

Deferral and Enforcement Powers of the United Nations Security Council under the Rome Statute: A Case Study of Kenya

DANN MWANGI
P.O BOX 51058-00100
NAIROBI
Email: lawyerdann@yahoo.com
dann@cps-research.com

Abstract

Article 24 (1) of the Charter of the United Nations (UN) bequeaths the United Nations Security Council (UNSC) with the primary responsibility of maintaining peace and security in the world acting in accordance with the purposes and principles of the United Nations¹. On the other hand, 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 humanity².

However, the ICC's statute grant the UNSC power of deferral of situations or cases before the ICC and also grants it enforcement powers. The drafters of the Rome Statute of the ICC envisaged a situation whereby the UNSC would impartially and effectively use these two mandates. It is the view of this paper that unfortunately, this has not been the case. The paper therefore analyzes how the UNSC has exercised these mandates and use Kenya as a case study.

Key words: Deferral, enforcement, Rome Statute, Security Council

¹ Stefan Talmon, 'The Security Council as World Legislature', (2005) *American Journal of International Law* 99 at 179-181.

² Rome Statute, UN Doc. A/CONF. 183/9 (1998), paragraph 2.

1.0 Background

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 immediately Mwai Kibaki of the Party of National Unity (PNU) was declared the winner of the presidential poll and sworn in on 30th December 2007³. The violence escalated as the leader of Orange Democratic Movement (ODM), Raila Odinga, immediately rejected the outcome of the poll⁴. The violence popularly known as Post-Election Violence (PEV) 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 women⁵. PEV ended on 28th February 2008 when a political compromise between Kibaki and Raila Odinga was reached through signing a power-sharing agreement that was mediated by former UN Secretary General, Koffi Annan⁶. 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.

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 were to investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election, investigate the actions or omissions of state security agencies during the course of the violence, and make recommendations as necessary; and perform any other tasks that the deemed necessary in fulfilling the foregoing terms of reference⁷.

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 challenges. 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 fell 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 law⁸. 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 investigation and possible prosecution⁹.

³Kwatemba, Shilaho Westen. "Kenya's coalition government: challenges and prospects for the 2012 general elections." *Politeia* (02568845) 29.1 (2010).

⁴Kagwanja, P. (2009) *Courting genocide: Populism, ethno-nationalism and the informalisation of violence in Kenya's 2008 post-election crisis* in *Journal of Contemporary African Studies* Volume 27, Issue 3, 2009

⁵Report of the Commission of Inquiry to the Post-Election Violence, Kenya, 2008 pages 304-344.

⁶Ibid

⁷ CIPEV available at http://kenyalaw.org/kenya_gazette/gazette/volume/NDky/Vol.%20CX%20%20-%20%20No.%2041 (accessed 23 April 2016)

⁸Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence*

⁹International Bar Association (2010) *Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya*

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.

With the ICC beginning to prosecute the Kenyan cases in December 2010, the campaigns of deferral by the Kenyan government, which is a case study for this paper started in earnest. The first phase of deferral campaigns that began under President Mwai Kibaki administration and then transited to the second and third phases of deferral campaigns under President Kenyatta administration. The first phase was unsuccessful just like the second one. It started on 8th February 2011 by Kenya asking the UNSC to defer the cases on the basis that Kenya was putting up a credible judicial mechanism to try the suspects locally, that it was putting up both credible governance and judicial institutions to punish impunity¹⁰. The African Union (AU) joined Kenya in demanding for the deferral but this was rejected by a majority of the permanent members of the UNSC although there was no formal sitting to discuss this matter¹¹.

The second phase of deferral campaigns began once Kenyatta and Ruto, both facing charges at the ICC, were elected as President and Deputy President respectively. Although this request was granted a hearing by the UNSC, it was equally rejected as some members of the UNSC felt that there was no threat of international peace and security to warrant it¹².

