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

*[i]Fareed Mohd Hassan and [i]Noor Dzuhaidah Osman

[i]Faculty of Syariah and Law, Universiti Sains Islam Malaysia, 71800, Bandar Baru Nilai, Negeri Sembilan, Malaysia

* (Correspoding author) E-mail: fareed@usim.edu.my

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 State Parties to the Rome Statute 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 - Head of State - International Criminal Court - African countries - United States

Introduction

The Rome Statute of the International Criminal Court came into force in 2002 and created the first permanent International Criminal Court (ICC) (Ambos, 1996; Piranio, 2011). It has jurisdiction over individuals who must be over 18 years old at the time of the commission of the crimes, including the Head of State for committing the crimes of genocide, crimes against humanity, war crimes and the crime of aggression as provided under Articles 6 to 8 *bis* (Mancini, 2012; Scheffer, 2010). However, the ICC can exercise its jurisdiction over these crimes subject to the complementary principle, where the national courts of State Parties will be the *forum conveniens* or has first-hand jurisdiction over the perpetrators compared to the ICC as stipulated under Paragraphs 4, 6, 10 and Articles 1 and 17 of the Statute (Bensouda, 2012; Cassese, 1999).

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 unable or unwilling genuinely to carry out the investigation or prosecution under Articles 17(3), Articles 17(2) and 17(3) respectively. 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 1593 (Cryer, 2006; Neuner, 2005) acting under Chapter VII of the UN Charter (Akande, 2003; Aloisi, 2013).

Consequently, the ICC Pre-Trial Chamber (PTC) issued two arrest warrants against President Omar Al-Bashir in 2009 and 2010 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. 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 (Jalloh, 2009).

To prevent the Sudanese President from being arrested and brought before the ICC, the African Union (AU) requested the UNSC to defer his indictment pursuant to Article 16 of the Rome Statute prior and after the PTC issued the first arrest warrant. However, it received no response from the UNSC but instead the UNSC insisted to refer the situation to the ICC (Tladi, 2009). Thus, the AU, through its Assembly of Heads of State and Governments decided not to cooperate with the ICC to execute the arrest warrant, even though 34 out of 54 of the AU Members are Parties to the Rome Statute, based on the decision of its Thirteenth Ordinary Session Assembly of the African Union on July 2009. As a result, President Omar Al-Bashir was neither arrested nor surrendered to the ICC when he visited Malawi, and he was even invited to visit Chad and Kenya, both being State Parties to the Rome Statute.

Similarly, after it withdrew from ratifying the Rome Statute which was signed during Clinton's Administration (Galbraith, 2003), the United States (U.S.) entered into various Bilateral Immunity Agreements (BIAs) 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" to the ICC if found to have committed the crimes on the territory of that States. "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. 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 (Hale & Reddy, 2013; Wagner, 2003).

Meanwhile, as a substantive international law, *jus cogens* norm and customary international law prohibit the act of aggression, genocide, crimes against humanity and war crimes (Chandrahasan, 2009; Henckaerts, 2009). 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 (Bassiouni, 1996). At the same, customary international law also provides both the sitting and former Head of State with immunity *ratione personae* and Immunity *ratione materiae* 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 Statue.

Prohibition Under *Jus Cogens* Norm and Customary International Law

Article 53 of the Vienna Convention on the Law of Treaties 1969 defines *jus cogens* norm as 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. 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 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 them as decided by the

International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Furundzija* (Orakhelashvili, 2008) 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 peremptory (Jørgensen, 2000) since it is an unwritten norm (Christenson, 1987) and lacks of formality (Petsche, 2010).

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 (Commission, 1966), 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 (Commission, 1966). Furthermore, international law scholars, such as Bassiouni (Bassiouni, 1996, 2002) and Crawford (Crawford, 2012) 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 (Bassiouni, 1996), 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 and the ICTY in *Furundzija* 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 (Bassiouni, 1996).

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 (Finch, 1947; Radin, 1946; Schwarzenberger, 1946). As one of the sources of international law, Article 38(1)(b) of the ICJ Statute defines customary international law as "evidence of a general practice accepted as law" where it requires States practice as well as acknowledgement from the States (Dahlman, 2012; Voeten, 2014) in order to legally bind all States (Alvarez-Jimenez, 2011; Scharf, 2014).

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) in Nuremberg and the International Military Tribunal for the Far East (IMTFE) in the Far East. In addition, the UN General Assembly (UNGA) under Resolution 95(1) acknowledged the IMT's jurisdiction over the crimes against peace, war crimes and crimes against humanity (Rosenberg, 2006) as well as its decisions (Cassese, 2009; Schick, 1947; Tomuschat, 1994; Wright, 1946). Furthermore, the

subsequent tribunals after the IMT, such as the ICTY and the International Criminal Tribunal for Rwanda (ICTR) also based their jurisdictions on the IMT principles, including the Rome Statute (Jescheck, 2004).

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 suicide (Smith, 1946) and Jean Kambanda, the first Head of Government to be criminally liable for committing genocide against the Rwandan Tutsis (Møse, 2005). Also, the ILC in its Draft Code of Crimes against the Peace and Security of Mankind defined the types of crimes against peace and security of mankind under its Draft Article 1 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 1899 and 1907 to outlaw war crimes. Even though not all provisions under the four Geneva Conventions 1949 and its Additional Protocols 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* (Meron, 2009; Nieto-Navia, 2003). 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 Commentaries (ICRC, 1958) 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 and the Appeals Chamber of the ICTY in *Delalic*. 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) 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. 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. 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.

