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**RESEARCH TOPIC:**

ANALYSIS OF ARTICLE 98 OF THE ROME STATUTE ON ITS IMPACT IN THE  
GLOBAL FIGHT AGAINST IMPUNITY.

SUBMITTED BY

**ABEL NDLOVU: R122102B**

**SUPERVISOR: MR. B. DUBE**

**2016**

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.....

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.....

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## **DEDICATION**

This one is for you my Father and best friend “Jabulisa Ndlovu”, thank you for bringing me into this world, support you gave me and most importantly for the sacrifices you made in order for me to obtain this degree. May the Lord be with you in all your endeavors and may you be the same light you were to me, to my siblings.

Above all, this is to all the victims of injustices and atrocities in Africa and the world over, you are the inspiration of this research, the time to end impunity and acquire international criminal justice has come.

## **ABSTRACT**

*International criminal justice system thrives and survives on state cooperation. In order to end impunity and pursuant to the principles of individual criminal accountability and individual criminal responsibility, states are obliged to arrest and surrender suspects within their territories or in their custody or control in terms of Article 86 and 87 of the Rome statute. State cooperation with the ICC is peremptory, since it is the major weapon the court can use to bring the suspects to trial since the court does not have police force or service of its own to arrest and bring suspects before the court. States parties must co-operate fully with the ICC in its investigations and prosecutions of crimes within the jurisdiction of the court in terms of Article 86 of the Rome statute. Non state parties may be invited to provide assistance to the ICC in terms Article 87(5) (a) of the Rome statute. Article 89(1) provides that the ICC may request arrest and surrender of a person from any state on the territory of which the suspect may be found and shall request the cooperation of that state. The aforementioned provisions should be read mutatis mutandis with the provisions of Article 27 of the Rome statute whose provisions seek to remove impediments that may hinder the full cooperation of states with on the pretext of official and personal immunity. Article 27 states that there are no immunities that may hinder the court from exercising its jurisdiction on any person on the basis of official and personal immunity. The defense of immunity has grown over the years especially with African states in particular the recent cases of Uhuru Kenyatta (Kenya) and Al Bashir (Sudan) where African states requested a deferral from the United Nations Security Council on the basis that they were seating presidents and could not be prosecuted. These aforementioned provisions go a long way in promoting cooperation with the court. It is however, the provisions of Article 98 of the Rome Statute which seriously impact on state cooperation as it prohibits the court from compelling a state to surrender any person or property. which may cause state requested to invoke immunity or protection of the person of the person in terms of its obligations in terms of its obligations in bi-lateral agreements or International*

*agreements. This research assesses the impact of Article 98 of the Rome statute to the state cooperation.*

## **ACRONYMS**

<b>BIA</b>	Bilateral Immunity Agreement
<b>ICC</b>	International Criminal Court
<b>ICTR</b>	International Criminal Tribunal of Rwanda
<b>ICTY</b>	International Criminal Tribunal of Yugoslavia
<b>UN</b>	United Nations
<b>UNSC</b>	United Nations Security Council
<b>USA</b>	United States of America
<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>SOFAs</b>	Status of Forces Agreements

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## CHAPTER ONE

### 1.1. INTRODUCTION

State cooperation under international law entails active participation of states in the implementation and enforcement of international laws, customs and rules and judgments. International criminal law as a new phenomenon evolving in the field of international law is no exception to the need for state cooperation. The objectives of the international criminal justice system are enforcement of individual criminal responsibility, accountability and ending global impunity. However, the efficiency of the international criminal justice system is imbued in states cooperation.<sup>1</sup>The consensual nature of international law makes state cooperation a pivotal principle in the enforcement of international law. Owing to the lack of policing agencies at international law, states become important players in maintaining the integrity and effectiveness of international institutions. State cooperation is a vehicle for arresting, investigating and surrendering individuals that are meant to appear before the court. This research, explores the doctrine of state cooperation in relation to the provisions of Article 98 of Rome statute, taking into account the inherent conflict between duties of states to comply with obligations to arrest and surrender suspects to the international criminal court on one hand and that of honouring and respecting bi-lateral agreements entered with other states on the other.

The world continues to be confronted with shocking atrocities constituting genocide, crimes against humanity and war crimes mainly perpetuated by heads of states, and government high ranking officials. In most instances domestic institutions have failed to prevent or punish offenders. The widespread atrocities invoke the need for international criminal justice to enforce individual criminal accountability, responsibility and give victims of atrocities justice from the perpetrators. The *Nuremberg* and Tokyo military tribunals were the first international criminal tribunals in the history of mankind and, their decisions have played a crucial role in the development of international criminal

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<sup>1</sup> A. Aust *"Handbook of International Law"* ( 2010), 3

law.<sup>2</sup>These military tribunals paved way to the establishment of the *Adhoc* tribunals in Rwanda and Yugoslavia which were established by the United Nations Security Council (UNSC) under Chapter VII of the United Nations Charter. <sup>3</sup>These *Adhoc* tribunals were meant to do justice and help maintain peace and security. The adoption of the tribunals was done under resolutions 827 and 955.<sup>4</sup> The resolutions 827 and 955 of (1993 and 1994), bound all state parties to the United Nations (UN) to cooperate with the tribunals.<sup>5</sup>

## 1.2. BACKGROUND

The *Adhoc* tribunals were established by the UNSC through resolutions. The provisions of the resolutions establishing the *Adhoc* tribunals which governed cooperation were peremptory and, they made cooperation of states with the international tribunals a mandatory obligation for all states. States were bound to comply with request for assistance issued by the trial chamber.<sup>6</sup> However, the resolutions appear to have referenced in general the duty of state cooperation, this duty is however, extensively referenced in the provisions of the statutes establishing the tribunals.<sup>7</sup> Articles 28 and 29 of the statutes establishing the International Criminal Tribunals of Yugoslavia (ICTY) and that of Rwanda (ICTR) emphasizes on the duty of states to cooperate with tribunals.<sup>8</sup>The duty of cooperation in the statutes of the ICTY and ICTR included locating suspects, investigations, and arrest but also the surrender of the accused person to the tribunals. The provisions of the statutes however, cemented what had already been provided for in terms of the resolutions with regards to state cooperation with the tribunals.

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<sup>2</sup> Y. Aksar *implementing international humanitarian law, from the Ad Hoc tribunals to a permanent International Criminal Court*, (2004).43

<sup>3</sup> *United Nations Charter*

<sup>4</sup> Y. Aksar (n2above)18

<sup>5</sup>D. Stroh *state cooperation with international criminal tribunals for the former Yugoslavia and for Rwanda* (2001) Vol 5 *Max Planck UNYB* ,2

<sup>6</sup> *United Nations Resolution 827(1993) and 955,(1994)*

<sup>7</sup> Stroh (n5 above)5

<sup>8</sup>*Statute of the International criminal tribunal of former Yugoslavia (1993) and Statute of the international criminal tribunal of Rwanda (1994)*

State cooperation under the provisions of Articles 28 and 29 of the statutes that established ICTY and ICTR respectively have a two pronged application. An analysis of the provisions of Article 28(1) and 29(1) appears to have a binding effect on all the states parties to the United Nations Charter to cooperate with tribunals.<sup>9</sup> However, analysis of Article 28(2) and Article 29(2) of the same statutes appears to be pointing out to individual states cooperation in accordance with the case.<sup>10</sup> The tribunals were faced with a lot of criticism from the individuals who appeared before them. The legality of the institutions, primacy over domestic court jurisdiction and their impact on the sovereignty of states was questioned.<sup>11</sup> The challenges emanating from these tribunals proved the need for a permanent criminal court established in terms of a treaty to advance the principles laid by the tribunals.

Owing to the challenges faced by tribunals a permanent international criminal court was mooted. The international criminal court was established in 1998 at the Rome conference unlike the tribunals which were established by the UNSC, the ICC is treaty based. State cooperation under the Rome statute is enshrined in the provisions of Article 86.<sup>12</sup> The provisions of Article 86 appear to only bind state parties to the statute to cooperate with the court instructions. The provisions of this article are treaty based and not resolution based. State cooperation under the new structure is now defined by the Vienna convention on law of treaties (VCLT).<sup>13</sup> The court can also proceed by way of Article 87 of the Statute in seeking judicial assistance thus, it may request any state not a state party to the statute for assistance.<sup>14</sup>

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<sup>9</sup> Stroh (n5 above)6

<sup>10</sup> Stroh (n5above)6

<sup>11</sup> *Defense Motions (Jurisdiction of the Tribunal, Principle of Ne-Bis-in-Idem, Form of the Indictment), Dusko Tadic, case No: IT -94-1-T (23 June 1995) (hereinafter Defense motions) cited in Y. Aksar implementing international humanitarian law, from the Adhocs tribunals to a permanent International Criminal Court, 2004. 25*

<sup>12</sup> *Rome statute, 1998*

<sup>13</sup> *Vienna Convention on the Law of Treaties 1969*

<sup>14</sup> *M, Benzig, U.S bilateral non-surrender agreements and article 98 of statute of the international criminal court: an exercise in the law of treaties (2004) 16*

However, owing to challenges faced during negotiations in Rome and the reservations of some states in being part of the court, Article 98 was incorporated.<sup>15</sup> Article 98 appears to be a defence for states not to cooperate with court on the basis of Bilateral Immunity Agreements (BIAs) which they would have entered into. The effect of Article 98 is that existence of a bilateral immunity agreement suspends the proceedings before the court hence a breeding ground for impunity.

Pursuant to Article 98 states such as the United States of America (USA) have enacted legislation which prohibits cooperation with the International Criminal Court.<sup>16</sup> In its campaign that began in 2002, the USA requested both states and non-state parties to the Rome Statute to enter into BIAs pursuant to Article 98(2), thereby sheltering its nationals from the co-operation regime of the Court<sup>17</sup>. Statistics have proven that USA has since in the period between 2003 and 2006 signed 100(hundred) or plus BIAs with state and non-state parties to the ICC.<sup>18</sup>

### **1.3. PROBLEM STATEMENT**

Since the International Criminal Court depends on state co-operation in respect of investigations, arrest and surrender of suspects, protection of witnesses and evidence, it becomes imperative to assess the impact of the (BIAs) on the operations of the court. This research traces the extent to which the provisions of Article 98 impacts on the efficiency and effectiveness of the ICC .it is also important to assess the best method to improve or preserve state co-operation in light of Article 98 ,in order to fulfil the objectives of international criminal justice and accountability .the research also suggest the ways in which the ICC can properly function and the risk posed by Article 98 of the Rome to the global fight against impunity.

