

Selective Justice, the International Criminal Court and Non State Parties

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Abstract

The right to seek justice is a fundamental element of the rule of law. People are unable to have their voices heard, exercise their rights, fight prejudice, or hold decision-makers responsible without access to justice. Therefore, justice should be delivered in a fair and non-discriminatory manner. The need for justice was the reason behind the creation of the International Criminal Court. The objectives behind the creation of an International Criminal Court is to try individuals accused of committing the most serious crimes like genocide, war crimes and crimes against humanity, to achieve justice for all, to end impunity, to end conflict and to help avoid similar crimes in the future. This study of research, therefore, investigates the International Criminal Courts jurisdiction on non-state parties. A qualitative research method using the case study research design in order to gain a comprehensive and multi-faceted understanding of the study was used during the course of this study. Also secondary sources like books, policy documents, reviews, laws and conventions were used in assessing the literature for this study. In this study of research, the International Criminal Courts objectives were broadly explained and how the International Criminal Court tries non- state parties was backed up by articles in the Rome Statute. This study of research includes the jurisdiction of the International Criminal Court, the structure of the ICC, the Legal basis of ICC on non-state parties. This study established the international criminal court is not effective on non- state parties except that situation in the country has been referred to the International Criminal Court by the United Nations Security Council or the non-state party gives the court permission to investigate individuals from its country. This study also established that the limitations the International Criminal Court has on non-state parties are the United Nations Security Council and the principle of complementarity. Therefore this study recommends that the International Criminal Court should have some access to investigate and prosecute persons within the jurisdiction of non-state parties.

Keywords: Non-State Parties, ICC, Jurisdiction, Rome Statute

Introduction

The International Criminal Court was created from the Rome statue which happens to be an international treaty which was signed in 2002 by countries who decided to be state parties to the International Criminal Court. The Rome statue was established in Rome by the Ad Hoc tribunal, which was a committee that helped countries settle disputes after the Second World War in order to maintain peace. The United Nations chose two panels to create a resolution for the establishment of an International Criminal Court (ICC) and an Ad Hoc court known as the International Criminal Tribunal for the previous Yugoslavia (ICTY) was established in 1993 in The Hague and the intention was to try people who infringed international humanitarian law (Schabas, 2011).

The International Criminal Court was created in 2002 because of the need for international intervention from a higher authority by several countries in the cases of genocide, the crime of aggression, war crimes and crimes against humanity. According to the Rome Statute genocide signifies any crimes involving the destruction of an entire national, ethnical, racial or religious group, killing individuals from these gathering and making serious damage to members from the group. Crimes against humanity include calculated attacks targeted on a civilian group (Glasius, 2006). Examples under this crime include; murder, slavery, torture, forceful transfer of population, extermination, rape, sexual slavery, prostitution, or any form of sexual violence, apartheid. War

crimes include infringement of the laws and customs concerning the rules of war and peace and examples under this division include; murder, capturing hostages, internationally attacking a large civilian population, rape, sexual slavery, and deliberately directing attacks on buildings dedicated to education, history, science, health, and charity, torture, mutilation, and initiating child soldiers.

The crime of aggression according to the Rome statute (2002), as embraced by the Assembly of States Parties during the Review Conference of the Rome Statute, held in Kampala Uganda between 31 May and 11 June 2010, signifies the utilization of armed forces by a State against the sovereignty, regional territorial integrity or political freedom of another State. Other definitions include the demonstration of hostility, attack, military occupation, and annexation by the utilization of force. The culprit of the act of aggression is an individual who is in a position adequately to practice control over or to coordinate the political or military activity of a State.

