

THE OBLIGATION TO PROSECUTE HEADS OF STATE UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) AND CUSTOMARY INTERNATIONAL LAW: THE AFRICAN AND UNITED STATES' PERSPECTIVES

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ABSTRACT

The United States (U.S.), a Signatory, but not a State Party to the Rome Statute, entered into various Bilateral Agreements (BIAs) with almost all Rome Statute State Parties prohibiting the arrest, surrender, or prosecution of the US Head of State before the International Criminal Court (ICC). Similarly, the African Union (AU) Members, being the majority State Parties to the Rome Statute have decided in the AU Assembly of Heads of State and Government not to cooperate with the ICC and to grant immunity to African Heads of State after the ICC Pre-Trial Chamber issued two arrest warrants against the Sudanese President for allegedly committing genocide, crimes against humanity and war crimes. This paper examines the tension between States' obligations under the Rome Statute to prosecute, surrender and arrest a head of State, including when referred to by the UN Security Council on the one hand, and the AU decision, the U.S. BIAs and customary international law which grants immunity to a sitting head of State from criminal prosecution by either an international or a foreign court on the other hand. It argues that States are bound by the obligations enshrined under the Rome Statute and both the AU decision and the BIAs are inconsistent with the duty of states to uphold jus cogens norms including those proscribed under the Rome Statute.

Keywords: Rome Statute, prosecution, Head of State, jus cogens, erga omnes, obligation, customary international law, International Criminal Court, international crimes, African countries, United States

Introduction

The Rome Statute¹ came into force in 2002 and created the first permanent International Criminal Court (ICC).² It has jurisdiction over individuals,³ regardless of their position as Head of State as provided under Article 27 for committing the crimes of genocide,⁴ crimes against humanity,⁵ war crimes,⁶ and aggression.⁷ The ICC has jurisdiction over the perpetrators, regardless of their positions, who must be over 18 years old at the time of the commission of the crimes.

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into Force 1 July 2002) 2187 UNTS 38544 (Rome Statute).

² Christopher J. Piranio, 'Introduction: Reflections on the Rome Statute' (2011) 24 Camb Rev Int'L Aff 307, 307-08; Kai Ambos, 'Observations from an International Criminal Law Viewpoint' (1996) 7 EJIL 519, 521-25.

³ Rome Statute, art 25. The ICC has jurisdiction over the perpetrators, regardless of their positions, who must be over 18 years old at the time of the commission of the crimes.

⁴ *ibid*, art 6.

⁵ *ibid*, art 7.

⁶ *ibid*, art 8.

⁷ *ibid*, arts 8*bis* and 15*ter*; Marina Mancini, 'A Brand New Definition for the Crime of Aggression: The Kampala Outcome' (2012) 81 Nord J Int'l L 227, 247; David Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 3 LJIL 897, 903.

subject to the complementary principle,⁸ where the national courts of State Parties will be the *forum conveniens*⁹ or has first-hand jurisdiction over the perpetrators compared to the ICC.

Nevertheless, national courts cease their position as the *forum conveniens* if either the situation has been referred to the ICC by the UN Security Council (UNSC) under Article 13(b) of the Rome Statute or if the national courts of the State Parties are unable¹⁰ or unwilling¹¹ genuinely to carry out the investigation or prosecution. As a result, States are required to arrest and surrender the alleged perpetrators, including the Head of State upon request made by the ICC for investigation or prosecution. Since genocide, crimes against humanity and war crimes have been allegedly committed in the territory of the Sudan, a non-Party to the Rome Statute, it has been referred to the ICC by the UNSC under Article 13(b) *via* Resolution 1593¹² acting under Chapter VII of the UN Charter.¹³

Consequently, the ICC Pre-Trial Chamber (PTC) issued two arrest warrants¹⁴ against President Omar Al-Bashir for allegedly committed crimes against humanity, war crimes and genocide in Darfur, Sudan accordingly. Since many Africans, particularly three African leaders have been targeted, charged and prosecuted before the ICC, the latter has been accused for being biased and Afrocentric.¹⁵ Hence, to prevent the Sudanese President from being arrested and brought before the ICC,¹⁶ the African Union (AU) requested the UNSC to defer his indictment pursuant to Article 16 of the Rome Statute prior¹⁷ and after¹⁸ the PTC issued the first arrest warrant. However, it received no response from the UNSC¹⁹ but instead the UNSC insisted to refer the situation to the ICC.

Thus, the AU, through its Assembly of Heads of State and Governments decided not to cooperate with the ICC to execute the arrest warrant,²⁰ even though 34 out of 54 of the AU Members are Parties to the Rome Statute. As a result, President Omar Al-Bashir was neither arrested nor surrendered to the

⁸ Rome Statute, Preambles [4], [6], [10] and arts 1, 17(1)(a) and (b); Fatou B. Bensouda, 'Reflections from the International Criminal Court Prosecutor' (2012) 45 Case W Res J Int'l L 505, 507; Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 144, 158.

⁹ Latin words which mean 'the most appropriate court to solve a particular dispute or case'.

¹⁰ Rome Statute, art 17(3).

¹¹ *ibid*, arts 17(2) and 20(3).

¹² UNSC Res 1593 (31 March 2005) UN Doc S/Res/1593; Matthias Neuner, 'The Darfur Referral of the Security Council and the Scope of the Jurisdiction of the International Criminal Court' (2005) 8 YBIHL 320, 321.

¹³ Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' (2013) 13 Int'l Crim LR 147, 150-51; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 JICJ 618, 647-48.

¹⁴ *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Warrant of Arrest) ICC-02/05-01/09 Pre-T Ch I (12 July 2010); *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Warrant of Arrest) ICC-02/05-01/09 Pre-T Ch I (4 March 2009); Johan D. Van Der Vyver, 'Prosecutor v. Omar Hassan Ahmed Al Bashir' (2010) 104 AJIL 461, 462-63.

¹⁵ Such as from Uganda, Democratic Republic of Congo, Central African Republic, Mali, Kenya and Cote d'Ivoire. However, such allegation is baseless where all of these cases are brought before the ICC by States' own referrals and ICC Prosecutor's own initiatives. See Charles Chernor Jalloh, 'Regionalizing International Criminal Law' (2009) 9 Int'l Crim LR 445, 462-63.

¹⁶ AU Peace and Security Council, '142nd Meeting Communique' (21 July 2008) AU Doc PSC/MIN/Comm(CXLII) [3].

¹⁷ AU Peace and Security Council 151st Meeting, 'Report of the Implementarion of Communique of 142nd Meeting of the Peace and Security Council held on 21st July 2008 on the Sudan' (21 July 2008) AU Doc PSC/MIN/Comm(CXLII) [3].

¹⁸ See, among others, Letter Dated 6 March 2009 from the Chargé d'affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council (6 March 2009) AU Doc S/2009/144; Assembly of the African Union, 'Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan' (1-3 February 2009) AU Doc Assembly/AU/Dec. 220(XII) [3].

¹⁹ Dire Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law: Africa and the International Criminal Court' (2009) 34 S Afr YBIL 57, 68.