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<sup>15</sup> *Rome statute 1998*

<sup>16</sup> *American service members' protection act of 2002, sec. 2004. [22 u.s.c. 7423]*

<sup>17</sup> *W. A Schabas, International Law Association Berlin Conference, International Criminal Court, 2004. 12*

<sup>18</sup> *C.M. Ribando "Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America" (2006) Congressional Research Services 5*

## 1.4. OBJECTIVES

- To illustrate the importance of state cooperation in the global fight against impunity in international criminal justice
- To interpret the provisions of Article 98 of the Rome Statute,
- To assess the impact of article 98 of the Rome statute to the effectiveness of the ICC in the fight against impunity.
- To proffer recommendations on the proper approach in interpreting Article 98 of the Rome Statute with respect to state cooperation.<sup>19</sup>

## 1.5. DEFINITION OF TERMS

### 1.5.1. State cooperation

This is a customary international law principle that requires states to assist international bodies that established by treaties that they are party to. It is an effective tool that ensure the effective performance of international bodies.<sup>20</sup>

### 1.5.2. *Rationae materiae*

This is immunity which associated with the functions of the office which an individual is occupying.<sup>21</sup>

### 1.5.3. *Rationae personae*

This is immunity attached to one's personality by virtue of being high ranking state official.<sup>22</sup>In most states heads of state and government are immune to criminal prosecution during their term of office. This principle has been used by the African states and the African union as a defense against initiating criminal proceedings involving seating presidents in the Kenyan-ICC case of Uhuru Kenyatta and Sudan- ICC case of Al Bashir.

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<sup>19</sup> Article 98 of the Rome Statute 1998

<sup>20</sup>G. A. Knoops et al , "The Duality of State Cooperation Within International and National Criminal Cases"(2006)Vol 30 Fordham International Law Journal ,261

<sup>21</sup> Dube. B "trials of high ranking officials of states: whether immunity is an exception to international criminal accountability in the 21st century?" (2014) Vol 5 International Journal of Politics and Good Governance,2

<sup>22</sup>Dube. B (n21above)2

#### **1.5.4. Bilateral immunity agreements**

They refer to agreements that states enter into in pursuance of Article 98 of the Rome statute. They require states parties to them to consult each other before surrendering a citizen of another that is wanted by the ICC to the ICC.<sup>23</sup>

#### **1.5.5. State sovereignty**

This refers to the right of states to have primary responsibility in all matters that occur within its territorial boundaries.<sup>24</sup> State sovereignty cannot be interfered with unless the state concerned has failed to protect its citizen, the UNSC can invoke Chapter **VII** of the United Nations Charter and interfere under the doctrine of responsibility to protect.<sup>25</sup>

#### **1.5.6. Adhoc tribunals**

These are international criminal tribunals' established by the United Nations Security Council, adopted under resolutions 827 and 955.<sup>26</sup> The establishment of the ICTY and ICTR followed the need to afford the victims of atrocities with justice and, the need for perpetrators atrocities to account. These were also used as peace and stability measures.<sup>27</sup>

#### **1.5.7. International criminal court**

A permanent international criminal court which is treaty based. It is established in terms of the Rome Statute which prescribes the court's jurisdiction and powers.<sup>28</sup> It plays a role of complementing domestic courts. It only deals with crimes that are sanctioned by the statute. It does not have jurisdiction to deal with matters that occurred before its existence.

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<sup>23</sup> A. Rosén et al "Article 98 Agreements: Legal or Not?"(2007)2

<sup>24</sup> J.C. Barker ,*International law and international relations* (2003) xii

<sup>25</sup> Article 2.4 United Nations Charter

<sup>26</sup> Y. Aksar(n2above)18

<sup>27</sup> Y. Aksar (n2above)18

<sup>28</sup> Rome statute 1998



### **1.5.8. Complementarity**

A customary international law principle that defines the role of international criminal tribunals as that of complementing domestic jurisdictions.<sup>29</sup> International tribunals are not courts of first instance but those of last resort that, deal with matters which states have failed prosecute or are not willing to prosecute. It is closely related to the principle of exhaustion of local remedies which principle, is premised on the rationale that before proceedings are brought before an international body, the state concerned must have had the opportunity to remedy the matter through its domestic system.<sup>30</sup>

### **1.5.9. Rome statute**

A treaty that establishes the International criminal court. It was adopted in 1998 at the Rome conference. It prescribes the jurisdiction of the court, its arms, functions and the nature of crimes which fall under the jurisdiction of the court.<sup>31</sup>

### **1.5.10. *Pacta sunti servanda***

A customary international law principle that is used as a tool of interpreting treaties and obligations of parties in a treaty. It has been codified in Article 26 of the Vienna Convention on the Law of Treaties. The principle states that treaties bind parties to them and must be performed in good faith.<sup>32</sup>

## **1.6. METHODOLOGY**

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<sup>29</sup> W.A. Schabas "An Introduction to the International Criminal Court"(2007)174

<sup>30</sup> *Jawara v the Gambia* AHRLR (2000) 107

<sup>31</sup> Public Information and Documentation Section Registry, International Criminal Court "Understanding the International Criminal Court" 3

<sup>32</sup> Vienna Convention on the Law of Treaties 1969

This paper shall employ a desktop study which involves use of secondary information such as articles and journals that are available in the library on the issue. Furthermore, this paper shall rely on doctrinal analysis of the principles evolving around the issues of state cooperation in international criminal justice. The author will also use a descriptive analysis on the provisions of Article 98 of the Rome statute. This paper shall also incorporate a case study of the United States of America and bilateral immunity agreements pursuant to Article 98 of the Rome Statute. Lastly direct observations of events unfolding shall be used in this research.

## **1.7. LITERATURE REVIEW**

The establishment of the International Criminal Court (ICC) and adoption of the Rome statute establishing the court followed, the need for international criminal justice and a treaty based permanent international criminal court. Benzig argues that it has become a truism to states that state cooperation is essential to the success of the International Criminal Court given that, unlike domestic courts international courts have no enforcement agencies to rely on.<sup>33</sup> Benzig's view appear to be persuasive as the same view is observed by Aust who argues that, the effectiveness of the international criminal justice is imbued in the doctrine of state cooperation.<sup>34</sup>

Stroh argues that the provisions of the statutes establishing the International Criminal Tribunals of Yugoslavia and Rwanda relating to state cooperation had a two pronged approach.<sup>35</sup> In his view the statutes of the tribunals reinforced the resolutions of the Security Council and bound all state parties to the United Nations. He argues further, that paragraph one to the provisions related to all states whereas paragraph two related to specific states party to the incident.

In support of Stroh's view Benzig argues that the provisions Article 86 of the Rome statute relating to state cooperation unlike those of the statutes are treaty based, governed by treaty law as opposed to those which are resolution based. Their argument

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<sup>33</sup> *Benzig (n14 above) 15*

<sup>34</sup> *Aust (n1 above) 3*

<sup>35</sup> *Stroh (n5 above)6*

appear to invoke the doctrine of *pacta sunti servanda* central to law of treaties and state obligation.

Beckman and Butte argue that, the law of treaties as set out in the VCLT, contains the basic principles of treaty law, the procedures relating to how treaties become binding on states and principles for interpreting treaties.<sup>36</sup>

Aksar argues that the provisions of Article 98 were incorporated as a result of challenges raised and reservations made by states such as USA on the criminal jurisdiction of the court and state sovereignty.<sup>37</sup> This explains why USA is an active participant in the signing of BIAs pursuant of Article 98.

Fleck as cited in Benzig argues that Article 98 is an exception to the duty to cooperate and surrender a person to the court.<sup>38</sup> Fleck's view appear to suggest that Article 98 forms a basis for a defence for states not to cooperate on the pretext of Bilateral Immunity Agreements.

Schabas argues that the USA has embarked on a campaign to shelter its citizens from the International Criminal Court engaging both state parties and non-state parties.<sup>39</sup>

Crawford argues that the Agreements undermine the purpose of the ICC and are contrary to the International Law of Treaties.<sup>40</sup> Crawford's view appears persuasive as Article 98 appears to be creating a ground for states to deviate from their international obligations under the Rome statute.

This research seeks to consolidate the ideas raised by the above mentioned scholars and more particularly explaining on the need for unhindered state co-operation. It also

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<sup>36</sup> R. Beckman and D. Butte, *Introduction to International Law*(2010)3<https://www.ilsa.org/jessup/intlawintro>

<sup>37</sup> Aksar (n2 above) 50

<sup>38</sup> D, Fleck "Are military personnel exempt from international criminal jurisdiction under status of forces agreements"? Cited in M, Benzig , *U.S bilateral non-surrender agreements and article 98 of statute of the international criminal court: an exercise in the law of treaties* (2004)17

<sup>39</sup> W. A Schabas, *International Law Association Berlin Conference, International Criminal Court, 2004*

<sup>40</sup> J. Crawford, P. Sands and R. Wilde, *Opinion on Bilateral Immunity Agreements* (2003)cited in J. Dietz *protecting the protectors: can the united states successfully exempt u.s persons from the international criminal court with u.s. article 98 agreements?*(2004)4

explains that state co-operation is an indispensable variable in international criminal justice process and procedure.

## **1.8. SYNOPSIS OF CHAPTERS**

### **1.8.1. Chapter One**

This is an introductory chapter which sets out the content and structure of the research. This chapter sets out the focus of the research or the problem statement, the aims and objectives of the study and literature review.

### **1.8.2. Chapter Two**

This chapter illustrates the importance of state cooperation in the global fight against impunity in international criminal justice.

### **1.8.3. Chapter Three**

This chapter gives an operative interpretation of the provisions of Article 98 of the Rome Statute

### **1.8.4. Chapter Four**

This chapter explores the impact of Article 98 of the Rome Statute on the effectiveness of the ICC

### **1.8.5. Chapter Five**

This chapter summarizes and proffers recommendations on the proper approach to interpreting Article 98 with respect to state cooperation<sup>41</sup>

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<sup>41</sup> *Rome Statute ,1998*

## **CHAPTER TWO**

### **2.0. STATE COOPERATION AND ITS IMPORTANCE UNDER THE ICC**

#### **2.1. Introduction**

The arrest process lies at the very heart of the criminal justice process and, unless the suspects are arrested and surrendered to the court, there will be no trials, no development of the law by the courts and ultimately, no international criminal justice.<sup>42</sup> The existence of state sovereignty under international law hinders the full function of international bodies within the borders of states. It flows from the lack of policing mechanisms that the ICC can only enjoy and exercises its jurisdiction when states have cooperated and surrendered individuals for trial. Non-cooperation by states with regards to investigations, arrest and surrender of the suspects required by the ICC renders the ICC access to suspects a nightmare. This chapter analyses the importance of state cooperation in the global fight against impunity and how state cooperation in arrest, investigation and surrender is key to the operations of the ICC. Furthermore, this chapter draws a comparative analysis of the nature of obligation to cooperate with the International Criminal Tribunals which exists under the ICC and that which existed under the Adhoc tribunal and military courts.

