



Deficiencies in the Statute of the ICC

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Abstract:

Although the international community has made tremendous efforts to combat international crime, and to prosecute war criminals and perpetrators of genocide and crimes against humanity, through the drafting of the Rome Statute, these efforts have not achieved complete success, because the Rome Statute suffers from many shortcomings and ambiguities, which It has allowed major powers to evade their obligations to extradite their criminals accused of crimes against humanity

Keywords:

Rome Statute - Genocide - Aggression - War

ملخص:

على الرغم من أن المجتمع الدولي قد بذل جهودًا جبارة لمكافحة الجريمة الدولية ، ومحاكمة مجرمي الحرب ومرتكبي الإبادة الجماعية والجرائم ضد الإنسانية ، من خلال صياغة نظام روما الأساسي ، إلا أن هذه الجهود لم تحقق نجاحًا كاملاً ، لأن نظام روما الأساسي يعاني من العديد من أوجه القصور والغموض ، التي سمحت للقوى الكبرى بالتهرب من التزاماتها بتسليم مجرميها المتهمين بارتكاب جرائم ضد الإنسانية.

الكلمات المفتاحية : نظام روما -الإبادة-العدوان -الحرب

1.-Introduction:

The establishment of the International Criminal Court is a great achievement achieved by the international community to prosecute war criminals and perpetrators of crimes against humanity, and countries have succeeded in enacting the Rome Statute legislation, with the aim of prosecuting criminals including heads of state, military leaders and those holders of diplomatic immunities without the need to issue a resolution from the Security Council in accordance with Chapter VII , Despite this achievement, the Rome Statute contained many shortcomings and shortcomings .

1.1-Study method:

I will touch on some articles of the Rome Statute, point out the most important elements of their shortcomings, and the impact of those elements on the ability of the International Criminal Court to accomplish its tasks, and I will discuss the possibility of achieving justice, in light of the Security Council's control over the referral decision, and then I conclude by presenting the most important findings and recommendations.

1.2-Research Importance :

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The research aims to clarify the shortcomings in the statute of the International Criminal Court, and how they led to the disruption of the work of the Court and the escape of thousands of criminals from the grip of the International Criminal Court , and The role of the great powers in influencing the work of the International Criminal Court, obstructing investigations, and exerting political pressures on the Security Council to postpone investigations , It also aims to show bias and racism in the decisions of the International Criminal Court, which was set up to try war criminals of any nationality, but only prosecutes citizens of African countries.

1.3-Research problem :

A) The problem of the research is that the Statute of the International Criminal Court is mandated to prosecute extraordinary criminals, including diplomats, military leaders and heads of state, who enjoy privileges and belong to different countries, which protect them and refuse to extradite them to the International Criminal Court

B) Many articles of the Rome Statute contain many contradictions and contradictions among themselves, on the one hand, and on the other hand, with the national legislation of member states , This inconsistency has given war criminals a tremendous opportunity to get away with it

C) The most important problem is that initiating the criminal case is mostly within the jurisdiction of the Security Council, and the decisions of this Council are issued with the approval of the five major countries, which resulted in those countries controlling the work of the International Criminal Court, meaning that the initiation of the criminal case is subject to the whims and interests of the great powers

D) Military aid provided by superpowers to member states puts pressure on the decisions issued by the General Assembly of the International Criminal Court , By this I mean that the United States of America has the upper hand in controlling the decisions of the ICC

E) The problem lies in the fact that the history of the ICC and the control of the great powers over its decisions confirms that that court was established to prosecute the nationals of African countries.

