

*Aleksandar V. Gajić, PhD**

DOI: 10.51204/Zbornik_UMKP_25114A
Originalni naučni rad

INTERNATIONAL CRIMINAL COURT AS JUDICIAL AND POLITICAL ACTOR¹

Abstract: In this article the author observes that the International Criminal Court is not only an international judicial institution but also a political actor in contemporary international affairs, whose activities cannot be ignored even by States that are not parties to the Rome Statute. The article provides remarks on the proper limits of the ICC's jurisdiction and particularly emphasize that in the contemporary international system, international criminal adjudication can play a role and effective function to the extent that is in line with the structural realities of international society, e. g. with the nature of international community.

Keywords: International Criminal Court, Jurisdiction of the ICC, Political actor, Prosecutor of the ICC.

*

The International Criminal Court (ICC) is not only an international judicial institution but also a political actor in contemporary international affairs. An

* Associate professor at the University of Belgrade – Faculty of Law, Chief Legal Advisor at the Ministry of Foreign Affairs and advisor to the Ministry of Justice of the Republic of Serbia. Positions and arguments presented in this article are of the author alone and are not necessarily positions of the Ministry of Foreign Affairs, Ministry of Justice or of the Government of the Republic of Serbia, ORCID: 0009-0005-4603-1608, gajic@ius.bg.ac.rs.

1 This article is the result of research conducted as part of the strategic project at the University of Belgrade Faculty of Law, titled “The Problems of Creation, Interpretation, and Application of the Law.” The subproject is “Judiciary and Contemporary Challenges”, with the research group's focus on “Judiciary Reform from the Standpoint of International Criminal Law and Criminal Law”, financed by the Faculty of Law at the University of Belgrade. (Овај рад је настао као резултат истраживања у оквиру стратешког пројекта за 2025. годину „Проблеми стварања, тумачења и примене права“ (подтема: „Правосуђе и изазови данашњице“ – тема истраживачке групе: „Правосудна реформа са становишта међународног кривичног права и кривичног права“), који финансира Правни факултет Универзитета у Београду.)

evergreen issue in international law and affairs is the complex relationship between law and politics, and the ICC has been one of the key subjects of this topic even before its establishment. In this article, I will present certain arguments and positions concerning the nature of the ICC's activities, both as an international judicial institution and as a political actor in international affairs.²

No doubt, the ICC is a judicial institution, but also a political institution, created by the political will of States Parties to the Rome Statute.³ There are attempts to perceive international courts in an idealistic manner, as completely autonomous institutions led by international law, however, this is not the case in the contemporary international community (a realistic approach). As observed by T. Ginsburg: "international disputes frequently involve high stakes, and so the dream of autonomous law providing technically correct solutions to resolve problems has always confronted the hard realities of international politics."⁴ In international criminal adjudications those stakes are much higher.

The key point of the international criminal administration of justice, in a contemporary, very solid legal framework, is prosecutorial policy. The policy pursued by the prosecution is the policy of the international criminal court or tribunal. While the published strategy of the Prosecutor of the ICC⁵ and the statements of the ICC prosecutors are developed under arguments of impartiality and

2 In this article I will try to avoid, as much as possible, considerations already presented in my other articles on similar subject matter. A. Gajić, "Head of States Immunity in the Context of the Jurisdiction of the International Criminal Court", *Raskršća međunarodnog krivičnog i krivičnog prava – reforma pravosudnih zakona Republike Srbije* (ur. M. Škulić, I. Miljuš, A. Škundrić), Udruženje za međunarodno krivično pravo, Palić, 2023, 60–68; A. Gajić, "Napomene o kontroli međunarodnih sudova i tribunala", *Suverenitet i rad međunarodnih krivičnih sudova* (ur. S. Nogo), Udruženje za međunarodno krivično pravo, Tara, 2018, 34–41.; A. Gajić, "Napomene o ulozi međunarodnog javnog prava i međunarodnog pravosuđa", *Međunarodno javno i krivično pravo u XXI veku* (ur. S. Nogo), Udruženje za međunarodno krivično pravo, Tara, 2020, 145–157.; "O univerzalnosti međunarodnog krivičnog prava i prirodi i ulozi međunarodnog krivičnog pravosuđa", *Odgovornost i sankcija u krivičnom pravu – sa posebnim osvrtom na međunarodno krivično pravo* (ur. S. Nogo), Udruženje za međunarodno krivično pravo, Tara, 2019, 100–108.

3 A. Gajić (2018), *op. cit.* For state parties to the Rome Statute see: <https://asp.icc-cpi.int/states-parties>, United Nations Treaty Collection, Rome Statute of the International Criminal Court, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg_no=XVIII-10&chapter=18&clang=en. 24. April 2025.

4 Tom Ginsburg, "Political Constrains on International Courts", *Public Law and Legal Theory Working Papers*, University of Chicago School of Law, Working paper No. 453, 2013, 484–502.

