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Contents

POLITICAL POWER, AUTHORITY AND LEGITIMACY: ANALYSING THE INCONSISTENCY OF MILITARY RULE WITH DEMOCRATIC GOVERNANCE IN WEST AFRICA

Tayewo A. Adewumi*

Abstract

On January 28, 2024, the media came alive with the news of the three Francophone West African countries leaving the Economic Community of West African States (ECOWAS). Before this, the military junta of the Niger Republic had approached the ECOWAS Court of Justice praying for the lift of sanctions imposed upon them by the ECOWAS, the quest to lift these sanctions failed because the court made it clear that it recognizes only democratic government as the only legitimate government. The three questions that this article seeks to answer are whether there is any country in West Africa with a democratic military government, whether the military juntas of these countries can withdraw from ECOWAS through media announcements, and whether their withdrawal from ECOWAS has implications. To answer these questions, this article examines the concept of political power, authority, and legitimacy by adopting theoretical and doctrinal study of primary sources and secondary sources. This study examines and evaluates information and provisions contained in international treaties, conventions and protocols, journal articles, books, newspapers, and materials sourced from the internet.

Keywords: Political, Power, Authority, West Africa, Legitimacy

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1. INTRODUCTION

In 1972, a proposal for a union of West African States emerged, the Nigerian head of state Gen Yakubu Gowon, and his Togolese counterpart Gnassingbe Eyadema travelled around the West African region in support of the integration idea. This brought about the emergence of the Treaty of Lagos in 1975 creating the Economic Community of West African States (ECOWAS).

Emerging political events led to the revision of the treaty and the expansion of its scope and powers in 1993. Cape Verde, one of the two Lusophone countries (Portuguese-speaking African countries, is known as Lusophone Africa, it consists of six African countries which are: Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe and Equatorial Guinea.) in the region joined ECOWAS, and in December 2000, Mauritania withdrew its membership. The Economic Community of West African States (ECOWAS) is made up of fifteen member countries that are in the Western African region (ECOWAS official website).

Three West African Francophone countries announced on January 28, 2024, that they were leaving ECOWAS for good and forming a confederation alliance (Busari, 2024). These countries are Niger Republic, Burkina Faso and Mali. The military junta in Niger Republic seized power from the democratic president in July 2023, Burkina Faso entered military rule in 2022 while Mali's entrance into military rule was in 2020. These three countries had received sanctions ranging from ECOWAS membership suspension to various economic sanctions. The position of the ECOWAS is that the military juntas of these countries should return power to their democratically elected governments. These military juntas refused to yield to ECOWAS's directive on this. It is from the above that we embark on the analysis of the inconsistency of military rule with democratic governance in West Africa by adopting theoretical and doctrinal study of primary sources and secondary sources. This study critically examines and evaluates information and provisions contained in international treaties, conventions and protocols, journal articles, books, newspapers, and materials sourced from the internet.

The first section is the introduction, the second section discusses the concept of political power, the third section discusses the concept of authority, the fourth section discusses the concept of legitimacy, the fifth section discusses the question as to whether democratic military government exists in West Africa, the sixth section discusses the legal implication of the non-membership of ECOWAS by the three countries and seventh section is the conclusion.

2. CONCEPT OF POLITICAL POWER

Political power is the semantic for the combination of power and politics. Politics involves partial control of human behavior through voluntary habits of compliance combined with threats of possible enforcement (Deutschp, 1967, p. 232), this means that politics is the interplay of habits and threats. Power has also been described as the ability to prevail in conflict and to overcome obstacles (Deutschp, 1967). Power has always been an important concept in the discussion and study of international relations (Ahmad, 2012, p. 83). Ahmad (2012), in discussing power referred to the postulation of Toffler (1990, pp. 15-16) on different ways power can be manifested, he said power can be manifested by violence, wealth, and knowledge. According to him, determination and identification of power in society is in these three elements and those in the position of authority use these three elements. These three elements are the major determinants of the location of power.

Berndtson (1970, p. 73) believes that there is a long and controversial history of the notion of power which has been uncharted. He believes that the approach to power may be discerned and put into some order even though power may be dark but warm at the same time. The concept of darkness and warmness of power lies in the hands of those who wield it, ideology, conscience, and objectivity always determine how power can be used in either a positive or negative way. Berndtson's (1970) figurative expression on the issue of power being "dark" but "warm" shows that the color of power is determined by the wielder of such power.

In discussing power and anarchy, Buzan (1984, p. 117) opines that military power offers one of the solutions to anarchy, but the self-sustaining mechanisms of anarchy would make any military attempt at a universal empire bloody. He recognizes the fact that military rule to any form of anarchy will explode into a bloody empire because the military would try to expand its rule and governance through guns which will bring about the rise of an army of rebels and militia groups.

In explaining the complexity in the definition of power, Emmet (1953, p. 26) opines that:

> Nevertheless, an omnibus term such as power may have its advantages when we are thinking about human efforts and relationships. The complexity in its meaning, if we are aware of this, may serve as a reminder that government and the management of human affairs are not simple things that can be formulated in terms of force or impersonal mechanisms of control, but that several subtle considerations of prestige, faith, admiration, personal flair, social function all enter in. And as we try to understand better the symbolic and metaphorical terms in which people try to express these sides of human relationships, we may see further into the problems suggested by the multiple associations of the concept of power (Emmet,1953, p. 26).

In corroborating the complexity of power, Arendt (1970, p. 44) believes that power does not belong to an individual except when it is surrendered to such an individual by a group of people. The author succinctly put it this way:

> Power corresponds to the human ability not just to act but to act in concert. Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together. When we say of somebody that he is "in power" we refer to his being empowered by a certain number of people to act in their name.

The above is a reference to the operation of a democratic government where political power is derived from a group of people. Parsons (1963, p. 232) however describes power thus:

> Power is one of the key concepts in the great Western tradition of thought about political phenomena. It is at the same time a concept on which, despite its long history, there is, on analytical levels, a notable lack of agreement both about its specific definition and about many features of the conceptual context in which it should be placed.

He identified the fact that there is no consensus on what power means but went on to give a meaning thus:

> There is, however, a core complex of its meaning, having to do with the capacity of persons or collectivities "to get things done" effectively, in particular when their goals are obstructed by some kind of human resistance or opposition. The problem of coping with resistance then leads to the question of the role of coercive measures, including the use of physical force, and the relation of coercion to the voluntary and consensual aspects of power systems.

He identified power as the capacity to get things done and the coping with human resistance which calls into question the methods to get these things done.

Haugaard (2010, p. 1050) identifies the difference between political power and coercive power thus:

> The distinction between political and coercive power involves what Max Weber called ideal types, which entail the construction of purified categories of analysis distilled from social life. Pure political power, devoid of violence and coercion, is a rare phenomenon. In most interactions, the two sources of power are mixed, yet some interactions are predominantly characterized by political power, and, with the emergence of the modern democratic state, the

> conditions of possibility for political power unsupported by coercion became hugely advanced.

He believes that no political power can exist without coercion and violence. Coercion may refer to the punishment or penalty stipulated in the law for disobedience of such law. In any case, man has never lived without political power, and political power has brought about both good and evil, often necessarily less than the ideal good (Sandelius, 1951, p. 715).

Neumann (1950, p. 162) believes that those who wield political power are always compelled to make the people respond to their rule by creating emotional and rational responses in them which make them accept their commands and instructions, he went further that failure of the political power wielders to successfully invoke people's submission through emotion result to simple violence. Neumann's description of political power is insightful, and the little violence referred to here is the punishment or penalty which attracts the breach of the law of the land.

Lukes (2007, p. 61) believes that there is no neutral, canonical, uncontestable way of conceiving power that is free of controversial political implications. He said this is due to the links between power, responsibility, and interests. He opines that "To attribute responsibility and to identify where agents' interests lie is inherently controversial. Power can be conceived narrowly or broadly and as incorporating one or more dimensions, yielding different pictures of how power is configured".

Uphoff (1989, p. 295) corroborated the above when he opines that power itself is a clear complex notion but when it is mixed with discussion of politics, it becomes more complex to define. In his words, he opines that:

> Power is a puzzling notion. It seems so useful as a way to talk about politics in ordinary discourse, but when used to analyze politics systematically it quickly becomes entangled in a snarl of concepts, its precise nature and meaning growing less clear in the underbrush of related terms.

He went further to say that:

> Power is often treated as synonymous with "authority," though if the two terms meant the same thing, we would need only one of the two words in our vocabulary. To make matters worse, authority is commonly referred to as "legitimate" power, making the three terms into a conceptual labyrinth (Uphoff 1989, p. 296).

The three terms were used by Hurd (1999, p. 379) who states that political theorists distinctly describe three mechanisms of social control that have the same bearing with the three currencies of power, which he calls coercion, self-interest, and legitimate authority. There has

never been a definite answer to what power is because it depends on the context in which it is used. From the above, political power can only be wielded by a democratic government.

3. CONCEPT OF AUTHORITY

The concept of authority in this section is discussed with politics, that is, we are discussing political authority. Beran (1983, p. 487) analyses the concept of authority as it relates to political authority when he opines that:

> When we ask what the basis of political authority is, we are concerned with what I will call authority-over, rather than with authority-on or authority-with. The distinction between the three types of authority is now widely accepted. Authority-over consists of the right to issue orders in certain areas of conduct, a right that one has by a role within a hierarchically organized group. Authority-on is detailed and systematic knowledge that is recognized as such by others. Authority- with readily accepted influence by leadership qualities or office or expertise.

To him, political authority has classification and the most appropriate one for this discussion is the "authority-over" which is what political authority is all about even though a group of people gave such authority willingly.

Carr (1989, pp. 730&731) discusses the concept of political authority in line with Kant's theory when he opines that "political authority is the precondition for both peace and freedom, and two unite under the political condition promoted by the state." To him, peace and freedom can only exist where there is political authority. The exercise of political authority requires the citizen to obey without question and the possibility of coercion (Cassinelli, 1961, p. 635).

Edmunson (2010, p. 180) opines that "Political authority consists in the state's (purported) moral power to place us under obligations to obey its commands, particularly its laws". Moral power in this context refers to the duty of the democratic government to provide amenities and a conducive environment for the citizens to strive and this creates the obligation in the citizens' minds to obey its law. Sanders (1983, p. 555) believes that political authority and natural authority are two different things, but political authority can successfully mimic the natural authority where genuine people hold office. In his words:

> Political authority is at best a pale imitation of the "natural" relationship it tries to mimic. For this reason, it is bound to be unsatisfactory, no matter what independent advantages it may be perceived by some to offer. But curiously, it can succeed to some extent in that it is not impossible that genuinely worthy

> people may come to hold office, and in that many people may come to regard an office-holder as a "natural" authority simply because of their faith in the institutional process. This, surely, is what the defenders of political authority hope for.

Sanders is referring to a democratic government with political authority in the hands of honest and good leaders which then turns to natural authority where the obedience is observed out of love for the leader as opposed to fear of punishment. The above shows that political authority can only exist in the hands of a democratic government.

4. CONCEPT OF LEGITIMACY

Legitimacy in politics means the right to rule and the acceptance of the government by the governed. Buchanan (2002, p. 719) has argued that where institutional resources are available for the democratic authorization of a wielder of political power, political legitimacy requires democracy.

Sartorius (1981, p. 17) in discussing legitimacy under democratic rule opines that:

> Those who legitimately wield the powers of government have the right to rule and the responsibility to do so for the benefit of, and with an eye to the protection of, the rights of those they govern. Those they govern lie under no general obligation to obey them and may, indeed, seek to remove from authority those who abuse the awesome powers of government.

The above paints the picture of a democratic setting where the power belongs to the people and there are checks and balances in governance. Cozzaglio (2022, p. 86) argues that a realist notion of legitimacy must be grounded on both acceptance and acceptability and must prioritize acceptance over acceptability. He believes that “a regime is legitimate when it exercises political power according to standards that are included in subjects’ acceptable beliefs”. Acceptable beliefs are the principles of democracy. Three fundamental principles of democracy are that (i) individuals have inalienable human rights; (ii) they ought to be free to make decisions for themselves when their actions do not improperly interfere with the lives of others; and (iii) they should have an equal voice over how they are governed, insofar as they are competent Keohane (2011, p. 99).

Pfaff et.al (2022, p. 4) in discussing legitimacy opine that "Legitimacy depends on inter-communal belief and faith in fair and effective government and civic systems. This includes the government’s ability to provide services, proportional access to shared funds, available jobs, and other resources fundamental to quality of life”.

Koppell (2008, p. 178) stressed that it is important to separate authority from legitimacy; he opines that authority exists in the absence of legitimacy. I agree with this assertion, a government may come into power and have authority but lack legitimacy, for example the military government. The motive for military intervention is at its peak when the military cares very strongly about a policy that can be effectively attained with little or no cooperation from the citizens (Sutter, 1999, p. 140). From the above, it can be concluded that legitimacy cannot exist under military rule.

5. IS THERE A DEMOCRATIC MILITARY GOVERNMENT IN WEST AFRICA?

The ECOWAS Court of Justice on December 7, 2023, dismissed the prayer of Niger Republic for the suspension of the sanctions imposed upon it by the ECOWAS Heads of State and Government. At the hearing of the case on November 21, 2023, it was argued that the sanctions imposed by the Authority of Heads of State and Government of ECOWAS have had negative effects on the people of Niger Republic which include food shortage, medicine shortage, and non-availability of electricity because of the closure of borders and stoppage of electricity supply by Nigeria.

The sanctions were carried out according to Article 77(1) and (2) of the ECOWAS Revised Treaty which provides that:

1. Where a Member State fails to fulfill its obligations to the Community, the Authority may decide to impose sanctions on that Member State.

2. These sanctions may include:

(i) suspension of new Community loans or assistance.

(ii) suspension of disbursement on ongoing Community projects or assistance programs;

(iii) exclusion from presenting candidates for statutory and professional posts.

(iv) suspension of voting rights; and

(v) suspension from participating in the activities of the Community.

The above provision has shown that the list of sanctions is not exhaustive. The Court, in rejecting the application, explained that the Republic of Niger being currently controlled by the military junta, lacked the legal capacity to bring any matter. It based its decision on Articles 9(2) and 10 of the Protocol of the Court. Article 9(2) of the protocol A/P.l/7/91 on the Community Court of Justice provides that:

> The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the Institutions of the Community on the· interpretation or application of the provisions of the Treaty.
>
> Article 10 of the Protocol of the Court provides that:
>
> The Court may, at the request of the Authority, Council, one or more Member States, or the Executive Secretary, and any other institution of the Community, express, in an advisory capacity, a legal opinion on questions of the Treaty.
>
> Requests for advisory opinion as contained in paragraph 1 of this Article shall be made in writing and shall contain a statement of the questions upon which advisory opinion is required. They must be accompanied by all relevant documents likely to throw light upon the question.
>
> Upon receipt of the request referred to in paragraph 2 of this Article, the Chief Registrar shall immediately inform Member States, and notify them of the time limit fixed by the President for receipt of their written observations or for hearing their oral declarations.
>
> In the exercise of its advisory functions, the Court shall be governed by the provisions of this Protocol which apply in contentious cases, where the Court recognizes them to be applicable.

In its ruling, the Court opined that an entity emanating from an unconstitutional change of government, and not acknowledged by ECOWAS as a government of a member state, lacks the legal capacity to initiate an action before the court to obtain benefits or reprieve.

The ECOWAS Community Court of Justice was established in 1991 by the ECOWAS Revised Treaty. Article 6(1)e lists the Community Court of Justice among the institutions of ECOWAS. Article 15 of the treaty provides for the establishment of the Community Court of Justice thus:

> 1. There is hereby established a Court of Justice of the Community.
> 2. The status, composition, powers, procedure and other issues concerning the Court of Justice shall be as set out in a Protocol relating thereto.
> 3. The Court of Justice shall carry out the functions assigned to it independently of the Member States and the institutions of the Community.

> 4. Judgements of the Court of Justice shall be binding on the Member States, the Institutions of the Community, and on individuals and corporate bodies.

The Court had made it clear that there is no democratic military government in West Africa and the military junta cannot benefit from its illegality, this can be likened to two maxims of equity namely "one who comes to equity must come with clean hands" and "one who wants equity must do equity". The Court referred to the Nigerien military government as an "unconstitutional and unrecognized governmental authority". Democracy and military rule are two different concepts that can never co-exist in the same environment. While democracy is the government of the people, military rule is the government of force and coercion.

ECOWAS Revised Treaty gives the Community Court of Justice the final say in settling disputes among member countries. Article 76 provides that:

> 1. Any dispute regarding the interpretation or the application of the provisions of this Treaty shall be amicably settled through direct agreement without prejudice to the provisions of this Treaty and relevant Protocols.
>
> 2. Failing this, either party or any other Member States or the Authority may refer the matter to the Court of the Community whose decision shall be final and shall not be subject to appeal.

From the above, the decision of the ECOWAS Court of Justice is the final and there is no provision for appeal of this decision. It has been emphasized that military rule and democratic governance cannot co-exist.

6. ECOWAS OBJECTIVES, PROCESS OF WITHDRAWAL AND IMPLICATION OF NON-MEMBERSHIP OF THE ECOWAS

Under this section, we are discussing the issue of membership in ECOWAS, the process of withdrawing as a member, and the implications of non-membership to the countries and their citizens.

6.1 Objectives

The Economic Community of West African States (ECOWAS) was created for a purpose. The purpose is as provided in Article 3(1) of the Revised Treaty as follows:

> The Community aims to promote cooperation and integration, leading to the establishment of an economic union in West Africa to raise the living standards of its

people and maintain and enhance economic stability, foster relations among Member States, and contribute to the progress and development of the African Continent.

Article 3(2) of the Revised Treaty laid down the process of achieving the objectives. Fundamental principles of the ECOWAS are as provided for under Article 4 of the Revised Treaty as follows:

a) equality and inter-dependence of Member States;

b) solidarity and collective self-reliance;

c) inter-State cooperation, harmonization of policies, and integration of programs;

d) non-aggression between Member States;

e) maintenance of regional peace, stability, and security through the promotion and strengthening of good neighborliness;

f) peaceful settlement of disputes among Member States, active co-operation between neighboring countries, and promotion of a peaceful environment as a prerequisite for economic development;

g) recognition, promotion, and protection of human and people's rights by the provisions of the African Charter on Human and Peoples' Rights;

h) accountability, economic and social justice, and popular participation in development;

i) recognition and observance of the rules and principles of the Community;

j) promotion and consolidation of a democratic system of governance in each Member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July 1991; and

k) equitable and just distribution of the costs and benefits of economic cooperation and integration.

The treaty recognizes the democratic system of governance.

