

EFFECTIVENESS OF THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION IN IMPUNITY PREVENTION

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Abstract

This research aims to describe and explain the International Criminal Court's jurisdictions in an effort to prevent impunity. Additionally, this research provides answer to the question of ICC's effectiveness in upholding justice over international crimes. This research is a normative law research. The research results shows, under Rome Statute of the International Criminal Court 1998, the purpose of a trial is to end impunity over serious crimes. To implement such a purpose, ICC exercise their jurisdictions conform to Rome Statute. However, the exercise of ICC's jurisdictions are still ineffective, such phenonemon could arise by many factors.

Keywords: *ICC's Effectiveness; ICC's Jurisdiction; Impunity prevention; International Criminal Law Enforcement.*

A. Research Background

International criminal law development and advancement is inseparable from the development and spread of international offenses (crimes). The international acceptance of an international criminal law's importance to respond to an international crime was first given through a resolution proposed in the United Nations' General Assembly on November 21st, 1947. The resolution affirmed that in the development of international society, a demand for a jurisdiction body (an international court) emerges to try certain crimes based on the international law in 1945, by the establishment of Nuremberg International Court (International

Military Tribunal Nuremberg)¹ and Tokyo Court (International Military Tribunal for the Far East)².

In 1993, based on Resolution No. 827³ of the United Nations' Security Council, an ad hoc court was established, that is The International Criminal Tribunal for

¹ United Nations, "International Military Tribunal Nuremberg", www.un.org/.../Doc.2_Charter%20of%20IMT%201945.pdf, accessed on 20 January 2020.

² United Nations, "International Military Tribunal for The Far East", www.un.org/en/.../Doc.3_1946%20Tokyo%20Charter.pdf, accessed on 20 January 2020

³ United Nations Security Council, "Resolution On Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia" United Nations Security Council Resolution 827, 25 May 1993.

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the former Yugoslavia (ICTY)⁴, and in 1994, based on Resolution No. 995⁵ of the United Nations' Security Council, The International Criminal Tribunal for Rwanda (ICTR) was established.⁶ Later, in the effort to uphold the international criminal law, in 1998 the UN through a Convention in Rome which involved developed countries, which were state parties, formulated a convention referred to as Rome Statute which regulates the international criminal law and which became the precursor of the formation of The International Criminal Court (ICC).⁷

The ICC is a permanent or fixed international criminal court, unlike other earlier criminal courts, which were *ad hoc* courts.⁸ Aside from its permanent characteristics, ICC is also different from ICTY and ICTR in that it is not part of the United Nations, rather, it is positioned as an independent international organization. Historically, the ICC establishment was inseparable from the dynamics of international politics, which also gave birth to the ICTY and ICTR.

Since the end of Cold War in early 1990s, there was a realization that serious crime offenders should not be allowed to walk away without punishment.⁹

The long history of international criminal law enforcement above is one of the forms of international society's awareness towards victims of international crimes, because in practice, it is sometimes difficult to rely on national legal mechanism and institutions to handle international crime situations, because an international crime can be committed by an individual who politically has power in a certain country, so that a national court which is expected to investigate or handle the international offense faces a situation in which it cannot perform its expected role.¹⁰ When law enforcement in the national court forum faces such a situation, there are considerations (especially political considerations) which lead to the national court's inability and unwillingness.¹¹

An international mechanism is needed to ensure that international crime offenders would not be untouchable or be beyond the law's reach, which in the Human Rights discourse is referred to as impunity.¹² The armed conflict which followed the dismemberment of Yugoslavian states in the first half of the 1990s was one example of how

⁴ The International Criminal Tribunal for the former Yugoslavia (ICTY), "About the ICTY", <http://www.icty.org/en/about>, accessed on 20 January 2020

⁵ United Nations Security Council "Resolution on Establishment of an International Tribunal and adoption of the Statute of the Tribunal" United Nations Security Council Resolution 955, 8 November 1994.

⁶ The International Criminal Tribunal for Rwanda (ICTR), "The ICTR in Brief", <http://unictr.unmict.org/en/tribunal>, accessed on 20 January 2020.

⁷ The International Criminal Court (ICC), "The International Criminal Court (ICC)", <https://www.icc-cpi.int/about>, accessed on 20 January 2020.

⁸ William A. Schabas, 2010, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, United Kingdom, p. 23.

⁹ I Wayan Parthiana, 2006, *Hukum Pidana Internasional*, Yrama Widya, Bandung, p. 205.

¹⁰ Arie Siswanto, "Pengadilan Hibrida (*Hybrid Court*) sebagai Alternatif Penanganan Kejahatan Internasional", *Jurnal Refleksi Hukum*, Vol. 10, No. 1, 2016, p. 38.

¹¹ *Ibid.*, p. 42.

¹² *Ibid.*

a national court structure could not be relied on. Similarly, the civil war situation in Rwanda also caused the failure of the national court. In a condition where the national court is unreliable to enforce the law against international crime offenders, one of the alternatives to be taken to prevent impunity is by establishing a court outside the national court institution as a medium for law enforcers and justice, that is, a criminal court of international capacity, such as the ICC.¹³ With the ICC, it is expected that the criminal laws enforced against international crimes can be implemented effectively.¹⁴

In enforcing the international criminal law, the ICC has jurisdictions as the basis for international criminal law enforcement against international crimes in order to prevent international crime suspects from escaping the lawsuit and enjoying impunity. However, in practice, there have been so many international crimes to which no response or action has been taken against the culprits. One of such examples is the never-ending international crime in Palestine. This has raised questions regarding the ICC's effectiveness in enforcing the international criminal law against international crimes. Based on aforementioned condition, this research

will discuss further regarding difficulties in upholding international criminal justice exercised by International Criminal Court.

