending it.¹² It was also criticised for implying that UN peacekeepers from states not party to the Rome Statute are more equal before the law, as compared to their counterparts from States Party to the Rome Statute.¹³

The UNSC defied these criticisms as it passed another deferral resolution, Resolution 1487 of 2003 which essentially was a renewal of resolution 1422(2002) which was to expire on 13th July 2003¹⁴. This renewal, which was the last of this kind, escalated the objection against such deferrals and as rightly argued by the Human Rights Watch, it contravened the Rome Statute¹⁵ as Article 16 was intended to be used in circumstances where there is actual existence of a threat to peace, or a breach of peace not to non-existent situations like on these two scenarios.

In this respect, the UNSC rejected the Kenyan deferral bid both 2011 and 2013 although unlike the two deferrals that were on non-existent situations, the Kenyan one was of a

⁹ This Resolution was passed within two weeks of the coming into force of the Rome Statute, and even before the Court had been set up.

¹⁰ Sean D Murphy, ‘Efforts to obtain immunity from ICC for US peacekeepers’ (2002) vol 96 American Journal of International Law 725–727.

¹¹ Ibid 725.

¹² See the ‘Letter from the Ambassadors to the UN of Canada, Brazil (2002), New Zealand and South Africa to the President of the UNSC in relation to the draft resolution 2.2002.747...under consideration by the UNSC under the agenda item Bosnia-Herzegovina,’ UN Doc S/2002/754.

¹³ Felipe Paolillo of Uruguay (2003), at the UN SCOR, 58th Session, on 12th June 2003, was adamant that he saw discrimination among peacekeepers as a deep injustice. He argued that all peacekeepers ‘must be subject to the same rules and work under the same Statute’, UN Doc S/PV.4772, 11.

¹⁴ United Nations, ‘Security Council Requests One-Year Extension of UN Peacekeeper Immunity from International Criminal Court (12 June 2003)

< <http://www.un.org/press/en/2003/sc7789.doc.htm>> accessed 7 November 2016.

¹⁵ Human Rights Watch, ‘The ICC and the Security Council: Resolution 1422< <https://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm>> accessed 8 November 2016.

situation already seized by the court¹⁶. Further, the UNSC also rejected both Sudan and Libya deferral bid although this does not form part of this study¹⁷.

Kenya became a party to the Rome Statute of the ICC on 15 March 2005. The 2007 presidential election was bitterly contested and degenerated into violence referred to as Post-Election Violence (PEV) that led to deaths of 1,113 people, serious injuries to 3,561 people, 117,216 instances of property destruction, displacement and deportation of thousands of people and rape of women¹⁸. Various attempts to domestically prosecute the perpetrators of the PEV as discussed in the next chapters failed as the Special Tribunal Bill that would have created the mechanism was rejected by the Kenyan National Assembly and therefore the ICC was seized of the situation. With the ICC stepping in, both the Kibaki and Kenyatta government fervently sought for the deferral of the cases.

In this regard, the first deferral request was submitted on February 2011 and this time the cases were at the confirmation hearing stage but it was rejected.¹⁹ The UNSC held that the request did not threaten international peace and security and that it did not garner bipartisan support within the grand coalition government. The 2013 deferral request was no exception as it was rejected too although it gained considerable support from some permanent members of the UNSC and all the African countries sitting in the UNSC²⁰. China and Russia passionately supported the bid arguing that it met the standards in Article 16 of the ICC's statute²¹. The US, France and Britain on one hand opposed the bid but chose to abstain from voting. They largely argued that Kenya's concern could be addressed by the Assembly of State Parties (ASP) to the ICC, despite that the ASP has no mandate over deferral under article 16 of the court's statute.

In this regard, this study will analyze the UNSC's powers of referral and enforcement under the ICC's statute using Kenya as a case study.

¹⁶International Criminal Court, 'Kenya, Situation in the Republic of Kenya, ICC-01/19 < <https://www.icc-cpi.int/kenya> > accessed 7 November 2016.

¹⁷ Juliet Okoth, 'Africa and the International Criminal Court,' Gerhard Werle, Lorell Fernandez, Moritz Vorm Baum, eds (TMC Asser Press 2014) 203.

¹⁸Report of the Commission of Inquiry to the Post-Election Violence, Kenya, (2008) 304-344.

¹⁹ Sosteness Francis Materu, 'The Post-Election in Kenya, Domestic and International Legal Responses.' (2015) T.M.C Asser Press 231.

²⁰ Ibid 18.

²¹ Ibid 19.

1.2 OBJECTIVES OF THE STUDY

This study will attempt to contribute to the scholarly debate about the role of the United Nations Security Council in the International Criminal Court processes by critically analyzing the powers of the council to defer situations or cases before the ICC and also undertake enforcement measures. The study will use Kenya as a case study.

The study specifically aims to address the following issues:

1. To critically analyze exercise of the UNSC's powers of deferral and enforcement under the Rome Statute
2. To evaluate how the relationship between the UNSC and the ICC has affected the ICC's judicial role and the fight against impunity;
3. To evaluate how the application of both deferral and enforcement powers by the UNSC has impacted on the image and the capabilities of the ICC
4. To give possible recommendations on how the relationship between the UNSC and the ICC can be enhanced to strengthen the ICC's judicial process and the fight against impunity.

1.3 STATEMENT OF THE PROBLEM

The Rome Statute of the ICC envisaged a situation whereby the UNSC would impartially use its mandates to defer investigations and prosecutions before the court and enforcement mechanisms. Unfortunately, this has not always been the case. UNSC was envisaged by the drafters of the court's statute to invoke this power in situations whereby an investigation or prosecution by the ICC would threaten international peace and security but so far, the two deferrals done by UNSC have largely not met this standard. In fact, the quest for the Kenyan deferral would largely meet this standard but was rejected by the council. Therefore, the UNSC has been accused of using this power selectively and abusing it thus denting the credibility of the ICC. The UNSC needs to apply this mandate impartially in order to safeguard the ICC against the accusations that it's a hegemonic tool for the west and also guarantee the ICC the required cooperation from both state and non-state parties to the ICC.

In addition, the drafters of the statute envisaged in article 87 (7) that the UNSC would undertake measures to ensure compliance with the court's decisions or cooperation requests by the ICC but so far, this has not been the case. Many states including some permanent

members of the UNSC such as China have failed to cooperate with the court and despite complaints by the ICC, UNSC has not taken any enforcement measure²². These states have hosted President Bashir of Sudan who is already indicted by the court but have refused to arrest and hand him over to the ICC and the UNSC has not taken any actions against these countries²³.

In this respect, the manner in which UNSC has exercised these legal powers over the ICC remains problematic and of fundamental concern because it directly affects the effort to fight impunity at the international level. This study will therefore analyze and evaluate the manner in which UNSC has used these powers and provide recommendations on how they can be properly used to enhance the fight against impunity.

1.5 RESEARCH QUESTIONS

This study will attempt to answer the following specific questions:

1. How has the UNSC exercised its power of deferral and enforcement under the Rome Statute?
2. How has the relationship between the UNSC and the ICC affected the ICC's judicial role and the fight against impunity?
3. How have the deferrals of cases by the UNSC and exercise of its enforcement powers impacted on the image and the capabilities of the ICC?

1.5 HYPOTHESIS

1. Unchecked powers of the UNSC to defer investigations and prosecutions before the court and also to undertake enforcement measures hampers the judicial functions of the court
2. Unchecked powers of the UNSC to defer investigations and prosecutions before the court and also to undertake enforcement measures frustrates the global fight against impunity.
3. There is need for institutional and legislative reforms as pertains Article 16 and 87 (7) of the Rome Statute.

²² Nerida Chazal, 'The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity' (Routledge 2016) 2-6

²³ Ibid.

1.6 JUSTIFICATION OF THE STUDY

The International Criminal Court has jurisdiction over international crimes such as the crimes against humanity, the crime of genocide and the war crimes²⁴. The court has no jurisdiction over the crime of aggression as it awaits ratification of the Kampala 2010 amendments by at least thirty state parties to the ICC and subsequent voting over the matter in 2017²⁵. The court does not exercise primary jurisdiction over situations unless a state is unable or unwilling to prosecute the crimes. In discharge of its duties, the court is seized of a situation through three ways; a referral by a state party to the ICC like the situations from Uganda, Central African Republic, Democratic Republic of Congo and Mali²⁶, an initiation of investigations by the Office of the Prosecutor, commonly referred to as *proprio motu*, the Kenyan case being an example and finally through a referral by the Security Council. In addition, the ICC can be stopped from undertaking an investigation or prosecution by the UNSC and so far, we have had two instances of distinct deferrals and two rejections of deferrals²⁷. The UNSC also has the mandate to take measures against states that refuse to cooperate with the ICC.

With this background, it's important to note that ICC and UNSC have a special but intricate relationship that directly affects the fight against impunity. This relationship has come under serious scrutiny and equally remained a contested issue right from the Diplomatic Plenipotentiaries discussions that led to creation of the Rome Statute of the ICC. The unchecked powers of the UNSC over these aspects of the court have been held with suspicions by some scholars and key stakeholders in the international criminal justice arena if not downrightly opposed by some. Some have argued that these powers interfere with the independence of the court and are also used arbitrarily, selectively and even abused thus denting the credibility of the court²⁸.

²⁴ International Criminal Court, 'How the Court Works'

<<https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess>> accessed 7 November 2016.

²⁵ Ibid.

²⁶ International Criminal Court 'Situations and Cases'

<http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> Accessed 23 September 2015).

²⁷ Morten Bergsmo, Jelena Pejic, Dan Zhu, 'The Rome Statute of the ICC' in Triffterer/Ambos, (eds) (3rd edn (Hart Publishing 2016) 770

²⁸ Nigel White and Robert Cryer, 'The ICC and the Security Council: An Uncomfortable Relationship in Doria,' Legal Regime 455-484.

These accusations cannot be ignored as the success of the ICC is wholly depended on its credibility. Further, politicization of the ICC hampers the fight against impunity as it provides an avenue for states not to cooperate with the court. Without states cooperation, ICC cannot succeed in prosecution as it entirely depends on support and goodwill from states in collection and preservation of evidence, access and protection of both witnesses and victims, arrest of indicted fugitives and access of government documents amongst other logistical support.²⁹

Therefore, this study is critical as it examines the powers of the UNSC in the ICC process and the analysis will attempt to provide possible recommendations on how this can be enhanced in order to effectively fight impunity at the global level.

1.7 THEORETICAL FRAMEWORK

The research will seek to analyze the legal aspects of the powers and the roles of the UNSC to defer cases and situations before ICC and its enforcement powers under the statute. It will use Kenya as the case study. I will therefore use the following theories:

Liberal Theory: The liberal theory will be very fundamental in this study as it will enable me to understand the behavior and explain the power play among members of the UNSC and the ASP in regard to the ICC. The liberal theory proposes that international law and politics' is comprised of fundamental factors such as private groups and rational individuals who so as to promote the politics often organize and exchange ideas³⁰. The theory takes on the bottom-up view of politics in which the societal groups and individual needs are treated as analytically prior to state behavior³¹. In social terms, the differentiated individuals define their international and material interests advance them by way of collective action and political exchange³². Competition is inevitable due to scarcity and differentiation (this theory rejects the utopian belief that there exists any harmony of interests in a society among groups and individuals) such pattern of interactions result in political order and interests³³. In interstate relations, of specific interest is the fact that the demands of the society that are

²⁹ Zhu Wenqi 'On co-operation by states not party to the International Criminal Court', (2006) vol 88 861 International Review of the Red Cross 91.

³⁰ Jeffrey L. Dunoff and Mark A. Pollack, 'Interdisciplinary Perspectives on International Law and International Relations: The State of the Art' (Cambridge: Cambridge University Press 2003) 84.

³¹ Ibid.

³² Ibid.

³³ Ibid 85.

very conflicting will likely result to coercion which will be used to achieve them have three societal factors that are associated with them: extreme inequality of social influence, contradictory claims that have fundamental beliefs and the extreme scarcity of material goods³⁴. Through this theory I will be able to critically analyze and explain the reasons why some states may want to seek legal and institutional reforms as pertains international law enforcement instruments and also why a state may choose not to honour fully or in part their international obligations.

The second assumption in the liberal theory is that states (or any other political institutions) are a representation of a domestic society subset whose rational state officials pursue their interests by means of world politics³⁵.

In essence I will use this theory to ground the research considering the social actors in Kenya, critically analyzing the relationships between the state and the non-state actors. What is their role in the ICC judicial process, are they pro or against reforms and what are the underlying reasons for the rational behavior among the state and the non-state actors in the intra and inter-state environment?

For the liberals, representative practices and institutions are the critical "transmission belt" through which the social power and the disparate preferences of civil society groups and individuals are transmitted into the political realm, aggregated, and translated into state policy. The liberal conception of domestic politics argues that the state rather than being an actor is an institution which is subject to even construction, reconstruction, capture and recapture by social actors.

The theory assumes that groups and individuals do not have equal influence on the policy of the state and that the state institution structure is not irrelevant³⁶. There is no government that rests on biased or universal political representation. Each of the governments represents some groups or individuals more fully compared to others—from a single tyrannical individual, an ideal-typical Pol Pot or Josef Stalin, to broad democratic participation³⁷. Societal pressures that are transmitted by representative practices and institutions define the state preferences which is—the ordering among underlying substantive outcomes that could

³⁴ Andrew Moravcsik, 'The New Liberalism' in Christian Reus-Smit and Duncan Snidal (eds), '(The Oxford Handbook of International Relations OUP 2008) 234-54.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

potentially result from interstate political interaction³⁸. The theory will ground the argument the reason behind countries obeying international law. According to the third assumption, the configuration of state preferences determines state behavior. According to the liberal argument, the determinant that influences state behavior is the different states distribution and interaction which means the theory causally privileges variation in the configuration among state preferences, while treating configurations of capabilities (central to realism) and information (central to institutionalism) "as if" they were either fixed constraints or endogenous to state preferences³⁹. Liberal theory sets aside not just the Realist assumption that state preferences must be treated "as if" naturally conflictual, but equally the institutionalist assumption that they should be treated "as if" (conditionally) convergent⁴⁰. On the other hand, a critical theoretical link between varying state preferences and varying interstate behavior is provided by the concept of policy interdependence. Policy interdependence in this case can be said as benefits and costs that has been created for foreign societies when dominant social groups in a given society seek to realize their preferences in the international realm, that is, the pattern of transnational social externalities resulting from the pursuit of domestic and international goals⁴¹.

Kenya as a state has many players both external and internal and this is portrayed by the activities of the various state organs, non-state actors including the CSOs and the NGOs. These players have been involved in various ways in the Kenyan ICC cases. Some of these organizations had sought to influence the process at the ICC, giving credence to the theoretical assumption that the state is a major player in the international system but not the only player and that it does act in isolation of it's the local players⁴². As an example, during the first phase of Kenyan deferral campaigns, many non-state actors were against deferral of the cases and this went to the extent that one part of the grand coalition was against the campaigns⁴³. At the enforcement level, many non-state actors were against President Bashir

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Njonjo Mue and Judy Gitau, 'Contested Justice: The Politics and Practice of the International Criminal Court Interventions,' in Christian De Vos, Sara Kendall and Casten Stahn (eds) (Cambridge University Press 2015) 210.

⁴³ Kenya Human Rights Commission, 'Kenyans for Peace with Truth and Justice (KPTJ) Network ICC Group asks the Government to cooperate with the ICC' 4 February 2011 <<http://www.khrc.or.ke/media-centre/news.html?start=28>> accessed 9 November 2015

visit to Kenya in 2010 and even some went to court to seek for an order of his arrest should be come back to Kenya⁴⁴.

Third World Approaches to International Law (TWAIL); This is an approach that argues that the design and the implementation of international law is geared towards modern day imperialism by the western countries against the developing third world countries (Mutua, 2000)⁴⁵. The TWAILERS view the international law as illegitimate, arguing that the third-world countries are not involved in the design of the international law and if they are, their views are subordinated to those of the developed countries. According to TWAIL, which is both an intellectual and political movement, international law holds Europe as the centre, christianity as key religion, capitalism as the preferred ideology and imperialism as a necessity (Angie and Chimni, 1999)⁴⁶

Mutua (2000) notes the objective of TWAIL as to deconstruct and unpack the use of international law as an imperialist tool that promotes the racialized hierarchy of non-Europeans to those of the Europeans, to provide an alternative legal edifice to that offered by the western powers in guise of international law and also to agitate for the development of the third-world countries which has always been enhanced by the modern-day colonialism of the Third world countries by the Europeans.

This study will therefore utilize this approach to contextualize the Kenya cases. This in effect means that this study will look into the ICC and the UN as an international organization, and the surrounding debate on how it has been used by the Europeans to shape the political and economic landscape of African countries in specific focus to the Kenyan cases. Various quarters have alluded that the international law as it is presently constituted does little to serve the interests of the African countries. This study will therefore analyze the arguments by the AU and Kenya that the UNSC has applied Article 16 of the ICC's statute in favour of the western countries without following merit but refused to defer the Kenyan cases despite existence of compelling reasons to defer the matter.

⁴⁴ *Kenya Section of the International Commission of Jurists v. Attorney General & another* [2011] eKLR.

⁴⁵ Makau W Mutua 'What is TWAIL?' American Society of International Law [2000] <<http://ssrn.com/abstract=1533471>> accessed on 25th June 2016.

⁴⁶ Anghie, Antony and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' [1999] Chinese Journal of International Law 33

1.8 RESEARCH METHODOLOGY

This study aims at analyzing how the UNSC has exercised its mandates of deferral and enforcement under the ICC's statute. It evaluates whether the exercise of these mandates fortifies the fight against impunity or not. In this respect, the study will be qualitative and exploratory. It will rely on both primary and secondary data. This study will primarily use the case study method. This method allows the researcher to concentrate the answers of the research questions on a given group, individuals or organizations⁴⁷. The case study method is appropriate for this study as it will allow me to look into a country that has been confronted first hand by the UNSC's powers of deferral and enforcement under the ICC. Therefore, since this study interrogates these powers and how they have been exercised, Kenya offers an excellent case study.

