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**INTERNATIONAL CRIMINAL COURT AND GLOBAL JUSTICE**

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**ABSTRACT**

International Criminal Court (ICC) is a permanent institution that came into existence on 1 July 2002 and has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in its Statute, and is complementary to national criminal jurisdictions. Any nationals of the state that have ratified the statute of the court can be a potential defendant before the court. In addition, the court has jurisdiction over crimes committed in state parties, even when perpetrated by nationals from state which have not been parties to the statute. The ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility. In addition, the ICC only tries those accused of the gravest crimes.

In this paper, it is concentrated on some important issues about ICC, such as international values, temporal, complementary and subject-matter jurisdiction of ICC and its relationship with Security Council. Also, the role of ICC at promoting international justice, enforcement of international humanitarian law and put an end to impunity for the perpetrators of international crimes are the other issues that have analyzed at greater depth throughout the paper.

The authors examine the problems, arguing that state sovereignty and in some cases, Security Council, are the major obstacles to the effective enforcement of global criminal justice.

**Keywords:** International Criminal court, jurisdictions, Security Council, Global Justice

## INTRODUCTION

ICC is new institution<sup>1</sup> and its basic role is to guarantee lasting respect for and the enforcement of international justice. (preamble of ICC Statute). It has the power to exercise its jurisdiction over person for most serious crimes of international concern, crimes committed after entry into force of the Statute.

The ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility. In addition, the ICC only tries those accused of the gravest crimes, that is, genocide, crimes against humanity, war crimes and aggression. The Court has jurisdiction over individuals accused of these crimes. This includes those

directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.

The Court does not have universal jurisdiction. The Court may only exercise jurisdiction if:

- *The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;*
- *The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or*
- *The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the*

<sup>1</sup> Statute of ICC was adopted in Rome on 17 July 1998. (A/CONF:183/9)

*nationality of the accused or the location of the crime.*

The Court's jurisdiction is further limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute's entry into force. However, in no case can the Court exercise jurisdiction over events before 1 July 2002.

Even where the Court has jurisdiction, it will not necessarily act. The principle of "complementarity" provides that certain cases will be inadmissible even though the Court has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution. For example, a case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility. In addition, a case will be inadmissible if it is

not of sufficient gravity to justify further action by the Court.<sup>2</sup>

Some problems may arise here:

1. Could ICC preserves the main values of international community? What kind of values is enshrined in the Statute?
2. Could it prosecute all perpetrators of international crimes? Are there any exceptions?
3. What kind of structural and institutional limitations does it confronted?
4. What kind of mechanism does it have for prosecution and punishment of perpetrators all around the world? Will the ICC prosecute all person suspected of committing most serious crimes?
5. What is the role of Security Council for referring the situation to the ICC?

These problems are discussed in depth to show the great role of the ICC to guarantee lasting respect for and the enforcement of international justice.

### **I. International community's values and the ICC**

The basic function of criminal law in all legal system is to preserve and to protect the values

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<sup>2</sup>-see:

<http://www.icc.cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm>

and ethical norms of community concerned. Some writers believe ‘international criminal law, properly understood, represents a liberal legal system emphasizing the right of the accused over the interests of prosecution or goals of international peace and security’.<sup>3</sup> Values differ from country to country. International community’ values, therefore, differ so fundamentally. The main questions are: what kind of values are there in the international community? Does the ICC have enough authorities and instruments to protect such values?

Some values considerable here: protection of human rights, respect for and the enforcement of international justice, put an end to impunity for the perpetrators of international crimes, prohibition of aggression and rights of civilian people. The ICC’ statute expressly refers to the most important values in the preamble such as ‘A fair appraisal of the *Rome Statute* suggests that its provisions are actually removed from the prevalent norm in international law that established genocide, war crimes, crimes against humanity and

aggression as crimes subject to universal jurisdiction.’<sup>4</sup>

The International Criminal Court is not a panacea for gross violations of human rights. But it will provide a world forum to try and prosecute the most serious offenders in the eyes of the international community. It will provide redress to victims when national courts are unable or unwilling to do so. It will furnish a credible instrument to enforce individual accountability for crimes committed in violation of international criminal law. Hopefully, too, the ICC will thereby become a genuine deterrent for those who would egregiously violate the human rights of others.<sup>5</sup>

Notwithstanding the fact that some basic values and norms have been accepted in the Statute, the main concern is about the methods of realization and enforcement of such values because The ICC is confronted with different restrictions as temporal complementary jurisdiction, SC authority and territorial limitation.