²⁰ Thirteenth Ordinary Session Assembly of the African Union, 'Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC)' (1-3 July 2009) AU Doc Assembly/AU/Dec.245(XIII) Rev. 1, [10].

ICC when he visited Malawi,²¹ and he was even invited to visit Chad²² and Kenya,²³ both being State Parties to the Rome Statute.

Similarly, after it withdrew from ratifying the Rome Statute which was signed during Clinton's Administration,²⁴ the United States (U.S.) entered into various Bilateral Immunity Agreements (BIAs)²⁵ with the Signatories, Parties and non-State Parties to the Rome Statute pursuant to Article 98(2) of the Rome Statute. The BIAs prohibit its Parties to surrender the U.S.' "persons"²⁶ to the ICC if found to have committed the crimes on the territory of that States. By virtue of these BIAs, the U.S. does not favour the ICC even though it has been one of the ardent supporters of the international criminal justice since World War II.²⁷

Meanwhile, as a substantive international law, *jus cogens*²⁸ norm and customary international law²⁹ prohibit the act of aggression, genocide, crimes against humanity and war crimes. Once these crimes have been committed, States have the obligation to prosecute or to extradite the alleged perpetrators the alleged perpetrators irrespective of their positions.³⁰ At the same, customary international law also provides both the sitting³¹ and former³² Head of State with immunity from being prosecuted before any foreign courts. However, the immunity of the Head of State is a matter of procedural law where it can be waived by the State itself or by the UNSC acting under Chapter VII of the UN Charter for committing international crimes.

Thus, this paper examines two questions: first, whether States have the obligation under international law to arrest, surrender and prosecute the alleged perpetrators of the crimes such as genocide, crimes against humanity and war crimes before its own court or by the competent tribunals even against the sitting Head of State; and second, whether the decision of the AU and the BIAs are contrary to international law for providing impunity to alleged perpetrators of these crimes. It argues that States are bound under international law to arrest, surrender and prosecute the alleged perpetrators and that both the AU decision and the BIAs are inconsistent with the duty of states to uphold *jus cogens* norms including those proscribed under the Rome Statute.

Prohibition Under *Jus Cogens* Norm and Customary International Law

The conflict arises between the crimes enumerated under the ICC jurisdiction and both the AU decision and the BIAs. This is because the former are prohibited both under *jus cogens* norm and

²¹ He attended a Summit of the Common Market for Eastern & Southern Africa (COMESA) in October 2011.

²² He was invited to attend a Summit of the Sahel-Saharan States in August 2011. See Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2010) 34 Fordham Int'l LJ 1584, 1609.

²³ He was invited to attend Kenya's Constitutional Celebration in August 2010. See <<http://www.amnesty.org/en/news-and-updates/kenya-refuses-arrest-sudanese-president-omar-al-bashir-2010-08-27>> Accessed 12 February 2015.

²⁴ Jean Galbraith, 'The Bush Administration's Response to the International Criminal Court' (2003) 21 Berkeley J Int'l L 683, 686; John R Bolton, 'International Criminal Court: Letter to UN Secretary General Kofi Annan' (US Department of State, 6 May 2002) <<http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>> Accessed 15 December 2014.

²⁵ Also known as "Impunity Agreement", "Article 98 Agreement" and "Non-Surrender Agreement".

²⁶ "Persons" under the BIAs has been defined as the current and former Government officials, employees (including contractors) or military personnel or nationals of one Party.

²⁷ Christopher Kip Hale and Maanasa K Reddy, 'A Meeting of the Minds in Rome: Ending the Circular Conundrum of the US-ICC Relationship', (2013) 12 Wash U Global Stud L Rev 581, 583; Markus Wagner, 'The ICC and Its Jurisdiction-Myths, Misperceptions and Realities', (2003) 7 Max Planck YB UN L 409, 416.

²⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53. Thereafter, VCLT. *Jus cogens* norm is a peremptory norm of general international law accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted, unless with subsequent norm having similar character.

²⁹ Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 JICJ 683, 684; Nirmala Chandrasanan, 'The Continuing Relevance of Customary International Law in the Development of International Humanitarian Law' (2009) 21 Sri Lanka J Int'l L 55, 61.

³⁰ M Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1996) 59 LCP 63, 66.

³¹ Immunity *ratione personae*.

³² Immunity *ratione materiae*.

customary international law but the latter are trying to avoid prosecution of the alleged perpetrators. Article 53 of the Vienna Convention on the Law of Treaties 1969 (VCLT) defines *jus cogens* as “a peremptory norm of general international law accepted and recognised by the entire international community as a norm from which no derogation is permitted”.

Even though Article 6 of the VCLT provides that every State has capacity to conclude treaties, but such treaties must be in line with *jus cogens* norms, as the highest position or benchmark for States to conclude treaties among them³³ pursuant to Article 53 of the VCLT. In other words, any treaty entered into between States shall be void if it violates the peremptory norm of general international law. However, *jus cogens* is controversial since Article 53 of the VCLT does not provide any objective test on what qualifies or constitutes peremptory³⁴ since it is an unwritten norm³⁵ and lacks of formality.³⁶

Nonetheless, the International Law Commission (ILC) in its Commentaries on the Law of Treaties contended that the interpretation of *jus cogens* is to be reflected to State practice and in the jurisprudence of international tribunals,³⁷ or customary international law. Yet, the ILC suggested a few examples of the *jus cogens* norms in its Commentaries, such as the prohibition of aggression, and the commission of international crimes like genocide, trade in slaves, and piracy.³⁸ Furthermore, international law scholars, such as Bassiouni³⁹ and Crawford⁴⁰ argued that international crimes under the ICC jurisdiction are considered as *jus cogens*. Thus, States can conclude any treaty so long as it does not provide impunity to the international crimes like genocide, war crimes, crimes against humanity and aggression.

The implication of recognising the crimes as *jus cogens* is that, States have the obligation to prosecute the alleged perpetrators or extradite them so that they will not walk unpunished,⁴¹ known as *obligatio erga omnes*. This is because, it would not be considered as peremptory norm of international law if it does not carry any obligation on the part of the States to punish the commission of the said crimes.

The International Court of Justice (ICJ) in *Barcelona Traction Case*⁴² also held that it is the obligation of every States towards the whole international community to prohibit the commission of international crimes, known as obligation *erga omnes*. Thus, when States have the obligation to prevent the commission of these crimes under international law, States also supposed to have the obligation and ability to punish the alleged perpetrators once the crimes have been committed.⁴³

Even if the prohibition of the act or committing the crimes under the *jus cogens* is controversial due to its lack of formality and in its unwritten form, these crimes are still prohibited by the international community under customary international law.⁴⁴ As one of the sources of international law,⁴⁵ Article 38(1)(b) of the ICJ Statute defined customary international law as “evidence of a general practice

³³ *Prosecutor v Anto Furundzija* (Judgment) IT-95-17/1-T (10 December 1998) [153]; Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 135-37.

³⁴ Nina H B Jørgensen, *The Responsibility of States for International Crimes* (OUP 2000) 89.

³⁵ Gordon A. Christenson, ‘Jus Cogens: Guarding Interests Fundamental to International Society’ (1987) 28 Va J Int’l L 585, 589.

