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THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL COURT IN PROSECUTING WAR CRIMES

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ABSTRACT

The International Criminal Court (ICC) plays a pivotal role in the protection and promotion of human rights by prosecuting individuals responsible for grave international crimes such as genocide, war crimes, crimes against humanity, and the crime of aggression.² This article is on the analysing the effectiveness of the International Criminal Court in prosecuting war crimes and it also gives an outline about the International Criminal Court, its jurisdiction, applicability and also the need for the development of international criminal court and its aftermath.

INTRODUCTION

ICC is established under the Rome Statute in 1998 and the ICC serves as a global judicial body with the mandate to address impunity where national courts are unwilling or unable to prosecute offenders. The ICC is headquartered in The Hague, Netherlands, and it serves as a key institution for promoting global justice and accountability. Its role in human rights protection is grounded in its efforts to hold perpetrators accountable for terrible violations and to provide justice to victims, thereby reinforcing the international legal framework for human rights. According to Joyner, war crimes denote not only the violations of the laws and customs of war, but also crimes against the peace, crimes against humanity, and genocide as those concepts have been defined since the end of the Second World War³. The ICC has jurisdiction over crimes committed by individuals, rather than states, and it operates based on the principle of complementarity⁴. This means that it will only intervene when national courts are unable or unwilling to prosecute these crimes. The Court aims to fill a gap in international law by holding individuals accountable for actions that threaten international peace, security, and the human rights of vulnerable populations. The Rome Statute of ICC has stated what constitutes war

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² Rome Statute of International Criminal Court (ICC), UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art 5 < <https://www.refworld.org/docid/3ae6b3a84.html>> accessed 9 November 2024.

³ Christopher C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1997) (59)4 Law and Contemporary Problems, 153.

⁴ Art 17 of Rome Statute

crimes. According to this Statute, war crimes means grave breaches of the Geneva Conventions of 12 August 1949, other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law and, in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949. The specific acts of these breaches, which constitute war crimes, have been listed in the Rome Statute.⁵

INTERNATIONAL CRIMINAL COURT

On 17 July 1998, 120 States adopted a statute in Rome – known as the Rome Statute of the International Criminal Court, establishing the International Criminal Court. For the first time in the history of humankind, States decided to accept the jurisdiction of a permanent international criminal court for the prosecution of the perpetrators of the most serious crimes committed in their territories or by their nationals after the entry into force of the Rome Statute on 1 July 2002.

The International Criminal Court is not a substitute for national courts. According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. Its investigations and prosecutions send a strong message to leaders and military officials of the states that severe breaches of human rights will not go unpunished. Furthermore, by focusing on individual accountability, the ICC promotes a culture of responsibility and justice, which is critical in preventing horrendous crimes.

The concept of an international criminal court was first proposed after World War I, but it gained momentum following World War II through the creation of the Nuremberg and Tokyo Tribunals. Despite this progress, the Cold War's geopolitical divisions hindered further development of a permanent court. It wasn't until the 1990s—after the Cold War ended and in reaction to the mass atrocities in Rwanda and the former Yugoslavia—that global efforts to establish a lasting judicial institution were revived. In 1994, the International Law Commission (ILC) submitted a draft statute for an international criminal court to the UN General Assembly, which laid the foundation for formal negotiations starting in 1995. Representatives from more than 160 countries, along with NGOs and legal experts, participated in intense discussions. Major topics included the scope of the court's authority, its interaction with national legal

⁵ Rome Statute, Art 8.

systems, and the precise definitions of crimes under its jurisdiction. These efforts culminated in the 1998 Rome Conference, where the Rome Statute was adopted with 120 countries voting in favour, 7 opposing, and 21 abstaining. The treaty required ratification by 60 states to become effective, a threshold reached on April 11, 2002. The ICC was thus established, operating under a legal framework that emphasizes accountability for individuals and upholds the principles of international justice. Its jurisdiction is limited to crimes committed after it was founded, and typically applies only to crimes occurring in or involving nationals of countries that have ratified the Rome Statute, unless a case is referred by the UN Security Council.

