

## **Exploring The Efficacy Of The ‘Principle Of Complementarity’ In The International Criminal Court**

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### **Abstract**

*The International Criminal Court (ICC) stands as an inter-governmental body and international tribunal headquartered in The Hague, Netherlands. Its mandate includes the investigation and, where deemed necessary, the prosecution of persons charged with the gravest offenses of international concern, such as genocide, crimes against humanity, war crimes, and the act of aggression. The concept of complementarity is fundamental to the functioning of the ICC. This concept stipulates that the Court may exercise its jurisdiction only when a country is unable or unwilling to conduct genuine proceedings against the accused crimes. This framework emphasizes that the primary duty to enforce international law rests with individual states, with the ICC acting as a backup mechanism should national legal systems fail. While the principle of complementarity has sparked debate, with some critics contending it gives states too much power to shield their nationals from ICC prosecution. However, proponents of the principle argue that it is essential to ensure that the ICC does not undermine national justice systems. In recent years, the ICC has been increasingly active, opening investigations into a number of situations around the world. However, the Court has also faced challenges, including a lack of cooperation from some states and a shortage of resources. This paper intends to explore the unique feature of the ‘Principle of Complementarity’ in ICC. The aim is to find out the need to have such principle and how it adds to the cases of war crimes in the current scenario.*

**Keywords:** *International Criminal Court, Principle of Complementarity, Justice, War Crimes*

### **I. Introduction**

ICC<sup>i</sup> is governed by the Rome Statute, established on July 17th, 1998, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and came into force on July 1st, 2002, as an independent global entity. As a judicial body established by treaty<sup>1</sup>, its main goal is to end impunity for perpetrators of the most severe international crimes, affecting the international community. The Court's main office is located in The Hague, Netherlands.

The establishment of the ICC was largely recognized as necessary in the aftermath of World War II, which inflicted deep and lasting damage on the global community, leading to the vow of "Never again"<sup>ii</sup>. Despite this vow, the international community saw its promise

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broken with the occurrence of the Bosnian war and the Rwandan genocide 50 years later, highlighting its inability to prevent such atrocities<sup>iii</sup>. Leaders and tyrants engaged in widespread horrific acts, including sexual assault, unlawful killings, and severe breaches of international human rights, without facing consequences or justice.

In Nuremberg<sup>iv</sup> and Tokyo trials<sup>v</sup> which took place after the World War II, emerged as pivotal events where individuals responsible for committing crimes against humanity were held accountable by the global community. Though, in general, the perpetrators escaped justice as the capable court to adjudicate their crimes. Apart from this, National judicial systems were often compromised or destroyed by the magnitude of the atrocities, leaving a significant void in international justice.

In the aftermath of World War II, the United Nations was established (1945), and the momentum for establishing the ICC increased. The International Law Commission (ILC)<sup>vi</sup> formed shortly thereafter, was charged with the responsibility of codifying the Nuremberg principles<sup>vii</sup> and creating a draft statute for such a court. Yet, the Cold War period saw a stagnation in these efforts. The 1990s, however, marked a turning point in international relations, facilitating the establishment of temporary International Criminal Tribunals to address the crimes in Yugoslavia<sup>viii</sup> and Rwanda.<sup>ix</sup>

The ad hoc tribunals and other global events reignited the conversation around a permanent court. The push for the ICC saw significant acceleration, culminating in notable advancements. The UN engaged in discussions around the ILC's draft Statute for an ICC in 1995. Over the next two years, it hosted six Preparatory Committee sessions to refine the Court's proposed structure, benefiting from the critical input of NGOs and experts in international law in refining the draft statute.<sup>x</sup>

## **II. State Sovereignty, International Crimes and the ICC: Balancing the**

One major challenge before the ILC was the territorial jurisdiction of ICC. Since it was treaty based, one may argue that the States who are party to it, surrender their sovereignty to ICC in cases of war crimes. Hence, no State would really support to surrender its sovereignty to an international institution as this would impliedly mean that a state was incapable of prosecuting war crimes within its own jurisdiction, a notion most states were unwilling to support.<sup>xi</sup>

In response to this issue, the ICC implemented the 'principle of complementarity' as a distinctive mechanism to reconcile the jurisdictional authority of both the states and the ICC itself. This principle allows the ICC to assert jurisdiction over crimes of war while respecting the sovereign authority of states to adjudicate war crimes domestically. This principle is elaborated in Article 17 of the Rome Statute, which outlines:

### **“Issues of admissibility:**

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
  - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) The case is not of sufficient gravity to justify further action by the Court.”