6.2 Process of Withdrawal

The process of withdrawal is as provided for in Article 91 of the ECOWAS Revised Treaty thus:

1. Any Member State wishing to withdraw from the Community shall give the Executive Secretary one year's notice in writing who shall inform the

> Member States thereof. At the expiration of this period, if such notice is not withdrawn, such a State shall cease to be a member of the Community.
>
> 2. For one year referred to in the preceding paragraph, such a Member State shall continue to comply with the provisions of this Treaty and shall remain bound to discharge its obligations under this Treaty.

Article 42(2) of the Vienna Convention on the Law of Treaties 1969 provides that "the termination of a treaty, its denunciation or the withdrawal of a party, may take place only because of the application of the provisions of the treaty or the present Convention. The same rule applies to suspension of the operation of a treaty". It means that the withdrawal of membership follows the provision of a treaty or convention. Also. Article 54 of the Vienna Convention on the Law of Treaties 1969 further provides for the conditions for the withdrawal of a party or termination of a treaty thus:

> The termination of a treaty or the withdrawal of a party may take place:
>
> (a) in conformity with the provisions of the treaty; or
>
> (b) at any time by consent of all the parties after consultation with the other contracting States.

6.3 *Implication of Withdrawal*

The implication of the withdrawal is succinctly stated in Article 70 of the Vienna Convention on the Law of Treaties 1969 thus:

> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) releases the parties from any obligation further to perform the treaty;
>
> (b) does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies to the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 92(1) of the ECOWAS Revised Treaty gives credence to the above when it provides that:

> Upon the entry into force of this revised Treaty in accordance with the provisions of Article 89, the provisions of the United Nations Vienna Convention on

the Law of Treaties adopted on May 23, 1969, shall apply to the determination of the rights and obligations of Member States under the 1975 ECOWAS Treaty and this revised Treaty.

Under the Treaty, each Member State had undertaken to honor its obligations under the ECOWAS Revised Treaty and to abide by the decisions and regulations of the Community (Article 5(3) of the ECOWAS Revised Treaty). The following are the benefits to be lost at the withdrawal of membership from ECOWAS.

(i) Loss of cooperation in food and Agriculture

Article 25 of the Revised Treaty provides for cooperation in agricultural development and food security. This cooperation will no longer exist the moment the countries cease to be members of ECOWAS.

(ii) Loss of Cooperation in Industry, Science and Technology, and Energy

Article 26-28 of the Revised Treaty provides for cooperation in the areas of industry, science and technology, and energy. This cooperation will be lost as soon as the countries cease to be members of ECOWAS.

(iii) Loss of Co-operation in Environment and Natural Resources

The three countries will lose the cooperation of ECOWAS in environment and natural resources as provided under Article 29-31 of the Revised Treaty as soon as they cease being members.

(iv) Loss of Co-operation in Transport, Communications and Tourism

Article 32-34 provides for cooperation in transport, communication and tourism. This cooperation will cease to exist the moment the three countries withdraw from ECOWAS.

(v) Loss of Co-operation in Trade, Customs, Taxation, Statistics, Money and Payments

One of the important areas of cooperation is in trade, customs, taxation, statistics, money, and payments as provided for under Article 35-53 of the Revised Treaty. The three countries will lose all these cooperations as soon as they withdraw from ECOWAS membership.

(vi) Loss of Benefits in Establishment and Completion of an Economic and Monetary Union

The desire of the regional organization to establish an economic and monetary union had been an uppermost agenda in driving economic and monetary integration in West Africa.

Article 54-55 of the Revised Treaty provides for this union, at the exit of the three countries from ECOWAS, the cooperation on this will cease to exist.

(vii) Loss of Cooperation in Political, Judicial, and Legal Affairs, Regional Security and Immigration

Article 56-59 provides for the cooperation of the member states in political, judicial, and legal affairs, regional security, and immigration. The moment these three countries withdraw from the ECOWAS, their citizens lose all rights to free migration among the ECOWAS countries, and the countries lose the regional political, judicial, legal, and regional security cooperation.

(viii) Loss of immigration Rights

Article 59 of the ECOWAS Revised Treaty provides for the immigration rights of the ECOWAS citizens thus:

1. Citizens of the Community shall have the right of entry, residence, and establishment and Member States undertake to recognize these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto.

2. Member States undertake to adopt all appropriate measures to ensure that Community citizens enjoy fully the rights referred to in paragraph 1 of this Article.

3. Member States undertake to adopt, at the national level, all measures necessary for the effective implementation of the provisions of this Article.

The moment the three countries withdraw from the ECOWAS, their citizens lose their rights of entry, residence, and establishment in ECOWAS member states.

(ix) Loss of Cooperation in Human Resources, Information, Social and Cultural Affairs

Article 60-66 provides for cooperation in human resources, information, and social and cultural affairs among the ECOWAS member states. The three countries will lose this cooperation from the moment they withdraw from the membership of the community.

(ix) Loss of Co-operation in Other Areas

Article 67 provides for the cooperation of the member states in other areas not specifically captured in the treaty. The three countries will lose all cooperation in other areas as soon as they cease to be members of the community.

(x) Loss of Special treatment for landlocked countries

Article 68 provides for the special treatment of the landlocked member states thus:

> Member States, taking into consideration the economic and social difficulties that may arise in certain Member States, particularly island and land-locked States, agree to grant them where appropriate, special treatment in respect of the application of certain provisions of this Treaty and to accord them any other assistance that they may need.

Niger Republic, Mali and Burkina Faso are all landlocked countries. Out of Africa's 55 countries, 16 of them which are landlocked are: Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, South Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

From the above, the loss of benefits at the withdrawal from the ECOWAS by Burkina-Faso, Mali, and Niger Republic will negatively affect the economic and social lives of their citizens. The loss will be enormous, and the freedom enjoyed by their citizens on free migration will be lost. It is like taking one thousand steps backward.

7. CONCLUSION

We have been able to see that there is nowhere in West Africa where democratic military rule exists because military rule lacks political power, authority, and legitimacy which are willingly given by the people. As rightly opined by Haugaard (2010:1049), political power is a power that comes through authority, which involves a performing act, authority is a democratic subject that interprets the world in a unique way, is disciplined, and therefore accountable to norms of equality and impartiality. In this context, it is the kind of power that everyone will spontaneously agree to identify as such, and it is the index of recognition that accompanies such authority, making its power legitimate (Oyarzún, 2011:225).

The three countries cannot withdraw from ECOWAS with a mere media announcement. The procedure for withdrawal is clear as provided for in Article 91 of the ECOWAS Revised Treaty. One year's notice in writing is required and during the pendency of this one-year notice, the countries must continue to comply with the provisions of the treaty. They can only be discharged at the expiration of such a given one-year notice.

The implication of these three Francophone West African countries' withdrawals from ECOWAS has been highlighted above. One fact is clear, we cannot use illegality to fight illegality, the duty of the military of a sovereign state is to protect the integrity of its territory from external aggression. Sacking their democratic government may not be the right thing to do despite the allegation of corruption against the government, however, reinstating democratic

government by allowing the citizens of these countries to decide who their next leaders are will be the right step to take.

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PACTA SUNT SERVANDA: EVALUATING PAKISTAN'S REPORTING ON CHILD SEXUAL ABUSE WITHIN THE CONVENTION ON THE RIGHTS OF THE CHILD FRAMEWORK

Muhammad Imran Ali *

Abstract

This article critically assesses the extent to which Pakistan has complied with the Convention on the Rights of the Child (CRC) and focuses on the principle of pacta sunt servanda, which advocates thorough and faithful performance of the covenants entered by a party. The article's focus is on the measures that have been established under the provision of the CRC by Pakistan to protect children from sexual abuse. However, the contention remains whether Pakistan as a member of CRC effectively utilizes the legislature in the course of protecting a child from sexual abuse under CRC. The recommendations of this article entail a firm comparison between the provisions of the legislation of Pakistan and those of CRC regarding the protection of children from sexual abuse. This article assesses the reports prepared by Pakistan on CRC requirements and submitted periodically to the CRC Committee. This article seeks to establish to what extent these reports show Pakistan in abidance with Pacta sunt servanda as well as the principles of the CRC encompassing the protection of children from sexual abuse. The concluding observations of the CRC Committee in case of consideration of the country reports of Pakistan are explained in detail to decipher the legal nakedness and the lack of enforcement approach to child sexual abuse in the country. The conclusions of this article draw this realization that it is high time that the country enhances its laws that would align with the international obligations of Pakistan under the CRC.

Keywords: Child Sexual Abuse, Convention on the Rights of the Child, Legislation, Pacta Sunt Servanda, Pakistan.

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1. INTRODUCTION

The protection of children from sexual abuse is a human rights issue of paramount global order, encompassing nationalities. Based on this kernel of truth, the international community pays a lot of attention to establishing complete mechanisms for securing the health, education, and rights of children universally. Among these instruments, the Convention on the Rights of the Child (CRC) is a hallmark treaty that tries to protect all these rights, including the civil, economic, social, and cultural rights of every child, beyond the limits of race, religion, and nation (Convention on the Rights of the Child, 1989).

Fundamentally, the term "Pacta Sunt Servanda" defines the significance of international agreements that states ratify and pledge their commitment to abide by the commitment they pledged in the agreements. That is to say that for countries acceding to the CRC, this involves ratifying the convention and including its principles in the national legal framework and policy to ensure the protection and promotion of children's rights (Mendez, 2013, p. 16).

Besides the enactment of the laws and policies, the implementation of the CRC also requires the formation of an environment where children can entirely exercise their rights. This has different dimensions, such as legal, institutional, and societal frameworks, all aimed at preventing children from every form of exploitation and harm, especially sexual abuse.

The basic notion of "Pacta Sunt Servanda" on which the CRC rests is that signatory parties must meet their commitments under the treaty (Jiang, 2022, p.764). However, the duties go a step further beyond just ratifying and striving for active integration and alignment of the core principles of the CRC with domestic laws, policies, and national practices, which eventually enable the practical realization of the convention in the country.

By signing the Convention on the Rights of the Child in 1990, Pakistan agreed to honor the principles of the treaty, which include the prevention and protection of child sexual abuse (Ali, 2018, p.117). Conversely, the role played by Pakistan must be carefully examined to determine whether it has effective means to bring about a solution to this problem. Pakistan has chosen to address child sexual abuse by creating new laws to revise the existing ones and enact special ones. The Criminal Law (2nd Amendment) Act (The Criminal Law (Second Amendment) Act, 2016) brought amendments to the provisions of the Pakistan Penal Code that gave stern punishments to child offenders. Along with passing this legislation, significant loopholes in the law still linger in protecting children from sexual abuse in the context of the legal provisions of Pakistan. Often, these loopholes contain violations of different norms regarding sexual abuse, weak protection of the victims, and issues connected with the violation of the system's impunity and corruption.

Pakistan is a signatory to the CRC; therefore, as provided by one of the core provisions of the CRC, the government has a mandate to present periodic reports to the Committee on the Rights of the Child (CRC Committee). These reports pool together useful information on Pakistan's efforts and challenges in realizing CRC objectives, including roadblocks they encountered and their strategies to deal with them. The CRC Committee goes through the submitted periodic reports of the national government and comes up with concluding observations that cover many important issues. Moreover, it is of course this mechanism that serves as a central element of state evaluation of its fulfillment of the CRC requirements or finding the areas that need more detailed study. A thorough examination of the periodical reports submitted by Pakistan to the CRC Committee gives a clear picture of the state's involvement in child sexual abuse prevention and the handling of such issues. The concluding observations of the CRC Committee on reports can be regarded as a consistent tool for Pakistan in developing a robust policy structure concerned with preventive measures against the abuse of children by sex offenders. This type of analysis will ultimately provide the country with a comprehensive and accurate picture of the areas that require correction to address and rectify the weaknesses.

The CRC Committee's concluding observations aim to hold state parties accountable by aligning with the principle of Pacta Sunt Servanda, which outlines the obligation of state parties to fulfill their responsibilities after joining the CRC. If Pakistan is to show its goodwill in this regard, it should not only comply with the CRC, but also undertake the CRC Committee's recommendations and execute its legal responsibilities to act for the protection of children's rights (Weissbrodt, Hansen, & Nesbitt, 2011, p.121).

2. CONVENTION ON THE RIGHTS OF THE CHILD AND SAFEGUARDING CHILDREN AGAINST SEXUAL ABUSE

Societies continue to celebrate the Convention on the Rights of the Child (CRC) for its enduring transformative role as one of the first major international instruments that drew attention to safeguarding children's rights, particularly in terms of sexual abuse. Article 34 of the CRC, which emphasizes child sexual abuse, is the standout point in this issue. It mandates that all member states must ensure the complete prohibition of such practices. Another thing to note is that Article 19 of the CRC does not only refer to physical punishment but goes beyond that to include any form of violence, such as sexual abuse. Thus, through this combined prevention within the CRC, its comprehensive approach becomes obvious, aimed at the safety and welfare of children (Whalen, 2022, p.300).

The CRC Committee's General Comment No. 13 (G.C.13) enriches understanding of the magnitude and scope of sexual abuse and exploitation of children that involves various forms of activities that impair children's psychological and physical well-being (General

Comment No. 13, 2011, p.10). Inducing and coercing children into illegal sexual acts, commercial sexual exploitation, and the creation of child pornography are examples of such activities. In this way, G.C.13 gives the formulation to the member states for legislation and actions for prevention and intervention (Svevo-Cianci, Herczog, Krappmann & Cook, 2011, p.984). The state parties are required to comply with G.C.13 through Article 19, which is about enacting executive and social measures to protect children from all manifestations of violence. It does not only confine itself to physical abuse but also includes sexual violence and takes some proactive measures to prevent, intervene, and support the victims. This shows that Articles 19 and G.C.13 side by side in the CRC illustrate the approach of this body to the eradication of sexual violence against children (Whalen, 2022, p.299).

The CRC not only builds measures instead of prohibiting anyone who causes violence to children but also compels member states to put in place and adopt proactive measures to prevent and eliminate sexual violence against children within their jurisdiction. This calls for legislation that will bring the frameworks in line with the CRC's obligations, with the aim of having universal and inclusive coverage for children. The responsibility of the state parties includes making assessments of the national laws and aligning the provisions with the CRC to eradicate child sexual abuse. Such a process involves drafting laws at the national, provincial, and municipal levels, which in turn strengthens the domestic legal frameworks according to the CRC principles.

The provisions in the CRC, specifically Articles 34 and 19, along with G.C.13, provide a strong worldwide framework for combating sexual abuse and violence against children globally (Maxwell, 2022, p.72). Thus, the CRC puts forward the responsibilities of States Parties, specifies in the provisions the ways a legal framework should be developed for safeguarding children from sexual abuse, and emphasizes how state officials should ensure a safe and harmless condition for children that is free of violence and exploitation.

2.1. Implementation of the Convention on the Rights of the Child

In accordance with Article 4 of the Convention on the Rights of the Child (CRC), States Parties are required to fully comprehend the underlying concepts of the CRC and to implement national laws to enhance the utility of the CRC. In effect, Article 4 highlights a primary notion of international law, which states that once a member state ratifies the CRC, it has a duty to ensure its national law, administration structures, and all related policies are in line with CRC requirements (Ruggiero, 2022, p.417). The CRC pays significant attention to the topics of economic, social, and cultural rights, highlighting the importance of states utilizing available resources to uphold these rights, and resorting to international cooperation when necessary.

The realization of Article 4 is the complex instrument consisting of reputation-building negotiations and raising awareness among the population, including children and other

groups of citizens, mentioned in Article 42. This is also underpinned by the relevant articles 43 and 45, which describe, mainly through the CRC Committee, the international mechanisms that should be in place for monitoring and implementation. Founded in 1991 and having since been expanded, the CRC Committee performs the foremost supervisory function of bringing periodic reports following the provisions of Articles 44 and 45 (Whalen & Lansdown, 2022, p.427). The CRC mandates member states to submit reports enlisting the progress made by them in providing for CRC rights, with the initial reports due at the most two years of ratification, which is followed by periodical reporting every five years ((General comment No. 5, 2003, p.13). These submissions should include a detailed analysis of the difficulties, joint progress, as well as the employed CRC's provisions to meet CRC Committee obligations and, among those, the legislative changes taken to adjust the domestic laws to the CRC requirement (General Guidelines regarding the Form and Contents of Periodic Reports to be submitted by State Parties, 1996, p.6).

The committee's work reconciles the planning of national laws with the principles of the CRC to reduce the number of violations of children's rights on the territory of the states. In the review mechanism, the Committee makes suggestions in the form of concluding observations to the states in terms of compliance with children's rights (Hoffman, 2020, p.139). To a great extent, the CRC, encompassing many years' worth of efforts aimed at uniting child rights in a single and comprehensive document, itself represents the outcome of those efforts. In addition to that, the CRC's jurisdiction applies to all individuals under the age of 18 who stand for the distinct pledge to protect children's rights internationally. Ruthless examination of domestic legislation and bringing it into compliance with the treaty's provisions is a main requirement for member states in testing their loyalty to the CRC.

2.2. Pacta Sunt Servanda and State Parties' Responsibilities under the Convention on the Rights of the Child

Pacta Sunt Servanda, meaning "agreements must be kept," is the fundamental principle in international law that mandates states to abide by their obligations not to breach treaties that they have ratified. It is the basis of practical cooperation and friendly relations, promoting diplomacy of stability and its intelligible rules in the sphere of interstate relations. This vector acknowledges the voluntary nature of state agreements and the obligations by which they abide, ranging from diplomatic, economic, environmental, and human rights treaties (Jiang, 2022, p.765). For instance, the Treaty on the Non-Proliferation of nuclear weapons (NPT) is a treaty that precludes signatory states from obtaining nuclear weapons, but in exchange, they have access to civil nuclear technology (Baldus, Müller & Wunderlich, 2021, p.206). However, the Paris Agreement provides the opposite by stipulating that the participating countries should tackle greenhouse gas emissions and adaptation to climate change (Santos, Ferreira & Pedersen, 2022, p.21). These treaties are living proof of the pacta sunt servanda principle, which politically binds the parties together and creates legal

obligations. Also, a way of settling the differences that might occur from acts of disregarding agreed matters is through this concept. International organizations, such as courts and tribunals, rely on it. Therefore, the International Court of Justice (ICJ) in the Barcelona Traction case affirmed the fact that states should strictly respect their commitments in a treaty and repay a debt, even if it is borrowed from another state or one of their nationals (Tams & Tzanakopoulos, 2010, p.793). Under pacta sunt servanda, international law is upheld, state stability is preserved, and the relationship between the states is brought to a trustworthy level. Treaties bind states, fostering collaboration and peaceful existence.