The International Criminal Court has about 123 countries called state parties under its jurisdiction. These state parties have willingly signed the Rome statute and have agreed to allow the International Criminal Court investigate and prosecute members of their state if the need arises. The International Criminal Court can prosecute individuals in three instances. The first is if the person wanted by the court is a member of a state which is a party to the International Criminal Court and has signed the Rome statute. Another instance is if the United Nations Security Council refers a case of a state either a party or non-state party to the International Criminal Court for investigation and prosecution. And finally, the International Criminal Court can prosecute an individual if the courts prosecutor decides to investigate a susceptible individual personally. This doesn't mean that the International Criminal Court is globally accepted by all countries in the world, instead the International Criminal Court is known for its limited jurisdiction which is dependent on the Rome statute. If crimes that fall within the criminal jurisdiction of the International Criminal Court are committed by members of non-state parties, does the court ignore these crimes?, and can the International Criminal Court function without state compliance?

Therefore, this paper examined the International Criminal Court's jurisdiction on non-state parties. The first section will explore the jurisdiction of the International Criminal Court, the second section will explain the structure of the ICC, the third section will look into Legal basis of ICC on non-state parties, the fourth section will explain what limits the jurisdiction of the ICC over non state parties and the final section will include the conclusion and recommendations.

Methodology

This study is qualitative and the methodology of this research was designed towards generating data on selective justice, the international criminal court and non-state parties. Content analysis was used as a method of data collection and secondary sources were used in assessing literature and analyzing data. Available documents like books, policy documents, reviews, conventions and laws were used to support the claims in this study

Objectives

The main objective of this study is to investigate the jurisdiction of the International Criminal court on non-state parties. While other objectives are to:

1. Examine the structure of the International Criminal Court.
2. Assess the effectiveness of the Rome statute on non-state parties
3. Examine the limitation of The International Criminal Court on non-state parties.

Literature Review

The term jurisdiction has multiple meanings in international law. It encompasses a state's legal ability or power to create, enforce, and adjudicate legal laws inside its borders. In other words, jurisdiction refers to the state's ability to influence people, property, and situations, and it embodies the fundamental ideals of state sovereignty,

equality, and non-intervention in domestic affairs. Jurisdiction is a crucial component of state sovereignty, as it is an exercise of power that can change, create, or terminate legal connections and duties (Mukanma, 2020).

The objectives of the International Criminal Court are to put an end to impunity of heads of states in order to ensure justice is served, to ensure that peace is sustained and to ensure that the crimes within its criminal jurisdiction are not reoccurring in other countries. The preamble of the Rome statute of the International Criminal Court also states that state parties should be mindful because in this period, millions of people have been victims of crimes against humanity, genocide and war crimes, and that it should be recognized that these crimes have threatened security and peace of the world and it is the duty of every state to exercise criminal jurisdiction over individuals responsible for international crimes. While it is so that the International Criminal Court was created to compliment national crimes and not to replace them, this means that if states are unable or unwilling to exercise criminal jurisdiction in their responsible states using their national courts, the International Criminal Court has the right to intervene and exercise jurisdiction over these crimes and prosecute individuals accordingly.

According to The Rome statute (2002), individuals who are nationals of states parties to the ICC, but not states, are subject to the ICC's jurisdiction. The International Criminal Court's (ICC) jurisdiction is complementary to national criminal jurisdictions. The Rome Statute establishes a complementarity principle that applies to the ICC's jurisdiction over state parties' domestic courts.

The criminal jurisdiction of the International Criminal Court are crimes against humanity, war crimes, crimes of aggression and genocide According to the Rome Statute genocide signifies any crimes involving the destruction of an entire national, ethnical, racial or religious group, killing individuals from these gathering and making serious damage to members from the group. Crimes against humanity include calculated attacks targeted on a civilian group (Glasius, 2006). Examples under this crime include; murder, slavery, torture, forceful transfer of population, extermination, rape, sexual slavery, prostitution, or any form of sexual violence, apartheid. War crimes include infringement of the laws and customs concerning the rules of war and peace and examples under this division include; murder, capturing hostages, internationally attacking a large civilian population, rape, sexual slavery, and deliberately directing attacks on buildings dedicated to education, history, science, health, and charity, torture, mutilation, and initiating child soldiers.

