ARTICLE 98 OF THE ROME STATUTE AS A SHIELD AGAINST THE PROSECUTION OF INTERNATIONAL CRIMES BY THE INTERNATIONAL CRIMINAL COURT

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Abstract

Article 98 of the Rome Statute makes provision for immunity and non-surrender agreements contrary to the objective and purpose of the Statute, thereby shielding perpetrators from prosecution for international crimes. This cuts down on the ability of the International Criminal Court to achieve its mission. Adopting a doctrinal method of research, this paper examines the effects of Article 98 and concludes that it has been the foundation of bilateral immunity and non-surrender agreements culminating in several approaches adopted by States, and International Organizations to insulate perpetrators from ICC prosecution. It is therefore recommended *inter alia* that State parties should not adopt measures friendly to Article 98 and its effect can be ignored by considering the requirement to waive immunity into an impartial, unbiased, and effective command from the UNSC to cooperate with the ICC in the prosecution of international crimes.

Keywords: Article 98, Rome Statute, Shield, Prosecution, International Criminal Court.

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1. INTRODUCTION

The creation of the International Criminal Court (ICC) with a permanent and more extensive jurisdiction was inspired by the desire among others to improve and make the prosecution and sanctioning of international crimes universal. It was also created to realize the determination of the International Community to put an end to impunity for the perpetration of heinous crimes threatening the existence of man and contribute to the prevention of such crimes (Paragraph 5 preamble of the Rome Statute, see Establishment of an International Criminal Court -Overview, July 2023; Orlov, 2023, pp. 99-112). This led to expectations that the court would serve 'as da eterrent to future international crimes, a contributor to stable international order, and a reaffirmation of international law' (McIntire, 2001, pp. 249-259). It also created significant expectations that the rule of law will prevail and the rights of affected ones will be ensured.

The euphoria surrounding the establishment of the ICC with the abovementioned expectations leaves much to be desired because the Rome Statute cuts down on the Court's ability to effectively prosecute crimes within its jurisdiction. Article 98 on cooperation concerning waiver of immunity and consent to surrender is a violation of the obligation to cooperate with the Court to arrest and surrender suspects. This poses as a serious shield against the prosecution of international crimes by the ICC because it is one hundred percent dependent on effective criminal cooperation from states and International Organisations as it has no police force or a standing army of its own. Thus it cannot take judicial actions such as executing arrest warrants (Cogan, 2002, pp. 111-119). It has become a truism to state that state cooperation is an essential requirement for the success of the ICC, given that, as opposed to domestic courts, international tribunals cannot rely on enforcement agencies of their own (Cassese, 1999, p. 144 et seq). The effective prosecution of serious crimes of concern to the International Community as a whole must be ensured by taking measures at the national level and by enhancing international cooperation (Paragraph 4 of the Preamble of the Rome Statute 1998) and making sure that all perpetrators are brought to book without respect for official capacity (article 27 Rome Statute).

Article 98 of the Rome Statute is controversial as its provisions are contrary to the principal aim and objective of creating the ICC. This is because it makes it possible for states to enter into bilateral immunity (Article 98(1) Rome Statute) and non-surrender (Article 98(2) Rome Statute) agreements which can enable individuals to flee prosecution and states not to cooperate with the Court thereby shielding prosecutions. Any provision aimed at shielding perpetrators from prosecution for the most egregious crimes against the very existence of humanity conflicts with *jus cogens* norms of International Law. It is worth indicating that the availability of the provisions of Article 98 has created an atmosphere that has been marked by

interpretations and actions undertaken to apply it, posing a shield against the prosecution of international crimes by the ICC.

To demonstrate the fact that Article 98 of the Rome Statute poses as a shield against the prosecution of international crimes by the ICC, this write-up starts by examining how the provisions of the aforementioned article oppose the aim and objectives underlying the creation of the Court. It examines Article 98 as a treaty violation enabling provision and also indicates that it violates *jus cogens* norms on the proscription of international crimes. It addresses the role of the United Nations Security Council (UNSC) in the light of obligations arising from its referrals and the effect of Article 98 on them. This is because this trigger mechanism enables the jurisdiction of the ICC to be extended to non-state parties. Given that the majority, if not all cases being prosecuted by the ICC are from Africa, the African Union's perception of Article 98 is examined to verify whether it works for or against the prosecution of international crimes by the ICC.

2. THE CONTRADICTORY NATURE OF ARTICLE 98 TO THE RAISON D'ETRE OF THE ROME STATUTE

The provision of Article 98 favors entering into bilateral immunity and non-surrender agreements which will have the effect of making states uncooperative with the ICC and prevent it from prosecuting international crimes effectively. It thus makes provisions that are contrary to the mandate of the ICC and has served as a foundation for states being coerced into the aforementioned agreements which vitiate consent in treaty-making.

