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Analyses of the challenges faced by the international criminal court in the exercise of its jurisdiction

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Abstract
This paper presents an analysis of the exercise of jurisdiction of the ICC and the factors hindering the court's proper discharge of its function. Though the court has been praised for its ability to prevent impunity and try perpetrators for the most serious crimes, there has been a number of criticisms against it. Factors outside its control have hindered the court from achieving its goals, among them, its jurisdictional limitation and its dependence on States cooperation. Adopting a purely doctrinal research method, this paper questions why the ICC wasn't granted universal jurisdiction from its inception which has served as a limitation to its jurisdiction. It concludes that due to these factors, the court has failed to achieve its aims. It recommends that universal jurisdiction should be granted to the court to enable it prosecute perpetrators irrespective of where these crimes occur.

Keywords: ICC, Universal jurisdiction, crimes, Complementarity, peace and security

1. Introduction

Prior to the creation of the International Criminal Court (ICC), four ad hoc international tribunals were setup in the course of the twentieth century namely; The International Military Tribunal at Nuremburg, the Tokyo Tribunal, the International Criminal Tribunal for Former Yugoslavia (ICTY) and that for Rwanda (ICTR) [1]. Since the end of World War I (1919), scholars have wrestled with ways of holding individuals accountable for gross violations of International Humanitarian Law (IHL). In 1947, the United Nations General Assembly (UNGA) requested that the International Law Commission (ILC) began to codify the principles of International Law that emerged from the Nuremburg Tribunal. The first draft Statute for establishing an International Criminal Court was completed in 1950. In 1994 the ILC produced a comprehensive draft Statute for an International Criminal Court which was submitted to the UNGA [2].

On July 17, 1998, the Rome Statute of the ICC was adopted. The purpose of this court is to try persons for the most serious crimes of international concern (genocide, crimes against humanity, war crimes and aggression), prevent impunity for these crimes, and maintain peace and security of the world. It is complementary to national criminal jurisdiction as stated in article 1. Though this Statute was the culmination of decades of efforts, its limitations have been widely acknowledged.

The court lacks jurisdiction wherewithal to track down and try perpetrators of heinous crimes irrespective of their nationality and place where they committed the crimes. This is a particular severe handicap for the court [3].

A lot of accusations have been levied against the ICC which inter-a-lia include; its focus on Africa, delay in prosecutions and investigations, its inability to try perpetrators irrespective of where the crimes occur and its failure to achieve its objectives stated in its preamble. A number of factors have prohibited this institution from achieving its goals. These factors are outside the control of the court and have hindered its proper functioning. The question may be asked, would the court be more effective if it had universal jurisdiction to try cases of violation? Many have questioned why the court was not granted universal jurisdiction from its inception. Universal jurisdiction was denied to reduce the influx of cases to the court which could reduce its effectiveness but recent developments have revealed that the absence of universal jurisdiction has created a loophole for perpetrators to escape justice. This is clearly seen in the case of Syria.

The subsequent paragraphs are going to highlight some of the factors hindering the court's proper discharge of its functions. They inter-a-lia include; its lack of jurisdiction over third parties, its dependence on States' cooperation, dependence on States, Organizations and individuals.

2. The Limited Jurisdiction of The Icc

The permanent ICC faces a number of limitations to its jurisdiction which inter-a-lia include the following situations; it may only investigate and prosecute cases in States that have ratified the Rome Statute, States that have consented to the Court's jurisdiction or which have been referred by the UN Security Council. It can only prosecute crimes committed after it was established in July 2002, even though in many cases conflicts and human rights abuses in its focal countries began prior to that time.

2.1 Lack of Jurisdiction Over Non-State Parties

While the Rome Statute was the culmination of decades of sustained efforts by the international community to create a centralized criminal court, its serious jurisdictional limitations have been widely acknowledged. As Professor Nsereko concluded in an evaluation of the court's jurisdiction;

"Article12(2) of the Statute provides that before the court can exercise jurisdiction over the alleged conduct, there must be a nexus between such conduct and the state where the conduct was committed or the State of the accused

person's nationality". Either of these States must be a party to the Statute. The only way the court can exercise jurisdiction where these States are not parties to the Statute is by either of them making a declaration under article 12(3) accepting the jurisdiction of the court with respect to the crime in question" [4].