The study will also use the textual analysis method. It will look into the various legal texts on the deferral as well as the enforcement mechanisms and carry out an analysis. This will include primary texts as well as the secondary texts that discusses the subject matter. The textual analysis will be used for presenting the various arguments. Primary sources shall consist of the Rome statute to the ICC, the ICC's Rules of Procedure and Evidence, the Charter of the UN, the UN's resolutions on Deferrals, the International Law Commission's draft statute on the ICC and Reports of the Preparatory Committees and Working Groups on the Establishment of the ICC.

Above all, this study will also apply a histo-legal approach. It will therefore trace the 2007/8 PEV, the failed efforts that Kenya put in place to prosecute the situation domestically, the failed deferral requests and the history of both cases before the ICC.

1.9 LIMITATION

The principal limitation in this study is that it will limit itself to the UNSC's powers of deferral and enforcement under the ICC's statute and not extend to the council's referral powers under article 13 (b) of the statute. The main reason for not looking into the referral powers of the UNSC under the Kenyan situation is because the issue of UNSC's referral of Kenya to the ICC did not feature when the blueprint of punishing impunity was proposed by the Waki Commission. The report proposed first the creation of a local special tribunal

⁴⁷ Winston Tellis, 'Introduction to Case Study.' (1997) Vol 3, No 2. The Qualitative Report, <<http://www.nova.edu/ssss/QR/QR3-2/tellis1.html>>.

to punish impunity and gave strict deadline of its creation, failure to which the situation would be referred to the ICC. Therefore, when Kenya failed to establish the tribunal, the most practical and simple solution was to have the OTP being seized of the matter under article 13 (c) of the statute as either way Kenya was a signatory to the ICC's statute when PEV occurred. Thus Kenya did not require a referral by the UNSC. In any case, the UNSC's referral is mostly sought in situations whereby states are unwilling or unable to punish impunity and are not signatories to the ICC's statute for example in the Sudan, Libya and Syria situations. However, when the OTP started preliminary investigations in Kenya, it did not want to intervene through article 13 (c) but rather requested Kenya to refer itself to the ICC through article 13 (a) but this request was denied.

Therefore, this study does not look into the issue of UNSC's referral in the Kenyan context as this route was not utilized. Further, it was unlikely that the UNSC's would refer Kenya to the ICC because it was a signatory to the court's statute. Above all, the analysis of the deferrals and enforcement will be limited to the Kenyan situations only.

1.10 LITERATURE REVIEW

The drafters of the Rome statute to the ICC envisaged a situation whereby the UNSC would exercise its mandates of deferral and enforcement impartially and effectively. This was particularly because for ICC to succeed in the fight against impunity, there was need for limited intervention of UNSC. The mandates of UNSC over the ICC was therefore a balance between an independent court and equally a role for UNSC in its primary mandate of maintaining international peace and security. However, the reality of how these mandates have been exercised so far shows a different picture. This study therefore examines how these mandates have been exercised so far using Kenya as a case study.

The literature review is divided into two main sections which dwells on deferral and enforcement powers of the Security Council.

Deferral Powers of the UNSC

Casten Stahn⁴⁸, argues about the challenges of deferral under article 16 as follows; a lack of common understanding as to the functions and conditions of a deferral, a lack of leading procedure dealing with tensions following the rejection of a request for deferral and absence

⁴⁸ Casten Stahn, 'The Law and Practice of the International Criminal Court' [2015] Oxford University Press, 77

of checks and balances. His argument that article 16 lacks checks and balances is quite compelling as this has been at the center of opposition against its application as its seen to be used selectively. However, his claim that one of the challenges of article 16 is lack of a common understanding of its functions is incorrect. Article 16 of the statute is clear that it aims at stopping investigation or prosecution for a period of one year though renewable once the UNSC passes such a resolution. This intent is clear and creates a very strong presence of UNSC in the ICC process which forms the heart of this research project. In fact, one of the research questions that this study aims at addressing is how the deferrals impact on the image and capabilities of the court. Overall, Casten's view that article 16 has the challenge of providing a procedure dealing with tensions following the rejections of a deferral request is correct and is an issue that features prominently in this study. Nonetheless, this argument by Casten looks at lack of such a procedure as a cause of tensions between ICC and other players but does not address it from the perspective of its ramifications in the fight against impunity.

Charles C. Jalloh, Dapo Akande and Max du Plessis⁴⁹ have analyzed article 16 from the perspective of African countries concerns about how UNSC has used this mandate. Although they largely share the same concern like the ones Casten has raised above, they have made interesting proposals on how African countries can address the concerns about article 16. They are of the view that any state that presents a deferral request must present concrete evidence as to why non-deferral would be a threat to international peace and security. They also urge states to use the complementarity regime under the ICC to punish impunity and seek for non-intervention of the ICC through article 53 of the court's statute. Although these proposals are good, they don't address the current problem of UNSC applying article 16 capriciously. The argument that states seeking a deferral should provide evidence is correct but it ignores that fact that there are no clear-cut criteria on conditions for a deferral especially looking at how the resolutions 1422 of 2002 and 1487 of 2003 were dealt with and non-deferral of Kenyan situation. Additionally, although they rightly advise that the African countries should utilize the complementarity regime to prosecute international crimes, they ignore that this does not address concerns about article 16. This is because a deferral is sought after a matter has been formally seized by the court unlike

⁴⁹ Institute for Security Studies, 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC,' (Position Paper 2010)

complementarity which only avoids ICC's interventions if domestic courts can conduct trials professionally.

Louis Arbour⁵⁰, argues, 'the increasing entanglement of justice and politics is unlikely to be good for justice in the long run. To make criminal pursuits subservient to political interests, activating and withdrawing cases as political imperatives dictate, is unlikely to serve the interest of the ICC which must above all establish its credibility and legitimacy as a professional and impartial substitute for deficient national systems of accountability. I'm not sure that partnership with the Security Council is the best way to attain these objectives'. This claim by Arbour sees no role for UNSC even in situations whereby prosecuting international crimes under the ICC could be a threat to international peace and security. Therefore, Arbour ignores that sometimes the interests of peace can override that of justice and thus there is need for UNSC to act in such situations but in adherence to article 16 of the statute. However, in such interventions, the UNSC should act on clearly set standards not capriciously in order to address concerns by Arbour and others that article 16 primarily serves the political interests of UNSC instead of judicial or peace interests.

In fact, William Schabas⁵¹ argues that article 16 had to be retained as an acknowledgment that UNSC's has a primary mandate of maintaining international peace and security. This project holds similar views but the point of divergence is that there are no proper guidelines on how article 16 is applied. One of the research questions is therefore on whether there is need to reform article 16.

Therefore, the above review shows there is inadequate studies on the exact extent to which the council has applied article 16, its impact on the fight against impunity and whether there is need to reform article 16. This study aims at addressing this gap.

Enforcement Mandate of the UNSC

Finally, the enforcement mandate of UNSC under article 87 (7) has also been largely researched on by international law scholars. This is particularly because ICC entirely relies

⁵⁰ Alana Tiemessen, 'The International Criminal Court and the politics of prosecutions,' (2014) *The International Journal of Human Rights*, DOI: 10.1080/13642987.2014.901310.

⁵¹ William A. Schabas, 'An Introduction to the International Criminal Court,' (2011) 4th Edition Cambridge University Press 166

on states cooperation in discharge of its duties and without it, it cannot succeed in the fight against impunity

Antonio Cassese⁵² argues ‘...the ICTY remains very much like a giant without arms and legs-it needs artificial limbs to walk and work. And these limbs are State authorities’. Kimberly Prost⁵³ reaffirms Casese’s argument in the context of cooperation within the ICC and restates that without states cooperation, ICC will remain utterly impotent. Prost is also disappointed because UNSC has failed to act on non-cooperative states. This review agrees with both Casese and Prost that ICC and by extension the fight against impunity cannot succeed without states cooperation. However, the review disagrees with Prost that UNSC can only act in matters that it has referred to the ICC and not on matters that have been referred by state parties or initiated by the OTP like the Kenyan one⁵⁴.

Mark S. Ellis⁵⁵ restates the centrality of cooperation in prosecution of international crimes and also the fundamental role of UNSC in dealing with non-cooperative states. He faults the UNSC for not taking any measures against states that have failed to offer cooperation to the ICC especially on the Sudanese cases. He is worried that UNSC has not taken even an informal or soft condemnation of the offending states. Ellis is however concerned that article 87(7) does not provide any way of dealing with non-cooperative states. This review agrees with Ellis that cooperation with the ICC is key for its success and that UNSC has not taken measures against any state for non-cooperation. However, it disagrees with Ellis that UNSC cannot act against uncooperative states because article 87 (7) of the ICC’s statute does not provide for any measures. The review holds that the Charter of the UN provides for measures of enforcing UNSC’s decisions and therefore even if ICC’s statute does not provide for enforcement actions, UNSC can act based on the charter.

⁵² Antonio Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law,’ (1998) *European Journal of International Law* 9 (19)

⁵³ *Ibid*

⁵⁴ *Ibid*

⁵⁵ Mark S. Ellis, ‘Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic Tribunals,’ (2014) Cambridge Scholars Publishing 111

Gwen P. Burnes⁵⁶ shares Ellis's concerns that failure by the UNSC to use its enforcement measures is undermining the court's judicial process and further calls for strengthening of enforcement mechanisms under the ICC. Gwen even recommends suspension or expulsion of ICC state parties who do not cooperate with the ICC. However, this study holds that this is largely a radical proposal and may not help to address the problem of non-cooperation by states.

Therefore, this review does not provide exhaustive ways of addressing the ineffective of UNSC in undertaking enforcement measures and thus this study will attempt to address this gap by recommending other concrete ways of dealing with the issue.

1.11 CHAPTER BREAKDOWN

This study consists of five chapters organized in the following way:

CHAPTER ONE: INTRODUCTION

1. Background of the Study
2. Objectives of the Study
3. Statement of the Problem
4. Research Questions
5. Hypothesis
6. Justification of the Study
7. Theoretical Framework
8. Research Methodology
9. Limitation
10. Literature Review
11. Chapter Breakdown

CHAPTER TWO: THE KENYAN CASES IN PERSPECTIVE

1. Background and Context
2. The Journey to The Hague
3. The Quest for deferral

⁵⁶ Gwen P. Burnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir,' [2011] vol 34 Fordham Int'l L.J. 1584.

4. Status of the Cases
5. Key Legal Issues Contested in the Kenyan cases
6. Conclusion

CHAPTER THREE: THE KENYAN SITUATION: DEFERRAL AND ENFORCEMENT

1. Introduction
2. Legal Issues Emerging from the Kenyan Quest for Deferral
3. Effects of Kenyan Deferral Request on the fight against Impunity
4. Enforcement under the Kenyan Cases; Kenyatta Case
5. Conclusion

CHAPTER FOUR: LIBERAL THEORY AND THIRD WORLD APPROACHES TO INTERNATIONAL LAW AS YARDSTICKS OF ANALYSIS OF THE STUDY FINDINGS

1. Deferral in the Context of the Kenyan Cases
2. International law and the International Criminal Court
3. A critique on the International Criminal Court
4. Enforcement under the ICC
5. African countries Response to UNSC's failure to Defer Kenyan and Sudan cases
6. Conclusion

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This chapter provides the key findings of the study in view of the statement of the problem, hypotheses and the research questions. The recommendations are drawn from the study findings.

CHAPTER TWO

THE KENYAN CASES IN PERSPECTIVE

2.1 Background and Context

The 2007 general elections in Kenya was a watershed event in the history of the country. Unprecedented violence broke out in many parts of the country immediately Mwai Kibaki of the Party of National Unity (PNU) was declared the winner of the presidential poll and sworn in on 30th December 2007⁵⁷. The violence escalated as the leader of Orange Democratic Movement (ODM), Raila Odinga, immediately rejected the outcome of the poll⁵⁸. Such violence had never occurred in Kenya before and it had devastating consequences. The violence, commonly referred to as Post-Election Violence (PEV), continued for the next 14 days after Kibaki was declared the winner and according to the Commission of Inquiry into Post-Election Violence report (CIPEV or WAKI report), it led to 1,133 deaths, rape of approximately 3,000 women, severe injuries to 3,561 persons, massive destruction of both government and private property and displacement of over 300,000 people. Kenya had not experienced violence of such gravity before as previous ethnic clashes documented by the Akiwumi Commission which was commissioned in 1998 was of much lower scale⁵⁹.

Although declaration of Kibaki as the duly elected president is what sparked the violence, Waki report and other agencies examined deep-seated issues which played a central role in causing the violence and these include; first is the culture of impunity in the country and politicization of violence in Kenya, second is the personalization of power around the presidency which had caused unequal distribution of national resources and therefore every ethnic group had to fight by all means for political power so as to get a higher chance of getting national resources, third is historical injustices especially on allocation of land and

⁵⁷Kwatemba, Shilaho Westen, 'Kenya's coalition government: challenges and prospects for the 2012 general elections.' (2010) *Politeia* (02568845) 29.1.

⁵⁸Kagwanja P, 'Courting genocide: Populism, ethno-nationalism and the informalisation of violence in Kenya's 2008 post-election crisis' [2009] vol 27 issue 3 *Journal of Contemporary African Studies*.

⁵⁹ Akiwumi Commission of Inquiry into Tribal Clashes, (2002). This was an inquiry into tribal clashes in Kenya. Some of its objectives included to investigate the tribal clashes that had occurred in various parts of Kenya since 1991, with view of establishing and/or determining: The origin, the probable, the immediate and the underlying causes of such clashes; the action taken by the police and other law enforcement agencies with respect to any incidents of crime arising out of or committed in the course of the said tribal clashes and where such action was inadequate or insufficient, the reasons there for; the level of preparedness and the effectiveness of law enforcement agencies in controlling the said tribal clashes and in preventing the occurrence of such tribal clashes in future

other key national resources that resulted to grievance and wedge politics and finally, unbalanced distribution of income and wealth in the country which made many youth jobless and thus ready to join militias and gangs⁶⁰.

PEV ended on 28th February 2008 when a political compromise between Kibaki and Raila Odinga was reached through signing a power-sharing agreement⁶¹. However, the journey to sign the agreement was not rosy. Many prominent leaders from Africa had tried to broker an agreement but without success. Even external pressure or threats from some western powers did not persuade Kibaki and Odinga to agree. It's after intense mediation process led by Koffi Annan, the former UN Secretary General, that Kibaki and Odinga finally agreed to sign the accord⁶². Koffi Annan had been appointed the mediator by African Union.

The power-sharing agreement was later domesticated into a law called the National Accord and Reconciliation Act, 2008, that was anchored in the Constitution. This Act created the positions of the Prime Minister and two deputies which were eventually headed by Raila Odinga and Uhuru Kenyatta and Musalia Mudavadi respectively. It also provided for the functions of the Prime Minister, portfolio balance between the two coalition partners and also a general framework on how the grand coalition would be governed. Further, the Annan mediation team, referred as Kenya National Dialogue and Reconciliation (KNDR) facilitated both coalitions to sign four implementation agendas which later created the opportunity for ICC's intervention in Kenya. In summary, the four agendas were; the taking of immediate action which sought to stop the violence and restore the people's fundamental liberties and rights; how to rise beyond the political crisis; immediate measures that would address the existing human internal crisis and promote reconciliation and healing; and finally, addressing long-term issues, including undertaking constitutional, legal and institutional reforms; land reform; and addressing impunity⁶³.

2.2 The Journey to The Hague

The Kenyan journey to The Hague was most unforeseen by the time the two principals, Kibaki and Odinga, signed the peace agreement. KNDR facilitated signing of the four

⁶⁰ Report of the Commission for the Inquiry into the Post-Election Violence (2009)

⁶¹Ibid.

⁶²Gabrielle Lynch, 'The ICC Intervention in Kenya, Chatham House (2013)

⁶³ Dr Migai Akech, 'Institutional Reforms in the new constitution of Kenya,' (2010) International Centre for Transitional Justice 11.

agendas of implementation by grand coalition government and as this study will show, part of agenda four, fighting impunity, is what started the unexpected journey to The Hague.

Acting on agenda four, President Kibaki formed a Commission of Inquiry into the Post-Election Violence headed by Justice Philip Waki on 23rd May 2008. Its terms of reference sought to look at the facts that led to PEV, look into the omissions or actions taken by state security agencies during the course of the violence, and make recommendations as necessary; and perform any other tasks deemed necessary in fulfilling its terms of reference⁶⁴.

CIPEV presented its report to the President and the Prime Minister on 15 October 2008. It made several radical recommendations and top amongst them was the need to address the issue of impunity. In this respect, it recommended creation of a Special Tribunal to prosecute all the perpetrators of PEV and especially the high-level perpetrators. This recommendation was informed by its assessment that the Kenyan judiciary was incapable of prosecuting such crimes as it had serious institutional weaknesses and also it faced credibility challenges⁶⁵. In any case, Odinga refused to challenge Kibaki's declaration as the president in the court as according to him the judiciary was untrustworthy.

To avoid any interference with the judicial independence of the tribunal and also ensure its effectiveness, the commission felt short of recommending a draft Special Tribunal Bill but instead proposed specific issues that the bill would include. These included a strict timeline of 60 days for the coalition partners to sign an agreement for setting up of the tribunal upon presentation of the CIPEV report, 45 days for enactment of the tribunal's law and 30 days of the tribunal's commencement once the bill is assented into law⁶⁶. It also provided that should the coalition partners fail to sign an agreement to set up a tribunal, or enactment of the bill fails or the tribunal is established but fails to function as envisaged in its report, the names of the prime suspects of PEV would be forwarded to the ICC's Prosecutor for further

⁶⁴ CIPEV

<http://kenyalaw.org/kenya_gazette/gazette/volume/NDky/Vol.%20CX%20%20-%20%20No.%2041> accessed 23 April 2016.