³⁶ Markus Petsche, ‘Jus Cogens as a Vision of the International Legal Order’, (2010) 29 Penn St Int’l L Rev 233, 242.

³⁷ International Law Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) 2 UNYBILC 187, 248 [3].

³⁸ *Ibid*, 247 [1] and 248 [3].

³⁹ M Cherif Bassiouni, ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’ in M Cherif Bassiouni (ed.), *Post-Conflict Justice* (Transnational Publishers, 2002) 390; Bassiouni, *International Crimes* (n 30) 68.

⁴⁰ James Crawford, *Brownlie’s Principles of Public International Law* (8 edn, OUP 2012).

⁴¹ Bassiouni, *International Crimes* (n 30) 65.

⁴² *Barcelona Traction Light and Power Company Limited* (Judgment) [1970] ICJ Rep 3 [33]-[34]; *Furundzija* (Judgment) (n 33) [151].

⁴³ *Furundzija* (Judgment) (n 33) [152]; Bassiouni, *International Crimes* (n 30) 66.

⁴⁴ George A Finch, ‘The Nuremberg Trial and International Law’, (1947) 41 AJIL 20, 26; Max Radin, ‘Justice at Nuremberg’ (1946) 24 Foreign Aff 369, 371; Georg Schwarzenberger, ‘Judgment of Nuremberg’ (1946) 21 Tul L Rev 329, 332.

⁴⁵ Statute of the International Court of Justice (ICJ Statute) art 38(1).

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accepted as law” where it requires States practice as well as acknowledgement from the States⁴⁶ in order to legally bind all States.⁴⁷

As the ILC has suggested abovementioned, the interpretation of *jus cogens* is to be reflected through State practice and jurisprudence of the international tribunals. Many international criminal tribunals have been established to punish the alleged perpetrators of the crimes, such as the establishment of the International Military Tribunal (IMT)⁴⁸ and the International Military Tribunal for the Far East (IMTFE).⁴⁹

In addition, the UN General Assembly (UNGA) under Resolution 95(1)⁵⁰ acknowledged the IMT’s jurisdiction over the crimes against peace,⁵¹ war crimes⁵² and crimes against humanity⁵³ as well as its decision. Furthermore, the subsequent tribunals after the IMT, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁵⁴ and the International Criminal Tribunal for Rwanda (ICTR)⁵⁵ also based their jurisdictions on the IMT principles, including the Rome Statute.⁵⁶

By virtue of the establishment of these tribunals, there were numbers of the alleged perpetrators who were found guilty for committing the crimes, including the Head of State, such as Admiral Doenitz, being both the Chancellor and the successor of the Third Reich of the State of Germany after Hitler committed suicide⁵⁷ and Jean Kambanda,⁵⁸ the first Head of Government to be criminally liable for committing genocide against the Rwandan Tutsis.⁵⁹ Also, the ILC defined the types of crimes against peace and security of mankind under its Draft Article 1⁶⁰ based on the jurisdiction of the IMT. Thus, it proves that the crimes under the ICC jurisdiction are prohibited under customary international law. In addition, as rules governing international humanitarian law which based on customary international law, the Geneva Conventions 1949 are adopted based on the Hague Conventions 1899⁶¹ and 1907⁶² to outlaw war crimes. Even though not all provisions under the four Geneva Conventions 1949⁶³ and

⁴⁶ Pierre-Hugues Verdier and Eril Voeten, ‘Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory’ (2014) 108 AJIL 389, 413; Christian Dahlman, ‘The Function of Opinio Juris in Customary International Law’ (2012) 81 Nord J Int’l L 327, 330.

⁴⁷ Michael P Scharf, ‘Accelerated Formation of Customary International Law’ (2014) 20 ILSA J Int’l & Comp L 305, 311; Alberto Alvarez-Jimenez, ‘Methods for The Identification of Customary International Law in the International Court of Justice’s Jurisprudence 2000-2009’ (2011) ICLQ 681, 686.

⁴⁸ Charter of the International Military Tribunal (IMT Charter).

⁴⁹ Charter of the International Military Tribunal for the Far East (IMTFE Charter).

⁵⁰ UNG Res 95(1) (11 December 1946) UN Doc A/RES/1/95; Antonio Cassese, ‘Affirmation of the Principles of International Law Recognized by the Charters of the Nurnberg Tribunal’ (2009) United Nations Audiovisual Library of International Law 3; Christian Tomuschat, ‘International Criminal Prosecution: The Precedent of Nuremberg Confirmed’, (1994) 5 Crim L F 237, 238; Franz B Schick, ‘The Nuremberg Trial and the International Law of the Future’ (1947) 41 AJIL 770, 770; Quincy Wright, ‘The Nuernberg Trial’ (1946) 37 J Crim L & Criminology 477, 478.

⁵¹ IMT Charter, art 6(a); IMTFE Charter, art 5(a).

⁵² IMT Charter art 6(b); IMTFE Charter, art 5(b).

⁵³ IMT Charter, art 6(c); IMTFE Charter, art 5(c). See Sheri P Rosenberg, ‘The Nuremberg Trials: A Reappraisal and Their Legacy’, (2006) 27 Cardozo L Rev 1549, 1550.

⁵⁴ Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute).

⁵⁵ Statute of the International Criminal Tribunal for Rwanda (ICTR Statute).

⁵⁶ Rome Statute, arts 6-8bis; Hans-Heinrich Jescheck, ‘The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute’ (2004) 2 JICJ 38, 43.

⁵⁷ Willis Smith, ‘The Nuremberg Trials’ (1946) 32 ABAJ 390, 390.

⁵⁸ *Prosecutor v Jean Kambanda* (Appeals Chamber Judgment) ICTR-97-23-A (19 October 2000); *Prosecutor v Jean Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998).

⁵⁹ Erik Møse, ‘Main Achievements of the ICTR’, (2005) 3 JICJ 920, 935.

⁶⁰ Draft Code of Crimes against the Peace and Security of Mankind, ‘Report of the International Law Commission on the Work of Its Forty-Eight Session’, (1996) 2 UNYBILC 17, [7].

⁶¹ Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899 (adopted 29 July 1899, entered into force 4 September 1900). Hereafter, Hague Convention 1899.

⁶² Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (adopted 18 October 1907, entered into force 26 January 1910). Henceforth, Hague Convention 1907.

⁶³ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949 (adopted 12 August 1949, entered into force 21 October 1950). Hereafter, Geneva Convention I; Convention

its Additional Protocols⁶⁴ are up to *jus cogens* level, the principles and prohibitions under Paragraphs (1) and (2) of Common Article 3 to the Geneva Convention IV are *jus cogens*.⁶⁵

Common Article 3 stipulates about the concerned with the individual and the physical treatment to which he is entitled as a human being during the conflicts. These provisions have been incorporated into the Rome Statute under Article 8(2)(c). Even though Common Article 3 only applicable to conflicts not of an international character, the International Committee of the Red Cross (ICRC) in its Commentaries⁶⁶ stresses that Common Article 3 also "... valid everywhere and under all circumstances and as being above and outside war itself" and further upheld by the ICJ in *Nicaragua Case*⁶⁷ and the Appeals Chamber of the ICTY in *Delalic*.⁶⁸

Thus, when such provisions are applicable at all times and in all circumstances it constitutes as norms of *jus cogens* where it protects basic considerations of humanity. The Geneva Conventions 1949 also formed part of customary international law when it is ratified by 196 States, including all UN Member States and UN Observers, a near universal acceptance.