The ICC is composed of four main organs:

- a. **The Presidency:** This organ is responsible for the overall administration of the court, except for the Office of the Prosecutor. It consists of three judges elected by their peers: the President and two Vice-Presidents, who serve for three-year terms.
- b. **The Judicial Divisions:** The Judicial Divisions consist of 18 judges divided into three sections: Pre-Trial, Trial, and Appeals Divisions. These judges are elected by the Assembly of States Parties and serve nine-year non-renewable terms.
- c. **The Office of the Prosecutor (OTP)** The OTP is responsible for conducting investigations and prosecutions. It operates independently from the other organs of the court and is led by the Prosecutor, who is elected by the Assembly of States Parties for a nine-year term.
- d. **The Registry:** The Registry is responsible for the non-judicial aspects of the court's administration, including managing court records, providing support to victims and witnesses, and maintaining the detention centre.

MEMBERS OF THE INTERNATIONAL CRIMINAL COURT

The members of the International Criminal Court (ICC) are countries that have ratified the Rome Statute, the treaty that established the Court. As of January 2025, 125 states are members, making up the majority of the world's nations. These member states are committed to upholding international justice and the prosecution of individuals responsible for the most serious international crimes, including genocide, war crimes, crimes against humanity, and the crime of aggression. Being a member of the ICC means that these states have agreed to cooperate with the Court in matters of investigation, prosecution, and the enforcement of sentences. This includes the obligation to arrest and surrender suspects when requested by the ICC, as well as providing assistance with investigations and judicial procedures. Importantly,

these countries are also bound by the principles and laws enshrined in the Rome Statute, which guides the operations of the Court. However, not all nations are members of the ICC. Some, including major powers like the **United States, China, India** and **Russia** have either never ratified the Rome Statute or have withdrawn from it.

NEED FOR THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

Before the ICC, there were no permanent institutions to hold individuals criminally accountable for atrocities like genocide, war crimes, and crimes against humanity. The most significant reasons that led to the creation of the ICC are

Nuremberg and Tokyo Trials:

After World War II, the Nuremberg Trials (1945-1946) and the Tokyo Trials (1946-1948) were established to prosecute high-ranking Nazi officials and Japanese military leaders for war crimes, crimes against humanity, and genocide. These trials set an important precedent for international criminal justice but were seen as ad hoc and limited in scope. They highlighted the necessity for a permanent institution to address such crimes, rather than relying on temporary tribunals created in response to specific conflicts.

Increasing Impunity:

In the decades following WWII, the world saw numerous other cases of mass atrocities, including the Rwandan Genocide (1994) and the Bosnian War (1992-1995). The inability of national legal systems to address these crimes led to widespread impunity. In the face of such crimes, there was growing recognition that accountability needed to be global, not just national, and should apply to any individual, regardless of their position or power.

Ad Hoc Tribunals and Their Limitations:

The establishment of ad hoc tribunals, like the International Criminal Tribunal for the former Yugoslavia (ICTY), 1993 and the International Criminal Tribunal for Rwanda (ICTR), 1995 demonstrated the need for an international mechanism to try perpetrators of serious crimes. However, these tribunals were established for specific regions and conflicts, which meant that other instances of international crimes were left unaddressed. These limitations reinforced the idea that a permanent court was necessary.

WAR CRIMES

War crimes under the Rome Statute of the International Criminal Court (ICC) are serious violations of the laws and customs of war, committed during armed conflicts. These crimes are listed in Article 8 of the Rome Statute and include offenses in both international and non-international armed conflicts.

1. War Crimes in International Armed Conflicts

- **Grave breaches of the Geneva Conventions (1949):**
 - Wilful killing
 - Torture or inhumane treatment, including biological experiments
 - Extensive destruction and appropriation of property, not justified by military necessity
 - Forcing prisoners of war or civilians to serve in hostile forces
 - Denying fair trials to prisoners of war
 - Unlawful deportation, confinement, or taking hostages
- **Other serious violations of international law, including:**
 - Intentionally directing attacks against civilians
 - Attacking humanitarian workers or peacekeepers
 - Using banned weapons (e.g., poison, biological, chemical, expanding bullets)
 - Using starvation of civilians as a method of warfare
 - Attacking undefended towns, villages, or buildings not used for military purposes
 - Using human shields
 - Recruiting or using child soldiers under the age of 15
 - Committing rape, sexual slavery, enforced prostitution, or forced pregnancy