B. Research Method

This conceptual research conducted in a normative method. Data are collected by studying statutes, treaties, books, written references, and dictionaries. These data are described as secondary data which will be the main source of the information in this normative method research. Collected data will be analysed furthermore using particular approaches, such as historical approach, statute approach, and grammatical approach. Historical approach describe that the study will employ literature research across ages of documented references. Statute approach also applied to include treaties and also statutes to add the needed source of information. Grammatical approach conducted to derive definition of many terms related to the research question and could eventually provide answers. These steps will resulted in facts.

Facts that are gathered will be written in descriptive and prescriptive method. Every fact regarding difficulties in upholding international criminal justice exercised by International Criminal Court will be carry out by drawing the overall condition then adding support facts, analyse every fact to the propositions gathered and make a conclusion. The conclusion will also have

¹³ Arie Siswanto, 2002, *Hukum Pidana Internasional, Loc.Cit.* See also Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, p. 342.

¹⁴ Eddy Djunaedi Karnasudirdja, 2003, *Dari Pengadilan Militer Internasional Nuremberg ke Pengadilan Hak Asasi Manusia, Sejarah Pengadilan Pidana Internasional Sejak Perang Dunie Ke II hingga Sekarang*, Tatanusa, Jakarta, p. 54.

suggestion and critical view on related topic.¹⁵

C. Discussion

1. International Criminal Court's Jurisdictions in Impunity Prevention

Rome Statute of the International Criminal Court 1998 stated that the court's objective is to end impunity against "the most serious crimes of concern to the international community as a whole".¹⁶ To implement such an objective, the ICC has four types of jurisdictions. Black's Law Dictionary¹⁷ defined jurisdiction as the authority to conduct legal proceedings, to prosecute, and to enact a law. The jurisdiction is court jurisdiction, that is, the power or authority to perform judicial actions against a particular case dealing with individuals, properties, or events that are presented before the Court.¹⁸

With such jurisdictions, the ICC can perform a legal process, prosecute, and adjudicate international criminals so that impunity is prevented and they must face the lawsuits and pay the consequence of their actions. Based on Rome

Statute of the International Criminal Court 1998, the four jurisdictions are as follows:¹⁹ 1) personal jurisdictions (*ratione personae*); 2) criminal/material jurisdiction (*ratione materiae*); 3) territorial jurisdiction (*ratione loci*); and 4) temporal jurisdiction (*ratione temporis*), which will be deliberated as Personal Jurisdiction (*Ratione Personae*), Criminal/Material Jurisdiction (*Ratione Materiae*), Territorial Jurisdiction (*Ratione Loci*), Temporal Jurisdiction (*Jurisdiction Ratione Temporis*).²⁰

As embraced by the earlier international criminal court, the ICC also embraces the principal of personal responsibility or Personal Jurisdiction (*Ratione Personae*). In the early part of Rome Statute 1998, in Chapter 1 it was firmly stated that: "An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this statute".²¹

The provisions in Chapter 1 are emphasized in Chapter 25 verse (1) and verse (2) which state, "The Court shall have jurisdiction over natural persons pursuant to this statute. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with

¹⁵ Mukti Fajar Nur Dewata and Yulianto Achmad, 2015, *Dualisme Penelitian Hukum Normatif & Empiris*, 3rd Edition, Pustaka Pelajar, Yogyakarta, p. 180-182.

¹⁶ Margaret M. deGuzman, "Gravity And The Legitimacy of The International Criminal Court", *Fordham International Law Journal*, Vol. 32, 1400, June 2009, p. 1401. See also Andreas Zimmermann, 2008, *Jurisdiction, admissibility and applicable law: Crimes within the jurisdiction of the Court*, Hart and Publishing, Portland, p. 133.

¹⁷ Henry Campbell Black, *Black's Law Dictionary*, 6th Edition, Centennial Edition 1891-1991.

¹⁸ Peter Ma Ianczuk, 2002, *Akehurst's, Modern Introduction to International Law*, Routledge Taylor & Francis Group, London and New York, p. 75.

¹⁹ William A. Schabas, 2001, *An Introduction to The International Criminal Court*, Cambridge University Press, United Kingdom, p. 55.

²⁰ Tolib Effendi, *Op. Cit.*, p. 245-257 and I Wayan Parthiana, *Op. Cit.*, p. 207-211.

²¹ *Ibid.*, p. 252.

this Statute”.²² Therefore, the Court only has personal jurisdiction against individuals not against countries or any other international law subjects other than individuals. Especially regarding its relations with countries, Chapter 25 verse (4) firmly stated that there is no provision in the Statute with regard to individual criminal responsibility would influence a country’s responsibility based on the international law. This is to be expected, because a crime incidence is due to individuals’ actions, regardless of their status or position when the crime took place.²³

The basic difference with earlier international criminal courts is the justifying reason and underlying reason in the ICC as commonly regulated by countries’ national laws.²⁴ The Rome Statute regulates the minimum limit for a crime offender as included in the ICC’s jurisdictions, and regulates the reasons that can exempt a criminal offender’s responsibility, Chapter 26 of the Rome Statute rules that “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”.²⁵ This has to do with the minimum limit of one’s age

to be demanded responsibilities in the national laws of the countries in the world is around 18 (eighteen) years old. Does it mean that someone who is under the age of just about 18 years, and he committed a crime as regulated by the Statute, is totally free from criminal responsibilities of the actions? If the Court rules out its jurisdiction, the individual would be returned to his country, and the criminal law to be applied is his national (criminal) laws.²⁶

Additionally, there are provisions that can be used as reasons to exempt an individual’s criminal responsibility, that is, when the crime took place, the individual was in certain conditions as regulated in Chapter 31 verse (1), namely a) the individual suffers from a mental or memory illness; b) the individual was intoxicated during the event which compromised his judgements; c) the individual committed the action out of self-defense or was in someone else’s defense; and d) the action or the crime under the Court’s jurisdiction was performed under inevitable physical and mental distress due to an event beyond the individual’s control.²⁷

The ICC has criminal/material jurisdiction against four types of crimes as stated in Chapter 5 of Rome Statute 1998, namely genocide, crimes against humanity, war crimes, and aggression. All of the crimes (except aggression) are detailed, genocide in Chapter 6; crimes against humanity in Chapter 7; and war crimes in Chapter 8. Furthermore, in

²² *Ibid.*, p. 253.