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 immunity (Corell, 2007; Lansing, 1907; Ludsin, 2013; Mallory, 1986) under the principle of *par in parem imperium non habet imperium*; a latin maxim which means 'an equal has no power over an equal' (Colangelo, 2013; Dinstein, 1966; Schaack, 2012). 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 as stipulated under Article 2(1) of the UN Charter.

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) (Summers, 2007). This customary rule was crystallised and codified into the Vienna Convention on Diplomatic Relations (VCDR) and ratified by 190 out of 193 UN Member States.

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 and *Mutual Assistance in Criminal Matters* Case 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 office (Alebeek, 2008; Denza, 2009; Tunks, 2002) even he has committed international crimes (Akande & Shah, 2011). 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 as enumerated under Article 39(2) of the VCDR.

The House of Lords in *Pinochet* 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 (Bianchi, 1999). 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 (Brown, 1988). 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 (Koller, 2004; Tladi, 2013). This practice is not new and has been exercised by the international tribunals after the outbreak of World War I and II (Dugard, 2005), such as the prosecution of Admiral Doenitz (Smith, 1946) before the IMT, which was affirmed by the UNGA in Resolution 95(1).

Moreover, both President Slobodan Milosevic of Serbia and Federal Republic of Yugoslavia and President Charles Taylor 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 (Deen-Racsmány, 2005; Nouwen, 2005). 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 Assembly on July 1-3, 2009 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 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 AU on whether the decision of its Assembly binds all its Members, it can be drawn from Article 23 of the CA (Plessis & Gevers, 2011). 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, 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 Chad Kenya, and Malawi even after the arrest warrants have been issued by the PTC (Barnes, 2010; Nkhata, 2011).

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 (Greenawalt, 2012). 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 as stipulated under Article 32 of the VCDR and as ruled by the ICJ in the *Arrest Warrant* Case.

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. 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 has invoked two Resolutions 827 and 955 acting under Chapter VII under the UN Charter (Gordon, 2014; Kiyani, 2013). Thus, Article 27 of the Rome Statute cannot be used to remove the immunity attached to President Omar Al-Bashir under customary international law (Akande, 2009).

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* (Bassiouni, 1996, 2002) and customary international law (Crawford, 2012) which does not recognise impunity. Even though he has immunity under customary international law and Articles 29 and 31 of the VCDR, the ICJ in the *Arrest Warrant Case* 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 (Koller, 2004).

Unlike the situation in Kenya; a State Party to the Rome Statute, immunity of President Uhuru Kenyatta 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. In addition, Kenya has also domesticated 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 (Okuta, 2009). 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 larger 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 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 it 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 it 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. Article 25 of the UN Charter provides that every Members agreed to accept and carry out the decision of the UNSC and has been reiterated by the ICJ *South West Africa* Case. 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. 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 (Liivoja, 2008). This principle has been illustrated in the *Lockerbie* Case. In this case, Libya refused to extradite two of its citizen 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. 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.

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. Therefore, Sudan has 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)

The BIAs, also known as "Impunity Agreement", "Article 98 Agreement" and "Non-Surrender Agreement", 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 as stipulated under Article 127 of the Rome Statute and Articles 54(a), 65(1) and 67(1) of the VCLT. (Galbraith, 2003). Even though there is a possibility that the U.S. to reconsider joining the Rome Statute after Obama and Trump took the office after President Bush, yet until present, such probability remain unknown (Peruccio, 2013; Willems, 2009). 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 1422 and 1487, the U.S. uses Article 98(2) of the Rome Statute to prevent its current or former Government officials, military or other nationals from being exposed to the ICC jurisdiction (Roscini, 2006).

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 as stated under Article 98(2) of the Rome Statute. 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 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 (Bogdan, 2008; Jain, 2005; Kreß & Kaul, 1999). 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 civilians (Fleck, 2013; Rosenfeld, 2003; Scheffer, 2005) 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 as stipulated under Article 31(1) of the VCLT (Zappala, 2003); to prevent the impunity of the crimes under the ICC jurisdiction notwithstanding of being the court of the last resort as mentioned in the Preambles and Articles 1 and 17 of the Rome Statute. 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* ruled that Senegal had violated its obligation 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.

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 (Wilt, 2005). 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 (Harris, 1986; *Trials of the Major War Criminals Before the International Military Tribunal*, n.d.). 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 BIAs (Akande, 2004). 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 (Commission, 1966; Villiger, 2009), 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* (Fitzmaurice, 2003). However, some international law scholars, like Alina Kaczorowska 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 (Alina, 2010). 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. Nonetheless, 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, the 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. For instance, there are 142 Parties to the Genocide Convention 1948, including almost all the AU Members, Sudan as well as the U.S, 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*.

In addition, the ICJ Advisory Opinion in the *Reservations to the Genocide Convention* Case 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* (Meron, 1995). 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 (Plessis & Gevers, 2011; Sluiter, 2010).

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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