2. War Crimes in Non-International Armed Conflicts (Civil Wars, Internal Conflicts)

These include similar offenses as above, but adapted to internal conflicts:

- **Serious violations of Common Article 3 of the Geneva Conventions:**
 - Murder, mutilation, cruel treatment, and torture
 - Taking hostages
 - Attacks against civilians
 - Summary executions or passing sentences without due legal process
- **Other serious violations of humanitarian law:**

- Destroying property not justified by military necessity
- Pillaging
- Attacking hospitals or religious institutions
- Recruiting or using child soldiers
- Committing rape, sexual slavery, or enforced sterilization

Cases Concerning War Crimes

For instance, the case of *The Prosecutor v. Thomas Lubanga Dyilo*⁶, the facts of the case were as follows, Thomas Lubanga Dyilo, a Congolese warlord, was the first person to be tried and convicted by the ICC. He was charged with enlisting and conscripting children under the age of 15 to participate actively in hostilities in the Democratic Republic of Congo (DRC) between 2002 and 2003. On March 14, 2012, the ICC found Lubanga guilty of war crimes related to the use of child soldiers. He was sentenced to 14 years of imprisonment. This case was a landmark as it was the first conviction by the ICC and highlighted the court's focus on crimes involving the exploitation of children in conflict. It set a precedent for future cases involving child soldiers. Also, the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.⁷ The facts of the case were as follows Jean-Pierre Bemba, a former Vice President of the DRC, was charged with war crimes and crimes against humanity, including murder, rape, and pillaging, committed by his militia, the Mouvement de Libération du Congo (MLC), in the Central African Republic (CAR) between 2002 and 2003. On March 21, 2016, Bemba was found guilty of all charges, including command responsibility for the actions of his subordinates. He was sentenced to 18 years in prison. This case was significant as it was the first time the ICC held a high-ranking official responsible for crimes committed by troops under his command. It also underscored the ICC's commitment to addressing sexual violence in conflict.

Furthermore, is the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*.⁸ The facts of the case shows that, Ahmad Al Faqi Al Mahdi, a member of the Ansar Dine militant group in Mali, was charged with the war crime of intentionally directing attacks against religious and historic buildings, including mausoleums in Timbuktu, in 2012. On September 27, 2016, Al Mahdi pleaded guilty and was sentenced to nine years in prison. This case marked the first time the ICC prosecuted the destruction of cultural heritage as a war crime. It highlighted the ICC's role

⁶ (ICC-01/04-01/06).

⁷ (ICC-01/05-01/08).

⁸ (ICC-01/12-01/15).

in protecting cultural property in conflict zones.

JURISDICTION OF INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) has jurisdiction over four main types of crimes. It is primarily outlined in Part 2 of the Rome Statute of the International Criminal Court⁹, specifically from Articles 5 to 22. These articles define the types of crimes under the ICC's jurisdiction, as well as the conditions under which it can exercise jurisdiction. Genocide means acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.¹⁰ This includes actions like killing members of the group, causing serious bodily or mental harm, and imposing measures to prevent births. Crimes Against Humanity are acts of violence or persecution committed against civilians, such as murder, enslavement, torture, and rape.¹¹ War Crimes includes serious violations of the laws and customs of war, such as attacking civilians, using prohibited weapons, or committing acts like torture or taking hostages.¹² Crime of Aggression refers to the planning, preparation, initiation, or execution of an act of aggression by a state or its leaders against another state, such as an invasion or military occupation.¹³

The ICC's jurisdiction is based on the principle of complementarity, meaning the court steps in only when national courts are unable or unwilling to prosecute these crimes.