The UNGA also adopted Resolution 96(1)⁶⁹ in 1946, which affirmed that genocide is prohibited under international law. The prohibition of genocide, which is a *jus cogens* norms was crystallised and codified into the Genocide Convention.⁷⁰ Article I of the Genocide Convention stipulates that genocide is a crime under international law which all the Parties undertake to prevent and punish the alleged perpetrators regardless of their positions pursuant to Article IV. Even though it is not universally ratified, where only 142 States are Parties to it, States which are not Parties to the Genocide Convention are still bound under these obligations This is because, the principles under the Genocide Convention are principles which are recognised by civilised nations, in line with the ICJ Advisory Opinion in the *Reservations to the Genocide Convention Case*.⁷¹ However, before States exercise the said obligations, it is important to resolve whether such obligations can be exercised upon the Head of State who enjoys immunity under customary international law.

(II) for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12 August 1949 (adopted 12 August 1949, entered into force 21 October 1950). Thereafter, Geneva Convention II; Convention (III) Relative to the Treatment of Prisoners of War, Geneva 12 August 1949 (adopted 12 August 1949, entered into force 21 October 1950). Hereafter, Geneva Convention III; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949 (adopted 12 August 1949, entered into force 21 October 1950), henceforth, Geneva Convention IV.

⁶⁴ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978). Hereafter, Additional Protocol I; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978). Thereafter, Additional Protocol II; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007). Hereafter, Additional Protocol III.

⁶⁵ Theodor Meron, 'The Geneva Conventions and Public International Law' (2009) 91 IRRC 619, 620, 624; Rafael Nieto-Navia, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law', in Lal Chand Vohrah *et al* (ed.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003) 595, 636.

⁶⁶ ICRC, 'Commentary to Common Article 3' in Jean Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 44.

⁶⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgments) [1986] ICJ Rep 14. [218].

⁶⁸ *Prosecutor v Zejnir Delalic et al* (Judgment) IT-96-21-A (20 February 2001) [150].

⁶⁹ UNGA Res 96(1) (11 December 1946) UN Doc A/RES/1/96.

⁷⁰ UNGA Res 260(III) (9 December 1948) UN Doc A/RES/3/260; Convention on the Prevention and Punishment of the Crime of Genocide 1948 (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 1021. Hereafter, Genocide Convention.

⁷¹ *Reservations to the Convention on the Prevention and Punishment of the Crime Of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 [23].

Customary International Law on the Immunity of the Head of State and Governments

Before the outbreak of World War I, the ruler and State were considered as one and treated alike while enjoying absolute immunity or sovereign immunity⁷² under the principle of *par in parem imperium non habet imperium*.⁷³ It reflects the principle of sovereignty of States and subjecting States to a foreign court's jurisdiction amounting to a violation of the principle of State sovereignty or equality.⁷⁴

However, this sovereign immunity was no longer applied after the outbreak of World War where many rulers or the Head of State have been using their immunity for the impunity in committing crimes. Still, customary international law provides the Head of State with immunity *ratione personae* (personal or private immunity) and immunity *ratione materiae* (official immunity).⁷⁵ This customary rule was crystallised and codified into the Vienna Convention on Diplomatic Relations (VCDR)⁷⁶ and ratified by almost all UN Member States.⁷⁷

Articles 29 and 31 of the VCDR provides that the diplomats shall be inviolable, not subject to arrest and enjoy an absolute immunity from criminal prosecution. Even though immunity under the VCDR only covers diplomats, their staffs and family, the ICJ in both the *Arrest Warrant Case*⁷⁸ and *Mutual Assistance in Criminal Matters Case*⁷⁹ ruled that immunity under the VCDR should also be extended to State high ranking officials, such as the Head of State, Head of Government and Minister of Foreign Affairs. However, their immunities are temporal, belong to the State and can be waived by the State at any time pursuant to Article 32 of the VCDR.

Immunity *ratione personae* is applied to the sitting Head of State, whether he is travelling abroad or not and also covers both his official and private acts as long as he is in the office⁸⁰ even he has committed international crimes.⁸¹ Once the reasonable period of time comes to an end, either when he leaves the receiving State or at the expiry of his tenure or appointment as the diplomatic agent, the Head of State is no longer protected under immunity *ratione personae*. Still, immunity *ratione materiae*, takes over but only limited to all official acts or conducts performed while he or she being the sitting Head of State.⁸²

⁷² Hallie Ludsin, 'Returning Sovereignty to the People' (2013) 46 Vand J Transnat'l L 97, 102; Hans Corell, 'Sovereignty and Humanity: Reality and Possibility' (2007) 36 Denv J Int'l L & Pol'y 1, 1-2; Jerrold L Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings', (1986) 86 Colum L Rev 169, 170; Robert Lansing, 'Notes on Sovereignty in a State' (1907) 1 AJIL 105 124.

⁷³ This Latin maxim means 'an equal has no power over an equal'. See Anthony J Colangelo, 'Jurisdiction, Immunity, Legality, and Jus Cogens' (2013) 14 Chinese JIL 53, 59-60; Beth Van Schaack, 'Par in Parem Imperium Non Habet Complementarity and the Crime of Aggression' (2012) 10 JICJ 133; Yoram Dinstein, 'Par in Parem Non Habet Imperium', (1966) 1 Isr L Rev 407.

⁷⁴ Charter of the United Nations (UN Charter) art 2(1).

⁷⁵ Mark A. Summers, 'Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create a New Customary Law Rule in Congo v. Belgium' (2007) 16 Mich St J Int'l L 459, 467-68.

⁷⁶ Vienna Convention on Diplomatic Relations 1961 (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95. Hereafter, VCDR.

⁷⁷ There are 190 States out of 193 UN Member States are Parties to the VCDR. See <<https://treaties.un.org/ages/untsonline.aspx?id=2>> Accessed 24 November 2014.

⁷⁸ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 [51].

⁷⁹ *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [170].

⁸⁰ Eileen Denza, 'Vienna Convention on Diplomatic Relations' (UN Audiovisual Library of International Law 2009) 1, 4; Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 80; Michael A. Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 Duke LJ 651, 655.

⁸¹ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 EJIL 815, 818-19.

⁸² VCDR, art 39(2).

The House of Lords in *Pinochet*⁸³ held that the Head of State will not be protected under immunity *ratione materiae* if he has performed certain acts, in this case the act of torture which is outside his official duty while being the Head of State. In other words, States are bound to protect the inviolability and immunity of the Head of State as long as he has acted or performed official acts while being in the office as upheld by the ICJ in *Diplomatic and Consular Staff Case*.⁸⁴

Furthermore, in order to prevent impunity, the Head of State will not be protected under both *ratione personae* and *ratione materiae* if he is allegedly to have committed international crimes, such as genocide, war crimes and crimes against humanity as ruled by the ICJ in the *Arrest Warrant Case*.⁸⁵ This practice is not new and has been exercised by the international tribunals after the outbreak of World War I and II,⁸⁶ such as the prosecution of Admiral Doenitz⁸⁷ before the IMT, which was affirmed by the UNGA in Resolution 95(1).