## II. Precondition to the exercise of jurisdiction

<sup>4</sup> CHRISTOPHER C. JOYNER & CHRISTOPHER C. POSTERARO, THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: RETHINKING THE STRUGGLE BETWEEN NATIONAL INTERESTS AND INTERNATIONAL JUSTICE (1999 Kluwer Academic Publishers. Printed in the Netherlands. P. 370

<sup>5</sup> - Ibid, p.385

<sup>3</sup> - Aaron Fichterbeng, international criminal law, critique of Erdemovic, journal of international criminal justice(2008), p.p. 3-19

The precondition to exercise of the ICC's jurisdiction is laid down in article 12 of the Statute. The Court has jurisdiction over all serious crimes<sup>6</sup> (that stated in the Statute) when the alleged crime is committed in territory of a state party (on the basis of territorial jurisdiction) or when the accused is a nationals of state party (on the basis of personal jurisdiction). The crimes committed in the territory of states that its situation referred by SC to the Court or committed by their nationals are under the jurisdiction of the ICC. A state which is not party to the Statute but accept the exercise of jurisdiction has such situation.

Article 12:

*1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*

<sup>6</sup> - Crimes within the jurisdiction of the Court are as follow: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression"

*2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*

*(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*

*(b) The State of which the person accused of the crime is a national.*

*3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.*

This article has been encountered with many objections. For example, United states opposition to the court centers heavily on article 12 and preconditions for the Court jurisdiction, since it made it made non parties to the Statute subject to offence committed on territory of state parties, or on territory of any state that chose to refer the conduct to court. "Concern of united states persists about the

scenario in which an American soldier is accused of a war crime while serving abroad”.<sup>7</sup> The basis of this critique is that “it is meritorious in allowing that the nationals of a state which did not sign the treaty may be internationally prosecuted for crimes committed on foreign soil”.<sup>8</sup> The problem here relates to non-state party to the Statute and the crimes that occur in the territory of that country and the capacity of UN SC to refer the situation to the ICC in accordance with article 13 (b). This kind of jurisdiction may be interpreted as universal jurisdiction. It seems, therefore, only the governments that violate human rights and humanitarian law are opposed with the article 12 provision. Prosecution and punishment of international criminals at any ground, even if it is against the territorial jurisdiction, can help for realizing and maintaining global justice. “It simply authorizes the court to exercise its jurisdiction with regard to nationals who have committed crimes in the territory of state party or of a state accepting ad hoc the exercise of the court’s jurisdiction.”<sup>9</sup> ICC is substituted for consenting state, which would

thus waive its right to exercise its criminal jurisdiction.

### III. Temporal restriction

The ICC’s temporal jurisdiction (*ratione temporis*) is strictly declared in article 11 of the statute:

1. *The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.*
2. *If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.*

The jurisdiction of the ICC, therefore, is non-retroactive. The ICC Statute entered into force on 1<sup>st</sup> July 2002. So, the earliest date from which the ICC can have jurisdiction over crimes under the Statute is 1<sup>st</sup> July 2002. Where the ICC Statute comes into force for a particular State Party *after* 1<sup>st</sup> July 2002, then the ICC has jurisdiction for crimes committed after the entry into force of the Statute for that State. Therefore for a State which accedes or ratifies after 1<sup>st</sup> July 2002, the entry into force of the Statute shall be the first day of the month after the 60<sup>th</sup> day following the deposit by the State of its instrument of ratification,

<sup>7</sup> - Christopher C. Joyner & Christopher C. Posteraro, *The United States and the International Criminal Court: Rethinking the Struggles between National Interests and International Justice*, *Criminal Law Forum* 10: 359-385, 1999.