EFFECTIVES OF ICC

On the one hand, the International Criminal Court (ICC) has made notable progress in the field of international law by refining the legal definitions of serious crimes and holding high-ranking individuals, including former heads of state, accountable for their actions. Its presence has also acted as a deterrent, prompting political and military leaders to weigh the potential legal repercussions of their decisions. However, the court continues to grapple with several issues that hinder its effectiveness. Among these is the lack of support from major global powers—such as the United States, China, and Russia—which have not ratified the Rome Statute, thus limiting the ICC's global jurisdiction. The court also depends heavily on the willingness of states to cooperate in arresting and handing over accused individuals, a requirement that is not

⁹ PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW of the Rome Statute

¹⁰ Art 6 of Rome Statute

¹¹ Art 7, *ibid*

¹² Art 8, *ibid*

¹³ Art 8 bis, *ibid*

always met. Furthermore, the ICC has been criticized for an apparent overemphasis on African cases, leading to concerns about its fairness and legitimacy.

Despite these difficulties, the ICC remains a key institution in the international justice system. Its efforts not only offer a route to justice for victims but also help reinforce the rule of international law and contribute to maintaining global peace and order.

Despite its ongoing challenges, the International Criminal Court (ICC) continues to hold an important place within the international legal system. It serves not only as a channel for justice for victims of severe international crimes but also as a vital mechanism for enforcing international law and contributing to global peace and stability. For the ICC to remain effective in the future, it must navigate political hurdles, expand its jurisdictional capacity, and uphold its integrity as a neutral and fair institution. It requires the states parties are obligated to comply with the court's requests for assistance, including arresting and surrendering suspects, providing evidence, protecting witnesses, and enforcing sentences.¹⁴ In cases where a state is not a party to the Rome Statute or refuses to cooperate, the ICC may seek the intervention of the United Nations Security Council (UNSC). The UNSC has the authority to refer cases to the ICC, impose sanctions, or take other measures to compel state compliance. However, this mechanism has limitations, especially when permanent UNSC members exercise their veto power. For instance, in 2005, the UNSC referred the situation in Darfur, Sudan, to the ICC, leading to the issuance of arrest warrants against Sudanese President Omar Al Bashir for genocide, war crimes, and crimes against humanity. Despite the referral, the enforcement of the warrants was complicated by Al Bashir's continued evasion and the lack of cooperation from certain states. Although the UNSC's referral initiated the ICC's involvement and inability to enforce the arrest warrants demonstrated the challenges associated with this mechanism.¹⁵

The Rome Statute, which established the ICC, is a comprehensive legal instrument containing 128 articles that define the court's powers, structure, and operations. Article 5 identifies the four major crimes under the ICC's jurisdiction: genocide, crimes against humanity, war crimes, and the crime of aggression. Notably, while the crime of aggression was included in the original statute, its enforcement was postponed and only became operational after an amendment was

¹⁴ K A Rodman, 'Darfur and the Limits of Legal Deterrence' [2006] (28) (3) Human Rights Quarterly Review 529- 560

¹⁵ R Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' [2005] (18) (3) Leiden Journal of International Law 529-552.

passed in 2010.

Jurisdictional authority is further defined under Article 12, which outlines the conditions under which the ICC can initiate legal proceedings. According to this article, the court may act if the alleged crime occurred in the territory of a state that has ratified the Rome Statute, if the accused is a national of a state party, or if the United Nations Security Council refers a case to the court. Article 17 introduces the principle of complementarity, which means the ICC acts only when national legal systems are either unwilling or unable to prosecute offenders effectively.

The statute also addresses the issue of immunity for high-ranking officials. Article 27 explicitly states that official status, including that of heads of state or government, does not exempt individuals from prosecution or reduce criminal liability. This ensures that those in positions of power can still be held accountable under international law. Furthermore, Article 53 gives the Prosecutor discretion to decide whether to open an investigation or proceed with prosecution. This decision is based on several considerations, including the seriousness of the alleged crimes and the broader interests of justice.

Article 8 provides a detailed definition of war crimes, identifying them as serious breaches of the laws and customs applicable in both international and non-international armed conflicts. These offenses include grave violations of the Geneva Conventions, such as willful killing, torture, and inhuman treatment. Other prohibited acts include targeting civilians or non-military infrastructure, using poisonous weapons or gases, engaging in acts of sexual violence, and recruiting or using children under the age of fifteen in armed conflicts. Article 7 further defines crimes against humanity as acts that are widespread or systematically directed against civilian populations, committed with the perpetrator's knowledge of the larger attack.