Furthermore, both President Slobodan Milosevic⁸⁸ of Serbia and Federal Republic of Yugoslavia and President Charles Taylor⁸⁹ of Liberia were also been prosecuted before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Special Court for Sierra Leone (SCSL) respectively for committing war crimes and crimes against humanity even though both of them were the sitting Head of State at the time of their indictment.⁹⁰

These practices have been incorporated into the Rome Statute pursuant to Article 27 where immunity of the Heads of State shall not bar the ICC from exercising its jurisdiction over the alleged perpetrators. Since the crimes of genocide, war crimes and crimes against humanity have been allegedly committed in Sudan, it has been referred to the ICC by the UNSC under Article 13(b) of the Rome Statute acting under Chapter VII of the UN Charter.

As one of the alleged perpetrators of these crimes, the ICC has issued two arrest warrants against the Sudanese President, even though he is the sitting Head of State of a non-Party to the Rome Statute. However, the AU decided to let him free and not to arrest him even after the issuance of two arrest warrants.

The African Union's Decision

The decision of the Assembly of the AU creates a conflict of obligations among the AU Members not to arrest President Omar Al-Bashir as decided by its Assembly⁹¹ and to cooperate with the ICC to arrest and surrender him according to UNSC Resolution 1593.

Thus, these situations create three legal questions, *inter alia*: whether the decision of the AU Assembly binds its Members; whether Sudan and other State Parties to the Rome Statute which are also the AU

⁸³ *Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others; Ex Parte Pinochet; R v. Bartle and the Commissioner of Police for the Metropolis and Others* [1999] 2 All ER 97; Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10 EJIL 237, 243.

⁸⁴ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 [62]; Jonathan Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 ICLQ 53, 53-54.

⁸⁵ *Arrest Warrant Case* (n 78) [61]; David S. Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgement as It Pertains to the Security Council and the International Criminal Court', (2004) 20 Am U Int'l L Rev 7, 14, 17, 19; Dire Tladi, 'The ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98', (2013) 11 JICJ 199, 220.

⁸⁶ John Dugard, 'Immunity, Human Rights and International Crimes', (2005) J S Afr L 482, 482-83.

⁸⁷ Smith, *The Nuremberg Trials* (n 57) 390.

⁸⁸ *Prosecutor v Slobodan Milosevic et al* (Second Amended Indictment) IT-02-54-T (28 July 2004).

⁸⁹ *Prosecutor v Charles Ghankay Taylor* (Judgment) SCSL-03-01-A (26 September 2013); *Prosecutor v Charles Ghankay Taylor* (Judgment) SCSL-03-01-T T Ch II (18 May 2012); *Prosecutor v Charles Ghankay Taylor* (Indictment) SCSL-03-01-I (7 March 2003).

⁹⁰ Sarah M H Nouwen, 'The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued' (2005) 18 LJIL 645, 667-68; Zsuzsanna Deen-Racsmany, 'Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity' (2005) 18 LJIL 299, 319.

⁹¹ Thirteenth Ordinary Session Assembly of the African Union, 'Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC)' (n 20) [10].

THE OBLIGATION TO PROSECUTE HEADS OF STATE UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) AND CUSTOMARY INTERNATIONAL LAW: THE AFRICAN AND UNITED STATES' PERSPECTIVES

Members have a legal obligation to arrest and surrender the Sudanese President under Article 89 of the Rome Statute; and whether the AU Members have a legal obligation to carry out the UNSC decision under Chapter VII of the UN Charter as Members to the UN.

Even though there is no express provision under the AU Constitutive Act (CA); the founding treaty which established the AU⁹² on whether the decision of its Assembly⁹³ binds all its Members, it can be drawn from Article 23 of the CA.⁹⁴ Article 23 of the CA stresses that, in the event when the AU Members failed to comply with the decisions of the AU Assembly, they may be subjected to sanctions which will be determined by the Assembly accordingly.

Furthermore, the fact that the Assembly is the supreme organ of the AU,⁹⁵ its decision should have been binding upon its Members. This can be seen where some of the AU Members have complied with such decision where President Omar Al-Bashir has not been arrested even though he has visited many States, such as Chad⁹⁶ Kenya,⁹⁷ and Malawi⁹⁸ even after the arrest warrants have been issued by the PTC.

However, it is argued that, since all of the States that Sudanese had visited are also Parties to the Rome Statute, these States have also breached their obligation to arrest and surrender the Sudanese President to the ICC as required under Article 89 of the Rome Statute.⁹⁹ Thus, these States have violated Article 26 of the VCLT for failure to comply with their treaty obligation.

Not only the above mentioned States have not acted as required under the Rome Statute, Sudan also refused to apprehend its own Head of State to the ICC even after Resolution 1593 was invoked by the UNSC. As mentioned earlier, immunity can be waived by the State.¹⁰⁰ Since Sudan refused to cooperate with the ICC to arrest and surrender its President, it means that Sudan refused to waive the immunity accorded its President.

Therefore, he should have still been protected under immunity *ratione personae* as provided under both customary international law and VCDR.¹⁰¹ Furthermore, unlike the ICTY and ICTR, neither the ICC nor the UNSC can remove the immunity attached to the Sudanese President because the ICC is an independent court and not an organ of the UN, even though the UNSC is acting under Chapter VII

⁹² The Constitutive Act, art 2.

⁹³ Ibid, art 7.

⁹⁴ Max Du Plessis and Christopher Gevers, 'Balancing Competing Obligations: The Rome Statute and AU Decisions' (2011) Institute for Security Studies Papers 1, 3.

⁹⁵ The Constitutive Act, art 6(2).

⁹⁶ Barnes, The International Criminal Court's Ineffective Enforcement Mechanisms (n 22).

⁹⁷ See (n 23).

⁹⁸ See (n 21); Mwiza Jo Nkhata, 'Along Came Omar Al Bashir to Malawi: International Criminal Law and the Immunity of Heads of State', (2011) 5 Malawi L J 149, 154.

⁹⁹ *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09 Pre-T Ch II (26 March 2013); *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09 Pre-T Ch I (12 December 2011); Alexander K. A. Greenwalt, 'Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir & African Union Response' (2012) 51 ILM 393, 393.

¹⁰⁰ VCDR, art 32.

¹⁰¹ <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtmsg_no=iii-3&chapter=3&lang=en> Accessed 22 February 2015.

under the UN Charter.¹⁰² Thus, Article 27 of the Rome Statute cannot be used to remove the immunity attached to President Omar Al-Bashir under customary international law.¹⁰³

Nevertheless, even if the decision of the AU Assembly is binding on its Members and the Sudanese President should have immune under immunity *ratione personae* as the sitting Head of State, it is argued that such a decision is void and the immunity is not applicable to him. This is because, the crimes that President Omar Al-Bashir has been charged are prohibited under *jus cogens*¹⁰⁴ and customary international law¹⁰⁵ which does not recognise impunity.