The Rome statute (2002) states in Article 13(a) that the exercise of jurisdiction of the International Criminal Court. This section states that the International Criminal Court can exercise jurisdiction over a state if the crimes committed within the court's criminal jurisdiction is referred to the prosecutor of the court by a state party requesting the prosecutor to investigate the situation in order to determine if one or more people should be charged for a particular crime.

Articles 13 (b) of the Rome statute also states that the International Criminal Court can exercise jurisdiction if the crimes committed by a state is referred to the court by the United Nations Security Council under chapter seven of the United Nations charter As a result, when the UNSC refers a matter to the ICC under Chapter VII, third states are obliged because the chapter is defined by crimes that fall under international customary law. There is no such certainty, however, because a UNSC permanent member who is not a signatory to the ICC may exercise a veto over prosecution of its people. Third countries will be subject to ICC jurisdiction if they sign a declaration agreeing to the court's jurisdiction in a particular case. (Romano et al, 2004).

While articles 13(c) states that the court can exercise jurisdiction of the prosecutor initiates an investigation in respect to the crimes within the jurisdiction of the International Criminal Court. Olasolo (2005) states that The Court's dormant jurisdiction has universal reach when the Security Council refers a case under article 13(b) of the Rome Statute. As a result, as long as the circumstance in question occurred after July 1, 2002, the Court's

jurisdiction will extend to it, regardless of: (i) where and when the situation occurred; or (ii) the nationality of the persons allegedly involved (the Rome statute, 2002).

The Court's dormant jurisdiction does not have universal reach because it is subject to some limitations when a State Party makes a referral pursuant to articles 13(a) and 14 of the Rome Statute, or when the Office of the Prosecutor makes a request for authorization of an investigation pursuant to article 15(3). In this scenario, the Court's jurisdiction will be limited to situations that occurred: (i) in the territory of a State Party, regardless of the nationality of the persons allegedly involved, or in the territory of a non-party State as long as nationals of States parties are allegedly substantially involved; and (ii) after the Rome Statute has entered into force for the State Party in question (Olásolo, 2005).

The Structure of the ICC

The International Criminal Court has three essential organs: the Presidency, the Office of the Prosecutor, and the Registry. There are also other organs namely; the Appeals, Trial and Pre Trial Divisions. The Assembly of State Parties is a part and body of the International Criminal Court but not an organ.

- **The Assembly of States Parties:** serves as the Court's administrative, monitoring, and legislative body, but it is not one of the Court's organs. It sets the budget, appoints judges and investigators, modifies laws and regulations, and carries out various tasks related to the Rome Statute. The Trust Fund for Victims, which is separate from the Court, was established by the Assembly of States Parties (as determined in Article 79 of the Rome Statute) to provide assistance to victims of Rome Statute crimes and their relatives, as well as to assist in the execution of Court-ordered repayments. The Trust Fund for Victims works to promote reparative justice, compromise, and long-term peace by attempting to alleviate the immediate consequences of atrocity crimes. (Novak, 2015).
- **The office of the prosecutor:** The Office of the Prosecutor is a self-sufficient organ of the Court. Its goal is to receive and dissect data on circumstances of crimes within the jurisdiction of the ICC, to dissect the conditions referred to it to decide if there is a sensible reason to start an investigation concerning a crime of genocide, crimes against humanity, and war crimes or crimes of aggression, and to bring the culprits of these violations under the investigation of the Court. To satisfy its goal, the Office of the Prosecutor is made out of three divisions: the Investigation Division, which is liable for directing investigations, analyzing proof, and addressing people being scrutinized as well as casualties and witnesses. The Statute requires the Office of the Prosecutor to research implicating and absolving conditions equally. The Prosecution Division has a job in the investigation process, yet its central obligation is prosecuting cases before the different Offices of the Court. The Jurisdiction, Complementarity and Cooperation Division, with the help of the Investigation Division evaluates data gotten, situations referred to the Court and analysis situation and cases to decide their tolerability and gets the collaboration needed by the Office of the Prosecutor (Glasius, 2006).

