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الموسوعة السياسيّة هي مبادرة أكاديمية غير هادفة للربح، تساعد الباحثين والطلاب على الوصول واستخدام وبناء مجموعات أوسع من المحتوى العلمي العربي في مجال علم السياسة واستخدامها في الأرشيف الرقمي الموثوق به لإغناء المحتوى العربي على الإنترنت.
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The obstacles facing the work of the International Criminal Court (ICC)

العقبات التي تواجه عمل المحكمة الجنائية الدولية

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Abstract:

The International Criminal Court is created to be as first permanent international criminal judicial court in history of international community. It is following the perpetrators of the most serious crimes in the world such as crimes of war, genocides, crimes of humanity and crimes of aggression. The Court is created to be as a court of last resort, so the Court is adopted the complementary principles. The court will not interfere in any case unless if the national judicial system failed to try perpetrators of these crimes.

After 15 years of application of Rome Statute, the Court face now some obstacles or perspectives these obstacles have become as challenges in front of the Court when it wants to spread the criminal justice in the world. These obstacles are identifying by some of international scholars. However, the most important perspectives are the Security Council Referral, sovereignty of states and cooperation of all states.

الخلاصة

تُعد المحكمة الجنائية الدولية أول محكمة قضائية جنائية دولية دائمة في تاريخ البشرية؛ فهي تلاحق الجناة في الجرائم الأكثر خطورة في العالم كجرائم الحرب، والإبادة الجماعية، وجرائم ضد الانسانية، وجريمة العدوان. لقد أنشئت هذه المحكمة لتكون الملاذ الأخير، وعزز ذلك تبني نظامها الأساسي المبادئ التكميلية؛ فالمحكمة سوف لن تتدخل ما لم يخفق النظام القضائي المحلي في محاكمة مرتكبي الجرائم المذكورة.

بعد مضي خمس عشرة سنة على سريان نظام روما، تواجه المحكمة الجنائية الدولية اليوم بعض العقبات التي أصبحت كتحديات تعيق هدف المحكمة في نشر العدالة الجنائية في العالم. لقد حدد بعض فقهاء القانون هذه العقابيل، بل أعظمها أهمية: الإحالة الى مجلس الأمن، سيادة الدول، وتعاون الدول جميعها.

Introduction

The Treaty of Rome Statute has created the first permanent international criminal court in the world; called the International Criminal Court. (ICC) The statute of the Court entered into the force in July 2002 with 66 ratifications. The court is a dependent judicial court with jurisdiction over the perpetrators of most dangerous crimes of international concern listed in the ICC's statute, which they are genocides, war crime, crimes against the humanity, and crimes of aggression. The Court will prosecute all these crimes if

eliminate them and help the Court to make a global justice. These challenges are divided to two types: the Sovereignty of the State and Lack of State Cooperation with International Criminal Court.

Importance of Research

The importance of this research is to find the obstacles, which challenge the work of the International Criminal Court and have effect on its job. It is important to identify these problems and reach on one conclusion to help the international community to amend the Rome Statute after seventeen years of application of Rome Statute.

Research Question

What are the main obstacles and perspectives facing the International Criminal Court when prosecuting military's the national judicial system fails to do this job under the principle of complementarity, which mentioned in the Article 17 of the Rome Statute. However, the Court cannot succeed alone. The work of the Court is a common endeavor, dependent on the support and cooperation of all States parties, as well as other States, international organizations and civil society.

The jurisdiction of the ICC may face some obstacles when the Court aims to have jurisdiction on a case. These obstacles become challenges of the Court especially after the intervention of the Court in Africa. These challenges are very complicated and they really negative impacts the confidence of the states on the Court because there are some defects in the global judicial system.