F) The problem is also that the decision to refer the case for investigation or to postpone it is under the control of the United Nations Security Council, an organ controlled by the Big Five, and thus the ICC has become an instrument. In the hands of the great powers, which have the right to postpone investigations into the crimes of the Israeli occupation in Palestine, as well as the crimes of the Russian invasion of Ukraine

1.4-Duties of the ICC

The Statute of the ICC has assigned specific tasks, namely:

A) genocide, or the intent to destroy in whole or in part a national, ethnic, racial, or religious group;

B) war crimes, or grave breaches of the laws of war, which include the Geneva Conventions' prohibitions on torture, the use of child soldiers, and attacks on civilian targets, such as hospitals or schools



C) crimes of aggression, or the use or threat of armed force by a state against the territorial integrity, sovereignty, or political independence of another state, or violations of the UN Charter

D) crimes against humanity, or violations committed as part of large-scale attacks against civilian populations, including murder, rape, imprisonment, slavery, and torture.

1.5- Procedures for initiating a criminal case to the ICC :

The court can open an investigation into possible crimes in one of three ways:

A) a member country can refer a situation within its own territory to the court.

B) the UN Security Council can refer a situation.

C) or the prosecutor can launch an investigation into a member state *proprio motu*, or “on one’s own initiative.”

D) The court can investigate individuals from nonmember states if the alleged offenses took place in a member state’s territory, if the nonmember state accepts the court’s jurisdiction, or with the Security Council’s authorization .

2.- Shortcomings in application of the Rome Statute

2.1- The flaw in the Article 12 of the Rome Statute:

Article (12) of the Statute of the International Criminal Court included an effective aspect of shortcomings. Where it stipulated the following:

“ .. the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

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

(b) The State of which the person accused of the crime is a national”.⁽¹⁾

According to this article, the Rome Statute does not apply to a state that is not a party to it, Hence, the nationals of those countries can commit crimes against humanity and genocide , and the Criminal Court is unable to prosecute them, Many countries have taken advantage of this loophole to disavow their nationals from being brought to trial , for example the U.S military and intelligence personnel committed torture crimes on Afghan territory as well as on the territory of other parties to the Rome Statute namely Lithuania, Poland, and Romania in regard to victims associated with the Afghan conflict.

so The U.S. government argues that nonparty state nationals do not fall under the ICC’s jurisdiction even if they commit atrocity crimes on the territory of a state party, such as Afghanistan or the three European nations.

However, since the United States is not a member of the ICC, Washington will be under no legal obligation to cooperate with any investigation by the court. U.S. Secretary of State Mike Pompeo has already made it clear that Washington will not cooperate, Without such cooperation, particularly regarding former officials who reside in the United States and are thus outside the reach of ICC arrest warrants (unless they travel to ICC states), it could be very difficult for the



prosecutor to establish sufficient evidence to charge and then arrest U.S. suspects.⁽²⁾

The Russian invasion of Ukraine constitutes a crime of aggression under international law, as this invasion is a war of aggression against peace, as the 1945 United Nations Charter has established the illegality of aggressive war (as opposed to defensive war) in international law.

In a statement issued by the Russian Foreign Ministry, Maria Zakharova confirmed that Moscow takes note of the April 25 announcement of the joining of the Prosecutor of the International Criminal Court to the joint investigation team established under the auspices of the European Union Agency for Judicial Affairs “Eurogest Poland, Lithuania and Ukraine.”

It also announced that it will not cooperate with the investigation committee because it is not a party to the statute of the International Criminal Court.

Therefore, one of the most prominent defects in the statute of the International Criminal Court is the shortcoming in the scope of its application to the state parties.

2.2- Shortcomings in the time of its application:

Article No. (11) of the Rome Statute states that:

“1- The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

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

Perhaps one of the most important shortcomings of the Rome Statute is that it does not apply retroactively. If we address the Israeli violations and crimes in occupied Palestine, we will notice that the article(11) grants the Israeli occupation immunity from being prosecuted for thousands of crimes it committed in the Palestinian territories decades ago.