2.1. Article 98 Provisions contrary to the Mandate and Purpose of the ICC

The provisions and spirit of Article 98(1) and (2) of the Rome Statute are contrary to the mandate of the ICC which was established by the same Statute with the principal objective of fighting against impunity for international crimes. This objective is affirmed in paragraph 4 of its preamble which drives a very strong message that most serious crimes of concern to the International Community must not go unpunished. Article 98 which is geared towards encouraging states to immune perpetrators from prosecution and not to cooperate in the surrender of suspects to the ICC will shield it from achieving the principal purpose for which it was created (Article 1, Rome Statute 1998). Article 98 is therefore contrary to the Rome Treaty and violates the provision of article 18 of the Vienna Convention on the Law of Treaties (VCLT) of 23rd May 1969 which is to the effect that states should act in a manner that does not defeat the purpose and object of a treaty in question for as long as it has signed the treaty, or intends to do so. The obligation on state parties not to act in a manner inconsistent with the object and purpose of a treaty was given judicial recognition by the International Court of

Justice (ICJ) in *Nicaragua v. United States of America* (Merits, Judgment, ICJ Rep 1986, p. 138, para. 276) where the Court variously and synonymously characterized the obligation not to engage in conduct inconsistent with the object and purpose of a treaty as 'the obligation not to defeat the object and purpose of the treaty' and the obligation to refrain from acts 'depriving' (p. 136, para. 271) or 'calculated to deprive' (para. 272) the treaty of its object and purpose….'.

The obligation identified by the ICJ was arguably foreshadowed in its somewhat cryptic dictum in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* where it stated:

> 'It is … a generally recognized principle that a multilateral convention is a result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison *d'être* of the convention.' (Advisory Opinion, ICJ Rep 1951, p. 15 at p. 21.)

A member state to a treaty has thus, under Article 18, a principal loyalty to that treaty and is consequently not legally permitted to consent to consecutive agreements at odds with the first treaty (Jeffrey, 2004-2005, p. 154). Therefore, the treaty creating the Rome Statute binds its members and brings out obligations that are supposed to be respected in good faith following the principle of "*pacta sunt servanda*" (Article 26 VCLT).

It can conveniently be contended that the provisions of Article 98 which prescribes bilateral immunity and non-surrender agreements is a treaty obligation that equally binds State Parties. But it amounts to acts which will immune perpetrators from prosecution contrary to the obligation of non-respect of official capacity in article 27 of the Rome Statute and will oblige states not to cooperate with the ICC thereby shielding perpetrators from prosecution for international crimes. Cooperation by the States Party to the Rome Statute is a treaty obligation that enables the accomplishment of the ICC's principal purpose. Therefore, any absence of cooperation by states to arrest and surrender accused persons in instances occasioned by their signing and respecting Article 98 agreements will act as a shield/blockage to prosecution. Tallman has to this effected commented that article 98 agreements come into clash with cooperation requirements found in articles 86, 87, and 90 of the Rome Statute and contradicts its purpose and objective (Tallman, 2003-2004, p 1046).

2.2. Immunity Cover under Article 98

Article 98(1) makes provision for bilateral immunity agreements which have the effect of shielding perpetrators from prosecution contrary to article 27 of the same Rome Statute which does not accord relevance to official capacity as a bar to prosecution for international crimes. Article 98(1) provides that:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law concerning the State or diplomatic immunity of a person or property of a third State unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

It can be deduced from the above provision that any internationally recognized immunities owed by a State Party to a third state in respect of one of the latter's officials will prevent the Court from requesting the former to surrender that official (O'Keefe, 2011; Yunqing, 2024, pp. 132-149). It therefore preserves the immunities of persons from non-state parties even if present in the territories of State Parties and renders Article 27 meaningless.

The term 'person' in the above provision is not defined and in the absence of any evidence that the states intended a special meaning to be given to it, (Article 31(4) VCLT) it should be taken to bear its ordinary meaning as provided for in the Vienna Convention on the Law of Treaties (Article 31(1)). From the foregoing, this provision grants diplomatic immunity from prosecution which by the rulings of the International Court of Justice (ICJ) in the *Democratic Republic of the Congo v. Belgium* (Arrest Warrant of 11 April 2000 Judgment, ICJ Rep 2002, p. 3) covers personal immunity of Heads of States, Heads of Government, Ministers of Foreign Affairs or any other officials who may fall within the reasoning of the ICJ. According to Jürgen Bröhmer, "Diplomatic immunity is enjoyed by (former or present) diplomats only, Head of State immunity is tied to being or having served as Head of State and State immunity is tied to being a State" (Bröhmer, 2000, 1, p. 233).