#### **2.2. History of international criminal Law and the development and Establishment of international criminal justice system.**

The growth of atrocities directed towards humankind and the perpetual growth of impunity of perpetrators of such atrocities, triggered the need to foster international criminal justice to be inevitable. The birth of international criminal follows the need for individual accountability and responsibility on the perpetrators of most heinous crimes against humankind. The international criminal justice system developed as a pillar that concerned itself with complementing and filling in gaps that exist with domestic jurisdictions.

The first International Criminal Tribunals in the history of mankind were the Nuremberg tribunals popularly known as the military tribunals which were established after the

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<sup>42</sup>Gavin Ruxton statement cited in L.Reydams, etal "International Prosecutors" (2003)647

world war two. Though known as the “**victor’s court of justice**”, military tribunals played a crucial role in the birth of international criminal law.<sup>43</sup> These tribunals were established by those who had won the war in order to try those that were responsible for the war. It was after fifty years since the military tribunals laid down the possibility of international criminal justice when the UNSC established the ICTY and the ICTR, that it could be said that an international law regime had evolved.<sup>44</sup> The *Adhoc* tribunals (ICTY and ICTR) were established pursuant of Chapter VII of the United Nations Charter<sup>45</sup> through resolutions 827<sup>46</sup> and 955<sup>47</sup>. These *Adhoc* tribunals were established as a measure pursuant of peace and security, making sure that perpetrators of most serious crimes are brought to justice.<sup>48</sup> Since the *Adhocs* were established by what was regarded as a political body (UNSC), they faced a huge criticism from the individuals who appeared before them. Their legality and, impact on the sovereignty of states as observed at international law was.<sup>49</sup> The primacy of tribunals over the national courts, and the subject matter of their jurisdiction were questioned.<sup>50</sup> With challenges facing the tribunals, the need for a permanent international criminal court established in terms of a treaty to advance the principle which the *Adhoc* tribunals had laid down became evident.

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<sup>43</sup> Y. Aksar (n2above)45

<sup>44</sup> R .Cryer *etal*, *international criminal law and procedure* (2011)3

<sup>45</sup> *United Nations Charter 1945*

<sup>46</sup> *United Nations Security Council Resolution 827/1993 on the establishment of the International Criminal Tribunal of Yugoslavia.*

<sup>47</sup> *United Nations Security Council Resolution 955/1994 on the establishment of the International Criminal Tribunal of Rwanda*

<sup>48</sup> A. Siebert-Fohr , “the relevance of the rome statute of the international criminal court for amnesties and truth reconciliations” (2003) Vol 7 *Max Planck UNYB* 554

<sup>49</sup> *Defense Motions (Jurisdiction of the Tribunal, Principle of Ne-Bis-in-Idem, Form of the Indictment)*, Dusko Tadic, case No: IT -94-1-T (23 June 1995) (hereinafter *Defense motions*) cited in Y. Aksar *implementing international humanitarian law, from the Adhocs tribunals to a permanent International Criminal Court*, 2004. 25

<sup>50</sup> Aksar (n2above)25

Following the inadequacies of the *Adhoc* tribunals to address the challenges emanating with individuals appearing before them a treaty based and Permanent International Criminal Court was mooted. The ICC was established pursuant to the adoption of the Rome statute by the statesmen in France 1998. The jurisdiction of the court is extensively discussed in paragraph 2.3 of this paper.

### **2.3. The Evolution and jurisdiction of the ICC**

The establishment of the ICC followed the challenges that emerged from the *Adhoc* Tribunals and, the need to consolidate and develop further the jurisprudence developed by these Tribunals. Those who appeared before the *Adhoc* tribunals viewed them as political bodies as compared to judicial ones since they were established by the UNSC and not by a treaty.<sup>51</sup> It followed from these challenges that the need for a Permanent International Criminal Court established through a treaty became inevitable. Owing to the need of permanent international criminal court, the ICC was established in 1998 with the Adoption of the Rome statute by statesmen at Rome. The ICC is a court of last resort which plays a role of complementing domestic courts in the prosecution of international crimes.<sup>52</sup> The domestic courts bear the primary responsibility for investigating and prosecuting international crimes before they are referred to International institutions and if referred the ICC is dependent on the state cooperation to investigate and surrender.<sup>53</sup> The jurisdiction of the ICC is provided in terms of Articles 11 to 15 which Articles shall be extensively analyzed in this chapter.<sup>54</sup>

Article 11 of the Rome statute is premised on the principle of non-retrospective application of the law which principle, sanctions against retrospective operation of the law in favour of a prospective operation. Article 11 states that the court shall not have jurisdiction on crimes committed prior to the entry into force of the Rome statute. However, there is an exception to this principle in terms of subparagraph two of the Article 11 which provides that states may make declarations in terms of Article 12(3) of

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<sup>51</sup> Aksar (n2above)25

<sup>52</sup> R. Cryer (n45above)82

<sup>53</sup> B. Van Schaack "State Cooperation & the International Criminal Court: A Role for the United States", (2011) 1

<sup>54</sup> Rome statute 1998

the Rome statute granting jurisdiction to the court on matters that occurred prior to the courts' existence.

Article 12 of the Rome statute appears to bear a two pronged approach to the jurisdiction of the ICC. The first stage to the application of Article 12 is that the court enjoys jurisdiction over all states that are party to the statute. This first stage appear to premised on the notions of Article 26 of the Vienna Convention on the Law of Treaties codifies the doctrine of *pacta sunti servanda* which states that treaties bind parties to them and must be performed in good faith.<sup>55</sup>The second stage to the application of jurisdiction in terms of Article 12 is when a non-state party makes a declaration that empowers the court to exercise jurisdiction in its territory and promises to fully cooperate. The second stage appears to be premised on the notion that international law is consensual and states have a choice to bind themselves to international law or not to be bound.

Article 13(b) of the statute empowers the Security Council to make referrals to the court.<sup>56</sup>The United Nations Security Council acting under the provisions of chapter VII of the United Nations Charter. A referral by the in terms of Article 13(b) binds the state concerned even if such a state is not a party to the Rome statute this obligation flows directly from the states' obligation under the united nations charter. The use of resolutions by the Security Council shall be analyzed below in relation to state cooperation. In 2005 through resolution 1593 the Security Council referred to the ICC the Omar Hassan Ahmad Al Bashir <sup>57</sup>situation in Darfur Sudan. <sup>58</sup>

Article 14 of the Rome statute empowers the state parties to make referrals of situations that are within the courts' jurisdiction. This referral shall be accompanied by relevant documentation that state clearly the circumstances and the evidence to be relied upon

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<sup>55</sup> *Vienna Convention on the Law of Treaties 1969*

<sup>56</sup> *Rome statute 1998*

<sup>57</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09*

<sup>58</sup> *United Nations Security Council Resolution 1593/2005 on the situation in Darfur Sudan.*



by the prosecutor in making a decision to prosecute. This Article was employed in the case of Comoros of 2013 where the matter was referred to the ICC for investigations.<sup>59</sup>

Article 15 of the Rome statute empowers the prosecutor of the ICC to institute investigations *proprio motu*. The prosecutor can initiate proceedings against a state in his or her own accord should she or he consider the circumstances in that state to be serious. This article requires the prosecutor to thoroughly analyze evidence before presenting such evidence to the pre-trial chamber for consideration. Article 15 was invoked in the Kenyan situation against the Kenyan officials.<sup>60</sup>

#### **2.4. State cooperation under international law**

The decisions, orders and requests of an International Tribunal can only be enforced by others, namely national authorities. Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants; it cannot seize evidentiary material, it cannot compel witnesses to give testimony, it cannot search the scenes where crimes have been allegedly committed.<sup>61</sup> An analysis of this statement is a prima facie indication that state cooperation is the most valuable tool or mechanism that drive the function of international bodies. The existence of state sovereignty in international law hinders the function of international bodies without the cooperation of states international bodies would be a *"pie in the sky"*.

Without state cooperation the ICC would be a wholly ineffective Court which is capable of making no more than empty gestures in the face of appalling atrocities being

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<sup>59</sup> *Referral of the "Union of the Comoros" with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip, requesting the Prosecutor of the International Criminal Court pursuant to Articles 12,13 and 14 of the Rome Statute^ to initiate an investigation into the crimes committed within the Court's jurisdiction, arising from this raid.*

<sup>60</sup> *The Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02/11*

<sup>61</sup> *Antonio Cassese, President, International Criminal Tribunal for the former Yugoslavia, address to the United Nations General Assembly, 7 November 1995*

committed.<sup>62</sup> The failure of the ICC would be a great blow to international criminal justice and the victims of the atrocities. Therefore state ought to cooperate at all times with the ICC in order boost the court's operations.

## **2.5. State cooperation under the international criminal tribunals**

Issues surrounding the cooperation of states with international criminal tribunals appear to back date to the time of the *Adhoc* tribunals and the birth international criminal law. The *Adhoc* tribunals were established as a consequences to the actions of the UNSC acting under Chapter VII which relates to peace and security. The tribunals were established through Security Council resolutions and later on cemented with statutes that governed and conferred them with jurisdiction.

The resolutions that established the two tribunals of ICTY and ICTR prescribed the nature of state cooperation required from states for the court to be able to exercise its functions. These resolutions provided that all state parties shall cooperate with the request for assistance by the tribunals. The use of all states shall shows that the obligation was directed to all the members of the United Nations and the directive was mandatory rather than directory.

Under the statutes of the ICTY and ICTR state cooperation was provided for under Articles 28 and 29.<sup>63</sup>The application of state cooperation under these two statutes and Articles appear to have had a two pronged approach. The first paragraph being a directive to the general United Nations members and the second paragraph being directed to the state concerned in the matter to comply with the court.<sup>64</sup>State cooperation under the tribunals appear to be different to one under the Rome statute which is treaty based and, specifically directed to state parties to the Rome statute.