The U.N and Security Council must support the Court to

International Criminal Court. This is the way in which the Security Council refers to the prosecutor a situation that appears to be a crime has been committed, and the Security Council acts in this case in accordance with Chapter VII of the Charter of the United Nations, the Security Council must assess the situation and if it constitutes a threat or breach international peace and security. The Council may refer this case to the International Criminal Court. The vote of referrals must be according to Article 27 of the Charter, which determines the procedures of vote. The Security Council resolution must have 9 members of the Council, including the votes of the permanent members being agreed, (without the vet).[1]

When the Security Council refers a case to the Court, the prosecutor leaders and perpetrators of crimes listed in Article 5 of Rome Statute.

Methodology

The research adopts the analytical method to analyze the Rome Statute and point out the problem, which arise after the 17 years of application of Rome Statute.

The research outline:

1. **Security Council Referral**
2. **Sovereignty of states**
3. **Cooperation of states member and non-states member**

1.Security Council Referrals

The question of the role of Security Council of referral the cases to the Court is the one of problems that facing the must start collect the evidences and begin with investigation

against perpetrator and he or she is not required to be a national of a state party of the Statute or the crime has been committed in the territory of a state Party.[1] The Security Council has been succeeded to refer two cases in Africa, which they are the case of Darfur and the case of Libya under the reason, which was grave violation of human rights. the violation is a threat to the international peace and security.[2] However, case of Burma, as it committed grave human rights violation, the Security Council began to focus four years prior of Libya's referral. It failed to make the referrals and reach to unanimous vote because veto of three of permanent member of Security Council. The question arises that what the criteria that the Security Council uses to make referrals? However, the Security Council fails to set objective criteria to determine that the actions may constitute the grave violation of human rights or not[3].

Furthermore, in many times the prosecutor of ICC intend to open investigation against Israel but it also failed because the protection of permanent members of the Council to Israel. In 2015, when the ICC started to open investigate against Israel excusing it committed violation of human rights , the office of prosecutor placed it self the in the eye of the storm now.

It is clear that the Security Council has the authority to refer to the Court in the according to in the Statute of the International Criminal Court, which undermines with two of the bases of the Court:

First- the principle of complementary jurisdiction: The Security Council was obtained the power to refer to the Court.

The referral must be done after determining the principle of complementary.

Second - the jurisdiction of the Court is over all State Parties and all of them must comply with the Statute and enter into any State accepting the jurisdiction of the Court. The referral will be done just if the state is not party of ICC statute, so the referral will be against the international obligation of states.

In addition, the Security Council has another authority under the Article 16 of Rome Statute it points that "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, 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."[4]. Therefore, the Security Council has right to freeze or stop all the procedures of such a case that the Court intends to take if the Council thinks that starting the investigation or trial may affect to international peace and security. Also, it gives the states, which have permanent membership in Security Council, the job of the judges[5].

2. The State's Sovereignty

The sovereignty of the state is the most complicated challenge, which the Court may face during the exercising jurisdiction. The Criminal International Law's scholars see that the sovereignty as the enemy stands in front of the ICC[6]. The relationship between international criminal law and the ICC is complicated and it may be misinterpreted because the work of ICC does affect by state's

behavior[7]. It imposes some rules if the states do not agree to follow or comply with rules[8] through going to Security Council specially when the state is not party to Rome Statute.

The ICC cannot violate the sovereignty of the state and make any arrest for the criminals[9]. In recent cases, \

he ICC is challenged to make either investigation or prosecution because it has stuck with the sovereignty approach. Otherwise, the cooperation of the state is the most important step to help the Court to achieve its goal because the Court does not have any special police or instruments to chase the criminal and get accused to The Hague. However, this cooperation is still not strong because several states are not providing any assistance to the Court in places which the Court must get help such as Sudan, Kenya and Uganda[10].