⁶⁵ International Bar Association and International Legal Assistance Consortium, 'Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya.' (2010)

⁶⁶Waki Commission, 'Report of the Commission of Inquiry into Post-Election Violence.'

investigation and possible prosecution⁶⁷. Although these strict timelines were regarded by some people as unrealistic to achieve due to challenges that the country faced, they were extended for a short period but nonetheless, the country was unable to form such a tribunal and that's why the ICC intervened in Kenya.

How Establishment of a Special Tribunal Bill failed

Immediately after the Kenyan cabinet approved the Waki report on 27th November 2008, a ten-member committee supervised by President Kibaki and Prime Minister Odinga was formed to oversee the implementation of its recommendations. Further, both Kibaki and Odinga signed an agreement for establishment of a Special Tribunal to prosecute persons who were involved in masterminding and orchestrating PEV on 17th December 2008.

Consequently, a Special Tribunal bill⁶⁸ was drafted to beat the 30th January 2009 deadline to set up a tribunal but parliament rejected the constitutional amendment bill on 12th February 2009⁶⁹. 101 MP's voted in favour of the bill against a requirement of 145, 93 voted against the bill and 1 abstained. A majority of the MP's who objected the bill stated that they didn't trust the Kenyan judicial system and therefore they preferred The Hague route⁷⁰. The rejection was also in the background of a sustained campaign by some politicians through a clarion call of "Don't be Vague lets go to Hague"⁷¹. However, one of the most peculiar reason of rejecting a local tribunal in favour of The Hague was because some politicians felt that Hague would take too long to successfully prosecute the Kenyan cases, prosecute only a few people or would not succeed at all⁷².

With the rejection of this bill, Koffi Annan got impatient and handed over the Waki envelope and evidence to the ICC's prosecutor in July 2009 as there was no possibility that government would successfully re-introduce and lobby for the bill six months after its rejection in February 2009. There was immediate anxiety in government as the possibility of ICC's intervention became clear and therefore the bill was reviewed for re-introduction

⁶⁷Ibid (n 64)

⁶⁸Special Tribunal Bill 2009

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf> accessed 28 February 2016.

⁶⁹ Sosteness Francis Materu, *The Post-Election in Kenya, Domestic and International Legal Responses* (2015) T.M.C Asser Press 66-72.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

into parliament but this never happened due to disagreements between the coalition partners. A third attempt to introduce a revised bill before parliament was made through a private member's motion by Gitobu Imanyara in November 2009 but this equally failed as there was no quorum in parliament⁷³.

Therefore, the three unsuccessful and highly political efforts to enact a Special Tribunal Bill to prosecute 2007/08 as recommended by CIPEV paved way for the ICC's prosecutor to intervene in Kenya under article 15⁷⁴ of the Rome statute to the ICC. On 29th November 2009, OTP made a formal request to the Pre-Trial II pursuant to article 15 seeking for the authorization to open an investigation into the Kenyan situation⁷⁵. This request was granted on 31st March 2010 although Justice Peter Han Kaul dissented. He averred that upon interpretation of article 7 (2) (a) of the courts statute which defines "attack directed against any civilian population" as key contextual element of crimes against humanity and his examination of the OTP's supporting materials and victim's representation, the situation did not fall under the jurisdiction of the ICC⁷⁶.

With the grant of authorization to investigate, the OTP embarked on a journey to investigate the Kenyan situation and on 15th December 2010, the chief prosecutor made a major announcement by naming six Kenyans, Uhuru Kenyatta, Major Hussein Ali and Francis Muthaura⁷⁷ on one hand and William Ruto, Henry Kosgey and Joshua Sang⁷⁸ on other hand as persons whom he had reasonable grounds to believe they committed crimes against humanity during the 2007/08 PEV. He subsequently requested Pre-Trial Chamber II to issue summonses for appearance to the six suspects and the requests were granted. This announcement marked the official beginning of the journey to The Hague.

Nevertheless, it's important to note that by the time the OTP sought for an authorization to investigate the Kenyan situation especially because of the failure to set up a credible special tribunal, the Kenyan judiciary, prosecutorial arm and the police had not initiated concrete steps to prosecute impunity. Many of these institutions were also undergoing both legal and

⁷³ Ibid (n 69)

⁷⁴ The prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the court.

⁷⁵ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09 para 2.

⁷⁶ Ibid, Dissenting Opinion of Justice Peter-Hans Kaul para 4.

⁷⁷ Public Redacted Version of Document ICC-01/09-30-Conf-Exp Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09, para 224

⁷⁸ Public Redacted Version of document ICC-01/09-31-Conf-Exp Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, para 213.

institutional reforms and thus lacked wherewithal to credibly punish impunity. In this respect, Kenya could not bank on the principle of complementarity under article 1 of the ICC's statute to stop the ICC from intervening.

Therefore, the Kenyan government contest of the admissibility of the cases before the ICC failed at both the Pre-Trial Chamber II and the Appeals Chamber as the government could not demonstrate the active steps it had undertaken to punish the high-level perpetrators of PEV.⁷⁹

2.3 The Quest for deferral

First Kenyan Quest for Deferral

When it dawned on the Kenyan government that the intervention of the ICC was real, the government though divided, immediately began pushing for the deferral of the investigations. On February 2011, in a memo titled "*Kenya's Reform Agenda and Engagement with the International Criminal Court (ICC)*", the Permanent Mission of the Republic of Kenya forwarded to all Permanent and Observer Missions to the UN seeking to justify the government's case for deferral ahead of any consideration of the matter by the UNSC⁸⁰. On 4th March 2011, the mission formally wrote to the President of the UNSC requesting under Article 16 for deferral of the investigation opened by OTP⁸¹. However, as will be extensively discussed in chapter three of this study, this request was seen by some quarters as an attempt of shielding the alleged suspects against potential prosecution at the ICC⁸².

Kenya therefore began a spirited deferral campaign which was carried out mainly by the then Vice President Mr Kalonzo Musyoka in what was termed as the 'Shuttle Diplomacy'⁸³. However, it faced opposition from one section of the grand coalition. While one part of the government led by President Kibaki argued that an Article 16 deferral was necessary because the ICC process would threaten the country's and thus the region's peace and

⁷⁹ *Prosecutor v. Francis Kirimi, and others* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11, paras 65-66.

⁸⁰ Casten Stahn, 'The Law and Practice of the International Criminal Court' (2015) Oxford University Press, 56-59

⁸¹ *Ibid.*

⁸² Brown, Stephen & Chandra Lekha Sriram, 'The big fish won't fry themselves: Criminal accountability for post-election violence in Kenya.' (2012) *African Affairs* 111.443 244-260.

⁸³ *Ibid* 60.

security, the Odinga led coalition partner did not support this position⁸⁴. They argued that the prosecution did not *'pose any threat to peace and security and to the contrary, failure to bring to justice the perpetrators of post-election violence poses grave danger to Kenya's internal peace and security'*⁸⁵. They also expressed doubts about the reforms in the judiciary and the formation of a local tribunal which they argued would be easily manipulated⁸⁶.

The UNSC was not persuaded with this request and therefore rejected it⁸⁷. The government's argument that non-deferral would threaten international peace and security did not persuade the Council. UNSC also noted the lack of agreement on this matter within the grand coalition. It therefore advised Kenya to consider appealing to the ICC under Article 19; challenges to the jurisdiction of the Court or the admissibility of a case⁸⁸. Thereafter, the government filed an Article 19 admissibility challenge on 31 March 2011, requesting the ICC to dismiss the case but Pre-Trial Chamber II rejected it on 30 May⁸⁹; on 30 August, the Appeals Chamber rejected the government's appeal for dismissal⁹⁰.

Second Kenyan Quest for Deferment

In 2013, Kenya for the second time in two years wrote to the UNSC seeking for deferral of the cases before the ICC. The country's Permanent Mission to the UN, in a petition dated October 16, wanted the UNSC to defer the cases since Kenya's concerns over the matter had not been addressed since October 2013⁹¹. The AU also supported this petition by addressing the UNSC on the matter⁹².

In arguing for a deferral, Kenya's ambassador to the UN wrote to the UNSC that *"The case at the ICC continues to pose serious political and social distraction within Kenya and by extension, continues to undermine the immediate and long term political stability of Kenya*

⁸⁴ Serena K. Sharma, 'The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya,' (2016) Routledge 103.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Casten Stahn, 'The Law and Practice of the International Criminal Court' (2015) Oxford University Press, 56-59.

⁸⁸ Ibid.

⁸⁹ Ibid (n 78).

⁹⁰ Hansen & Thomas Obel, 'A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' [2012] vol 7 issue 13(1) Melbourne Journal of International Law 217.

⁹¹ Security Council, 'Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council', <http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/624> accessed 2 May 2016.

⁹² Ibid.

*and threatens of the sub-region of Eastern and Africa and Horn of Africa*⁹³. This request was equally rejected just like the 2011 one and chapter three provides an extensive analysis of why it was rejected.

2.4 Overview of the Cases

The ICC Presidency on 6 November, 2009 assigned the Kenyan situation to the Pre-Trial Chamber II and the prosecutor submitted an application to the chamber to start a formal investigation on 26 November 2009. The pre-trial chamber by the majority granted this authorization on 31 March 2010⁹⁴ as it held that the situation met the threshold of admittance before the ICC. This threshold entailed, the supporting materials and information availed by the OTP demonstrated; reasonable basis to proceed⁹⁵, the case appeared to fall within the jurisdiction of the ICC⁹⁶, reasonable basis to believe that crimes against humanity within the jurisdiction of the ICC have been committed⁹⁷ and that the case is admissible under article 17 of the ICC's statute⁹⁸.

Judge Hans-Peter Kaul, made a dissenting opinion. He argued that 'the acts which occurred on the territory of the Republic of Kenya do not qualify as crimes against humanity falling under the jurisdictional ambit of the Court'⁹⁹.

On 8 March 2011, Pre-Trial Chamber II issued summonses to appear for all six of the suspects in the two cases. As with the decision to authorize the investigation by the Prosecutor, Judge Hans Peter Kaul dissented and opposed the issuance of summonses¹⁰⁰. The cases were then prosecuted as follows;

Case 1: The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang

The accused faced the following charges; murder under article 7(l)(a); deportation or forcible transfer of population under article 7(l)(d); and persecution under article 7(l)(h) of the ICC's statute which all constituted crimes against humanity¹⁰¹. Most specifically, they

⁹³ Ibid.

⁹⁴ Situation in the Republic of Kenya, Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09.

⁹⁵ Ibid 10-36.

⁹⁶ Ibid 37.

⁹⁷ Ibid 40-49.

⁹⁸ Ibid 50.

⁹⁹ Ibid 148-153.

¹⁰⁰ *The Prosecutor v. William Samoei Ruto, and others*, ICC-01/09-01/ ICC-01/09-01/11 11 Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute paras. 41-59.

¹⁰¹ Ibid 22.

were accused of forming an organization along with other Kalenjin persons as early as 2006 with the sole purpose of removing members of the Kikuyu, Kamba and Kisii ethnic groups from the Rift Valley region of Kenya in order to create a large pro-ODM power base in that region¹⁰². The accused were also alleged to have planned to inflict fear and destroy homes and property of these ethnic groups so as to force them to relocate from the Rift Valley. Sang, who at the time of the election was a presenter of a radio programme on the Kalenjin language station, KASS FM, was accused of using his broadcasts to spread instructions and incitements to violence.

The Pre-Trial Chamber II issued its decision of confirmation hearings on 23rd January, 2012 whereby both Ruto's and Sang's charges were confirmed but that of Kosgey dropped. The chamber stated that upon scrutinizing the available evidence, it did not find Kosgey criminally responsible as an indirect co-perpetrator with Ruto as per article 25 (3) (a)¹⁰³ of the ICC's statute¹⁰⁴. On the other hand, it confirmed Ruto's charges as it found substantial grounds that demonstrated that he jointly with other members of the organization committed, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, greater Eldoret area, Nandi Hills and Kapsabet town pursuant to articles 7(1)(a), (d) and (h) of the Statute¹⁰⁵. The Chamber was persuaded to confirm Sang's charges as available evidence demonstrated that he contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, greater Eldoret area, Nandi Hills and Kapsabet town pursuant to articles 7(1)(a), (d) and (h) of the Statute¹⁰⁶.

With the confirmation of the charges, both Ruto and Sang were committed to a Trial Chamber and after initial submissions by both their defence teams and the OTP and also serious legal and diplomatic battles and sideshows, the two accused made submissions for no case to answer in 2015 which succeeded in 2016. The Trial Chamber V (a) in a 2-1

¹⁰² Ibid 39-98.

¹⁰³ Rome Statute of the International Criminal Court, A/CONF.183/9, art 25 (3) (a) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

¹⁰⁴ Ibid 293-300.

¹⁰⁵ Ibid 300-349.

¹⁰⁶ Ibid 350-367.

decision vacated the charges against them¹⁰⁷. Judge Fremr¹⁰⁸ found that the OTP did not present sufficient evidence on which a reasonable Trial Chamber could convict the accused while Judge Eboe-Osuji¹⁰⁹ declared a mistrial in the case. However, he noted that weaknesses in the OTP case might be explained by the incidence of tainting of the trial process by way of witness interference and political meddling that was likely to intimidate witnesses. On the other hand, Judge Herrera Carbuccion in her dissent considered, ‘... *that the OTP case had not ‘broken down’ and ... that there is sufficient evidence upon which, if accepted, a reasonable Trial Chamber could convict the accused*’¹¹⁰. This marked the end of Ruto’s and Sang’s cases.

Case 2: The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali

The accused faced the following charges; murder under article 7(1)(a); deportation or forcible transfer under article 7(1)(d); rape under article 7(1)(g); persecution under articles 7(1)(h); and other inhumane acts under article 7(1)(k) of the ICC’s statute which constituted crimes against humanity¹¹¹. Specifically, the three were accused of planning and coordinating retaliatory attacks that were perpetrated by the Mungiki and pro-Party of National Unity (PNU) youth in different parts of Nakuru, and Naivasha and encouraging and abetting the failure of the Kenya Police to intervene¹¹².

After conclusion of the confirmation hearings, Ali’s charges were not confirmed but that of both Kenyatta and Muthaura were confirmed. The basis of not confirming Ali’s charges was that the evidence placed before the chamber did not provide substantial grounds to believe that the Kenya Police participated in the attack in or around Nakuru and Naivasha and therefore it was not possible to attribute of any conduct of the Kenya Police to Mr. Ali, and his individual criminal responsibility¹¹³. As for Muthaura and Kenyatta, the chamber was convinced based on the evidence submitted that they were reasonable grounds to confirm their charges of murder, deportation or forcible transfer, rape, persecution and other

¹⁰⁷ *The Prosecutor v. William Samoei Ruto, and others*, ICC-01/09-01/11 Decision on Defence Applications for Judgments of Acquittal 2.

¹⁰⁸ *Ibid* 3-56.

¹⁰⁹ *Ibid* 57-253.

¹¹⁰ *Ibid* n 106, Dissenting Opinion of Judge Herrera Carbuccion, ICC-01/09-01/11, pages 1-44

¹¹¹ *The Prosecutor v. Francis Kirimi Muthaura, and others*, ICC-01/09-02/11 Decision on the Confirmation of Charges Pursuant to Arts 61(7) (a) and (b) of the Rome Statute, para 21.

¹¹² *Ibid* 102.

¹¹³ *Ibid* 425-426.

inhumane acts in Nakuru and Naivasha¹¹⁴. The chamber refused to confirm their charges of other forms of sexual violence¹¹⁵.

With the trials of both Muthaura and Kenyatta beckoning, the OTP chose not to proceed to trial with Muthaura's case and therefore applied for a withdrawal of his case under article 61 (4) of the court's statute on 11th March 2013. The OTP's application was grounded on the argument that its evidence could not support the charges against Muthaura and that it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt¹¹⁶. The Trial Chamber thus allowed the OTP to withdraw the case¹¹⁷.

President Kenyatta's case just like Muthaura's did not proceed to trial. On 5th December, 2014, OTP issued a notice for withdrawal of Kenyatta's case¹¹⁸. OTP argued that its evidence against criminal responsibility of Kenyatta had not improved beyond reasonable doubt and in light of the rejection of its request to have the case adjourned until Kenyan government cooperated with the ICC, it had no option but to withdraw the case¹¹⁹. On 13th March, 2015, Trial Chamber V (B) noted the OTP's request and terminated Kenyatta's case but with caveat that '*...Prosecution to bring 'new charges against the accused at a later date, based on the same or similar factual circumstances, should it obtain sufficient evidence to support such a course of action'*¹²⁰. This marked the end of Kenyatta case but legally the OTP as noted by the Trial Chamber V (B) can bring new charges against him based on the same or similar circumstances at a later date if it obtains the necessary evidence. It's unlike an acquittal which would bar the OTP from charging him on the same or similar circumstances.

Nonetheless, this case was characterized by a lot legal drama and especially on the question of Kenyan government cooperation with the ICC. The Trial Chamber noted that Kenyan government did not fully cooperate with the OTP but did not find Kenya for non-cooperation¹²¹. However, this decision was reversed by the Trial Chamber V (B) in 2016

¹¹⁴ Ibid paras 428-430.

¹¹⁵ Ibid.

¹¹⁶ *The Prosecutor v. Francis Kirimi Muthaura, and others*, ICC-01/09-02/11 Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura paras 2-12.

¹¹⁷ Ibid 11.

¹¹⁸ *The Prosecutor v. Uhuru Muigai Kenyatta*, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11, para 2.

¹¹⁹ Ibid.

¹²⁰ Ibid 9.

¹²¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Judgment on the Prosecutor's appeal against Trial Chamber V (B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', para 9.

and this led to referral of Kenya to the ASP for non-cooperation¹²². So far, the ASP has not deliberated the referral of Kenya for non-cooperation.