This legislation emphasizes that the principal duty and authority to prosecute crimes of an international nature rest with individual states. The jurisdiction of the ICC is called upon only when domestic legal frameworks are ineffective, especially in situations where they seem operational but are in fact unwilling or incapable of conducting authentic proceedings. This method is designed to encourage the legal action against persons charged with offenses within the national judiciary framework of each state, thus strengthening the application of international humanitarian law.<sup>xiii</sup>

Hence, ICC respects for the principal jurisdiction of States. Also, other obvious reasons, the ICC acknowledges the efficiency and effectiveness of prosecutions carried out by states, which typically have superior access to evidence, witnesses, and resources. This principle ensures that the most serious international war crimes are punished, ultimately striving to end impunity.

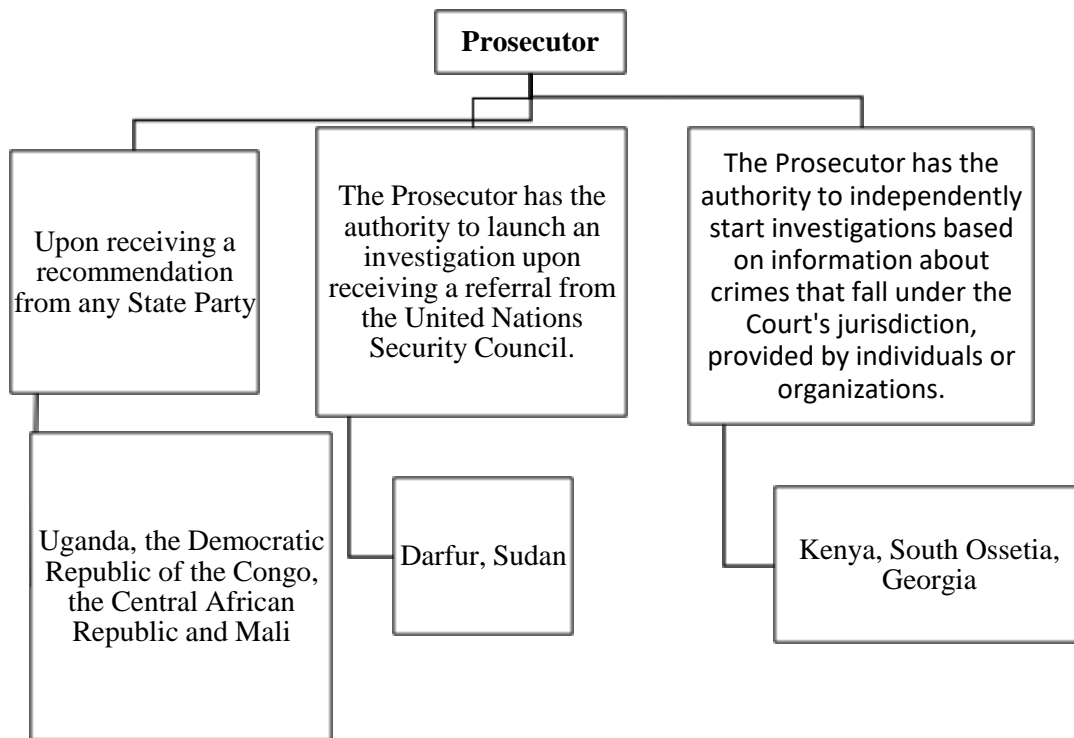
Consequently, the 'principle of complementarity' creates an assumption that favors prosecution by national courts, marking a shift from the approach taken by the Criminal Tribunals for the former Yugoslavia and Rwanda. Although primacy rests with the state, Article 17(2) grants the Court the authority to evaluate the quality of domestic investigations or prosecutions, determining whether to proceed with a prosecution in the Court. Similarly, in cases where a domestic trial has occurred, the legal stance remains consistent.