The doctrine of pacta sunt servanda is a founding idea of international law, and in the case of the Convent on the Rights of the Child, it is very vital. The CRC becomes customary law once a ratified treaty holds its binding commitment to the state parties to achieve the protection and development of children's rights. A scan of how this principle was implemented in the context of the CRC shows the wide range of methods and the difficulties state parties face in honoring their obligations. For instance, in Norway, a country that is recognized as one of the most developed when it comes to child welfare, the widespread practice of adhering to the CRC principles can be observed through their full and effective incorporation in legislation, social programs, and the institutional mechanisms that are designed to defend children's rights. Efforts done by Norway to observe and engage concerning child poverty issues, such as inclusive and accessible education and child protection efforts, reflect the clear and visible commitment by Norway to the fulfillment of its obligations under the CRC (McTavish, McKee, Tanaka & MacMillan, 2022, p.14). Ultimately, while "pacta sunt servandum" talks about the obligation to uphold the CRC, the disparities in state performance show how international norms interplay with domestic realities and bring forth the need to intensify these efforts to bridge the gap and make sure that children are granted holistic well-being everywhere on the globe.

3. APPLICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN PAKISTAN

Child sexual abuse in Pakistan is a pervasive and deeply troubling issue, with recent data highlighting the extent of the problem. According to the NGO Sahil's annual report "Cruel Numbers," In the year 2023, a total number of 4213 child abuse cases have been reported in newspapers. The total of 4213 cases includes reported cases of child sexual abuse (CSA), cases of abduction, cases of missing children, and cases of child marriages (Cruel Numbers, 2023, p.01).

Pakistan signed and ratified the Convention on the Rights of the Child (CRC) on November 12, 1990, and it was effective in the country on December 12, 1990 (Ali, 2018, 99). Although, in Pakistan, ratification of a treaty is considered to be an executive act, it requires legislative action to fulfill the treaty obligations. In *Shehla Zia vs. WAPDA* (Shehla Zia vs.

WAPDA,1994, p.703) the Supreme Court established that legislation must ratify international treaties and agreements for them to become laws. A member country such as Pakistan has to apply the CRC within its borders. To prevent children from sexual abuse, the state must initiate actions, among which the biggest are reforms in legislation to enact comprehensive laws (Ali, 2019, p.32). The CRC Committee oversees the member state's implementation of the CRC principles by issuing concluding observations after the countries have submitted periodical reports. Pakistan has been submitting periodical reports to the CRC Committee since 1993, and the Committee judged the country's progress towards the implementation of CRC provisions through its concluding observations. Pakistan has submitted its recent combined 6th and 7th reports in August 2023. The government has the approach of putting children's rights in the Constitution, passing the relevant bills in the last two years, and placing the draft bills for consideration. Discussing child sexual abuse requires a review of the legislation enacting protective laws in Pakistan. Pakistan's acceptance of the CRC reflects its intention to defend children's rights. Nevertheless, the accomplishment of translating international commitments into domestic laws needs legislative action. Pakistan has worked to include children's rights in its constitution, and enact related laws and legislation to address emerging issues like child sexual abuse.

3.1. Legislation Addressing Child Sexual Abuse in Pakistan

The primary source of law addressing child sexual abuse in Pakistan is the Pakistan Penal Code (Pakistan Penal Code, 1860) as amended by the Criminal Law (Second Amendment) Act (The Criminal Law (Second Amendment) Act, 2016). These amendments were designed to try and stamp out various types of criminal action, especially those committed against children by way of sexual abuse and exploitation. Among the amendments are Section 292A, which is based on seduction; Section 292-B, which discusses child pornography under the background of the need to protect children from offline and online pornography; and Section 292C, which provides for the penalties for its transmission, dissemination, or possession. Section 328A speaks of cruelty to a child, where the relevance of child abuse or neglect is enhanced. Also, Sections 577A and 377B define sexual abuse and specify the penalties for perpetrators. These changes in the PPC are highly commendable actions by the government to help address societal issues. The components of sections 328A and 369A focus on the protection of the vulnerable group.

But still, this notable virtue may have its dark side. Implementation and enforcement remain catalytic, as the final step depends on the efforts of law enforcement agencies and the judiciary. There may be ambiguities in defining offenses such as exposure to seduction or cruelty to a child, which are difficult to understand and prove. Additionally, the purpose of penalties is not only to deter but also to provide a rehabilitation program for the victim and address the root causes of crime. The introduction of these amendments is a positive strategy;

however, it is only the initial step and further committed efforts are necessary for its proper implementation and tackling ongoing reasons for criminal behavior in Pakistan.

3.2. Flaws in the Legislation Addressing Child Sexual Abuse

The Criminal Law (Second Amendment) Act (The Criminal Law (Second Amendment) Act, 2016) was a major win in the fight against child sexual abuse. Critical analysis, though, reveals some voids in this law. The main goal of Section 292A was to prevent sexual behaviors that may corrupt minors. Despite its successful aim, the effectiveness of Section 292A in preventing actual child sexual abuse remains uncertain. This is mostly because of the uncertainty of what is meant honestly by the phrase "exposure to seduction" and the absence of comprehensible regulations for implementation. Sections 292B and 292C deal with child pornography and prescribe punishments for its manufacturing, transmission, and possession. Section 328A, which does not provide the necessary elements for identifying what actions are called cruelty, therefore opens other interpretations and loopholes in actions against cruelty. Furthermore, the lack of criteria to decide the punishment category and gravity of the situation may lead to inconsistencies in sentences, which is not effective at being a deterrent. Sections 377A and 377B outline sexual abuse and incorporate punishments prescribed for the perpetrators. Even though these clauses deal a blow to sexual violence, there are some questions about their generality and implementation. However, the strict definition of sexual abuse may not cover the full range of non-consensual sexual acts, and the extent of the punishment might not always suit the gravity of the offense, causing both sorts of mistakes.

Despite the insertion of specific provisions in the Pakistan Penal Code (Pakistan Penal Code, 1860) through the Criminal Law (Second Amendment) Act the Criminal Law (Second Amendment) Act, 2016) to safeguard children and combat sexual offenses, the law still has some loopholes that require closure. These lacunae encompass an ambiguity in the particular definition of the offenses, an inconsistency in enforcement and sentencing, and an inadequacy in dealing with the complexity of some particular forms of exploitation, mainly concerning minors. Bridging these lacunae will demand far-reaching reforms that ensure child rights and the justice system's proper implementation.

3.3. Pakistan's Periodic Reports and Concluding Observations of the CRC Committee

The periodic reports prepared by Pakistan and the concluding observations of the CRC Committee exhibit the development of Pakistan in relation to the implementation of the provisions of the CRC across its state. Pakistan submitted its 1st initial report to the CRC Committee on January 25, 1993, and the Committee delivered its concluding observations on April 25, 1994. The 2nd periodic report to the Committee was submitted on January 19, 2001, and the Committee delivered its concluding observations on October 27, 2003. The 3rd and 4th combined periodic reports to the CRC Committee were submitted on January 4, 2008, and the

Committee delivered its concluding observations on October 9, 2009. The 5th periodic report to the Committee was submitted on January 7, 2015, and the Committee delivered its concluding observations on June 03, 2016. Pakistan has submitted its combined 6th and 7th reports on August 3, 2023, to the CRC Committee.

The initial report (Initial Report to the CRC Committee, 1993, p.6) of Pakistan mentioned the legislation aiming at consolidating laws related to the protection of children from sexual abuse into one document. The CRC Committee observed that the legalization existing for convention ratification was not proper in its application. Despite the enforcement of certain provisions, further steps are necessary to ensure proper guardianship (Concluding Observations of the CRC Committee on the Initial Report, 1994, p.5). The 2nd report submitted by Pakistan does not contain specific legislative laws that address child sexual abuse (Second Periodical Report submitted by Pakistan, 2001, p.441). The CRC Committee worries that Pakistan has not implemented programs that are effective in dealing with child sexual abuse and exploitation. Emphasizing the importance of conducting legislative review at both the federal and provincial levels, the Committee underscored the lack of laws enforcing penalties on perpetrators and of definitions of consent in sexual relationships. Additionally, it posted about poor prosecution rates, data absence, and inadequate reporting on child sexual abuse cases. Urgent action is called for so that the pieces of legislation can align with the principles of the CRC and the protection of children in Pakistan can be effective (Concluding observations on 2nd periodical report by Pakistan, 2003, p.6).

In the 3rd and 4th consolidated reports of Pakistan, it is evident that the National Commission for Protection of Children was established at the federal and provincial levels. These efforts were made to enforce domestic laws such as the Protection of Women Act 2006, which repealed the *Hadood* Ordinance and resolved rape cases under the Pakistan Penal Code. Nevertheless, the report notes that child sexual harassment cannot be prosecuted for a subset of relevant offenses. The Lahore High Court judgment in "State vs. Abdul Malik" brought to the forefront the significance of enacting legislation to deal with sexual assault against children (Third & Fourth Combined consolidated report submitted by Pakistan to the CRC Committee, 2009, p.627). The Committee, in its observations, shows a high level of worry about the criminal offense of child rape in general and the absence of specific laws and their definitions. One of the recommendations is legislative review and the enforced adjustment of definitions and limitations on perpetrators prosecution. The very fact that child sexual abuse is such a deep-rooted problem in Pakistan needs immediate action to counter it effectively (CRC Committee concluding observations on combined 3rd & 4th periodical report of Pakistan, 2009, p.23).

Through Pakistan's 5th Periodical Report, it has been stated that the government introduced amendments into the Pakistan Penal Code in 2009 called the 'Child Protection

(Criminal Law Amendment) Bill' aimed at making various offenders punishable whose conduct is related to that of child protection, i.e., exposure to explicit material, child pornography, cruelty, or child trafficking, but there is no provision pertaining specifically to child sexual abuse in them. This report identifies child sexual abuse as a grave offense and explores the need to amend penal laws to enhance the effectiveness of legal measures against this crime, thereby strengthening the protection of children in Pakistan (Fifth Periodical report submitted by Pakistan to the CRC Committee,2015, p.44).

In its review of the 5th periodical report submitted by Pakistan, the CRC Committee specifically pointed out the need for measures to suppress child sexual abuse. Pakistan has mentioned the laws, i.e., the Pakistan Penal Code and the Criminal Law (Amendment) Bill, 2016, which focus on the seduction of adults, child pornography, and trafficking of people. However, the bill, once passed by the Lower House, was lying in the Upper House, awaiting approval. The Committee pointed out that the adoption of a law should be a matter of public concern, and it should be made criminal while providing the reporting system. It pointed out that government actions were inadequate and suggested legal measures that put emphasis on victim protection and justice. Such legal measures should also be comprehensive and coordinated with a child-friendly reporting mechanism that promptly deals with child sexual abuse and exploitation, highlighting the urgency of this problem (Concluding observations of the CRC Committee on the 5th periodical report of Pakistan, 2016, p.8).

It was described in the combined 6th and 7th periodical reports of Pakistan that child sexual abuse and exploitation were dealt with in the laws by explicitly defining and prohibiting the act. The Criminal Law (Second Amendment) Act, 2016, is comprised of Sections 377-A, 377-B, 292B, and 292A. According to Section 377A, child sexual abuse is recognized as any activity involving minors under the age of 18. Subsection 377-B warrants both imprisonment sentences ranging from one to seven years and fines for those who commit the crime. Sections 292A and 292B cover seduction that is exposed to children and child pornography, respectively, which are punishable with imprisonment for three to seven years (Combined 6th and 7th periodic reports submitted by Pakistan, 2023, p.19).

Up until now, Pakistan has submitted seven periodical reports to the CRC Committee, and the CRC Committee considered it a serious issue not to have legislation in place for the protection of children against child sexual abuse.

3.4. Analyzing Pakistan's CRC Committee Reports

The periodic progress reports by Pakistan presented to the CRC Committee detail a long journey that is in many places seasoned with legislative advances, but elsewhere is notably bound by gaps and impediments. At first, there was a concentration on making a legal

framework for services related to this problem. Nevertheless, later reports show that, instead of focusing on laws, there are no measures clearly directed at the prevention of child sexual abuse. While it is stated that the formation of the National Commission to Protect Children is more important, laws such as the Protection of Women Act, 2006 are equally important. However, there are some remaining flaws, as shown by the difficulty of continuing the prosecution even when the offenses against children are related to sexual harassment. The gaps in the legislation addressing child sexual abuse are evident in the Lahore High Court's judgment in "State vs. Abdul Malik." The hurtful gap would be filled by reforming the bill like the Child Protection (Criminal Law Amendment) Bill in 2009. Though it covers the issue, it does not address it in any way to provide direct solutions to child sexual abuse rather than just recognition of how serious it is.

The lag in periodic reporting, which was apparent in the 6th and 7th combined reports in 2023, highlights Pakistan's incoherent stance, with the effect of hindering the monitoring mechanism. It was paragraph 116 of the 2023 report that marked a crucial step with the Criminal Law (2nd Amendment) Act, 2016, stating some provisions within the Pakistan Penal Code by which have given a definition of child sexual abuse. Sections 377A, 377B, 292B, and 292A highlight different offenses against children that carry powerful punishments to deter offenders. Still, the difficulty of closing the gap between legislation and enforcement as the issues of corruption and societal reluctance seem to worsen the problem. Similarly, this draws a line under the need for a centralized law to fight the problem of child sexual abuse in a holistic manner. Finally, Pakistan's reports suggest an emerging will to fight against child sexual abuse, but there is a dead area between legislative commitments and the practical realization of the required actions.

3.5. Reviewing CRC Committee's Observations on Pakistan's Reports

The concluding observations of the Committee on the Rights of the Child brought into focus Pakistan's efforts, which have been found wanting in several areas, including in the context of reforming state machinery and the legal system. Upon the first report rendered by Pakistan, the CRC Committee noticed that the laws enforced in the country are not in line with the Convention on the Rights of the Child. The CRC Committee drew attention to the imperfections of the legal system of the country while commenting on the second report submitted by Pakistan, insisting on reviewing legislation on different levels: federal and provincial. It highlighted the shortcomings of the legislative system in terms of penalties for the perpetrators and consent definition in sexual relationships, as well as sexual abuse reporting rates and inefficiencies of prosecution. The call for urgent action is an absolute necessity to ensure the legislation is in harmony with CRC principles and enhance child protection in Pakistan. The CRC Committee remarked about child rape laws and their non-specificity issues, as reflected in Pakistan's 3r and 4th consolidated reports. Suggestions consist of the formation of legislation, reviewing it, and making it more precise in terms of prosecution. Child sexual

abuse in Pakistan is an entrenched issue, hence the immediate need for efficient interventions. A review of the CRC Committee on the 5th periodic report revealed several child sexual abuse-related measures that needed to be taken on an urgent basis. The Pakistani government invoked laws such as the amendment in the Pakistan Penal Code through the Criminal Law (Amendment) Bill, 2016 to address the related issues hindering enforcement owing to the legislative delays in approving these laws. It censured government lethargy and suggested stringent legal actions and other schemes from the child-friendly reporting mechanism to immediately prevent child sexual abuse. This explains why the problem requires an immediate and substantial response to prevent further deterioration of children's rights in Pakistan.

Important issues are outlined by the committee in its observations. Primarily, the lack of specific laws leads to unclear ground and lowers the risk of punishment among the culprits. Ambiguity as to what constitutes child sexual abuse and what consent implies complicates legal prosecution. The second consideration is that the focus on the investigation and prosecution effectiveness may be a sign of a lack of confidence in the justice system of Pakistan, highlighted by low prosecution rates that conserve impunity. The solution to these problems should be achieved through multi-tiered measures. There should be legislative reforms enacted to give meaning and ensure the supremacy of enforcement machinery.

3.6. Harmonizing CRC Committee's Observations on Pakistan's Reports with Pacta Sunt Servanda

The concluding observations of the CRC Committee concerning the steps that Pakistan has taken in combating child sexual abuse give a detailed insight into the country's adherence to the CRC provisions. The classic principle of Pacta Sunt Servanda, or agreements must be kept, is the most important point of the states sticking to their treaty commitments. In particular, the CRC Committee underscores various areas where Pakistan's process of implementation falls below the meaning of the principle of non-discrimination. Initially, the CRC has been ratified by Pakistan, and the plan to effectively implement the CRC has been contemplated, but legislative and other related means are not enough to implement the CRC. Pakistan being emphasized by the Committee about the review and enhancement of the legislation, either federal or provincial, illustrates the dissimilarities existing between Pakistan's commitments and its consequent conduct as well. There is no penal legislation that specifically targets those who abuse children sexually, nor is there any law that clearly defines sexual consent. Consequently, all these add up to making the gap even wider.

Also, the CRC Committee's persistent qualms, demonstrated in many periodic reports, show the very bad situation of child sexual abuse in Pakistan, which the country has not solved yet. Child sexual abuse enjoys immunity from the enactment of any laws specifically targeting their prevention, and inadequate investigation and prosecution of perpetrators further exposes the existence of a structural weakness towards children's rights protection and

exploitation. The recommendations put forth by the CRC Committee on Pakistan to criminalize child sex abuse, put into place mandatory reporting systems, and emphasize the prosecution of offenders exemplify the urgency that is to be taken soon. The Committee, by demanding that Pakistan have a child-centered approach in the reports and a proactive strategy to support the victims, stresses the fact that to eradicate child sexual abuse, the approach has to be holistic.

It is obvious that the Committee's observations aim at making Pakistan responsible for their billion-dollar obligations that they had to meet under the CRC. Through the magnification of loopholes in Pakistan's legislative regime and coordination deficits, the committee intends to demand from the Pakistani government that it honor its commitments made as per the CRC. The call for legislative reform and proactive actions at all levels is almost a constant element in the recommendations, emphasizing the expectation that the Pakistani government will enact concrete measures in this area.

On the other hand, it is much more important to realize that the committee in the CRC has limitations in enforcing compliance. Though the Committee might have an opinion and recommend actions, it is the states that bear the responsibility to pass the changes. Hence, in spite of the Committee's findings being in alignment with the principle of Pacta Sunt Servanda, which calls for holding Pakistan accountable, the moving of these findings to a reasonable effect depending on Pakistan's action is paramount.

The CRC Committee's final remarks on the implemented measures by the Pakistani government to prevent child sexual abuse point to question marks regarding the proper fulfillment by the Pakistani government of its commitments under the CRC. The committee's suggestions related to parliamentary reforms, establishing an accountable mechanism, and enhancing victim support demonstrate their determined effort to defend the rights of children. However, Pakistan's failure to accept the Committee's advice and take relevant measures against child sexual abuse may result in the partial upholding of the provisions in this treaty.