2.5 Key Legal Issues Contested in The Kenyan Cases

There have been some major legal issues touching on the Kenyan cases that have been contested and viewed positively, the contests have helped in developing the jurisprudence of the court and generally the international criminal law. This study identifies key legal issues contested and classifies them into two categories; Legal issues contested in the ICC's Chambers and Legal issues contested in the Assembly of State Parties to the ICC.

i. Legal issues contested in the ICC's Chambers

There have been many legal issues in the Kenyan cases that have been contested right from the Pre-Trial Chamber II to the Appeals Chamber but for the purpose of this study, I will examine two key legal contestations.

a) Definition of the contextual element of "state or organization policy"

The first contest was in regard to whether the Kenyan situations had met the threshold of the contextual element of "state or organization policy" as a critical ingredient in seeking the authorization to investigate the crime of "crimes against humanity" as defined in article 7 (2) (a) of the ICC's statute. Article 7(1) a-k defines the material elements of the crimes against humanity¹²³ "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...and... 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in article 7 (1) a-k against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".

This definition provides the contextual elements for CAH which must be proved by the OTP despite the material elements for any prosecution of CAH to succeed. These are; the

¹²² Ibid para 38.

¹²³ Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in para 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

attack must be widespread or systematic, directed against a civilian population, the perpetrators must have knowledge of the attack and overall the attack must be made in furtherance of a state or organizational policy. Put simply, the threshold put by the contextual elements of CAH differentiates between CAH and ordinary crimes. Most importantly, all these tenets of the contextual elements must be met for CAH to be prosecuted.

In this respect, the majority, consisting of Justices Curno Turfusser and Katerina Trendavilova differed with Peter Hans Kaul on whether the supporting materials and information provided by the OTP demonstrated existence of a state or organizational policy in both cases. The OTP, is under obligation in both articles 13 (c) and 15(3) to provide supporting materials to the PTC if it believes it has reasonable basis to proceed with a situation and in this case, it provided information to the effect that PNU leaders used state apparatus such as the police and also non-state actors which were highly organized like the Mungiki group, to commit the material elements of the crimes against humanity as defined in Article 7 (1) a-k¹²⁴. PNU personalities who included elected leaders, aspirants, councilors and business people were also accused of planning and coordinating the attacks and also fundraising money for facilitating the same¹²⁵. On the other hand, senior ODM leaders were also accused of planning and coordinating attacks against perceived PNU supporters using highly organized gangs.

In this regard, the majority decision was of the view that the level of organization of both PNU and ODM gangs was meticulous, well-coordinated¹²⁶ and therefore granted OTP the request to investigate the Kenyan situation¹²⁷. They were persuaded that the state policy does not have to be conceived at the highest level as Judge Kaul argued but also at a regional or local state organ.¹²⁸ Further, they relied on the jurisprudence of the definition of policy established by the ICTY tribunal to buttress this position but this was highly contested by Judge Kaul¹²⁹. Kaul was of the view that such jurisprudence cannot take precedence of the statute as article 21 of the statute expressly states that ICC should first rely on its statute,

¹²⁴ *The Prosecutor v. William Samoei Ruto, and others*, ICC-01/09-01/ ICC-01/09-01/11 11 Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute paras. 41-59.

¹²⁵ *Ibid*

¹²⁶ *Ibid*

¹²⁷ *Ibid*

¹²⁸ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09, 31 March 2010, para 43.

¹²⁹ *Ibid* 29.

elements of crimes and rules of evidence and procedure and have no leeway to entertain jurisprudence from such tribunals as either way, there is no institutional link between them and the ICC¹³⁰.

In his further refusal to authorize investigations, Kaul was of view that PEV was largely spontaneous, committed by different criminal gangs in different places and for different reasons, some *ad hoc* and others that existed before PEV¹³¹. According to him, PEV created an opportunity of opportunistic crimes and therefore such criminal gangs could not qualify as organizations. However, he admitted existence of some low level of organization¹³² within these different gangs but disagreed that such level could fit within the general characteristics of organizational policy that both himself and the majority held qualifies as organizational policy. Both held that organizational policy entails; (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale¹³³.

This contestation over the element of organizational policy arose again at the confirmation charges stage. Justices Justices Curno Turfusser and Katerina Trendavilova confirmed the charges against Ruto, Sang, Kenyatta and Muthaura and committed them for trial but Justice Kaul refused to confirm on the basis that the OTP did not provide adequate evidence to support the existence of an organizational policy and therefore should have been prosecuted domestically¹³⁴.

In this regard, although the majority had their way, there are fundamental issues in regard to the extent of judicial scrutiny at the PTC raised by Judge Kaul that cannot be ignored as they are bound to come up in future. As acknowledged by both the majority and Judge Kaul, article 15 was a compromise arrived at in order to ensure that the *proprio mutuo* investigations by the OTP are not politicized and abused as the PTC would evaluate a

¹³⁰ Ibid.

¹³¹ Ibid 82.

¹³² Ibid 93.

¹³³ Ibid 51.

¹³⁴ *The Prosecutor v. William Samoei Ruto and others* ICC-01/09-01/11 23 January 2012; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute para 60; *The Prosecutor v. Francis Kirimi Muthaura and others*, ICC-01/09-01/11, 23 January 2012; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para 66.

request for investigation pursuant to article 53 of the court's statute. However, the drafters of the statute provided a low evaluation standard, if not vague which may risk converting PTC into a clearing house of OTP's request. This is the primary reason why Kaul and the majority bench could not agree on the issue. Kaul was of the view that PTC must be cautious while handling requests for authorization to investigate as generous or summary evaluation of such requests may satisfy the standard merely because the standard is low¹³⁵. In fact, he asks, "*how low is the standard in article 15 of the Statute?*"¹³⁶ According to him, a liberal approach to the issue of standard will confer the ICC with jurisdiction over ordinary crimes which would better be handled by national courts and therefore bog down the court with many cases that it has no capacity to handle and also accusations of interfering with states sovereignty. This is a valid concern that cannot be ignored and needs careful considerations.

b) Kenyan Government Cooperation in Kenyatta's Case

The second legal issue contested is the matter of Kenyan state cooperation with the ICC as envisaged in Article 93 (1)¹³⁷ of the ICC's statute. From the onset, the ICC relies heavily on states cooperation in its investigations, access of victims, evidence and any other critical material and forms of support required in the course of prosecution. Additionally, the court requires states cooperation in arrest of suspects as it has no standing police officers. In a nutshell, the critical role played by both states and non-state parties to the ICC in ensuring the efficiency and effectiveness of the ICC cannot be over-emphasized. Simply put, without

¹³⁵ Ibid 62.

¹³⁶ Ibid (n 127) para 16.

¹³⁷ States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- a) The identification and whereabouts of persons or the location of items;
- b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- c) The questioning of any person being investigated or prosecuted;
- d) The service of documents, including judicial documents;
- e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- f) The temporary transfer of persons as provided in paragraph 7;
- g) The examination of places or sites, including the exhumation and examination of grave sites;
- h) The execution of searches and seizures;
- i) The provision of records and documents, including official records and documents;
- j) The protection of victims and witnesses and the preservation of evidence;
- k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

states cooperation, ICC cannot deliver its promise of punishing impunity and will merely remain a giant without arms and legs just like what Antonio Casese described ICTY¹³⁸. The position that states cooperation is the fulcrum of the court is further restated by Phillippe Kirsch, a former President of the ASP, who states, “Like any judicial system, the ICC system is based on two pillars. The court is one pillar, the judicial pillar. The operational pillar belongs to states, international organizations, and civil society.”¹³⁹

In this regard, the Kenyatta case was dominated with a plethora of OTP’s accusations against the Kenyan government for non-cooperation and as discussed in other sections of the study, OTP withdrew its case against Kenyatta for what it termed as lack of adequate cooperation by the Kenyan government, a position upheld later in 2016 by the Trial Chamber V (B)¹⁴⁰. The OTP’s accusations against the government gathered momentum when it requested the court’s chamber on 2nd December 2013 to make a finding of non-compliance against the Kenyan government pursuant to article 87 (7) of the ICC’s statute and also sought for an adjournment of the proceedings of the case until the Kenyan government complied with the outstanding cooperation requests¹⁴¹. OTP also sought for referral of Kenya to ASP for non-cooperation¹⁴². At the same time, Kenyatta defence made a request for termination of the case due to lack of evidence and averred that the cooperation requests were made in bad faith as they could not in any case help the court to proceed with the trial.

At the heart of the accusations of non-cooperation was that Kenya government had failed to provide Kenyatta’s financial records and telephone communications for over one and half years and had not demonstrated any serious intent to do so¹⁴³. According to the OTP, the financial records were critical to their allegation that Kenyatta helped fund the violence and thus were likely to assist the Chamber in adjudicating the charges against him¹⁴⁴. The OTP further contested the government assertions that it could only provide this information if it

¹³⁸ South Africa Litigation Centre, ‘Ensuring Cooperation with the ICC’ <<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Cooperation-with-the-ICC.pdf>> accessed 14th July 16

¹³⁹ Ibid.

¹⁴⁰ *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11; Second decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute para 38.

¹⁴¹ *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11; Public Redacted version of the Prosecution Application for a finding of non-compliance pursuant to article 87 (7) of the Statute against the Government of Kenya, paras 2, 3, 29 and 31

¹⁴² Ibid 31.

¹⁴³ Ibid 3.

¹⁴⁴ Ibid 1.

obtained a court order from the chamber and also if the accused provided consented to hand over to the OTP some part of the information¹⁴⁵.

In its ruling dated 31st March, 2014, the chamber granted OTP its prayer for a limited adjournment and stated that it was for the specific purpose of providing the Kenyan government an opportunity to cooperate with the OTP's request. The chamber therefore adjourned the provisional trial commencement date to 7 October 2014. However, it rejected OTP's request for finding Kenya for non-cooperation pursuant to article 87 (7) of the statute.

Nonetheless, despite the urgency to get these records, the OTP was cautious that the outcome of the records request could not necessarily provide evidence of probative value as either way, it could provide exculpatory evidence that would lead to termination of the case¹⁴⁶. The chamber also ruled that a status conference would be held on 9 July, 2014 in order for the OTP and the Kenyan government to provide an update on the status of the execution of the revised request and any other relevant issues¹⁴⁷. However, to avoid ambiguity on the part of the OTP's records request, the chamber also directed that the records request adhere to the requirements of specificity, relevance and necessity. On 11th July 2014, the OTP filed the revised request.

In response to these requests, the Kenya government supported by Kenyatta defence rejected these revised requests on the basis that it was broad, unspecific and did not demonstrate relevance to the case although this position was rejected by the chamber¹⁴⁸. The AG further stated that Kenya had no resources or administrative capacity to conduct the broader search of records and that "*OTP cannot outsource us the investigation of their case*"¹⁴⁹. Kenyatta defence sought for termination of the case as in their view, the requests were "*completely fruitless exercise*"¹⁵⁰. The Legal Representative of Victims (LRV) made submissions in support of the OTP.

This tussle escalated up to 28th August, 2014 when the chamber ordered the OTP file a notice confirming whether it anticipated being in a position to start trial on the provisionally

¹⁴⁵ Ibid 3.

¹⁴⁶ Ibid 29.

¹⁴⁷ Ibid 103.

¹⁴⁸ Ibid 21

¹⁴⁹ Ibid 23.

¹⁵⁰ Ibid.

scheduled commencement date of 7 October, 2014¹⁵¹. The chamber also ordered both the LRV and Kenyatta defence to make responses on this matter¹⁵².

As expected, the OTP made submission on 5th September, 2014 where they stated their inability to commence the trial due to, “...available evidence is insufficient to prove Mr. Uhuru Kenyatta's alleged criminal responsibility beyond reasonable doubt”¹⁵³. OTP therefore sought for another adjournment of the case until the Kenyan government fully executed the revised cooperation request. LRV held the same position and went further to ask the chamber to make a finding of non-compliance against Kenya under article 87 (7) of the statute¹⁵⁴. However, the defence opposed this position and asked the chamber to terminate the case and deny OTP any further request for adjournment of the case¹⁵⁵.

In its determination, the chamber vacated the 7th October, 2014 provisional trial commencement date and scheduled another status conference dated 7th October, 2014 where Kenya's AG was invited and another dated 8th October, 2014 where Kenyatta was required to attend in person¹⁵⁶. The same accusations by the OTP against Kenyan government for non-cooperation were again replayed during the October's status conference. Kenya government also strongly opposed accusations of non-cooperation as it had done before and Kenyatta's defence also sought for termination of his case as it had done before¹⁵⁷. Overall, OTP re-stated its position that the chamber should find Kenya for non-cooperation as per article 87 (7) of the court's statute and a referral of Kenya to the ASP for non-cooperation¹⁵⁸.

In a bid to end this contestation over the Kenyan government cooperation, the Trial Chamber VI made a decision on 3rd December, 2014 where it asked the OTP to file a notice within seven days indicating either its withdrawal of the Kenyatta charges or if the evidentiary base against him had improved to a degree which would justify proceeding to trial¹⁵⁹. In response

¹⁵¹*The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02111; Order requiring a notice in relation to the provisional trial commencement date para 2.

¹⁵² *Ibid.*

¹⁵³ *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02111; Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters para 6.

¹⁵⁴ *Ibid* 9.

¹⁵⁵ *Ibid* 7.

¹⁵⁶ *Ibid* 18.

¹⁵⁷ Felix Olick, “Assembly of State Parties unlikely to assist Bensouda in Uhuru's” *The Star*, (Nairobi, 11th October 2014),

<<http://www.the-star.co.ke/news/article-193460/assembly-state-parties-unlikely-assist-bensouda-uhurus-icc-case#sthash.ospNxM1a.MkpFRG9v.dpuf>> accessed 17 October 2014.

¹⁵⁸ *Ibid.*

¹⁵⁹ Decision on Prosecution's application for a further adjournment, 3 December 2014, [CC-O 1/09-02/1 1-981, 26.

to this decision, the OTP issued a notice of withdrawal of Kenyatta's case on 5th December, 2014. It charged that the evidentiary levels against Kenyatta had not improved and that the denial of further adjournment of his case until the Kenyan government provided further cooperation would be untenable¹⁶⁰. However, the withdrawal was without prejudice of bringing charges against him should it find any evidence on the same circumstances in future.

On 13th March, 2015, the Trial Chamber V (B) agreed with the OTP's request for withdrawal, thereby termination Kenyatta's proceedings, discharging him of the summons conditions but also stated that the OTP could bring the same charges against him in future should it get evidence¹⁶¹. With the Trial Chamber rejection of finding Kenyan government of non-cooperation under Article 87 (7) of the statute on 3rd December, 2014¹⁶² and Appeals Chamber refusal to overturn the OTP's appeal on this matter on 19th August, 2015¹⁶³, the contestation over Kenya's government cooperation with the ICC ended and this marked the end of Kenyatta's case. The Trial Chamber held that the OTP did not demonstrate that it had exhausted all judicial measures to obtain evidence and that a referral to the ASP is not automatic as argued by OTP¹⁶⁴. However, the Trial Chamber V (B) reversed the December 2014 ruling and found Kenya for non-cooperation in September 2016¹⁶⁵. It further referred Kenya to the ASP and the matter is now before it for consideration¹⁶⁶.

ii. Legal Issues Contested at the Assembly of State Parties

The Kenyan cases generated a lot heat and controversy if not overshadowed the 12th and 14th Sessions of the Assembly of State Parties of the ICC. Of the twenty-one situations and cases before the ICC, none has brought such heat at the ASP like Kenya. This section will

¹⁶⁰ *Prosecutor V. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, para 2, 5 December 2014 Notice of withdrawal of the charges against Uhuru Muigai Kenyatta.

¹⁶¹ *Prosecutor V. Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr. Kenyatta, 01/09-02/11, para 9-11, 13 March 2015.

¹⁶² Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute ICC-01/09-02/11-982, 46.

¹⁶³ Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" ICC-01/09-02/11 OA 5 para 98.

¹⁶⁴ *Ibid*.

¹⁶⁵ *The Prosecutor v. Uhuru Muigai Kenyatta*, "Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" ICC-01/09-02/11, para 38.

¹⁶⁶ *Ibid*

therefore analyze key legal issues that were ventilated at these sessions but with a lot of contestation.

a) African Union Sponsored Proposal to Amend Article 27 of the ICC's Statute during the 12th Session of the ASP

The AU acting on behalf of the majority of its members sponsored an amendment of Article 27 of the statute during the 12th Session of the ASP in order to grant both Kenyatta and Ruto immunity from prosecution due to their new status as the President and Deputy-President respectively¹⁶⁷. This proposal was made because the UNSC refused to defer their cases again in November 2013 and therefore the November's 2013 meeting of the ASP was the only opportunity they had to get any form of excusal from physically attending the trials.

This session was therefore reduced to a battleground between the AU on one side and the other countries on the other side as the clarion call for African countries mass withdrawal from the ICC due to non-deferral of the Kenyan cases had reached fever pitch. As noted by some observers, the main agenda for this session was therefore reduced to cooling tensions from the AU over Kenyatta and Ruto's cases¹⁶⁸ and a quick solution had to be found.

However, the proposal to amend Article 27 of the statute was found so drastic by the majority of non-African states and Kenyan civil societies groups like Kenya for Peace Truth and Justice and Kenya Human Rights Commission¹⁶⁹. They argued that such amendment would defeat the overall objective of the world's community of punishing impunity at the highest levels of government¹⁷⁰. Nonetheless, this attempt was legally unwise as such an amendment would not have benefitted the accused as Article 121 (4) of the ICC's statute provides that any amendment can only come into force one year for all state parties after instruments of ratification or acceptance have been deposited with the Secretary-General of the UN by seven-eighths of them.

Even so, it led to a compromise of amending the court's RPE as unlike the statute, the amendments would take effect immediately and therefore benefiting the accused and also

¹⁶⁷ Coalition for the International Criminal Court, *Report on the 12th Session of the Assembly of States Parties to the Rome Statute*, available at http://www.iccnw.org/documents/asp12_report.pdf (accessed 8 November 2016).

¹⁶⁸ Ibid.

¹⁶⁹ Kenya for Peace Truth and Justice, 'Njonjo Mue's Remarks at the 12th Assembly of State Parties of the International Criminal Court', available at <http://kptj.africog.org/njonjo-mues-remarks-at-the-asp/> (accessed 8 November 2016).