Assuming that the brutal Russian invasion of Ukrainian territory, which was accompanied by the commission of the most heinous crimes against the peaceful Ukrainian people, ended, and assuming that Russia decided to accede to the Statute of the International Criminal Court, the Russian President and his military leaders would enjoy immunity from appearing before the International Criminal Court, This is based on the text of Article 11 of the Rome Statute and the principle of non-retroactivity of the law

On the other hand, the Article (11) of the Rome Statute contradicts the Article (29), which established an important principle that crimes against humanity should not be subject to a statute of limitations.

According to the Article (29) of Rome Statute “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”⁽⁴⁾

The Rome Statute did not address the statute of limitations for punishment , As Article 29 merely stipulates that crimes are not subject to a statute of limitations



, A part of international jurisprudence believes that punishment also does not lapse by statute of limitations by analogy with the crime ⁽⁵⁾

2.3- the Retroactive of the Rome Statute and persistent crimes:

According to Article 11 of the Rome Statute , the articles does not apply retroactively to crimes committed before 1 July 2002, but I believe that this principle does not include to continuing crimes.

I mean that those in which the criminal behavior begins before the Rome Statute comes into force and continues until the date of its commencement, and then the jurisdiction falls to the International Criminal Court.

And the rulings of the ICC have been repeated on this, as the Pre Trial Chamber of international criminal court held: ‘the crime of enlisting and conscripting is an offence of a continuing nature referred to by some courts as a “continuous crime” and by others as a “permanent crime”. The crime of enlisting or conscripting children under the age of fifteen years continues to be committed as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach age fifteen ⁽⁶⁾

so all of material elements of the crime of conscription or enlistment of children (continuing membership of an armed group or force for the duration of such membership while under the age of fifteen years) occur each successive day. The ICC could thus exercise jurisdiction where an underage child was recruited prior to the entry into force of the Statute and continued, post entry into force date, to be a member of such armed group or force while under the age of fifteen. ⁽⁷⁾

The same considerations would apply to the use of children under the age of fifteen to participate actively in hostilities where, again, this straddled the applicable temporal threshold.

another example concern continuing crimes Trial Chamber found the crime of direct and public incitement to commit genocide ‘is an inchoate offence that continues in time until the completion of the acts contemplated’, thereby justifying its extension beyond the express temporal restriction contained in the ICTR Statute, which limits the Tribunal’s jurisdiction to events occurring during 1994. In so doing, the Trial Chamber found that articles in the local publication Kangura and RTLM radio broadcasts, including those occurring prior to 1994, constituted one continuing incitement to commit genocide such that the Tribunal could convict the appellants on the basis of the totality of the articles and broadcasts, i. e. including those occurring in 1993.⁽⁸⁾

3- The domination of major powers over the ICC:

3.1- Shortcomings in Article 16 of the Rome Statute :

According to the article (16) of Rome Statute: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council resolution , that was in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions. “⁽⁹⁾



According to that article, the Security Council can postpone investigations into cases of aggression, genocide and crimes against humanity for a period of 12 months, and it can also postpone the investigation for another 12 months without justification.

There is no doubt that the Security Council's decisions are dominated by the five major countries , Therefore, Article 16 of the Rome Statute made the filing of the international criminal case dependent on the interests of the five major countries .

International jurisprudence believes that this Article (16) of the Rome Statute leads to the subordination of a judicial body to a political body that controls its decisions. ⁽¹⁰⁾

Although the article gives the Security Council the right to postpone any investigation or trial by the International Criminal Court for a period of one year, with the possibility of renewing the postponement, but there must be a prior decision by the Security Council that there is a threat to peace and security and must agreed upon by 9 members, including the five countries permanent.