The devastating consequences of these limitations to the ICC's potential to deter and prosecute international crimes were noted by Professor Nsereko;

"The court lacks jurisdiction wherewithal to track down and try perpetrators of heinous crimes irrespective of their nationality and the place where they committed the crimes. This is a particularly severe handicap for the court. It will not be able to try dictators whose countries for obvious reasons may not accede to the Statute. These dictators will be able to roam the globe assured that the hand of international justice will not be long enough to reach them" [5].

Under the Rome Statute, the ICC has jurisdiction over nationals of non-parties in three situations;

a. The ICC may prosecute nationals of non-parties in situations referred to the ICC by the UNSC [6]. The vast majority of the States at Rome were of the view that the Security Council (SC) had an appropriate role to play in enabling the ICC to exercise jurisdiction. Since the SC's power to create international criminal tribunals had largely been accepted, at least since the *Tadic Interlocutory* appeal in 1995 [7], most States took the view that it would be more appropriate for the SC to refer matters to the ICC rather than to create further ad hoc tribunals. Article 13 details the circumstances in which the court's jurisdiction may be initially invoked or "triggered". The article allows the prosecutor to initiate investigations under three grounds; *proprio motu*, upon the referral of a State party or upon the referral of the SC [8].

So far, the SC has made two referrals to the ICC; the case of Sudan and Libya. The SC over the hard-negotiated abstentions from the veto of the United States and China, and the abstentions (for very different reasons) of Algeria and Brazil, finally decided at the end of March 31st 2005 in Resolution 1593 to refer the situation in Darfur to the ICC. The referral was welcomed by many as a victory for international criminal justice [9]. On June 1, 2005, the Prosecutor of the ICC Luis Moreno Ocampo officially opened the ICC's investigation into the situation in Darfur [10].

It is clear from the above that without the SC's referral, the ICC cannot intervene in non-party states. This is a serious impediment to achieving its purpose set out in the preamble of the Rome Statute. This explains why the court has been unable to intervene in Syria because two permanent members of the SC (Russia and China) have vouched that the SC will not refer this case to the ICC, thus protecting Syria. And more recently, Russia vetoed SC referral of Syria irrespective of the bombings. It is a serious limitation and creates a loophole for perpetrators to roam the globe knowing that the hand of international justice is not long enough to reach them. This also opens doors to impunity of core crimes and hinders the court from maintaining peace and security.

Also, in the case of Libya which has not yet ratified the ICC Statute, the United Nations Security Council (UNSC) unanimously passed Resolution 1970 in 2011 referring the situation in Libya to the ICC. The reason being that, Libya is not a party to the Rome Statute and so the court can only exercise jurisdiction over it through the SC referral. This was only the second time that the SC used its discretion under the ICC Statute to refer a matter to the court for possible prosecution. The resolution stated that;

"The widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity". The referral was not limited to crimes against humanity and individuals could potentially be charged with other crimes under the Rome Statute such as war crimes and possibly even genocide. The referral was temporarily limited to events that have taken place since 15, February 2011. In line with the referral, the Prosecutor, Luis Moreno Ocampo (former) issued arrest warrants against Muammar Gaddafi, his son, Saif Al-Islam Gaddafi and the Intelligence Chief Abdullah Al - Senussi [11].

In many respects, the ICC is well placed to address the crimes allegedly committed in Syria. The court is an established institution with the capacity to investigate and prosecute complex international crimes cases. There is however a number of difficulties associated with the ICC as a forum for justice in Syria. One key issue is that of triggering the court's jurisdiction. Since Syria is not a State party to the Rome Statute, a referral from the UNSC acting under Chapter VII of the UN Charter is required to trigger the jurisdiction of the court. A state party to the Rome Statute cannot refer the situation to the ICC nor can the prosecutor initiate an investigation *proprio motu*. Whilst some members of the SC, including the UK and France, have supported the referral of the situation in Syria to the ICC, China and Russia each of which holds the power to veto action by the SC, have not supported such a move [12].