¹⁷⁰ Ibid.

ease the tension between the AU and the ASP. Three rules were inserted after rule 134 of the RFP and they dwell on three fundamental issues namely the presence of an accused through the use of video technology¹⁷¹, physical excusal from trial¹⁷² and excusal from presence at trial due to extraordinary public duties¹⁷³.

This heralded a new jurisprudence not just in the ICC but also in other international criminal *ad hoc* tribunals as never before had accused persons being granted such form of judicial privileges. However, rule 134*quater* that provides excusal from presence at trial due to extraordinary public duties has faced challenges on what exactly entails ‘extraordinary public duties’. This issue was brought up by the OTP when Ruto applied to be excused from physical presence at all trial hearings due to his extraordinary duties as a Deputy-President. In objecting this request, OTP argued that such a rule only exempts Ruto due to his strict official duties and was not a blanket excusal.¹⁷⁴ OTP therefore averred that the rule was open to abuse and thus Ruto needed to specify the exact extra-ordinary duties he was conducting as not all his official duties were extraordinary. The Trial Chamber was not

¹⁷¹ Rule 134*bis*

Presence through the use of video technology.

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

¹⁷² Rule 134*ter*

Excusal from presence at trial.

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
2. The Trial Chamber shall only grant the request if it is satisfied that: (a) exceptional circumstances exist to justify such an absence; (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate; (c) the accused has explicitly waived his or her right to be present at the trial; and (d) the rights of the accused will be fully ensured in his or her absence.
3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

¹⁷³ Rule 134*quater*

Excusal from presence at trial due to extraordinary public duties.

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.
2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

¹⁷⁴ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11, Paras 29-31, 18 February 2014; Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*.

persuaded by the OTP and therefore allowed Ruto to skip virtually all trial hearings except critical sessions such as¹⁷⁵.

The exemption to application of rule 134*quater* was also extended to Kenyatta's case. The Trial Chamber refused to excuse him from not physically attending the status conference on 8th October, 2014 as it felt his case had reached a 'critical juncture' and that the issues for deliberations had a direct impact on his interests and that of both the victims and witnesses¹⁷⁶. Kenyatta therefore attended the conference and this marked the last day of his attendance at the ICC as the OTP withdrew his case on 5th December 2014.

With these rulings, a new precedent was created through the Kenyan cases though not without contention. The tensions between the AU on one hand and both the ASP and the ICC on the other hand substantially reduced because of rule 134*quater*. This amendment and the TC's ruling in Ruto's case indicates the careful legal and political compromise that both the ASP and the ICC faces in prosecutions of high ranking government officials who willingly cooperate with the court.

b) Kenya's Review of the Application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly during the 14th Session of the ASP

The 14th Session of the ASP, which the author of this study attended, was again overshadowed by the Kenyan government supplementary agenda that sought clarification of the legislative intent of rule 68 of the RPE that was amended during the 12th Session of the ASP¹⁷⁷. Kenya wanted the ASP to reaffirm the non-retroactive application of the rule to

¹⁷⁵ Ibid.

- 1) the entirety of the closing statements of all parties and participants in the case;
- 2) when victims present their views and concerns in person;
- 3) the entirety of the delivery of the judgment in the case;
- 4) the entirety of the sentencing hearing, if applicable;
- 5) the entirety of the sentencing, if applicable;
- 6) the entirety of the victim impact hearings, if applicable;
- 7) the entirety of the reparation hearings, if applicable;
- 8) the first five days of hearing starting after a judicial recess as set out in regulation 19bis of the Regulations of the Court; and
- 9) (9) any other attendance directed by the Chamber either *proprio motu* or other request of a party or participant as decided by the Chamber.

¹⁷⁶ *Prosecutor V. Uhuru Muigai Kenyatta* ICC-01/09-02/11 30 September 2014; Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014 paras 19-2.

¹⁷⁷ Secretariat, Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Fourteenth Session The Hague,' 18-26 November 2015 Official Records Vol I ICC Publication 2015; submission made

situations commenced before the 27 November 2013¹⁷⁸. This move was necessitated by adoption of amendments of rule 68 by the 12th ASP's session and its subsequent application in Ruto's and Sang's cases that led to the Trial Chamber admission of prior recorded statements of some OTP's witnesses who now refused to testify before the court or were deceased¹⁷⁹.

The amended rule 68 of the RPE allowed use of prior recorded testimony if it comes from a person who has subsequently died, is presumed dead or due to obstacles that cannot be overcome with reasonable diligence, the witnesses cannot testify orally. However, it noted that such evidence should not be used at the detriment of the accused and therefore Kenya argued that without an express clause stating that it would not be applied on cases seized by the ICC before the 27th November, 2013 when it was adopted, Ruto and Sang would be prejudiced, a view I agree with¹⁸⁰.

Kenya therefore proposed the following text clarifying the application of rule 68 as amended during the 12th Session of the ASP, “...Recalling further that in amending rule 68, the Assembly of States Parties was mindful of article 51(4) of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused...”¹⁸¹.

This proposal was again accompanied by threats to withdraw from the ICC by Kenya and many African countries¹⁸² and was sharply opposed by the OTP¹⁸³, local and international pro-ICC civil societies organizations¹⁸⁴, the Latin American and Caribbean, Eastern European, Western European and Others groups¹⁸⁵. It had overwhelming support of the African group and considerable support of some members of the Asia-Pacific group. The

by Kenya on 3rd November 2015 for the inclusion of two supplementary items in the agenda of the fourteenth session of the assembly.’

<https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-35-Add2-ENG.pdf> accessed on 24th July 2016.

¹⁷⁸ Ibid.

¹⁷⁹ Decision on Prosecution Request for Admission of Prior Recorded Testimony, para 151.

¹⁸⁰ Ibid n176.

¹⁸¹ Ibid.

¹⁸² Justus Wang, ‘Kenya issues threatens to pull out of the ICC’ Sunday Nation (Nairobi 22 November 2015).

¹⁸³ Global Justice, “ASP 14: ICC independence under threat at annual assembly”, available at <<https://ciccglobaljustice.wordpress.com/2015/11/27/asp-14-icc-independence-under-threat-at-annual-assembly/>> accessed 1 July 2016.

¹⁸⁴ Ibid.

¹⁸⁵ George Kegoro, ‘Lessons in Kenya’s bid to save Ruto from Hague clutches’ Sunday Nation (Nairobi 2015).

overriding reason fronted for opposing this proposal was that it raised a matter that was under consideration by the Appeals Chamber and therefore Kenya should have left it to the chamber's decision¹⁸⁶. It was also felt that Kenya was attempting to politically interfere with the independence of the court and therefore should not be allowed as in any case, the AU was admitted¹⁸⁷ as an *amicus curiae* on this matter by the Appeals Chamber. Finally, there are groups that alleged that any affirmation of Kenya's proposal would be rewarding impunity due to possible instances of witnesses tampering and interference¹⁸⁸.

Despite these opposition, Kenya and the African group put very strong diplomatic persuasion and were able to come up with a compromise text which read as follows, “*Following the debate on the supplementary item “Review of the Application and Implementation of Amendments to the Rules of Procedure and Evidence introduced at the ICC-ASP/14/20 20-E-070316 13 12th Assembly”, the Assembly recalled its resolution ICC-ASP/12/Res.7, dated 27 November 2013, which amended rule 68 of the Rules of Procedure and Evidence, which entered into force on the above date, and consistent with the Rome Statute reaffirmed its understanding that the amended rule 68 shall not be applied retroactively*”¹⁸⁹.

However, this compromise was again criticized by many CSOs as they termed it as political arm-twisting of the ICC, which dents the credibility of the courts judicial process¹⁹⁰. Nonetheless, the 12th February, 2016, Appeals Chamber judgement of Ruto's and Sang's appeal against the use of prior recorded evidence indicates that the Kenya's success at the 14th Session of the ASP was not a win as regarded by the Kenyan delegation at the ASP¹⁹¹, as the Appeals Chamber rejected its application. The chamber argued that the text was inapplicable because it was not carried out in a resolution but rather it was contained in the

¹⁸⁶ Human Rights Watch, 'Recent International Criminal Court Developments on Kenya, South Africa' <<https://www.hrw.org/news/2016/01/27/recent-international-criminal-court-developments-kenya-south-africa>> accessed 8 November 2016.

¹⁸⁷ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11 OA 10 12 October, 2015; Decision on applications for leave to submit amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence.

¹⁸⁸ KPTJ, Statement by Kenyans for Peace with Truth and Justice 14th Assembly of States Parties of the Rome Statute KPTJ/19/11/15.

¹⁸⁹ *Ibid* n176.

¹⁹⁰ *Ibid* 117.

¹⁹¹ Simon Ndonga 'Leaders hail Kenya's win at ICC conference' *Capital FM* (Nairobi 27 November 2015) <<http://www.capitalfm.co.ke/news/2015/11/leaders-hail-kenyas-win-at-icc-conference/>> accessed 1 June 2016.

official records of the proceedings¹⁹². It also stated that assuming the text was carried out in a resolution, its language did not amount to amending the amended rule 68 of the 12th Session of the ASP¹⁹³.

This judgment therefore carries a fundamental advice to states during negotiations of ensuring the drafting language of any agreement is in congruence with their overall objective and also carried in a resolution or the applicable text as a state may be quick to declare victory but when closely scrutinized as held by the Appeals Chamber on this matter, it's not a victory.

The chamber's judgment was therefore the real victory for the accused not the ASP's compromise as it overturned the Trial Chambers admission of prior recorded evidence. It held that the amended rule 68 of the RPE enlarged exemptions to the principle of orality as stipulated in Article 69 (2) of the statute thereby denying the accused the rights to cross-examine the witnesses and challenge the evidence thus compromising the rights to a fair trial as enshrined by the statute¹⁹⁴. In summary, it held that the Trial Chamber applied amended rule 68 of the Rules retroactively to the detriment of both Ruto and Sang¹⁹⁵. This marked the end of the contestation of the application of the amended rule 68 and created a jurisprudence on this matter.

2.5 Conclusion

As analyzed in this chapter, the disputed 2007 general elections in Kenya led to unprecedented violence in Kenya which was later held as crimes against humanity by Pre-Trial Chamber I. The political settlement that followed thereafter entailed the commitment to punish the perpetrators of the 2007/2008 PEV. However, the Kenyan judiciary could not be trusted to punish impunity and at the same time, it did not have the capacity to do. Further, the political elite in Kenya had historically promoted and enjoyed the benefits of impunity and therefore could not be trusted to punish the perpetrators of the PEV and especially the high-level ones.

Kenyan parliament rejected efforts to establish the local tribunal and therefore the ICC's prosecutor was seized of the Kenyan situation. Efforts by Kenya to stop the trials through

¹⁹² *Prosecutor v. William Samoei Ruto and Joshua arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", paras 18-19.

¹⁹³ *Ibid* 19.

¹⁹⁴ *Ibid* 94.

¹⁹⁵ *Ibid* 95.

deferral failed and this escalated tensions between the ICC and the AU. Therefore, Kenya resorted to the ASP to get some judicial privileges but after a lengthy legal and diplomatic contestation, all the Kenyan cases collapsed. The Kosgey and Ali cases were not confirmed whereas that of Kenyatta, Ruto, Muthaura and Sang were withdrawn by the OTP. Overall, the Kenyan cases have played a central role in developing the jurisprudence of the ICC and the international criminal law.

CHAPTER THREE

The Kenyan Situation: Deferral and Enforcement

3.1 Introduction

Article 16 of the International Criminal Court statute gives the United Nations Security Council power to stop or suspend any investigations or prosecutions before the ICC for a period of one year that is renewable. It reads as follows; *'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations has requested the Court to that effect; that request may be renewed by the Council under the same conditions'*.

Article 16 is unlike that of article 23 (3) of the first draft of the International Law Commission which expected the court not to commence any prosecutions or investigations on any situation which was seized by the UNSC as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the UNSC decides¹⁹⁶. In this respect, this power of the UNSC was one of the most contested issue during the drafting of ICC's statute¹⁹⁷. The drafting was very contentious, reflecting the widely divergent views expressed throughout the negotiating process on what the link should be between the Court as the judicial body and the Security Council as a political organ of the United Nations¹⁹⁸. The controversy escalated as article 16 was held by some states as a codification of the right of the UNSC, a political body, to interfere with the work of a judicial body and thus undermining the stature of the court as an independent and impartial judicial body¹⁹⁹. Even when it became clear in preparatory negotiation meetings that a majority of the states supported some form of UNSC deferral power, the modalities of its exercise remained controversial.

¹⁹⁶ International Law Commission Draft Statute for an International Criminal Court II B I (1994), article 23 para 3 85.

¹⁹⁷ Morten Bergsmo, Jelena Pejic, Dan Zhu, 'The Rome Statute of the ICC' in Triffterer/Ambos, (eds) (3rd edn (Hart Publishing 2016)770

¹⁹⁸ William A. Schabas, 'The International Criminal Court: A Commentary on the Rome Statute', (2016) 2nd Edn OUP 437.

¹⁹⁹ See Robert C., Hakan F., Darryl R., & Elizabeth Wilmschurst *An Introduction to International Criminal Law and Procedure* (2012) Cambridge University Press: Cambridge, 2007 138; Also see Robert Cryer, 'The Security Council, Article 16 and Darfur', (2008) *Oxford Transitional Justice Working Paper Series*, at 2; Report of Chatham International Law Meeting Summary, with Parliamentarians for Global Action, 'The UN Security Council and the International Criminal Court', 14.

An analysis of the negotiations that led to adoption of article 16 discloses various reasons why state parties granted UNSC the deferral power. These include; First, the understanding of some state parties was that the UNSC has the primary responsibility of maintenance of international peace and security and thus should be allowed to intervene when demands of peace overrides that of justice²⁰⁰. Second, the state parties felt that rushed action by OTP over a situation in which international crimes are suspected to have been committed may undermine diplomatic, political or other mechanisms adopted by the council to preserve or restore calm in an otherwise volatile situation²⁰¹. Therefore, article 16 would be a safeguard against prosecutorial zeal and this was one of several compromises that had to be made in order to persuade reluctant states such as the U.S.A, China, Israel, Qatar and Libya to support the establishment of the ICC.²⁰²

In this regard, there has been an intense debate about how UNSC exercises its deferral power and also the exact way this power is supposed to be exercised. The question of deferral powers of the UNSC continues particularly because there has been abuse of this power by the UNSC and also it has not deferred situations before the ICC whose proponents believe are meritorious. The refusal to defer cases like that of Kenya has had negative consequences on the fight against impunity. Through the AU, the refusal has galvanised a lot of opposition against the ICC and the UNSC. Although article 16 of the ICC's statute together with article 39 of Chapter VII of the charter of the UN has attempted to specify the criteria for deferral of cases, UNSC's refusal to defer these cases has been termed as bias and malice towards African countries.

3.2 Article 16 in Practice

Since when the ICC began operations, there has been two deferrals of situations which I regard distinctive. This is because unlike the strict interpretation of article 16 which means a deferral can only occur for an investigation which is before the OTP or a prosecution that is underway, these deferrals are of situations not before the OTP's investigation or prosecution. These are;

²⁰⁰ Ibid.

²⁰¹ Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', [2002] vol 78 issue 4 *International Affairs* (Royal Institute of International Affairs 1944-) 704.

²⁰² Ibid; See also John Bolton, 'The risks and weaknesses of the International Criminal Court from America's perspective' [2000] vol 41 *Virginia Journal of International Law* 186-198.

a. Resolution 1422 of 2002

The UNSC, on 12th July 2002, adopted Resolution 1422 of 2002.²⁰³ This resolution requested the ICC to refrain from initiating investigations or prosecutions over the UN peacekeepers from states not party to the Rome statute, for actions or omissions that may arise after the adoption of the resolution which may amount to international crimes. Further, the resolution reaffirmed the intention of the UNSC to *'renew the request... under the same conditions each subsequent 1st of July for further 12 month periods...'*²⁰⁴ This resolution was adopted at the behest of the US, which had threatened in June 2002 to veto the renewal of the mandate of the UN Mission in Bosnia and Herzegovina, in addition to vetoing all future peacekeeping operations unless its servicemen were granted immunity from ICC jurisdiction.²⁰⁵

b. Resolution 1487 of 2003

The UNSC again on the insistence of the US, on 12th June, 2003 adopted Resolution 1487 of 2003.²⁰⁶ Resolution 1422(2002) was to expire by 13th July 2003, thus on 12th June 2003, the council renewed it for a further twelve months by adoption of resolution 1487 of 2003. The two resolutions were essentially identical. The council's request was that for the twelve-month period beginning on July 1, 2003, the ICC was to refrain from commencing or continuing investigations into UN peacekeeping personnel states not party to the Rome Statute. The UNSC in resolution 1487(2003) also expressed its intention, as it had done under resolution 1422 (2002) in the previous year, to renew the resolution *'under the same conditions each 1 July for further 12-month periods for as long as may be necessary'*.²⁰⁷ Essentially, the council was by this resolution granting a one-year extension of immunity

²⁰³ This Resolution was passed within two weeks of the coming into force of the Rome Statute, and even before the Court had been set up.

²⁰⁴ See UNSC Resolution 1422 of 12th July 2002; See also Bryan MacPherson, 'Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings' American Society of International Law Insights.

²⁰⁵ Sean D Murphy 'Efforts to obtain immunity from ICC for US peacekeepers' [2002] vol. 96 American Journal of International Law 725–727; See also the statement by the United States' representative at the UNSC's meeting of 10 July 2002 (UN Doc S/PV/4568, 9–10)

²⁰⁶ United Nations Security Council Resolution 1487, UN Doc S/RES/1487, (2003). The UNSC Resolution 1487, while referencing Article 16 of the Rome Statute, provided that the ICC, in the event 'a case arises involving current or former officials or personnel from a Contributing State not a Party to the Rome Statute over acts or omissions relating to a UN established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.'

²⁰⁷ Ibid.

from ICC action to UN peacekeeping personnel from countries that were not party to the ICC, beginning on July 1, 2003.