Furthermore, the Security Council will have to specify that any investigation or prosecution commenced or continued by the ICC does interfere with its mandate of maintaining international peace and security. This means that it has to show that in the absence of its decision to suspend all investigations and prosecutions under Article 16, international peace and security would be threatened. This of necessity requires the Security Council to specify the particular situation or case whose investigation or prosecution would undermine the maintenance of international peace and security.⁽¹¹⁾

3.2- The ICC and The double standards:

Looking at the statute of the International Criminal Court, we note that its main task is to prosecute those accused of crimes of genocide, aggression and crimes against humanity, regardless of their nationalities, Therefore, all countries are subject to the Rome Statute without discrimination , It has been proven by the decisions of the International Criminal Court that they exclude US citizens from prosecutions. For example , On 27/6/2002, the United States submitted a request to the International Criminal Court to grant American citizens immunity from prosecution by the International Criminal Court , However, the court refused because there was no legal justification to distinguish American citizens from other countries, The United States resorted to the court's threat to withdraw from the peacekeeping forces in the world, and the result of the threat was that the International Criminal Court agreed and issued Resolution No. 1422 on 12/7/2002, which included granting American citizens immunity. . for the year ⁽¹²⁾

The United States of America was not satisfied with that, but it reinforced Resolution No. 1422 with another resolution issued by the US Congress under No. 4775 that includes the immunity of the American armed forces against the prosecution of the International Criminal Court.⁽¹³⁾



This decision of the International Criminal Court is a violation of international law , It affirms the dominance of the great powers over the decisions of the International Criminal Court, it asserts that the International Criminal Court has double standards .

Also, this decision is a violation of Article (98) of the Rome Statute, which states that:

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

2- The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. ⁽¹⁴⁾

3.3- The ICC is only targets African :

The records of the International Criminal Court since its inception in 2002 confirm that it only pursues nationals of African countries and turns a blind eye to Israel, When the issue relates to Sudan or the Democratic Republic of Congo, the Security Council immediately begins an investigation, but when Palestine submits a report accusing Israel of committing crimes against humanity in the occupied territories, the report is not given sufficient attention. ⁽¹⁵⁾

Although many believe that the court was created to try Africans, African countries unwittingly participated in the politicization of the ICC by joining the Rome Statute, agreeing to refer cases, timing of accession, and cooperating with the court. ⁽¹⁶⁾

about Double Standards we can say It is empirically accurate that virtually all of the cases before the ICC involve Africans. Some scholars have even noted that “It will not be an overstatement to argue that thus far the ICC has acted predominantly as a transnational criminal court for Africa.” As of June 2015, the ICC was investigating situations in eight countries, and had issued three verdicts. By November 2016, the Court had ten ongoing examinations, five of which involved African states.⁽¹⁷⁾

There were ten situations under investigation, nine involving African countries This has indeed developed into a public relations nightmare for a Court that ostensibly set out to deliver justice to victims of war crimes, genocide and crimes against humanity, globally. Given the above figures, is the ICC applying a double standard and unilaterally instigating investigations against Africans? At first glance, there are legitimate concerns insofar as the ICC has dared not investigate atrocities alleged to be committed by major powers and although the ICC Prosecutor has argued that her office has investigations in Afghanistan, in Colombia, in Palestine and in Ukraine⁽¹⁸⁾



So African countries' criticism of the ICC does not focus on human rights violations, but many of Africa's grievances against the ICC seem more political than legal⁶⁰, its focus on discrimination between African nations and other nations⁽¹⁹⁾

On the other hand, the International Criminal Court turns a blind eye to the crimes of the great powers and Israel, despite Israel, Palestine acceded to the Statute of the ICC on January 2, 2015, when it handed over its instrument of accession to the UN Secretary-General. The Statute entered into force for the State of Palestine on April 1, 2015, so both of them became members

In 2015, Palestine reported to the International Criminal Court that Israeli soldiers had committed crimes against humanity in the West Bank, including East Jerusalem, and the Gaza Strip.⁽²⁰⁾ Especially the 2014 attacks in Gaza, where the Israel Defense Forces (IDF) committed war crimes.