On the matter of enforcement, UNSC has not invoked its powers under article 87 (7) to address instances of non-cooperation by the states even on situations that it has referred to the court. The most conspicuous example is that of President Omar al Bashir and his allies who were indicted through a referral by the UNSC but have refused to obey summons by ICC. ICC separately issued two warrants of arrest against him on 3rd April 2009 and 12th July 2010 for charges of genocide, war crimes and crimes against humanity¹³ but the UNSC has failed to use its enforcement powers under the statute to arrest and hand him to the ICC in order to face justice. Further, many states, both parties and non-parties to the ICC and even a permanent member of the UNSC like China have hosted Bashir in their countries and despite complaints by the ICC¹⁴, UNSC has taken no action against them.

2.0 Source of problem: deferral powers of the UNSC

Article 16 of the ICC statute gives the UNSC 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'.

¹⁰Daily Nation, 'Kenya petitions UN organ to delay trials, 10 February 2011', available at <http://www.nation.co.ke/News/politics/Kenya+petitions+UN+organ+to+delay+trials+/-/1064/1105328/-/12yufy5/-/index.html> (accessed 7 November 2015)

¹¹Alana Tiemessen (2014): The International Criminal Court and the politics of prosecutions, The International Journal of Human Rights, DOI: 10.1080/13642987.2014.901310

¹²<http://www.nation.co.ke/News/politics/Why+Kenya+failed+to+defer+ICC+cases+at+Security+Council+/-/1064/1129160/-/m4rw3gz/-/index.html>

¹³Bashir Watch, 'Bashir Travel Map' available at <http://bashirwatch.org/> (accessed 8 October 2015)

¹⁴ Global Policy Forum, 'International Criminal Court Investigations Sudan' available at <https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/darfur-sudan.html> (accessed 8 October 2015)

Article 16 is unlike article 23 (3) of the first draft of the ILC 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 decides. In this respect, this power of the UNSC was one of the most contested issue during the drafting of ICC's statute. According to Ambos et al (2016) the drafting of article 16 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 UNSC as a political organ of the United Nations. 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 body¹⁵.

Even when it became clear in preparatory negotiation meetings that a majority of states supported some form of UNSC deferral power, the modalities of its exercise remained controversial. 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 potential abuse of this power by some permanent members of the council such as the US and also the council has not deferred cases before the ICC whose proponents believe are meritorious. The refusal to defer cases like that of Kenya and Sudan 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 countries¹⁶.

3.0 Kenya's first attempts to have the cases deferred under article 16

The first Kenyan government deferral request was submitted to the UNSC on 4 March 2011. This request was accompanied by an intense diplomatic lobbying to various countries which was led by then the Vice President, Kalonzo Musyoka. It also enjoyed a considerable backing of the AU and Intergovernmental Authority on Development (IGAD). 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 process.

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 Attorney General 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 reconciliation.

3.0.1 Internal and external opposition for deferral

¹⁵See Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press: Cambridge, 2007) at 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", held on 16th March 2012 at 14.

¹⁶ Max du Plessis, *The International Criminal Court that Africa wants*, (Institute for Security Studies: Pretoria, 2010) at 13-18.

This request drew immediate opposition from various quarters. In fact, the request did not garner bipartisan support within the grand coalition government as Orange Democratic Movement (ODM) party, which formed part of the grand coalition immediately opposed the deferral bid¹⁷. 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 and a majority of international civil societies' groups.

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 cases¹⁸. 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'¹⁹.

Eventually, UNSC, through an informal side meeting rejected the Kenyan deferral bid²⁰. Its 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 Kenyan bid did not meet the threshold of article 16. In an analysis of the UNSC's opposition to this bid, some legal scholars opine that the reasons presented by Kenya pertained to complementarity not deferral of a situations. This paper associates with this view as any 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 later did, but not to justify for a deferral.

