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Jurisdiction of the International Criminal Court against the Perpetrators of International Crimes

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Abstract

Crimes do not only occur at the national level, but have also occurred at the level of international crimes, especially crimes that violate human rights. The failure of national law to resolve international crime cases is the reason for the birth of the International Criminal Court to try perpetrators of international crimes who are unable or unwilling to carry out settlements by the state. The international criminal court is only able to have jurisdiction over countries that are members of the Rome Statute, so the jurisdiction of the International Criminal Court is very limited to arrest perpetrators of international crimes which are not participants in the Rome Statute. The international criminal court is only a complement to the national court because of the principle of state sovereignty. For this reason, the awareness of both the state and the international community is the basis for smooth law enforcement for perpetrators of international crimes.

Keywords: International Criminal Court, Perpetrators of International Crimes, State Sovereignty

1. Introduction

States, as subjects of international law, have rights and obligations to uphold international law and participate in the prevention of international crimes. (Alvarez, 2011; Acquaviva, G. 2005) However, in reality, many international crimes and human rights violations occurred (MacKinnon, 1993; Altman, 2004; Glasius, 2002). The inability of states to enforce international criminal law led to attempts by the international community to establish an International Criminal Court, especially after the creation of the League of Nations (El Zeidy, 2001). These efforts came from a number of prominent legal experts such as Vespasien Pella, Donnedieu de Vebres, Quintiliano Saldana, Megalos Ciloyanni, and Raffaele Garofalo. Support for this effort also came from international community associations such as The International Law Association, The American Society of International Law, and The International Parliamentary Union (Irham, 2020).

The efforts of legal experts and various international community associations are not only a hope but can be realized. It is clear that four international ad hoc tribunals have been created in the last 50 years. First, after World

War II, international criminal courts were formed, namely the International Military Tribunal (IMT) or better known as the Nuremberg Tribunal in 1945 and the International Military Tribunal for the Far East (IMTFE) in 1946 (Schabas, 2009). During the war, a criminal court were created, namely the International Criminal Court for the former Yugoslavia (ICTY) and the International Criminal Court for Rwanda (ICTR) (Schabas, 2006). The four ad hoc courts formed became the basis for the formation of a permanent International Criminal Court due to criticism of the ad hoc court's exercise of jurisdiction (Florea, 2019). The IMT was criticized for not prosecuting all criminals who were Nazi leaders in World War II (Hirsch, 2020). Some were even pardoned for their crimes. In addition, the IMT was also criticized as a victorious court because all prosecutors and judges were from allies, not neutral countries (Meron, 2006). All the defendants and their defenders were from Germany and had very limited opportunities to prepare their cases and be informed of the prosecution evidence. However, the IMT is very important for the enforcement of international human rights because it has established the basic principles of individual criminal responsibility, as expressed in the Nuremberg Principles.

Like the IMT, the IMTFE was also criticized as a victorious court because Japan was not allowed to take the United States to the Tokyo Trial over the US bombing of Hiroshima and Nagasaki, nor was Japan allowed to try the Soviet Union for violating the Neutrality Agreement of April 13, 1941 (Chang, 2017). Apart from that, the practice of impunity was also very visible at this Court when the United States decided not to try Emperor Hirohito, but to perpetuate his position in the Empire of Japan (Johnson, 2010). The ICTY was also criticized as many people considered this process to be accidental given the failure of diplomacy and sanctions and the UN's refusal to sacrifice its security forces through armed intervention against war criminals. This court is also considered to be a selective court because it can only try crimes committed in certain countries. Moreover, this Court has not yet tried the NATO troops who participated in the bombing of the former Yugoslavia. In fact, it is quite clear that the NATO air strike on Kosovo must hold NATO leaders accountable for their bombing choices, as this is a clear violation of the laws of war. Similar to the ICTY, criticism that the four ad hoc courts exercised selective justice was also directed at the United Nations when the Security Council formed the ICTR. Many people believe that the ICTY and ICTR are simply international tribunals established for highly political reasons and based on abstract and obscure principles. Criticism of all ad hoc courts is one of the reasons for the international community to immediately form an International Criminal Court which can minimize practices such as selective justice. This wish was finally realized on July 17, 1998. 120 countries in the United Nations Plenipotentiary Diplomatic Conference on the Establishment of the International Criminal Court agreed to ratify the Rome Statute, a statute of the International Criminal Court (ICC) (Lee, 1999).