The Statue of ICC does not provide a real mechanism when the states actually encourage using its sovereignty in the way which they believe it is necessary to maintain their territories[11]. Therefore, the ICC is trying to provide a mechanism to solve the problem of sovereignty under the principle of complementarity. The mechanism means the ICC is designed to respect the states sovereignty especially when the states are willing to act responsibly to fulfill their obligations to international justice[12]. It shows that the decisive basis of the entire ICC system which makes the Court as a court of last resort, it is still does not work effectively because it is against (Hague) principle in the international law called the principle of territorial law which the states already owned[13].

The ICC has ignored the sovereignty of the states in many

cases and it has relied on the principle of complementarity to impose the rules of the ICC, but the ICC has done nothing for most these cases.[14] The prosecutor of the Court from 2010 until 2013 declared that seven investigations are ongoing under the jurisdiction of the Court. They are in the Central African Republic Uganda, the Democratic Republic of Congo, and Darfur in Sudan, the Republic of Kenya, the Libyan Arab Jamahiriya, and the Republic of Côte d'Ivoire.[15] Two cases involving Venezuela and the U.S. presence in Iraq had been dismissed[16]. The declaration has sent a message to the states that the Court has interpreted the complementarity principle in very a wide way and it will really effect on states sovereignty. Therefore, the Court hasn't received helping in most of these cases especially in Sudan' case. It has done nothing for the president of Sudan who is charged with committing crimes against humanity[17]. Therefore, the Sudan's case is the most famous case that may show how the sovereignty of the states has stopped the ICC from exercising the jurisdiction over this country and how the countries refused because they think the ICC violated the sovereignty of Sudan.

2.1. The Sovereignty of Sudan is an Obstacle in Front of the ICC to Get Al-Bashir to The Hague

The International Criminal Court issued on the March 2009 an arrest warrant against the Sudanese President, Omar al-Bashir[18], "for masterminding a campaign of crimes against humanity and war crimes by government troops and Arab militias in the Darfur region"[19].

The ICC stated that the attacks were widespread and systematic, and that "Bashir acted as an indirect perpetrator"[20]. The ICC has argued that all the states whether they are parties or not they have to cooperate fully with the Court[21]. Sudan's government has refused to cooperate with the ICC because many domestic legal systems also grant heads of states the immunity from criminal prosecution[22]. It stated that the arrest warrant violated the sovereignty of Sudan. Also, Bashir's administration blamed "Western pressure for regime change, and accused the Court of being part of a neocolonialist plot against a sovereign African and Muslim state"[23]. Bashir's administration also barred ICC investigators from getting touch with all of Sudanese officials[24]. Furthermore, Bashir's administration suspended the operation of thirteen humanitarian organizations the reason was they are accused of cooperation with the ICC and supplying information to it. The president said that he will deport all foreign or humanitarian organization getting touch or cooperate with ICC.

The Bashir administration has received strong support from many countries in the world especially from the Arab and African leaders, and among regional organizations such as the African Union (AU), the Arab League, the Community of Sahel-Saharan States (CEN-SAD), and the Organization of the Islamic Conference (OIC)[25]. Former Secretary General of the Arab League Amr Moussa rejected the arrest warrant against Al-Bashir. He argued that arrest of president of Sudan is violated the sovereignty of the country and it is a threat to Arab League, and the Arab League is supporting

Sudan[26]. Then, the African Union rejected the arrest warrant against Bashir and it decided that the Union would never cooperate with the ICC in carrying out the arrest warrant in this case[27].

After the position of the Arab and African countries, Al Bashir traveled to many counties without fearing of the arrest warrant of the ICC. The Prince of Qatar points out that Qatar is not a party of the Rome Statute, and is not legally comply to arrest warrant of Amr Bashir[28]. However, that announcement absolutely violated Article 87 of the Rome Statute. Then, he traveled even to Kenya, Chad and Djibouti, which they are states parties in Rome Statute. The movement of Al-Bashir gives signs that the arrest warrants have not had any impact on Bashir's international movements because all these countries are supporting him because they believe the arrest warrant violated the sovereignty of Sudan, and sovereignty is most important thing, which the Court must consider it when it wants to get any criminal to The Hague[29].