5 "According to the principle of complementarity to national jurisdictions, the OTP is mandated to conduct independent, impartial and effective preliminary examinations, investigations and prosecutions of crimes under the Court's jurisdiction, in cooperation with States Parties and other relevant stakeholders.", *Office of the Prosecutor Strategic Plan 2023-2025*, ICC, available at <https://www.icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf>, 24. April 2025.

objectiveness⁶, the reality of international prosecution shows that politics has always been heavily involved.⁷

“Victorious justice” is a term that most frequently determines the conduct and outcome of the international criminal justice system.⁸ However, the ICC, like other international institutions, acting at the time of the situation it has under its jurisdiction, might be a significant political actor. “Selective adjudication” and “fine adjustments” might pursue politics under the cover of “justice”.

*

The main and most important issue in the international administration of justice is, certainly and undoubtedly, the issue of jurisdiction. Universal and obligatory judicial settlement of all international disputes is simply an unfathomable fairytale. The jurisdiction of international criminal courts and tribunals is also facultative in nature, and without the consent of a relevant State there is no

6 Luis Moreno-Ocampo, ‘Keynote Address’, speech delivered at the Council on Foreign Relations, Washington DC (United States), 4 February 2010, 6, <https://www.icc-cpi.int/sites/default/files/NR/>, 24 April 2025.

rdonlyres/A80CDDDD-8A9A-432E-97CE-F6EAD700B5AE/281527/100204Prosecutor sspeechforCFR.pdf.; Fatou Bensouda, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda on Concluding the Preliminary Examination of the Situation Referred by the Union of Comoros: “Rome Statute Legal Requirements Have Not Been Met”’, transcription of audio-visual statement, 6 November 2014, <https://www.icc-cpi.int/news/statement-prosecutor-internationalcriminal-court-fatou-bensouda-concluding-preliminary>, Karim Khan, ‘Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation’, 2 March 2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukrainereceipt-referrals-39-states>, 24 April 2025.

7 R. H. Steinberg, “Politics and Justice at the International Criminal Court”, *Israel Law Review* 2024, 309–310.

8 W. A. Schabas, “Victor’s Justice: Selecting “Situations” at the International Criminal Court”, *The John Marchal Law Review*, 43/2010, 535–552.

“All this suggests that in the international context, Lady Justice might not be blind. There is no shortage of arguments that international justice is merely ‘victor’s justice’, and most of the examples above of earlier international justice efforts may be seen in that light, with powerful states championing and establishing international justice mechanisms that selectively prosecute military and civilian leaders of weaker states whose military has usually lost a conflict. In so far as the ICC has been perceived as a European-led effort which has mainly investigated and prosecuted people from former European colonies in Africa, it too may be seen as analogous to victor’s justice, to the extent that the powerful constituted a court that is prosecuting the weak.” (R. H Steinberg, *op. cit.*, 311.) “To survive, the ICC must often act politically, influenced by pressure from powerful actors to exercise its authority in ways they favour. Wedged between the law of the Rome Statute and global politics, a logic of appropriateness and a logic of consequences, the ICC faces challenges from which it cannot completely escape.” *Ibid.*, 312.

jurisdiction. That is a clear rule derived from the indisputable concept of sovereignty of States on which the contemporary international community is based. Providing consent is always a matter of policy.⁹

Trying individuals on the basis of their policies and (in)actions for crimes allegedly committed can be perceived, and is perceived, as a substitute for jurisdiction over states or parties to a conflict inside the state (like civil wars). International criminal courts and tribunals are not concerned with “ordinary” law violators, they are concentrated on the high-ranking military and political figures acting in the name of the State, and their acts are, almost by definition, attributable to the State (or to a party to a conflict). This consideration cannot be underestimated in discussions on the acceptance of jurisdiction of international institutions, even though the responsibility under international criminal law is individual and does not, by itself, impose state responsibility. However, issuing arrest warrants against heads of States or governments, against key military and political leaders, cannot be divorced from the impact on State policy and political and legal responsibility.

A prominent example, the Nuremberg trial was a symbol of trying the Third German Reich (Nazi Germany) for aggressive war and the Holocaust. By conviction of Hermann Göring and others¹⁰ Nazi Germany was convicted, a policy pursued by Germany during the Second World War. Similarly, suing a head of State or high ranking political and military leaders is not a simple establishment of individual criminal responsibility. Its consequences are more far-reaching. On the other hand, German Third Reich was defeated. There were no trials against perpetrators of international crimes on the victorious side. However, it is one thing to sue political and military leaders “after the war” when military defeat is not sufficient punishment, suing them during the war or situation that led to investigation of the ICC is, for now, a mission with high political bets¹¹.

In the international community where the primary subjects are States, international criminal jurisdiction over state officials is a deviation from the traditional concept of sovereignty under international law.

9 In international law, accepting jurisdiction means providing consent to jurisdiction. Providing consent is always a matter of policy. Political interests are predominant in providing consent to the jurisdiction of any international court or tribunal. For example, a state such as the USA, with 750 military bases in 80 countries, and heavily involved in various armed conflicts, is hardly likely to accept the jurisdiction of the ICC, where the Prosecutor has the authority to determine on their own whether or not to conduct an investigation. On the other hand, it is completely understandable that Liechtenstein would be one of the main leaders in activities surrounding the promotion and development of universal criminal jurisdiction.