The formation of the ICC is an embodiment of the international criminal policy or the rational efforts of the countries in the world to collectively tackle the four core crimes which constitute violations of *delicto jus gentium*. This policy is needed because these violations have the following elements: first, a direct threat to world peace and security; second, indirect threat to world peace and security; third, shocking to the conscience of humanity; fourth, conduct affecting more than one State; fifth, conduct including or affecting citizens of more than one state; and sixth, means and methods transcend national boundaries (Irham, 2020).

2. Discussion

2.1. Conception of Competence of the International Criminal Court (ICC)

The International Criminal Court is an international judicial institution that is permanent and independent with its position outside the United Nations agency. The ICC was established based on the 1998 Rome Statute with the main objective of being able to prosecute individuals who have committed gross violations of international humanitarian law (Schabas, 2004). The history of the formation of the ICC began with crimes that occurred in World War I which led to the establishment of a military court known as the Nuremberg Trial through the London Agreement to try Nazi war criminals (Harris, 2007). Likewise in 1946, the allied nations agreed to a charter establishing the International Military Tribunal for the Far East known as the Tokyo Tribunal to try Japanese war criminals during World War II. The formation of the Nuremberg Trial and the Tokyo Trial became the beginning of awareness of the importance of establishing a permanent and independent international judiciary to be able to prosecute perpetrators of crimes against humanity and eliminate the right to impunity, including heads of state and

diplomats who can acquit them to trial in court (Hagan, 2002). Its main goal is to stop all forms of crimes against humanity such as genocide, ethnic cleansing as well as war crimes committed by individuals. Based on this, the UN General Assembly formed a commission to prepare proposals related to the establishment of an international tribunal. Gradually from 1949 to 1954, the UN International Law Commission made preparations for the establishment of a draft Statute which contained the establishment of an international criminal court. an international criminal court. The International Criminal Court or commonly known as the International Criminal Court (ICC) is an international criminal justice body established under the Rome Statute and has jurisdiction to try people accused of international crimes.

The International Criminal Court (ICC) is an independent, permanent International Criminal Court, and does not apply the retroactive principle, so that the trial process is in accordance with the general principles of universal criminal law (Luban, 2008). Furthermore, Article 5 paragraph (2) of the Rome Statute states that the requirements for exercising the jurisdiction of the International Criminal Court (ICC) must comply with the relevant provisions in the United Nations Charter. Based on Article 5 paragraph (1) of the 2002 Rome Statute, the International Criminal Court has jurisdiction over the most serious crimes and is of concern to the international community. This jurisdiction applies to four core crimes or what are known as the four international crimes which consist of war crimes, crimes against humanity, crimes of genocide and crimes of aggression. These four crimes are often referred to as *stricto sensu* international crimes. However, the International Criminal Court only has jurisdiction over crimes that occurred on the territory of countries that ratified the 2002 Rome Statute.

The ICC only has jurisdiction over crimes committed after the 2002 Rome Statute came into effect, effective from 1 July 2002. This is contained in Article 11 paragraph (1) of the 2002 Rome Statute which states that "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute". For crimes that occurred prior to the entry into force of the 2002 Rome Statute, other law enforcement alternatives are needed, such as prosecution by the national legal system, the establishment of an ad hoc international judicial body, or prosecution by other countries that have jurisdiction, including countries that apply universal jurisdiction. Universal jurisdiction refers to state jurisdiction over a crime, regardless of the place where the crime was committed and the nationality of the perpetrator or victim of the crime (Macedo, 2006). The ICC has jurisdiction over crimes that occur in the territory of a state party to the 2002 Rome Statute or crimes committed by citizens of a state party to the 2002 Rome Statute as explained in Article 12 paragraph (2) of the 2002 Rome Statute. Based on Article 12 paragraph (3) of the 2002 Rome Statute, non-state countries -parties or those who do not ratify the 2002 Rome Statute can make a declaration to accept the jurisdiction of the ICC, specifically for related cases. In addition, the ICC only has jurisdiction over individuals, with the age limit specified in Article 26 of the 2002 Rome Statute, namely as follows: "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime". Which means that the ICC has no jurisdiction over individuals who were under 18 years of age at the time of the commission of the crime.