²³ I Wayan Parthiana., *Op. Cit.*, p. 207.

²⁴ In the criminal law, legal justification is different from legal excuse or offense waiver. According to Dutch *Strafvordering*, legal justification makes an action nonchargeable, whereas legal excuse makes an offender nonchargeable. See Jan Rimmelink, translated by Tristram Pascal Moeliono, 2003, *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, Gramedia Pustaka Utama, Jakarta, p. 205-253.

²⁵ Tolib Effendi, *Loc.Cit.*

²⁶ I Wayan Parthiana, *Op. Cit.*, p. 208.

²⁷ *Ibid.*

Chapter 9 it was confirmed the need to clearly deliberate those elements of crimes, in order to help the Court in interpreting and implementing the regulations stipulated in Chapters 6, 7 and 8 of the Statute. The institution which holds the authority to formulate and decide is the Member Countries Assembly, based on the agreement by two thirds of the member countries. In this case, and it turns out that the Member Countries Assembly has succeeded in formulating the elements of each of the crimes,²⁸ except that the crime of aggression, which so far hasn't been agreed upon in terms of definition and scope, pending the amendment to the Statute (Chapter 121) and its review (Chapter 123).²⁹

According to Chapter 5 of Rome Statute 1998, the actions which are under the ICC's jurisdiction are, among others, firstly, Genocide, as stipulated in Chapter 6 of Rome Statute 1998 refers to: actions performed with an objective of destroying all or part of a national, ethnic, race, or religious group, such as: killing members of the group; inflicting serious physical or mental injury to members of the group; deliberately creating a condition which is calculated to cause a complete or partial physical destruction the group; imposing actions intended to prevent birth in the group; forcibly removing children from the group to another group.³⁰

²⁸ Kriangsak Kittichaisaree, 2001, *International Criminal Law*, Oxford University, New York, p. 426-462.

²⁹ I Wayan Parthiana, *Loc.Cit.*

³⁰ Chapter 6 of Rome Statute, and Chapter 8 Law No. 26 Year 2000 on Human Rights Court, see also I Gede Widhiana Suarda's book, 2012, *Hukum Pidana Internasional*, Citra Aditya Bakti,

Secondly, Crimes against humanity, as stipulated in Chapter 7 of Rome Statute 1998 refers to:³¹ one of the following actions, when acted upon as part of a widespread or systematic attack against a group of civilians consciously: murder; annihilation; expulsion or forced removal of residents; arbitrary deprivation of independence or other deprivation of physical freedom; forced pregnancy, sterilization, or other similar sexual violence; persecution against a certain group based on shared political belief, race, nationality, ethnicity, culture, religion, gender, or other reasons which are universally accepted as prohibited according to international law; forced removal of people; apartheid crime; and other inhumane conducts with similar characteristics of deliberately inflicting serious suffering, or profound injury on either body or mental or physical health.

Thirdly, War crimes, crimes during either international or non-international armed conflicts as stipulated in Chapter 8 of Rome Statute 1998, they refer to: gross violation against the Geneva Convention, dated 12 August 1949, namely each of the following actions against people or property protected based on Geneva Convention, regarding: (i) conscious killing; (ii) inhuman torture, including biological experimentation; (iii) consciously causing serious suffering, or serious wounds on the body or health; (iv) widespread destruction and property confiscation, unlawful under military

Bandung, p. 166-167.

³¹ Chapter 7 verse (1) of Rome Statute, see also Chapter 9 Law No. 26 Year 2000 on Human Rights Court.

purposes and conducted without reason; (v) forcing prisoners of war or other protected individuals to serve in the troop of the other side's armed-force; (vi) consciously deprive of protected prisoners of war's rights of a fair and just trial; (vii) unlawful deportation or transport or detention; (viii) holding hostages. As well as other serious violations against the laws and conventions applicable in an international or non-international armed conflict, under stipulated international laws.³²

Fourthly, Crimes of aggression, international crimes formulated to accommodate individual criminal responsibilities. In which the position of the individual in question is as the leader.³³ Therefore, crimes of aggression criminalization aims at state leaders or others with leadership requirement.³⁴ Especially regarding crimes of aggression, they haven't been stipulated in detail in Rome Statute 1998, pending amendment to Chapter 121 and Chapter 123 of Rome Statute 1998.

Generally, the ICC's jurisdiction applies in countries which ratified Rome Statute 1998, but the subsequent regulations and the future implementation are not that simple. Talking about territorial jurisdiction in the ICC is a very complex thing. It is complicated because not all countries ratified Rome Statute 1998, which means that not all countries acknowledge the jurisdiction held by the ICC. Even more so, when an

offender of an international crime which belongs to the ICC's material jurisdiction hides in a country which doesn't ratify Rome Statute 1998. The ICC's future goal and spirit in eliminating impunity could surely be hindered, however, more detailed regulation regarding territorial jurisdiction can bring another meaning, that is, for the sake of eliminating impunity, a country's sovereignty may be set aside. Territorial jurisdiction is discussed in Rome Statute 1998 from Chapter 12 to Chapter 15, as detailed below:³⁵

Chapter 12 verse (1) of Rome Statute 1998 stated that: "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5³⁶." Chapter 12 verse (1) of Rome Statute 1998 stated that: in a case such as described in Chapter 13, verse (a) or (c), the ICC can exercise its jurisdiction if one or more of the countries are state parties or those which have accepted ICC's jurisdiction as mentioned in verse (3): (a) the country in which the offense was committed or, if the offense was committed on a ship or an airplane, the country where the vessel was registered to, (b) the country in which someone is charged for committing a crime. The second territorial jurisdiction is when an offense was committed in a country or on a vessel registered to the said country, and the country is a state party in Rome

³² Chapter 8 verse (2) of Rome Statute, see I Wayan Parthiana, *Op. Cit.*, p. 131.