Struggles of ICC in prosecuting War Crimes

The International Criminal Court (ICC) was established in 2002 under the Rome Statute to prosecute individuals for serious international crimes, including genocide, crimes against humanity, and war crimes. While the court marked a significant advancement in global justice, it has faced numerous challenges that limit its effectiveness in prosecuting war crimes. These challenges include a lack of enforcement power, limited jurisdiction, political interference, and procedural inefficiencies.

One of the court's most critical weaknesses is its lack of enforcement mechanisms. Unlike national courts, the ICC does not have its own police force and must rely on member states to arrest suspects and enforce rulings¹⁶. This dependence has led to situations where individuals indicted for war crimes, such as former Sudanese president Omar al-Bashir, have evaded arrest despite international warrants. Many states are unwilling or politically unable to comply with arrest requests, making enforcement sporadic and inconsistent.

The ICC's jurisdiction is also limited, which restricts its ability to act globally. The court can only prosecute crimes committed on the territory of states that have ratified the Rome Statute, by their nationals, or when referred by the United Nations Security Council. However, major powers such as the United States, China, Russia, and India have not joined the ICC. As a result, many conflicts occur outside the court's reach unless referred by the Security Council, which is itself subject to political interests and vetoes. The ICC's jurisdiction is limited to crimes committed on the territory of a State Party or by nationals of a State Party unless referred by the United Nations Security Council. This limitation restricts the court's ability to address crimes in non-member states.¹⁷

Political interference further complicates the ICC's ability to function impartially. The court has faced criticism for focusing disproportionately on African cases during its early years, leading to accusations of bias and selective justice. Some African leaders have accused the court of targeting their continent while ignoring crimes committed by powerful nations. Additionally, some countries, including the United States, have actively opposed ICC investigations, imposing sanctions on court officials and refusing to cooperate. When states refuse to cooperate, it severely hampers the court's ability to prosecute crimes. In the case of Saif al-Islam Gaddafi, son of former Libyan leader Muammar Gaddafi, Libya refused to surrender him to the ICC despite an outstanding warrant for his arrest on charges of crimes against humanity during the 2011 civil war. Libya insisted on trying him domestically, illustrating how state non-cooperation can obstruct ICC proceedings.

In addition to these structural and political challenges, the ICC faces practical difficulties in

¹⁶ W A Schabas, 'The Banality of International Justice' [2011] (9) (4) *Journal of International Criminal Justice* 903-908.

¹⁷ H Olosolo, 'The Triggering Procedure of the International Criminal Court: Procedural Treatment of the Principle of Complementarity and the Role of the Office of the Prosecutor' [2007] (4) (1) *International Criminal Law Review* 121-146

conducting investigations and trials. Gathering reliable evidence in war zones is often dangerous and difficult. Witnesses may fear retaliation, and documentation may be scarce or manipulated. These issues can lead to weak cases and long trial delays. Trials at the ICC are often expensive and time-consuming, sometimes taking over a decade to reach a verdict. As a result, the court has secured relatively few convictions since its inception, raising questions about its efficiency. While the International Criminal Court represents a major step toward global accountability for war crimes, its effectiveness is hindered by several serious obstacles. Without enforcement power, broader international participation, and more consistent cooperation from states, the ICC struggles to fulfill its mission. To truly serve as a deterrent and deliver justice for war crimes, the court must overcome these limitations through reform, stronger support from the international community, and improved operational procedures.

CONCLUSION

The International Criminal Court (ICC) has played an important role in advancing international justice by tackling war crimes and crimes against humanity. It has achieved convictions in several prominent cases, including those of Thomas Lubanga Dyilo and Dominic Ongwen, showcasing its ability to bring perpetrators to justice. Nonetheless, the court encounters major obstacles, such as restricted jurisdiction, political opposition, and difficulties with enforcement and securing state cooperation. These challenges hinder the ICC's effectiveness and have fueled criticism regarding its impartiality and limited global influence.

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