It is evident that the court is limited when it comes to exercising jurisdiction over non-party states and where the SC fails to refer (like in the case of Syria and Israel), the court is powerless. This provision limits the effectiveness of the court and creates loopholes for impunity.

b. Non-party nationals are subject to ICC's jurisdiction when they have committed a crime on the territory of a State that is a party to the ICC Statute or have otherwise accepted the jurisdiction of the court with respect to that crime [13]. It is well-known that under article 12 of the Rome Statute, the ICC can exercise its jurisdiction over the crime on the territory of the state party. However, article 12 must be read in conjunction with articles 16 [14] and 98 [15].

Ivory Coast is not a party to the ICC Statute but has accepted its jurisdiction. What President Alassane Ouattara did from the outset, even before he was sworn in was to ask the ICC to take over the investigations and prosecutions of the grave violation of IHL in the post-election violence. The Presidency of the ICC assigned the situation in Ivory Cost to the Pre-Trial Chamber (PTC) II [16]. This was the first time the ICC opened a case in a state party to the Rome Statute which has however accepted the jurisdiction of the court.

c. Jurisdiction may be exercised over nationals of non-party where the non-party has consented to the exercise of jurisdiction with respect to a particular crime. In either of the first two circumstances, the consent of the state of nationality is not a prerequisite to the exercise

of jurisdiction [17]. The case of Ivory Coast is illustrative.

Also, Article 16 forms part of the rules written into the Rome Statute with the purpose of cementing a relationship between the UN and the ICC. Far from being the only such provision, paragraph 9 of the preamble to the Rome Statute describes the ICC as an "Independent permanent ICC in relationship with the UN system". The effect of article 16 is best appreciated when its tenets are juxtaposed with the ILC. The ILC proposal contemplated a situation whereby once the SC has started dealing with a matter, the jurisdiction of the ICC over such a matter is banished until either the SC decides otherwise or could no longer be said to be dealing with the matter, howsoever, that may be determined [18].

All these acts as hindering factors to the proper functioning of the court and explain why the court has failed in achieving its objectives.

2.2 The Limitation of the Principle of Complementarity

The principle of Complementarity, one of the innovative elements of the ICC framework, may be thought of as a limitation on ICC Jurisdiction. As expressed in the Rome Statute, this principle provided that a case or situation will be inadmissible before the ICC where the same offences are "being investigated or prosecuted by a State which has jurisdiction … unless the State is unwilling or unable to genuinely carry out the investigation or prosecution [19]. Thus, Article 17 states that the court shall determine that a case is inadmissible where: "the case is being investigated by a state which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".

The purpose of this article, as discerned from its drafting history, is to ensure that any unwillingness or inability of state parties to the Rome Statute to investigate or prosecute crimes committed by their citizens does not impede international justice even though such states enjoy priority of trial. Under the complementarity principle, the ICC cannot truncate adjudication of a matter by a national court, except in the absence either of the two qualifying conditions stated in article 17 [20].

It is important to be clear on two fundamental points; first, the ICC is only intended to exercise jurisdiction in relation to "the most serious crimes of international concern". Secondly, it is specifically designed to be "complementary" to national criminal justice systems. Essentially, the intention is that, the ICC will only be brought into play where the national judicial institutions were unwilling or unable to act. The inability might be subsequent to the collapsing of national judicial institutions as a result of internal conflicts (for example, the case of Somalia, Rwanda, Sierra Leone) or the dissolution of a State. The unwillingness might be where a State is unwilling to prosecute its own nationals or in the context of state officials being the alleged offenders [21]. This principle was first sounded in Article 1 of the Rome Statute which states that the court 'shall be complementary to national criminal justice systems'.

A different view shared by some States and many NGOs held that the court should have potential for a greater role. Fearing the possibility of sham investigations or trials aimed at protecting perpetrators, these states argued that the court should intervene where the proceedings under a national jurisdiction were ineffective and where a national judicial system was unavailable. The rationale was that the court should intervene where the national prosecutions were sham trials aimed at protecting perpetrators [22]. Through its respect for primacy of national jurisdiction, complementarity can operate to halt or suspend conduct of ICC's investigations, raising the question of when, and if, honoring the principle is always in the interests of justice. The impact of the ICC investigation in Uganda on the ongoing Juba Peace process is a prime example.