The Office of the Prosecutor is a free organ of the Court headed by the prosecutor, who is helped by at least one Deputy Prosecutor. The Deputy Prosecutor in charge of prosecutions is Ms Fatou Bensouda of The Gambia. This office also functions as a Registry to advise people with respect to their privileges under the Rome Statute, the principles of the Court and the accessibility of the casualties and witnesses unit. The unit is also in charge of making security plans and giving defensive measures, counselling and other sorts help to people (Gentile, 2009).

- **The Presidency:** The presidency of the International Criminal Court comprises of three appointed authorities, the President and two Vice-Presidents. Elected by an absolute majority of 18 judges of the Court for a limit of two, three-year terms, and they may be re-elected once (Gentile 2009; Novak, 2015). The Presidency is answerable for the organization of the Court. It represents the Court to the rest of the world and assists the organization with the work appointing authorities. The Presidency is additionally liable for completing different errands. For example, guaranteeing the enforcement of sentences by the Court (Gentile, 2009). Furthermore, the Presidency works in accordance to the Rome

Statute and always works with and seeks the advice of the prosecutor of the court before making decisions (Novak, 2015).

- **The Judges:** The judges are people of noble character, fairness and respectability who have the capabilities needed in their individual States for appointment to the most elevated legal offices and all judges of the International Criminal Court have broad experience pertinent to the Court's legal action. The 18 Judges of the Court are chosen by the Assembly of States Parties (Novak, 2015). The Judges choose three within themselves that can act as the president, the first vice and second vice presidents. (Gentile, 2009). Judges of the International Criminal Court have broad knowledge on explicit issues, such as violence against women and children and the crimes taken up by the International Criminal Court. The appointment of the judges considers the requirement for the representation of the principal legal systems and a fair representation of people. The judges guarantee the equity of proceedings and the management of justice (Novak, 2015).
- **The Registry:** The Registry is the central authoritative organ of the Court headed by the Enlistment center and is responsible for the non-legal parts of the organization of the Court, including Court the executives, human resource and finance (Gentile, 2013). The Registry assists the Court in regards to fair and public trials. The center capacity of the Registry is to offer regulatory and functional help to the Chambers and the Office of the Investigator which guarantees that the Court is appropriately handled and creates compelling ways to help victims, witnesses and the defense to protect their privileges under the Rome Statute and the Rules of Procedure and Evidence (Novak, 2015).
- **The Chambers:** The chambers consist of 18 adjudicators divided into the trial, pre-trial and appeals division. the Pre-Trial Division which is made out of seven adjudicators, the Trial Division which is made out of six adjudicators and the Appeals Division which is made out of five adjudicators. The jobs and obligations of the adjudicators are laid out according to the Pre-Trial, Trial, and Appeals Chambers (Gentile, 2009). The pre-trial chamber has the role of the first phase of a judicial proceeding and then makes the choice whether to confirm the charges against an accused or not. After the charges are confirmed, the trial chamber decides if the accused is innocent or guilty. If guilty, a sentence is imposed on the convict either by rehabilitation, restitution or compensation by paying money. If the prosecutor or the convict appeals the decision of the trial chamber, the appeals chamber may decide to reverse or amend the decision placed by the trial chamber (Novak, 2015).

The ICC and Non-State parties

The Rome statute mentions the jurisdiction of the International Criminal Court as it applies to state parties only and mentions that the ICC can exercise jurisdiction over a non-state party of the case is referred to the UNSC. The statute also mentioned the right of a prosecutor to exercise investigations on a state if the alleged crime was committed on the territory of a state party, according to the ICC Treaty, can the ICC have jurisdiction over non-party citizens without the permission of the state of nationality or referral by the Security Council. Despite this territoriality requirement, some proponents of the ICC Treaty have argued that ICC jurisdiction over non-party state nationals is based at its core on the principles of universal jurisdiction, which allow any state's courts to prosecute its nationals for certain serious international crimes (Morris, 2000). However, international law which is the basis on which the International Criminal Court was created is based on the choices of a state and the consent of states to agree to the jurisdiction of international criminal law. According to international law, state decisions are final.