3.1 Second request for 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 the fact 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. UNSC was evenly divided on this matter as 7 voted in favour of deferral, 8 abstained and therefore Kenya did not garner the required 9 affirmative votes²¹. 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 East Africa and giving Kenya a chance in consultation with the Court and

¹⁷ Daily Nation, 'Reject Kenya plea, Orange asks UN, 13 March 2011', available at <http://www.nation.co.ke/news/politics/Orange-asks-UN-to-reject-Kenya-plea/-/1064/1124530/-/dgr0em/-/index.html> (accessed 1 May 2016)

¹⁸ Ibid

¹⁹ ICC, 'Statement of the Prosecutor on the Situation in Kenya', available at <https://www.icc-cpi.int/NR/rdonlyres/269744E4-9F7D-468F-9B24-C2AE74B012D1/283377/StatementICCProsecutoronsituationinKenya1.pdf> (accessed 1 April 2016)

²⁰ Capital FM, 'Kenya deferral bid flops at UNSC, 19 March 2011', available at <http://www.capitalfm.co.ke/news/2011/03/kenya-deferral-bid-flops-at-uns/> (accessed 2 April 2016).

²¹ United Nations, 'Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining, 15 November 2013', available at <http://www.un.org/press/en/2013/sc11176.doc.htm> (accessed 12 February 2016)

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 situation²².

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 a deferral²³. The US argued that Assembly of States Parties (ASP) to the ICC and the ICC were the best platform for Kenya to get a redress although we find this argument 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'²⁴. 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 Chapter VII threshold beyond which the Court's proceedings against the Kenyan leaders would pose a threat to international peace and security'²⁵. 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.

On the other hand, China and Russia, permanent members of the UNSC took a different position from their counterparts and voted in favour of deferral²⁶. 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 integrity²⁷. 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 UN. 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 mandates²⁸. All the African countries sitting at the UNSC's hearing, Rwanda, Togo and Ethiopia supported the Kenyan bid. They 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 argued 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

²² 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'S/2013/624

²³Ibid at 12.

²⁴Ibid

²⁵Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

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”²⁹.

4.0 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. Article 16 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.

This therefore means the major consideration before a deferral is arrived at is whether an investigation or prosecution is a threat to international peace and security or not.

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 attention. In fact, the representative stated that, ‘her delegation had abstained because it was the Council’s duty to interpret strictly whether the trial posed a threat to international peace and security, and Argentina did not think it did.’³⁰

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, 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 out other emerging legal questions. First, although article 16 gives any state party the right 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 some countries had submitted a draft resolution in full knowledge that it would not be adopted did not accord with the goal of promoting Council unity...’³¹ 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

²⁹ Ibid

³⁰ Ibid.

³¹ Ibid.

68 and 69 of the ICC's statute respectively once a case is deferred. The critical questions in this regard by many scholars are how to protect victims, witnesses and preserve evidence if an investigation or prosecution is deferred under article 16. Unfortunately, this issue was raised by Argentina's representative and despite its centrality to a deferral, the UNSC did not address it. 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 request. 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, the UNSC is expected together with the ICC to put measures to protect victims, witnesses and preserve evidence during the deferral period.

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 as 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'³².

Four, the Kenyan deferral together with Sudanese 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 feeling, 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 16. Failure to defer Kenya and Sudanese cases have heightened calls for amending article 16 in order to allow the UN General Assembly to hear a deferral request should the UNSC fail to hear it within six months³³. 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.

5.0 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 it was not

³² Ibid.

³³Max du Plessis, *International Criminal Court in Africa; Confronting the Myths* (Institute for Security Studies: Pretoria, 2008)

held for non-cooperation by the Appeals Chamber.³⁴ 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 players³⁵. 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 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 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 Africa³⁶.

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...³⁷.

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 have 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. 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 parties³⁸. 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 lack of a time-line of such actions is also a concern. Therefore, 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 ICC.

This inaction by UNSC despite having considerable powers in articles 41 and 42³⁹ of the Charter of the UN is arguably the reason why domestic civil societies have opted to use the

³⁴The Prosecutor v. Uhuru Muigai Kenyatta, 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', ICC-01/09-02/11.