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<sup>62</sup> Lionel Yee, *Head of the Singapore delegation to the Preparatory Committee on the Establishment of an International Criminal Court, "Finding the Right Balance", 5 The International Criminal Court Monitor (August 1997), p. 14*

<sup>63</sup> *Statute of the International criminal tribunal of former Yugoslavia (1993) and Statute of the international criminal tribunal of Rwanda (1994)*

<sup>64</sup> *D. stroh (n5above)254*

## 2.6. State cooperation under the ICC

State cooperation appear to have been central to the negotiations and drafting of the Rome statute to try and minimize state chances of paralyzing the Permanent International Criminal Court. The Rome Statute of the International Criminal Court' ("Rome Statute") recognizes the importance of State cooperation to the effective operation of the ICC-an entire Part of the Rome Statute is dedicated to matters of international cooperation and judicial assistance.<sup>65</sup> State cooperation under the ICC is governed by the provisions of Article 86 to Article 102 of the Rome statute. The provisions of Article 86 governs cooperation of state parties to the ICC and the Rome statute. The provisions of article 86 state that state parties shall cooperate with the court on investigations and prosecution of crimes within the jurisdiction of the court. The approach to this provision is that the language deployed is peremptory and mandatory. The mandatory nature of the language suggest that states cannot deviate from this obligation under what so ever circumstances.

The use of peremptory language appear to have been used as a measure to guard against any deviation from compliance which waters down courts effectiveness. The peremptory nature of the language used in Article 86 state parties are bound to cooperate with the court by the doctrine of *pacta sunti servanda*.<sup>66</sup> The nature of state cooperation under the ICC appears different from that which was provided by the resolutions establishing the Adhocs tribunals.

Though the provisions of Article 86 directly deals with cooperation of state parties, cooperation is not only limited to state parties under Article 86. Article 86 is meant for state parties to the Rome Statute. However, in terms of Article 87 the court may request a non-state party to assist in arrest and surrender of an individual and such a state will be bound to cooperate with the request of the court. Another instance for cooperation of non-state party to the court is where that state has granted jurisdiction to the court to investigate and try matters in the states territory under Article 12(3) of the Rome

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<sup>65</sup> V. Oosterveld ,etal "the cooperation of states with the international criminal court"(2002) Vol 25  
Fordham international journal 767

<sup>66</sup> Vienna (n11above) Article 26

Statute. The provisions Article 12(3) clearly point out to the fact that such a state shall fully cooperate with the court without delay, this cooperation is mandatory.

Though it is not arguable that state cooperation is a pillar on which operations of international institutions lie, state cooperation under the ICC is treaty based and on voluntary basis as compared to the one under the Adhoc. Under the *Adhocs* the nature of state cooperation had no regard to subscription to the tribunals but it bound states by virtue of being United Nations members to cooperate with the court in the arrest and surrender of suspects.

## **2.7. Cooperation of non-state parties**

Treaties are binding in principle only on state parties, for non-party states, there is neither harm nor benefit in them according to the general principles embodied in the VCLT the obligation of non-party states to cooperate differs from that of state parties.<sup>67</sup> Article 86 discussed above related to the general obligation to cooperate with the ICC. Article 87 introduces the issues of cooperation by non-state parties to the Rome statute and none cooperation state parties.

Article 87(5) states that the court may request for assistance from non-state parties. The language used in this provision is directory rather than peremptory this flows from the fact that obligation of a treaty cannot bind a third party not a party to the treaty except with their consent.<sup>68</sup> To every general rule there is an exception, treaties can actually bind third parties but this exception is dependent on the express agreement or declaration of acceptance. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.<sup>69</sup>

An analysis on Article 87(5) in relation to Articles 34 and 35 of the VCLT point to the consensual nature of international law. However, a comparative analysis of articles 86

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<sup>67</sup> Z. Wenqi "On co-operation by states not party to the International Criminal Court"(2006) Vol 88 *international review on the Red cross*, 89

<sup>68</sup>Vienna (n12 above)Article 34

<sup>69</sup> Vienna (n12above) Article 35

and 87(5) shows that the obligation of state parties and that of non-state parties is different. The obligation of state parties is peremptory in that there is a requirement of full cooperation with the ICC whereas, that of non-state party is directory in that there is the use of the word “may” leaving their cooperation their own discretion.

Cooperation by non-state parties is also discussed in the provisions of Article 12(3) of the Rome Statute which refers to acceptance of the jurisdiction of the court by non-state party. The provisions of Article 12(3) make cooperation with court peremptory for a state that has accepted the jurisdiction of the court to cooperate with the court without delay. The use of the phrase “without delay point to the importance of state cooperation in the operations of the court in fighting global impunity.

## **2.8. The effect of failure by state parties to cooperate**

Cooperation of state parties to the Rome statute with ICC is essential for the effective function of the ICC. Article 87(7) provides a mechanism in which the court should adopt, should a state party fail to comply with a request to arrest and surrender sent by the court. The provisions of article 87(7) state that if a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.<sup>70</sup>Article 87(7) was invoked by the court against Malawi and Chad on their failure to arrest and surrender the Sudanese president Omar Hassan Ahmad Al Bashir.<sup>71</sup>

The approach to this mechanism is two pronged in that the court can either approach the Assembly of States Parties or the United Nations Security Council. This provision is an indication of the complementarity relationship between the ICC and the United Nations Security Council. The approach of these two bodies only occurs where the

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<sup>70</sup> *Rome statute(n11 above) Article 87(7)*

<sup>71</sup> *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87 (7) of the Rome Statute, ICC-02/05-01/09-139 (Pre-Trial Chamber I), 12 December 2011 [Malawi Decision].*

requested party's' failure hinders the court from exercising its jurisdiction. The decisions of the Assembly of States parties have a binding decision on the concerned state. Whereas, the approach to the Security Council is adopted on the cases referred by the Security Council. The decisions of the Security Council through resolutions binds the members of the United Nations to comply. When the Court's proceedings have been triggered by a referral by the UN Security Council under Chapter VII of the Charter, the cooperation obligations of states parties derive not only from the Rome Statute, but also from the UN Charter, and, this resolution prevail over states obligations under any other international agreement.<sup>72</sup>

Non-cooperation by state parties and the non-state parties to the ICC appears to water down the spirit of the treaty establishing the court and as step backward in the global fight against impunity. The failure of Malawi and South Africa to arrest and surrender to the court the Sudanese president Omar Hassan Ahmad Al Bashir has made the public lose confidence on the effectiveness of the court in bringing justice to the victims of atrocities. The ICC due to states failure to assist in solving the Darfur situation it has turned to a toothless bulldog that is not capable of ending the global impunity and, usher in international criminal justice. This paper argues the importance cooperation with the ICC and how non-cooperation with the court harms the integrity of the court in public eye, furthering impunity of perpetrators of atrocities.

## **2.9. The duty of states to provide national mechanism to facilitate forms of cooperation.**

The ICC plays the complementary role to domestic courts in prosecuting international crime. It follows therefore from this complementarity relationship that the obligation of cooperating with the court can only be successfully implemented if the national mechanism for cooperation are available. Article 88 of the Rome statute states that states Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation. The provision is peremptory making the obligation to be mandatory.

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<sup>72</sup>*Amnesty International "Bringing power to justice Absence of immunity for heads of state before the International Criminal Court" (2010)46*

Article 88 is central to the provisions that relate to cooperation with the ICC. The availability of national mechanism is a measure of facilitating investigations, arrest and surrender to the ICC which has no policing agents nor territory of its own but which relies on the cooperation of states. This article also appear to be related to Article 89 which states that in execution for request to surrender the state shall without delay through its national procedures transmit the person and surrender the person to the court. <sup>73</sup>The words national procedure suggest the national mechanism provided by Article 88. It appears therefore domestic procedures and mechanisms form an essential part of the regime of cooperation by states to with the ICC.

## **2.10. Conclusion**

It appears the cooperation of states lies at the heart of the operations of the ICC. Without cooperation of states aims of the Rome Statute will be watered down especially one that lies in the soul of the statute its preamble, which makes reference to ending the global impunity. There is need for cooperation from both state parties and non-state parties to the ICC and the Rome statute. Without co-operation with the ICC the regime of international criminal law and international criminal justice will be facade. States ought to act in good faith in the interpretation and implementation of the Rome statute a wrong interpretation may paralyze the international criminal court.

This chapter unveiled that state co-operation has always stood as an important tool in the enforcement of international criminal justice since the inception international criminal law. Owing to lack of policing agents and territories of its own, state co-operation appear to be vital tool for that International Criminal Tribunals rely on for investigations, arrests and surrender of individuals. This chapter has highlighted that even in the current regime state cooperation is still an integral part of the operations of the ICC that is why it is emphasis from Articles 86 to 102 to cement its importance.

This chapter has further highlighted the importance of state co-operation to the operations of the court and, how the Rome Statute tries to prevent the deviation of states from co-operating. Article 87(5) has been argued by this chapter as a safety

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<sup>73</sup> *Rome statute(n11 above) Article 89*

valve posed by the Rome Statute against state parties who fail to cooperate. This chapter has shown how in the past the court has enforced the provisions of this Article in order to protect states from watering their obligation under the Rome Statute of cooperating to fight and end impunity.

## **CHAPTER THREE**

### **3.0. AN INTERPRETATION OF ARTICLE 98 OF THE ROME STATUTE**

#### **3.1. Introduction**

The aim of interpretation of conventions and treaties is to try and investigate the true intention of the drafters, giving the treaty a meaning that befits that intention. Individuals responsible with the interpretation should at all times protect themselves from employing a method of interpretation that defeat the intention of the drafters. This chapter investigates and analyses interpretative tools that are available in the interpretation of treaties and conventions as proposed by the Vienna Convention on the Law of Treaties (VCLT).<sup>74</sup> it shall further, propose tool which appear to be an appropriate tools to be adopted in the interpretation of Article 98 of the Rome statute without watering down the spirit of the statute and the true intention of the drafters.

#### **3.2. The role of the courts in the interpretation of treaties**

Courts play the most significant role in the interpretation application of the law especially treaties and in the exercise of this role they must always guide themselves against injustices and, watering down of the treaty they are seeking to interpret and implement. More often courts are faced with difficulties in the implementation and interpretation of treaties especially with regards to the lacunas that exist in laws. The question that normally arises with such scenarios is whether the court has got the power to fill in the gaps that exist in the law or they must apply the as is without additions or alterations. Purist literalists maintain that the very word of the statute must be adhered to.<sup>75</sup> The purist literalist view appear to be premised on the doctrine of separation of power.