Parties to the ICC clearly have territorial criminal jurisdiction over non-party citizens who commit crimes on the ICC party's territory. Similarly, in circumstances when an alleged offense is being investigated, under international law, an ICC party with custody of the accused has universal jurisdiction. In most cases, the perpetrator would have the right to prosecute him regardless of his nationality. Akande, (2003) explains that the main question is whether signatories to the ICC Statute have the authority to delegate their criminal jurisdiction to an international tribunal without the approval of the accused person's state of nationality. The notion that such

delegations of jurisdiction are illegal is based on two considerations. First, it is maintained that state delegations of criminal jurisdiction are generally illegal unless the accused's state of nationality agrees. Alternatively, even if delegations of judicial jurisdiction by one state to another are legal, such a delegation to an international tribunal is unusual, according to some. The International Criminal Court does not have the right to prosecute states or investigate a state on its own. Rather, the International Criminal Court prosecutes and investigates individuals. Therefore the International Criminal Court cannot exercise power over a citizen of a non-state party who commits a crime in the jurisdiction of a state party. This is why the non-state party has to allow the ICC to prosecute such an individual.

An example is the United States which is not a party to the Rome statute or the International Criminal Court. The U.S also doesn't recognize the legitimacy of the International Criminal Court. In the case of the United Nations peace keeping missions in Afghanistan, where the United States sent troops to help with the missions, reports came back that the United States military had committed human rights infringements which fell under the criminal jurisdiction of the International Criminal Court. The ICC, was unable to investigate that case because the United States prevented it and stated that they as a nation, are not members of the court so the court has no right to exercise jurisdiction over them. However I believe that state officials and individuals who commit crimes within the criminal jurisdiction of the ICC, on a state party's territory should be prosecuted because failure to do so limits the International Criminal Court.

What Limits the Jurisdiction of the ICC Over Non State Parties

It is now widely accepted that an individual's official role does not absolve him or her of substantive criminal responsibility for crimes banned by international law. As a result, under international law, even top state leaders may be held criminally accountable for crimes. Article 27 reflects this principle (Akande, 2001). Article 27 (a) of the Rome statute states that the Rome statute will apply to all individuals without distinction based on official capacity, be it a governor, a head of state, a member of the parliament, or a government official. Also the sentences of their crimes will not be reduced because of their position in power. Article 27(b) goes further to state that immunities will not be attached to such individuals (Rome statute, 2002). However reverse is the case as government officials escape the clutches of justice through the use of immunity just as the United States did after the troops violated human rights during the peace keeping missions. While the ICC has broad jurisdiction over state officials, its power to seek the arrest and surrender of state officials from other countries is limited by the immunity accorded to state officials when they are overseas under international law. Article 98 (1) is especially relevant for governments that are not parties to the ICC Statute since it prohibits parties to the Statute from detaining and surrendering officials or diplomats from non-ICC states. where international law provides immunity to those authorities or diplomats In fact, some ICC parties and authors have stated that this provision solely serves to prevent the surrender of non-parties' officials, and that it cannot be used by parties to the Statute when their officials are in another party's territory.