In this respect, although these two resolutions are the classical way in which the UNSC has attempted to defer situations, they have faced considerable opposition from some countries as they are regarded not in tandem with the letter and spirit of article 16²⁰⁸. During the Council's debate on resolution 1487, Netherlands opposed the interpretation of article 16 to mean that it would be invoked in respect of unknown future events²⁰⁹. In the view of Netherland's delegates, which was also supported by Canada, Germany, the then UN Secretary General and Syria, article 16 allows a deferral on a case by case basis and not on general situations²¹⁰. These countries were opposed to this form of interpretation of article 16 due to concerns that it would expose the ICC to unfettered interference by the UNSC thus damaging its credibility and independence²¹¹. Further extension of these resolutions was also met with strong opposition as they came at a point when the US was globally accused of mistreating prisoners in Guantanamo Bay and Iraq²¹². Since then, the UNSC has not deferred any situation before or outside the purview of the court.

The opposition to such deferrals also extends to various legal scholars like William Schabas who questions the legality of how it was applied as according to him, article 16 ought to apply to a specific situation or investigation and not a blanket excusal of a group of persons²¹³. Further, he contends that it also should apply when there is a threat of international peace and security and in this situation, there was none²¹⁴. Moreover, scholars like Ken Obura have brought further concerns regarding how article 16 was applied like discrimination of peace keepers from state parties to the ICC as they were not exempted

²⁰⁸ United Nations, 'Security Council Requests One-Year Extension of UN Peacekeeper Immunity from International Criminal Court' (12 June 2003)

< <http://www.un.org/press/en/2003/sc7789.doc.htm>> accessed 8 November 2016.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² UN SCOR, 58th Session, 20.

²¹³ William A. Schabas, 'An Introduction to the International Criminal Court,'[2011] 4th edn Cambridge University Press 185-186.

²¹⁴ Ibid.

from the ICC's jurisdiction like those from non-state parties²¹⁵. Obura also notes that such an application affects the credibility of the court²¹⁶.

3.3 Kenya's Deferrals Attempts

The first Kenyan government deferral request was submitted to the UNSC on 4 March, 2011. In an attempt to fulfil the conditions of deferral in article 16, Kenya advanced two central reasons. One, that any trials of the six suspects would threaten international peace and security and secondly, that it could domestically and credibly prosecute the perpetrators of PEV as it has enacted a new Constitution that ushered in credible reforms in its judicial process²¹⁷. In a bid to demonstrate that Kenya was serious to undertake domestic trials, the request was accompanied by a brief that indicated how the police were pursuing 6,000 people over human rights atrocities committed during the PEV and also an order by the AG to investigate the six ICC suspects over any international crimes committed during the PEV. As indicated, the AU supported this reasoning and added that Kenya had capacity to deliver justice to PEV victims due to significant judicial transformation process and that a deferral would grant Kenya an opportunity of undertaking national healing and reconciliation²¹⁸.

This request drew immediate opposition from various quarters. In fact, the request did not garner bipartisan support within the grand coalition government as ODM party, which formed part of the grand coalition immediately opposed the deferral bid²¹⁹. ODM argued that prosecution of the 6 suspects would not threaten international peace and security but instead failure to prosecute perpetrators of post-election violence would pose grave danger to Kenya's internal peace and security. It also argued that Kenyan judiciary was incapable of prosecuting such crimes amongst other reasons. This position was supported by Kenyan civil societies groups.

²¹⁵ Ken Obura, 'The Security Council and the International Criminal Court: When can the Security Council Defer a Case?' (2015) *Strathmore Law Journal*
< <http://www.press.strathmore.edu/uploads/journals/strathmore-law-journal/SLJ1/1-SLJ-1-KObura-UNSC-and-ICC-Deferral.pdf>> accessed 8 November 2016.

²¹⁶ *Ibid.*

²¹⁷ Sosteness Francis Materu, 'The Post-Election in Kenya, Domestic and International Legal Responses' (2015) TMC Asser Press 231.

²¹⁸ *Ibid.*

²¹⁹ Lionel Nichols, 'The International Criminal Court and End of Impunity in Kenya,' (2015) Springer, 217.

At the international level, France and Britain, permanent members of the UNSC opposed this request sending strong pointer that the bid would not succeed. France was of the opinion that Kenya should challenge the jurisdiction of the ICC and admissibility of the cases in the ICC instead of seeking to defer the cases²²⁰. The ICC's prosecutor also bitterly opposed the request. OTP accused Kenya of '*promoting a growing climate of fear that is intimidating potential witnesses and ultimately undermining national and international investigations*'²²¹.

Eventually, UNSC, through an informal side meeting rejected the Kenyan deferral bid²²². This trend was similar to that of both Libya and Sudan where the council refused to defer the prosecution of both Presidents Gaddafi and Bashir as requested by the AU²²³.

With this regard, the UNSC members, especially France, the US and Britain argued that the prosecution of six Kenyans was not a threat to international peace and security. Put simply, UNSC felt that the Kenyan bid did not meet the threshold of article 16. In an analysis of the UNSC's opposition to this bid, some legal scholars like Dapo Akande opine that the reasons presented by Kenya pertained to complementarity not deferral of a situations²²⁴. This is correct as reforms in the Kenyan judiciary would have been a basis for Kenya to challenge the jurisdiction of the ICC and the admissibility of the six cases as it did, but not to justify for a deferral.

Notwithstanding the 2011 deferral rejection, Kenyan government through robust support by AU again, submitted another request in 2013. However, this request was equally rejected despite that it enjoyed a higher profile and attention from the UNSC than the 2011 bid as two suspects, Uhuru Kenyatta and William Ruto were elected as President and Deputy President respectively on 4th March 2013. The UNSC was evenly divided on this matter as

²²⁰ Serena K. Sharma, 'The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya,' (2016) Routledge 103.

²²¹ ICC, 'Statement of the Prosecutor on the Situation in Kenya', <<https://www.icc-cpi.int/NR/rdonlyres/269744E4-9F7D-468F-9B24C2AE74B012D1/283377/StatementICCProsecutoronsituationinKenya1.pdf>> accessed 1 April 2016.

²²² Ibid (n 219).

²²³ Juliet Okoth, 'Africa and the International Criminal Court,' Gerhard Werle, Lorell Fernandez, Moritz Vorm Baum, eds (TMC Asser Press 2014) 203.

²²⁴ Dapo Akande, 'Kenya's ICC Deferral Request and the proposed amendment to article 16 of the Rome Statute' <<http://www.ejiltalk.org/kenya%E2%80%99s-icc-deferral-request-and-the-proposed-amendment-to-article-16-of-the-rome-statute/>> accessed 7 November 2016.

7 voted in favour of deferral, 8 abstained and therefore Kenya did not garner the required 9 affirmative votes²²⁵. Notably, the reasons advanced for seeking the deferral were quite different from the ones stated in 2011 deferral bid. The request was hinged on the following; prevailing and continuing terrorist threat existing in the Horn of Africa and giving Kenya a chance in consultation with the Court and Assembly of States Parties to the Rome Statute, to consider how best to respond to the threat to international peace and security in the context of the Kenyan situation²²⁶.

Nonetheless, the outcome of this request is instrumental in this study as it offers a deep insight on how various members of the UNSC applied article 16. The different positions taken by permanent members of the UNSC were quite interesting. US, France and Britain on one hand opposed the bid but chose a diplomatic way by abstaining from voting while on the hand, both China and Russia voted in favour of deferral²²⁷. The US argued that ASP and the ICC were the best platform for Kenya to get a redress although this argument is less compelling. This is because the ASP and ICC cannot handle any request for deferral as per article 16. They can only wait for a communication from the UNSC on whether it has deferred a matter or not. Essentially, the US did not argue on whether Kenya's bid met the deferral threshold as enunciated in article 16 of the court's statute. France also failed to address the legal merit of Kenya's application as it only stated, '*...the vote had been unnecessary when the Council was in the midst of consultations with African States*'²²⁸. In contrast, Britain attempted to look into whether the Kenyan request met the legal threshold set by article 16. It stated, '*...the sponsors had failed to establish the Charter VII threshold beyond which the Court's proceedings against the Kenyan leaders would pose a threat to international peace and security*'²²⁹. Therefore, both the US and France did not delve into the legal merit of Kenya's application and although Britain attempted to do so, its argument was superficial not analytical as would have been expected. An analytical assessment would have interrogated whether the Kenya's deferral request supporting information was a threat

²²⁵ United Nation, 'Security Council Resolution Seeking Deferral of Kenyan Leaders; Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining.'

<<http://www.un.org/press/en/2013/sc11176.doc.htm>> accessed 12 February 2016.

²²⁶ Security Council, 'Identical letters from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council.' (2013) S/2013/624.

²²⁷ Ibid 165.

²²⁸ Ibid.

²²⁹ Ibid.

to international peace or not, inquire into the status of witnesses and the victims of the PEV and whether the interests of peace overrode those of justice.

This failure to adequately address the legal merits of the deferral request by countries that abstained extended to other non-permanent members of the UNSC such as Argentina, Australia, Guatemala, Luxembourg and Republic of Korea. Although Argentina abstained, it justified that UNSC's failure to interpret strictly whether the trial posed a threat to international peace and security was the cause of its abstention²³⁰. This view by Argentina is critical for this study as it raises a fundamental legal question on why UNSC by-passed considerations of article 16 while making a decision to defer or not. It also provokes the legal question as to whether in the first-place article 16 provides an adequate legal framework to guide considerations of deferral of cases or situations. Guatemala just like Argentina abstained but the arguments it made are profound for this study. It noted that non-deferral of the cases would be detrimental to AU but at the same time questioned why '*...some countries had submitted a draft resolution in full knowledge that it would not be adopted...*'²³¹. This position elicits the question of what more should states like Kenya have fronted in order to secure a deferral considering that article 16 lays the general legal requirement of a deferral. Further, it provokes the question of what satisfies UNSC that a situation merits a deferral considering that Resolutions 1422 of 2002 and 1487 of 2003 did not provide any concrete jurisprudence on this matter. In any case, these deferrals were not on a situation or case already seized by the ICC.

In this respect, China and Russia, permanent members of the UNSC took a different position from their counterparts and voted in favor of deferral²³². However, together with other countries, they centered their arguments mainly on article 16 unlike those who abstained. Russia stated that Kenya's request was meritorious as it was engaged in fighting terrorism in the Horn of Africa and that it did not undermine ICC's integrity²³³. Additionally, Russia averred that the request would have actually increased the credibility of the ICC among African countries and demonstrate its readiness to address "complicated and ambiguous" situations. China argued that the request was properly grounded on the principles of the

²³⁰ United Nations Security Council, Peace and Security in Africa, S/PV.7060, 15 November 2014 para 4.

²³¹ Ibid 2.

²³² Ibid 5.

²³³ Ibid 6.

UN²³⁴. Notably, Azerbaijan just like Russia advanced the reasoning that the deferral was necessary as it would enable both Kenyatta and Ruto who were democratically elected to effectively discharge their constitutional mandates²³⁵.

In this respect, a review of submissions of all the African countries sitting at the UNSC's hearing, Rwanda, Togo, Ethiopia and Kenya, shows the gravity of tension between UNSC and ICC on one side and the AU and majority of African states on the other side²³⁶. The African countries did not just advance the legal meritocracy of the request but also the narrative accompanying the request that some western members of UNSC such as the US, Britain and France are biased against African countries on ICC matters. The Rwandan representative summed up as follows, '*...Let it be written in history that the Council failed Kenya and Africa on this issue...Today's vote undermined the principle of sovereign equality and confirmed the long-held view that international mechanisms were manipulated to serve select interests. Article 16 had never been meant to be used by an African State; it appeared to be a tool used by Western Powers to "protect their own"*'²³⁷.

3.4 Emerging Legal Issues from Kenyan Deferral Attempts

Although article 16 of the ICC's statute provides for deferral, the deliberations of the Kenyan deferral requests bring out critical legal issues and gaps that need to be addressed. However, from the analysis of this study, the two deferrals by UNSC and two non-deferrals shows a different picture as the issue of the threat of international peace and security was not extensively considered by the UNSC.

In the Kenyan situation, there was an attempt to examine whether its request met the threshold in article 16 but as noted by the Argentina representative, this issue was not given proper attention²³⁸. By not analysing whether the Kenyan situation was a threat to international peace and security and especially by those members who were against the deferral, the UNSC failed to provide a jurisprudence on what exactly entails a threat to international peace and security under article 16 or ICC trials to be exact. This is more so because the deferral resolutions 1422 of 2002 and 1487 of 2003, did not examine this issue and thus the Kenyan request was a golden opportunity to discuss the matter. Additionally,

²³⁴ Ibid 12.

²³⁵ Ibid 9.

²³⁶ Ibid 10.

²³⁷ Ibid 10.

²³⁸ Ibid 4.

the Kenyan request provided a rare opportunity of analysing whether the trial of a sitting head of state and his deputy can amount to a threat to international peace and security as argued by both Kenya and the AU.

Moreover, the Kenyan deferral also brought us other emerging legal questions such as; First, although article 16 gives any state party the right to apply for a deferral, which policy guides how that right ought to be effectively exercised and also the specific framework that guides UNSC in making a determination of deferral. These questions are critical as from the first Kenyan deferral request, it appears Kenya did not properly frame its deferral request. The request appeared more of a complementary one not a deferral. The unpreparedness, which could be attributable to lack of a specific guideline might be the one which prompted the Guatemala representative to say that Kenya brought a request knowing well that it would not be adopted and did not accord with the goal of promoting Council unity²³⁹. Further, the reasons granted by the UNSC for not deferring the matter did not appear grounded in article 16, on both requests, and therefore caused more disenchantment with both the UNSC and ICC. It led to accusations that the UNSC was biased against African countries.

Second, the Kenyan deferral brought an emerging issue on the protection of the victims, witnesses and their participation in the proceedings and also how to deal with evidence under article 68 and 69 of the ICC's statute respectively once a case is deferred. The critical questions in this regard by some scholars like Olasolo are how to protect victims, witnesses and preserve evidence if an investigation or prosecution is deferred under article 16²⁴⁰. Unfortunately, this issue was raised by Argentina's representative and despite its centrality to a deferral, the UNSC did not address it²⁴¹. Further, there was no indication that UNSC had asked the ICC to provide status of both the witnesses and victims so as to guide them on how to address the deferral requests. This was a missed opportunity for the UNSC as since a deferral presumes that an investigation or prosecution will resume once the threat to international peace and security is over, measures to protect victims, witnesses and preserve evidence during the deferral period ought to be put in place.

²³⁹ Ibid 2.

²⁴⁰ Hector Olasolo, 'The Triggering Procedure of the International Criminal Court,' (2005) Martinus Nijhoff Publishers 295.

²⁴¹ Ibid (n 229).

Third, the Kenyan deferral brought out the question of how reparation for victims under article 75 should be handled if an investigation or prosecution is deferred. Considering that it's in the interest of the victims and their families for a case to be expeditiously heard and determined so as to get reparation if the accused persons are convicted, this means a deferral will prolong the period of reparation. Evidently, although a state has a right to get a deferral subject to article 16, the victims and their families also have a right to timely reparation and therefore the UNSC is expected to consider this interest. Unfortunately, this issue was raised by Argentina's representative but was not granted careful thought by the UNSC. She said, '*...However, the rights of victims could not be forgotten or the subject of indifference; they deserved truth, justice and reconciliation*'²⁴².

Four, the Kenyan deferral raises the legal question of whether article 16 accommodates the interests of all state parties or not or whether it should be amended to allow an all-inclusive process in deferral decision. There has been a general debate, which cannot be ignored, that some permanent members of the UNSC have used this power selectively and therefore there is need to stop abuse of article 16²⁴³. Failure to defer the Kenyan cases has heightened calls for non-cooperation and mass withdrawal of African countries from the ICC²⁴⁴.

In summary, these legal gaps and questions need to be addressed in order to ensure article 16 promotes the fight against impunity not hinder it. It will also inform the necessary legal and policy changes that are required so as to make article 16 more effective.

3.5 African countries Response to UNSC's failure to Defer Kenyan Cases

As discussed above, there has been tension between a majority African countries and AU on one side and UNSC and ICC on the side due to failure by UNSC to defer the Kenyan. This study holds that such tension does not augur well for the ICC as it denies it unequivocal support from a majority of African countries and also their regional body, the AU. In this regard, African countries have attempted to address this issue by doing the following;

First, the African Union has led a major onslaught against court which is largely hinged on accusations of selectivity or non-usage of article 16 by the Security Council²⁴⁵. Individual

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Liber A. Mahmoudi, 'International Law and Changing Perceptions of Security,' (2014) Brill Nijhoff 243.

²⁴⁵ Mark John, 'Bensouda: ICC protects Africans', *The Standard* (14 December 2011) 6.

African states like Kenya, Uganda, Sudan and Rwanda have also led spirited opposition to the ICC and the main cause is how the UNSC has applied article 16. Although the AU is not a state but a membership regional body of African states, its efforts of mobilizing its members to pass resolutions opposing the ICC due to lack of deferral of cases like that of Kenya and even Sudan cannot be ignored. It has led to the AU passing resolutions barring its members from cooperating with the court.²⁴⁶ This is a blow to the court as for it to succeed in investigations and prosecutions of all cases before it, it requires full cooperation of individual African states and regional bodies. So far, the implications of such resolutions has seen some African states like Kenya and many others like Libya, Democratic Republic of Congo, Malawi, Djibouti, Nigeria, South Africa and Chad refuse to arrest President Omar Bashir who has failed to voluntarily appear before the court to answer to genocide charges.

Secondly, they have proposed amendment of article 16 so that the UNGA can act where the UNSC fails to decide on a deferral request after six months.²⁴⁷ During the eighth session of the ASP in 2009, African countries through the AU presented a proposal for amendment of article 16 so as to empower the UNGA to act in situations where the council fails to decide on a deferral request after the lapse of six months²⁴⁸. Although the ASP failed to include this amendment in the 2009 ICC review conference, this proposal highlights various aggressive steps that many states in Africa have attempted to undertake in order to force deferral of cases by the Security Council.