<sup>8</sup> - Cassese, *op. cit.*, p.160

<sup>9</sup> - *ibid*

acceptance, approval or accession. States which are not State Parties can make a declaration under Article 12(3) of the Statute, accepting the Jurisdiction of the ICC for particular crimes. The Jurisdiction of the ICC would then be from the date of declaration.<sup>10</sup> In accordance with the article 11, most crimes that committed before entry into forcing the Statute are excluded from the prosecution and trial. This article ensures against *ex post facto* prosecution, and accords with the related principles of *nulleum crimen sine lege* and *null poena sin lege*.<sup>11</sup> Despite of that, some government's authorities and nationals that had committed serious crimes against humanity may be escape from global justice. The philosophical basis of The ICC is to prosecution of international perpetrators and retroaction of victims. Temporal jurisdiction

can help the criminals.” It does not, of course, prevent the United Nations from establishing ad hoc tribunals to prosecute crimes which occurred before the entry into force of the Statute”<sup>12</sup> thus, for instance, the serious crimes which were committed in Cambodia or Somalia could not be prosecuted in the ICC, but, they could be persecuted before a tribunal established for such purpose by the United Nations Security Council, acting under chapter VII of the Charter of the United Nations.<sup>13</sup>

#### IV. Complementarity

In the preamble of ICC's Statute, it is emphasized that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions “. This principle repeated again on article 1.<sup>14</sup> complementarity, therefore, is one of the most important basic principles of

<sup>10</sup> - Article 126 provides that: 1. *This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.* 2. *For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.*

<sup>11</sup> - Ruth B. Philips, the international criminal court statute: jurisdiction and admissibility, Criminal Law forum 10:62, 1999.

<sup>12</sup> - Ibid

<sup>13</sup> - See, for instance: Jean E. Mendez, in defense of transitional justice, in < TRANSITIONAL JUSTICE AND THE RULR OF LAW IN NEW DEMOCRACIES. ( A. James Mc Adams, ed.,1997); Diane F. Orintlicher, Settling Accounts: the duty to prosecute human rights violation of a prior regime, 100 Yale L.J. 2537(1991)

<sup>14</sup> - Article 1 of statute: An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

the ICC and has a close connection with rule of **admissibility**.(article 17& 18)

The real reason for establishing complementary jurisdiction is that “The experience of the two ad hoc international tribunals led to further developments of the notion of jurisdiction .The primacy given to these tribunals gave rise to much controversy, since States felt that their sovereignty was being eroded. A new type of relationship was required in order to preserve State sovereignty without detriment to the goal of reducing impunity. It was therefore considered that the international court, instead of having primacy over domestic courts, should be complementary to such courts and intervene only when national criminal jurisdiction was not available or unable to perform its tasks.”<sup>15</sup> The ICC does not enjoy primary over national courts but should only step in when the competent domestic prosecution or courts fail, or are unwilling or unable to act. As stated in article 17:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction

over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) *The proceedings were or is being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;*

(b) *There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with intent to bring the person concerned to justice;*

<sup>15</sup>- Oscar Solera, complementary jurisdiction and international criminal justice, *RICR Mars IRRC* March 2002 Vol. 84 No. 845, p145

(c) *The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.*

3. *In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.*

Complementary jurisdiction dictates that the ICC would be competent to investigate and try a case, unless there is a State that claims jurisdiction. States continue to play the central role. But if they fail or find it impossible to assume that role, or show disinterest or bad faith, the ICC will step in to ensure that justice is done. In particular, it is designed to operate in cases where there is no prospect of international criminals being duly tried in domestic courts. Emphasis is placed on the Court being a body which will complement existing domestic jurisdictions and existing procedures for international judicial cooperation in criminal matters, and which is not intended to exclude the existing

jurisdiction of domestic courts or to affect the right of States to seek extradition.<sup>16</sup>

#### V. The role of the Security Council

In accordance with Art 34 of the Vienna Convention on the Law of Treaties, international agreements are capable of binding only contracting parties; they do not bind third States without their consent. Practice suggests, however, that multilateral treaty arrangements may on the basis of political or legal reality impose certain constraints on the behavior of third States. These constraints do not result from legal obligations, but accrue instead from the formation of a broad international consensus stemming from multilateral agreements that possess a constitutional nature.<sup>17</sup> The Statute of ICC is an international treaty and there are some provisions in the Statute imposing obligations on third States.

Under Art 12 of its Statute, the ICC's jurisdiction over a case or situation may be triggered in any of following ways; either where a situation or offence takes place in the territory of, or by national of state party;<sup>18</sup> where territorial state or state of the nationality of accused are parties to the

<sup>16</sup> - Ibid. 148

<sup>17</sup> - GM Danilenko, *The Statute of International Criminal Court and Third States*, 21 *Mich J Int'l L* (2000), 444, p448.