The immunity cover contemplated under article 98(1) of the Rome Statute refers to two types of immunity under Customary International Law which renders officials of one state immune from the jurisdiction of another state and by extension the jurisdiction of the ICC. Here we have immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity). Personal immunities are attached to certain State officials by their office. Heads of State, Heads of Government, Diplomatic agents (articles 1(e), 29 and 31(1) of the Vienna Convention on Diplomatic Relations, 1961) and Foreign Ministers fall within this category (Arthur, 1994, p. 247). Such immunities are absolute in that they cover all acts of the official, whether done in a public or private capacity, whether done while on an official or private visit, and whether done while in, or before taking office. The absoluteness of this immunity flows from the functional rationale underpinning it. It enables high State officials to carry out effectively their duties on behalf of their States (*Arrest Warrant Case, para. 53*). This personal immunity ceases when the concerned official leaves office and he/she can only make recourse to immunity *ratione materiae* (article 39, Vienna Convention on Diplomatic Relations 1961).

Unlike Personal immunity, immunity *ratione materiae* (functional immunity) is broader. This is because it provides all State officials with immunity from foreign jurisdiction only in respect of their official acts. It rests on the idea that an official is acting as a mere instrument of the State, and as such, his/her official action is attributable only to the State, not the individual (*Prosecutor v. Tihomir Blaškić* (29 October 1997) IT 95 14, paras 38 and 41 (Appeals Chamber, ICTY). Consequently, the immunity continues after the official has left office. Personal immunity is a procedural defense. It renders the State official immune from a foreign State's jurisdiction (Cassese, 2002, pp. 863-864). Functional immunity, by contrast, is a substantive defense. i.e. the violation of law is only imputable to the State, and thus individual liability does not arise.

While in office, a high government official who holds personal immunity will be immune from the jurisdiction of foreign national courts. This may also be the case with the ICC even if he/she allegedly committed an international crime (*Arrest Warrant Case*, para 51 Judgment of the Court). This rule was affirmed by the International Court of Justice (ICJ), and the Belgian Court of Cassation (Cassese, 2003, p. 437). The dicta of the ICJ in the Arrest Warrant case was ambiguous and did not safe the date for ensuring the removal of immunity for state officials concerning international crimes and still gives the possibility of an effective Article 98 immunity cover as a shield from prosecution (Paragraph 61 Arrest Warrant Case). The immunity from prosecution for international crimes for persons ranking as such was given judicial recognition by the International Criminal Tribunal for former Yugoslavia (ICTY) in the *Prosecutor v. Tihomir Blaskić*, (Judgment, IT-95-14-108bis: Blaskic (Interlocutory), 29 October 1997. Paragraph 57) where the Appeals Chamber found it crucial to quash a *subpoena duces tecum* addressed to the Croatian Defense Minister and Croatia, allowing only a binding order addressed to Croatia alone (Paragraph 58). Despite the supremacy of the ICTY over national judiciaries, the Appeal Chamber found that the ICTY could not address binding orders to a State official acting in their official capacity under article 29 of the ICTY Statute (regarding "Co-operation and Judicial Assistance"). This can also be seen in the ICC's indictment of Omar Al Bashir which sparked a lot of controversies and led to the contention that as a sitting Head of State, he was immune from prosecution. This was supported by Malawi a State Party to the ICC which was requested to arrest and surrender Omar Al Bashir to the ICC on his visit to the country (ICC- 02/05-01/09-136-Conf and Conf Anx 1 to 4 (Pre-Trial Chamber I), 18 October 2011). Malawi refused to comply with the ICC's request based on domestic and international law about the immunities accorded to President Omar Al Bashir as a sitting Head of State. Professor Gaeta argues forcefully that the ICC is not authorized to issue such a request for surrender, and that a State would commit a wrongful act should it decide to honor the request (Gaeta, 2009, 2, pp. 315-332). The immunity barrier raised by article 98(1) is controversial and contradicts the provision of article 27 of the same Rome Statute which is to the effect that immunities pose no bar to the exercise of the Court's jurisdiction once a third-state official has been surrendered, they may stand in the way of that surrender.

It is important to note that article 98 of the Rome Statute of the ICC, which was drafted after prosecutions conducted by former International Criminal Tribunals (The Nuremberg and Tokyo Tribunals) does not follow their precedent as their decisions are normally supposed to be a guide. An example is the decision of the International Military Tribunal for the Far East denying the relevance of diplomatic immunity for the prosecution of Hiroshi Oshima, the Japanese Ambassador in Berlin ((I.M.T.F.E.), 29 April 1946-12 November 1948, Volume I, Röling and Rüter (eds), (1977), 456). The Nuremberg tribunal also followed the same strand of reasoning to the effect that general international law accords immunity to Heads of State about ordinary criminal acts performed in the course of exercising public functions, but they do not enjoy the same for serious international crimes. It stated that:

> "The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position to be freed from punishment in appropriate proceedings" (The Trial of The Major War before The International Military Tribunal 171, 218 (1947).