³³ Arie Siswanto, *Op. Cit.*, p. 226.

³⁴ *Ibid*, p. 241.

³⁵ Tolib Effendi., *Op. Cit.*, p. 245-249.

³⁶ In Chapter 5, 4 offenses are said to be "the most serious crimes of concern to the international community as a whole", namely (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression.

Statute 1998 or has accepted the ICC's jurisdiction.

Chapter 12 verse (3) of Rome Statute 1998 stated that: "If there is an acceptance by a country which is not a state party of the Rome Statute 1998 as stipulated in verse (2), the country is allowed, by means of self-surrender similar with registering state, to accept the ICC's jurisdiction regarding the offense. The accepting country must cooperate with the ICC without delay or exception according to part 9). The stipulation in verse (3) regulates that a country which accepts the ICC's jurisdiction be of equal position with the state parties.

Chapter 13 (a) stated that in a situation where one or more offenses that have been committed earlier are submitted before the prosecutor by a state party according to Chapter 14. Chapter 14 verse (1) of the Rome Statute 1998 stated that the state party can refer to the prosecutor that there has been a situation in which one or more offenses under the ICC's jurisdiction have been committed, and therefore request to prosecutor to investigate the situation to determine one or more individuals that can be prosecuted by the crime commission. The third territorial jurisdiction of the ICC is that the ICC can perform its jurisdiction when a state party requests the prosecutor to investigate an offense in its territory, and upon such a request, the prosecutor performs an investigation until the time that the case is submitted to the ICC. In a similar condition, the request for investigation comes from a

state party/a member of the Rome Statute 1998.

Unlike with Chapter 13, points (b) and (c) of the Rome Statute 1998 stated that the Court can exercise its jurisdiction regarding a crime listed in Chapter 5 based on the Statute's stipulation, if: a situation (case) in which one or more offenses that have visibly been committed would be forwarded to the Prosecutor by the Security Council which acts based on Chapter VII of the United Nations or if the Prosecutor takes the initiative to conduct an investigation regarding the offense as stipulated in Chapter 15.

Chapter 15 verse (1) stated that "The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court". The fourth territorial jurisdiction, the ICC can also exercise its own jurisdiction in a *proprio motu* manner against actions that are alleged as violations within the ICC's jurisdiction. The investigation results would then be submitted to the Pre-Trial Commission to be decided whether they can proceed to the next process and be brought for prosecution to the ICC. According to Luis Moreno-Ocampo, the first prosecutor in the ICC, the terms for a *proprio motu* in the Rome Statute would be the differentiator between the ICC and other international courts like the ICTR or ICTY. According to him, the *proprio motu* terms would ensure justice for the political decisions by nations of the Security Council.³⁷

³⁷ Daniel Benoliel dan Ronen Perry, "Israel, Palestine, and the ICC", *Michigan Journal of International Law* 73, Vol. 32, February 2010, p. 76.

According to Chapter 13 (b) and (c) jo Chapter 15 verse (1) of the Rome Statute 1998, it is not shown whether the investigation by the Prosecutor's initiative can be conducted against all nations, or only against state parties by *a contrario*, as long as not regulated how it must be conducted, it can be interpreted otherwise. Because it is not clearly quoted whether it applies only to state parties or not, it can be concluded that the initiative applies to both state parties and non-state parties. The role of jo Chapter 15 verse (1) is in line with the ICC's spirit and character in the intention of eliminating impunity, as stated in the Rome Statute 1998 preamble: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...". The talk about ICC's territorial jurisdiction corresponds with the universal jurisdiction³⁸, which is beginning to be introduced in the ICC.

This has something to do with the four crimes as stipulated in Chapter 5 of the Rome Statute 1998, in which even though the perpetrators or the victims are just a group of individuals and it took place in a certain location, either in a country's territory or on the borders, or somewhere outside any country's territory, but the crime created such a massive psychological impact. For example, it touches the sense of justice

³⁸ Universal jurisdiction contains a joint statement to cooperate in upholding international interests so that countries together can deal with it and protect it, and thus the nation's interest can also be protected by other countries. See also R. Sughandi, 1980, *KUHP dan Penjasannya*, Usaha Nasional, Surabaya, p. 8.

and legal awareness as well as universal human values of all or most of the people in the world, regardless of ethnicity, race, origin, religion or belief, language, ideology or political conviction, or other differences. Humans all over the world show similar reactions, such as profound fear and condemnation against such crimes and calling them as inhuman.³⁹

Crime is a problem for all human beings, therefore, wherever the perpetrators may be, they must be held responsible to their actions, that is, based on the universal principles, countries are given the right and authority to put the perpetrators on trial based on the current regulations, and when proven guilty, must be served with fair punishments. Perpetrators must not walk away with their crime and enjoy impunity.⁴⁰ Further regarding the temporal jurisdiction (*jurisdiction ratione temporis*), if Nuremberg Trials and Tokyo Trials, and two other *ad hoc* international criminal trials exercised the retroactive principles, which means denying the legality principles, it doesn't work that way with the ICC. Chapter 11 of the Rome Statute 1998 stipulates as follows: Chapter 11 verse (1) states that "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." Chapter 11 verse (2) states: "if a country becomes a state party of the Statute, the ICC applied its jurisdiction only against the crimes committed after the Statute applies in the country, unless the country

³⁹ I Wayan Parthiana, *Op. Cit.*, p. 108-109.