<sup>18</sup> - ICC Statute, Arts 12(1) and 14(1)

statute;<sup>19</sup> or where the Security Council acting under Chapter VII of the UN Charter refers a situation to the ICC prosecutor.<sup>20</sup> Unlike the case of State Party referral, there is no detailed provision in the Statute concerning Security Council referral. Security Council referral is governed by Article 13 (b), which authorizes the Court to exercise its jurisdiction over crimes within its jurisdiction in accordance with Article 5 if ‘[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’.

The Relationship Agreement between the United Nations and the Court makes specific provision for cooperation in the event of a Security Council referral.

*1. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to*

*the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.*

*3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security.*

If it triggers the Court, “the Council should be prepared to live within the parameters of the Statute with respect to such matters as jurisdiction. For example, it could not request that the Court consider the atrocities committed by the Khmer Rouge in Cambodia during the late 1970s because Article 11 of the Statute clearly declares that the Court cannot judge crimes committed prior to the entry into force of the Statute. In such cases, the Council would be required to set up an additional *ad hoc* tribunal. For the same reason, the Council could not transfer the

<sup>19</sup> - Ibid, Art 12(2)

<sup>20</sup> - Ibid, 13(b)

powers of the existing *ad hoc* tribunals to the new Court. It remains uncertain whether the Security Council must also meet the other admissibility criteria and respect the principle of complementarity, a matter that seems to have been intentionally left unresolved at the Rome Conference”.<sup>21</sup>

This mechanism can help to prosecute intentional criminals that ICC doesn't have jurisdiction in normal way and SC refers the situation to the Court. Referral by SC may be construed as universal jurisdiction, even if, the SC is a **political organ**<sup>22</sup> of the UN and can defer investigation or prosecution under Art 16 because SC deferrals can generally- as long as they do not lead to an unlawful permanent deferral in the concrete case- be prolonged on discretionary basis. They bind only the ICC and are possible also in those

situations based upon UNSC referrals and has no effect on preliminary examinations of the prosecutor and measures for the protection of victims and witnesses. Investigations presenting a unique opportunity to take testimony or a statement from a witness or to examine collect or test evidence would normally fall under the scope of Art.16 of Rome Statute.

## CONCLUSION

Principle of sovereignty is a main obstacle of human rights and humanitarian law enforcement and realization. This concept still has a great impact on international law and international relations; States are not yet ready to give up these privileges. “Faced with the necessity of dealing with international crimes, States could therefore accept a permanent international court only if it acted on a limited basis, i.e. when the competent States agree that appropriate action cannot be taken at the national level”<sup>23</sup>. Because of the ICC role on protection and enforcement of human rights rules, State' sovereignty can be challenged the ICC in some cases especially in the field of jurisdiction, cooperation and complementarity.

One of the strongest criticisms of the ICC is about the ability of the members of the

<sup>21</sup>- Ruth B. Philips, 'The International Criminal Court Statute: Jurisdiction and Admissibility', (1999) 10 *Criminal Law Forum* 61 at 7

<sup>22</sup>- The composition of the Security Council, the veto power of its permanent members, and its need to fashion immediate remedies in crisis situations can endanger the independence and legitimacy of the ICC, particularly if the Council's decisions are seen as politically motivated. In using its power of referral, the Council should apply criteria and processes that are as objective and consistent as possible... See for more details to: Lawrence Moss, *The UN Security Council and the International Criminal Court Towards a More Principled Relationship*, available at; <http://library.fes.de/pdf-files/iez/08948.pdf>

<sup>23</sup>- Oscar Solera, op. cit., p170

Security Council, of which three of the five permanent members are not parties to the Rome Statute, to refer situations involving states not parties to the Court and defer of it. Through Security Council referrals and deferrals, the ICC becomes a policy tool to advance the political interests of those states represented on the Security Council and there is a risk of double-standards.

Although referral and especially deferral by UNSC can endanger the function and independence of the ICC, a deferral has no effect on preliminary examinations of the prosecutor and is possible in those situations based upon UNSC referrals. So, probability of referral by SC could help international community to pursue its basic humanitarian values and prosecute international crimes perpetrators when state sovereignty impedes the jurisdiction.

In short, as Cassesse stated, the Rome Statute, far from amounting to a 'mis-print', represent a luminous page in world history and all states and individuals concerned strive not only to make the ICC a living reality, but also to improve its profile as much as possible.<sup>24</sup>

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