The exclusion of the official position of an individual as a possible defence to crimes under international law by the Nuremberg Tribunal and some international treaties, such as the 1948 Genocide Convention, has already resulted in a claim that, as a matter of general Customary International Law, even Heads of States are personally liable if there is sufficient evidence that they "authorized or perpetrated serious international crimes (Arthur, 1994, p. 84; Ngirishi, 2022).

Domestic Courts like the abovementioned former international criminal tribunals have adopted the same conceptual approach. An example is the case of *Regina v. Bartle, Ex parte Pinochet* ((2000) 1 AC 147 (H.L. 1999), 380) where the House of Lords held that under international law torture cannot be part of the functions of public officials, including Heads of State. Andrea Bianchi put it that, "international law cannot grant immunity from prosecution about acts which the same international law condemns as criminal and as an attack on the interests of the International Community as a whole" (Bianchi, 1999, pp. 260-61).

Given the fact that article 98(1) allows a tradition of immunity that conflicts with the object and purpose of the ICC and can prevent its prosecution of international crimes, such can be ignored by considering the requirement to waive immunity into effective and unbiased command from the United Nations Security Council (UNSC) to cooperate with the ICC. Relevant to note is the fact that it will be difficult for the Rome Statute to alter international law on immunities that exists between its States Parties and non-States Parties except in cases of UNSC referrals backed by an effective order for cooperation in that respect. While non-States Parties may not waive the immunity of their officials, the situation is supposed to be

different for States Parties which by article 27 should waive the immunity of their officials under national and international law not to bar the ICC from exercising jurisdiction. This should also extend to officials of other states who are in the territory of State Parties. Therefore, States Parties, by article 27(2), would be understood to have waived the immunities existing between themselves in respect of the international crimes under the jurisdiction of the ICC in situations where it intends to prosecute and is requesting surrender. The purpose and objective of the ICC would be undermined if States Parties could claim immunities on behalf of their officials and officials of other states located in their territories when the Court is requesting their surrender from other States Parties thereby shielding perpetrators from prosecution. State Parties to the ICC are therefore required to refrain from entering into immunity agreements that would defeat the object and purpose of the Rome Treaty (Article 18 VCLT).

2.3. Opposition to state cooperation concerning surrender of persons

Effective Cooperation with the ICC by states as mentioned earlier is an indispensable tool for the Court to effectively prosecute international crimes. This cooperation from state parties is made mandatory by the Rome Statute in Part 9, specifically, Article 86 which provides that "States Parties shall, by the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

The word 'shall' in the above provision denotes that cooperation with the ICC is a mandatory obligation for State Parties. This obligation is echoed in paragraph 4 of the preambles which in strong terms makes it clear that effective prosecution of international crimes must be ensured by measures at the national level and by international cooperation. This implies that State Parties are not to adopt an attitude that would be detrimental to the objective and functioning of the ICC in this respect (Amougou, 2012, p. 16). The Court's request for cooperation can concern matters relating to the arrest and surrender of persons (Articles 89 and 91), investigation and prosecution, transfer of victims and witnesses (Article 93(1)(j)), search and seizures (Article 93(1)(h)), enforcing orders and judgments of the ICC (Article 109) and other types of assistance (Article 93(1)(L)) provided they facilitate the investigation and prosecution of international crimes.

Article 98(2) of the Rome Statute opposes state cooperation to surrender in line with the obligation to do so as indicated in article 86 read alongside articles 89 and 91 of the same statute. It provides that:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements according to which the consent of a sending State is required to

surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender".

The above provision addresses generally possible conflicts of obligations of a requested state which are normally State Parties *vis-à-vis* the ICC on the one hand and the sending state on the other hand. The expression 'may not proceed with a request' can be interpreted to encompass both the non-transmission of a request and the circumstances in which the Court transmits a request for arrest and surrender only to discover that the suspect is covered by the sort of agreement described in article 98(2). The assumption in this case is that the Court would be bound to withdraw its request (See Rule 195(2) REP).

This provision prohibits the surrender and insulates the prosecution of non-ICC state nationals- sending states. 'Sending State' is not defined but can refer to a state whose armed forces or police or other official or government-employed or contracted personnel are stationed or otherwise deployed in the territory of another state under some sort of agreement (Scheffer, 2005, pp. 346-50). The import of Article 98(2) in this respect is that because the ICC may not proceed with a request for such persons, a State Party to the Rome Statute will never be placed in the position of being bound by article 89(1) to surrender to the Court a national of a third state (non-State) present in the territory of the State Party under an agreement with the third state.