Even though he has immunity under customary international law and the VCDR,¹⁰⁶ the ICJ in the *Arrest Warrant Case*¹⁰⁷ and the practice under customary international law have shown that immunity of the Head of State, both *ratione personae* and *ratione materiae* will no longer be applicable if the Head of State is alleged to have been committed international crimes, such as genocide, war crimes and crimes against humanity.

Unlike the situation in Kenya; a State Party to the Rome Statute, immunity of President Uhuru Kenyatta¹⁰⁸ has been waived by Kenya under Article 27 of the Rome Statute when the case has been referred to the ICC by the Prosecutor under Article 13(c) of the Rome Statute. This is because, immunity of the Head of State will be automatically removed under Article 27 of the Rome Statute when Kenya ratified the Rome Statute.¹⁰⁹

In addition, Kenya has also domesticated¹¹⁰ the Rome Statute, called the Kenyan International Crimes Act 2008 where Section 27(1) of the Act also reflects the same principle under Article 27 of the Rome Statute.¹¹¹ Therefore, the immunity of the Head of State of Kenya has been waived domestically and through Article 27 of the Rome Statute which render him been referred to the ICC.

Besides, it is argued that the AU decision is contrary to some of the provisions of the AU itself. For instance, Preamble 9 and Article 3(h) stipulate that the AU is determined to promote and protect human and people's rights. However, since the AU Assembly refused to arrest and surrender the Sudanese President as the alleged perpetrator of genocide, crimes against humanity and war crimes to the ICC, it denied the rights of the victims of these crimes for justice. In addition, Article 4(o) of the CA elucidates that the AU respects the sanctity of human life, condemns and rejects the impunity.

Nonetheless, the alleged perpetrator of the crimes is still free at large and not even been arrested and surrendered before the ICC for trials even though he has been allegedly committed international crimes. Furthermore, Article 3(e) of the CA also provides that the objective of the AU is to encourage international cooperation by taking due account of the UN Charter and the Universal Declaration of Human Rights (UDHR). But, the AU refused to cooperate with the ICC and disregard the UNSC

¹⁰² Asad G. Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) 12 Chinese JIL 467, 476-77. See UN Charter, Chapter VII; UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955; Joy Gordon, 'The United Nations Security Council and the Emerging Crisis of Legitimacy' (2014) 9 YJIA 40, 41.

¹⁰³ Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 JICJ 333, 339.

¹⁰⁴ See (n 39) and (n 40).

¹⁰⁵ See (n 44).

¹⁰⁶ VCDR, arts 29 and 31.

¹⁰⁷ Ibid. (n 78) [61]; Koller, Immunities of Foreign Ministers: Paragraph 61 (n 85) 14, 17, 19.

¹⁰⁸ *Prosecutor v Uhuru Muigai Kenyatta et al* (Decisions on the Confirmation of Charges) ICC-01/09-02/11 Pre-T Ch II (23 January 2012) [398], [428]; *Prosecutor v Uhuru Muigai Kenyatta et al* (Summonses to Appear) ICC-01/09-02/11 Pre-T Ch II (8 March 2011).

¹⁰⁹ <http://www.icc-cpi.int/en_menus/asp/pages/asp_home.aspx> Accessed 6 September 2014.

¹¹⁰ Kenya domesticated the Rome Statute prior to its New Constitution 2010 in which it becomes a monist country after the came into force of its new constitution. As a monist country, any treaty ratified by Kenya will form part of Kenya's laws pursuant to Article 2(6) of the Kenyan Constitution 2010.

¹¹¹ Antonina Okuta, 'National Legislation for Prosecution of International Crimes in Kenya' (2009) 7 JICJ 1063, 1073.

Resolution 1593 which is based on Chapter VII of the UN Charter to arrest and surrender the Sudanese President.

The action of Sudan for failure to comply with UNSC Resolution 1593 to cooperate with the ICC by arresting and surrendering its President raises another key issue; whether it is bound to arrest its President even though it is not a Party to the Rome Statute. This is because, Article 34 of the VCLT provides that any obligation under the treaty cannot be imposed upon States which are not Parties to the treaty without its consent. Even though Sudan is a Signatory to the Rome Statute, it has decided not to ratify it¹¹² and thus it has no obligation to perform any obligations enshrined under the Rome Statute.

However, Article 38 of the VCLT provides that even though a treaty is not binding upon a third State, that is, a non-Party without its consent, that third State is still bound if the issue at hand is customary rule of international law. Thus, Sudan is still bound under international law because the crimes which have been allegedly perpetrated by the Sudanese President are both *jus cogens* norms and prohibited under customary international law.

In addition, Sudan is still bound to arrest and surrender its President under Article 25 of the UN Charter by virtue of its position as a UN Member since 1956.¹¹³ Article 25 of the UN Charter provides that every Member has agreed to accept and carry out the decision of the UNSC and has been reiterated by the ICJ in the case of *South West Africa*.¹¹⁴ Since its President has been referred to the ICC under Resolution 1593 acting under Chapter VII of the UN Charter, Sudan is bound to accept such referral and arrest its President to be surrendered to the ICC and thus, notwithstanding the AU decision. Therefore, the immunity attached to President Omar-Al-Bashir still has been shifted by virtue of the UNSC referral.

Furthermore, even if it is argued that the decision of the AU is binding upon its Members, Article 103 of the UN Charter stipulates that the obligation of the UN Charter prevails if there is a conflict between obligations under the UN Charter and under other treaties.¹¹⁵ This principle has been illustrated in the *Lockerbie Case*.¹¹⁶ In this case, Libya refused to extradite two of its citizens allegedly accused for the Pan Am flight as required under the Montreal Convention to the U.S. or the United Kingdom. Libya contended that it has the right to exercise its jurisdiction over the alleged accused under the treaty.

However, the U.S. argued that such a right could not be exercised because it was superseded by the UNSC Resolutions 731, 748 and 883 by virtue of Article 25 and 103 of the UN Charter.¹¹⁷ The ICJ ruled that since UNSC Resolutions 731, 748 and 883 were not explicitly required Libya to extradite two of its citizens to the U.S. or the United Kingdom for trials, therefore Libya has no obligation to do so notwithstanding the Resolutions adopted by the UNSC.¹¹⁸

Applying the same principle into the issue at hand, Paragraph 2 of Resolution 1593 explicitly mentioned that the Government of Sudan must cooperate fully with the ICC.¹¹⁹ Therefore, Sudan has

¹¹² <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xviii-10&chapter=18&lang=en#11> Accessed 23 February 2015.

¹¹³ <<http://www.un.org/en/members/>> Accessed 24 January 2015.

¹¹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16. [116].

¹¹⁵ Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 Int'l CLR 583, 598, 601; UN Charter, Charter II, Art 3 on UN Membership. The VCLT also mentioned about the UN Charter under Article 30 and therefore it is argued that the VCLT recognises the UN Charter as a treaty.

¹¹⁶ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v the United States Of America)* (Preliminary Objections, Judgment) [1998] ICJ Rep 115).

¹¹⁷ *ibid*, [36] and [40].