On February 19, 2008, the government of Uganda and LRA signed an Annex to the agreement on Accountability and Reconciliation that had been agreed by the parties in June 2007 as part of the phased peace negotiations. The annex provided that a special division of the High Court of Uganda would be established to try individuals "alleged to have committed serious crimes during the conflict". The annex also committed the government of Uganda to 'address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA' and 'undertake any necessary representations or legal proceedings nationally or internationally' to implement the provisions of the principal agreement and the annex. This reference to 'legal proceedings' suggested that the government of Uganda would be expected to formally challenge ICC jurisdiction if it conflicted with its exercise of jurisdiction under the annex [23]. This agreement and annex have paved the way for jurisdictional challenges under this principle of complementarity

The way in which the principle of complementarity can divest the ICC of jurisdiction has also become a contested issue in the Darfur situation. Since the UNSC referred the situation in Darfur in 2005, the government of Sudan has repeatedly asserted that it is capable of conducting its own trials. In June 2005, days after the announcement by the Prosecutor that he would commence an investigation, the Sudanese government established the Special Criminal Court for the Events in Darfur (SCCD). In its analysis of the statute and legal framework of the SCCD and the initial cases heard by the court, the Darfur consortium concluded that the SCCD "appears to be designed to divest the ICC of jurisdiction without delivering justice". The consortium found that there were 'major gaps' between the SCCD regime and international legal standards and that much more needed to be done to remedy what it termed 'key defects in Sudan's legal and criminal justice systems that have permitted impunity … for serious crimes committed in Darfur'. The SCCD prosecuted mainly civilians or low-ranking officials for very minor offences [24]. All these show the complex interaction between ICC and domestic jurisdiction.

The rapid progress towards the establishment of the ICC reflects a growing recognition by the international community that national courts have failed to deter the commission of international crimes and that only an international legal system can effectively reduce the appalling human sufferings caused by such crimes [25]. Complementarity belittles the seriousness of international crimes since States can opt for the 'ordinary crime approach' thereby prosecuting international crimes as ordinary crimes. For instance, genocide can be investigated or tried as 'murder', or ill treatment of prisoners of war as "assault" instead of war crimes. Thus, according to Jann

Kleffner, international tribunals should prosecute international crimes because they have the resources, facilities and competence as compared to national courts. This explains why the case of Charles Taylor [26] was transferred to The Hague on June 20, 2006 by the Special Court for Sierra Leone for the purpose of using the facilities of ICC during his trial.

The complementary nature of the ICC's jurisdiction is in itself a source of considerable difficulties considering that even after the court's jurisdiction has been established, many additional, factual, legal and especially political issues most of them quite delicate, must be resolved in order to ascertain whether its proceedings are 'admissible' [27]. Thus, complementarity is a severe handicap to the court and where national judicial systems are not strong enough to prosecute, impunity is inevitable and maintenance of peace and security is farfetched. It slows down prosecution and may even hinder the proper discharge of ICC's functions.

3. Lack of Financial Autonomy by the ICC

Article 115 and 116 provide that all expenses of the ICC shall be paid from the funds, which consist of assessed contributions made by state parties and funds provided by the UN. Additionally, the Statute provides that the ICC may receive and utilize voluntary contributions from governments, International Organizations, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of State Parties (ASP).

3.1. The Running Cost of the Court (Dependence on States, Individuals and NGOs)

The funding of the ICC is a critical issue in assessing the credibility and viability of the Institution. There are deep concerns not just about the ICC's acute financial dependence upon western European funding corrupting the court's legal independence but also on the all too obvious inefficiencies in how that money is used. American Commentator John Rosenthal has gone to the heart of the ICC's claim to political independence while accepting money from major funding states accused of involvement in large - scale war crimes:

"it is a self-evident principle that the independence and hence impartiality of a court is only as sure as the independence of its financing" [28].