The jurisdiction of the International Criminal Court may apply in trying perpetrators of international crimes on the following two principles of application:

- 1) The Unwilling Principle means that there is a country's unwillingness to prosecute international crimes that occur in its territory. So that the International Criminal Court must step in to uphold justice. Regarding a country being said to be unwilling or unable basically still raises fundamental questions, such as under what circumstances a country can be said to be unwilling or unable. What considerations are needed by the ICC to determine whether a country is declared unwilling or unable. Because in essence it can be said that all countries that commit international crimes are their own citizens, especially citizens who have a large enough role for the country will not want to try the person concerned if he commits an international crime. The state will try its best to protect its citizens. The existence of the ICC's authority to determine whether a country is unwilling or unable is of course a very good thing in relation to being a complementary institution in enforcing international criminal law against perpetrators of international crimes so that international perpetrators do not go unpunished. However, is the ICC's authority to determine whether a country is unwilling or unable to be properly implemented by the ICC, so that no perpetrators of international crimes go unpunished?

- 2) The principle of inability means that there is an inability of a country to prosecute perpetrators of international crimes. Either because they were unable to find the perpetrator, did not obtain the necessary evidence along with the testimony of the person allegedly responsible for the crime, and/or were unable to carry out the judicial process. In addition, the Rome Statute explains that one of the indicators that a country is unable (unable) is the absence of a national legal system, one of the indications of the absence of a national legal system is that the state is unable to process criminal cases due to the absence of applicable laws to be able to prosecute the perpetrators of these crimes. Because of this legal vacuum, the role of the ICC is to accommodate a country's national legal system in resolving these cases. Against this kind of situation, the ICC can exercise jurisdiction to try him.

For these two things, the International Criminal Court based on its jurisdiction can handle and adjudicate international criminal cases. Basically the ICC jurisdiction is divided into four consisting of territorial jurisdiction (*ratione loci*), material jurisdiction (*rationae materiae*), temporal jurisdiction (*ratione temporis*), and personal jurisdiction (*rationae personae*) (Van der Vyver, 2000). Territorial jurisdiction means that ICC jurisdiction only applies within the territory of a state party, jurisdiction is also extended to ships or aircraft registered in a state party, and in the territory of a non-State party that recognizes ICC jurisdiction based on an Ad Hoc declaration. Material jurisdiction means that crimes that fall under the jurisdiction of the ICC consist of crimes against humanity, war crimes, genocide and crimes of aggression. Temporal jurisdiction means that the new ICC has jurisdiction over crimes regulated in the Statute after the Rome Statute came into effect on July 1, 2002. Personal jurisdiction means that the ICC has jurisdiction over natural persons, where the perpetrators of crimes within the jurisdiction of the ICC must be held accountable for their actions individually (individual criminal) responsibility), including government officials, commanders both military and civilian. The position of the ICC is in accordance with the provisions of Article 17 paragraph (1) of the 2002 Rome Statute, that the jurisdiction of the ICC is only complementary or complements the national legal system, so that as long as the country that has jurisdiction is still willing and able to process the criminal case, the ICC does not have jurisdiction to adjudicate.