⁴⁰ *Ibid.*

declares as mentioned in Chapter 12 verse (3).⁴¹

For certainty, it must first be determined about the time and date when the Statute applies. According to the stipulations in Chapter 126 verse (1), the Statute applies on the first day of the month after the sixteenth day the ratification instruments was stored, accepted, agreed upon, or accessed by the UN's Secretary General.⁴² Therefore, the Court only has jurisdiction against crimes as stipulated in Chapters 5-8 of the Statute which took place after the date it applies. The Court doesn't have jurisdiction against crimes which took place before. This is in line with the non-retroactive principle (non-retroactive *ratione personae*) in Chapter 24 verse (1) which states that no one would be demanded responsibility of the crimes based on the Statute on actions conducted before the Statute applies.⁴³

Furthermore, in the Rome Statute 1998 which discusses temporal jurisdiction, especially in terms of a case's expiry date, it is stipulated in Chapter 29 of the Rome Statute 1998. Chapter 29 stated that "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." What is meant by statute of limitation in this case is time limitation of expiry

date of the right to prosecute.⁴⁴ In other words, the Court doesn't apply lapse of time principle that is subject to the stipulations of the Statute. Therefore, even though a crime took place such a long time ago and based on expiry principles the right to prosecute or to punish is invalidated, the perpetrator can still be prosecuted before the Court.⁴⁵

There are several matters regarding the ICC's temporal jurisdiction, namely:⁴⁶ Firstly, the ICC applies in state parties or in countries as described in the territorial jurisdiction part against crimes within the ICC's material jurisdiction, which is conducted after the Statute is applicable or is binding in the nation, that is, after July 1st, 2002.⁴⁷ Regarding crimes committed before July 1st, 2002, the national laws of each of the nation would try the case, and if the nation is unable or unwilling, it is possible to form an ad hoc international court as has been done earlier. Secondly, to the countries which ratified the Rome Statute 1998 after its entry into force, that is, after July 1st, 2002, the ICC can exercise its jurisdiction after the ICC is pronounced as applicable in the country.

⁴¹ Tolib Effendi, *Op. Cit.*, p. 250.

⁴² The authentic script of Chapter 126 verse 1 of the Statute affirms as follows: "This Statute shall enter into force on the first day of the month after the 60th day following the date of the de of the 60th instrument of ratification, acceptance, approval or a with the Secretary General of the United Nations".

⁴³ I Wayan Parthiana, *Op.Cit.*, p. 208-209.

⁴⁴ Tolib Effendi., *Loc.Cit.*

⁴⁵ It seems that this stipulation was inspired by Convention on the Non-Applicability of statutory Limitations to War Crimes and Crimes against Humanity 1968 and also by European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes 1974. See. I Wayan Parthiana, *Op.Cit.*, p. 209.

⁴⁶ Tolib Effendi, *Op. Cit.*, p. 251.

⁴⁷ Entry into force of the ICC, that is, 1st of July 2002. After 1st of Juli 2002, the ICC can exercise its jurisdiction after the ICC is stated as applicable in the country.

According to Chapter 126 verse (2) of the Rome Statute 1998, countries that have ratified, accepted, authorized and added this statute after storing the ratification instruments, accepting authorizing or augmenting on the sixteenth day, the Statute is stated as applicable on the first day in the month after the sixteenth day of the storing of the ratification files for the country, for example Indonesia, ratified it on February 1st, 2010, then the ICC is stated as applicable on May 1st, 2010, and can be exercised against crimes committed after May 1st, 2010. Thirdly, the ICC has no expiry limitation in trying cases that took place after the ICC is stated as applicable, either in countries which ratified it after declared applicable, or in places as discussed in the part of ICC's territorial jurisdiction. The question is, which court can try perpetrators such as stipulated in the Statute, but the crime was committed before the Statute was applicable?

The answer is the national court where the crime took place or another country's national court that has jurisdiction over the crime.⁴⁸ Certainly, the Court's temporal jurisdiction only applies in the member countries' territory, that is, the countries that have ratified and thus are bound by the Statute. In case of their countries that don't bind or haven't bound themselves to the Statute, and there is a crime committed such as the one stipulated by the Statute, the Court doesn't have jurisdiction over it. This is consistent with the principle of *pacta tertiis nec nocent nec prosunt*

⁴⁸ I Wayan Parthiana, *Op.Cit.*, p. 209.

in the international treaty law, that an international treaty doesn't give a right or apply an obligation to a third party. Against such a crime, the criminal responsibility over the perpetrator is placed under the national criminal law of the country.⁴⁹

However, if the country is incapable or unwilling to apply the national criminal law, and is incapable to try the perpetrator, just as the case with the territorial jurisdiction mentioned earlier, the UN's Security Council, based on Chapter VII of the Charter can issue a resolution to submit the case to the Persecutor, later, the Persecutor with own initiative can proceed with his own investigation and prosecution.⁵⁰

2. Analysis of the International Criminal Court's Jurisdiction Effectiveness in the Efforts to Prevent Impunity

As deliberated in the earlier discussion, in preventing impunity, the ICC has 4 types of jurisdiction. With such jurisdictions, the ICC can exercise legal process, prosecute, and try international crime perpetrators to prevent impunity and never let the perpetrators get away with their crimes. According to Arie Siswanto, the ICC's jurisdictions are quite authoritative in fighting against impunity.⁵¹ However, the author has a different point of view. The author

⁴⁹ *Ibid.*

⁵⁰ William W. Burke-White, 2008, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", *Harvard International Law Journal*, Vol. 49, No. 1, p. 78.

⁵¹ Arie Siswanto, *Op. Cit.*, p.. 347.

thinks that the ICC's jurisdiction is still ineffective in preventing impunity. The author considers that there are several factors which allow international crime perpetrators enjoy impunity.

According to Anthoni Allot, the law will be effective if the purpose of its existence and application can prevent unwanted actions to eliminate chaos. Effective law in general can make what is designed can be realized. If there is a darkness then the possibility of easy rectification occurs if there is a necessity to implement or apply the law in a different new atmosphere, the law will be able to resolve.⁵² The study of legal effectiveness is an activity that shows a general problem formulation strategy, namely a comparison between legal reality and the legal ideal, specifically looking at the level of law in action with law in theory, in the other words, this activity will show the relationship between law in the book and law in action.⁵³

In the legal ideal, as previously described that based on Rome Statute of the International Criminal Court 1998, to prevent impunity International Criminal Court has four kinds of jurisdiction in prosecuting perpetrators of international crimes, namely personal jurisdiction (*ratione personae*); criminal/material

jurisdiction (*ratione materiae*); territorial jurisdiction (*ratione loci*); and temporal jurisdiction (*ratione temporis*). But whether in reality (action) it can be implemented effectively?