The Statute of the court states that it is financed by contributions from the state parties. The amount payable by each state is determined using the same method as the UN: each state's contribution is based on the country's capacity to pay, which reflects factors such as a national income and population. The maximum amount a single country can pay in any year is limited to 22 percent of the court's budget. There are two points of immediate concern regarding the ICC's budget; The first is that while the Rome Statute sets a cap on funding at 22 percent of its budget from any one state, considerably more than 50 percent of its funding comes from member countries of the EU, which is to all intents and purposes one state, especially after the ratification of the Lisbon treaty in November 2009 [29].

There is always a direct relationship between levels of payment and control. Noting Germany's 'ideological sponsorship of the court' and commenting on the inevitably political nature of the ICC, Rosenthal recorded that official German sources spoke early on of Germany alone assuming upwards of 20 percent of the court's budget. He documented that in 2001, Hans-Peter Kaul, at the time an official of the German Foreign Office (and subsequently as ICC Judge), cited a figure of 22 to 25 percent for the German contribution. Rosenthal noted:

"In what amounted to an admission that it expected this financial support to translate into influence, the Foreign Office published a bulletin announcing that Germany would be able to 'fill' a more or less commensurate portion, 'around 20 percent' of the court's administrative positions and providing a foreign office contact for potential candidates" [30].

Secondly, in the section of the ICC's own website entitled "How is the court funded?", the Court interestingly revealed that it also receives money from 'international corporations, individuals and other entities'. Article 116 of the Rome Statute provides for these voluntary contributions. No details are provided of this funding line and in its report of 13 May 2009, the ASP also made no reference to these donors. The thought of private interest such as major multinational businesses helping to finance a judicial organization is one that should be of great alarm to all those who believe in the rule of law. Rosenthal noted:

"None of us would put our faith in the impartiality of a local or national court if it depended upon the largesse of private individuals or corporations, who by definition might have an interest in the outcome of particular proceedings" [31].

By 2008, the ICC had cost the International community over 600 million dollars and was yet to be anywhere near its first conviction.

The ICTR was established pursuant to the UNSC's Chapter VII mandate and was financed by mandated state contributions. The SCSL, by contrast, was established by bilateral agreement and therefore depended on voluntary contributions. This raises several issues, such as potential bias in favour of, and interference by contributing countries in the choice of court priorities and the need to privilege fundraising at the expense of other areas such as outreach. In 2005, having received only half its budgeted expenditure, the UN Secretary General and Special Representative for the SCSL were forced to seek a 'subvention grant' from UN assessed contributions. In June 2007, the SCSL made a further appeal for funding during its briefing to the UNSC. As the SCSL is now operating from two bases, Freetown and The Hague, it is anticipated that funding requirements will increase substantially. It is estimated that the Taylor trial cost in excess of 1 million US dollars [32].

3.2. 'He Who Pays the Piper Calls the Tune'

In his open letter to the ICC, Barrister Bernard Muna stated:

"The well-known English saying goes as follows: 'He who pays the piper, calls the tune'. Who pays the running cost of the ICC? The fiction is that the running cost of the court is paid by contributions from nations, signatory of the Rome treaty and member nations of the court. This is only half the truth. A majority of African nations who might have signed the treaty and even ratified it have never paid a dime to the court. Their contributions are paid by 'kind and generous' western governments. In any case, the contributions do not cover the cost of running the court, so the same western nations with some individuals contribute large sums to keep the court afloat. The French have a saying which goes, '*pas d'intérêt, pas d'action'*, which loosely translated means; one cannot act in a matter where one has no interest. What therefore is the interest of these western nations and rich

individuals to finance the ICC?" [33]

The court is dependent on the contributions of state parties, NGOs, some private individuals and even western European countries. These huge contributors who have interests in the court use their stance to manipulate the court. The court is therefore vulnerable because the running cost is paid by these rich and powerful states and individuals. They therefore influence the functioning of the court, hence the saying, "He who pays the piper, calls the tune". Recent trends have revealed that the ICC is just a puppet in the hands of these great powers and individuals who fuel the running of the court and as a result manipulate the court's decisions and actions.