The Prosecutor has concluded that the investigation of those cases would be admissible under the Statute. This means that any case that can be brought before the Court regarding the situation in the Occupied Palestinian Territories would be admissible under the terms of Article 17 of the ICC Statute, which focuses in paragraph 1(a) on the fact that the jurisdiction of the ICC is based on the principle of complementarity with national jurisdiction.⁽²¹⁾

Despite this, the case is still pending with the International Criminal Court, where Israel claims that Palestine is not a sovereign state, and therefore is not subject to the jurisdiction of the International Criminal Court.

Palestine held the following arguments to the ICC:

First, Palestine avers that it "joined the Rome Statute as a State within its internationally recognized borders, as defined by the 1949 Armistice Line." **Second**, Palestine added that the Statute gives no authority to the Court to make a determination on the issue of the statehood of a State party., Palestine also argued that since the Statute reflects jus cogens prohibitions that prevail over any competing legal obligations, not of the same rank, any other regulations would be 'null' and 'void.'⁽²²⁾

Despite these tremendous efforts, the case is still pending before the International Criminal Court since the beginning of 2015 until now, as a result of double standards, and as a result of the control of the great powers over the International Criminal Court.

And that hegemony will not stop with the subjects of the great powers and Palestine, but it will include other countries, for example, the brutal Russian invasion of the state of Ukraine, the commission of war crimes and other crimes against humanity, the killing and displacement of the peaceful Ukrainian people, How will the Security Council deal with this issue? What is the position of the ICC? I believe that Russia will block any Security Council resolution against its own citizens, even though the crimes committed in Ukraine are war crimes and threaten international peace and security.



I think , The ICC will be powerless to investigate this case due to Russia's dominance of a seat on the UN Security Council, as well as its refusal to cooperate with the court during the investigations.

3.4- US aid domination the ICC:

The United States of America contributes with military aid that exceeds 30% of the value of expenditures needed to maintain peace in all countries of the world , it spends hundreds of millions of dollars annually to train foreign military and police forces to be more effective UN peacekeepers. The U.S. agencies responsible for training peacekeeping forces include regional combatant commands for the Department of Defense; the State Department's Bureau of Political Military Affairs which oversees the Global Peacekeeping Operations Initiative (GPOI), ; the Africa regional bureau at State, which runs the Africa Contingency Operations Training and Assistance (ACOTA) program; and State's bureau for International Narcotics and Law Enforcement (INL), which manages the International Police Peacekeeping Operations Support program. The U.S. presidential memorandum on peacekeeping forcefully states, "The Departments of State and Defense will ensure that any U.S. provided peacekeeping training includes a component on the prevention of SEA. They will condition peacekeeping training or related assistance on the commitment of the TCCs and Police Contributing Countries (PCCS) to ensure that adequate disciplinary measures for SEA violations exist. ⁽²³⁾

In contrast, commanders and USA officers during training commit crimes of sexual violence, forcible detention, and murder, and these crimes warrant prosecution before the International Criminal Court, As soon as the victims filed a lawsuit with the ICC , the USA threatened to stop military aid, as well as to withdraw the American forces participating in peacekeeping, And she coveted more than that, as she pressed the ICC and obtained a decision that included immunity for American officers from prosecution for a year.⁽²⁴⁾

3.5- Bilateral Immunity Agreements:

A bilateral immunity agreement can be defined as an agreement between the United States of America and another country that includes the two parties refraining from conducting investigations or handing over suspects, civilians or military, who are nationals of the two countries to the ICC ⁽²⁵⁾.

Hence, the bilateral treaties concluded by the United States of America eliminate the efforts of the ICC and prevent it from prosecuting the perpetrators of crimes.⁽²⁶⁾

But the question arises about the goal of the United States in concluding bilateral immunity agreements, and does it aim for the American courts to have jurisdiction over the prosecution of American criminals? Or does it aim to evade punishment for good?