10 *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22* (22nd August, 1946 to 1st October, 1946).

11 This word is intentionally used, with meaning “to gamble or risk something valuable against an unknown outcome”.

The proper establishment of individual criminal responsibility requires not merely legal norms, but a fundamental transformation of the structure of the international community — a task that the ICC is manifestly unable to achieve. The ICC can function as an independent and autonomous judicial institution only within a framework resembling a “world state,” which, at present, far from reality. In the contemporary international system, international criminal adjudication can have a role and effective function to the extent that is in line with the structural realities of international society.

The issue of jurisdiction, as a legal concept, is based on political will of states. It cannot be established by a group of States, but requires consent of, if not all States, then a predominant majority of States including those that hold predominant political power in international community.

*

The ICC was created despite the opposition from the major great powers, particularly the United States of America, which was heavily engaged in its creation. The position of the United States at the Rome Conference was that the UN Security Council should be the arbiter of what the ICC could or could not investigate and prosecute, but ultimately this position was not accepted,¹² as well the jurisdiction of the ICC has not been accepted by the United States of America.

The position of the United States of America and the Russian Federation is clear, the Court has no jurisdiction over nationals of states that are non-parties to the Statute. The same voice is also raised by China. At the last Assembly of the State Parties to the Rome Statute the representative of China, as an observer state, expressed a clear position on the most controversial issue on the jurisprudence of the ICC¹³:

“The Court’s jurisprudence on jurisdictional immunity of State officials has long been a controversy in the international community. Under recognized international law, incumbent heads of State, heads of Government, ministers for foreign affairs enjoy absolute immunity from criminal jurisdiction and inviolability. According to the rule of international law that “A treaty does not create either obligations or rights for a third State without its consent”, Art.27 of the Statute which provides that immunities which may attach to the official capacity of a person shall not bar the Court from exercising its jurisdiction over such a person, is only binding on States parties and could not be used to

12 M. Kersen, “The International Criminal Court’s Pursuit of Justice and Legitimacy”, *Current History*, Jan. 2025, 16.

13 Statement by the observer delegation of China to the 23rd Assembly of States Parties to the Rome Statute of the International Criminal Court, available at https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP23-GD-CHN-3-12-ENG.pdf, 24 April 2025.

negate the Court's and the States parties' obligations to respect the immunity from criminal jurisdiction of high-ranking officials of non-States parties under general international law. In accordance with Art.98 of the Statute, the Court may not proceed with a request for cooperation that might result in a breach by the requested State of its obligations to a third State. The Court's practice of exercising jurisdiction over non-State parties is also controversial. It is our consistent view that the Court should act in strict compliance with the Rome Statute, and may not exercise its jurisdiction over acts committed by nationals of non-State parties on the territory of non-State parties, unless referred by the UN Security Council. A previous judgment of the Court held that the Court may exercise jurisdiction insofar as at least one element of a crime within the jurisdiction of the Court, or a part of such crime, has been committed in the territory of a State party to the Statute, but this is inconsistent with Art.12 of the Statute which requires that the conduct in question occurred in the territory of a State party, resulting in over-extension of the Court's jurisdiction."¹⁴

The Chinese statement is completely in line with the positions of the United States and the Russian Federation (as well as many other states) and also in line with international law, explaining in simple language and excellent legal analysis the key problem of the jurisprudence of the ICC, while sending political message that judicial activity is accepted only if in harmony with the proper limits of the ICC's jurisdiction. The message is clear, the functions of the Court must be carried out as summarized by China, "objectively and impartially" and only in this case that would contribute to the "maintaining the stability of the international order and building lasting peace and security".

In other words, the ICC can be just and effective only when its actions are in line with the clear rules of the jurisdiction of international criminal court and when it is in line with the main aims of international community. This is completely in line with the consideration that underlines the mandate of the UN Security Council as provided by the Charter of the United Nations. It reflects the starting point of the United States of America position towards the ICC that it needs to have jurisdiction only by referral of the Security Council of the United Nations.

However, the Rome Statute goes a few steps forward, not only the Security Council but also the States can refer situations to the Prosecutor of the ICC, and even the Prosecutor of the ICC may conduct investigations *proprio motu*. This created a complex jurisdictional rule that is not completely in line with the interests of non-parties to the Rome Statute. The present structure of the jurisdiction of the ICC creates more problems than it can resolve through its jurisprudence.