The drafting and inclusion of Article 98(2) in the Rome Statute was intended to address the question of the effect of the ICC Statute on existing Status of Forces Agreements (SOFAs) (Scheffer, 2005, pp. 333) and Status of Mission Agreements ('SOMAs') (An example is Military Technical Agreement between International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, 4 January 2002, 41 ILM 1032 (2002), which cover military and associated civilian personnel stationed or otherwise deployed abroad, as well as for analogous non-military (for example, scientific) agreements which, in the words of the provision, would require the consent of a sending state to surrender to the Court persons within its scope. Article 98(2) enables States Parties to fulfill their existing obligations under the aforementioned agreements. Where such agreements exist, the Court will refrain from requesting a State Party to surrender the individual(s) concerned, unless consent can be obtained from the sending State. According to Hans-Peter Kaul and Claus Kress, both members of the German delegation to the drafting of the Rome Statute, Article 98(2) was designed to address possible not certain conflicts between existing obligations under SOFAs and the ICC Statute. They explained that the idea behind the provision of Article 98 (2) was to solve legal conflicts that might arise because of Status of Forces Agreements which are already in place. It was not designed to create an incentive for (future) State Parties to conclude Status of Forces Agreements which will amount to an obstacle to the execution of requests for cooperation issued by the Court (Hans-Peter & Kress 1999, at p. 165; Christopher 2000, p. 786 n. 36).

However, even in situations where Article 98(2) were to be interpreted to apply to renewed SOFAs, SOMAs, and new agreements of such nature entered into by States Parties to the ICC, these agreements would have to be consistent with the object and purpose of the Statute, as well as with other rules of international law (Article 18 and 31 VCLT). It should thus not be done to cause states not to cooperate with the ICC which would serve as a shield against the prosecution of international crimes given that cooperation is an indispensable tool for its effectiveness. Even though the drafting of Article 98(2) was intended to address existent bilateral immunity and non-surrender agreements, the availability of this provision has been exploited by some states especially the United States of America (USA) to coerce or pressure some states to enter into new of such agreements (Khan, 2020).

2.4. Article 98 and agreements vitiating consent to a treaty

Article 98 of the Rome Statute has served as a foundation for coercing states into bilateral immunity and non-surrender agreements vitiating consent in treaties thereby questioning their validity. Acts that amount to persuading or coercing states into being a party to a treaty nullify consent and render them void without any legal effect. This is supported by the provisions of articles 51 and 52 of the VCLT which is to the effect that the expression of a State's consent to be bound by a treaty that has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

The United States of America made use of economic threats and suspension of military aid to persuade states into bilateral immunity agreements. In July 2003, it announced the suspension of its military aid to 35 states following their refusal to grant immunity to American nationals who can be indicted by the ICC (Amougou, 2012, n. 46, p. 20). A total withdrawal of $46 million by the United States was reported. International Military Education and Training (IMET) was one of the programs affected, (CICC official webpage, 20 December 2023) a program which states like Kenya, Peru, and Ecuador, have relied upon (CICC official webpage, 20 December 2023). This act served as a threat to the many states around the world that are dependent on American aid (Van Der Vilt, 2005, p 94). The Bush administration threatened ICC States Parties with the withdrawal of military aid, including education, training, and financing the purchases of equipment and weaponry, if they failed to protect Americans serving in their countries from the ICC's reach (Chibueze, 2006, p. 212). By May of 2005, about 100 States had signed this immunity agreement which is referred to colloquially as the 'Article 98 Agreement' (Amnesty International Report, May 18, 2005). As of May 2022, an update of the countries involved in the aforementioned agreement indicates that many more countries have done the same (https://guides.ll.georgetown.edu/article_98., last update May 2022. Accessed 7/02/2024). These agreements aim to prevent the appearance before the ICC of any US national or, insofar as he or she is not a US national, any US official, employee, or service person.

The US-Uzbekistan Agreement regarding the Surrender of Persons to the International Criminal Court is typical of the above mentioned bilateral immunity agreement, which are more or less *pro forma*. Article 2 of the Agreement provides that Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party, (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or (b) be surrendered or transferred by any means to any other entity or a third country, or expelled to a third country, for surrender to or transfer to the International Criminal Court (Agreement between the Government of the United States of America and the Government of the Republic of Uzbekistan regarding the Surrender of Persons to the International Criminal Court, Washington, 18 September 2002, 42 ILM 39 (2003)). Article 3 provides that when the US extradites, surrenders, or otherwise transfers a person of the Republic of Uzbekistan' to a third state, it will not agree to the surrender or transfer of that person to the ICC by the third state without the express consent of Uzbekistan.