Most jurisprudence believes that the purpose of these bilateral agreements is to escape of punishment for American citizens, and not to escape the grip of the ICC , Because according to Article 1 of the Rome Statute, the jurisdiction of the ICC is complementary to the national judiciary, hence The priority is always the



national judiciary according to the Rome Statute, but the United States seeks to evade the prosecution of its citizens both domestically and internationally.⁽²⁷⁾

I think that these agreements, unanimously, are invalid, because they are in violation of Article (53) of the Vienna Convention, which stipulates that:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁽²⁸⁾

4- The Judiciary of the ICC is supplementary:

The general principle is that international criminal justice is complementary, meaning that the state does not resort to the ICC until after it relinquishes the jurisdiction of the internal national judiciary,

4.1- The ambiguity of the Rome Statute on the national amnesty for crime:

There is no explicit reference to amnesties in the ICC Statute or the court's Rules of Procedure and Evidence. This omission is deliberate as parties at the Rome Conference discussed amnesties but could not reach a consensus. During the preparatory meetings, the United States issued an informal “non paper” that suggested „the Court should take account of domestic amnesties when deciding whether or not to exercise jurisdiction“. Some participants greeted this proposition favorably. South Africa was particularly supportive as it was concerned that the ICC would view processes like its Truth and Reconciliation Commission (TRC), as evidence of a state's unwillingness to prosecute. However, NGOs and many of the strongest state supporters of the ICC“ strongly resisted the US proposals, fearing that allowing amnesties to block the court's jurisdiction would enable abusive governments to shield themselves.⁽²⁹⁾ The participant states“ inability to reach a consensus is indicative of the incoherence of state practice on amnesties. The issue was left unresolved and the Rome Statute is arguably sufficiently ambiguous to allow the ICC to recognize certain forms of amnesty

There are a wide variety of legal sources supporting the principle that domestic laws or judicial decisions cannot exempt a person accused of international crimes from individual criminal responsibility or prevent a foreign or international court from prosecuting. For example, as early as 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties took note of the rule that “no trial or sentence by a court of the enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States.” The Allied Control Council Law No. 10 of 1946 similarly provided that no statute, pardon, grant of immunity or amnesty under the Nazi regime would be admitted as a bar to trial or punishment⁽³⁰⁾

The 1949 Geneva Conventions require states to criminalize „grave breaches“ of the conventions and to prosecute or extradite perpetrators.⁽³¹⁾ This obligation to



prosecute is “absolute”, meaning „that states parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches”

4.2-Misunderstanding Article 6 (5) of the Protocol II To War Crime:

Article 6(5) of Additional Protocol II is sometimes invoked to justify the granting of amnesties for war crimes. It stipulates that :

“[a] the end of hostilities, the authorities in power shall Endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict”. The exact scope of this provision has been the subject of debate.⁽³²⁾ Several courts have used it to support their findings that amnesties are valid under international law. Their conclusions are bolstered by stressing the need for reconstruction after violent civil wars, which is interpreted as the rationale behind Article 6(5). However, there are strong arguments countering the applicability of Article 6(5) of Protocol II to war crimes.

First, if one applies the rules of interpretation of the 1969 Vienna Convention on the Law of Treaties, which directs States Parties to interpret in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,⁽³³⁾ it is difficult to conclude that Article 6(5) covers amnesties for war crimes. Additional Protocol II was designed to ensure greater protection for the victims of non-international armed conflicts by developing and supplementing Article 3 common to the Geneva Conventions.⁽³⁴⁾ If Article 6(5) were to allow amnesties which prevent prosecution for the most egregious human rights abuses during armed conflict, the provision would be inconsistent with the primary objective of the Protocol. The words “shall Endeavour to grant the broadest possible amnesty” can be interpreted in the sense that Article 6 (5) should be employed only when it can be implemented without infringing other binding international treaties or customary international law⁽³⁵⁾1995

5.- Obstacles to immunity and humanitarian asylum

5.1- The ICC and the Obstacle of Diplomatic Immunity

I think that Article (27) of the Rome Statute contradicts Article (98), and to clarify this:

Article (27) stipulates that

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

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”⁽³⁶⁾

Hence, according to that article, no person may be exempted from prosecution either under national law or under the Rome Statute on the grounds that he enjoys immunity or that he is a head of state or a military commander.