Regarding personal jurisdiction, The Court only has jurisdiction over individuals, not over countries or any other subjects of the international law, not one of the Statute's stipulations which deal with an individual's criminal responsibility would influence a country's responsibility based on the international law. The basic difference with the earlier international criminal courts is the presence of justification and excuse in the ICC. The Rome Statute 1998 regulates reason which can exempt a criminal perpetrator's responsibility which states that the ICC has no jurisdiction against someone under the age of 18 years when committing a crime.

Perpetrators under 18 years of age must be returned to his/her own country, and the country would apply the national criminal law. In its current development, perpetrators of crime can also be under the age of 18 years, such as the so-called child soldiers. There have been many children recruited and trained to become soldiers, others may have joined because they were desperate, they believed that the armed groups offered the best opportunity for them to survive.⁵⁴ Therefore, according to the author, the stipulation about the excuses should be questioned regarding their

⁵² Salim, H.S and Erlis Septiana Nurbani, *Penerapan Teori Hukum Pada Tesis dan Disertasi*, First Edition, Rajawali Press, Jakarta, 2013, page. 375. See also Anthoni Allot, Winter 1981, "The Effectiveness of Law", *Valparaiso University Law Review*, 15 Val. U. L. Rev. 229 Number 2 Available at: <https://scholar.valpo.edu/vulr/vol15/iss2/1>.

⁵³ Soleman B Taneko, 1993, *Pokok-Pokok Studi Hukum dalam Masyarakat*, Rajawali Press, Jakarta, p. 47-48.

⁵⁴ Human Rights Watch, "Child Soldiers", <https://www.hrw.org/topic/childrens-rights/child-soldiers>, accessed on 22 January 2020.

relevance, considering there have been new armed groups which consist of members aged below 18 years. There is no ICC's jurisdiction, and the national law also disregards it, therefore, many are still able to enjoy impunity and can walk away with their unlawful actions.

Furthermore, there are also terms which can be used as excuses to escape from an individual's criminal responsibility when committed, the individual would have the following conditions, as contained in Chapter 31 verse 1, which are summarized as follows: a) having mental illness or memory loss; b) being intoxicated when committing the crime which interfered with the ability to make proper judgement; c) performing self-defense or in defense of someone else; d) committing actions under inevitable physical or mental duress.

However, in practice, how far can these excuses be justified for use? This certainly must be scrutinized by the Court itself through trial based on procedural law and examination of evidence, so that they would not be utilized as excuses for international crime perpetrators to enjoy impunity and to escape from responsibilities of their actions. In correlation with territorial jurisdiction and criminal jurisdiction, ICC's territorial jurisdiction applies in state parties/ratifying countries to the Rome Statute 1998, as well as non-member countries because the Court is a criminal justice agency which is meant to reach the four type of crime stipulated in

the Statute. Upon crimes that take place within or across territorial borders of the countries that are already members of the Statute, there should not be any problem with exercising the Court's territorial jurisdiction, because these countries accept the Court's jurisdiction, as confirmed by Chapter 12 verse (1) of the Rome Statute 1998.

In relations with countries that are unwilling or that reject to become members of the Statute, in order to prevent the perpetrator from enjoying impunity because the country where the crime took place is not a member of the Statute, the Court can also apply its criminal jurisdiction against crimes that took place in a country that hasn't ratified or doesn't ratify the Statute, on one condition, that is, the country should issue a declaration which states acceptance of the Court's jurisdiction, and the declaration should be submitted to the Clerk. However, regarding that matter, the Author identifies two problems, firstly, how far would a country be willing to express a statement about accepting the Court's jurisdiction, it would all depends on the political will of the country itself, the problem is, if a non-member country is not willing to express a declaration which states acceptance to the Court's jurisdiction in order to protect an offender, the Court surely cannot exercise its criminal jurisdiction against the crime which took place in the country's territory. Therefore, the perpetrator can still enjoy impunity and escape from any legal charges because of the absence of the Court's jurisdiction.

Secondly, in practice, the ICC's criminal jurisdiction against crimes that took place in a country which hasn't ratified the Statute is also ineffective, even though the country has given the declaration on the ICC's jurisdiction, but it doesn't always mean that the ICC can respond and exercise its jurisdiction. This can be seen in the case of Palestine. Palestine has expressed a declaration to accept the International Criminal Court's jurisdiction on December 31st 2014.⁵⁵ It was well received by the United Nation's Secretary General and by the International Criminal Court, which makes Palestine as an Effective State Member on April 1st 2015.⁵⁶ However, still there has been no response or action from the Court to exercise its jurisdiction to put international crime offenders on trial.

Moreover, based on Chapter 13 point (b) and (c) of the Rome Statute 1998, the Court can exercise its jurisdiction based on Chapter VII or the United Nation's Charter if it receives reference from the Security Council which is forwarded to the Prosecutor or when the Prosecutor takes the initiative to perform an investigation on a crime as stipulated in Chapter 5 of the Statute and which took place in a non-member country. Considering the stipulation of the Chapter, the jurisdiction to try

an offense which in Chapter 5 of the Statute can only be applied through two prompts, first, a reference from the United Nations' Security Council, and second, a direct initiative by the International Criminal Court's Prosecutor to conduct an investigation in a certain country.

However, according to the Author, the implementation of Chapter 13 points (b) and (c) of the Rome Statute 1998 in practice would be difficult to exercise. The two prompts for the International Criminal Court's jurisdiction through a reference from the United Nations' Security Council and a direct initiative by the International Criminal Court's Prosecutor have triggered a lengthy debate.⁵⁷ Lionel Yee stated in his article that the International Criminal Court's jurisdiction prompt through a reference from the United Nations' Security Council has caused an argument among a few member countries which are minority. The reasons for disapproval include the fear that the involvement of the United Nations' Security Council in the International Criminal Court would bring an impact of politicization of the court forum.⁵⁸

⁵⁵ International Criminal Court, "Declaration Accepting the Jurisdiction of the International Criminal Court 31 December 2014", http://www.iccpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf, accessed on 22 January 2020.