Just consider this fairy tale situation: presidents of most powerful states in the middle of the most critical situations in international community, resign from

14 *Ibidem*.

their duties in order to obey an arrest warrant issued by an international prosecutor. Imagine Donald Trump, Vladimir Putin and Benjamin Netanyahu, at the request of the current ICC Prosecutor Karim Khan, sitting in the custody in the Hague Detention Unit, preoccupied with the consultations with their legal counsels, waiting for the decision of the Prosecutor and ruling of the Chamber whether to bring charges or to release them. That means that Karim Khan, the Prosecutor of the ICC, has a power over the heads of States or Governments of most powerful states (even if they did not accept jurisdiction of the ICC), and has the ability to impact or alter leadership in those countries, for example USA, Russia and Israel. However, this is not a fairy tale, this is what would happen if the arrest warrant against the President of the Russian Federation and Head of Government of the Israel (the high-ranking state officials of States not parties to the Rome Statute) were obeyed.

Jurisdiction of the ICC, as interpreted or understood by the Prosecutor of the ICC, if effective, makes him the most powerful person in the international community. However, this is not in line with political reality, and the role of the ICC must be considered in the real sociological and political context. Universal criminal jurisdiction is not a concept acceptable to a large number of States, particularly the most powerful States, and that was very clear even before the Rome Conference on the ICC. The acceptable model was the one that might keep the Prosecutor of the ICC under control. As pointed out by M.P. Scharf “on the eve of the Rome Diplomatic Conference in the summer of 1998, both the U. S. Congress and the Clinton Administration indicated that they were in favour of an international criminal court if the right protections were built into its statute.”¹⁵

While certain States pursue more universal jurisdiction¹⁶, on the other hand, certain States withdraw from the Rome Statute (South Africa, Burundi, Gambia and the Philippines)¹⁷. However, only 125 States are parties to the Rome Statute.

15 M. P. Scharf, “The Politics Behind U. S. Opposition to the International Criminal Court”, *The Brown Journal of World Affairs*, 1999/1, 100.

“The theory appropriate to naked power has been stated by Plato in the first book of the Republic, through the mouth of Thrasymachus, who gets annoyed with Socrates for his amiable attempts to find an ethical definition of justice. ‘My doctrine is,’ says Thrasymachus, ‘that justice is simply the interest of the stronger.’” B. Russell, *Power*, Routledge, London, 1938, 9, quoted upon M. Bergsmo, “Unmasking Power in International Criminal Justice: Invisible College v. Visible Collegues”, *Power in International Criminal Justice* (eds. M. Bergsmo et al.), Brussels, 2020, 39.

16 Those States form a Group of Friends for the Review of the Rome Statute – Review of the Kampala Amendments on the Crime of Aggression.

17 See: United Nations Treaty Series, *Rome Statute of the International Criminal Court*, Status at 26.04.2025 (available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18).

However, in the last resolution State Parties to the Rome Statute “Welcomes the report of the Bureau on the Plan of action and notes with appreciation the efforts of the Court’s President, the Office of the Prosecutor, the President of the Assembly, the Assembly, States Parties and civil society to enhance the effectiveness of universality related efforts

Of 139 States that signed the Rome Statute 29 have not ratified it, while certain States (Israel, the Russian Federation, Sudan and the United States of America) indicated that they withdrew its signatures, e. g. that they do not intend to ratify the Rome Statute. One of the main issues was the reaction of the African Union to the ICC activities on the African continent. The Assembly of Heads of State and Government of the African Union adopted (with certain reservations) the Decision on the International Criminal Court by which it adopted “the ICC Withdrawal Strategy¹⁸” in reaction on the issuance by the ICC of the arrest warrant against president Omar Al Bashir and other activities of the ICC on the African continent.¹⁹ On the African continent, because of the opening of investigations in Uganda, DR Congo, Dafur (Sudan), Kenya, Libya, Ivory Coast, Burundi and Mali the ICC gained a reputation as “racist and neocolonial.”²⁰ Taking the position of the African Union seriously, and in order to keep African States as members of the ICC the management of the ICC took measures to keep African States as members.²¹ It is also not unimportant that actual Prosecutor of the ICC is Karim Khan, who had been a defence counsel for William Ruto in the Kenya case.²²

*

The ICC cannot act on its own and is highly dependent on the cooperation of States. “The ICC prosecutor has no independent authority to conduct investigations, gather evidence, interview witnesses, or arrest suspects on the territory of state parties²³ without their cooperation. As pointed by Posner and Yoo, while

and to encourage States to become parties to the Rome Statute, as amended, and to the Agreement on the Privileges and Immunities of the International Criminal Court, as well as relevant efforts undertaken in the framework of the Universal Periodic Review of the Human Rights Council; Recalls rule 42 of the Rules of Procedure of the Assembly of States Parties, and underscores the importance of promoting the universality of the Rome Statute and of strengthening the openness and transparency of the Assembly (paras 12 and 13)