I think that the above Article No. (27) of the Rome Statute contradicts the text of Article (98). Which stipulates that:

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”⁽³⁷⁾

Applying the foregoing to the issue of the arrest of the Sudanese President, we note that , despite inherent tension between the two articles , but , the Article 98(1) cannot be relied on to justify refusing to comply with the cooperation requests for the arrest of President Al Basher.⁽³⁸⁾

Article 98(2) does not discuss customary law but instead “obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court” , The language implies explicit agreements, in contrast with the customary law norms addressed in Article 98(1).

Article 98(2) also has no applicability to the customary law norms regarding head of State immunity. Neither Chad nor Malawi has a specific agreement with Sudan requiring the consent of Sudan before honoring their obligations to the Court. The Malawi Decision identifies two arguments in raised by Malawi:

A) Al Basher is a sitting Head of State not Party to the Rome Statute and therefore Malawi accorded him immunity from arrest and prosecution in line with “established principles of public international law” and in accordance with the “Immunities and Privileges Act of Malawi.

B) The Republic of Malawi, being a member of the African Union, decided to fully align itself with “the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute”

The Malawi Decision noted various African Union resolutions requiring its members not to cooperate with the warrant of arrest against President Al Basher. The Pre-Trial Chamber summarized these resolutions as based on Article 98⁽³⁹⁾

Therefore, the member states of the Rome Statute rely on Article 98 of it as an excuse not to extradite the accused, because they enjoy immunity.

Hence, I believe that there is a conflict between Article 27 of the Rome Statute and Article 98. This conflict often leads to the disruption of the functions of the International Criminal Court and may lead to impunity for the holders of immunities.

5.2- The ICC and of Geneva 1951, Convention:

Article 33 of the 1951 Geneva Convention on Refugees states that:



“1. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”⁽⁴⁰⁾

The Draft Convention as adopted by the ad hoc Committee at its first session contained the following Article 28: “No Contracting State shall expel or return, in any manner whatsoever, a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion”.

The Committee made the following comments: 'The turning back of a refugee to the frontiers of a country where his life or freedom would be threatened on account of his race, religion, nationality or political opinion would be tantamount to delivering him into the hands of his persecutors. 'The Convention of 1933 contains a provision of this kind⁽⁴¹⁾.

In the present text reference is made not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened for the reasons mentioned. This Article does not imply that a refugee must in all cases be admitted to the country where he seeks entry.

Some believe that handing over a refugee to the International Criminal Court is a violation of Article 33 of the 1951 Geneva Convention, which requires states to refrain from returning a refugee to his country or handing him over to another party.

I think There is no conflict between Article 33 of the 1951 Geneva Refugee Convention and the state's right to extradite a refugee, as Article 1 of the Convention excluded from its scope of application the perpetrators of crimes and stipulated that:

“ The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations”

So The protection of Article 33 does not apply to refugees who commit crimes against humanity

In the same way, international extradition law has developed since 1951. Where a serious international crime has been perpetrated, multilateral conventions now provide a duty to extradite or prosecute and act as a surrogate extradition treaty if no other arrangement exists between the affected States.