4. The Failure of States to Cooperate with the ICC

Article 9 of the Rome Statute is dedicated to matters of international cooperation and judicial assistance and this is clearly stated in article 86. Without its own police force or enforcement mechanism, the ICC is dependent on the cooperation of state parties in the investigation and prosecution of crimes under the jurisdiction of the court. Under article 87(7) of the Rome Statute, failure to comply with a request for cooperation authorizes the ICC to make a finding of non-compliance and to refer the matter to the ASP or to the SC, if the SC had referred the situation being investigated or prosecuted to the court for further action [34].

In all of its activities, the ICC relies on the international cooperation from states. State parties are obligated to cooperate with the court in its investigations and prosecutions. More specifically, the court may request states parties to assist in the arrest and surrender of persons to the court. Other examples of state cooperation include enforcing the orders and judgments of the ICC such as seizing and forfeiting proceeds of crime, protecting victims and witnesses and allowing the Prosecutor to conduct investigations on the territory of a state. For example, on 17 March 2006, Thomas Lubanga Dyilo was arrested by the Congolese authorities and transferred to the ICC custody after a warrant was issued by the court for his arrest. Late 2014, the ICC Prosecutor, Fatou Bensouda met with the CAR's Minister for Justice with responsibility for Judicial Reform and Human Rights and the Attorney General in order to discuss the issue of CAR's cooperation with the court, particularly in relation to the investigation opened on 24 September 2014. Therefore, the success of the ICC almost exclusively relies upon the cooperation of states parties [35].

Member states are required to cooperate with the ICC in its investigation and prosecutions. The ICC may request the arrest and surrender of an individual to the ICC. Hence, when the ICC decides to indict an individual, it may issue a request to a member state or states, specifying the manner in which the member state is expected to cooperate. It will then cooperate with the member state in order to transfer the individual from that state to the ICC which is located in The Hague, Netherlands. If a member state fails to cooperate, however, the Rome Statute is largely silent on the repercussions [36].

While the ICC member states are required to cooperate with the ICC in its investigations and prosecutions under article 98 of the Rome Statute, there are circumstances in which ICC member states are either immuned or excused from cooperation. Under article 98(1), member states are not permitted to cooperate with the ICC if the member state has an international obligation or contract that conflict with its duties under the Rome Statute in regards to the "state or diplomatic immunity of a person or property of a third state". Under article 98(2), the member state also does not have to cooperate if it has a binding international agreement with another state and cooperation would cause the member state to breach that agreement [37].

Where states fail to cooperate, the ICC is powerless. This can be seen in the case of the Sudanese President Omar Al-Bashir. The ICC issued a second indictment directly before President Bashir's visit to Chad on July 21, 2010. When President Bashir traveled to Chad, AU was pleased with the developments. The ICC, the European Union, Human Rights Watch and Amnesty International, however, were concerned with the events and called on Chad to arrest President Bashir, but Chad refused. Then on August 28, 2010, President Bashir travelled to Kenya, also a member of the ICC. The government of Kenya invited him to attend a signing ceremony to honour Kenya's new Constitution. Once again, the defiant President was permitted to leave a free man. The Kenyan government claimed that it could not arrest President Bashir because it would have been detrimental to the Sudanese peace process [38].

Despite Ocampo's optimism, however, in 2011, Al – Bashir visited two member states of the ICC. He travelled to Djibouti for the Djibouti President's May 8, 2011 inauguration ceremony. Then, on August 7, President Bashir went to Chad for the inauguration ceremony of the Chad's Head of State, Idriss Deby. The ICC issued a decision to the UNSC and the ASP to the Rome Statute regarding President Al - Bashir's presence in Djibouti and asked that they take whatever action they deem appropriate. The ICC specifically asked that Chad respond to the charge that it has allowed President Bashir into its country without arresting him on two occasions [39].

The government of Sudan has repeatedly stated that it will not hand over its citizens to be tried by a foreign court. Although initially reluctant, to press the matter due to concern about the progress of the political process, the international community eventually began to criticize Sudan's failure to cooperate. On June 16, 2008, a unanimous UNSC declaration urged "the government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the court in order to put an end to impunity for the crimes committed in Darfur". The next day, the EU's Council on External Relations declared that it "stood ready to consider measures against individuals responsible for not cooperating with the ICC, should the obligation under the UNSC Resolution 1593 continue to be disregarded" [40]. President Al-Bashir had been at large until recently when he was handed over to the court by the military failure which his apprehension would have been impossible. It is therefore difficult for the ICC to effectively apprehend perpetrators when states fail to cooperate. This is a severe handicap for the court and has hindered the proper discharge of the Court's functions.