### **III. The question of Prosecution in ICC**

Another crucial consideration pertains to the eligibility criteria for bringing a matter in the ICC. Article 13 of the Statute precisely outlines the procedural requirements, establishing that the Court's jurisdiction depends on certain prerequisites. These conditions include:

- (a) a State Party referring a situation involving alleged crimes under Article 5 to the Prosecutor in accordance with Article 14;
- (b) the Security Council, acting under Chapter VII of the United Nations Charter, referring a situation with apparent crimes to the Prosecutor; or
- (c) the Prosecutor independently initiating an investigation pursuant to Article 15.

Countries have the right to present cases directly to the ICC, as seen with Uganda and Congo, in line with Article 14. In contrast, the Prosecutor can also decide to begin investigations according to Article 15. Challenges may occur if a State is not a signatory to the Rome Statute, creating ambiguity over the ability to prosecute. Under these circumstances, the ICC still has jurisdiction when the United Nations Security Council, acting under Chapter VII of the UN Charter, makes a referral to the Prosecutor. Importantly, the Rome Statute skillfully addresses cases involving non-signatory States accused of war crimes. The ICC can still proceed with prosecution based on referrals from the United Nations Security Council. This feature highlights the ICC's capability to act decisively in situations where a State has not joined the Rome Statute, thus emphasizing its critical function in dealing with international criminal acts.



#### IV. Journey from Leipzig to ICC

At international level the prosecution of war crimes is not a novel concept, with historical roots dating back to 1921. The Leipzig War Crimes Trials that occurred during that period marked a significant effort to bring World War I German war criminals to justice. Held in Leipzig, these trials were conducted as part of the punitive measures against Germany outlined in the Treaty of Versailles. The idea emerged during First World War I when Allied leaders envisioned holding defeated enemy leaders accountable for breaches of international law during the conflict. The concept gained momentum at the Paris Peace Conference in 1919, leading to the establishment of the Commission of Responsibilities by the Allied governments. The Treaty of Versailles, through Article 227, made provisions for the establishment of a special court with judges from the principal Allied countries, namely Britain, Italy, France, Japan and USA. Article 228 allowed the Allied governments to conduct trials in their military tribunals<sup>xiii</sup> for German war criminals, regardless of any proceedings in German courts, raising concerns about double jeopardy. Despite these efforts, the Leipzig trials ultimately led to the trial of only twelve individuals, with a mere six being convicted, highlighting the trials' limited effectiveness in delivering harsh penalties<sup>xiv</sup>. The trial, though not entirely effective, introduced the concept of holding individuals accountable for international war crimes. Subsequently, the Tokyo and Nuremberg Trials following the World War II reiterated the principle that war crimes must face justice, further shaping the international legal landscape and establishing precedents for addressing atrocities committed during armed conflicts.

#### V. ICC in Practice

After the formation of the ICC, several trials unfolded within its jurisdiction, including some with domestic roots that carried international implications. One notable example is the Bangladesh International War Tribunal<sup>xv</sup>, formed after the Bangladesh Liberation War in

1971<sup>xvi</sup>. This war culminated in Bangladesh gaining its independence, and the ensuing genocide led to the establishment of the International Crimes Tribunal<sup>xvii</sup> by the Bangladesh Parliament. This tribunal aimed to prosecute individuals, irrespective of nationality or affiliation, who committed atrocities during the Liberation War. Notably, the main perpetrators, the Pakistani soldiers, remained beyond the reach of domestic courts. The War Crimes Fact Finding Committee identified 1,600 suspects, providing a unique hybrid approach to justice.