¹¹⁸ *Lockerbie Case* (n 116) [43]-[44].

¹¹⁹ UNSC Res 1593 (n 12) [2]: "Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and,

the obligation under Resolution 1593 to surrender its President to the ICC as requested by the UNSC acting under Chapter VII of the UN Charter.

In addition, by virtue of the words “all States” and “regional organisation” under the same Paragraph 2 of Resolution 1593, it should have also bind other the AU and other States to surrender the Sudanese President to cooperate fully with the ICC. This is in line with Article 53 of the UN Charter where the Security Council can utilise the regional arrangement available to enforce any action under its authority. Since the ICC has issued two arrest warrants against the Sudanese President which require States’ cooperation, all States, regardless of being Parties or non-Parties to the Rome Statute are bound to arrest and surrender him to the ICC under Article 25 and 103 of the UN Charter.

Similar to the AU, the U.S. also refused to cooperate with the ICC. However, the means used by the U.S. to avoid its Heads of State from being prosecuted before the ICC is different; through various international agreements with the Signatories, State Parties and non-Parties to the Rome Statute.

The United States’ Bilateral Immunity Agreements (BIAs)¹²⁰

The BIAs entered into between the U.S. with other States, such as the Signatories, Parties and non-Parties to the Rome Statute creates similar situation like the AU, the conflict of obligations. The U.S. also prevents the ICC from exercising its jurisdiction over U.S. nationals after it withdrew from ratifying the Rome Statute in 2002.¹²¹ However, the method used by the U.S. is different from the AU. Apart from using Article 16 of the Rome Statute to defer investigations or prosecutions for a period of 12 months through UNSC Resolutions 1422¹²² and 1487,¹²³ the U.S. uses Article 98(2) of the Rome Statute¹²⁴ to prevent its current or former Government officials, military or other nationals from being exposed to the ICC jurisdiction.

If Article 89 of the Rome Statute obligates its Parties to arrest and surrender the alleged perpetrators for committing the crimes, including the Head of State to the ICC upon request made by the ICC, the BIAs require them to the opposite. This is because, by virtue of Article 98(2), it stipulates that the ICC may not proceed with a request for surrender under Article 89 which would require the requested State to act inconsistently with its obligations under international agreements, unless with prior consent of the sending State.¹²⁵

Therefore, it raises the question as to whether the BIAs are within the ambit of Article 98(2) of the Rome Statute. If this question is in the affirmative, should the Parties to the Rome Statute arrest and surrender the alleged perpetrator to the ICC as required under Article 89, or refuse to do so as required under the BIAs in the event where crimes have been perpetrated by U.S. nationals on the territory of the State Parties to the Rome Statute.

It is argued that the BIAs entered into are not within the ambit of Article 98(2). It is true that Article 98(2) does not expressly mention that the words “international agreement” refers to the existing or

while recognizing that State not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully”.

¹²⁰ Also known as “Impunity Agreement”, “Article 98 Agreement” and “Non-Surrender Agreement”.

¹²¹ Rome Statute, art 127; VCLT, arts 54(a), 65(1) and 67(1); Galbraith, *The Bush Administration’s Response* (n 24) 686; Bolton, *International Criminal Court* (n25). Even though there is a possibility that the U.S. to reconsider joining the Rome Statute after Obama took the office after President Bush, yet until present, such probability remain unknown. See Caitlin Peruccio, ‘To Join or Not to Join the International Criminal Court: Arguments for and against American Ratification of the Rome Statute’, (2013) 29 *Conn J Int’l L* 181, 189-90; Kurt R. Willems, ‘US National Security and the International Criminal Court: Should the Obama Administration Consider Reengagement’, (2009) 16 *UC Davis J Int’l L & Pol’y* 213, 236.

¹²² UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422).

¹²³ UNSC Res 1487 (12 June 2003) UN Doc S/RES/1487).

¹²⁴ Marco Roscini, ‘The Efforts to Limit the International Criminal Court’s Jurisdiction over Nationals of Non-Party States: A Comparative Study’, (2006) 5 *L & Prac Int’l Cts & Tribunals* 495, 499, 509.

¹²⁵ Rome Statute, art 98(2): “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 pursuant to which the consent of the 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”.

new agreements. However, by looking at the overall provisions under the Rome Statute, such as Articles 90(6), 93(3), and 97(c), it qualifies as existing agreements, such as the Status of Forces Agreements (SOFAs) but not the new agreements.¹²⁶

By virtue of that agreements, it protects the exclusive jurisdiction of the sending State over its nationals involved in peacekeeping operations, both the troops and civilians¹²⁷ and thus, ICC cannot proceed with the request for the arrest and surrender of the nationals of the sending States except with its prior consent.

Even though the words “international agreement” can also qualify as new agreements, it must be considered based on the object and purpose of the Rome Statute;¹²⁸ to prevent the impunity of the crimes under the ICC jurisdiction notwithstanding of being the court of the last resort.¹²⁹ The content of the BIAs is silent as to whether the U.S. or other State, in the event of non-surrender of its citizens or Head of State to the ICC, should prosecute the alleged perpetrators within its own national court in the light of the complementarity principle.

The ICJ in the *Case Relating to the Obligation to Prosecute or Extradite*¹³⁰ ruled that Senegal had violated its obligation¹³¹ under Article 7(1) of the Convention Against Torture for the delay to prosecute its Former Head of State, Hissene Habre which impedes the object and purpose of the treaty.¹³²

If a mere delay to prosecute the alleged perpetrators under the treaty breaches State's obligation as well as the object and purpose of the treaty, the BIAs' non-surrender and silence on the prosecution of the alleged perpetrators should have been a clear violation of the obligation and the object and purpose of the Rome Statute since it provides impunity where the alleged perpetrators will not be prosecuted and walked unpunished.¹³³ Thus, it does not reflect what Justice Jackson, the Chief Prosecutor of the IMT from the U.S. have said during the trials of the German Nazi after the outbreak of World War II. He contended that, the purpose of having international tribunal is to prosecute the alleged perpetrators of international crimes, regardless of their positions as to fulfil humanity's aspirations for justice.¹³⁴

Therefore, by prohibiting the States to surrender the alleged perpetrators to the ICC, it violates States' obligation pursuant to Article 26 of the VCLT, object and purpose of the Rome Statute under Article 18 of the VCLT as well as denying the right of the victim for justice as has been promoted by the U.S. since the establishment of the IMT in 1945.

However, it is argued that the BIAs are not “international agreements” under Article 98(2) since the word “sending State” is incompatible with the broad definition of the word “persons” under the

¹²⁶ Attila Bogdan, 'The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98', (2008) 8 Int'l CLR 1, 23-24; Neha Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court' (2005) 16 EJIL 239, 248; Hans-Peter Kaul and Clauss Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 YIHL 143, 165.

¹²⁷ Dieter Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations' (2013) 95 IRRC 613, 616; David Scheffer, 'Article 98 (2) of the Rome Statute: America's Original Intent' (2005) 3 JICJ 333, 338; Erik Rosenfeld, 'Application of US Status of Forces Agreements to Article 98 of the Rome Statute', (2003) 2 Wash U Global Stud L Rev 273, 286.