Third, the AU made a decision in 2009 to extend the mandate of the African Court of Justice and Human Rights to cover international crimes and transnational crimes based on the following reasons: the perceived abuse of the principle of universal jurisdiction by courts in some European countries targeting high-level African officials and politicians; the challenge faced by the AU over Senegal's repeatedly stalled efforts to prosecute the former President of Chad, Hissene Habre and the need to give effect to Article 25(5) of the African Charter on Democracy, Elections and Governance that created a new crime of 'unconstitutional

²⁴⁶ African Union, Assembly, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)', (30-31 January 2011), Assembly/AU/Dec.334(XVI), para 5; African Union, Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court-Doc EX.CL/670(XIX)', Assembly/AU/Dec.366(XVII) (30 June -1 July 2011).

²⁴⁷ Max du Plessis, 'International Criminal Court in Africa; Confronting the Myths.' (2008) Institute for Security Studies: Pretoria.

²⁴⁸ Ibid.

change of government.’²⁴⁹ In this respect, although the current cases before the ICC cannot be taken over by the African court, there is a likelihood that in future, more international crimes committed in Africa and that fall under the ICC’s jurisdiction will be tried in the African court.

3.6 Enforcement Powers of the UNSC

Article 87 (7) of the ICC’s statute provides for enforcement powers of the UNSC in situations whereby state parties to the ICC fail to cooperate with the court on matters it has referred to the ICC. It states as follows, *‘Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council’.*

Kenya has faced two major accusations of non-cooperation with the ICC, on Presidents Kenyatta and Omar al Bashir cases, but this study will dwell on President al Bashir case. This is because although Kenyan government faced accusations of non-cooperation in the Kenyatta case but was not found for non-cooperation by the Appeals Chamber²⁵⁰, should Kenya have been held for non-cooperation, the matter would have been referred to the ASP not the UNSC. UNSC only deals with non-cooperation issues of matters it has referred to the ICC like that of Sudan.

In this respect, Kenyan government invited President Omar al Bashir of Sudan to grace the promulgation of a new Constitution on 27th August 2010 and this elicited a lot uproar from the ICC and other players²⁵¹. This is because as a state party to the ICC, Kenya was obliged to arrest and hand over Bashir to the ICC to face charges of genocide, war crimes and crimes against humanity but did not do so. In fact, inviting Bashir to grace such an auspicious occasion was held by many as a slap on the ICC’s face and an indication of Kenya’s non-commitment to the ICC. Kenya was quick to defend itself by asserting that it was abiding

²⁴⁹ African Charter on Democracy, Elections and Governance (2007).

²⁵⁰ *The Prosecutor v. Uhuru Muigai Kenyatta*, ‘Decision on Prosecution’s application for a finding of non-compliance under Art 87(7) of the Statute’, ICC-01/09-02/11.

²⁵¹ Lucas Barasa, ‘Kenya tells ICC why Bashir was not arrested,’ *Daily Nation* (Nairobi 18 September 2010) <<http://www.nation.co.ke/news/politics/Kenya-tells-ICC-why-Bashir-was-not-arrested/-/1064/1013798/-/pu5xot/-/index.html>> accessed 14 March 2016.

by a 2009 resolution by the AU not to cooperate with the ICC and also that Sudan was a central player in peace and conflict resolution efforts in the Horn of Africa²⁵².

The ICC moved swiftly and reported Kenya to the UNSC under article 87 (7) of its statute. It argued and correctly so that Kenya, ‘...has a clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest, which stems both from the United Nations Security Council Resolution 1593(2005), whereby the United Nations Security Council “urge[d] all States and concerned regional and other international organizations to cooperate fully” with the Court...’²⁵³.

However, UNSC did not act against Kenya just like the situations in China, Malawi, Nigeria, Chad, South Africa, Qatar, Saudi Arabia, Mauritania, Libya, Kuwait, Djibouti, Egypt, Eritrea, Ethiopia, South Sudan and Democratic Republic of Congo where they hosted al Bashir but did not arrest and hand him over to the ICC. This inaction by UNSC has a negative effect on the fight against impunity and especially because the sole reason why the UNSC was granted this power was to address non-cooperation by states as noted by Mc Goldrick²⁵⁴. The unwillingness to arrest Bashir by state parties to the ICC like Kenya, Nigeria and South Africa and even a permanent member of the UNSC like China has ensured that victims of international crimes in Darfur do not get justice. It has also weakened the ICC as it cannot prosecute unless the accused willingly appear before it or are arrested by the concerned parties. Additionally, the inaction has raised questions of whether article 87 (7) imposes an obligation on UNSC to act or not and also which options the ICC has if UNSC fails to act altogether. The time-line of such actions is also a concern. This has extended to calls for reforms on article 87 (7) in order to make it mandatory for UNSC to take measures against any state for non-cooperation with the ICC as inaction encourages impunity and weakens the ICC²⁵⁵.

This inaction by UNSC despite having considerable powers in articles 41 and 42²⁵⁶ of the Charter of the UN may be the reason why domestic civil societies have opted to use the

²⁵²Dapo Akande, ‘ICC Reports Kenya and Chad to the UN Security Council over Bashir’s Visits’ (2010).

<<http://www.ejiltalk.org/icc-reports-kenya-and-chad-to-the-un-security-council-over-bashirs-visits/>>
accessed 8 November 2016.

²⁵³ *The Prosecutor v. Omar Hassan Ahmad al Bashir*, ICC-02/05-01/09 para. 4 ‘Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s presence in the territory of the Republic of Kenya.’

²⁵⁴ Dominic Mc Goldrick, ‘The Permanent International Criminal Court: Legal and Policy Issues’, Dominic Mc Goldrick, Peter Rowe, Eric Donnelly, eds. (Hart Publishing 2004) 102.

²⁵⁵ Casten Stahn, ‘The Law and the Practice of the International Criminal Court,’ (2015) OUP 272.

²⁵⁶ UN Charter, Art 41, ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to

domestic courts in a bid to force their countries to arrest and hand over Bashir as seen in Kenya and South Africa. In Kenya, the Kenyan Section of the International Commission of Jurists, went to the High Court in 2010 seeking for the following orders among others; issuance of a provisional warrant of arrest against Omar Al Bashir and issuance of orders to the 2nd Respondent, the Minister of State for Provincial Administration, to effect the said warrant of arrest, if and when, Omar Al Bashir sets foot within the territory of the Republic of Kenya²⁵⁷. These orders were granted although the government appealed and the appeal court is yet to make a determination. South Africa was confronted by the same issue in 2015 when President al Bashir attended the AU General Assembly. The South African Litigation Centre went to court to seek for arrest and hand over of Bashir to the ICC²⁵⁸. Although they were granted the orders, Bashir had already left South Africa by the time they were issued and therefore was not arrested. The South African government lost on appeal at the Supreme Court.

Therefore, although these two cases did not succeed in having Bashir arrested, they have set forth very important jurisprudence on this matter. South Africa now has an explicit obligation to arrest and hand over Bashir to the ICC should he set foot in its soil. In the Kenyan situation, the appeal court is yet to make a determination.

3.7 Conclusion

Article 16 is critical as it enables the UNSC to intervene in situations whereby an investigation or prosecution by the ICC can jeopardize international peace and security. However, the application of article 16 has generated controversy from various quarters and brought out the need to relook on how the UNSC has applied article 16.

The UNSC has deferred situations not before the ICC, but not a single case or potential investigation by the ICC and therefore has shown its capacity to invoke this power. In this respect, when confronted by deferral requests, it must properly satisfy itself on the merit of the application before making a decision. In addition, the UNSC is expected to provide

apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'; Article 42, 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

²⁵⁷ *Kenya Section of the International Commission of Jurists v. Attorney General & another* [2011] eKLR.

²⁵⁸ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others* 2015 (5) SA 1 (GP).

reasoned arguments on why it's unable to defer a situation. Failure to do so is causing unnecessary tension between it and the majority of African states and the AU as the council appears determined to reject a deferral request from African states despite the merit. In the end, the friction makes the ICC suffer as it fails to get adequate cooperation from states and thus making the fight against impunity a farce.

In regard to enforcement issue, there is consensus that ICC cannot succeed without states cooperation and this becomes even more urgent in states like Sudan that are not members of the ICC. The UNSC has a fundamental role of ensuring that both state and non-state parties of the ICC cooperate with the court especially on matters it has referred to it. The UNSC should be alive to the fact that failure to enforce measures on countries that are not cooperating with the ICC amounts to supporting impunity and therefore it needs to act swiftly in such circumstances.

CHAPTER FOUR

Analysis of the Study Findings

4.1 Introduction

Arising from the examination of how the UNSC has exercised its deferral and enforcement powers under the ICC's statute, this chapter will analyze the findings of this study using the liberal theory and the third world approach approaches to international law.

Deferral in the Context of the Kenyan Cases

In these modern times, states are finding themselves more inclined to be members of the international community as the world moves towards becoming a global village. The absorption as members of the international community accrues many benefits to states but comes with responsibilities including complying with the international law as the rules of engagement amongst and between states as well as the treatment of the individual citizens and non-citizens in those states. These international legal bodies which include the ICC have established laws and norms which the signatories must adhere to the age-old question of the obedience to international laws. From the foregoing, I have majorly discussed the issues of the deferral of the Kenyan cases, a subject of the ICC under article 16 as well as the enforcement powers of the UNSC under article 87 (7) of the Rome Statute.

The UNSC has the power to defer a case under article 16 of the Rome Statute. This power has been bestowed upon the UNSC due to its primary responsibility under the Charter of the UN of maintaining peace and security in the world. It is a mandate that requires a non-judicial body which is regarded as political to intervene on affairs of the ICC, a judicial body, for the sake of international peace and security. Put simply, it's a complex relationship as rarely will politically oriented institutions be allowed to interfere with judicial bodies in the modern state.

In this regard, liberal theory assumes that the state is just but a player in the international system and there are other factors that control its behavior including the established international bodies, political or judicial. The various states' influence at the international system differ and that is moreso the reason why few states compose the UNSC and also are its permanent members. The members of the UNSC particularly the permanent ones have wide-ranging influence in the global arena especially because of their economic and political

might. They tower above the economically weak states and this has led to the AU and countries like Kenya demand for fair treatment of all African states²⁵⁹. These demands have been primarily directed to the permanent members of the UNSC like the US, Britain, France and their cohorts, as they are accused of viewing themselves as the owners and defenders of the ICC whereas the rest, the court's subjects²⁶⁰. The Kenyan cases as elaborated in the previous chapters therefore offer a practical explanation on the inter-play of the states as assumed by the liberal theory.

In the years 2011 and 2013, Kenya threatened and even instituted proceedings in the National Assembly to pull out of the ICC and this became costly when the state put in a deferral request. The threats to withdraw had no legal effect on ongoing cases but was deemed as endorsement of impunity and blackmail of both the ICC and UNSC. Kenya did not withdraw from the ICC but this plus other diplomatic efforts made it become a subject of international law in various ways.

4.2 Liberal Theory: International law and the International Criminal Court

Liberal theory can be applied to explain the Kenyan situation. This is a theory that has its roots in international relations but has made much contribution to the development of international criminal law. It posits that the states' preferences and actions are not the only determinants of the situations at the international sphere but the social interests play a great role since they bear the consequences or benefit in any international action by the state. The state bureaucrats have largely formulated the foreign policy with participation of the citizenry and this has been problematic since the people's opinion are subordinated to those of the state bureaucrats. Liberalists argue that the development of international law has been majorly influenced by the social dynamics in the countries, with the people having a pivotal role, and this legitimizes international law as well as the international legal institutions²⁶¹.

The enforcement of international human rights, according to the liberal theory also depends on the society-state relationship. This means that the various matters (substance) in the international system, including the substance of international law will be affected by the state-societal relations. This has contributed to international criminal law where some of the states are not trusted by the citizens to prosecute people in some quarters. There are

²⁵⁹ Oliver Mathenge, 'ICC Exit shelved as Kenya takes reforms to UN' *The Star* (Nairobi 2016) 4-5.

²⁶⁰Ibid.

²⁶¹ Andrew Moravcsik, 'Liberal Theories of International Law: International Law and International Relations: The State of the Art' in Jeffrey L. Dunoff and Mark A. Pollack(eds.) (OUP 2003) 83

situations where the state itself is the perpetrator. Through international law, they are made to answer to their actions both at the systemic or state level.

Moravcsik argues notes that ‘There are three specific ways in which involvement of social actors can have a direct influence on institutional form and compliance pull²⁶². First, the future preferences of individuals and groups can influence decisions about institutionalization and compliance; second, many international legal rules directly regulate the behavior of non-state actors; and third, many international enforcement systems are “vertical,” functioning primarily by embedding international norms in domestic institutions and politics’²⁶³.

This means that international law will direct the behavior of states by outlining the legal frameworks within which it should operate²⁶⁴. Further, it means that the state not only have to negotiate with the supra-national bodies and other states but also with its population²⁶⁵. This is what Keohane and Nye term as “complex interdependence” and Robert Putnam²⁶⁶ calls a “two-level game”²⁶⁷. The liberal theory also posits that the international law as well as the international institutions can interact and regulate the behavior of non-state actors directly. This involves cooperation in the curbing and punishing crimes²⁶⁸. It also includes the granting of the right of representation of views in these international institutions. A good case in point is when NGOs in Kenya and internationally submitted views opposing the Kenyan deferral bid and also lobbied individual members of the UNSC not to defer the cases²⁶⁹. Another instance was when a non-governmental organization was sought to be enjoined in the Kenyan cases at the ICC although the request was denied²⁷⁰.

Liberal theory leans more towards the actions and the effects of those actions by and on other actors rather than the state. The ICC process which confers the UNSC the powers to

²⁶² Jeffrey L. Dunoff and Mark A. Pollack (eds), ‘Interdisciplinary Perspectives on International Law and International Relations: The State of the Art.’ (Cambridge: Cambridge University Press 2003) 84.

²⁶³ Ibid.

²⁶⁴ Ibid 85.

²⁶⁵ Ibid 86.

²⁶⁶ Robert Putnam, ‘Diplomacy and Domestic Politics: The logic of Two-Level games’ [2008] vol 42 international Organisation 54.

²⁶⁷ Robert O K & Joseph S N, ‘Power and Interdependence: World Politics in Transition.’ (4th edn Longman classics 1977) 78

²⁶⁸ KJ Alter, ‘Agents or trustees? International courts in their political context,’ [2008] European Journal of International Relations 1234

²⁶⁹ Njonjo Mue and Judy Gitau, ‘Contested Justice: The Politics and Practice of the International Criminal Court Interventions,’ in Christian De Vos, Sara Kendall and Casten Stahn (eds) (Cambridge University Press 2015) 210.

²⁷⁰ Ibid.

defer a case also offers a clear illustration in that the political processes can as well be given priority over judicial processes. The UNSC is conferred powers to defer a case or a situation where it feels that that any prosecutions or investigations are a threat to international peace and security. This power of the UNSC have not come without some reservations from some states with the major arguments being the fact that the states being political entities can exercise these powers in a political manner and for their own interests.

In this regard, the role of the people in and as actors in the international system, the individuals and the non-governmental institution played a central role in the Kenyan cases with the evidence against the indictees being largely obtained from the non-governmental organizations, both local and international²⁷¹. This clearly articulates the fact that the individuals as well as the non-government organizations have continued to play a big part in the international system. When Kenya was seeking a deferral of the case, a consortium of NGOs wrote to the UNSC and prevailed upon it not to allow for a deferral of the Kenyan case²⁷². The main opposition party, the Orange Democratic Movement, also moved swiftly by writing to the UNSC requesting for a non-deferral of the Kenya cases²⁷³. This is a clear illustration that non-state actors have powers to keep the state in check over the affairs that they don't agree with. However, this doesn't mean that the state is not the primary player in the international system but also that the other non-state actors' positions matters and have to be considered before any action is taken.

Another fundamental issue in the liberal theory is that the state's preferences determines states behavior. This is a crucial central assumption in the explanation of the state's action during the progression of the cases. The President had pronounced during the presidential campaigns that his ICC case was a personal challenge but when he took power the interests of the state did not change. The calls to pull-out from the ICC and defer his case and that of others remained just like during President Kibaki's administration. The state did not deal with this matter as a personal challenge of the President. The liberal theorists more or less expected this.

Another notable issue in the Kenyan cases deferral has been the role of the AU. AU has played a key role in the ICC process and especially on the Kenya situation. It has sought for

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Lionel Nichols, 'The International Criminal Court and End of Impunity in Kenya,' [2015] Springer 217

UNSC's deferral of Kenyan cases, passed resolutions to bar Kenya from continued cooperation with the ICC amongst other actions²⁷⁴. The African states have time and again as elaborated in the previous chapters been on the offensive, citing the ICC as biased in the process of trying Africans. A majority of the members of the AU apart from Botswana agreed to a possible mass pull-out from the ICC although only three countries, Burundi, Gambia and South Africa have initiated steps to withdraw from the ICC²⁷⁵. The Kenyan President, Uhuru Kenyatta, termed the application of Article 16 by the court as biased against the African States and added his voice to an African alternative to the court²⁷⁶. The African states argued that they were sovereign and deserved to be treated as such²⁷⁷. Liberalists argue that the state is increasing attaining 'new sovereignty' where the states are performing and engaging at the international level with the adherence of set rules by international bodies which they subscribe to²⁷⁸.

Further, Thomas Franck noted that the key to compliance is 'the fairness of international rules themselves'²⁷⁹ and in agreement with his argument, before the ICC intervened in Kenya, the ICC was viewed fairer by a majority of the parliamentarians than the proposed local tribunal and that is why they refused to support the Special Tribunal Bill²⁸⁰. Further, despite the continued rhetoric on the mass pullout of the African states from the ICC, none including Kenya, has taken concrete measures to withdraw from ICC. In fact, even Kenya which has been at the forefront of campaigning for withdraw from ICC is now seeking for reforms in the ICC instead of withdrawal despite that all its cases before the court have

²⁷⁴ African Union, Assembly/AU/Dec.588-604(XXVI) at 10; Security Council, 'Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council', <http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/624> accessed 2 May 2016.