- 18 Decision on the International Criminal Court, Assembly/AU/Dec.622(XXVIII), The African Union, available at [https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/Assembly%20AU%20Dec%20622%20\(XXVIII\)%20_E.pdf](https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/Assembly%20AU%20Dec%20622%20(XXVIII)%20_E.pdf), 24 April 2025.
- 19 P. I. Labuda, “The African Union’s Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?”, 5 February 2017, *EJIL:Talk! Blog of the European Journal of International Law* <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/> 21.04.2025.
- 20 M. Karsen, *op. cit.*, 17.
- 21 Among those measures are establishment of the representation of the ICC at the African Union Headquarters in Adis Abeba and promote dialog with the African Union (see: ICC-ASP/23/Res.1 -Strengthening the International Criminal Court and the Assembly of State Parties, Adopted on 6 December 2024, by consensus, paras. 8, 57-59)
- 22 See also <https://www.theeastafrican.co.ke/tea/news/east-africa/icc-prosecutor-karim-khan-recuses-himself-from-kenyan-cases-4329612>, 25 April 2025.
- 23 E. A. Posner, J. C. Yoo, “Judicial Independence in International Tribunals”, *California Law Review*, 1/2005, 68.

factual and legal limitations of the power of the prosecutor are frequently emphasised, “the Rome Statute does not provide for any sanction if a state party obstructs the prosecutor’s efforts. This led some commentators to argue that the ICC prosecutor’s institutional weakness could undermine the Court.”²⁴ The same authors wrote more than a decade ago: “we predict that the ICC will not be an effective tribunal. Although the Rome Statute is aimed at individual defendants, the ICC’s jurisdiction strikes at the heart of state interests. Prosecutions will inevitably raise questions about the legality of a decision by a state to use force and the legality of the tactics used by a state under international law (both *jus in bellum* and *jus ad bello*).”²⁵ However, as pointed by Schabas “the ICC is not entirely free of external political control in the selection of situations.”²⁶ Selecting situations and cases is at the discretion of the Prosecution, that is the strongest political weapon.²⁷ However, whether the Prosecutor is “independent” in this task? How should the situation be handled when 39 States refer the situation in Ukraine to the ICC? Those referrals certainly had a strong impact on the Prosecutor to request and the Chamber to issue an arrest warrant against the president of the Russian Federation, a non-member State of the ICC.²⁸

When the ICC Prosecutor and the ICC Judges crossed the line, by issuing secret arrest warrants against the actual president of Russian Federation and latter on against the actual Prime Minister of Israel²⁹ a strong reaction occurred. As a result, two non-member States of the ICC imposed sanctions against Karim Khan and the ICC.³⁰

24 *Ibid.*, 69.

25 *Ibidem*.

26 W. Schabas, *op. cit.*, 541.

27 “In theory, the Security Council or the State Party, as the case may be, may challenge the Prosecutor’s decision before the Court. In practice, it is hard to imagine how even the judges will be able to force the Prosecutor to proceed where he chooses not to, given that this requires an allocation of scarce resources that only the Prosecutor can make. The Prosecutor could simply respond to an order from the Court with which he disagreed by assigning responsibility over the situation or the case to the international equivalent of Inspecteur Jacques Clouseau, confident that there would be no effective result.” *Ibidem*.

28 Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 02. March 2022. available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>, 24. 04. 2025.

29 A. Gajić (2023), *op. cit.*; D. Akande, “International Law Immunities and the International Criminal Court”, *The American Journal of International Law*, 2/2024.

30 “We back the endeavor to combat impunity. However, it’s been a long time now since the ICC itself and its activities lost any link with the administration of justice. It is nothing but a political performance commissioned by the patrons of the ICC, who seem to have an “on/off” button, and skillfully use it.” Statement by Deputy Permanent Representative Maria Zabolotskaya at a UNSC Briefing on the Report of the ICC Prosecutor on the Situation in Darfur, 27. January 2025, https://russiaun.ru/en/news/icc_270125, 24 April 2025.

As an international institution with a permanent mandate, the ICC ensures that the ‘political pressure’ in ongoing conflicts will persist until the accused side is defeated or the reputation of the ICC is put at risk. Instituting proceeding might be interpreted as a sign that the policy will be pursued to the very end, until the political goal is achieved. On the other hand, a judicial institution such as the ICC cannot serve as a real substitute for military and political, and even legal strengths and skills. As pointed out by Mark Kersten participating in “the debate regarding the effects of the ICC interventions on conflict dynamics and pace process”, and having particularly in mind situations in Uganda and Libya, that “the targets of ICC arrest warrants will reject participating peace negotiations and instead comment themselves to political violence”, as well as that there is a likelihood that “that actors not targeted by the Court may reject negotiating with their adversaries and thus commit to violence.” Another author pointed out that “there are two mechanisms by which prosecutions have become politicized: the referrals of conflict situations to the ICC by political actors, i.e. States Parties to the Rome Statute and United Nations Security Council, and the prospect and degree of state cooperation with the Court. Consequently, prosecutions have targeted only one side of the conflict and reflect the strategic political interests of the referring actors but promise a greater degree of state cooperation.”³¹

*

In connection with the recent activities of the ICC, particularly the issuance of arrest warrants against Israeli Prime Minister Benjamin Netanyahu and Former Minister of Defence Yoav Gallant, the United States of America has declared such a situation as a national emergency. In the Presidential Order of 6th February 2025³², it is, *inter alia*, stated:

The United States unequivocally opposes and expects our allies to oppose any ICC actions against the United States, Israel, or any other ally of the United States that has not consented to ICC jurisdiction. The United States remains committed to accountability and to the peaceful cultivation of international order, but the ICC and parties to the Rome Statute must respect the decisions of the United States and other countries not to subject their personnel to the ICC’s jurisdiction, consistent with their respective sovereign prerogatives.