3.7. Evaluating Pakistan's Compliance with Pacta Sunt Servanda in CRC Implementation

Assessing the degree to which pacta sunt servanda, as exemplified by the CRC, is followed by Pakistan necessitates the scrutiny of its legal reforms as well as implementation tactics for preventing child sexual abuse. Pakistan offers periodic reports to the CRC Committee about its achievements and failures in combating child sexual. The development of the Pakistani legislature regarding child sexual abuse is a sign of slow but often weak reactions to the problem. The assessment of Pakistan's compliance with Pacta Sunt Servanda, particularly in connection with the CRC and protection against sexual abuse, is a pivotal inquiry aimed at determining the country's dedication to international commitments and the effectiveness of the national legislation in ensuring children's rights, particularly against sexual abuse. Pakistan ratified the CRC in 1990 and would be responsible for complying with the principle of Pacta

Sunt Servanda. It should be noted that although Pakistan has framed national laws to incorporate the provisions of the CRC, for instance, the Criminal Law (2nd Amendment) Act 2016, there exist fundamental loopholes that prevent the full implementation of protective measures against child sexual abuse. The periodical reports submitted by Pakistan before the CRC Committee describe ongoing problems in implementing the recommendations. The CRC Committee's concluding remarks prove that Pakistan has not fully implemented its laws in compliance with the CRC; problems like inadequate legal frameworks, absence of implementation, and insufficient protection mechanisms have been observed. According to the concluding observation of the CRC Committee on Pakistan's periodic reports on its CEDAW, the existence of the legislative measures often does not correspond with their practical application, which points to a distinct implementation gap. The CRC Committee's observations conform with the ideology of Pacta Sunt Servanda and the requirements of states to honor their treaty obligations. But Pakistan reacted to the suggestions presented timidly and moved the system forward only partially. The line of continuity between the concluding comments of the CRC Committee and the principle of Pacta Sunt Servanda illustrates the necessity for Pakistan to treat the protection of children from sexual abuse as a primary concern and enhance its legal and institutional frameworks to fight against the sexual abuse of children. Attention should be paid to the refinement of the legal framework, the improvement of the work of law-enforcing bodies, and the communication of the issue of protecting children's rights in society. Nevertheless, the problem of Pakistan's compliance with the Pacta Sunt Servanda through the practical application of some CRC provisions that encompass the protection of children from sexual abuse still persists, and combating it requires the joint efforts of domestic and international actors to provide care to all children within its borders.

4.CONCLUSION

Hence, evaluating the Pakistani commitments from the perspective of the Convention on the Rights of the Child (CRC) along with the principle of Pacta Sunt Servanda indicates the improvements and shortcomings within Pakistan's continued journey towards providing safety to children against sexual abuse. Officially recognizing the importance of children's rights through joining the CRC, Pakistani governments continue to struggle to translate their membership into draft laws that are backed up by enforcement structures. It is possible to identify the critical issues when examining various aspects, like the identification of the implementation of the CRC, the understanding of the legal principle of Pacta Sunt Servanda, and the specific application of these standards in the context of Pakistan. The principle of Pacta Sunt Servanda, a principle of international law, states that, as a state party to the CRC, Pakistan has to fulfill the provisions stated herein. This also involves extensive endeavors to protect children from sexual exploitation and abuse through appreciable parliamentary measures for establishing laws and implementing them.

While adopting a pluralistic approach and making efforts to domesticate the CRC, the protection of child sexual abuse continues to remain weak and inadequately addressed in Pakistani laws. These deficiencies leave children exposed to similar risks, suggesting that there is a need to enhance the existing and the implementation of child laws. The reporting mechanisms to the CRC Committee are essential and effective means by which member states may be both evaluated and depicted considering the need for reform. However, there are contradictions along with a need for more frequent and serious reports to identify the actual efficacy of the policies and practices in Pakistan, as well as a look at the concluding observations of the CRC Committee, which show that their reports have lots of limitations and a lack of thoroughness. Due to such statements, the CRC Committee findings are useful in addressing legal compliance issues about Pakistani laws. However, the gap between these ideals and practice on the ground is a sign of a major problem to tackle. The principle of Pacta Sunt Servanda confirms that agreements reached on the international level should be followed strictly, as all state parties are bound by their signatures that confirm the international agreement. Thus, there is a clear implication for Pakistan; legislative reforms notwithstanding, what is essential for protecting children's rights is not merely change on paper but implementation and enforcement in letter and spirit.

It is noteworthy that legal reforms take place and work on legislation continues. The question's key issues lie in their practical implementation and outcomes. It is, however, still an open question if and how these reforms succeeded in preventing child sexual abuse; hence, the need to raise awareness and strive to make policies match the desired practice. As for the future direction of the state, Pakistan must accept the principle of Pacta Sunt Servanda by strengthening its legal system, increasing the set of measures to combat violations effectively, and using a wide range of prevention and intervention activities. It will also help in highlighting how Pakistan is committed to the protection of children's rights, as well as effectively implementing and following set international legal parameters. To accommodate international commitments and national laws, a non-negotiable approach to the rule of law is necessary. There is a regulatory point to identify the future of Pakistan in its mission to safeguard children from sexual exploitation. To achieve this goal, however, there needs to be a concerted and sustained global campaign to prevent and eradicate any form of abuse and neglect of children and also to promote their rights to be protected and to be free from every form of abuse. The war against child sexual abuse is not merely a matter of enacting new laws but a fight calling to include effective prevention strategies, enough safeguard measures, and children's rights promotion.

If Pakistan follows the principle of Pacta Sunt Servanda and measures of eliminating CRC in a full sense, then the country has a chance not only to improve its legal situation but also to protect Pakistani children from sexual abuse. Such continued effort shall be a testament to the nation's determination and commitment to safeguarding the inhabitants who are most

susceptible to facing the impact of the danger and its capacity to address its international responsibilities honorably and passionately.

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

Fon Fielding Forsuh*

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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- *The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC- 02/05-01/09-136-Conf and Conf Anx 1 to 4 (Pre-Trial Chamber I), 18 October 2011.*
- *Regina v. Bartle, Ex parte Pinochet ((2000) 1 AC 147 (H.L. 1999), 380).*
- *The Prosecutor v. Furundzija (Case No. IT-95-17/1 (1998.)*
- *Demjanjuk v. Petrovsky (776 F. 2d 571, 582 (6th Cir. 1985).*
- *Attorney General of Israel v. Eichmann (36 I.L.R. 277 (Isr. S. Ct. 1992).*

THE ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER THE OHADA UNIFORM ACT ON MEDIATION

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Abstract

On 23 November 2017, OHADA member states adopted the Uniform Act on Mediation. The Act lays down rules relating to mediation of disputes which, if successful, ends in a settlement agreement. Settlement agreements that are not freely respected by the parties will have no effect unless they are forcefully executed. Forceful execution is made with the help of a court or notably public who are empowered to insert an executory formula on the agreement after verification of its regularity. These local authorities involved in the enforcement process rely on domestic laws of member states which vary from state to state. This has the effect of tainting the harmonization process intended by the OHADA lawmaker and may be inimical to investors. This raises the problem of the suitability of the Act to dispute settlement as regards enforcement of settlement agreements. With the help of qualitative and comparative analysis, this article brings to limelight the intricacies of the enforcement of settlement agreements under OHADA. It concludes that enforcement of settlement agreements is rendered simple and rapid but faces serious drawbacks which could be alleviated by setting up OHADA mediation institution to oversee the entire mediation process, besides other recommendations.

Keywords: agreement, enforcement, exequatur, mediation

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1. INTRODUCTION

Disputes are commonplace and when disputes arise parties often try to settle them amicably. In case the parties are unable to settle their dispute amicably, they could request the help of a third party, the mediator, who will try to establish a favorable climate for a settlement in an informal and relatively cost-conscious manner (Niek 2019). Compared with many other forms of alternative dispute resolution, mediation allows for flexible solutions and settlements. If a settlement is reached and complied with, mediation may help to preserve the relationship of the parties. These perceived advantages of mediation justify its exponential growth in the past twenty years. It has become the most privileged means of dispute settlement in the world recently and legislation promoting mediation has been enacted in a budding number of jurisdictions within and outside the territory of the Organisation for Harmonisation of Business Law in Africa (OHADA).

Within the OHADA region, the enactment of mediation legislation was seen in Burkina Faso[1], Senegal[2] and Ivory Coast[3]. Mediation centres were also created such as CAMC-O[4], CAMeC[5], CENACOM[6], and CECAM[7]. As to mediation rules outside the OHADA region, we have for instance, World Intellectual Property Organisation Mediation Rules 2002; European Union Mediation Directive 2008; The International Bar Association Rules for Investor-State Mediation 2012; International Chamber of Commerce Mediation Rules 2013; ICSID Mediation Rules 2018; UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018.

To ensure harmonisation of mediation rules from regional blocks and some international institutions, the UN through UNCITRAL negotiated and adopted the Convention on the International Settlement Agreements Resulting from Mediation (Singapore Convention) which was adopted by the General Assembly on 20 December 2018 and the signing ceremony took place on 7 August 2019 in Singapore. Three members of OHADA (Benin, Congo, and Democratic Republic of Congo) were amongst the original signatories of the Convention in 2019 and others (Chad, Gabon, and Guinea Bissau) signed subsequently. With the above trends, all member states of OHADA joined the train; they adopted the Uniform Act on Mediation (UAM) on 23 November 2017, hereinafter referred to as the Act.

Mediation as per Article 1(a) of the Act is *any process, regardless of its name, whereby the parties request a third person to assist them in their attempt to reach an amicable settlement*

[1] « Loi n° 052-2012/AN portant médiation en matière civile et commerciale ».
[2] « Décret n° 2014- 1653 relatif à la médiation et à la conciliation ».
[3] « Loi n° 2014-389 relative à la médiation judiciaire et conventionnelle ».
[4] « Centre d'Arbitrage, de Médiation et de Conciliation de Ouagadougou ».
[5] « Centre d'Arbitrage, de Médiation et de Conciliation du Benin ».
[6] « Centre National d'Arbitrage, de Conciliation et de Conciliation de la République Démocratique du Congo ».
[7] « Centre de Conciliation et d'Arbitrage du Mali ».

of their dispute, adversarial relationship or disagreement ("the dispute") arising out of a legal or contractual relationship, or related to such relationship, involving natural persons or legal entities, including public bodies or States. A successful mediation ends with a settlement agreement which is binding and enforceable (article 16(1). This agreement is essentially a contract between the parties obliging them (Kefimmabuh 2020). As such, the agreement should wilfully be executed. A settlement reached and complied with, helps to preserve the relationship of the parties (Niek 2019) and produces according to Payne (1986), a sense of fairness which is frequently not as readily apparent in the judicial arena.

A mediated agreement should be complied with wilfully since it ensues from mutual assent of the parties and thus a contract between them. Payne (1986) argues that a mediated agreement is enforced as a contract and elements of a valid contract should be present. If a settlement agreement is not voluntarily complied with, the party who wishes specific performance may proceed to forceful execution, in which case the agreement should be endowed with an executory force. For the settlement agreement to obtain executory force, it has to go through the procedure for approval (recognition) and enforcement resulting in the issue of an exequatur as laid down in the Act. The approval and enforcement of the agreement are crucial and integral parts of the mediation process. Following the grant of an exequatur, the settlement agreement becomes a writ of execution[8] and receives the assistance of the State given its forceful execution in favor of the party seeking specific performance (Munemeka 2019; Ilboudo 2012; Anoukaha & Tjouen 1999; Assi-Esso & Diouf 2002).

The terms recognition and enforcement are usually used interchangeably but they have different meanings. Recognition is when a state court is requested to acknowledge the existence, authenticity, and validity of an award or a mediated agreement. It can be sought as proof that a dispute has been determined and is no longer subject to litigation or adjudication. Such proof acts as a defense and prevents the losing party from bringing a second allegation before a local court or arbitral tribunal. If a party were to bring an action against the other about the subject matter of the dispute, based on the same cause of action, the court would dismiss the action on the basis that the issues had been disposed of and was *res judicata* (Daradhek 2005).

Enforcement, on the other hand, entails taking a step further after recognition to force the other party to execute the award or settlement agreement. The court in this situation is expected to take action against the assets of the unsuccessful party to implement the settlement by way of seizure (Tsetsa 2021). The successful party uses enforcement as a sword where the unsuccessful party refuses voluntary compliance with the agreement. In practice, both processes are usually undertaken together because enforcement necessarily involves

[8] Article 33 of of the Uniform Act on Simplified Recovery Procedure and Measures of Enforcement 2023.

recognition. They are usually sought from a state court because a foreign award, agreement or judgment cannot be enforced without being recognized (Amas et al 2022).

The Federal Court of Australia in *Eiser Infrastructure Limited v. Kingdom of Spain*[9], made the following distinction between recognition and enforcement; 'Simplistically, recognition refers to the formal confirmation by a municipal Court that an arbitral award is authentic and has consequences under municipal law. Enforcement goes a step further. It refers to the process by which a successful party seeks the Municipal Court's assistance in compliance with the award (as recognized) and obtaining redress to which it is entitled. The same distinction holds for recognition and enforcement of mediated agreements.

The Act has laid down rules relating to the enforcement of settlement agreements, with a preponderant role placed on local authorities. This raises concerns as local authorities involved in the enforcement processes rely on domestic laws of member states which vary from state to state. This has the effect of tainting the harmonization process intended by the OHADA lawmaker and may be inimical and less attractive to investors. Enforcement may also encounter difficulty when the agreement has international elements. These raise the problem of the suitability and effectiveness of the Act in dispute resolution as regards compliance with settlement agreements. Employing qualitative and comparative analysis and with most examples drawn from Cameroon[10], this article sets out to bring to the limelight the intricacies of enforcing settlement agreements under OHADA. The article demonstrates that to ensure forceful compliance with settlement agreements, conditions for recognition must be met before enforcement is commenced. It also shows that a party could seek enforcement under the Singapore Convention where the settlement agreement has international elements even though challenges abound.

2. CONDITIONS FOR ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER OHADA

Conditions for enforcement are imperative because when they are not met, a settlement agreement cannot be forcefully executed. A settlement agreement that is not complied with produces no effects. Such an agreement may be ignored, renegotiated, or enforced by judicial authorities. The enforcement will require an exequatur – a decision by which a court gives an executory force to an arbitral award or a decision from a private judge (Cornu 2016). According to Article 16 of the Act, for a settlement agreement to receive an exequatur, it must be in writing and not contrary to public policy.

[9] (2020) FCA, 157.
[10] Cameroon is chosen not only because the author masters its judicial system but also because it operates a bi-jural system with different procedural rules, though with harmonised judicial organisation.

2.1 The settlement agreement must be in writing

The requirement of writing is necessary as evidence of the existence of the settlement agreement as well as for the control of its authenticity. It equally enables the judge to verify the content of the agreement to establish its conformity with public policy. The Act does not recognize settlement agreements that are not evidenced in writing, and approval and enforcement would not be granted to such.

The Act does not prescribe the form of writing. In any case, a settlement agreement is in writing if its content is recorded in any form. Writing of any form including a private deed is permitted, especially as the agreement needs to be deposited with the notary public for authentication and insertion of the executory formula. The Act does not explicitly address electronic communications, which raises questions about their admissibility. According to Article 2(2) of the Singapore Convention, electronic agreements are valid if they are accessible for future reference (Niek 2019). It is suggested that it should be the same for electronic communications under the Act. It is also questioned whether writing is a substantial or formal requirement. Mukuamu (2023) opines that whether it is a substantial or formal requirement, imposing such a requirement tempers the will of the parties.

In some jurisdictions like the USA, enforcement of oral settlement agreements is permitted. This is consistent with the standard contract law principle which recognizes the validity of oral contracts (except for contracts where writing is required by statute, for example, contracts for transfer of land). Courts in the US enforce mediation settlement agreements in the absence of an executed written agreement if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound[11]. Nevertheless, Sussman (2018) observed that a Uniform Mediation Act is in the process of being passed in the US which exempts unwritten mediation settlements and they will henceforth be inadmissible in court if the Act is adopted throughout the USA.

2.2 The settlement agreement must conform to public policy

Public policy refers to principles and standards regarded by the legislator or by the courts as being of fundamental concern to the state and the whole of society. Settlement agreements have to conform to public policy. The requirement is very important as it is a ground not only of refusal of exequatur but also of appeal to the CCJA where an agreement is automatically homologated, that is, confirmed or approved (article 16 UAM). It is equally provided for in the Uniform Act on Arbitration (UAA) where it is sometimes couched as international public policy. Its Article 25(3) provides that '…parties may agree to waive the annulment action against the arbitral award if it is not contrary to international public policy'.

[11] *White v. Fleet Bank of Maine*, 875 A.2d 680 (Me. 680); *Standard Steel, LLC v. Buckeye Energy, Inc.*, 2005 WL 2403636 (W.D. Pa. 2005); *Harkader, supra*, 2005 WL 1252379; *Ford, supra*, 68 P.3d 1258.

By virtue of article 26(e), 'the annulment action shall only be permitted…e) if the arbitral award is contrary to public policy…' and finally that 'The recognition and the exequatur shall be denied when the award is manifestly contrary to rules concerning international public policy' (Article 31(4).

Neither the UAM nor the UAA define the scope and content of the notion of public policy or international public policy. In terms of scope, it has been held that the term refers to the public policy of OHADA as a community and not the individual public policy of member states or that of all the States in the world. This position seems reasonable because appeals for breach of such public policy are heard by the CCJA whose main role is to ensure harmonious application of regional law (Sassou 2022).

In terms of content, public policy has been held as 'designating all the principles written or not, which are considered in a given legal order as fundamental, and the respect of which is therefore imperative' (CREDIMI 2013). A distinction has been made between procedural public policy and substantive public policy. Breach of procedural public policy consists of violations of certain cardinal principles of the Act such as equality and impartiality, the right of all parties to be heard as well as the composition of the tribunal. Substantive public policy on its part will be violated where the award or agreement upholds an illegal activity such as corruption, racial discrimination or human trafficking (Kenfack 2021).

The notion of public policy has equally been held to encompass the fundamental principles of justice within the OHADA member states (Diakite 2016). A notable case where the CCJA annulled an arbitral award for breach of public policy was *Etat du Benin c/ SCP et Patrice Talon*[12].The apex court held in this case that: 'considering that while an arbitral tribunal is competent to entertain disputes arising from the exercise by the State of its prerogatives, its competence is limited to reparations due to private persons and does not extend to acts carried out by the State in the exercise of these prerogatives. In the present case, the tribunal instead of limiting itself to pecuniary awards, declared Decree nº 2013-485 null and void, and in so doing, this award is in breach of international public order.'

Case law holds that the principle of *res judicata* is a fundamental principle of international public policy. In *Société Planor Afrique SA c/ Société Atlantic Telecom*[13], the CCJA stated that; 'considering that the principle of *res judicata*, a fundamental principle of justice insofar as it ensures legal certainty, is part of international public policy within the meaning of articles 29(2) and 30(4) of the arbitration Rules of the CCJA, and precludes the arbitrator from ruling in the same cause between the same parties; that consequently, by ruling

[12] CCJA-Ohada, Ass. plén., arrêt nº 104/2015 du 15 oct. 2015.
[13] CCJA-Ohada, arrêt nº 03/2011 du 31 janv. 2011.

again on the request…, the award of the arbitral tribunal which thus undermines international public policy must be annulled.'