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<sup>74</sup>*Vienna Convention on the Law of Treaties 1969*

<sup>75</sup> *E.A Kellaway ,principles of legal interpretation(stautes ,contracts and wills),(1995)138*



Which is a doctrine advocating for the separation of three arms of government. It states that the role of the legislature (treaty drafters) is to make the law whereas, that of the executive is to implement laws and, courts play the role of interpreting the law.<sup>76</sup> However, it appears a blind adherence to this literalist view can water down the real intention of the drafters and, courts should always be ready to depart from the literal view and adopt a more purposive approach to interpretation of statutes. Judicial activism is central in upholding the true will of the parties to a treaty and courts should at all times employ judicial activism in order to achieve justice and in arriving on the true intention of the drafters.

### **3.3. Importance of correct interpretation of Article 98 and the Rome statute**

Interpretation of treaties is arguable the most important part in the application and realization of the spirit and purpose of a treaty. Most importantly treaty interpretation must be done in good faith without watering down that treaty's spirit, through interpretation which does not reflect the true intention of the drafters. Arriving at the legal meaning of a treaty is central in the application of any treaty, this flows from the idea that every law is enacted to remedy a certain mischief and the intention of the drafters is important.<sup>77</sup>

A blind approach to interpretation of treaties and conventions appear to embody the potential of watering down and defeating the real intention of the drafters. This potential has to this end led to formulation and adoption of various rules and, principles of interpretation which guide courts in interpreting treaties. Courts interpret statutes starting from the language used in the drafting of a particular treaty, the pieces of information collected during drafting in order to get to the true intention. This paper however, shall examine all the tools employed by the court in their investigation of what is the true intention of the drafters.

### **3.4. Vienna Convention on the Law of Treaties**

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<sup>76</sup> L .Madhuku ,*An introduction to law in Zimbabwe*,(2010)47

<sup>77</sup> *Madhuku(n3above)*,144

The Vienna Convention on the Law of Treaties (VCLT) has been viewed as the starting point in interpreting and understanding of treaty law. It is the constitutional document that provides for the tools of interpretation of treaties. The VCLT has been viewed as the messiah to the old doctrinal controversies on both the purposes and methods of interpretation.<sup>78</sup> The codification of the interpretative framework in term of Articles 31 to 33 appear to have led to the Articles being recognized as customary international law.<sup>79</sup> Articles 31 to 33 of the VCLT have been viewed by courts as to enunciate in essence generally accepted principles of international law' and thus apply to the interpretation of every international agreement making them .<sup>80</sup> It appears therefore that since Article 98 of the Rome statute is a part of an international agreement, it should be interpreted in accordance with Articles (VCLT). The debate in the interpretation of statutes appear to be hinged on the textual, intention of the parties and teleological views to statutes. Article 31 of the VCLT is headed

### **Article 31, GENERAL RULE OF INTERPRETATION**

*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

*2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

*3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the*

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<sup>78</sup>P. McRae, "The search for meaning: continuing problems with the interpretation of treaties" (2002) vol 33 VUWLR,210

<sup>79</sup> Mcrae (n69above)210

<sup>80</sup>Golder v United Kingdom , (1975) Series A no 18, par 34 as cited in D. Sartori Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights (2014),3

*application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.*

4. *A special meaning shall be given to a term if it is established that the parties.*<sup>81</sup>

Article 31 appears to codify the general canons of interpretation of statutes as shall be discussed in the following paragraphs with regards to each interpretive tool suggested by Article 31. Article 31 appear to list three interpretative methods: the *textual* (or literal) interpretation, relying on the ‘ordinary meaning to be given to the terms of the treaty’; the systemic (or contextual) interpretation, relying on the ‘*context*’ of the terms to be interpreted; *the purposive* (or teleological) interpretation, relying on the ‘object and purpose’ of the international agreement.<sup>82</sup>

### **3.5. The notion of ordinary meaning (textual or literal) interpretation.**

The starting point to Article 31 of the VCLT is that a treaty must be interpreted in good faith in accordance with its ordinary meaning. The textual approach appear to suggest that the true intention of the legislature can only be drawn from the words that the drafters have employed in structuring the treaty concerned. The notion “in good faith in accordance with ordinary meaning” appear to suggest that the courts should take a strict approach in its interpretation of a treaty taking into account the employed language and nothing outside the language employed to get to the intention of the legislature. Importantly Article 31 appear to suggest that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.<sup>83</sup>The notion of “good faith” appear to suggest that interpretation must not water down the obligation of the parties which arises in terms of the principle of ***pacta sunti servanda***. On the other hand the

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<sup>81</sup> *Vienna convention on the Law of Treaties*

<sup>82</sup> *Sartori (n7above)3*

<sup>83</sup> *J. G. Merrill , “Two Approaches To Treaty Interpretation”, Australian International Law,56*

notion appear to suggest that in interpreting a treaty the conclusion reached from the interpretation must not defeat the integrity of the statute.

The textual meaning appear to also that suggest that an interpretation is based on finding the meaning of the text and, not an investigation on the real intention of the drafters. This approach has been viewed as an orthodox approach to interpretation as it is easy to execute.<sup>84</sup>The literal approach also contends itself with absurdity, ambiguous results which defeat the intention of the drafters. It appears the strong problem that might emanate with the employment of the literal view to Article 98 will be to defeat the very essence in which the Rome statute was enacted for which ending the global impunity. If the notion of “good faith” which is stated in Article 31 relates to protection of the integrity of the statute and the institution then, a literal approach to Article 98 appear in consistent with that notion and view.

### **3.6. Contextual approach to interpretation**

This approach is enshrined in the provisions of Article 31(1), it is stated in detail in Article 31(2) (a) (b). Article 31(2) (a) (b) provides that an interpretation of a treaty which is contextual involves the use of the preamble to the treaty, annexes ,treaty made by parties in connection to the conclusion of the treaty, any instrument made by parties in connection to the conclusion of the treaty as an addition to the text.<sup>85</sup>The investigation of the intention of the legislature through the preamble appear to be most favorable approach towards interpretation because preambles usually enshrine the purpose of which the statute is enacted. The term ‘in addition to text’ which is employed and enshrined in Article 31(2) of the VCLT appear to suggest that the contextual approach must not be used independently but in conjunction with the ordinary meaning.

It appears that the contextual approach though it is wider than the literal approach it is an extension of the literal approach. It suggests that, meaning should be derived from the context in which words have been used in a statute. The object of this approach entails courts not only approaching words in their ordinary meaning only but, ordinary

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<sup>84</sup> *McRae (n69above)213*

<sup>85</sup> *Vienna Convention on the Law of Treaties 1969*

meaning as applied to the subject matter.<sup>86</sup> Contextual approach is no more than a more nuanced version of the textual, it concerns itself with revealing only the meaning of the text not the intention of the drafters.<sup>87</sup> Although the contextual approach appear to be wider and rigid its application to Article 98 appear to be more ideal as compared to a literal approach.

### **3.7. Purposive approach to interpretation of article 98**

It is not arguably that the purpose of interpreting a statute is to investigate the true intention of the drafters. It follows therefore that every statute is crafted for a purpose thus, the purpose of the statute underlies the true intention of the drafters. The purposive approach combines all tools of interpretation in its bid to find the true intention of the drafters. Proponent of the purposive approach state that the investigation should begin with the “text, then context, broadly defined, consider evidence contained in preparatory works or other sources, use supposed "rules" as a guide or aid where useful, and examine the subsequent conduct of the parties as evidence of intentions”.<sup>88</sup> Just like contextual interpretation this approach cannot not be used in a manner that exclude other methods of interpretation.

The use of object and purpose in interpreting Treaties aims at resolving ambiguities that arises with vague provisions of statutes. Where the ordinary meaning is ambiguous, using the object and purpose will help to determine which one of two possible meanings is correct, and which one is not.<sup>89</sup> This approach appears as the tool of purification in terms of two conflicting ideas. The provisions of Article 98 appear to be unclear as to how it should be applied.<sup>90</sup> A plain reading of Article 98 relying on its ordinary grammatical meaning appear to provide a defense to state not to cooperate with the ICC. The danger associated with the plain meaning of Article 98 is that it defeats the

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<sup>86</sup> *Kellaway (n66above)72*

<sup>87</sup> *McRae( n69above)215*

<sup>88</sup> *McRae s(n69above)216*

<sup>89</sup> *ULF LinderFalk. “On The Interpretation of Treaties, The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties”(2007) 203*

<sup>90</sup> *Rome statute 1998*

spirit of the Rome statute therefore a purposive approach to the Article is ideal. However, employing a purposive approach to Article 98 appear to be ideal in that this approach combines all forms of interpretive tools and, this approach is not concerned with the meaning of the statute but the true intention of the drafters.

### **3.8. Article 32 of the VCLT supplementary means of interpretation**

This approach is enshrined and expressed in detail in the provisions of Article 32. Article 32 states in detail the material which is considered part of supplementary means of interpretation. This approach just like all other tools provided in article 31 it is not independent of the methods provided in article 31 but it aims at clarifying and validating the results obtained from the methods provided in Article 31. Article 32 makes reference to the use of supplementary means of interpretation, preparatory work of the treaty and the circumstances of its conclusion, as a measure to confirm the meaning resulting from the application of article.<sup>91</sup>

The approach to the use of Article 32 appears to be two pronged in its application. Stage one to the approach of Article 32 seeks to confirm the validity of the result that emanate with the use of Article 31. The second stage to the use of Article 32 is where the results of the interpretation in terms of Article 31, (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

The first stage appear to suggest that although the results may appear to reflect the true intention of the drafters there is need to validate the conclusion. Whereas stage two appear to suggest that ambiguities and absurdities that may rise with the use of other canons of interpretation provided in terms of Article 31 can be remedied by the use of supplementary means of interpretation. Preparatory work in the context of Article 32 refers to the proceedings leading to the drafting and adoption of a treaty by the parties, including the reading of the treaty to parties before adoption. It is with no doubt that preparatory work can shed light to the correct intention of the drafters of the Rome statute in incorporating of Article 98 into the Rome Statute and what is it the true

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<sup>91</sup> *Vienna Convention on the Law of treaties 1969*

meaning and purpose of Article 98. Preparatory work just like circumstances leading to the conclusion of a treaty are equally important because they reveal the true object which led parties to adopt the statute in essence the “true intention” of the drafters.