The United States will impose tangible and significant consequences on those responsible for the ICC’s transgressions, some of which may

31 A. Tiemessen, “The International Criminal Court and the politics of prosecutions”, *The International Journal of Human Rights*, 19/2014.

32 Imposing Sanctions against International Criminal Court, The White House, 6 February 2025. <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/>, 20. 04. 2025.

include the blocking of property and assets, as well as the suspension of entry into the United States of ICC officials, employees, and agents, as well as their immediate family members, as their entry into our Nation would be detrimental to the interests of the United States.

I therefore determine that any effort by the ICC to investigate, arrest, detain, or prosecute protected persons ... constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to address that threat.

Targeting leaders of non-member States, the ICC exceeded proper limits of its jurisdictional framework and involved themselves in situations that are, for a long time before the Security Council of the United Nations. That is a high steak for the ICC.

The Presidential Order imposing sanctions against Karim Khan reveals perception of the ICC as a political instrument and does not concern application of general rules of international law (like China's statement before the Assembly of State Parties), but rather calls on "allies" of the United States of America "to oppose any ICC actions against the United States, Israel, or any other ally of the United States that has not consented to ICC jurisdiction." A similar reaction failed when Russian Federation was in issue. On the contrary, President of the USA, J. Biden welcomed issuing arrest warrant against president Putin, endorsing action of the ICC.³³ Reasons clearly underline political nature of the ICC activities.^{34, 35}

33 *Putin arrest warrant: Biden welcomes ICC's war crimes charges*. BBC, 18. March 2023., <https://www.bbc.com/news/world-europe-64998165> 24. 04. 2025.

34 In the Guardian, and elsewhere, it is stated "Putin will now be labelled an alleged war criminal for the rest of his life by the court responsible for investigating some of the most serious violations of recent decades. It puts him in the same company as infamous figures such as Slobodan Milošević, the former president of Yugoslavia, and the former Sudanese dictator Omar al-Bashir." *Joe Biden hails decision to issue ICC arrest warrant against Vladimir Putin* <https://www.theguardian.com/world/2023/mar/18/biden-hails-decision-icc-arrest-warrant-against-putin>, 24 April 2025.

35 The European Union strongly supported the ICC's activities against Russia. Russia: Statement by the High Representative on threats against the International Criminal Court, 22. 05. 2023., European Union External Action, https://www.eeas.europa.eu/eeas/russia-statement-high-representative-threats-against-international-criminal-court-0_en, 20.04.2025. International Criminal Justice: Statement by the High Representative following the US decision on possible sanctions related to the International Criminal Court, 16.06.2024, European Union External Action, https://www.eeas.europa.eu/eeas/international-criminal-justice-statement-high-representative-following-us-decision-possible_en, *International Criminal Court: Statement by the High Representative/Vice-President Josep Borrell on the US decision to repeal sanctions against the International Criminal Court*, 03.04.2021. European Union Action Service, https://www.eeas.europa.eu/eeas/international-criminal-court-statement-high-representativevice-president-josep-borrell-us-decision_en (25 April 2025). In this case, the EU "expresses

On the announcement of the Government of Hungary to withdraw from the Rome Statute because it received the Israeli Prime Minister on an official visit, the Presidency of the Assembly of State Parties³⁶ reacted by expressing concerns and regret, emphasising that: “The ICC is at the centre of the global commitment to accountability, and in order to maintain it strength, it is imperative that the international community support it without reservation. Justice requires our unity.”³⁷

Advancing international criminal justice was a strong argument behind establishment of international criminal institutions.³⁸ However, behind this idea lies quest for further political opportunities through international criminal proceedings.³⁹ This trend is still ongoing. However, unrealistic call to support the ICC activities without reservation is political aim that simply cannot be achieved.

States called “Group of Friends for the Review of the Rome Statute – Review of the Kampala Amendments on the Crime of Aggression”⁴⁰ indicate limitations of the crime of aggression by excluding of non-state parties and limiting jurisdictional regime (Article 15bis (4) of the Rome Statute). The main issue concerns “the inability of the ICC to prosecute non-state parties for the crime of aggression has resulted in a selective application of international criminal law and weakened the ICC’s mandate. Developing a strong legal framework will provide crucial protection for all States, including small and medium-size States which are often the most affected by acts of aggression”.⁴¹ Indicating that “revisiting Kampala Amendments is not a complex legal issue” they emphasize that “the main challenge lies in securing the political will of State Parties to agree on those changes”.