The International Criminal Court in the context of international criminal law is a permanent judicial body established by the United Nations. The International Criminal Court is one of the instruments of the United Nations to prosecute and try the perpetrators of international crimes or crimes (Benzing, 2003). The International Criminal Court was established based on the 1998 Statute of Rome which was the result of a diplomatic conference which took place in Rome on 15 – 17 July 1998 (Arsanjani, 1999). The conference was attended by representatives of each member country of the United Nations in the world or envoys from organizations government and non-governmental organizations. After being regulated in the Rome Statute of 1998 and the provisions therein coming into effect, the International Criminal Court has legally been established as a permanent (permanent) international judicial body with the duties, functions and powers it has. The International Criminal Court is based in The Hague, Netherlands. The existence of the International Criminal Court as a permanent international judicial body. This Court also has the character of international law (International Legal Personality), meaning that the International Criminal Court is a subject of international law with its capabilities, and there are rights and obligations based on international law (Nyssanbekova, 2016). Apart from having an international legal character, the International Criminal Court also has a national legal character (National Legal Personality), which also means as a national legal subject for participating countries or non-participating countries (Article 4 paragraph (2) of the 1998 Rome Statute). The position of the International Criminal Court in relation to the United Nations, because the formation of this court cannot be separated from the initiative of the United Nations through the general assembly with the role of the International Law Commission. This court is not under or as a part (main part, subsidiary part or special part) of the UN, so that it can be said that the court is outside the UN system with its position equal to or equivalent to the UN. This is based on an agreement between the court and the United Nations as stipulated in Article 2 of the Rome Statute of 1998. Jurisdiction is the authority to act based on applicable provisions concerning duties, functions and objectives. Like the jurisdictions of other judicial bodies, for example the 1945 Nuremberg Court, the 1946 Tokyo Court, the 1993 Former Yugoslavia Court, and the 1994 Rwanda Court, the existence of the International Criminal Court also has jurisdictions, which include personal jurisdiction, territorial jurisdiction, temporal jurisdiction, and jurisdiction criminal (Murphy, 2006). The explanations regarding these jurisdictions are as follows:

- 1) Personal Jurisdiction Is the authority possessed by the court to try the perpetrators of crimes or criminal

acts in the form of people or individuals who must be responsible for the crimes committed as determined in the Rome Statute of 1998 (Article 25 paragraph (1), so that in this case, the state is not a personal jurisdiction for courts or other international law subjects except for individuals. Special matters in the personal jurisdiction of courts, namely regarding perpetrators of international crimes who are less than 18 years old, the court does not have the authority to try them before the trial courts, so that they can be held accountable based on the national laws of the countries concerned (Article 26) of the 1998 Rome Statute.

- 2) Territorial Jurisdiction Is the authority of the court in carrying out its duties and functions as an international judicial body based on the location or jurisdiction over which the international crime occurred. Basically, this jurisdiction applies in the territory of the participating countries in the 1998 Rome Statute, in the event of a crime that crosses the country's territorial borders. However, in relation to countries that reject or are not members of the 1998 Rome Statute (not participating in ratifying the contents of the 1998 Rome Statute), the court cannot exercise its jurisdiction over crimes that occur in the territory of that country. Thus, the perpetrators of crimes are outside the reach of the jurisdiction of the court, who also do not receive immunity from the court.
- 3) Temporal Jurisdiction Is the authority of the court as regulated in Article 11 paragraph (1) and (2) of the Rome Statute of 1998 which reads: the court only has jurisdiction over crimes committed after the entry into force of this statute. The court does not have jurisdiction over crimes that occurred before, this is in accordance with one of the principles of international criminal law, namely the non-retroactive non-retroactive principle), this is based on Article 24 paragraph (1) of the 1998 Rome Statute. Regarding the temporal jurisdiction that exists in the court, that it does not apply the principle of lapse of time to the four types of crimes subject to jurisdiction as stated in the 1998 Rome Statute, namely crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. This is in accordance with Article 29 of the Rome Statute of 1998 which states that there is not one or more crimes within the jurisdiction of the court which is subject to a time limit for prosecuting the perpetrators of these crimes.
- 4) Criminal Jurisdiction Is the jurisdiction owned by the court in carrying out its duties to try international crimes that are included in or regulated in the 1998 Rome Statute. others as follows: a) the crime of genocide, b) crimes against humanity, c) war crimes and d) The crimes of aggression mentioned above, the Statute also explains in detail the definition or meaning of the crime in question, as in Article 9 of the Rome Statute of 1998, explaining the need to be formulated in more detail regarding the elements of each crime (elements of crimes) in helping to interpret or apply provisions related to article m Indicates the types of crimes referred to in the Rome Statute of 1998. As an international criminal court, the ICC uses several languages in its official forums. The official languages used are English, French, Arabic, Chinese, Russian and Spanish. In accordance with article 36 of the Statute, there are 18 judges in the ICC who are elected from the member states of the Rome Statute. In the Statute article 36 regarding the qualifications of judges, judges are selected from people who have moral character, a high sense of justice and integrity and have the qualifications required of the member states to occupy the highest office in their respective countries. The term of office of judges is divided into 9 years, 6 years and 3 years and can be re-elected except for judges who have received a term of office of 9 years. The main office of the ICC is located in The Hague, Netherlands. However, in carrying out trials, if trials cannot be conducted at the head office, the ICC can occupy a State to be able to carry out trials if deemed necessary. Until now there are 6 offices located in other countries namely in Kinshasa and Bunia (Democratic Republic of the Congo), Kampala (Uganda), Bangui (Central African Republic), Nairobi (Kenya) and Abidjan (Côte d'Ivoire). The International Criminal Court may exercise its functions and powers, as stipulated in the Statutes, over the territory of a State Party and, by special agreement, over the territory of a State (Caesius, 1999). This Statute applies equally to all people without any distinction on the basis of official position. In particular, official position as a Head of State or Government, member of a Government or parliament, elected representative or government official does not in any way exclude a person from criminal responsibility under this Statute (Akande, 2004), nor does it in and of itself constitute a reason to reduce sentences and the International Criminal Court has no jurisdiction over a person who was less than eighteen years of age at the time of the commission of a reported crime (Leveau, 2013). The International Criminal Court is complementary to the jurisdiction of national courts (Kleffner, 2003; Carter, 2010). That is, the International Criminal Court has jurisdiction over the most serious international crimes against human