Case law equally holds that acts of corruption and other illicit practices are a violation of public policy. In the *République du Kirghizistan c/ Valéry Belokon*[14], the Paris Court of Appeal said, 'considering that the recognition or execution of the arbitral award which would have had the effect of making M. Belokon benefit from the product of illicit activities, manifestly, concretely and effectively violates international public policy, it is necessary to grant the applicant annulment…' The above cases, though not related to mediation, illustrate when settlement agreements would be contrary to public policy. Even though of considerable importance about the enforcement of settlement agreements, public policy consideration is uncertain in scope and its application may be inimical to enforcement.

3. THE PROCEDURE FOR ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER OHADA

The procedure of enforcement is important because it determines if the party seeking compliance is satisfied. Satisfaction is attained if the procedure is simple and swift. The Act achieves this through diversification of the methods of obtaining an exequatur as well as a considerable reduction of the time limits and grounds of appeal. The enforcement is by either the notary or the competent court.

a) Enforcement by the notary

A principal innovation of the Act is the possibility of authentication and enforcement of the settlement agreement by a notary. The parties or the most diligent party can deposit a written copy of the settlement agreement with the notary who registers the same and issues an exequatur for execution (Article 16(2) UAM). This procedure enables the parties to bypass the national courts and simplifies the enforcement process. The copy issued by the notary bearing the executory formula constitutes a writ of execution (Article 33(5) UASRPME).

Notaries are common in all the member states of OHADA except the English-speaking regions of Cameroon. The English-speaking regions of Cameroon are the only part of OHADA territory with the common law tradition. The rest of the territory practices civil law which has dominantly influenced the OHADA uniform acts. In this part of Cameroon, the homologation is done by lawyers since they equally perform the functions of notary public as per the transitional provisions of Law nº 90/059 of 19 December 1990 Organizing Practice at the Bar and Article 155(1) of Decree n° 95/034 of 24 February 1995 on the Status and Organisation of the Profession of Notary.

[14] CA Paris, pôle 1, ch. 1, 21 févr. 2017, nº 15/01650.

The Act does not place any obligation on the notary to control the conformity of the settlement agreement with public policy as is the case with the court. However, enforcement by the notary has the advantage of guaranteeing the confidentiality of the agreement which is one of the main goals of mediation (Aka, Feneon and Tchakoua 2018). Another advantage is that there is no appeal against homologation by the notary, especially as most often it is done at the joint request of the parties.

b) Enforcement by the court

According to Article 16(3) of the Act, the parties can seize the competent court for enforcement of the agreement. The Act gives a very limited and passive role to the court seized. The court verifies the authenticity of the agreement without the possibility of modifying the content (Article 16(4). This is obvious because the court is not seized to decide on what has been decided by the parties consensually but to recognize its regularity and order that it should be enforced (Tchakoua 2013). What is imperative here is the *imperium* (power to give orders) and not the *jurisdictio* (power to decide on merit) of the judge. The court equally ensures that the settlement agreement is in compliance with public policy, failure of which it will refuse to enforce it (article 16(5). The judge has a deadline of 15 working days after being seized, to rule on the application for approval and enforcement. Where this time limit expires, the approval is automatically granted and the most diligent party applies to the registrar-in-chief of the court to affix the executory formula on the settlement agreement (article 16(6). The implicit grant of exequatur works against any delays by the courts which could be a procedural irritant in the execution of settlement agreements. The decision of exequatur whether explicit or implicit is not subject to appeal before any national court; it can only be brought before the CCJA for judicial review and the court has six months to rule (article 16(7).

The restriction of instances of appeal against the decision of exequatur or homologation of a settlement agreement as well as the competent jurisdiction to entertain such appeal, guarantees celerity. Mukuamu (2023) observes that the use of the terms homologation or exequatur creates the impression that there are two procedures and questions why institute two procedures to achieve the same purpose. In any case, exequatur or homologation all lead to the forceful execution of the settlement agreement. The parties can appeal where the approval or enforcement of the settlement agreement is automatic due to the failure of the court to rule within the prescribed time limits. The aggrieved party in this case can object to such approval or enforcement within 15 days of being notified, on grounds that the agreement is contrary to public policy. In such a case, the appellant has to specify how the settlement agreement offends public policy as was held by the CCJA in *Sonapra c/ SHB*[15]. The appeal is heard and decided by the CCJA within 6 months and all other time limits provided by the rules of the CCJA are reduced by half. The appeal suspends the execution of the settlement agreement (article 16(6).

[15] CCJA-Ohada, Ass. plén., arrêt nº 04/2011 du 30 juin 2011.

The parties can equally file an appeal where the court refuses to grant approval or enforcement of the award. The aggrieved party, in this case, makes an appeal to the CCJA within the same conditions as above (Article 16(7).

Where the settlement agreement is concluded while arbitral procedures are still pending, the parties rather than seeking judicial or notarial enforcement, can request the arbitral tribunal to include the agreement into a consent award (article 16(8). The award will then be executed according to the normal procedure for enforcement of arbitral awards as provided by the UAA. This also enables it to be enforced even in other jurisdictions under the New York Convention on enforcement of foreign awards. Even though the New York Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties, it should be assumed that consent awards also fall under the scope of the Convention (Niek 2019).

The Act does not designate the competent court to issue exequatur for enforcement of settlement agreements. In *Société Ciments UNIBECOS S.A c/ Ibrahim Ahmad YOUNES*[16], the CCJA stated that 'except the uniform acts designate the competent court to rule on disputes arising from their application, the determination of the competent court is left for each member state'. In line with this decision, some OHADA member states have enacted laws to designate the competent courts or judges mentioned in the UAA, for instance, Cameroon[17], Côte d'Ivoire[18], Senegal[19], Togo[20] and Burkina Faso[21].

In Cameroon, the competent judge to issue exequatur is the President of the Court of First Instance or the judicial officer designated by him as per section 15(2) of Law nº 2006/015 of 29 December 2006 on Judicial Organisation as amended by Law nº 2011/027 of 14 December 2011. Section 5(2) of Law nº 2003/009 of 10 July 2003 to designate the competent Courts mentioned in the Uniform Act on Arbitration within the framework of OHADA Treaty and to lay down conditions for referring matters to them, provides that 'In case of petition for exequatur, the President of the Court of First Instance shall be seized by an application or by motion ex parte, alongside with documents establishing the existence of the award as outlined in Article 31 of the Uniform Act on Arbitration within the framework of the OHADA Treaty'. Law nº 2007/001 of 19 April 2007 to institute a judge in charge of litigation relating to the execution of judgments and to lay down conditions for the enforcement in Cameroon of foreign court decisions, public acts and arbitral awards, equally points to the court of first instance (section 5).

[16] CCJA, arrêt nº 129/2015, Pourvoi Nº 090/2012/PC du 13/08/2012.
[17] Law nº 2003/009 of 10 July 2003.
[18] Ordinance nº 2021/158 of 9 February 2021.
[19] Decree nº 2016/1192 of 3 August 2016.
[20] Law nº 2016/of 2 December 2016.
[21] Law nº 047-2017/AN of 14 November 2017.

The provisions of the above laws point to the President of the Court of First Instance or a judge delegated by him as the competent judge to grant approval and enforcement of both national and foreign awards and judgments. In the absence of specific legislation aimed at the UAM, it is safe to conclude that the provisions of this law are applicable mutatis mutandis to the UAM. This is especially so given the similarity of the provisions of both laws (Mbide 2022).

4. ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER THE SINGAPORE CONVENTION ON MEDIATION

It is important for the attractiveness of mediation to international investors that the parties be able to enforce the agreement in countries other than the one in which it was made. It is given this that the UN Convention on the International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) was adopted in 2018. It creates a harmonized framework for the effective and prompt enforcement of international mediation settlement agreements and aims to render mediation more efficient and attractive to parties globally, as an alternative to international arbitration and litigation. The Convention fills a missing gap in enforcement options for mediation, as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards successfully did for arbitration (Tzevelekou 2018). The provisions of the Singapore Convention are equally integrated into the UNCITRAL Model Law on Mediation of 2018. The Convention applies only to international mediation (article 1) and imposes an obligation on signatory states to enforce settlement agreements and to allow parties to invoke a settlement agreement as proof that a claim against them has been resolved (article 3). The Singapore Convention lays down the conditions for enforcement as well as grounds on which enforcement may be refused.

4.1. Conditions of enforcement under the Convention

A request for recognition and enforcement under the Singapore Convention must fulfill certain conditions under Article 4, as to the form of the agreement and the nature of the dispute contained in the settlement. As to the form:

- The mediation agreement must be signed by the parties to the mediation;
- The party must provide evidence that the settlement agreement resulted from mediation. Such evidence can be in the form of the mediator's signature on the agreement, a document signed by the mediator attesting that the mediation took place, an attestation from the institution that administered the mediation, or any other evidence that is acceptable to the enforcing authority; and
- The agreement must be translated where it is not in the same language as that of the country where enforcement is sought.

As to the nature of the dispute:

- The settlement agreement should be international. A settlement agreement qualifies as international if: (a) at least two parties to the settlement agreement have their place of business in different states, or (b) the state in which the parties to the settlement agreement have their places of business is different from either: (i) the state in which a substantial part of the obligations under the settlement agreement is performed, or (ii) the state with which the subject matter of the settlement agreement is most closely connected (Niek 2019).
- The settlement agreement should not be concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family, or household purposes, or be related to family, inheritance, or employment law (Article 1(2) (a-b).
- The settlement agreement should not have been approved by a court or concluded in the course of proceedings before a court and is enforceable as a judgment in the state of that court; and have not been recorded and is enforceable as an arbitral award (Article 1(3) i-ii).

4.2 Grounds for refusal of enforcement under the Convention

The grounds for refusal of enforcement under Article 5 of the Singapore Convention are of two categories, that is, those that must be invoked and proved by a party and those that may be taken into account by the competent court on its motion (Feneon 2020). Upon proof of the party against whom enforcement is sought, the competent authority may refuse to grant relief if one of the following six conditions has been fulfilled:

(a) a party was under some incapacity;

(b) the mediated settlement agreement: (i) is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority; or (ii) is not binding, or is not final, according to its terms; or (iii) has been subsequently modified;

(c) the obligations in the settlement agreement have been performed or are unclear;

(d) granting relief would be contrary to the terms of the settlement agreement;

(e) there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) the mediator failed to disclose "to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure, that party would not have entered into the settlement agreement."

The Court seized with the application for approval and enforcement may also refuse such a request *suo moto* where it finds that: (a) doing so would be contrary to the public policy of that State; or (b) the subject matter of the dispute is not capable of settlement by mediation. These grounds are substantially more extensive than those provided for under the Act where the only ground for refusal of approval and enforcement is a breach of public policy.

5. CHALLENGES TO ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER OHADA

The introduction of mediation into the OHADA ADR framework undoubtedly has many advantages, especially to investors in the OHADA zone due to its less contentious nature. There are, however, many challenges to the effectiveness of OHADA mediation particularly in the settlement of investment disputes. These challenges are related to the specific nature of investment disputes, the inherent characteristics of mediation as well as those inherent in the OHADA system as a whole. They include the absence of a mediation institution, difficulty of forceful execution against public entities, uncertainties relating to competent jurisdiction, and imprecision on predictability.

5.1 The absence of OHADA mediation institution

Institutional support is an important factor in the success and quality of ADR. Institutions can raise awareness about the use of ADR and inform parties about the process. They can support parties when they decide to submit their case and act as a facilitator in case of disagreement on the use of ADR or when they need help finding the best neutral third party (arbitrator, mediator, or conciliator) for their case and, if need be, by finally appointing the neutral. Institutions can supervise the proceedings to ensure their correct and fair conduct (Tumpel 2011).

Pougoue (2000) thinks that arbitration under the CCJA is 'without precedent both in Africa and the world at large', mainly because it brings together all the arbitration operations, from the request for arbitration to the final decisions on the awards. The advantages of CCJA arbitration include '…the fact of having contact with only one authority for both the arbitration phase and the eventual litigation phase and of having at one's disposal a very high-level authority giving the guarantees of integrity and independence' (Bourdin 1999). Comparatively, OHADA mediation doesn't have the same advantages of arbitration abovementioned. While the Act provides for institutional mediation, there is no supra-regional institution like the CCJA which administers and oversees the entire process from initiation to enforcement of the settlement agreement. The jurisdiction of the CCJA is restricted to administering arbitrations within the scope of Article 21 of the OHADA Treaty. The CCJA comes into mediation only when an appeal is made relating to exequatur or homologation.

There are a multitude of mediation centers in the region in different member states, each with their rules and in competition with the other. The absence of a regional mediation institution deprives OHADA mediation of the backing of a credible and independent institution with clear and uniform rules, trained mediators, and scrutiny of the settlement agreement. This goes contrary to OHADA's aim of harmonization and makes OHADA mediation less able to compete with other mediation systems like ICSID. On the whole, the absence of the institutional support of the CCJA deprives OHADA mediation of the prestige attached to the institution which is a necessary leverage to attract investor-state mediations. That is why state parties continue to prioritize international arbitration in their International Investment Agreements (IIA) over OHADA mediation. The new generation of BITs signed by OHADA member states after the adoption of the Act such as Burkina Faso- Turkey BIT (2019), Cote D'Ivoire-Japan BIT (2020), Mali-UAE BIT (2018), Mauritius-China FTA (2019) and the Democratic Republic of Congo- Rwanda BIT (2021), continue to provide for arbitration under UNCITRAL, ICSID and ICC with no reference to OHADA mediation (Bebohi Ebongo 2021).

5.2 Difficulties of forceful execution against the State and public Entities

Since mediation is a consensual process, it might be expected that the parties would voluntarily comply with the resulting settlement agreement which ensues from their mutual assent. Such is not always the case, though, and it is sometimes necessary to resort to forceful execution. The Uniform Act on Simplified Recovery Procedures and Measures of Execution (UASRPME) provides in Article 28 that 'in default of voluntary execution, any creditor may, regardless of the nature of his claim and under the conditions provided for in this Uniform Act, compel the defaulting debtor to honor his obligations against him or take protective measures to secure his rights'.

This is not so easy, however, where such forceful execution is sought against the State or other public entities due to the principle of State immunity from forceful execution enshrined in OHADA law (Vodounon-Djegni, 2022; Sawadogo 2010). In effect, article 30 of the UASRPME provides that *compulsory execution and protective measures shall not apply to persons who enjoy immunity from execution*. This provision which is categorical and emphatic seems to grant absolute immunity to the category of persons mentioned (Chia 2023). It does not, however, indicate the category of persons to whom such immunity applies, although it is accepted that it includes the State, decentralized authorities, public corporations, and public establishments (Nkongho 2019). This discourages investors from engaging in mediation with OHADA member states and other public entities as there is uncertainty as to whether they would be able to enforce the resulting settlement.

Many reasons have been advanced for the immunity of States from forceful execution. These include the belief that the State is never insolvent and is at all times in a position to meet its financial obligations. Another reason is the fact that forceful execution through the seizure

of public property will inevitably paralyze the ability of the State to carry out its public service mission, jeopardize the continuity of the public service, and ultimately cause suffering to the community at large.

The CCJA initially firmly sustained the absolute immunity of the State in *Aziablevi Yoyo et autres c/ Société Togo Telecom*[22], where it upheld the decision of the Court of Appeal annulling a forceful execution ordered against Togo Telecom, a State-owned company. The CCJA in that case ruled that public corporations, whatever their mission, are immune from forceful execution irrespective of any national legislation that provides the contrary. It equally emphasized the superiority of OHADA law over national legislation and the direct applicability of the Uniform Acts under Article 10 of the Treaty and held that the Togolese law which waived the immunity of public companies is contrary to Article 30 of the UASRPME. This decision of the CCJA was taken in disregard of the 2004 UN Convention on jurisdictional immunity of states and their property, according to which immunity from execution of the state or other public corporate bodies disappears when they undertake commercial activities (articles 13, 14, 15, and 16).

Due to hefty criticism, the CCJA has recently sought to restrict the extent of the application of state immunity from execution. Henceforth, the state and other public corporate bodies are not immune concerning the commercial activities they engaged in[23]. Besides, for a Semi-public corporation to benefit from immunity, the State must own the majority of the shares[24]. The mere participation by the State in the capital of the corporation without majority control will not confer immunity from execution. More importantly, the apex court took a remarkable shift in *SOTRA c/ SONAREST Etat de Cote d'Ivoire*[25] where it held that public corporations with majority public participation or even with the State as a sole shareholder but which for their operation have chosen one of the forms of Commercial companies provided for in the Uniform Act on Commercial Companies are subject to the Uniform Act on Simplified Recovery Procedures and their property can be seized without any restriction. This was confirmed in *Les membres du collectif ex personnel de la Société ENERCA S.A c/ La Société Energie Centrafricaine ENERCA S.A*[26] wherein the CCJA held that State corporations, vested with a public service mission, but created in the form of private companies and managed as private companies under the Uniform Act on Commercial Companies are not covered by immunity from execution.

[22] CCJA Arrêt no. 043/2005 du 7 Juillet 2005.
[23] *Mbutu Museso v Grand Hotels du Congo GHC*, CCJA, 3e ch. No 103/2018, 26 avril 2018 ; *Société Ivoirienne de Raffinage (SIR) v Trafigura Beheer BV*, CCJA no 002/2015 du 25 juin 2015 ; *Société Ivoirienne de Concept et de Gestion du Mali (SICOGEM) c/ Banque Malienne de Solidarité BMS*, CCJA no 010/2013 of 3 juillet 2014.
[24] *Gregoire BAKANDEJA WA MPUNGU C/ Société des Grands Hotels du Congo*, CCJA 1ere Ch. Arrêt No 267/2019, 28 novembre 2019.
[25] CCJA, 2eme Chambre, Arrêt No 190/2020 du 28 mai 2020.
[26] CCJA, 2eme chambre, Arrêt No 076/2021 du 29 avril 2021.

Immunity from execution will not be raised if the State or public body corporation or enterprise has waived its immunity. In this light, the CCJA held in *Société de Commercialisation des Produits Alimentaires du Sénégal (SCPA) c/ Société Senegalaise de Raffinage SOR*[27] that SOR had waived its immunity from execution by entering into a contract with SCPA that included a waiver of immunity clause. Thus, SCPA was entitled to seize its assets to satisfy the judgment debt. Despite the evolution in CCJA case law, it is still difficult for an investor to forcefully execute a settlement agreement against the State even after receiving an exequatur. Most often the party seeking enforcement resorts to renegotiation which is time-consuming.

However, a solution has been attempted in the amended Uniform Act on Simplified Recovery Procedures and Enforcement Measures of 2023. As per Section 30(1), any claim evidenced by an enforceable title or arising from an acknowledgment of the debt by a legal entity governed by public law, in particular the State, a local authority, or a public establishment may, after formal notice has been given to the governing body or competent authority in each State Party, which has remained unsuccessful for a period of three months from the date of notification, be automatically entered in the accounts for the financial year and in the budget of the said legal person, as a compulsory expenditure. The registration request, sent to the Minister of Finance, shall be accompanied by supporting documents for the debt and the formal notice. Claims registered following a request for automatic registration shall automatically bear interest at the legal rate in force from the date of formal notice. Even though interesting, this provision can only produce its effects if public entities concerned act in good faith.