What lies behind these proposals for universal jurisdiction of the ICC over crime of aggression? While this idea might be welcomed, its political context and

its regret regarding US executive order allowing sanctions on International Criminal Court” <https://www.aa.com.tr/en/europe/eu-laments-us-executive-order-imposing-sanctions-on-icc/3474990>, 25 April 2025.

See also: L. de Kruijf, “Could the EU “blocking statute” protect the ICC from US sanctions”, Atlantic Council, 27.02. 2025. <https://www.atlanticcouncil.org/uncategorized/could-the-eu-blocking-statute-protect-the-icc-from-us-sanctions/>; EU leaders and lawmakers condemn Trump’s sanctions against ICC, 12.02.2025, EuroNews, <https://www.euronews.com/my-europe/2025/02/12/eu-leaders-and-lawmakers-condemn-trumps-sanctions-against-icc>, 20. 04. 2025.

36 Composed of the representative of Finland, Poland and Sierra Leone.

37 ICC, Pres release: The Hague, 3 April 2025.

38 See for example, M. Cherif Bassiouni, “Establishing and International Criminal Court: Historical Survey”, *Military Law Review*, 149/1995, 56.

39 Like in the case of the ICTY.

40 The Group of Friends was initiated by Germany in 2023- It is co-chaired by Liechtenstein. Its members are Austria, Belgium, Bulgaria, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Guatemala, Iceland, Ireland, Italy, Liechtenstein, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Sierra Leone, Slovakia, Slovenia, Spain, State of Palestine, Sweden, Switzerland, Ukraine and Vanuatu.

41 Non paper of the Group of Friends.

the possibility of its realization are surrounded by obstacles in international law and international politics, particularly from Great Powers and their allies.

However, official documents and resolutions such as the recent resolution concerning Strengthening the International Criminal Court and the Assembly of State Parties⁴² adopted by consensus often contain language of support emphasising very problematic impartiality and independence. At the last meeting of the Assembly of the State Parties to the Rome Statute the crucial question, jurisdiction to issue arrest warrants against high officials of States that are not parties to the Statute was, in order to maintain the spirit of consensus, avoided, and the discussion was postponed until the next meeting.

*

There is no international judicial institution with universal jurisdiction; its jurisdiction is facultative in nature, and in the case of the ICC, complementary to those of national courts. As argued above, the ICC is also a significant political actor in the international community whose actions cannot be ignored even by States that are not parties to the Rome Statute. However, there is a need to emphasize that in the contemporary international system, international criminal adjudication can play a role and effective function to the extent that is in line with the structural realities of international society, e. g. with the nature of international community.

BIBLIOGRAPHY

- Akande D. "International Law Immunities and the International Criminal Court", *The American Journal of International Law*, 2/2024.
- Bassiouni M. C., "Establishing and International Criminal Court: Historical Survey", *Military Law Review*, 149/1995.
- Bergsmo M., "Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues", *Power in International Criminal Justice* (eds. Bergsmo M., Klamberg M., Lohne K., Machony C. B.), Brussels 2020.
- Gajić A., "Napomene o kontroli međunarodnih sudova i tribunala", *Suverenitet i rad međunarodnih krivičnih sudova* (ur. S. Nogo), Udruženje za međunarodno krivično pravo, Tara, 2018.
- Gajić A., "O univerzalnosti međunarodnog krivičnog prava i prirodi i ulozi međunarodnog krivičnog pravosuđa", *Odgovornost i sankcija u krivičnom pravu – sa posebnim osvrtom na međunarodno krivično pravo* (ur. S. Nogo), Udruženje za međunarodno krivično pravo, Tara, 2019.

42 ICC-ASP/23/Res.1 -Strengthening the International Criminal Court and the Assembly of State Parties, Adopted on 6 December 2024, by consensus, available at: https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-Res.1-ENG.pdf, 20. 04. 2025.

- Gajić A., “Napomene o ulozi međunarodnog javnog prava i međunarodnog pravosuđa”, *Međunarodno javno i krivično pravo u XXI veku* (ur. S. Nogo), Udruženje za međunarodno krivično pravo, Tara, 2020.
- Gajić A., “Head of States Immunity in the Context of the Jurisdiction of the International Criminal Court”, *Raskršća međunarodnog krivičnog i krivičnog prava – reforma pravosudnih zakona Republike Srbije* (ur. Škulić M., Miljuš I., Škundrić A.), Udruženje za međunarodno krivično pravo, Palić, 2023.
- Ginsburg T., “Political Constrains on International Courts”, *Public Law and Legal Theory Working Papers*, University of Chicago School of Law, Working paper No. 453, 2013.
- Kersen M., “The International Criminal Court’s Pursuit of Justice and Legitimacy”, *Current History*, Jan. 2025.
- Labuda P. I., “The African Union’s Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?”, 5 February 2017, *EJIL:Talk! Blog of the European Journal of International Law* <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/> 21.04.2025
- Posner A. E., Yoo, J. C., “Judicial Independence in International Tribunals”, *California Law Review*, 1/2005.
- Schabas W. A., “Victor’s Justice: Selecting “Situations” at the International Criminal Court”, *The John Marchal Law Review*, 43/2010.
- Scharf M. P., “The Politics Behind U. S. Opposition to the International Criminal Court”, *The Brown Journal of World Affairs*, 1/1999.
- Steinberg R. H., “Politics and Justice at the International Criminal Court”, *Israel Law Review*, 2024.
- Tiemessen A., “The International Criminal Court and the politics of prosecutions”, *The International Journal of Human Rights*, 19/2014.