### **3.9 Scholarly interpretation of Article 98**

The correct meaning to be impleord on Article 98 of the Rome statute has been subject to debate amongst scholars as to what is the true meaning representing the intention of the drafters and, which method of interpretation should adopted. In the opinion of professor Gaeta it is necessary to review the text of Article 98 in order to provide a textual analysis.<sup>92</sup>The textual analysis of article 98 on the face of it concerns what the court may do and not what the states may do.<sup>93</sup> Article 98(1) refers to diplomatic and state immunity whereas Article 98(2) refers to general agreements that require the cooperation of sending state.<sup>94</sup>

It is worth recalling that the original intent of Article 98 agreements was to ensure that Status of Forces Agreements (SOFAs) between the United States and scores of countries would not be compromised and that Americans on official duty could be specially covered by agreements that fit Article 98's terms.<sup>95</sup> The USA's interpretation of Article 98 appears to be that which is to protect all American citizens.

It has been argued also that the interpretation of Article 98 of the Rome statute must be interpreted in light of the preamble of the Rome statute which makes reference to “determination to end impunity for perpetrators of serious crimes”.<sup>96</sup> A textual analysis of Article 98 of the Rome statute and the intent behind it has come to be much debated since the text seem to allow exemption from punishment while the purpose of the Rome

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<sup>92</sup> P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?'(2009), Vol 7 *Journal of International Criminal Justice*, 316.

<sup>93</sup> J.M Iverson , “ The Continuing Functions of Article 98 of the Rome Statute”,(2012),Vol 4 *Goettingen Journal of International Law*,137

<sup>94</sup> Iverson (n92above)137

<sup>95</sup> DAVID J. SCHEFFER “Original Intent at the Global Criminal Court” *Wall Street Journal Europe*. (2002)1, [www.amicc.org/docs/Sept20](http://www.amicc.org/docs/Sept20)

<sup>96</sup> A. Rosén, (n23above)16

statute as a whole is to ban and counteract impunity of perpetrators.<sup>97</sup> It appears therefore that the correct position of interpreting this Article must be a purposive interpretation which directly addresses the spirit behind the Rome statute which is to end impunity.

### **3.10. Conclusion**

The need for a correct interpretation of Article 98 was central to the analysis provided by this chapter. Chapter three of this paper evaluated all interpretative canons that are provided in the VCLT stating their weaknesses and strength and most importantly how the use certain canons may adversely affect the operations of the court and, its aim of ending impunity. The provisions of Article 31 to 32 of the VCLT were used in this evaluation considering that the VCLT has graduated to customary international which is highly recognized in the interpretation of treaties.

This chapter analyzed the provisions of Article 31 which point to the need of treaties being interpreted in “good faith”.it concluded that the term “good faith” clearly supports the notion that the drafter of the Rome Statute could have never at any point intended Article 98 so as to defeat the spirit and purpose of the statute which, is to end the global impunity. It concluded that an interpretation in good faith will that interpretation that contributes to the end of global impunity.

This chapter further analyzed the literal canon of interpretation which in enshrined in Article 31.it concluded that in as much as the literal rule require words to be awarded their ordinary meaning, do so to the provisions Article 98 will prima facie be contrary to the object of the Rome statute and ICC. Literal interpretation produces absurd result contrary to the notion of ending global impunity and reintroduces the customary international principle of state and individual immunity which hinder co-operation an important tool to court operations.

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<sup>97</sup> *Rosén, (n23above)16*



This chapter then analyzed the contextual meaning of Article of Article 98 with reference to the Provisions of Article 31 of the VCLT. It concluded that, in as much as this approach is deal to interpret Article 98 as it encourages the use of the preamble to arrive to the intention of the drafters and, the preamble to the Rome statute is surely the soul to the statute clamoring the need to end global impunity. This recommended that Article 98 must be interpreted in light of the Preamble of the Rome statute which make reference to putting an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.<sup>98</sup> However, this chapter also concluded that this approach is an extension of the literal rule in its broad context.

Lastly things chapter fell in love with the provisions of Article 32 which provide for the purposive approach to interpretation. The purposive approach appeared to be ideal to interpreting Article 98 and was recommended by this chapter as it combined all canons of interpretation to arrive to the intention of the drafter. This point to the purposive approach's bid to arrive at the true intention of the drafters. Thus chapter three was an evaluation of the rules of interpretation in order to arrive at the rule that appear to serve the aim of the Rome statute which is to end impunity and removal of all impediments that hinder co-operation the most important tool to achieving the aim.

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<sup>98</sup> “...most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. **Preamble of the Rome statute of 1998**

## CHAPTER FOUR

### 4.0. THE EFFECTS OF ARTICLE 98 OF THE ROME STATUTE ON THE EFFECTIVENESS OF THE ICC.

#### 4.1. Introduction

Chapter two of this paper stresses the importance of state cooperation under international law and in particular in the global fight against impunity. Whereas chapter three is an operative interpretation of Article 98 of the Rome statute which seek to identify weakness inherent with different types of interpretative tools and, it proposes what can be termed the ideal method to interpret Article 98. This chapter however, explores the impact of the provisions of Article 98 of the Rome statute on the operations of the court. It further, confirms how proves how proves the discovery made in chapter three on the harms associated with interpreting Article 98 in manner not consistent with the object of the Rome statute.

#### 4.2. BIAs pursuant of Article 98, its effect on the ICC Operations

The fear of the unknown consequences of the jurisdiction the ICC appear to have forced many countries not sign and ratify the Rome statute. America is one of the states that have not yet ratified or signed the statute despite being a major player in the negotiation process. Though not a state party and, the law of treaties stating that only state parties to a treaty are subject to that treaty the fear of the ICC has not ceased to exist leading to American pursuit of BIAs pursuant of Article 98.

It appears America has embarked in the use of BIAs as shield to protect its citizens from the ICC, engaging both state and non-state parties to the ICC.<sup>99</sup> This move however, undermines the ICC and is contrary to the Law of Treaties.<sup>100</sup> Notwithstanding compulsory surrender obligations under the Rome statute, it appears African states have suffocated under the pressure emanating from America to enter into BIAs with the

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<sup>99</sup>W. A Schabas, (n17above)5

<sup>100</sup> J. Crawford, (n33above)4

latter pursuant to Article 98.<sup>101</sup> BIAs seeks to bar states concerned in a BIA from transferring through whatever procedure, without the consent of the United States, any 'current or former Government officials, employers (including contractors), or military personnel either to the ICC or to a third state or entity with the purpose of eventual transfer to the ICC without American consent.<sup>102</sup> The fact that America enters into BIAs with intention to provide impunity to a person credibly suspected of having committed a crime within the jurisdiction of the ICC makes the BIAs inconsistent with the Rome statute.<sup>103</sup> The American BIA stance does not only appear to threaten the effectiveness of the ICC but, also violate the principle of equality before the law and contravene the obligations undertaken by State Parties to the Rome Statute.<sup>104</sup>

#### **4.3. Article 98(2) and state cooperation with the ICC.**

The Rome Statute appear to have two overarching objects thus, to bring justice and end impunity to perpetrators of atrocities and grave crimes which are relatively of high magnitude and also encourages states to investigate and prosecute before resorting to the ICC.<sup>105</sup> The Rome Statute creates obligations on the part of state parties to provide the means by which to enforce the powers it provide to the court and binds state parties

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<sup>101</sup> L. Stone and M. du Plessis "The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries" ,303

<sup>102</sup> *The campaign by the United States to cut aid to several African countries that are States Parties to the Rome Statute has put some governments in a dilemma whether to support the Court at the risk of losing financial aid from the United States.*

<sup>103</sup> J Crawford 'The Rome Statute of the International Criminal Court and bilateral agreements sought by the United States under article 98(2) of the Statute: Joint Opinion' 5 June 2003  
[http://www.lchr.org/international\\_justice/Art98\\_061403.pdf](http://www.lchr.org/international_justice/Art98_061403.pdf).

<sup>104</sup> 27 D N Nsereko, "Triggering the jurisdiction of the International Criminal Court", 2004 Vol 4 *African Human Rights Law Journal* 262.

<sup>105</sup> D. Scheffer "Article 98(2) of the Rome Statute: America's Original Intent", (2005) vol 3 *Journal of International Criminal Justice* ,335

to cooperate with the ICC.<sup>106</sup> Article 86 of the Rome statute which is headed as the General obligation to cooperate provide as follows:

*“States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>107</sup>*

The literal and grammatical meaning of the provisions of this Article is clear and unambiguous in extending obligations upon state parties to cooperate with the ICC. The use of the word shall in the provisions changes the complexion of the obligation to be peremptory and, not allowing any derogation by state parties .The provisions of Article 86 appear to be consistent with the spirit and purpose of the Rome statute and the ICC which, is aimed at ending global impunity. Contrary to the provisions of Article 86, the provisions of article 98(2) appear to undermine the obligation provided under Article 86 for state parties to cooperate with the ICC.

Article 98 of the Rome statute which is headed “Cooperation with respect to waiver of immunity and consent to surrender” under sub-paragraph two (2) states that

*“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 a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”<sup>108</sup>*

An analysis on the provisions of this Article suggest that states may derogate from the obligation imposed on them by the provisions of Article 86 to cooperate fully with the court. The existence of a Bilateral Immunity Agreement appear to water away state obligation to cooperate and, any request which may require a state to act inconsistent

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<sup>106</sup> Tan, Jr., Chet J. "The Proliferation of Bilateral Non-Surrender Agreements among Non-Ratifiers of the Rome Statute of the International Criminal Court." (2003)Vol 19 American University International Law Review, 1119

<sup>107</sup> Rome statute 1998

<sup>108</sup> Rome statute(n2 above ) Article 98(2)

with its obligation under Bilateral Immunity Agreements and, calls for the court to suspend proceedings. A broader view or analysis of the article suggest that Bilateral Immunity Agreement take precedence over the inconsistency that may be caused by state failure to act on request under the Rome statute. A further analysis on the provisions of this Article show that the effect of article is not to the state parties or non-state parties but to the court itself as it is the court that is prevented from acting.<sup>109</sup> A plain interpretation of Article 98(2) with the use of the literal approach appear to defeat the spirit of the treaty.

#### **4.4. Effects of Article 98 to the trigger mechanism under Article 13(b) of the Rome statute**

The other mechanism which the ICC may gain jurisdiction to try an individual is through the Security Council referral process. Article 13(b) of the Rome Statute empowers the United Nations Security Council acting under the provisions of Chapter VII of the Charter of the United Nations to refer matters to the court.