⁵⁶ International Criminal Court, "ICC welcomes Palestine as a new State Party". Press Release ICC-CPI-20150401-PR1103, 1 April 2015.

⁵⁷ Manhoush H. Arsanjani, 1999, "The Rome Statute of the International Criminal Court ", *93 American Journal of International law*, 22, p. 23.

⁵⁸ Lionel Yee, *The International Criminal Court and the Security Council*, in Roy S. Lee, "Introduction, in The International Criminal Court: The Making Of The Rome Statute: Issues, Negotiations", *Kluwer Law International* 2nd ed. Results 27, 2002, p. 149. dapat diakases di enakan masih dikatakan oleh I Wayan Parthiana dalam bukunya yang berjudul *Hukum Pidana Internasional* I Wayan Parthiana, *Op. Cit.*, p. 211.

Judging from the procedure, the first prompt in the form of a reference from the United Nations' Security Council can only take place if the Security Council already convened to discuss the matter that happened in the territory or across the borders of the country which is a non-member of the Statute, which according to the Council is considered as a threat against world security and peace (Chapter VII of the UN Charter) and ended by a decision making which is expressed in the form of a resolution to submit the case to the Prosecutor to be followed up according to the Statute's stipulations. The decision needs nine supporting votes, including an agreement from the five permanent members, namely Britain, France, the US, Russia, and China, as stipulated in Chapter 27 verse (3) of the UN Charter.

The Security Council is a political institution, therefore political nuances are inseparable from it, with the right to veto owned by the five permanent members, practically, these members would never be subjected to Security Council's resolutions which may hurt themselves or which pose a disadvantage. In practice, the Security Council's resolutions would be hard to deliver because when one of the countries issues a veto, the resolution would fail. The right to veto is one of the biggest hindrance to resolutions from being issued by the Security Council.

This is in line with what was stated by I Wayan Parthiana. He said that "If a crime took place in one or more non-Statute member countries, and was

deliberated in the Security Council, but due to the country's ability to approach one of the five permanent members to use the right to veto, it can prevent the resolution from being taken, or, in a more concrete action, if a crime was committed in one of the five countries with the right to veto, which is under the jurisdiction of the Court, and the country itself didn't take any action against the perpetrator, it is certain that the crime would not be deliberated in the Security Council. Even if it was deliberated, and a decision would be taken to submit it to the Prosecutor of the Court, the decision would be vetoed by the said country".⁵⁹

This can be seen in current reality in various countries, there are still so many international crimes as opposed to an 'ordinary crime' also known as "the most serious crimes of concern to the international community as a whole", It included the following categories of crimes: (i) aggression, (ii) genocide, (iii) crimes against humanity, (iv) crimes against United Nations and associated personnel and (v) war crimes.⁶⁰ For example the prolonged international crime case in the Palestine. Up to the current time, the ICC's jurisdiction hasn't been exercised in the conflict between Palestine and Israel, because there hasn't been reference from the UN Security Council.

⁵⁹ See ILC, Draft Code of Crimes against the Peace and Security of Mankind, 1996, Arts. 17–20, in ILC, 1996, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, UN GAOR, 51st Sess., Supp. No. 10, at 93, UN Doc. A/51/10.

⁶⁰ William Thomas Worster, 2012, "The Exercise of Jurisdiction By The International Criminal Court Over Palestine", *American University International Law Review*, Vol. 26, No. 5, p. 1159.

The possibility of reference issuance from the UN Security Council seems to be very little, considering that the US, as one of the members of the Security Council has always been showing its support towards Israel in its strong refusal against the International Criminal Court's jurisdiction, therefore, the Security Council always fails to issue a resolution to submit the case to the Prosecutor, because of the veto from the US. This has caused many countries to start questioning the function and effectiveness of the UN Security Council. The close relations between the US and Israel in various issues has made the UN Security Council ineffective.⁶¹

Therefore, the implementation of Chapter 13 verse (b) and (c) of the Rome Statute 1998 in exercising jurisdiction based on Chapter VII of the United Nations through the UN Security Council to submit to the Court through the Prosecutor regarding crimes as stipulated in Chapter 5 of the Statute that take place in non-member countries would be difficult to implement. The effort must gain nine supporting votes, including votes from the five permanent members.⁶² If one of these countries issues a veto, the resolution would fail, and practically, the perpetrator would enjoy impunity and would walk away with his crime.

Regarding the mechanism that triggers the International Criminal Court's jurisdiction implementation through

the Prosecutor's initiative, there have been arguments concerning the interest to grant the Prosecutor independent power to conduct investigation and prosecution. Several state parties emphasized that the importance of independence for the Prosecutor for the sake of the International Criminal Court's effectiveness and credibility emerged from the concern that complaints from state parties wouldn't be enough to make the International Criminal Court operate in the name of the international community as a whole.⁶³

In the case of Palestine, there hasn't been any direct initiative from the International Criminal Court's Prosecutor to conduct investigation despite the fact that there are so many international offenses that took place, and those were acts that threaten international peace and security, the Prosecutor should take the initiative to exercise its jurisdiction based on Chapter VII of the United Nations Charter. However, this is not what happens in reality. Therefore, the Author considers that such jurisdiction is ineffective, because it fails to protect and to offer justice to victims of international crimes, and it fails to respond to actions conducted by international crime perpetrators so that the perpetrators walk away with their crimes, free from any legal consequences of the actions. Moreover, in its website, up to now the ICC still has a long list of pending cases, which means that there is no certainty that the International

⁶¹ Peter Ma lanczuk, *Op. Cit.*, p. 378.

⁶² International Commission of Jurists, 1998, "Exercise of Jurisdiction and Complementarity", *International Commission of Jurists Brief No. 2*, 2 Juni. p. 2.