By refusing to cooperate with the ICC, the AU has breached its obligations under article 87(6) of the Rome Statute of the ICC which imposes an obligation on intergovernmental organizations to cooperate with the ICC in the investigation and prosecution of perpetrators of international crimes. Even more so, the act of refusing to cooperate with the ICC in the arrest of individuals from Kenya, Sudan and Libya could amount to a violation of international law rooted in

customary international law imposing obligation on states to prosecute international crimes or cooperation with international and national courts in the punishment of these crimes [45].

The success of the ICC will be determined by the level of cooperation it receives from states. Having no police force, military or territory of its own, the ICC will need to rely on state parties to, among other things, arrest individuals and surrender them to the court, collect evidence and serve documents in their respective territories. Without this assistance, the ICC will encounter difficulty conducting its proceedings. The Rome Statute of the ICC recognizes the importance of state cooperation to the effective operation of the ICC. The duty to cooperate with the ICC imposed on state parties by the Rome Statute is twofold: a general commitment to cooperate and an obligation to amend their domestic laws to permit cooperation with the court [46].

The ICC has no independent enforcement powers. It is entirely dependent on the ability and willingness of states to provide resources, cooperate with the court's requests for information and, ultimately enforce arrests warrants. State parties to the Rome Statute are under an obligation to assist the court, and the SC may also create legal obligations to assist the court and enforce its decisions [47].

A very grave limitation on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the court, of difficult access, unstable and unsafe. Carrying out investigations in Uganda, DRC, CAR or with regards to Darfur entailed logical and technical difficulties, unprecedented problems which no other Prosecutor or court is faced with [48].

From the foregoing, where states fail to cooperate, the ICC is helpless and this hinders its proper functioning to exercise its jurisdiction. It is clear that the most states are no longer ready to cooperate with the ICC and this is detrimental to the proper functioning of the court.

5. Lack of Universal Jurisdiction

The concept of "Universal Jurisdiction" is normally taken as referring to the assertion of criminal jurisdiction by a state over certain serious crimes regardless of where the crime was committed or the nationality of either the victim or the alleged perpetrator. This is in contrast to the normal situation where a state may only prosecute for crimes committed in its own territory or in certain other specifically prescribed circumstances. In its purest form, universal jurisdiction does not depend upon the existence of any treaty obligation and is based upon the idea that certain crimes are so serious that they affect the whole international community and that as a result, every state is free to exercise its jurisdiction to prosecute the perpetrators. This was memorably expressed by the supreme court of Israel in the *Eichmann case* [49].

As commonly known, the jurisdiction provided by the 1949 Geneva Conventions is universal in that those suspected of being responsible for grave breaches come under the criminal jurisdiction of all states parties, regardless of their nationality or the *Locus Commissi delict* [50].

The UN Diplomatic Conference was held in Rome in the summer of 1998 to finalize the Statute for the permanent ICC. As the conference progressed, however, several problems became apparent. Many states, most notably the United States of America (US), were concerned that allowing the ICC to exercise powers traditionally reserved to states will negatively impact national sovereignty. The conference participants quickly rejected a scheme of universal jurisdiction under which nationals of any state, regardless of whether their state was a party to the treaty, could be tried before the ICC for international crimes. States such as the US, which feared an overly independent court, clearly could not be persuaded to accept such widespread jurisdiction [51].

According to William A. Schabas, to let an international court hold universal jurisdiction was seen as a step too far. The ICC does aim towards universal jurisdiction, but is dependent on the cooperation and consent of its member states. The Rome Statute does not automatically prevail over other international bilateral or multilateral treaties and it is left upon the states themselves to decide whether to surrender a suspect to the ICC or another state if they are both requesting surrender [52].