5.3 Uncertainty as to the competent jurisdiction to entertain applications for enforcement

Article 16 of the Act provides that *the mediated agreement may also be subject to approval or exequatur by the competent court*. This provision as is customary in OHADA law does not identify the competent court but leaves this task to the member states. In some cases, however, member states have not enacted legislation on the competent court to enforce mediated agreements. In Cameroon for example, no such court exists, unlike the case for arbitral awards. Fortunately, section 15(2) of the law on the judicial organization in Cameroon designates generally, the President of the Court of First Instance or judge designated by him as the competent judge to issue an exequatur.

However, the problem is less acute because the notary public is empowered to issue an exequatur in matters of mediation. At least notaries exist in all the member states of OHADA. The only shortcoming is that they are not empowered to verify the conformity of the settlement

[27] CCJA nº 019/2008 du 22 juin 2012.

agreement with public policy. The uncertainty in the enforcement procedure can lead to loss of confidence in the OHADA mediation system.

5.4 The lack of precision on mediatability

Mediatability determines whether a matter can be settled by mediation or not. It answers the question of whether the subject matter of a claim is or is not reserved to domestic courts under national law. The Act does not define the disputes that can be resolved by mediation under OHADA; it provides simply in Article 2 that it shall apply to mediation. While it is possible to presume that just like arbitration, mediation can be resorted to concerning the rights that the parties can freely dispose of, the absence of precision in the Act gives rise to unnecessary uncertainty (Mbide 2022). This lack of certainty can cause the refusal of enforcement of a settlement agreement under both the Act and the Singapore Convention. Article 5 of the Singapore Convention on its part provides that a state party can refuse to grant recognition and enforcement of a settlement agreement where the subject matter of the dispute is not capable of settlement by mediation under the law of that party.

Like mediatability, arbitrability determines the type of disputes which can be settled through arbitration. If the dispute is not arbitrable or mediatable, the claim must instead be submitted to domestic courts. Arbitrable disputes are those concerning rights that can be disposed of freely. Only rights which are fully under the parties' control and which they can freely alienate and dispose of are subject to arbitration. This category includes the majority of rights enjoyed by parties under civil and commercial law. However, certain domains such as marriage and divorce under family law are not arbitrable (Kenfack 2021). Mediatability like arbitrability can be a matter of public policy. Under Article 5(2)(a) of the New York Convention, recognition and enforcement of an award may be refused if the court where such recognition and enforcement is sought finds that *the subject matter of the difference is not capable of settlement by arbitration under the law of that country*.

According to the Act, non-conformity with public policy is a ground for refusal of approval and enforcement. Thus, the mediatibility of disputes under the Act is determined by public policy. The Act, however, does not define the content or scope of public policy. This could be unfriendly to investors as lack of definition may lead to broad interpretations by the State courts, leading to the refusal of approval of valid settlement agreements. In *Richardson v. Mellish*[28] it was stated that 'public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all but when all points fail'.

[28] 1824-34 All ER, 258.

6. CONCLUSION

Settlement agreements that are not freely respected by the parties will have no effect unless they are forcefully executed. OHADA mediation is attractive because the forceful execution of settlement agreements is recognized and regulated. Enforcement which is done through exequatur is simplified and made rapid. An exequatur may be obtained from a notary public, the court, or may even be automatic if the court fails to rule on an application for exequatur within a specified time. In addition, there are restrictive grounds on which enforcement may be refused, the most important of which is non-conformity with public policy. As interesting and charming as it appears, the procedure of enforcement is plagued with a lot of challenges such as the absence of a regional mediation institution, the difficulty of enforcement against the State and other public entities, imprecision on certain notions, and non-designation of competent courts to enforce mediated agreements. To strengthen confidence and promote the use of mediation within the OHADA framework, it is recommended inter alia that the OHADA legislator should create a regional mediation institution or enact mediation rules to enable it to be conducted under the aegis of the CCJA as is the case with arbitration. This will harmonize the mediation rules of the member states. Electronic communications should also be admissible as evidence of settlements if they are accessible for future reference.

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THE STATE AND FEDERAL HIGH COURTS' JURISDICTION OVER BANKER-CUSTOMER DISPUTE FROM THE PRISM OF DECIDED CASES: WHITHER THE MAGISTRATE COURT'S JURISDICTION

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Abstract

The Magistrate Court Law of most States in Nigeria, (including Oyo State) gives them jurisdiction over tortious acts of which detinue is one. Thus, where a bank customer, mistakenly makes an intra or interbank transfers to a wrong account whereof the money is withheld by the bank, and the withheld amount is within the monetary jurisdiction of the Magistrate Court, the customer, usually brings an action in detinue for the bank to release the money to him/her. This is usually done notwithstanding that both the Supreme Court of Nigeria (SCN) and Court of Appeal (CA) have held that the State and Federal High Courts' have concurrent jurisdiction over banker-customer disputes. This paper, adopts desk-based method in interrogating the jurisdiction of the Magistrate Court of Oyo State under the Oyo State Magistrate Court Law, 2011 vis-à-vis the jurisdiction of the State and Federal High Courts over banker-customer dispute based on decided cases to determine whether there is any conflict. It argues that the cases in which the SCN and CA have held that the State and Federal High Courts have and exercises concurrent jurisdiction over banker-customer disputes, were decided without reference to the jurisdiction of other equally competent courts i-ncluding the Magistrate Court of Oyo State (and other States as well). It found that there is not jurisdictional conflict between these courts in relation to banker-customer disputes but symbiotic. The paper makes vital recommendations before concluding.

Keywords: Banker, Customer, Constitution, Jurisdiction, Magistrate Court, Nigeria

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1. INTRODUCTION

The Federal High Court was created as the Federal Revenue Court is a specialized court. Thus, the law is that courts are the creation of statute and the statute that creates a court, gives it jurisdiction to the extent that any matter not expressly included as the court's jurisdiction, is by necessary implication, taken away from the courts was held in *Gafar v. Govt. Kwara State* (*2*007) Section 251 of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter simply referred to as CFRN, 1999) invest the Federal High Court (herein referred to as FHC) with exclusive original civil jurisdiction over a wide range of disputes including banking matters. (Adekunle and Onokoya 2016, Pp. 184-204) On the other hand, section 272(1) of the CFRN, 1999 invests the State High Court (and by necessary implication, the High Court of the Federal Capital Territory, Abuja) with jurisdiction over certain matters too. One of the controversies that has arisen from the FHC's jurisdiction to banking matters is whether or not the FHC has and exercises exclusive original civil jurisdiction over banker-customer disputes as was held in *Access Bank Plc v. Okpu* (2021). Nigeria's appellate courts (i.e. the Court of Appeal and Supreme Court) in an avalanche of decisions such as *Diamond Bank Ltd. v. PIC Ltd.* (2009); *Union Bank of Nigeria Plc. v. Mr. N.M. Okpara Chimaeze* (2014); and *Union Bank of Nigeria Plc v. Alhaji Adams Ajabule & Anor* (2011) (which are examined in the subsequent part of this article) have resolved the quagmire *Interdrill Nigeria Ltd. & Anor* v. *United Bank For Africa Plc* (2017). The outcome of the resolution is that in relation to disputes bothering on banking administration and control, the FHC has and exercises exclusive original civil jurisdiction *Keystone Bank Ltd v. Dazz Motors Ltd.* [2021] but, in relation to disputes pertaining to or arising from banker-customer relationship, the FHC and State High Court (including the High Court of the Federal Capital Territory, Abuja by necessary implication), have and exercises concurrent original civil jurisdiction over such disputes *Nigeria Deposit Insurance Corporation v. Okem Enterprises Limited & Anor* [2004].

Meanwhile, Section 19(1) of the Oyo State Magistrate Court Law, 2000 provides for the civil jurisdiction of the court which includes tortious liability such as detinue. Under this jurisdiction, it has become a practice where a bank customer, mistakenly transfers money to the wrong bank account either of the same or different bank wherein the money is in the custody of the recipient bank and reversal is not made after a demand, to approach the Magistrate Court under the tort of detinue (or purely for a reversal order owing to wrongful transfer) for an order directing the bank to release the detained money. This practice has persisted and gained momentum even though the Court of Appeal and Supreme Court of Nigeria (CA and SCN) have held that the Federal High Court and State High Court have and exercise concurrent jurisdiction over banker-customer disputes.

Based on the foregoing, the issues arising are: whether or not the decisions of the CA and SCN to the effect that the Federal High Court and State High Court have and exercise concurrent original jurisdiction over banker-customer disputes affects the jurisdiction

bestowed on the Magistrate Court of Oyo State (and similar State Magistrate Court) to entertain banker-customer disputes hinged on the tort of detinue? Whether or not the jurisdiction invested on the High Court and reverberated by these decisions of the CA and SCN is exclusive thereby sequestrating all other courts (including the Oyo State Magistrate Court) of jurisdiction? What is the utilitarianism of Magistrate Courts being seised of small money claims in banker-customer disputes about access to court and quick dispensation of justice? These questions form the crux of this article.

By structure, the article is divided into five sections. Section one which includes this part, contains the introduction. Section is an exegesis of the concept of jurisdiction under Nigerian law. Section three analytically discusses the stance of the CA and SCN on the jurisdiction of the Federal High Court and State High Court on banker-customer disputes explicating the extent of the applicability/bindingness of these decisions. Section three answers the question of whether or not the position taken by the CA and the SCN affects the jurisdiction bequeathed on the Magistrate Court of Oyo State by Section 19(1) of the Oyo State Magistrate Court Law, 2000 and matters arising. Section five contains the conclusion and recommendations. This article adopts a doctrinal method through analytical interrogation of the question raised. It relies on primary data such as the Constitution of the Federal Republic of Nigeria, 1999, Federal High Court Act, 1973, Oyo State Magistrate Court Law, 2000, Case law, and secondary data such as articles in learned journals, textbooks, and online materials. The case law from the Court of Appeal and Supreme Court of Nigeria were critically analyzed with the aim of showing that the jurisdiction conferred on the State High Court and the Federal High Court on banker-customer relationship, is not exclusive, but extends to other courts such as the Magistrate Court. These data were subjected to rigorous context and jurisprudential analysis. The importance of these findings is that the Magistrate Court is a grassroots court which access is easier and less expensive unlike the State and Federal High Courts that although available, are limited in terms of number, and the vast majority of litigants with small claims, may not easily have access to especially bearing in mind the cost of retaining a legal practitioner for such courts.

2. EXPLICATING THE CONCEPT OF JURISDICTION OF COURT UNDER NIGERIAN LAW

Jurisdiction of the court is a fundamental principle in adjudication. The Supreme Court of Nigeria (SCN) in *Egharevba v Eribothe* (2010) while defining jurisdiction and its nuances held as follows:

> Jurisdiction is a term of comprehensive import embracing every kind of judicial action. It is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction also defines the power of the court to inquire

> into facts, apply the law, make decisions, and declare judgments. It is the legal right by which Judges exercise their authority. Jurisdiction is equal to the court what a door is to a house. This is why the question of a court's jurisdiction is called a threshold issue because it is at the threshold of the temple of justice. Jurisdiction is a radical and fundamental question of competence, for if the court has no jurisdiction to hear the case, the proceedings are and remain a nullity however well conducted and brilliantly decided they might have been. A defect in competence is not extrinsic but rather intrinsic to adjudication.

Thus, (Akeredolu and Eyongndi, 2019, Pp. 3-4) argued that the foregoing position of the court is instructive as it gives credence to the position earlier stated by the SCN in the *locus classicus* case of *Madukolu v Nkemdilim* (1962) where the indicia for determining the competence of the court were first laid down. The SCN stated the law as follows:

> A court is competent when it is properly constituted as regards the numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction and the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. The court further held that any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication.

From the foregoing, a court is said to have the requisite jurisdiction to adjudicate over a matter when it is composed of the prescribed number of judges/justices and their qualifications is intact. Moreso, the subject matter must be within its express adjudicatory purview; all condition(s) required to be fulfilled before the institution of the case had been met and due process of the law had been strictly adhered to. In *Attorney General of Ogun State v Coker* (2002), the SCN held that failure to meet any of these requirements will render the court incompetent to adjudicate over the dispute, and any decision reached, will be a nullity.

Jurisdiction is germane to adjudication (Ukeje 2006, 249-250). Jurisdiction of a court is an intrinsic matter that due to its importance, can be raised at any stage of the proceedings even on appeal at the Supreme Court for the first time *National Bank of Nigeria Ltd. & Anor v John Akinkunmi Shoyoye & Anor* (1977). According to (Eyongndi and Onu 2019, Pp. 243-270) the law is that once the issue of jurisdiction of a court is raised howsoever, the court must keep at abeyance further proceedings and determine the

challenge one way or the other as was decided in *Felix Onuora v Kaduna Refining and Petrochemical Co. Ltd* (2005). The rationale is that irrespective of how well the proceedings were conducted if they were conducted in want of jurisdiction, the whole exercise would be one in futility *Ibori v Ogboru* (2005). This position of the law is to guide against fruitless adjudication that this rule exists to save the precious scarce time of the court as well as resources of litigants and the overall interest of justice. The jurisdiction of a court could be original or appellate. Original deals with matters that the court can entertain as first instance while appellate deals with matters emanating from inferior courts which the court can entertain on appeal (Obi and Ochonogor 2020, Pp. 49-63). It could also be territorial or monetary. Territorial jurisdiction refers to the territorial area within which disputes emanating thereof could be entertained by a court while monetary pertains to the amount of money issued or claimed upon which a court can adjudicate. The jurisdiction of a court could also be supervisory which gives the court the power to exercise a supervisory role over others. For instance, based on hierarchy, the Magistrate/Area Courts are inferior to the State High Courts. As a result, State High Courts exercise supervisory jurisdiction over these inferior courts.

In Nigeria, the doctrine of precedent is recognized and practiced. By this doctrine, decisions of superior courts, are binding over inferior courts. By section 6(6) (5) of the Constitution of the Federal Republic of Nigeria, 1999, the hierarchy of courts in Nigeria from the top to the least follows from the Supreme Court, the Court of Appeal, the High Court, Federal High Court, State High Court, High Court of Federal Capital Territory, Abuja, the National Industrial Court of Nigeria, the Customary Court of Appeal of a State, the Sharia court of Appeal of a State, the Customary Court of Appeal of the Federal Capital Territory, Abuja, the Sharia Court of Appeal of the Federal Capital Territory, Abuja, the Magistrate Court/Area Court. The point must be noted that all the High Courts, (i.e., Federal High Court, State High Court, High Court of Federal Capital Territory, Abuja, the National Industrial Court of Nigeria) are courts of coordinate jurisdiction, i.e. they rank the same on the judicial hierarchy. As a result, none of these courts can sit on appeal over the decision of another, and the decision of one, is not binding on the other. The National Industrial Court of Nigeria (NICN), Customary Court of Appeal of a State, the Sharia court of Appeal of a State, the Customary Court of Appeal of the Federal Capital Territory, Abuja, the Sharia Court of Appeal of the Federal Capital Territory, Abuja are specialized courts. The NICN has and exercises exclusive original civil jurisdiction over labor and ancillary matters. Appeals from the courts beneath the Court of Appeal, lie to the Court of Appeal either as of right or with the leave of the court first sought or obtained.

Jurisdiction is germane that it challenge could be raised at any stage of the proceedings and even at the Supreme Court for the first time. Thus, where the jurisdiction of a court is challenged, the only prudent option the court can take is to pause further

proceedings and decide the challenge one way or the other. The reason is that any judicial adjudication done in want of jurisdiction is an exercise in futility. Where a court has jurisdiction to entertain a case filed before it, that jurisdiction must subsist throughout the hearing of the case. In determining whether a court has jurisdiction over a suit filed before it, recourse is usually had to the statement of claims of the claimant (*Yakubu v. Governor of Kogi State* 1997). Thus, once a court has examined its jurisdiction and finds that it lacks the requisite jurisdiction, the proper order for it to make is an order striking out the suit and not dismissal to give the party where possible, the opportunity to remedy the defect and present the matter before the appropriate court as was held in *Babington-Ashaye v. E. M. A. Gen-Ent. (Nig.) Ltd* (2012). Thus (Eyongndi, Onu & Ebiye 2022, Pp. 339-340) have posited that jurisdiction is a threshold issue and it is to adjudicate what blood is the body of living things.

3. THE STANCE OF THE CA AND SCN JURISDICTION OVER BANKER-CUSTOMER DISPUTES

The relationship subsisting between a banker and customer is mainly contractual and that of the debtor and creditor *Dike v Key Construction Ltd* (2017). The controversy has been the interpretation of sections 251(d) and 272(1) of the CFRN, 1999 that relates to the jurisdictions of the Federal High Court and State High Court. These sections respectively provide that:

> Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters connected with or about banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures: Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank.
>
> Subject to the provisions of section 251 and other provisions of this constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings

> involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offense committed by any person.

It is the opposite to note that what is known today as the Federal High Court (FHC) was established by Decree No. 13 of 1973 as the Federal Revenue Court. The name Federal High Court is a creation of 228(1) and 230 (2) of the Constitution of the Federal Republic of Nigeria, 1979. Gleaning from its original name, the FHC is a specialized court meant to handle matters dealing with the revenue of the federal Government but whose jurisdictional scope, was enhanced and enlarged under both the 1979 and 1999 Constitutions. Thus, Section 251(1) of the CFRN, 1999 invests the FHC with exclusive original civil jurisdiction over a broad spectrum of matters. One of the matters is banking as contained in section 251(1) (d). Thus, controversy has arisen as to the interpretative import of the section transmogrifying the question of whether the FHC has exclusive original civil jurisdiction over banking matters to banker-customer disputes. This question arose about the jurisdiction conferred on the SHC under section 272(1) of the CFRN, 1999. Thus, in *De Lluch v. S.B.N. Ltd* (2003) the Court of Appeal had the opportunity to answer the vexed question and concluded that:

> The purport of the proviso to section 230(l)(d) of the 1979 Constitution as amended by Constitution (Suspension and Modification) Decree No. 107 of 1993, which is in pari materia with section 251(1)(d) of the 1999 Constitution is that the Federal High Court does not have exclusive jurisdiction over matters listed in the section if the dispute in respect of the matters is between an individual customer and his bank; and that both the Federal High Court and a State High Court enjoy concurrent jurisdiction over such disputes. In the instant case, the dispute between the parties arose from a customer/banker relationship. In this circumstance, both the Federal High Court and the State High Court had concurrent jurisdiction over the same.