Like the USA, Afghanistan has sought to prevent the surrender to the ICC of its military and civilian personnel falling within the scope of Article 98 of the Rome Statute. The last sentence of paragraph 4 of Annex A ('Arrangements regarding the Status of the International Security Assistance Force') of the Military Technical Agreement concluded in January 2002 between the International Security Assistance Force (ISAF), composed of NATO personnel, and the Interim Administration of Afghanistan provides that 'the Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation'. Not only has Article 98 of the Rome statute served as the foundation for coercing states into bilateral immunity and non-surrender agreements shielding perpetrators from being prosecuted for international crimes, but it also violates peremptory norms of international law.

3. The Contradictory nature of article 98 to *Jus Cogens*

3.1. Jus Cogens Prescription on the Purpose of a Treaty

Customary International Law obliges a State Party independently of the terms of the treaty in question not to engage in conduct inconsistent with that treaty's object and purpose. The existence of such an obligation is contained in Article 18 of the VCLT and is also implicit in the principle of *pacta sunt servanda* codified in Article 26 of the same Convention. The Customary nature of such a treaty obligation was recognized by the ICJ in the Nicaragua case as an obligation on states 'not to impede the due performance of a treaty' to which it is party (Merits, Judgment, ICJ Rep 1986, p. 135, para. 270). It can therefore be concluded from the foregoing that the provisions of article 98 of the Rome Statute are contrary to Customary International Law on state-party treaty obligations as it prescribes immunity from prosecution

and non-surrender of accused persons requiring State Parties to act contrary to the object and purpose of the Rome Treaty. This article is void in this respect because it contradicts the norm of *pacta sunt servanda* (Article 53 VCLT) which is undoubtedly universally recognized as a peremptory norm of Customary International Law. Relying on Customary International Law norm as enunciated by the ICJ ((*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, 138 paras 275-276.), Crawford et al assert a well-established principle as follows: "States Parties … have an obligation to each other not to act in such a way as to 'deprive' a treaty of its object and purpose, or to undermine its spirit" (Crawford et al, 5 June 2003, pp.18-21). Since the object and purpose of the Statute include a commitment to combat impunity, the authors conclude that: "[A] State Party which enters into a new agreement which has … the effect of immunizing persons within the jurisdiction of the ICC from prosecution at either international or national level contradicts the obligation not to deprive the Statute of its object and purpose".

3.2. Nature of Crimes Proscribed by the Rome Statute

Article 98 of the Rome Statute contradicts *jus cogens* norms on the proscription of heinous crimes by prescribing immunity and non-surrender agreements which require states not to cooperate with the ICC in the prosecution of international crimes. The Rome Statute in Article 5 empowers the ICC to prosecute crimes of genocide, crimes against humanity, war crimes, and crimes of aggression which are core crimes with very disastrous effects on humanity as a whole. These are universal crimes because they have wide effects no matter where they are committed (Forsuh, 2020, p. 9). These are known as crimes against *iuris gentium*- universal or International Crimes (Akonumbo, 2007 p. 113). The prescription and prosecution of international crimes as in the Rome Statute has been recognized as peremptory and therefore *jus cogens*. This was evident in the *Prosecutor v. Furundzija* (Case No. IT-95-17/1 (1998), para. 153) where the ICTY reviewed international law against torture and decided that the norm was peremptory and had consequently become *jus cogens* norm.

Crimes under the competence of the ICC especially acts of genocide have been recognized as a universal crime under both the 1948 Genocide Convention and general international law. The International Court of Justice stated in the 1996 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that 'the rights and obligations enshrined in the Genocide Convention are rights and obligations *erga omnes'*((Bosn. & Herz. v. Yugo.) 1996 I.C.J. 595, 616 (July 11). The ICJ went further to indicate that the obligation each state has to prevent and punish the crime of genocide is not territorially limited by the Convention. In line with the foregoing, the International Law Commission has confirmed that universal jurisdiction concerning the crime of genocide exists as a matter of Customary law for those states that are not parties to the Genocide Convention (8, Report of the International Law Commission on the work of its forty-eighth session, GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10, para. 30 (1996)). This therefore implies that

contrary to treaty obligation and by extension the spirit of article 98 of the Rome Statute, the proscription and prosecution of international crimes is a matter of *jus congens*. The violations of International Humanitarian Laws (ILH) are war crimes proscribed by article 8 of the Rome Statute. IHL are preemptive norms of Customary International Law as evident in the *Nuclear Weapons* advisory opinion, where the International Court of Justice emphasized that fundamental rules of IHL are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of International Customary Law (Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257).