rights and as a complement to the national criminal court system, if the national court system is ineffective or unavailable, the International Criminal Court can exercise its jurisdiction in prosecuting and trying international criminal perpetrators in jurisdiction of the International Criminal Court (Benzing, 2003; Stigen, 2008). This complementary principle is a mechanism for a balanced approach which is intended to provide an opportunity for countries to fulfill their obligations as a state to regulate and run state organizations in accordance with applicable laws and regulations and have powers that are not bound and not subject to other powers except for the provisions that have been determined, such as international provisions. Thus, in fact no state sovereignty has been violated, in fact this complementary principle is in line with the principle of state sovereignty. The jurisdiction of the International Criminal Court is exercised and carried out by an independent Prosecutor when a participating country (Rome Statute) transfers jurisdiction over crimes to the United Nations Security Council or to the Prosecutor himself (Brubacher, 2004). However, the problem is if a country where the most serious crimes against human rights have occurred, is not willing to surrender the perpetrators or is not willing to provide information about the crimes that have occurred to the Prosecutor, due to the doctrine of state sovereignty, because they do not want their country's laws to be interfered with by other countries especially handed over the perpetrators to be tried by the International Criminal Court, which generally (the perpetrators) were those who at the time the crime occurred had power within the country concerned and whose existence was strong enough to influence the country's national policies.

2.2. Authority of the International Criminal Court in Settlement of International Criminal Cases

The International Criminal Court exercises its powers and functions pursuant to the Statutes, over the territory of a State Party and, by special agreement, over the territory of a State (Sarooshi, 1999). This Statute applies equally to all people without any distinction on the basis of official position. In particular, official position as a Head of State or Government, member of a Government or parliament, elected representative or government official does not in any way exclude a person from criminal responsibility under this Statute, nor does it in and of itself constitute a reason to reduce sentences and the International Criminal Court has no jurisdiction over a person who was less than eighteen years of age at the time of the commission of a reported crime. The International Criminal Court is one of the bodies that functions in the field of justice as a permanent court for cases of serious crimes committed by individuals, both as state leaders and individuals with personal interests. It is this international individual judiciary that makes the ICC different from judicial institutions, namely the International Court of Justice which only has the scope of the state as its legal subject. So that the ICC can probe into a more micro space, but follow up on crimes at a macro level. In addition, the ICC only tries to try those accused of the most serious crimes. In every activity, the ICC observes the highest standards of fairness and due process. The jurisdiction and functions of the ICC are regulated by the Rome Statute which is the result of an international conference in Rome in June 1998. With the formation of the International Criminal Court it has specific objectives, namely:

- 1) To act as a deterrent against people planning to commit these serious crimes according to international law.
- 2) Urge national prosecutors who are fundamentally responsible to bring those responsible for these crimes to justice.
- 3) Ensure that victims and their families have the opportunity to obtain justice and truth, and begin the process of reconciliation.
- 4) Take big steps to end the problem of acquittal/sentence.