The foregoing position had been reached by the Supreme Court when it had to answer the same question in *Nigeria Deposit Insurance Corporation v Okem Enterprises Limited & Anor*. (2004) The Supreme Court of Nigeria per Kalgo JSC (as he then was) held as follows:

> It will be seen clearly that Section 251(1) (d) confers exclusive jurisdiction on the Federal High Court in specified matters notwithstanding Section 272(1). What this means is that the jurisdiction conferred upon and exercised by the State High Court hitherto regarding those specified matters has been removed. The proviso to Section 251(1) (d) however exempts any dispute between an individual Customer and his Bank from the exclusive jurisdiction of the Federal High Court. What this means is this. The proviso has done two

things, First, the jurisdiction of the High Court in transactions involving an individual customer and his Bank has been preserved. In the second place, although the Federal High Court has jurisdiction in such disputes, it is not to exclude the State High Court. In other words, both Courts have concurrent jurisdiction, That is to say under the proviso to Section 251(1) (d) of the Constitution, the Federal High Court has concurrent jurisdiction with the State High Court in transactions involving an individual customer and his Bank

4. ANY DISPUTE BETWEEN THE CA AND SCN DECISIONS AND SECTION 19(1) OF THE OYO STATE MAGISTRATE COURT LAW?

From the preceding section, it has been established from the decisions of the Court of Appeal and Supreme Court of Nigeria examined that, the FHC and SHC under the CFRN, 1999 have and exercise concurrent jurisdiction over banker-customer disputes. The issue this raises is that: aside from these courts (i.e. the FHC and SHA) does any other court in Nigeria have the jurisdiction to entertain disputes arising from or about banker-customer relationships? Is the jurisdiction vested in the Magistrate Court over torts that have made it entertain a variant of banker-customer dispute in compliance with this decision or not? This section of the article addresses these questions.

Section 19(1) of the Magistrate Court Law of Oyo State, 2000 provides that subject to the provisions of this, or any other law or Act, a Chief Magistrate shall have and exercise jurisdiction in civil cases: a. In all personal suits, whether arising from contract, or tort or from both where the debt or damage claimed, whether as balance claimed or otherwise, is not more than Thirty thousand Naira in the case of a Chief Magistrate Grade I and Twenty-five Thousand Naira in the case of Chief Magistrate Grade II. While Section 2 of the Magistrate Courts (Increase in Jurisdiction of Magistrates) Order 2022 provides as follows: In all proceedings in respect of which jurisdiction has been conferred on them within their various cadre be it under Part 4 Section 19 of the Magistrate Court No. 82, Volume III laws of Oyo State of Nigeria (2000), or by any other conferring jurisdiction generally on Magistrates, actions may be instituted in the Court where the amount claimed or the value of the subject matter of the case may be or are as follows:

Chief Magistrate I - ₦10, 000,000.00

Chief Magistrate II - ₦9, 000,000.00

Senior Magistrate Grade I - ₦8, 000,000.00

Senior Magistrate Grade II - ₦7, 000,000.00

Magistrate Grade I - ₦6, 000,000.00

Magistrate Grade I - ₦5, 000,000.0

From the foregoing provisions of the Magistrate Court Law of Oyo State, 2000 and the Magistrate Courts (Increase in Jurisdiction of Magistrates) Order 2022, the Magistrate Court of Oyo State and other states with similar provisions, has jurisdiction to hear civil matters which are personal suits bothering on contract or tort or both where the debt damage being claimed is based on the amount/monetary jurisdiction of the court. Whenever claimants file suit to recover money in the possession of a bank especially where extra-judicial appeasement has been unsuccessfully made, such actions are hinged on the tort of detinue which the court has vires over *Julius Berger Nigeria Plc v. Omogui* (2001). Once the tort of detinue is established, unless and until the possession of the detained chattel is given up, the cause of action subsists and since jurisdiction over torts has been lawfully vested in the Magistrate Court over the same, the court is competent to be seized of the matter and to adjudicate thereof *Ordia v. Piedmont Nig. Ltd* (1995). It is the law that an action in tort could be successfully maintained against any person natural or artificial.

From the foregoing, it is apposite to note that the decisions of the Court of Appeal and Supreme Court to the effect that banker-customer disputes under sections 251(1) (d) and 272(1) of the CFRN, 1999 relate only to adjudications dealing with the question of between these courts (i.e. the Federal High Court and State High Court) which has jurisdiction over the subject. These decisions do not extend to all courts that could exercise jurisdiction over the matter. The bone of contention was not which court has exclusive jurisdiction but it was strictly between these two courts. In resolving this issue, the appellate courts concluded that neither the Federal High Court nor the State High Court has exclusive original jurisdiction but that so far as the question is concerned, both courts have and exercise concurrent jurisdiction. The reason for this conclusion is that the phraseology of the Constitution conferring jurisdiction on both courts is not framed in exclusivity but concurrence. Because the State High Court and Federal High Courts are courts of coordinated jurisdiction and access to court requires the availability of several avenues for ventilation of legal grievances, coming to the conclusion that both courts have and exercise concurrent jurisdiction is welcomed. It is trite that a case is a precedent only about the matter is decided, *Ecobank (Nig.) Ltd. v. Anchorage Leisures Ltd & 2ors* (2018) and no two cases are the same no matter their similarity *Union Bank of Nigeria Plc. v. Olori Motors & Co Ltd & 2 ors.* (1988). Thus, the decisions in cases like *Nigeria Deposit Insurance Corporation v. Okem Enterprises Limited & Anor.* (2004), *De Lluch v. S.B.N. Ltd.* (2004) *First City Monument Bank v. Nigeria Deposit Insurance Company* (1999) cannot be construed as sequestrating the jurisdiction of any other court in Nigeria to entertain banker-customer relationship. To argue otherwise is to push to a ridicule extreme, the absurd especially when

the issue adumbrated and decided upon was which court, between the two has jurisdiction. The irresistible and logical conclusion from the foregoing is that the position of the law that the FHC and SHC have and exercise concurrent jurisdiction over banker-customer disputes does not mean that no other court in Nigeria, is competent to entertain such dispute. Hence, these decisions do not sequestrate the jurisdiction conferred on the Oyo State Magistrate Court under section 19(1) of the Magistrate Court Law of Oyo State and Magistrate Courts (Increase in Jurisdiction of Magistrates) Order 2022, the Magistrate Court of Oyo State. The only limitation placed on the jurisdiction of the Magistrate Court to entertain banker-customer disputes is the monetary jurisdiction specified under the law. All these courts, (i.e. the Federal High Court, State High Court, and Magistrate Court) are competent to entertain banker-customer disputes. While the monetary jurisdictions of the former is unlimited, that of the latter court is strictly and expressly limited.

It is worth noting that the Magistrate Court is somewhat of a grassroots court. Aside from being a court of summary jurisdiction, its special procedure and less rigidity in its adjudicatory practice and procedure make it most suitable for the adjudication of petty banker-customer claims. The dockets of the High Courts (whether State or Federal), are enormously overcrowded requiring decongesting. It will be calamitous to add to their already filled dockets seemingly small and financially inconsequential claims that are being adjudicated at the Magistrate Court. Such small claims require expeditious adjudication which is most impracticable at the High Court. As such, a litigant should be encouraged to take advantage of the respite found at the Magistrate Court rather than made to face to hurdle of litigating where to litigate.

5. CONCLUSION AND RECOMMENDATIONS

Extrapolating from the analysis above, it is crystal clear that the jurisdiction conferred on the Federal High Court and State High Court by the appellate court in their interpretation of sections 251(1) (d) and 272(1) of the CFRN, 1999 over banker-customer disputes as a court of first instance is concurrent. Thus, despite the originality of the jurisdiction, its concurrence does not make it exclusive to any other court in Nigeria which is statutorily empowered to be seised from such dispute. Thus, it is within this prism that other courts, subject to the law empowering them, can and are entertaining banker-customer disputes. One of these courts is the Magistrate Court of Oyo State which is empowered by its enabling law to entertain civil actions bothering on torts of which detinue is one. Thus, the act of customers of banks whose money is withheld by a bank despite request of same approaching the Magistrate Court under section 19(1) of the Oyo State Magistrate Court Law, 2000 does not by any legal logic impede on the jurisdiction of either the FHC or SHC based on the decisions of the CA and SC.

Thus, if the Magistrate Court is faced with an objection to its jurisdiction to entertain banker-customer disputes rooted in the tort of detinue or any other civil suit for that matter, once the amount involved is within the court's monetary jurisdiction, such objection meant to hoodwink the court should be discountenance as it lacks merit howsoever.

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AN APPRAISAL OF THE INTERNATIONAL LEGAL FRAMEWORK ON THE HEALTH RIGHTS OF A CHILD

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Abstract

In any decision that must be taken in respect of a child, the best interest of the child must be the paramount consideration. The rights of the child must be safeguarded from any form of abuse or violation. The abuse or violation of the rights of the child is often detrimental to the health and well-being of the child. Every child is entitled to the right to health and health facilities, in other words, practices and acts that are detrimental to the health of the child must be avoided. Some of these practices sometimes claim the life of the victim or may lead to permanent deformity. Both the State and the parents of the child have a greater role to play in ensuring that the child enjoys his/her right to health. This study examined the child's right to health, practices that violate the right to health, and the legislative framework on the right to health and health facilities. The essential goal of this study was to recognize the necessity of the health of the child concerning relevant international legal frameworks and to justify the need for enactment of an enabling law on the health rights of the child. The study adopted a doctrinal research method. It relied on primary sources of data such as statutes, conventions, and judicial decisions and secondary sources of data such as articles in journals, textbooks, and internet materials among others. This study however concluded that the health of the child is of great importance to the development and well-being of the child.

Keywords: child, health, laws, rights

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1. INTRODUCTION

The future of the nation is based on how well the child is protected and groomed to be productive adults who will contribute to the growth and development of the nation (Obiechina, 2014). Despite the importance of the rights of a child, little attention is given to this right across the globe (Kilkelly, 2020). The rights of the child should be at the forefront of every society. A child should be protected from any form of practice that could be harmful to their health and well-being. Apart from the obvious duties of the parents, the state must also safeguard the health of the child and provide basic health care facilities. The state must also ensure that the right to health is protected, respected, and fulfilled. Child survival in Nigeria is threatened by nutritional deficiencies and illness, most especially malaria, diarrhea, and acute respiratory infections that often account for the majority of mortality and morbidity in childhood (USAID Policy Project, 2002). The right to health is a widespread right that every child is expected to enjoy. The breach of the rights of the child to essential health care and health facilities is rubbing on them since they are often helpless (Obiechina, 2014). The childhood mortality rate is higher in the rural areas than the urban areas and higher in the northern region than the southern region (Nigerian National Health Policy, 2016). Thirty-seven percent of children below the age of five are stunted, and 29% weigh below average (Nigerian National Health Policy, 2016). The rights of the child to health constitute an imperative part of the basic rights of the child.

UNICEF is dedicated to the survival and development of the child, it relies on children's access to shelter, good nutrition, clean water, healthcare, and sanitation (UNICEF, Health and HIV). According to a report by UNICEF, the health of a child is often taken for granted in most Nigerian states most especially in the northern part of Nigeria where most parents reject the routine immunization given to children of a certain age (UNICEF, Health and HIV). For instance, only a few children have full immunization against polio in the northeastern part of Nigeria due to the insecurity resulting from the Boko Haram insurgency. Apart from the abandonment of polio vaccination, children are also prone to HIV either through their mothers or from sexual assault from the insurgents (UNICEF, Health and HIV). For instance, in 2015, about 41,000 children were infected with HIV and only a few percent of them had access to an appropriate healthcare facilities and good nutrition (UNICEF, Health and HIV). Some of the main factors contributing to the high mortality rate among children in Nigeria are inadequate access to potable water and proper hygiene, as a result of which they are susceptible to various kinds of diseases such as cholera, diarrhea, etc. (UNICEF, Health and HIV).

2. MEANING OF A CHILD

There is no universally acceptable definition of a child. The definition of a child differs from one jurisdiction to another. The Convention on the Rights of a Child defines a child as a human being below the age of 18 years unless under the law applicable to the child, the majority is attained earlier (Convention on the Rights of a Child 1991, art 1). A child is a boy or a girl of any age between infancy and adolescence (Azi and Saluhu, 2016). The Children and Young Persons Act defines a child as a person who has not attained the age of 14 years while a young person is a person who has attained the age of 14 years but has not attained the age of 17 years (Children and Young Persons Act 1958). A child means any human being below the age of eighteen years who has not reached the age of majority by special agreement (Congo Child Protection Code, 2010). A child or a minor is an individual of either sex who has not yet reached twenty-one years (Cote d'Ivoire Minority Act 1970). A child is a person under 16 years (Libya Children's Protection Act 1997). The Sudan Child Act defines a child as every person who is not above the age of eighteen years. The National Child Welfare Policy of 1989 defines a child as anybody who is 12 years or below. The different definitions of a child across the globe raise doubt as to whether the protection and promotion of the rights of the child can be achieved in the best interest of the child (Alemika and Kigbu, 2015). Children are important in society, they are the assurance of continuity of human society and the most vulnerable members of society with the absence of physical, mental, and emotional maturity (Tajudeen, 2015).

Due to their age and tender nature, they require special care and attention. The future of the nation and the kind of leaders any society will have tomorrow depends on how the children are raised, catered for, and protected in society today. Apart from communal clashes, violence, and insurgence, children are also affected by the economic crisis of the country and the world at large, which often results in deteriorating health conditions, sexually transmitted diseases, and various ailments associated with child marriage leading to great helplessness. These problems compound their risk of survival and also create dreadful impediments to the development of children (Tajudeen, 2015). There are various legislations on the protection of the child both locally and internationally, for instance, the Child Rights Act seeks to protect the rights of the child as provided for in the Constitution of the Federal Republic of Nigeria 1999 and other subsidiary legislations (Adam, 2013). It guarantees the rights and protection of the child.

3. CHILD'S RIGHT TO HEALTH

Good health is fundamental to the growth and development of a child and it helps a child to achieve his full potential (Zillen Kavot, 2023). The rights of a child identify the child's need for protection and recognition. The right to health and health facilities is provisional (such as emotional, mental and physical rights). It is the responsibility of the state to safeguard the

health of the child through the provision of basic health facilities. Right to health encompasses medical care, access to safe drinking water, adequate sanitation, and health-related information (Backman, Hunt, and Khsola, 2008). Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. The right to health is the right to the enjoyment of a variety of facilities and conditions, which is the responsibility of the state to provide as being necessary for the attainment and maintenance of good health (Asher, 2005). By providing adequate living conditions, access to potable water, and accessible and acceptable health facilities, the state is also fulfilling its human rights obligation and contributing to the dignity and well-being of the child (Rubenson, 2002). The right to health is interconnected with other human rights like education, housing, food, etc. (Rubenson, 2002). Because the status of health reflects a wide range of socio-economic factors, the right to health is also connected to the basic rights (civil, economic, social, cultural, and political (Rubenson, 2002). Every child deserves the right to mental and physical health. The right to health is important because of the susceptibility of children to the risk of illness, and when they are protected from sicknesses and disease, they grow to become productive adults (Humanium, 2018).

Right to health is not just good management, justice, or humanitarianism; it is an obligation under human rights law (Backman *et al,* 2008). The right to health requires effective, responsive, integrated health services that are good for all (Hunt and Backman, 2008). Access to health and health facilities is an important aspect of the right to health. Medicines and health facilities must be available and accessible to the child (Backman *et al,* 2008). A child is to be protected from any disease or ailment and should be protected from any harmful practices that can be dangerous to the health of the child. Such dangerous practices include child marriage, female genital mutilation, child trafficking, and among others. Everyone has the right to a good standard of living adequate for his/her health and well-being (Art 25, Universal Declaration of Human Rights 1948). and the right to enjoy the best physical and mental health (Art. 16 (1) African Charter on Human and Peoples' Rights, 1986). A child is entitled to enjoy the best state of health such as spiritual, mental, and physical health. Parents have the primary responsibility of ensuring the effective enjoyment of the right to health of their children.

The state must eliminate any form of practices that may be harmful to the health and welfare of the child. The law recognizes the responsibility of the state, especially in respect of children whose parents are poor or do not have the means of providing basic health care (UNICEF, 2007). It is the responsibility of the government, parents, guardian, institution, agency, organization, or body to provide the best state of health for the child (Section 13 of the Child Rights Act 2003). The state also has the responsibility of taking necessary and preventive measures against any form of disease. The obligation of the state also includes the provision of health care facilities, safe drinking water, good hygiene, and prevention of any act that may be detrimental to the health of a child.

Making tribal marks or tattoos on the child also affects the health of the child; sometimes the instrument used in making these marks is dangerous, unsterilized, and can harm the victim (Section 24 Child Rights Act 2003). This section also prescribes punishment for any person who violates the provision of this section. However, corporal punishment without injury is an acceptable way of correcting a child and a way of disciplining children for wrongful acts in Nigeria. There are several judicial authorities in support of corporal punishment. For instance, in the case of *Willie v. State* a woman hit her eleven-year-old son with an extension cord and caused bruises that were neither serious nor permanent, the Supreme Court held that the punishment was reasonable. In the case *Costello-Roberts v. UK* the European Court of Human Rights held that giving a 7-year-old boy three 'whacks' with gym shoes over his trousers was not a forbidden degrading treatment. In the case of *Ingraham v. Wrights*, a group of pupils at Drew Junior High School in Florida were slow in leaving the stage of the school auditorium when a teacher asked them to do so. The principal Willie Wright Jr. took the pupils to his office to be paddled. James Ingraham, a 14 years old boy refused to accept the punishment. An assistant to the principal held Ingraham prone across a table while Wright hit the child over twenty-one times with a paddle. The beating caused a hematoma from which fluid later oozed out. A doctor had to prescribe painkillers, laxatives sleeping pills, and ice packs. The child had to rest at home for over ten days and could not sit comfortably for three weeks. The court held that the boy did not receive cruel or unusual punishment. The action of Wright in this case seems to be grave to the extent that it affected the health of the child. In as much as corporal punishment is acceptable as a way of correcting a child, there should be a level of control on how this punishment is meted out on a child.

4. PRACTICES THAT VIOLATE THE RIGHT TO HEALTH OF THE CHILD

Practices that violate the health rights of a child can be regarded as child abuse. Child abuse or violation means denying a child equal rights, liberties, and opportunities and subjecting such a child to poor, unfair, and demeaning treatment (Atere, Akinwale, and Owoade, 2005). This form of violation is the intentional or unintentional acts that endanger the physical health, and moral, educational, and emotional welfare of the child. Child abuse is a global problem that is deeply rooted in cultural, economic, and social practices and it occurs in various ways (Umobong, 2010). Persons known to and trusted by the child often violate the rights of the child, it can be at home or in school (Umobong, 2010). Child abuse violates the human rights of the child and often leads to consequences that affect the health of the child. The various forms of child abuse that violate the health rights of the child are discussed under this heading.