³⁵ Daily Nation, 'Kenya tells ICC why Bashir was not arrested, 18 September 2010', available at <http://www.nation.co.ke/news/politics/Kenya-tells-ICC-why-Bashir-was-not-arrested/-/1064/1013798/-/pu5xot/-/index.html> (accessed 14 March 2016)

³⁶<http://www.ejiltalk.org/icc-reports-kenya-and-chad-to-the-un-security-council-over-bashirs-visits/>

³⁷The Prosecutor v. Omar Hassan Ahmad al Bashir, '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' ICC-02/05-01/09 para. 4.

³⁸ Alexis Demirdjian, 'Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference', (2010) *International Criminal Law Review* at 11-15.

³⁹ Article 41 of the Charter of the UN, '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 apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal,

municipal 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 Kenya⁴⁰.

These orders were granted and the government lost in the appeal. The same trend happened in South Africa in 2015 when President al Bashir attended the Africa Union General Assembly. The South African Litigation Centre went to court to seek for arrest and hand over of Bashir to the ICC⁴¹. 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 just like Kenya 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. Both Kenya and South Africa now have an explicit obligation to arrest and hand over Bashir to the ICC should he set foot in these countries again. The Kenyan matter even granted ICJ Kenya the powers to arrest Bashir should Kenyan government fail to do so in future. Justice Ombija stated,

What happens when the warrants are issued and the Minister for Internal Security fails, neglects or refuses to execute the same? The answer to that is that any legal person - ICJ Kenya Chapter included - who has the requisite mandate and capacity to enforce and/or to execute the warrant may be at liberty to do so'.⁴²

6.0 Conclusions

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. Although the UNSC has only deferred one situation but not a single case or potential investigation by the ICC, it has shown its capacity to invoke this power and thus when confronted by deferral requests, it must properly satisfy itself on the merit of the application before making a decision. Further, the deferral decisions must be done impartially. UNSC is not expected to just allow any deferral request as it must meet the threshold in article 39 of the charter of the UN but is expected to provide adequate reasons on why it is unable to defer a situation. Failure to do so is causing unnecessary tension between it and some African states and the AU as the council appears unwilling to entertain a deferral request. 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 brief, there is need for a policy framework to guide how states should apply for a deferral and also how UNSC should address it and the timeframe. There is also need to amend article 16 in order to provide a maximum number of years that a situation or a case can be deferred as the current

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'.

⁴⁰Kenya Section of the International Commission of Jurists v. Attorney General & another [2011] eKLR

⁴¹Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others 2015 (5) SA 1 (GP)

⁴²Kenya Section of the International Commission of Jurists v Attorney General & another [2011] eKLR

law allows an indefinite deferral subject to an annual renewal. This study also recommends establishment of mechanisms to address the issues of witnesses, victims, preservation of evidence and reparation once a situation or case is deferral.

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. To address the current inaction by the UNSC, this paper proposes amendment of article 87 (7) to make it compulsory for the UNSC to act under articles 41 and 42 of the Charter of the UN against any state that fails to cooperate with the court. The amendment should also provide a strict timeline within which the UNSC is supposed to take such action. Further, the paper also proposes further amendment of this article to allow the UNSC to act even on matters that it has not referred to the ICC as referral of such matters to the ASP cannot guarantee cooperation with the court as the ASP has no enforcement powers or even capacity.

This paper is alive to the fact that the politics of international criminal law making processes and especially the considerable powers and protectionist behaviour of the permanent members of the UNSC may limit the realization of some of the recommendations of this paper.

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Dann Mwangi is an Advocate of the High Court of Kenya with a keen interest and passion of using his legal, research and analytical skills and knowledge to transform his country. He is currently pursuing his Master of Law (LLM) degree at the University of Nairobi. His area of specialization is Public International Law and Principles of Good Governance. He got a Post Graduate Diploma in Law from the Kenya School of Law in 2014. Mwangi got his Bachelor of Laws (LLB) degree from the University of Nairobi in 2009. Currently, Dann Mwangi is a Deputy Director of Political Affairs in the Executive Office of the Presidency, Republic of Kenya.