As stated above, the sovereignty of the states is like an obstacle in front of the Rome Statue, it makes the Court in many cases is not the Court which creates to represents global justice, but it has made the Court works with willing of the state. That will never achieve the dream of the international community of having first a permanent international court[30].

3. Cooperation of States Members and Non-States Members

Seventeen years, after the signing the treaty of the ICC, one of the major challenges facing the International Criminal Court is the lack of cooperation of the

states. According to the Rome Statute, all the states are obligated to cooperate with the ICC[31]. Cooperation is the most important issue to keep the Court working because the Court does not have an enforcement mechanism. It must rely on the states' cooperation to make either the arrest or investigation[32]. From the practice of the exercising the jurisdiction of the Court, the states raise several grounds for non-compliance with the court's cooperation request. One of the most important ground is the request of extradition of accused may hit with challenges and prevent execution of request. The cooperation may be inconsistent with state's obligations regarding to international law, diplomatic immunity and human rights.[33]

All these grounds have major effects on the cooperation with the ICC that makes jurisdiction of the Court ineffective in many cases, especially the African's cases. For example, the president of Sudan's case shows when the many African and Arabic states have refused to cooperate with the ICC the Court is placed in a critical position because Bashir has been able to travel freely to several African countries, including ICC members Kenya and Chad[34]. When he traveled to Kenya and Chad, both countries refused to arrest him because the African Union (AU) issued to the states, which are members they should refuse to comply with the ICC indictment of President Al Bashir[35]. After that, many states have raised the question about the jurisdiction of the Court.[36]

The lack of cooperation of the states has placed the international organizations including the United Nations in a difficult position to enforce the ICC rules[37]. After the failure of

the Court in many places in Africa such as Sudan's case2, the ICC has asked the Security Council to emphasis the cooperation with the ICC in its resolution[38]. The International Criminal Court President Judge Sang-Hyun Song said the International Criminal Court will not be the global judicial court without cooperation of all UN members, whether they are parties or not. The cooperation must be not in investigations and the gathering of evidence, but also it must be in aspects such as the execution of arrest warrants and tracing the assets of suspects. It would be very necessary that cooperation would be as an obligation, without which it is very hard for the ICC to discharge the perpetrators of these crimes. [39].

In fact, the cooperation with the ICC has been affected by many states that are not parties to the Rome Statute because the ICC does not have any authority or capacity to impose them or ask to undertake state responsibility[40]. Furthermore, states, which do not, accept or ratify the treaty of Rome Statute, they do not have any legal binding affect under principles of international law and general rules of obligation of treaties [41]. They are only be bound in the Security Council resolution.[42]

However, with the "veto" system in the Security Council, it makes many states think about their interests more than the cooperation with the Court. In particular, when the United States is the one of the most powerful states in the world, it is not party to Rome Statute that makes many states refuse to join to Rome Statute. Therefore, without State cooperation, the ICC cannot fulfill its mandate and the Rome

Statute system really encounters risks of collapse[43].

Conclusion

The research has been identified three main obstacles, which face the international Criminal Court. All of these obstacles have become challenges of having international criminal justice. The United Nation - Security Council referral became a stone in way of the International Criminal Court. The Security Council's interfere in the Court has turned the nature of the work of the Court to be more political Court. Furthermore, the sovereignty of the states is the big challenge in front of the all-international legal system, but it has started to be more obvious when the International Criminal Court interned into force in 2002. The sovereignty of states becomes as peaceful land for the criminals and others. The international criminal justice will not have impacts or values on the international community if the immunity of sovereignty of state still in same power and capacity. Finally, the cooperation of the states are only way to make the International Criminal Court a successful court without of such a cooperation will not have any effectiveness of its decision. The decision and the judgments will be just as procedures rules in the Court

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Footnotes

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