4. OBLIGATIONS ARISING FROM UNITED NATIONS SECURITY COUNCIL REFERRALS AND ARTICLE 98 EFFECTS ON PROSECUTION

Article 13(b) of the Rome Statute empowers the United Nations Security Council (UNSC) to initiate actions at the ICC by referring a case to it making use of its powers under Chapter VII of the United Nations Charter of 1945. Such referrals are important in the fight against impunity for international crimes in that they extend the ICC's jurisdiction to non-state parties that are under obligation to cooperate with it (UNSC Resolution 1593 of 31 March 2005, para. 2 UNSC Resolution 1970 of 2011). The UNCS council in the same light is also under an obligation to cooperate fully and adequately with the ICC as provided for in Article 87(6) of the Rome Statute and Article 2(2) of the Relationship Agreement between the ICC and the United Nations Organisation (UNO) of 2004 (Forsuh, 2017, pp. 101-120). However, some actions undertaken by the UNSC contrary to the aforementioned cooperation requirements seem to have been done under the cover of Article 98 of the Rome Statute of the ICC.

The UNSC adopted two resolutions under Chapter VII of the UN Charter which while not falling under Article 98(2) of the Rome Statute because they are not international agreements, reflect measures specifically designed to prevent the surrender of third-state (non-state) military personnel to the ICC, still under the purview of the aforementioned article. It also reflects the belief that measures aimed at the non-surrender of military personnel of non-State Parties to the ICC are not per se unlawful. An example can be seen in UNSC Resolution 1497 (2003) which authorized Member States to establish a Multinational Force in Liberia but decided in paragraph 7 to prevent the surrender to the ICC of current or former officials or personnel from a contributing State, which is not a party to the Rome Statute. It required that the aforementioned personnel shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia unless such exclusive jurisdiction has been expressly waived by that contributing State. When the UNSC referred the situation in Darfur

to the ICC by Resolution 1593(2005), it also decided to prevent the surrender to the ICC of personnel of non-state Parties to the Rome Statute. This was done taking note of article 98(2) of the Rome Statute and in recognition of the presence in Darfur of a mission made up of States of the African Union, possibly including the deployment of US troops. The resolution prevents the ICC's prosecution by limiting to the exclusive jurisdiction of contribution states the prosecution of nationals, current or former officials, or personnel from a contributing State outside Sudan which is not a party to the Rome Statute. The prosecution refers to all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union unless such exclusive jurisdiction has been expressly waived by that contributing State.

It is important to note that UNSC resolutions reflect acts that as mentioned earlier fall within the scope of its mandate and authority as provided for in Chapter VII, Articles 39 and 41 of the UN Charter. According to Article 25 of the Charter, all decisions made by the Security Council are binding on all UN member States, and under Article 103, obligations arising from the Charter to member States prevail over obligations under any other international agreement. Therefore any resolution aimed at enforcing the non-surrender of a non-State Party national to the ICC in line with the provision of article 98 of the Rome Statute is binding on all UN member States and would shield perpetrators from prosecution by the Court. Despite all this, the bottom line is that where the ICC taking correct account of articles 98(1) and (2) of the Rome Statute proceeds with a request to a State party for the surrender of a suspect, the State Party's refusal, on sole account of an 'article 98' agreement between it and non-State Party, to surrender the person will constitute a breach of article 89(1) of the Statute. It is proposed that the UNSC council referral should be backed by a requirement for effective cooperation from all UN member States because it will extend the jurisdictional reach of the ICC in the prosecution of heinous crimes. This could be through follow-up support to the Court once the UNSC has referred a situation to it. Therefore, when the ICC notifies the UNSC of non-cooperation by States like failure to give effect to arrest warrants arising from Security Council referrals, the Council's statement of support, or an acknowledgment of information and an emphasis on the need for cooperation between all parties coupled with compelling measures like economic and military aid bands will go a long way to enforce cooperation.

5. THE AFRICAN UNION'S PERCEPTION OF ARTICLE 98 AND EFFECT ON PROSECUTION

The relevance of addressing the African Union's (AU) perception of article 98 in this write-up is because its cooperation with the ICC like that of the UNO (through the UNSC) is very important for the Court's prosecution of crimes within its jurisdiction. Moreover, the majority if not all cases the Court has prosecuted, those still being investigated and prosecuted by the ICC involve Africans requiring full cooperation from the AU. In terms of representation at the ICC, as of February 2024, 124 states are parties to the Rome Statute creating the ICC.