¹²⁸ VCLT, art 31(1); Salvatore Zappala, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements' (2003) 1 JICJ 114, 124.

¹²⁹ Rome Statute, Preamble, arts 1 and 17.

¹³⁰ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422.

¹³¹ *ibid*, [117].

¹³² *Ibid*, [112] and [115].

¹³³ VCLT, art 18(a); Harmen Van Der Wilt, 'Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?' (2005) 18 LJIL 93, 105.

¹³⁴ Trials of the Major War Criminals before the International Military Tribunal (Vol. 2; Nuremberg, Germany, 14 November 1945 - 1 October 1946) 101; Whitney R. Harris, 'Justice Jackson at Nuremberg' (1986) 20 Int'l L 867, 881.

BIAs.¹³⁵ Article 98(2) mentions that “the ICC may not proceed with such a request” only for persons who have been “sent” by the sending State and should have been present on the territory of the requested State at the time of the commission of the alleged crimes.

Since the BIA’s definition of “persons” as current and former Government officials, employees (including contractors) or military personnel or nationals of one Party, it creates another question whether it also covers former government officials who are not “sent” or no longer been “sent” by the sending State but present on the territory of the requested by virtue of their private visit or reside in the requested State. Thus, the ICC shall determine the validity and compatibility of the “international agreements” under Article 98(2) before it uses its power to request for the arrest and surrender of a person under Article 89.

Even if one contends that the BIAs are valid and compatible with Article 98(2) of the Rome Statute, it is still argued that the BIAs are void and have similar effect with the AU decision under Article 53 of the VCLT for contradicting the *jus cogens* norm. For the BIAs to be considered as void and invalid under Article 53 of the VCLT, it must first be examined whether the BIAs are “treaties” in the eyes of the VCLT. Article 2(1)(a) of the VCLT stipulates that a treaty means “an international agreement concluded between States in written form and governed by international law”.

Since the BIAs are entered into between the U.S. and other States, such as Benin, Botswana and Cambodia, they are caught under the definition of treaty abovementioned. However, one may question whether the BIAs, which have the word “agreement” should also be considered as “treaty” under Article 2(1)(a) of the VCLT.

Regardless of the terms used by the Parties,¹³⁶ such as “convention”, “Protocol”, or “agreement”, it is still considered as a treaty under Article 2(1)(a) as long as it is entered into between States as ruled by the ICJ in *Qatar v Bahrain*.¹³⁷ However, some international law scholars, like Alina Kaczorowska¹³⁸ argue that not all international agreements are treaties even though they have been entered into between States by looking at the contents of the agreements. She contended that the content of the agreements, either expressly or impliedly may be governed by municipal law, but not international law. Still, the contents of the BIAs are silent on their governing law and this allows them to be considered as treaties by virtue of Article 2(1)(a) of the VCLT.

Still, there are other alternative legal mechanisms that can prevent both the AU and the U.S. from using the Assembly decision as well as the BIAs as an excuse from fulfilling their obligations under the international law and treaties, such as through the Genocide Convention 1948, Geneva Conventions 1949 and the Convention Against Torture 1984.

Alternative Means

Since the crimes of genocide, war crimes and torture under the ICC jurisdiction are also based on various treaties, such as the Genocide Convention 1948, The Geneva Conventions 1949 and Convention Against Torture 1986, States which are Parties to these treaties are still obliged to prosecute or surrender the alleged perpetrators before a competent tribunal for prosecutions.

¹³⁵ Dapo Akande, ‘International Law Immunities and the International Criminal Court’ (2004) 98 AJIL 407, 427.

¹³⁶ *Jurisdiction and Admissibility Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, (Qatar v Bahrain)* (Judgment) [1994] ICJ Rep 112, [27]; Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) 76; ILC, Draft Articles on the Law of Treaties with Commentaries (n 37) 188.

¹³⁷ Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’, in Malcom D. Evans (ed.), *International Law* (1 edn, OUP 2003) 174-75.

¹³⁸ Alina Kaczorowska, *Public International Law* (4 edn, Routledge 2010) 93.

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For instance, there are 142 Parties to the Genocide Convention 1948, including almost all the AU Members, Sudan as well as the U.S,¹³⁹ where they have the legal obligation under the Genocide Convention 1948 to arrest persons accused for genocide even if the crime has been committed outside its territories and hand them to competent national or international tribunals as ruled by the ICJ in the *Genocide Case*.¹⁴⁰

In addition, the ICJ Advisory Opinion in the *Reservations to the Genocide Convention Case*¹⁴¹ ruled that States which are not Parties to the Genocide Convention are still bound under the obligations enshrined under the Genocide Convention 1948 since they are principles which are recognised by civilised nations, or *jus cogens*.

Similar to Article 27 of the Rome Statute, Article IV of the Genocide Convention also does not provide immunity to the Heads of State. Even if Sudan argued that it has no obligation to arrest its own President and refused to waive his immunity under Article 27 of the Rome Statute, still it has the obligation to do so after ratifying the Genocide Convention. Thus, when the ICC issued the second arrest warrant against the Sudanese President for allegedly committed genocide, both Sudan and AU Members which are Parties to the Genocide Convention are under the obligation to arrest him.¹⁴²

In addition, Article VI of the Genocide Convention provides that alleged criminals can be tried by an international penal tribunal which have jurisdiction over the crime where the Parties accepted the jurisdiction. Since the ICC has jurisdiction over the crimes of genocide, the ICC can exercise its jurisdiction over Sudanese President. Even though Sudan is not a Party to the Rome Statute and does not accept the ICC's jurisdiction over genocide, it is still bound under the UNSC referral pursuant to Article 13(b) of the Rome Statute which has been exercised through Chapter VII of the UN Charter under Resolution 1593.

Therefore, the obligations under the Genocide Conventions supersedes the BIAs and the AU decision where it has been proven that both the AU decision and the BIAs provide impunity to the alleged perpetrators where the AU refused to arrest the Sudanese President and no prosecution has ever mentioned under the BIAs.

Conclusion

It has been established that there will be no immunity to both the sitting and former Head of State for allegedly committed the crimes of genocide, crimes against humanity, and war crimes as such crimes have been prohibited under international law. With regards to the AU Member States, they are bound under the Article 25 and 103 of the UN Charter, Article 89 of the Rome Statute, Article VI of the Genocide Convention 1948 to arrest President Omar Al-Bashir and the decision made by the Assembly of the AU is void under Article 53 of the VCLT since it is inconsistent with the obligation under both the UN Charter and *jus cogens* norms. In relation to the BIAs in which the U.S. has entered into, the obligation of non-surrender of the alleged perpetrators under the BIAs is not in line with the obligation to arrest and surrender the alleged perpetrators. Also, it is contrary with the object and purpose of the Rome Statute to end the impunity, in which the Rome Statute Signatories and State Parties are bound to follow.

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¹⁴¹ See (n 71); Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554, 556.

¹⁴² Plessis and Gevers, *Balancing Competing Obligations* (n 94) 11; Goran Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the Icc in the Al Bashir Case' (2010) 8 JICJ 365, 374.

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