The two most recent United Nations multilateral counter-terrorism conventions, on the suppression of terrorist bomb attacks and their financing For terrorism, both include a non-persecution clause that extends to “ethnic origin.” With the exception of persecution, refugee criminals may be extradited to any country. ⁽⁴²⁾

Results and Recommendations

- 1- International criminal justice is a standby justice , So the Court can exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the Court by the United Nations Security Council. The Court is designed to complement existing national judicial systems: it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes. Primary responsibility to investigate and punish crimes is therefore left to individual states.
- 2- The application of the laws of war and international criminal law at the Nuremberg and Tokyo tribunals marked the beginning of a new era for the development of international criminal justice. At that time, countries sought to prepare a draft for the codification of international criminal law by holding the Diplomatic Conference of the Geneva Convention of 1949. Indeed, the United Nations General Assembly began the procedures for codification, but the United States and Russia opposed these developments and the situation remained as it is until now
- 3- The double standards of the International Criminal Court have resulted in a loss of confidence in the international criminal judiciary , and the evidence is that , the Court has opened investigations into four situations: Northern Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur. The Court has issued public arrest warrants for twelve people , This confirms that the mission of the International Criminal Court is to prosecute Africans .
- 4- I believe that the ICC needs financial independence. One of the main practical challenges facing the ICC is the need for adequate resources to investigate cases that fall within its jurisdiction and to prosecute individual cases that are selected. So far, the Court has relied on funding from the Assembly of Member States in addition to some donations, These donations allowed major countries such as the United States of America to interfere in the affairs of the ICC and influence its decisions. The Court issued several decisions that violate international law and the Rome Statute, including Resolution No. 1422 of July 12, 2002 granting US citizens immunity from prosecution for 12 months, The lack of financial independence of the Court, coupled with the lack of financial resources, puts pressure on the freedom of the ICC to issue decisions.
- 5- Article 12 of the Rome Statute contained a serious flaw when it gave the Security Council the authority to defer investigations for 12 months and the authority to stop them permanently, This article would make the Security Council a tool in the hands of the major powers to control decisions to refer cases, as the court can, according to Article 12, stop investigations into the

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commission of war crimes by US citizens by a decision of the Security Council , for example UN Security Council Resolution 1970 (2011) concerning the referral of the situation in Libya to the ICC the council “ Decide that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the ICC shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya ٭ While the ICC necessarily has jurisdiction over nationals from a state that is party to the Rome Statute, this language is intended to extend ICC jurisdiction to Libyan nationals, but exclude all other nationals of states that are not party to the Rome Statute, On the contrary Sudan is not a State Party to the Rome Statute. However, the United Nations Security Council referred the situation in Darfur to the ICC in Resolution 1593 (2005) on 31 March 2005, the ICC exercised its jurisdiction over crimes listed in the Rome Statute committed on the territory of Darfur, Sudan, or by its nationals from 1 July 2002 onwards.

- 6- The conflict between the rules of immunity and the application of the Rome Statute has sparked widespread controversy. that’s because Countries have granted senior officials immunity that protect them from being arrested or detained on the territory of foreign countries, so that these officials can carry out their duties, I think that immunity does not protect them from being arrested. According to the principle of universal jurisdiction, which gives the ICC the power to try war criminals, regardless of their immunity.

I believe that the principle of universal jurisdiction is contained in the legislation of many countries of the world, and therefore it allows the international criminal judiciary to try war criminals, and this principle is also stipulated in the Geneva Convention and its protocol, and therefore the International Criminal Court has the authority to try the perpetrators of the crimes contained in Rome Statute regardless of their immunity

- 7- I think that African countries are the primary culprit in allowing the ICC to use double standards and go after Africans, The United States of America for example seeks to protect its citizens from prosecution under invalid agreements because they are outside the scope of international law , Therefore, African countries must conclude African collective agreements that prevent their nationals from being tried outside the African continent, African countries can take advantage of Article 1 of the Rome Statute, and that the jurisdiction of international criminal justice is complementary, and then African countries can preempt the ICC and try Africans under national law
- 8- One of the most prominent defects that impede the conduct of international criminal justice is the lack of an executive body for the International Criminal Court to implement its rulings, but it only relies on the cooperation of countries that allow it to enter their territories to investigate, inspect and search for evidence.

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