#### **Article 13 Exercise of jurisdiction**

*“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:*

*(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or..”<sup>110</sup>*

Since treaties bind only state parties and not non-state parties, this entails that the ICC has no jurisdiction over individuals that are not party to the Rome statute and consequently to the ICC. However, since the purpose of international criminal law is to put end to global impunity Article 13(b) is mechanism that functions as a tool to prevent individuals from escaping accountability. A referral by UNSC is inconsiderate whether a

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<sup>109</sup> *Tan, Jr., Chet J. (n1 above)1125*

<sup>110</sup> *Rome statute 1998*

state is a party to the ICC statute or not but it simple bunch both together regardless of status by virtue of being a member of the United Nations.

However, this paper argues that the existence of Article appears to be a threat to the jurisdiction of the court especially if the court is operating under the provisions of Article 13(b). The existence of a BIA appears as a strong defense and shield for any suspect that has been referred under the trigger mechanism as it only takes the existence of a BIA for the court to suspend proceedings. The effect of Article 98 to the trigger mechanism has a strong bearing to the effectiveness of the court especially with regards to court jurisdiction over non state parties.

#### **4.5. Article 98's Impact on personal and official immunity.**

Two types of international immunity exist under customary international law which render officials of one State immune from another State's jurisdiction: immunity *ratione personae*, or personal immunity and immunity *ratione materiae* or functional immunity. The immunity of heads of states, kings and their ambassadors exist from time immemorial stemming from heraldic principles of kings being untouchable, above the law and not liable to their people or other alliances of the state.<sup>111</sup>The Westphalia Treaty was a symbol that glorified the sovereignty of states and immunity of heads of states. It seems Impunity of perpetrators of worst atrocities in the world and in the history of mankind seems to be deeply rooted in the customary international law principles of *rationae materiae* and *rationae personae* (official and personal immunity).

International criminal justice system thrive to bring an end to this impunity and the Rome statute advocates strongly against immunity of officials from prosecution. In most states government high ranking officials and head of states cannot be prosecuted.th Zimbabwean constitution (2013) in Section 98 protects the president from any prosecution while still in the office.<sup>112</sup>The defense of immunity that arises as a result of office has made the prosecution of high ranking officials the most difficult task on both

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<sup>111</sup> G. Robertson "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial",(2005) Vol 38 Cornell International Law Journal,650

<sup>112</sup> Constitution of Zimbabwe amendment no.20 of 2013

domestic and international tribunals.<sup>113</sup>The recent cases of **Prosecutor v Uhuru Kenyatta**<sup>114</sup>and **prosecutor v Albashir**<sup>115</sup>have proved how functional immunity still stands as strong pillar in shielding government officials from accountability and prosecution as African states argued that they were sitting president and could not be prosecuted. Since international criminal justice aims at ending impunity the drafters of the Rome statute, realized the importance of limiting the defense of immunity of heads of states and government high ranking officials by taking it away. The provisions of Article 27 of the Rome statute which are headed irrelevance of official immunity appear to uplift the privileges associated with the immunities of both office and that of a person.

### **“Article 27**

#### **Irrelevance of official capacity**

**1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.**

**2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”<sup>116</sup>**

The provisions of article 27(1) clearly strips those who would be appearing before the ICC of any immunities that would be enjoyed at international law.<sup>117</sup>Interpretation of statutes requires words to be given their true grammatical meaning if they are clear, unequivocal and not leading to absurdity. The provisions of Article 27 of the Rome statute explicitly state that both *rationae materiae* and *rationae personae* do not bar the

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<sup>113</sup> B. Dube (n20above),2

<sup>114</sup> The Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02/11

<sup>115</sup>The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09

<sup>116</sup> Rome Statute 1998

<sup>117</sup> H. King “immunities and bilateral immunity agreements: issues arising from articles 27 and 98 of the Rome statute” ,(2006) Vol 4 NZJPIL,275

court from exercising its jurisdiction over high ranking officials. The provisions of 27(1) directly relate to official immunity and, are peremptory in disregarding the defense of official immunity. The phrase “...Capacity...government official shall in no case exempt a person from criminal responsibility”<sup>118</sup> relate lies in the very heart of the Rome Statute which concerns itself with individual criminal responsibility, accountability and ending global impunity. Whereas the provisions of Article 27(2) seem to suggest that that personal immunity does not bar the court from exercising its jurisdiction on any individual who has committed a crime under international law, Article 98 is the direct opposite of Article 27.

### **Article 98**

#### ***Cooperation with respect to waiver of immunity and consent to surrender***

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

A plain understanding of Article 98(1) appears to reintroduce the traditional principles of immunities which immunities are a breeding ground of impunity. Furthermore, it also appears that a conclusion made in hindsight that negotiators aimed with Article 98 to ensure impunity for atrocity crimes it would be a perverse mangling of negotiating intent.<sup>119</sup> This paper strongly argues that article 98 waters down of the intention of the drafter of the Rome statute. Further, this paper argues that there is need to adopt an interpretation which is consistent with the Rome statute and the intention of the drafters. The existence of Article 98 is a strong defense towards the ICC especially with regards to issues of immunity and may leading to the failure of the Rome Statute to end global impunity.

#### **4.6. State cooperation with the ICC the Kenyan case study.**

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<sup>118</sup> Article 27(1) Rome statute

<sup>119</sup> D. Scheffer, (n89above)333



State cooperation has proven to play a pivotal role in the effective function of the ICC as highlighted by previous chapters of this paper. The case of Kenya is central in the highlight of the important role played by state cooperation in the dispensation of criminal justice and how lack of cooperation disables the court from effective function. The Kenyan case point to how investigations are central in prosecution of criminal matters and, how lack of policing agents to conduct investigate may water down proceeding. But most importantly this case points out that leaders are powerful in their states and their prosecution might be difficult even if they surrender themselves to the ICC.

The prosecutor of the ICC through the powers granted to the Prosecutor in Article 15 of the Rome statute initiated proceedings *proprio motu* against the Kenyan leaders for alleged violation in the period 2007 to 2008<sup>120</sup>. The suspects cooperated with the court in the initiation of the proceeding and appeared for trial before the ICC as summoned. Despite the African Union (A.U) challenge and request for a deferral of the matter since suspects were incumbent leaders of a state the ICC and UNSC proceeded with proceeding. The 2016 move by the ICC to drop charges against the three charged suspects on the basis of lack of evidence clearly establishes that without cooperation of states in investigations they cannot exist any prosecution of suspects, it also proved the power that state leader have in their countries and how it can be manipulated to cover evidence. Further, Article 98(1) appears to speak directly to the A.U challenge of arresting incumbent president and how it affects presidential immunity.

#### **4.7. African states cooperation and Article 98**

Despite the growing critic of the ICC by African states and the A.U it appears article 98 of the rome statute has provided a significant defense to African state against the ICC. The growing challenge of the ICC has witnessed African states threatening to withdraw from the ICC. A recent stance taken by South Africa and The Gambia to pull out of the ICC. The recent cases of Sudan and Kenya have seen African states invoking the international customary law principles of immunity as a defense not cooperate.

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<sup>120</sup> *The Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02/11*

It appears the problem of the A.U is not with the ICC but the ICC prosecutorial policy, the UNSC involvement and some of the provisions of the Rome Statute.<sup>121</sup> The UNSC is empowered by the provisions of Article 14 of the Rome Statute refer matters to the court for investigation this power however, has been criticized by many scholar as a weapon used by the UNSC in imposing its will on the weaker states. A.U holds the view that the ICC is now a tool against the African leaders. This view has led to the threat to withdraw and not cooperate with the court.

Though the UNSC might appear to be central to the feud between African states and the ICC it appears the major issue is the ICC prosecutorial policy which is not exclusive of incumbent presidents. Article 27 of the Rome Statute appear to have dealt with the issue of official and personal immunity with regards to grave breaches that are committed by heads of states and government officials. Scholars have argued that the evolution of international criminal law the rules of customary international law on personal immunities of current heads of state do not bar the exercise of the jurisdiction of the ICC with respect to an incumbent head of state.<sup>122</sup> However, the summoning of the Sudanese and Kenyan Presidents has increased the rift between the A.U and the ICC as it challenges the customary principles of Immunity (*rationae materiae* and *personae*).

The recent events surrounding the Malawian and South African refusal to arrest and surrender Albashir to the court clearly establishes the A.U stance in cooperating with the ICC. Though the two countries are states parties to the ICC they still did not comply with the mandatory obligation of cooperation that is enshrined in the provisions of Article 86 of the Rome statute. The ICC instituted proceeding against Malawi through the provisions of article 87(7) of the Rome statute which sanctions the failure to cooperate with the court by state parties. The Malawian defense to the proceedings was based on

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<sup>121</sup>M.T. Maru "the international criminal court and African leaders: deterrence and generational shift of attitude" (2014) Analysis No. 247 ISPI ,1

<sup>122</sup>P. Gaeta "Does President Al Bashir enjoy immunity from arrest?" (2009 )Vol 7 Oxford Journal of International Criminal Justice 315

the existence of Article 98 Agreements though the court refused this defense it clearly proved that Article 98(2) is a strong defense for impunity<sup>123</sup>.

Article 98(1) of the Rome Statute appear to support the A.U stance of protecting the incumbent presidents. The existence of this provision has got a potential of cementing the A.U defense against the prosecution of the incumbent presidents. It appears the existence of Article 98 necessitates a breeding ground for impunity and is inconsistent to the spirit of the Rome Statute that makes reference to ending global impunity.

#### **4.8. Conclusions**

This chapter analyzed the impact of Article 98 on the global fight against impunity. It argued that the object aim of the ICC lies in the preamble of the Rome statute which makes reference to the need to end global impunity. This aim appears from the analysis of this chapter can only be possible if there is full co-operation with the Court by states both non- state parties and state parties.

This chapter interrogated the American BIAs pursuant to Article 98 of the Rome statute and, concluded that they were illegal. The American BIAs were pointed by this chapter as to pose a threat to the operations and the spirit of the ICC of ending impunity. This chapter argued that the American interpretation Article 98 is not operative but a tool of destruction for the court, highlighting that USA's aim regarding BIAs is to protect all its citizens from the court. This chapter proved that such stance is a recipe for harboring impunity. Lastly on the USA's BIAs it argued that American approach to BIAs which involves signing the agreements with both states parties and non-state parties to the ICC seriously hinder court operation which are premised on state co-operation.