Out of them, 33 are from Africa, 20 are from the Asia Pacific, 18 are from Eastern Europe, and 28 are from Western Europe and Other Countries. The high number of Africans indicted and its high representation at the ICC shows the need for effective cooperation from the AU. This requires that the AU adopts an approach not friendly to Article 98 which makes provision for bilateral immunity and non-surrender agreements requiring states not to cooperate with the ICC. However the AU's perception of the aforementioned article has served as a shield against the prosecution of international crimes by the ICC (Hendrickse, 2024).

On the 9th of January 2012, the AU's Commission issued a press release on the ICC Pre-Trial Chamber I decision on the 'alleged' failure by Chad and Malawi to comply with the cooperation requests concerning the arrest and surrender of the then President Omar Al Bashir of Sudan (African Union Press Release Nº 002/201 (9 January 2012). The press release asserted that the decision has the effect of "Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless [.]" This is because the AU viewed article 98 of the Rome Statute as forbidding arrest warrants for sitting Heads of State and therefore believed that it provided immunity for President Omar Al Bashir. The AU's Interpretation of article 98 of the Rome Statute is buttressed by various African Union resolutions which required its members not to cooperate with the warrant of arrest against President Al Bashir (See African Union Peace and Security Council, 2009, Statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir, PSC/PR/Comm. (CLXXV), 5 March, Addis Ababa, Ethiopia).

Just like the situation surrounding the indictment of Omar Al Bashir, the situation in Kenya which involved the ICC indicting a sitting Head of State led to a serious strained relationship between the Court and the AU. The AU adopted a position that can be interpreted in the light of Article 98(2) as calling upon African States not to cooperate with the ICC in the prosecution of Kenyans accused by the Court after an unsuccessful attempt to secure UNSC deferral of the situation in Kenya which it considered to be detrimental to peace and security of citizens. The AU contended that standing trial as a sitting Head of State is particularly troublesome because of their demanding functions. The absence of the Kenyan President and his Deputy resulting from the required presence at the ICC would constrain them from attending to the domestic security situation in Kenya after the attack on the Nairobi shopping center on 21st September 2013. With this, the then-Kenyan government successfully lobbied AU members to adopt a resolution calling for the cases to be referred to Kenya for national proceedings to be taken, rather than being left to the ICC (Forsuh, 2015, p. 356). The AU's approach here can be interpreted as the requirement to grant immunity to sitting Heads of State as provided for by article 98(1) of the Rome Statute which in its absence, persons holding such positions cannot effectively carry out their functions. The argument held by the AU that the indictment of Kenyan leaders compromised the security situation in Kenya requiring a deferral was supported by David Crane the former chief prosecutor of the Special Court for Sierra

Leone (SCSL) and the person who built the case against Charles Taylor. He argued that in pursuing indictment against Kenyatta and Ruto, the ICC ignored political realities both at domestic and international levels. He suggested that the ICC should have used the "threat of its intervention to push for reforms rather than launching prosecutions that the Kenyan elite would never support" (Howden, October 18, 2013, cf. Mbaku 2014).

6. CONCLUSION

The creation of the ICC with a wide jurisdictional reach compared to *ad hoc* tribunals came with lots of expectations that there would be no more impunity for heinous crimes. It was hoped that the Court would serve as a deterrent to future international crimes, a contributor to stable international order, and a reaffirmation of international law. But the provisions of article 98 of the Rome Statute creating the Court leave much to be desired. This is because this article makes provision for immunity and non-surrender agreements which encourages States not to cooperate with the ICC posing a serious barrier to its functioning thereby shielding perpetrators from prosecution. It opposes the object and purpose of the Statute as echoed in its preamble and required by international law. It also contradicts preemptive norms of Customary International Law.

It has been underscored that the ICC cannot achieve its mission without effective cooperation from states and International Organizations especially the UNSC which has powers of referral by article 13(b) of the Rome Statute and the AU representing the African continent from which the majority of not all of ICC cases come from. It has been demonstrated that instead of effectively cooperating with the ICC to ensure the prosecution of international crimes, the UNSC has adopted some measures which are in furtherance of the provisions of Article 98. The AU on its part has opposed the indictment of sitting Heads of State calling on African states not to cooperate with the ICC reflecting the provisions of Article 98 amounting to shielding perpetrators from ICC prosecution. It is therefore relevant that State Parties and non-state Parties where the case may be should not adopt approaches friendly to and refrain from measures friendly to the provisions of article 98 which are contrary to the object and purpose of the Rome Statute creating the ICC. Since Article 98 allows the tradition of immunity and encourages non-cooperation which conflicts with the object and purpose of the ICC and shields perpetrators from prosecution, its effects can be ignored by considering the requirement to waive immunity into an impartial, unbiased, and effective command from the UNSC to cooperate with the ICC in the prosecution of international crimes.

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