Another instance involves the ICC's prosecution of Omar Hassan Ahmad al-Bashir<sup>xviii</sup>, the Sudanese President for war crimes, genocide and crimes against humanity in Darfur<sup>xix</sup>. Having held power since 1989, al-Bashir was the first incumbent president to be charged by the ICC in 2009. The charges included allegations of directing mass killing, rape, and pillage against civilians in Darfur.

However, prosecuting war crimes in domestic courts can pose significant risks, as demonstrated by the Iraqi Special Tribunal's case against Saddam Hussein. The presiding judge, Raouf Abdul Rahman, who handed down Hussein's death sentence in 2006, was allegedly seized and killed by extremists, highlighting the potential perils of such legal actions<sup>xx</sup>.

Following the 2007 General Election in Kenya, which led to significant violence and allegations of electoral fraud, the International Criminal Court (ICC) stepped in. The Waki Commission's findings held certain individuals responsible for crimes against humanity, noting a death toll of approximately 1,200 and the displacement of more than 500,000 people, President Kenyatta among them. Kenyatta became the first sitting head of state to voluntarily appear before the ICC in 2012. The Kenyan government's refusal to hand over crucial documents and allegations of witness bribery and intimidation complicated the case. The principle of complementarity eventually eased the tension between Kenya and the ICC, leading to a halt in ICC investigations and the relocation of cases to Kenyan jurisdiction, under the watchful eye of the ICC prosecutor and with regular updates to the pretrial chamber. This approach aimed to balance justice goals while preventing impunity for heinous crimes committed in Kenya<sup>xxi</sup>.

In the context of the Sri Lankan Civil War of 2009, accusations of war crimes were leveled against both the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan armed forces, encompassing civilian attacks, execution of fighters and detainees, forced disappearances, and the conscription of minors. Despite Sri Lanka's non-affiliation with the Rome Statute, compelling evidence of war crimes during the last stages of the civil conflict has been documented by the UN.

The UN advocated for a specialized "hybrid" international tribunal to probe those accountable for these heinous acts<sup>xxii</sup>. The ex-President of Sri Lanka, Mahinda Rajapaksa, anticipating possible legal repercussions for purported war crimes, resisted the UN-established framework for international war crime prosecution and discouraged the enactment of new legislation targeting military personnel. The ICC's jurisdiction to probe and prosecute Sri Lankan war crimes hinges on a recommendation from the UN Security Council. In 2010, Ban Ki-Moon, UN Secretary-General convened a panel of experts to assess accountability measures in Sri Lanka, leading to the publication of the "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka." The Sri Lankan state, however, dismissed the panel's formation as undue meddling. Sri Lanka faces significant international pressure to either self-refer to the ICC or pursue domestic legal action against the accused. Should Sri Lanka fail to take action, the Security Council might direct the case to the ICC.

## VI. Conclusion

The unique feature of the 'principle of complementarity' in ICC allows the flexibility to the States to exercise their sovereignty within their territorial jurisdiction without compromising with the international conscience to prosecute war crime perpetrators. In a way, ICC ensures

that perpetrators do not go unpunished. Moreover, creating such kind of mechanism also acts as pressure on domestic courts to prosecute such war crime perpetrators. Moreover, it saves time in establishing ad-hoc tribunals.

Another important advantage of ICC is individual criminal liability which may create a deterrent effect and also set example for the society at large. It asserts that war crime perpetrators will not go scot free and the international community will not be mute about it. A distinctive aspect of the ICC is its capacity to deliver justice in instances where national courts either cannot or choose not to prosecute. In such cases, ICC's intervention acts as a savior for civilians, who have lost all hopes, even from their own judicial mechanisms. It also reduces the risks of lives by transferring the case either to some other place or by trying the case itself. It fulfills the entire task without compromising with the principle of sovereignty of the States jurisdiction. It also deals with the situation where the State is not a signatory of Rome Statute. Without principle of complementarity in place, it would have been beyond imagination as to how the ICC would have worked and was it even possible to have ICC with so many States being a party to it. ICC in itself, has a lot to offer and the principle of complementarity make it even more acceptable to States.

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