OTHER SOURCES

- Decision on the International Criminal Court, Assembly/AU/Dec.622(XXVIII), The African Union, available at [https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/Assembly%20AU%20Dec%20622%20\(XXVIII\)%20_E.pdf](https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/Assembly%20AU%20Dec%20622%20(XXVIII)%20_E.pdf)
- ICC-ASP/23/Res.1 - Strengthening the International Criminal Court and the Assembly of State Parties, Adopted on 6 December 2024, by consensus,
- Imposing Sanctions against International Criminal Court, The White House, 6 February 2005. <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/> (20.04.2025)
- Office of the Prosecutor Strategic Plan 2023-2025, ICC, available at <https://www.icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf>
- United Nations Treaty Collection, Rome Statute of the International Criminal Court, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_

no=XVIII-10&chapter=18&clang=en. Luis Moreno-Ocampo, 'Keynote Address,' speech delivered at the Council on Foreign Relations, Washington DC (United States), 4 February 2010, 6, <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/A80CDDDD-8A9A-432E-97CE-F6EAD700B5AE/281527/100204ProsecutorspeechforCFR.pdf>.

Statement by the observer delegation of China to the 23rd Assembly of States Parties to the Rome Statute of the International Criminal Court, https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP23-GD-CHN-3-12-ENG.pdf

Bensouda, Fatou, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda on Concluding the Preliminary Examination of the Situation Referred by the Union of Comoros: "Rome Statute Legal Requirements Have Not Been Met"', transcription of audio-visual statement, 6 November 2014, <https://www.icc-cpi.int/news/statement-prosecutor-internationalcriminal-court-fatou-bensouda-concluding-preliminary>,

Khan, Karim, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation', 2 March 2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukrainereceipt-referrals-39-states>.

Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 02. March 2022. available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>, 24.04.2025.

Statement by Deputy Permanent Representative Maria Zabolotskaya at a UNSC Briefing on the Report of the ICC Prosecutor on the Situation in Darfur, 27. January 2025, https://russiaun.ru/en/news/icc_270125.

International Criminal Justice: Statement by the High Representative following the US decision on possible sanctions related to the International Criminal Court, 16.06.2024, European Union External Action, https://www.eeas.europa.eu/eeas/international-criminal-justice-statement-high-representative-following-us-decision-possible_en, 20. 04.2025.

International Criminal Court: Statement by the High Representative/Vice-President Josep Borrell on the US decision to repeal sanctions against the International Criminal Court, 03.04.2021. European Union Action Service, https://www.eeas.europa.eu/eeas/international-criminal-court-statement-high-representativevice-president-josep-borrell-us-decision_en, 20. 04. 2025.

Joe Biden hails decision to issue ICC arrest warrant against Vladimir Putin <https://www.theguardian.com/world/2023/mar/18/biden-hails-decision-icc-arrest-warrant-against-putin>

Putin arrest warrant: Biden welcomes ICC's war crimes charges. BBC, 18. March 2023., <https://www.bbc.com/news/world-europe-64998165>, 24.04.2025.

Kruijff, L. de "Could the EU "blocking statute" protect the ICC from US sanctions", Atlantic Council 27.02. 2025. <https://www.atlanticcouncil.org/uncategorized/could-the-eu-blocking-statute-protect-the-icc-from-us-sanctions/>

Др Александар В. Гајић*

МЕЂУНАРОДНИ КРИВИЧНИ СУД КАО ПРАВОСУДНИ И ПОЛИТИЧКИ АКТЕР

Резиме

У овом чланку аутор уочава да Међународни кривични суд није само институција међународног права, већ и политички актер у савременим међународним односима, чије се активности не могу игнорисати чак ни од стране оних држава које нису чланице Римској конвенцији. Аутор износи најомије о ограничењима надлежности Међународног кривичног суда и посебно наглашава да у савременом међународном систему, међународно кривично право може имати улогу и ефективну функцију само у мери у којој су у складу са структуралним реалностима међународне заједнице, односно у складу са природом међународне заједнице.

Кључне речи: Међународни кривични суд, надлежност Међународног кривичног суда, политички актер, тужилац Међународног кривичног суда.

* Ванредни професор на Универзитету у Београду – Правном факултету, Главни правни саветник у Министарству спољних послова и саветник у Министарству правде Републике Србије, gajic@ius.bg.ac.rs. Ставови и аргументи изнети у овом чланку могу се приписати искључиво аутору и не представљају нужно и ставове Министарства спољних послова, Министарства правде, нити Владе Републике Србије.