²⁷⁵ Luckystar Miyandazi, Philomena Apiko, and Faten Aggad-Clerx 'Why an African Mass Withdrawal from the ICC is Possible,' Newsweek (united states 2 November 2016) < <http://www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-burundi-515870>> accessed 8 November 2016.

²⁷⁶ PSCU, 'Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union,' Standard, (Nairobi 13 October 2013) <<http://www.standardmedia.co.ke/article/2000095433/speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union>> accessed 7 November 2016.

²⁷⁷ Ibid.

²⁷⁸ Koh, Harold Hongju, 'Why Do Nations Obey International Law?' [1997] Paper 2101 Faculty Scholarship Series. <http://digitalcommons.law.yale.edu/fss_papers/2101> accessed 8 November 2016.

²⁷⁹ Thomas M. Franck, 'Fairness in International Law and Institutions' (1995 Clarendon Press) 15.

²⁸⁰ Sosteness Francis Materu, 'The Post-Election in Kenya, Domestic and International Legal Responses' [2015], T.M.C Asser Press 66-72.

collapsed²⁸¹. This in essence means that the states obey the ICC process due to their own interests.

How would it be enforced in hypothetical situation where the indictees and the state refused to comply with the request of the prosecutor that they appear in court after the summons? This sits well in the legal positivists domain who argue that the way and manner that the Rome Statute came into force involved the input of the African States and more so Kenya. Kenya took a key role in the drafting of the Rome statute. A majority of African states who now oppose the ICC process also played a pivotal role in drafting the statute and therefore giving legitimacy to the court by the mere act of being involved and giving their input during its formation. According to the legal positivist, this is enough reason to abide by it. According to them, the main reason for Kenyan's compliance with the state was justified as it was involved in the creation of the court and eventually ratifying the statute.

4.3 Third World Approaches to International Law: A critique on the International Criminal Court

The Third World Approaches to International Law (TWAIL) comes in handy in analysis of this study. Makau wa Mutua, one of the key proponents of TWAIL defines TWAIL as a dialectic opposition to international law as according to him and other advocates of TWAIL referred to as TWAILERS, the application and the design of the international law is an instrument for conquest and subordination of non-European people, key amongst them Africans²⁸². TWAILERS argue that international law is anti-liberation and anti-freedom and thus TWAIL is a response to decolonization and end of imperialism over non-Europeans. Essentially, TWAIL is driven by three central pillars; deconstructing uses of international law as an instrument of subordinating non-Europeans to Europeans, presenting an alternative legal edifice for international governance and using scholarship, politics and policy to remove underdevelopment in the third world²⁸³.

In this regard, TWAIL has resonated well with the various arguments brought forth with concerning the ICC's intervention in Kenya and Africa in general but not without some

²⁸¹Oliver Mathenge, 'ICC Exit shelved as Kenya takes reforms to UN', *The Star (Nairobi 2016)* 4-5.

²⁸² Mutua W Makau, 'What is TWAIL?'[2000] American Society of International Law <<http://ssrn.com/abstract=1533471>> accessed on 25 June 2016.

²⁸³ Ibid.

contradictions. However, the contradictions are answered by what Gathii terms as lack of a single authoritative voice or text by TWAILERS²⁸⁴.

First, TWAILERS support the ICC, but share the same concerns with the AU and other African leaders over the considerable powers of the UNSC in the ICC namely deferral, referral and enforcement²⁸⁵. The selectivity of application of the UNSC's powers remains a concern especially on how the UNSC has exercised its deferral powers, which is a cornerstone of this study. TWAILERS are concerned that the UNSC, which is a political body, exercises influence over the ICC, which is supposed to be purely an independent judicial body²⁸⁶. The AU and a majority of African leaders have voiced concerns over the rejection of both Kenya's and Sudan's deferral bids and this has coalesced opposition against both the UNSC and the ICC. Lack of deferral especially that of Kenya has led to some arguments which are extensively discussed in chapter three of this study that the UNSC is biased against African countries and its exercising hegemony through the ICC.

In this respect, both TWAILERS and the AU group agree that both the UNSC and ICC need reforms as the current composition of the UNSC and its control over the UN does not allow the principles of sovereign equality of states²⁸⁷.

Secondly, TWAILERS as expounded by Angie and Chimni support individual accountability in addressing internal conflicts and this falls in line with what WAKI commission proposed and Kenyans wanted²⁸⁸ in order to bring to justice all perpetrators of PEV. In fact, the grand coalition cabinet and parliament adopted the Waki report which signified support for individual culpability even though the Special Tribunal bill which was supposed to ensure Kenya domestically prosecute did not garner adequate support in parliament. The bill lacked support due to what some legislators termed as potential bias in the local process and therefore preferred the ICC's intervention. Although this is arguable, this thinking is shared by Angie as according to him, TWAIL proponents insist on a consistent and objective approach in establishing individual accountability.

²⁸⁴ Gathii, James Thuro, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography,' (2011) vol 3 Trade L & Dev 26.

²⁸⁵ Antony Anghie and B.S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts,' [2003] Chinese Journal of International Law 93.

²⁸⁶ Ibid 94.

²⁸⁷ Ibid 81.

²⁸⁸ Gallup, "Kenya Votes 2013: Attitudes Toward the Election, Judicial System, and Security" <<http://www.gallup.com/poll/157898/kenya-votes-2013-attitudes-toward-election-judicial-system-security.aspx>> accessed 12 August 2016.

Third, just like the Kenyan parliamentarians who initially insisted, “Don’t be Vague, let’s go to Hague” and therefore landed Kenya into Hague, TWAIL supports the ICC despite its weaknesses as according to them, “...ICC represents the efforts of the international community as a whole to address these problems and to cover the gaps in international humanitarian law pertaining to the responsibility of the individual in internal wars”²⁸⁹. However, when the ICC’s intervention became a reality in Kenya, a sizeable number of Kenyan political class, including President Kenyatta and his deputy began opposing the ICC using one of the major planks of TWAILERS that the international law has created supranational institutions that are being used to spread global hegemony of the West. In 2013, President Kenyatta was of the view that, “...Western powers are the key drivers of the ICC process. They have used prosecutions as ruses and bait to pressure Kenyan leadership into adopting, or renouncing various positions...”²⁹⁰ In further demonstration of how the ICC is Eurocentric and therefore hegemonic as TWAILERS have argued of international institutions, Kenyatta quoted the British foreign secretary Robin Cook who said at the time, that the ICC was not set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States²⁹¹. However, inasmuch as Kenya has made active attempts to withdrawal from the ICC due to what it terms the court as hegemonic, Kenya has reversed on this move and gone back to TWAILERS position that the weaknesses in the ICC can be addressed after all²⁹². This perhaps explain key TWAIL crusaders like Makau Mutua have consistently supported the ICC’s intervention in Kenya despite that TWAIL scholars view such supranational institution and especially the ones that the UNSC wields considerable like ICC as hegemonic.

From the foregoing, it can be deduced that TWAIL as an intellectual movement faults international law in its current mode as a situation that represent one side of the world, Europe, and fail to recognize the unique aspects of the African and other non-European countries.

The TWAIL notes that there ought to be a counter-hegemonic movement to challenge the global hegemony of the west perpetuated through various international institutions²⁹³.

²⁸⁹ Antony Anghie and B.S Chimni, Third World Approaches to International Law and Individual Responsibility in Internal Conflicts, [2003] Chinese Journal of International Law 95

²⁹⁰ Ibid (n 274)

²⁹¹ Ibid.

²⁹² Ibid (n 287)

²⁹³ Mutua W Makau ‘What is TWAIL.’ [2000] American Society of International Law <<http://ssrn.com/abstract=1533471>> accessed on 25 June 2016.

However, they caution that any counterhegemonic move should be made for the interests of the ordinary people in the Third World not just their leaders²⁹⁴. TWAIL therefore calls for the democratization of all the international institutions and chief among them the UNSC so that all the states can have an equal voice.

However, Gathii notes that the Third World categorization may be irrelevant in the era of globalization as it represents the old divide and rule strategies, concentrating on the weaknesses of the states and their differences and magnifying them, leading to more division which is taken advantage of by the hegemonic west²⁹⁵. TWAILERS puts so much emphasis on the state in such a way Gathii argues that the UN seems to be getting more funding from non-state actors who are now shaping its agenda²⁹⁶. Gathii urges caution among the TWAILERS as there was the *'need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of contemporary international law'*. He also notes that TWAILERS tends to provide *'Imaginative Solutions'* and *'empty gestures'*²⁹⁷.

However, Gathii's argument faces a challenge as many African states are now calling in unison for the development of an African justice system and with the installation of the African Court on People's and Human rights, Africa might soon realize its vision of an Afrocentric justice system. Moreover, in a counterhegemonic move against the ICC which has been regarded by the AU and its cohorts as a western tool for neocolonialism²⁹⁸, the AU established a special court in 2013 which successfully prosecuted the former Chad President, Hissene Habre, for committing crimes against humanity²⁹⁹.

4.4 Enforcement under the ICC

The issue of enforcement of the decisions by the ICC has been one of the most complex issues and in many times it has led to the realists questioning whether international law is law at all. Enforcement of the decisions by the ICC over state parties has majorly lacked

²⁹⁴ Ibid.

²⁹⁵ Gathii, James Thuro, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography,' (2011) vol 3 Trade L & Dev 26, 30

²⁹⁶ Ibid 34

²⁹⁷ Ibid 36

²⁹⁸ Ibid (n 291)

²⁹⁹ African Union, 'AU welcomes the judgement of an unprecedented trial of Hissène Habré, <<http://www.au.int/en/pressreleases/30728/au-welcomes-judgement-unprecedented-trial-hiss%C3%A8ne-habr%C3%A9>> accessed 11 July 2016.

due to political considerations. This has been demonstrated in various occasions where the state has been ordered by the local courts to effect the decisions of the court but have failed to do so due to the intra-states relations which might be more important than complying with the ICC. Many states have found it hard to enforce the ICC's decisions, even a permanent member of the court like China due to the economic and political considerations as well as other strategic interests.

The Bashir Case

The ICC has issued two warrants of arrest against President Omar Bashir of Sudan for charges of genocide, crime against humanity and war crimes. Kenya being a signatory of the ICC was therefore under obligation to arrest and hand him over to the court when he visited in August 2010 but did not do so.

This led to the ICC's Pre-Trial Chamber referring Kenya to the UNSC but no action was taken. The government fronted various reasons for inviting Bashir and not arresting him and key amongst them was that it had '*a legitimate and strategic interest in ensuring peace and stability in the sub-region and promoting peace, justice and reconciliation in the Sudan*'³⁰⁰. Apart from being members of the AU, they have trade and economic relations and a liberalist would agree that this would be much more important between the two states than the ICC itself.

This brings once again the debate of how international law can be reduced to mere writings on paper with no way of effecting it. This gives ground to the liberalist Kantian that the states obey these international laws due to the fact that they have a sense of moral obligation but are quick to shelve this moral obligation if their interests are threatened³⁰¹.

Therefore, there have been calls for the review and reform of article 87 (7) in order to ensure the enforcement of the ICC decisions by the UNSC.

4.5 Conclusion

This analysis now leads me to conclude that the deferral of any matter before the ICC is not only guided by the legal provisions of the Rome Statute but also geo-political considerations and the interplay between states. The non-state actors also play a central role

³⁰⁰Charles Sampford, Ramesh Thakur (eds), 'Institutional Support for International Rule of Law,' (Routledge 2014) 57

in the deferral process as seen in the Kenyan situation where both local and international NGOs, and political parties championed against the government's efforts to have the cases deferred. This is in line with liberal theory where the state is not the only actor in its affairs but also other non-state entities which have considerable influence.

The role of the UNSC in the deferral process is therefore compromised by the politics of the day.

At the enforcement level, the UNSC has failed to take actions against states like Kenya for not cooperating with the ICC on the Bashir's case. The non-cooperation with the ICC by states like Kenya and South Africa has forced non-state actors in these countries to resort to their domestic courts in order to ensure Bashir is arrested and handed over to the ICC. The actions by these non-state actors affirms the liberal theory that the state is not the only actor in its affairs. However, the resort to the domestic courts by these non-state actors would be unnecessary if the UNSC puts coercive mechanisms to ensure compliance with the ICC's requests or obligations.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This study sought to critically analyze the United Nations Security Council's powers of deferral and enforcement under the Rome statute of the International Criminal Court using Kenya as a case study. This was informed by the fact that the UNSC plays a central role in the ICC's fight against impunity and therefore the manner in which it uses these powers or fails altogether to exercise them has a direct effect on the effectiveness of the ICC. Most specifically, the study was informed by the problem that the manner in which the UNSC's has exercised its deferral powers under article 16 is against the expectations of the drafters of the ICC's statute and that it has failed to take enforcement measures against states that have failed to cooperate with the court as envisaged by article 87 (7). Further, Kenya was used as a case study as it has provided a unique example of how the UNSC has failed in exercising its deferral power impartially and exercising its enforcement power all together.

In this respect, the study sought to answer the following questions: To what extent has the UNSC exercised its power of deferral and enforcement under the Rome Statute? How has the relationship between the UNSC and the ICC affected the ICC's judicial role and the fight against impunity? To what extent has the deferrals of cases by the UNSC and exercise of its enforcement powers impacted on the image and the capabilities of the ICC? Is there a need to institute reforms as pertains the Articles 16 and 88 (7) of the Rome Statute? The study has dealt with these matters extensively, analyzing the case of Kenya in the quest to provide answers to these research questions.

Additionally, the study applied a liberal approach which enabled the interrogation of the non-state actors as key players in conduct of the international law on states. The study concludes that as much as the states are the key player, the role of the non-state actors, primarily the civil society as well as the other interest groups cannot be understated. This played out in the whole duration of the cases as ably demonstrated in the study. The research also looked into the Third World Approaches to International Law (TWAIL) concluding that as much as international law has been termed as an imperialist tool, reforms at the various supranational institutions like the ICC are necessary as they are sometimes the instruments of the last resort due to failure by states to punish impunity Kenya being an example.

5.2 Conclusion

The study has therefore analyzed these powers and interrogated how they have been applied or failed to be applied using Kenya as the case study and makes the following conclusions: Firstly, the UNSC has exercised its deferral powers twice by passing two resolutions requesting the ICC to refrain from initiating investigations or prosecutions over the UN peacekeepers from states not party to the Rome Statute, for actions or omissions that may arise after the adoption of the resolution which may amount to international crimes. Further, the UNSC refused to defer the Kenyan cases upon request by both Kenya and the AU. A section of the members of the UNSC who did not support Kenya argued that the request was not a threat to international peace and security and that it could be addressed by the ASP. The failure to defer the Kenyan cases has generated a lot of criticisms against both the UNSC and the ICC by the AU and many individual African states and leaders as the UNSC has been accused of bias, selectivity and also of abusing its powers under article 16. This is especially because the UNSC's readily deferred two situations which were not before the ICC and thus were largely undeserving but failed to defer the Kenyan one which they felt had merit. Further, the request heightened calls by the AU for non-cooperation with the ICC, which some countries have heeded to and this has escalated to threats by African states of mass withdrawal from the ICC.

Overall, the tension between the UNSC and the ICC on one hand and the AU and its members on the other hand has led to accusations that the ICC is a hegemonic tool for the permanent members of the ICC and other Western countries. This has affected its credibility and effectiveness due to denial of much needed cooperation by many African countries and the AU too. This tension has therefore negatively affected the global fight against impunity despite weakening the ICC too.

Secondly, the study concludes that the UNSC has not used its enforcement powers in articles 87 (5) (b) and (7) to address non-cooperation by Kenya over the Sudanese cases. This lack of enforcement extends to other states like South Africa, Chad, Djibouti, China, Libya, Democratic Republic of Congo, Rwanda, Indonesia, Nigeria and Malawi which have hosted but failed to arrest President Bashir after visiting in their countries. The failure to take any enforcement measures has crippled attempts by the ICC to prosecute Bashir since 2009 as it has no standing international police to arrest and hand him over to the ICC. Therefore, the UNSC has only entrenched impunity on this matter and the situation is quite worrisome because the UNSC itself referred the Sudanese situation to the ICC. The situation is grave

as even a permanent member of the UNSC like China which did not veto referral of Sudan to the ICC has hosted him but failed to hand him over to the ICC.

Thirdly, the study concludes that there is need for legal reforms in as pertain articles 16 and 87 (7) of the Rome statute in order to ensure that the UNSC exercises its deferral powers impartially and that it enforces cooperation requests from the ICC.

5.3 Recommendations

This study has concluded that the UNSC has not excised its mandate of deferral under article 16 impartially and that it has failed to take enforcement measures against states that have failed to cooperate with the ICC thus undermining both the court and the global efforts to address impunity. The study therefore recommends:

- a. The UNSC together with the ASP to develop a deferral policy and in particular define in the policy the exact meaning of the term, “the interests of international peace and security” in the context of deferral under article 16 of the statute. The policy should also contain that any request for a deferral should be granted a formal hearing by the UNSC and heard within three months of receipt. Further it should provide that the ICC should submit an assessment of the status of the victims, witnesses and evidence and also how to protect them should a matter be deferred. In addition, the policy should provide that the victims will get a form of reparation once a matter is deferred which will be increased depending on whether the suspects in a deferred matter are convicted once the case continues. Finally, the policy should state that the UNSC should not defer a non-existent situation.
- b. The ASP to amend article 16 of the ICC’s statute to provide a capping on how long a matter can be deferred as the current drafting language does not and thus is open to abuse and also to make the Bureau of the ASP part of the decision maker in a deferral matter as it has equitable geographical representation.
- c. The ASP and the UNSC to form a Working Group with the AU that will address AU’s concerns over the matter of deferral.
- d. The amendment of article 87 (7) of the Rome statute in order to expressly provide for action by the UNSC against states that fail to cooperate with the ICC. The provision should also contain deadlines for the action of which the study proposes three months upon receipt of the enforcement request by the ICC.

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