⁶³ International Criminal Court, "Situations under investigation", <https://www.icc-cpi.int/pages/situation.aspx>, accessed on 24 January 2020.

Criminal Court wishes to add another list of pending cases.⁶⁴

Further about the temporal jurisdiction (*ratione temporis*), Chapter 11 verse (1) stated that the ICC has jurisdiction only against cases that took place after the Statute was stated as applicable (non-retroactive principle). If a crime was conducted before the Statute applies, it is the national court where the crime took place that has the jurisdiction over it. A case also can not be investigated by the ICC if the case is still being investigated by a prosecutor of the state or if the case has been investigated by the authority of a particular country and the country's judicial system decides not to proceed to court. It called "The Complementarity Principle". This principle means that the Court will complement, but not supersede, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the International Criminal Court will act when national courts are 'unable or unwilling' to perform their tasks.⁶⁵

⁶⁴ Roy S. Lee, "Introduction, in The International Criminal Court: The Making Of The Rome Statute: Issues, Negotiations", *Kluwer Law International 2d ed*, Result 27, 2002. Mr. Lee is the Director of the Codification Division in the Office of Legal Affairs of the United Nations and also the Secretary of the International Law Commission and of the Sixth Committee of the General Assembly. He was the Secretary of the Preparatory Committee on the Establishment of an International Criminal Court.

⁶⁵ Michael A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara J. Int'l L.* 115, 2010 as a cited by Linda E. Carter, "The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem", 8 *Santa Clara J. Int'l L.* 165, 2010, p. 167

In his thoughtful paper, Professor Newton expresses a concern that the implementation of complementarity may not honor the underlying premise of state prerogatives in pursuing national prosecutions. He would like to see a deferral to the good faith reasonableness of domestic jurisdictions.⁶⁶ However, the problem is that the national court may fail to function because it cannot exercise its jurisdiction, or that the national laws do not regulate over said action as a crime in its national regulations. This was also mentioned by Arie Siswanto, who stated that sometimes the national court fails to function when it faces structure and system disorders. The national court's structure and system disorders can happen after a country experienced a serious conflict.⁶⁷

Moreover, the national justice system is often unwilling to exercise its jurisdiction to try a crime offender and tends not to be neutral or even protective towards international crime offender. This was also mentioned by Georg Schwarzenberger who stated that the national justice system is often incapable of taking a neutral step.⁶⁸ This has an

⁶⁶ Arie Siswanto, 2015, *Hukum Pidana Internasional*, Andi Offset, Yogyakarta, page 298. See also Mohamed M. El Zeidy, 2002, "The Principle of Complementarity: A new Machinery to Implement International Criminal Law", *Michigan Journal of International Law*, 23, p. 903.

⁶⁷ Georg Schwarzenberger, "International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict", *Netherlands International Law Review*, Vol II, 1968, p. 463.

⁶⁸ J. Llewellyn, "A comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transnational Contexts?", *Dalhousie Law Journal*, 24, 2001, p. 192.

implication that the justice process or the court's decision given would obscure the criminal responsibility over an offense.⁶⁹ Such a situation would surely allow criminal offenders to enjoy impunity and walk away with their crime.

The Court's temporal jurisdiction only applies over crimes that took place within the state parties, that is, the countries that have ratified and thus are bound under the Statute. The other countries that are not or yet to bind themselves under the Statute, and in their borders a crime took place which is stipulated by the Statute, even though the event was after the Statute applies, still the Court doesn't have jurisdiction over the case (*pacta tertiis necnoent nec prosunt*) under the international treaty law, in the international treaty law doesn't give the right and/or demand obligation to the third party. Against such a crime, the criminal responsibility over the perpetrator is returned to the national criminal law of the said country.

If the country is incapable or unwilling to apply its national criminal law, and unable to try the perpetrator, the UN Security Council based on Chapter VII of the Charter can issue a resolution to submit the case over to the Prosecutor, and the Prosecutor with its own initiative would continue the investigation and the prosecution. As was mentioned earlier, in practice it would be difficult to issue a resolution, which is strictly political. If one of the countries issues a veto, the resolution would fail to be issued, and practically, the perpetrators would enjoy

impunity and would walk away with their crimes.

Therefore, the author's opinion is the ICC's jurisdiction to process, prosecute and try criminal offenders in order to prevent impunity in not yet effective because effective law in general can make what is designed can be realized.⁷⁰ While the jurisdiction owned by the ICC in order to prevent impunity can not be realized in its implementation. there are still many factors or reasons that cause perpetrators to enjoy impunity or be free from lawsuits and legal responsibility for their actions.

D. Conclusion

From the above description, it can be concluded that based on the Rome Statute of the International Criminal Court 1998, the International Criminal Court has four types of jurisdiction, namely: 1) Personal jurisdiction (*ratione personae*) means that the Court only has personal jurisdiction over individuals, not over countries or other international law subjects other than individuals; 2) Criminal/material jurisdiction (*ratione materiae*) means that The court has a jurisdiction deals with four types of criminal offenses which are under the ICC's jurisdiction as stipulated in Chapter 5 of the Roma Statute 1998, namely genocide, crimes against humanity, war crimes, and aggression; 3) ICC's territorial jurisdiction applies in state parties/ratifying countries to the Rome Statute 1998; 4) Temporal jurisdiction means that the Court only has jurisdiction

⁶⁹ Anthoni Allot, *Loc.Cit.*

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against crimes as stipulated in Chapters 5-8 of the Statute which took place after the date it applies. the Court doesn't apply lapse of time principle that is subject to the stipulations of the Statute.

Therefore, the author's opinion is the ICC's jurisdiction to process, prosecute and try criminal offenders in order to prevent impunity in not yet effective because effective law in general can make what is designed can be realized. While the jurisdiction owned by the ICC in order to prevent impunity can not be realized in its implementation. there are still many factors or reasons that cause perpetrators to enjoy impunity or be free from lawsuits and legal responsibility for their actions.

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