This chapter analyzed the provisions of Article 98 and concluded that, Article 98 is a hub of customary international law principles of state and individual immunity. This chapter argued that although the provisions of Article 27 seem to have dealt with the issues of *rationae materiae* and *personae* Article 98 reintroduce them. Further

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<sup>123</sup> *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87 (7) of the Rome Statute, ICC-02/05-01/09-139 (Pre-Trial Chamber I), 12 December 2011 [Malawi Decision*

highlighted, that Article 98(2) also introduces state immunity and strips the court of operations where there is BIA and the concerned state is not willing to waive the Immunities. Lastly in its analysis of this chapter it concluded that as long as immunities exist the aim to end impunity is dream far-fetched.

This chapter also analyzed the importance of co-operation by states in investigations, arrest and surrender but centrally in investigations. The Kenyan case study was central in that it is a recent event which shows that without full co-operation by state in the investigation process. The ICC move to drop charges against the Kenyan officials proved that submission to the jurisdiction of the court by individuals is not enough because only investigations prove their guilt, it only investigations are proper conducted that end to global impunity may be achieved.

Lastly this chapter strongly lamented the attitude of African towards the ICC especially on the issue of co-operation and prosecuting officials. This chapter proved that the two necessary ingredients to end impunity are state co-operation and the removal of immunities. African states on the other hand argue that a seating official is clothed with immunity and cannot be prosecuted something, which Article 27 outlaws and Article 98 reintroduces. It further showed that this issue has led to African states withdrawing in numbers from the ICC and some refusing to perform their treaty obligation of arrest and surrender of Al Bashir. In conclusion this chapter argued that it is only when the obstacles that hinder full state cooperation with the ICC have been removed that the aim to end global impunity be achieved and, the preamble to the Rome statute affirmed.

## **CHAPTER FIVE**

### **5.0. CONCLUDING REMARKS AND RECOMMENDATIONS**

#### **5.1. Introduction**

An Analysis provided by the previous chapters has proved that the aim of international criminal justice is to end global impunity and to bring perpetrators of injustices to account affording the victims of such with justice. Furthermore, the adoption of the Rome statute and establishing of the ICC was aimed at providing a machinery vehicle which could be used to facilitate the development of international criminal law and, ending the global impunity. The ICC was established to complement domestic courts where they are failing or unwilling to prosecute perpetrators of gross atrocities.

This paper has established that effective function of the ICC lies in the cooperation of states. Cooperation of states under the Rome Statute and the ICC appears to be the heartbeat of the operations of the Institution. Without cooperation of states the ICC is a “toothless bulldog” it cannot bite anyone. State cooperation act as teeth for the ICC performing the job of investigating, arresting and surrendering suspects to the ICC. This function is at the heart of the ICC operations since the ICC has no territory or policing agents of its own, it relies on those that have territories and policing agents (states) to comply with it.

Importantly to note which was established by this study is that state cooperation under the Rome statute is over emphasized. Cooperation of state parties in terms of the provisions of Article 86 of the Rome Statute is peremptory and does not allow the states to derogate from their treaty obligations of maintaining and protecting the integrity of the Rome statute and the ICC by not cooperating. There is no acceptability of derogation from obligation this is emphasized by the provisions of Article 87(7) of the Rome Statute.

Furthermore, this paper has uncovered that international customary principles of personal and official immunity (*rationae personae* and *rationae materiae*) are still in existence and, they continue to affect the functions of international bodies such as the ICC. Scholars have advanced arguments to the effect that Article 27 of the Rome Statute has put to end the immunity of individuals especially officials that commit grave breaches that threaten humankind and which are shun by the Rome Statute.

Article 98 of the Rome Statute shelters the defense of official and personal immunity which protects officials or individuals that are summoned by the ICC to appear and answer to charges levelled against them. It suspends the proceedings of the court where it has been invoked. This study has further, unveiled that it could have not been the intention of the legislature to incorporate a provision in the Rome statute which has the potential to water down the spirit and purpose of the Rome statute. It follows therefore from this study that the American campaign of Bilateral Immunity Agreements(BIAs) with both state and non-state parties is illegal under the Rome Statute and, Article 98 should be properly interpreted as to have intended to protect state relations not shelter perpetrators of atrocities. Most importantly the study revealed that the incorporation of Article 98 was inspired by the continued fear of the consequences of the ICC. However, this article has been unearthed by this paper to be a defense for African states and African Union against cooperation with the ICC.

This paper argues that the defenses of individual and state immunity enshrined in the provisions of Article 98 of the Rome Statute defeats the spirit of the statute as embodied in the treaty's preamble. It is this papers recommendation that Article 98 should interpreted in light of the preamble to the Rome statute. The preamble to the Rome statute removes immunities of individuals as referenced in Article 27 of the Rome Statute and advocates for the end of impunity which is something that this paper has proved that textual interpretation of Article 98 reintroduces.

## **5.2. Specific Recommendations**

It has been observed that state cooperation is a pillar on which the effective function of the ICC lies. This chapter therefore, proffers recommendations on how to address the problems which were raised by the previous chapters of this paper to try and protect the integrity of the Rome Statute and the ICC.

### **5.2.1. A proper interpretation Article 98**

Interpretation of treaties or statute plays a pivotal role in the protection and preservation of the purpose and integrity of the treaty and its bodies. An improper interpretation may lead to the defeat of the intention of the drafters and the parties to the treaty concerned .since the protection of the integrity of the institution is important proper interpretation must be accorded to Article 98 of the Rome Statute. Since it appears the drafters could have not intended to water down the spirit of the Rome Statute in incorporating Article 98, this paper recommends that, Article 98 should be interpreted to exclude state parties who appear to have a peremptory obligation under Article 86.<sup>124</sup>This paper proposes this solution based on the Malawian article 87(7) pretrial chamber decision that found Malawi as state party that has violated article 87(7) by failing to arrest and surrender Omar Hassan Al Bashir.<sup>125</sup>

The interpretation accorded to Article 98 must show that it was only covers those agreements of bilateral or multilateral character between nations that provide for non-surrender to the ICC of a nation's military or official personnel and related civilian component sent abroad on official mission by such nation it excluded individuals acting independent of a foreign government in their own capacity.<sup>126</sup>

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<sup>124</sup> *Rome statute 1998*

<sup>125</sup> *Malawian decision (n62above)*

<sup>126</sup> *D. Scheffer (n89above),333*

The textual analysis of Article 98 on the face of it concerns what the court may do and not what the states may do.<sup>127</sup> Article 98(1) refers to diplomatic and state immunity whereas Article 98(2) refers to general agreements that require the cooperation of sending state. This interpretation directly clashes with the preamble to the Rome Statute which seeks to end impunity by prosecuting individuals regardless of their status. The preamble is clarified by the provisions of Article 27 of the Rome Statute which disregards immunity of individuals. In light of these findings it appears a purposive approach to Article 98 is ideal.

A purposive approach to Article 98 entails that Article 98 should not be read in plain text but should be read in a manner that upholds the true intention of the drafters. The preamble of a treaty is the spirit to it. It only in the spirit that the true intention of the drafters may be found, it guides towards proper interpretation. It appears therefore that Article 98 should be interpreted in light of the preamble to the Rome statute which makes reference to prosecution of serious crimes in order to end impunity of perpetrator. It this papers recommendation therefore, that Article 98 should be purposively interpreted.

### **5.2.2 Expunge Article 98**

In the alternative to the proper interpretation of Article 98 this paper proposes an amendment of the Rome statute to expunge Article 98. Since appears there are various interpretation accorded to Article 98 of the Rome Statute and that affect the jurisdiction of the court this paper proposes that the expunging of Article 98 may solve this current debate on the proper legal interpretation of Article 98.

It appears expunging Article 98 from the Rome statute has got an effect of solving the problems of interpretation that have arose with the existence of Article 98. Article 98 appears to have sparked a debate among scholars as to what was the reason of its incorporation in the Rome statute. Some scholars have argued that its incorporation

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<sup>127</sup> J.M Iverson , “ *The Continuing Functions of Article 98 of the Rome Statute*”,(2012),Vol 4 Goettingen *Journal of International Law*,137



was as result of America which had reservation on the effects of the court's jurisdiction which had likelihood of affecting its soldiers on military missions in other states there, Article 98 refers to SOFAS.

If the interpretation of Article 98 of the Rome Statute which makes reference to SOFAS is adopted the spirit of the Rome Statute which makes reference to ending impunity will be defeated. It also appears that a literal or textual meaning of article 98 adopted would affect the court operations rather than the state to cooperate. It is therefore, a recommendation of this paper that Article 98 should be expunged .a purposive interpretation of Article 98 shows that Article 98 defeats the soul of the Rome Statute which is enshrined in its preamble which make reference to ending impunity and reintroduces individual and state immunity.

### **5.3. Conclusion**

The purpose of this paper from chapter one to five was to provide a critical analysis on the provisions of Article 98 of the Rome Statute and how they affect the global fight against impunity. The Rome Statute, other various international treaties, resolutions and case law authority were used as aid to understanding and interpreting article 98 in relation to state cooperation.

An analysis on the back ground of this paper indicated that state cooperation is an essential tool in international law. The relationship state cooperation, state sovereignty (no territory of their own) and lack of policing agents (rely on states to arrest and surrender) at international level indicates that without cooperation of states international bodies are "toothless bull dogs" that cannot effectively perform their complementary role of domestic courts.

This paper has established that state cooperation under the ICC is mandatory for the state parties to cooperate with the court in the arrest and surrender of the suspects. Article 86 of the Rome Statute is preemptory and the failure of state parties to comply has a sanction in terms of Article 87(7) of the Rome Statute.

It has been also been indicated by this paper that Article 98 has a potential of making Article 87(7) of the Rome Statute redundant and ineffective as states can easily subvert cooperating with ICC under the pretext of existence of BIAs. This has been observed with the Malawian case of failure to arrest the Sudanese leader and surrender him to the ICC later justifying such with Article 98(2).

This paper has further established that the existence of Article 98(1) appear to introduce the traditional customary law principle of official and personal immunity. It has been argued by scholars that the provisions of Article 27 of the Rome statute have dealt away with immunity however the provisions of Article 98(1) appear to be harboring them.

Lastly this paper has highlighted the need to end impunity lies in the heart of the Rome statute and how state cooperation is a necessary tool towards the execution of that need. Without cooperation of states impunity will be at its peak and international criminal justice will be a facade. It concluded that, removal of obstacles that hinder full co-operation of states such as Article seem ideal in achieving the end to global impunity.

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