The current problems of the ICC.

The relationship between the ICC and the U.S. has usually been complicated: nowadays, the risk is that it will become even more complicated. On the one hand, as we know, the U.S. distrust an outside entity which is able to persecute American military personnel; on the other, some African States want to withdraw from the ICC. Also in U.S., according to someone, the ICC project is going to end.

First of all, the U.S. fear that an universal judge – which is able to judge and punish the most serious crimes in the world – may violate the States sovereignty: for this reason, in 2002 G.W. Bush Administration revoked the Rome Statute signature, posed by Bill Clinton in 2000. The U.S. prefer to help the suffering populations without joining the ICC and – as Stephen Rapp said – without changing their identity. More, in Rapp's opinion, the U.S. will be able to help the ICC with criminal cooperation acts only in case of need and with a case by case approach: obviously, without being part of The Hague Court.

On the 3rd of November 2016, an American expert, Stephen Lendman, published an article on the web journal "Global Research", entitled "ICC to investigate US War Crimes in Afghanistan?": according to this journalist, the ICC Prosecutor wants to prosecute war crimes and crimes against humanity, committed during the War in Afghanistan, also by American soldiers.

This is an interesting perspective: could the Court prosecute crimes committed since 2001, by military personnel of a State not-party of the Rome Statute?

Article 11 of the Rome Statute regulates the Court's jurisdiction *ratione temporis*: ICC doesn't prosecute crimes committed before the entry into force of the Statute, that is before the 1st July 2002: as everybody knows, U.S.-led NATO forces attacked Afghanistan on the 7th October 2001.

Probably, the ICC Prosecutor believes that in Afghanistan, nowadays, war crimes and crimes against humanity are still daily continuing: for this reason, the ICC can take action! In fact, if we consider that the presence of the NATO – and thus of the U.S. – in Afghanistan from 7th October 2001 and onwards is illegal, some of the crimes committed by the military personnel will certainly fall under the jurisdiction of the ICC. These are the so called permanent crimes whose effects are still causing harm to the Afghan population.

The most serious problem is that U.S. does not take part to the Rome Statute: with the note issued on the 6th of May 2002, G.W. Bush Administration wrote that the U.S. recognized no obligation toward the Statute. The subsequent Obama Administration (2008-2016) didn't re-signed the Statute and we may believe that neither the new Trump Administration will sign it.

The ICC system isn't an example of the direct enforcement model, like the International Tribunal of Nuremberg: the Court relies indeed on the States Parties' cooperation as for the investigations, the trial and the execution of its sentences; ICC must respect sovereignty of the States: it takes action only after checking that States Parties having jurisdiction over the case, don't want – or don't have the possibility – to

prosecute the case. This *lis pendens* rule, established by Article 17 of the Rome Statute, applies indeed only in relation to the States which have signed the Statute; for all others, the Statute has not any value.

The aim to investigate on the American crimes in Afghanistan is more political than real. If it is possible, on the one hand, to bypass the jurisdiction *ratione temporis* rule, it will be absolutely difficult, on the other hand, to prosecute American military personnel without the signature and the ratification of the Rome Statute by the US.

But, the American position will be more clear by reading an article published on "The Wall Street Journal" on the last 31st of October by John Bolton, already author of an essay entitled "Surrender Is Not an Opinion: Defending America at the United Nations and Abroad".

Bolton observed that on a basis of 193 U.N. members, only 124 have joined the ICC; then, in his opinion, it is pure fantasy that the ICC system is supervised by 124 governments: it is more probable that the ICC system will be not supervised by anyone.

Many of 124 ICC members are African: so, the discontent of Gambia, South Africa, Burundi and Kenya is a problem for the ICC system. The four African States threaten to withdraw from the Court: if their example will be followed by other African States, the Court will be paralyzed .

This is the second of the two most serious, current problems of the ICC.

A lot of cases over which the Court exercises its jurisdiction refer to the African context; since 2002, the ICC prosecuted a lot of African politicians. In these cases, the Court took action because African States having the jurisdiction over the situations, didn't have an autonomous and organized State structure, so they didn't have the possibility to prosecute those criminals. For example, in 2014 the ICC convicted Mr. German Katanga: the prosecution has been issued after checking that Democratic Republic of Congo didn't have a solid political and judiciary apparatus to prosecute Katanga.

But, someone said that this particular sort of application of the *Lis pendens* rule is the last European neo-colonial pretext to interfere in African national affairs. In fact, some African States don't like the ICC investigation on Sudan's President, Mr. Omar al-Bashir. Obviously the ICC exercised its jurisdiction over this situation: Sudan cannot prosecute its President, who someone describes as a dictator. On the 4th March 2009 the ICC Prosecutor issued a warrant of arrest against al-Bashir; within six years, the order has not been executed. In 2015, al-Bashir were in South-Africa for the meeting of African Union; the ICC asked to South-African Supreme Court to catch the Sudan's President, but the Pretoria government allowed al-Bashir left Johannesburg, before the local judges emit their ruling.

The South-African government – as a lot of African States – thinks that the ICC is a not-impartial Court in relation to African affairs: this is the reason of the current distrust with regard to the ICC.

Another example is the Burundi. On the 27th of October 2016, the little African State – already reached by an investigation of the Court, for few bloody events which

took place in 2015 – declared its withdrawal from the Court: according to the President, Mr. Pierre Nkurunziza, the government claimed the ICC is an instrument used by the most powerful countries to punish leaders who do not comply with the West. More correctly, who do not comply with the European Union.

The two examined situations are dangerous for the ICC system: the relations between the Court and the States rely on the principle of complementarity. This is a different rule from subsidiarity, according to which an outside norm defines a purpose and States or international organizations take action, depending to the most efficient subject. In relationship with the ICC, States consider freely: *a)* whether to take part or not to the Court system; *b)* to prosecute or not the international crime: only in the last situation, ICC exercises its jurisdiction.

The distrust of U.S. and the withdrawal of the African States risk to create a prejudice to the effectiveness of the ICC and to its purpose to be the only – and universal – judge for the crimes listed by the Article 5 of the Rome Statute. Nowadays, the goal of direct enforcement model is, for the ICC, farther than it looked before last summer.