The principle of complementarity means that the ICC only steps in if a national state court fails to or is unwilling to act. This principle applies to non-member states to the Rome Statute. According to Cassese [53], this is a principle that can be abused if a state pretends to investigate for the sole purpose of protecting the accused persons [54]. Especially because of Article 18(1) of the Rome Statute, which regulates that the Prosecutor of the ICC must notify the state with jurisdiction over the crimes concerned (even a non - member to the Rome statute) when an investigation is about to be initiated by the ICC [55].

While the Rome statute was the culmination of decades of sustained efforts by the international community to create a centralized criminal court, its serious jurisdictional limitations have been widely acknowledged. The devastating consequences of these limitations to the ICC's potential to deter and prosecute international crimes were noted by Professor Nsereko:

"The court lacks universal jurisdiction wherewithal to track down and try perpetrators of heinous crimes irrespective of their nationality and the place where they committed the crimes. This is a particularly severe handicap for the court. It will not be able to try dictators whose countries for obvious reasons, may not accede to the statute. These dictators will be able to roam the globe assured that the arm of international justice will not be long enough to reach them" [56].

Given this statutory gap, there has been renewed interest in the doctrine of universal jurisdiction to permit domestic legal systems to prosecute serious humanitarian crimes in the absence of international jurisdiction. The Common Law origins of the Universal jurisdiction doctrine can be traced to efforts of the international community in the middle Ages to effectively police piracy on the high seas, which posed a very serious threat to international commerce and navigation [57].

According Cedric Ryngaert, in his article titled "The International Criminal Court and Universal Jurisdiction", universal jurisdiction is understood as the exercise of jurisdiction over a crime by either the ICC or a state in the absence of a territorial, personal, or other nexus to the crime. It is jurisdiction that is based on the heinous nature of the crime [58].

As is known, the ICC does not have universal jurisdiction at least not in the strict sense of the word. Stating that the ICC does not have universal jurisdiction is stating that the ICC

cannot exercise jurisdiction over whoever committed the crimes, or wherever the crimes may have been committed. If the court had truly jurisdiction, it would be able to deal with crimes that are committed in any part of the world, irrespective of whether the territorial state or the state of nationality of the offender has ratified the statute, or whether the SC has referred the situation to the court. Under the Rome statute, the court does not have such jurisdiction over international crimes. It would therefore make sense to expand the jurisdictional basis of the Rome statute so as to include the universality principle. There are strong legal arguments in favour of a grant of universal jurisdiction to the ICC [59].

The fact that the ICC has not been granted universal jurisdiction exercisable *proprio motu* has been criticized on the basis that it will leave some offences beyond its power to prosecute. The question has been, if the drafters of the Rome statute were necessarily wrong in deciding not to grant the court such jurisdiction [60]. Olympia Bekou concluded that to have given the court universal jurisdiction would have been lawful under current International Law and would have provided a welcome reaffirmation of the concept. Such jurisdiction would be difficult, if not impossible for the court to use, given that the court has to operate in a world of sovereign states, not all of whom are sympathetic to it, the drafters' choice was a prudent one [61].

The court's lack of universal jurisdiction serves as an impediment to its exercise of jurisdiction. Recent trends have revealed that for the court to achieve its purpose, it should be granted universal jurisdiction. This could be deciphered even from the wordings of the Prosecutor of the ICC, Fatou Bensouda concerning the case of Syria. She made it clear that the court would have intervened to initiate proceedings in Syria but its hands are tied because of lack of jurisdiction in the absence of SC referral. The rational for universal jurisdiction is to ensure that international crimes do not go unpunished either because of sham trials, poor investigations or SC failure to refer.

6. Conclusion

The ICC which came into force in July 2002 has jurisdiction over the most serious crimes; genocide, crimes against humanity and war crimes. This statute has serious flaws which hinder the court from proper discharge of its functions, though the statute can be considered the most important institutional innovation since the founding of the UN. Thus, constant effort is needed to end the history of impunity for particular serious crimes of concern to the International Community and to make the court more effective in prosecuting international criminals.

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15. The court may not proceed with a request for the 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 party, unless the court can first obtain the cooperation of that third state for the waiver of the immunity.
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