If the Security Council, acting under Chapter VII of the UN Charter, has requested a deferral, the ICC Prosecutor may not begin or proceed with an investigation or prosecution, according to Article 16 of the Rome Statute. The deferral of inquiry or prosecution lasts for 12 months, but the Security Council has the authority to extend it. This clause was added to provide the Prosecutor limited political authority over his or her job (Akande, 2003) While it was not agreed that the Security Council should have general political control, it was acknowledged that there may be times when the Court's exercise of jurisdiction might interfere with the Security Council's resolution of a continuing conflict. The ICC parties have agreed that, in those restricted situations, the Security Council, acting under Chapter VII, may demand that the needs of peace and security take precedence over the immediate demands of justice (Sarooshi, 2001). The fact that the United Nations Security Council has the right to stop an ongoing investigation shows that the International Criminal Court is limited in terms of jurisdiction. Also the fact that powerful countries like the United States can also prevent the United Nations

security council from performing its duties explains the political interference at play when it comes to international law.

The principle of complementarity which states that the International Criminal Court is meant to compliment national courts and not to replace them can be a limitation for the International Criminal Court because the ICC has no right to investigate or prosecute people in a state if the national courts are willing and ready to investigate and prosecute that individual. Akande (2003) states that the ICC cannot prosecute an individual from a non-state party who commits a crime within the jurisdiction of a state party because non-state party may argue that their national courts can handle the case. And if the ICC carry's on with their investigation, non-state parties have the right to challenge the jurisdiction of the ICC at the pre trials chamber.

Summary of Findings

1. This study established that the international criminal court is not effective on non- state parties except that situation in the country has been referred to the International Criminal Court by the United Nations Security Council or the non-state party gives the court permission to investigate individuals from its country.
2. This study established that the limitations the International Criminal Court has on non-state parties are the United Nations Security Council and the principle of complementarity.

Conclusions

The relationship that exists between the International Criminal Court and non-state parties will continue to be a topic of discussion in the foreseeable future. However, even though non state parties like the united states find bases to stop the International Criminal Court from exercising jurisdiction over them, I believe that the ICC exercising jurisdiction over crimes referred to by the UNSC and in cases where by a national of a non-state party commits a crime in the jurisdiction of a state party should be legal. The fact that powerful state such as the United States use political means to prevent the ICC from performing its duties shows impunity and questions the legitimacy of a global institution of justice such as the ICC.

The Rome statute should be rebranded and redrafted so as to include clearly, cases whereby non- state parties will be obliged to enable the International Criminal Court prosecute and investigate their citizens without political interference and impunity.

References

- Akande, D. (2003). The jurisdiction of the International Criminal Court over nationals of non-state parties: legal basis and limits. *Journal of International Criminal Justice*, 1(3), 618-650.
- Cassese, A., Gaeta, P., & Jones, J. R. (Eds.). (2002). The Rome statute of the international criminal court: A commentary (Vol. 1). *Oxford: Oxford University Press*.
- Gentile, L. (2009). Understanding the International Criminal Court. *The African Guide to the International Criminal Court. Pretoria: Institute for Security Studies*.
- Glasius, M. (2006). The International Criminal Court. Taylor & Francis. The International Criminal Court. Taylor & Francis.
- Glasius, M. (2007). *The International Criminal Court: A Global Civil Society Achievement (Routledge Advances in International Relations and Global Pol)* (1st ed.). New York, USA: Routledge.
- Morris, M. (2000). High crimes and misconceptions: the ICC and non-party States. In *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (pp. 219-279). Brill Nijhoff.
- Novak, A. (2015). The International Criminal Court: An introduction. Springer.
- Olásolo, H. (2005, October). Reflections on the International Criminal Court's Jurisdictional Reach. *In Criminal Law Forum* (Vol. 16, No. 3, pp. 279-301). *Kluwer Academic Publishers*.

- Romano, C. P., Nollkaemper, A., & Kleffner, J. K. (Eds.). (2004). *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*. Oxford: *Oxford University Press*.
- Sarooshi, D. (2001). Aspects of the relationship between the International Criminal Court and the United Nations. *Netherlands Yearbook of International Law*, 32, 27-53.
- Schabas, W. (2011). *An introduction to the International Criminal Court*. (4th Ed). *Cambridge, UK; New York: Cambridge University Press*.