The jurisdiction or authority possessed by the ICC to enforce the rules of international law is to decide limited cases against perpetrators of serious crimes by citizens of countries that have ratified the statute of the court (Stahn, 2005). The ICC is a complement to the International Court of Justice. The parameter between the two is that the ICJ is a court adjudicating disputes between countries as states. On the other hand, the ICC is a court that prosecutes and convicts individuals. Jurisdiction is a legal parameter that relates to various things related to the commission of a crime and can be used as a guide for the work of the court. These parameters are:

- 1) Subject matter jurisdiction (*ratione materiae*) Refers to the most serious crimes such as the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.
- 2) ICC's temporal jurisdiction (*ratione temporis*) strictly applies the principle of legality which does

not allow retroactive application of regulations (nullum crimen nulla poena sine lege).

- 3) Personal/individual jurisdiction (ratione personae) The ICC has jurisdiction over the citizens of participating countries who are prosecuted for a crime (the State of which the person accused of the crime is a national).

The International Criminal Court is complementary to the jurisdiction of national courts. That is, the International Criminal Court has jurisdiction over the most serious international crimes (against human rights) and as a complement to the national criminal court system, if the national court system is ineffective or unavailable, the International Criminal Court can exercise its jurisdiction in prosecuting and prosecuting perpetrators. international crimes within the jurisdiction of the International Criminal Court. This complementary principle is a mechanism of a balanced approach which is intended to provide an opportunity in advance to countries to fulfill their obligations as a state which regulates and runs state organizations in accordance with applicable laws and regulations and has powers that are not bound and not subject to other powers except for the provisions that have been stipulated, such as international provisions. This principle is as regulated in Article 17 of the Rome Statute which states that the International Criminal Court does not function to replace the national court of a country but when the state is unwilling and unable to carry out its obligations to punish perpetrators of crimes that fall within the jurisdiction of the International Criminal Court, the International Criminal Court can carry out jurisdiction. This principle is a guarantee that the International Criminal Court aims to streamline a country's national criminal court system. The jurisdiction of the International Criminal Court is exercised and carried out by an independent Prosecutor if a state which is a party to the Rome Statute surrenders jurisdiction over crimes to the United Nations Security Council or to the Prosecutor himself. However, the problem is if a country where the most serious crimes against human rights have occurred, is not willing to surrender the perpetrators or is not willing to provide information about the crimes that have occurred to the Prosecutor, due to the doctrine of state sovereignty, because they do not want their country's laws to be interfered with by other countries especially handed over the perpetrators to be tried by the International Criminal Court, which generally (the perpetrators) were those who at the time the crime occurred had power within the country concerned and whose existence was strong enough to influence the country's national policies.

3. Conclusion

The International Criminal Court (ICC) is an international criminal justice body established under the Rome Statute and has jurisdiction in trying people charged with international crimes. The inability of the state to uphold international criminal law, gave birth to efforts by the international community to form an International Criminal Court. The International Criminal Court has jurisdiction over the most serious crimes of concern to the international community. This jurisdiction applies to the Four core crimes or what are known as the four international crimes which consist of war crimes, crimes against humanity, the crimes of genocide, and the crimes of aggression. The jurisdiction of the International Criminal Court can apply in trying international criminal perpetrators on two principles, namely unwillingness and inability. The International Criminal Court is complementary to the jurisdiction of national courts. That is, the International Criminal Court has jurisdiction over the most serious international crimes (against human rights) and as a complement to the national criminal court system, if the national court system is ineffective or unavailable, the International Criminal Court can exercise its jurisdiction in prosecuting and prosecuting perpetrators. international crimes within the jurisdiction of the International Criminal Court.

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