4.1 Female Genital Mutilation

Female genital mutilation (FGM) as the name implies is peculiar to a female child. Female genital mutilation involves the removal of the clitoral hood or labia minora, the excision

of the clitoris, and the dangerous act of infibulation. (Owolabi, 2012). Female genital mutilation is a form of violence against the girl child and an infringement on the right to life, health, integrity and human dignity of the girl child (National Policy and Plan of Action on the Elimination of Female Genital Mutilation in Nigeria, 2002). Female genital mutilation often occurs during the early days of a child i.e. few weeks after the birth of a female child. This traditional condemnable method has kept some girls at various risks of life, health, and psychological consequences (Onwe, 2014). Studies conducted by the World Health Organisation and the United Nations Development Systems reveal that female genital mutilation is prevalent in Nigeria at approximately 60% of the Nigerian female population; unfortunately, it was omitted in the Child Rights Act 2003 (Mandara, 2004). The World Health Organisation has classified FGM into four different categories namely, type I- Clitoridectomy, type II- Excision, type III-Infibulation, and type IV- other (WHO, Understanding and Addressing Violence against Women: Female Genital Mutilation, 2012). According to World Health Organisation, the FGM procedure is often performed on young girls between infancy and the age of 15 years, it does not have any benefits and may sometimes lead to severe bleeding and complications during childbirth (WHO, Female Genital Mutilation, 2012). Its origin can be traced to the need to avoid promiscuity, and encourage chastity and/ or initiation of girls into womanhood. (Okeke and Anyaehie, 2013).

4.2 Physical abuse

Physical abuse is a non-accidental form of injury or serious physical harm inflicted on a child. Subjecting the child to severe beating is a form of physical abuse. This is common in Nigeria and it is seen as a form of correcting or chastising the child for wrongdoing. The Penal Code also makes provision for physical punishment as a means of correcting a child, it allows parents or guardian to beat the child without inflicting grievous harm on the child (Section 55 Penal Code Act). It is a common believe in Nigeria and most Africa countries that when a child is chastised for wrongdoing, such child would not repeat such act again. However, sometimes these chastisements often result in physical and psychological harm to the child. Physical abuse includes acts, which causes burns, laceration, bruises, broken bone or any other physical injury. It includes beating, kicking, punching, slapping etc. Some of the authorities against physical abuse are *R v. McDonald, R v. Nicholas, R v. Bounyman.* The prohibition of physical abuse as a form of punishment in the Child Rights Act is one of the reasons for the rejection of the Child Rights Act in the northern states (Alkali, Hak and Yusoff, 2014). It is seen as a product of western civilization and also aimed at taking Muslim children from the training and control of Muslim community (Alkali, Hak and Yusoff, 2014). Physical abuse is a social menace whose negative impact on child development cannot be overemphasized in Nigeria (Uzodinma, Ogundeyi, Dedeke and Owolabi, 2013).

4.3 Child Labour and Street Hawking

Child labor means an active trade in children within and outside the country (Mbakogu, 2004). This practice is similar to the African culture of handing over children to affluent members of the same family, who helps in the household chores while the affluent member of the family assists by training the child (Adam, 2013). This is a form of trade by barter. Child labour often arises as a result of poverty, it is a problem faced by developing countries, and it sometimes involve inhuman and degrading treatment (such as ritual killing, child prostitution etc.) (Adam, 2013). For instance, in 2016 a trafficking link from Nigeria to Italy through Nigerian and Libya traffickers took some women and children to Italy where they were forced into prostitution and child labor respectively United States Department of States, 2018). Another prevalent form of child labour is bus conducted by children in rural areas, this is as a result of population pressure bought by massive rural-urban drift leading to high demand for buses for commercial purposes (Onuikwe, 1998). Article 23 prohibits child labour, it provides that state should end child labour practices and see how the conditions and circumstances of children in legitimate employment can be protected to provide adequate opportunity for their healthy upbringing and development (Bhat, 2010). Child labour depends on the normative attitude towards children in the society and the culturally determined roles and functions of the socialization process in the society (Clark and Yesufu, 2015). The effect of child labour is that the affected children experience abuse, molestation, pseudo-education, poor physical and mental health (Ogunsakin, 2008). In the case of *R v. Macdonald*, the victim, a 14-year-old girl living with her father and her stepmother did most of the household chores, attended to the needs of the two young children, milked goats, and feed dogs. She later died in the most pitiable circumstances due to stress and other associated health conditions. This is among other unreported cases of child labor that has shortened the lives of victims or caused permanent deformity.

Street hawking is a form of child labor common in Nigeria. It occurs due to the poor financial status of the parents to take care of their children. These children hawk on the street and the highway to complement the family income and to earn a living (Isamah and Okunola, 2002). Sometimes, children are sent from villages to cities to work as house helps and are made part-time street hawkers (Onwe, 2014). However, the harsh economic realities of Nigeria have made the prohibition of street hawking unattainable (Onwe, 2014). The high level of trekking involved in hawking activity, the risk of road accidents, physical exhaustion, sexual harassment, molestation, and the various forms of exploitation are the problems faced by children who hawk (Okojie, 2007). Street hawking is associated with problems like truancy, exposure to hazards of weather, fatigue, accidents, kidnapping, rape, and unwanted pregnancy (Aderinto and Okunola, 1998). It also hurts the mental health of the child, and causes respiratory problems, injuries, and malnourishment (Oli, 2013).

4.4 Child trafficking

Child trafficking is the illicit movement of children across national and international borders to force them into sexually or economically oppressive, illegal, and exploitative conditions for the profit of the traffickers (UNICEF, United Nations General Assembly, 2002). It is synonymous with slavery because it involves the acquisition and movement of persons across local and international borders with or without the consent of the victim (Kwagyang and Saulawa, 2012). Child trafficking is a human rights abuse and a violation of the fundamental rights of the victims. It may lead to the loss of lives of the victims, sexual violence, HIV/AIDS, unwanted pregnancy, and massive deportation (Owolabi, 2012). Trafficking is common in Nigeria. Victims are moved from Nigeria to Mali, Morocco, and Spain by boat, some also travel by road across the Sahara desert (Owolabi, 2012). Children are often victims of human trafficking. Poverty is the major cause of child trafficking. Sometimes children are trafficked into domestic service, street trading, and commercial sex exploitation (Jones, Presler-Marshall, Cooke, and Akinrimisi, 2011). Children between the ages of seven and sixteen are frequently taken to Italy, Cameroun, and Gabon, from different parts of Nigeria such as Akwa Ibom Cross River, Abia, and Imo State. (Makama, 2013). Between March 1994 and January 1997, at least 400 children were rescued from child traffickers in Akwa Ibom State (Makama, 2013). Out of 952 people that were rescued from human traffickers in 2013, about 602 were children between the age of 0-17 years (Kwagyang and Saulawa, 2012). In a few cases, children are persuaded to join military units by their peers or family members, they wield sophisticated weapons with little training and they are forced to commit acts of extreme savagery, under the influence of drugs to suppress their conscience and sensitivity (Fernanda Estevan and Jean-Marie Baland, 2007). Procuring a girl to become a common prostitute or trading in prostitution or exercising control over the movement of prostitutes within or outside Nigeria is an offense and anyone caught in this act will be held liable (Section 225 Criminal Code Cap C38 LFN 2004). Section 18 of the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015 prohibits recruitment for use in armed conflict and foreign travel, which promotes prostitution or sexual exploitation.

4.5 Early/Child Marriage

Islamic law, also known as Sharia, does address marriage but does not prescribe a specific age of marriage. Instead, it typically emphasizes the importance of maturity and readiness for marriage. However, interpretations and applications of Sharia can vary widely across different cultures and regions. Child marriage is a complex social issue with cultural, economic, and religious factors at play. While some communities may justify child marriage using religious or cultural arguments, it's important to note that Islam itself does not set a specific age for marriage. Many Muslim scholars and organizations worldwide advocate for setting a minimum age for marriage based on considerations of mental, emotional, and physical maturity. The International Covenant on Civil and Political Rights (ICCPR) and the

Convention on the Rights of the Child (CRC), both of which many countries have ratified, also call for protection against child marriage. Therefore, while some communities may practice child marriage citing religious reasons, it's essential to understand that Islam as a religion does not prescribe or promote child marriage but rather emphasizes responsible and mature decision-making in matters of marriage. However, these reasons are the girl child.

Some of the reasons for early marriage are poverty, the need to avoid premarital sex, and because little or no importance is attached to a female child who is rather seen as a property to be acquired by a man. It is also seen as a way of protecting the child from sexual assault and unwanted pregnancy (Fayokun, 2015). However, section 23 of the Child Rights Act prohibits child marriage where it provides that anyone who marries, betroths, or endorses the marriage of a child commits an offense and is liable on conviction of 5 years imprisonment with the option of fine or both. Such early or child marriages often lead to infant mortality, miscarriages, complications during childbirth, and death. Despite the prohibition of child marriage and betrothal by the provision of sections 21-23 of the Child Rights Act, it is still in practice in most of the northern states of Nigeria. For instance, in 2010 the former Governor of Zamfara State Ahmad Sanni Yerima got married to a 13-year-old Egyptian girl. The loopholes in the 1999 Constitution have contributed to the consistent practice of child marriage in Nigeria. For instance, these loopholes are found in sections 29 (1) and 29 (4) of the Constitution (Fayokun, 2015). Section 29 (1) of the Nigerian Constitution 1999 provides that any citizen of Nigeria of full age who wishes to renounce his Nigerian citizenship shall make a declaration in the prescribed manner for the renunciation, while section 29 (4) of the Nigerian Constitution 1999 provides that for subsection (1) of this section full age means the ages of eighteen years and above and any woman who is married shall be deemed to be of full age. By the provision of section 29 (4) of the Constitution of Nigeria 1999, a child bride who is less than 18 years is deemed to be of full age, thereby providing a legal justification for child marriage. Sometimes, child marriage terminates the child's education and introduces the girl child to early sexual life, early motherhood, vesicovaginal fistula (an unusual opening between the vagina and bladder that often lead to continuous urinary incontinence), anemia (insufficient red blood cells or hemoglobin to transfer oxygen to body tissues), eclampsia (seizures during pregnancy) and series of health challenges (Fayokun, 2015).

5. Legal Framework on the right to health of the child

The evolution of the rights of the child was derived from the human rights framework provided by the United Nations (Adam, 2013). Civil organizations and nongovernmental organizations started agitating for the protection of the rights of the child towards the end of the 20th century; this led to various legislations on the protection of the rights of the child. This framework invalidates customs and religious practices that are injurious to the health, welfare, and development of the child. The right to health extends to prevention, treatment, and control

of disease, access to essential medicines, child reproductive health, and equal and timely access to basic health care services (WHO, the Right to Health Fact Sheet).

The Constitution of the Federal Republic of Nigeria protects the various rights of persons in Nigeria. Section 33 of the Constitution of Nigeria makes provision for the right to life of all persons, which includes the child. The provisions of the Constitution cover both adults and children. The Constitution guarantees adequate protection of life being the obligation of the state. Apart from the right to life, the Constitution also prohibits any form of torture or inhuman and degrading treatment (article 37 (a) Convention on the Right of the Child, 1989) which, may also include harmful traditional practices against the health of the child. Children are protected under international human rights laws from harmful cultural practices or any form of practice that has a negative effect on them because it is their right and they have limited ability to protect themselves from these harmful practices (FXB Center for Human Rights, 2013). Physical abuse being a form of inhuman treatment often has severe consequences on the health of the child. It is the responsibility of the State to direct its policy towards ensuring that the health, safety, and welfare of all persons in employment are safeguarded and not abused but to provide adequate medical and health facilities for all persons (section 17 (3) (c) (d) Constitution of Nigeria. In addition, the state has the responsibility of protecting, and improving the environment and safeguarding the water, air, and land. There should be allocation and provision of health resources for all communities, most especially the poor and vulnerable communities. Denial of access to health facilities would amount to the violation of the right to health of the child. The child has the right to a standard of living adequate for the child's health and well-being including food, clothing, a clean environment, housing, and medical care (Article 25 (1) Universal Declaration of Human Rights, 1948).

States must ensure that the institutions, services, and facilities responsible for the care or protection of children conforms with the standards established by competent authorities in the area of safety, health as well as competent supervision (Article 3 (3) Convention on the Right of the Child, 1989). States must strive to also provide other health services needed by the child; they must make an effort to reduce health risks by safeguarding the health of the child. The state is expected to ensure that adequate and proper measures are put in place to prevent any form of disaster; epidemic, endemic etc. Article 12 (2) International Covenant on Economic Social and Cultural Rights, 1966). The United Nations Committee on Economic and Social, Cultural Rights adopted a General Comment on the availability, accessibility, acceptability and quality of health facilities as part of the right to health. States are to ensure the availability of accessible and quality health facilities for the child (WHO, The Right to Health, 2007). In any situation that has to do with the child, the best interest of the child must be the utmost consideration (Article 3 (1) Convention on the Right of the Child, 1989). Every child has the right to enjoy the best state of physical, mental, and spiritual health and anyone responsible for the care of the child must endeavor to provide the best attainable state of health for the child (Article 13 (2) and 14 (1) African Charter on the right and Welfare of a Child,

1999). The state or government must recognize the right of the child to enjoy the best standard of health and health facilities for the treatment of illness and the rehabilitation of the child's health (Article 24 Convention on the Right of the Child, 1989). The state must not deprive any child of his or her right of access to health care facilities.

Public health care is severely stretched in the face of unrelenting diseases and satisfactory protection of the child from such menace (Connelly and Ikpaahindi, 2016). It is the responsibility of the state or government to reduce infant child mortality and provide necessary medical assistance and healthcare facilities to all children through the development of primary health care. The state must also provide adequate nutrition, drinking water, good hygiene, and environmental sanitation (Article 14 (2) African Charter on the Right and Welfare of a Child, 1999). Through the instrumentality of primary health care and the application of appropriate technology, the state must combat disease, and malnutrition and ensure proper health care for expectant and nursing mothers (Article 14 (2) African Charter on the right and Welfare of a Child 1999 and Article 24 (2) (c) (d) Convention on the Rights of the Child, 1989).

Parents and children are to be supported by the government in the use of basic knowledge of child health and nutrition, the benefits of breastfeeding, and environmental sanitation (Article 24 (2) (e) Convention on the Rights of the Child, 1989). To ensure the best attainable health, any person having the care and custody of a child under the age of two years must ensure such child is fully immunized. To ensure the safety on health of the child, any form of mark on the skin or tattoo on the child (Article 24 (1) Convention on the Rights of the Child, 1989) and any traditional practice that is prejudicial to the health of the child are prohibited (Article 24 (3) Convention on the Rights of the Child, 1989). The child is protected from economic exploitation or any work that is likely to be hazardous or to interfere with the child's health Article 32 (1) Convention on the Rights of the Child, 1989). To safely guide the health of the child, the child should not be involved or exposed to the production or use of narcotic drugs or psychotropic substances (Article 33 Convention on the Rights of the Child, 1989 and Article 28 African Charter on the Rights and Welfare of a Child, 1999). An assessment order may be granted by the court on the application of the relevant authority for the assessment of the state of health of the child or development of the child, to determine whether the child is suffering or likely to suffer significant harm.

A child is expected to grow up in a family environment, in an atmosphere of happiness, love, and understanding because a child occupies a special position in society. The African Charter on the Rights and Welfare of the Child recognizes that due to the need for a child's physical and mental development, the health of the child must be taken care of (Preamble to the African Charter on the Rights and Welfare of a Child, 1999). States must also ensure the meaningful participation of non-governmental organizations, and local communities in the planning and management of basic service programs for children (Preamble to the African Charter on the Rights and Welfare of a Child, 1999). They are expected to support

through technical and financial means, and mobilization of local community resources on the development of the health facilities of children. Children are to be protected from any hazardous work (Article 15 (1) African Charter on the Rights and Welfare of the Child, 1999) and all forms of torture and treatment that may affect the physical and mental health of the child work (Article 16 (1) African Charter on the Rights and Welfare of the Child, 1999). The State is also expected to assist parents by providing materials and support programs about nutrition, health, education, clothing, and housing of the children (Article 20 (2) (a) African Charter on the Rights and Welfare of the Child, 1999). This Charter also makes provision for the elimination of customary practices prejudicial to the health or life of the child (Article 21 (1) (a) African Charter on the Rights and Welfare of the Child, 1999).

Other jurisdictions also recognize the right to health as a right of the child, for instance, the Philippines' Special Protection of Children against Child Abuse, Exploitation and Discrimination Act describes a denial of emergency medical treatment to an injured child as a form of child abuse, when death or serious impairment of growth and development results (Section 3(b) (4) Philippines' Special Protection of Children against Child Abuse, Exploitation and Discrimination Act, 1992). This Act also makes provision for priority of delivery of social services in health and nutrition for children. The South African Children's Act identifies the right of every child to information about his/her health, information about health care services, and the right of children who are 12 years and above to consent to medical treatment (Section 129 South African Children's Act, 2005). Medical treatment must be in the best interest of the child and his continuing health and well-being (Section 3 (1) (b) Uniform Medical Consent of Minor, 1975). By the provision of the Egypt Child Law 1996, the protection and health right of the child starts from birth. Only trained and licensed birth attendants are allowed to take delivery, it makes provision for vaccination against communicable diseases, maintenance of regular records of children's health, and the regulation of the use of additives in children's food. Under the Child Protection Act of 1997, the Libyan Arab Jamahiriya introduced compulsory medical examination before marriage in order to detect hereditary diseases that could affect children's physical or mental health. Screening of newborn babies is mandatory to detect congenital disabilities and hereditary illnesses if any (UNICEF, Law Reform and Implementation of the Convention on the Right of the Child, 2007).

The National Health Policy also recognizes the health of the child with the objectives of reducing maternal morbidity and mortality, childhood mortality, promoting the healthy growth and development of school-aged children, promoting of optimal health of the child through implementation of child survival strategies, reducing the risk associated with pregnancy and childbirth; through the promotion of comprehensive obstetrics care at all levels and the enactment and implementation of legislation for mitigation of harmful cultural practices (National Health Policy, 2016).

6. Concluding Remark and Recommendation

Every child has the right to health, this right is not only restricted to the mental health of the child, it extends to the physical and psychological health and well-being of the child. This right has received wide recognition across the globe with several countries making provisions for the protection of this right. The child's right to health and healthcare facilities includes the provision of portable drinking water, food, and sanitation. Children are to be protected from any form of acts or practices that violate their right to health. Some of these practices are female genital mutilation, child labor, child trafficking, street hawking, etc. This study however recommends that states and parents should take up the responsibility of ensuring adequate protection of the health of the child. States should ensure the safety of life, health (physical, mental, emotional) survival, and development of the child. There should be Provision of assistance to poor parents, and provision of social welfare services to protect the rights of the child, there should public enlightenment campaign on the importance of health right to the well-being of a child.

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