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The Principle of Complementarity in the Jurisdiction of the International Criminal Court

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Abstract---This research examines the principle of complementarity within the jurisdiction of the International Criminal Court (ICC). The aim of this principle is to prevent impunity for perpetrators of international crimes, as defined in Article 5 of the Rome Statute. These crimes are considered to be the most serious threats to international stability. These crimes include genocide, crimes against humanity, war crimes and the crime of aggression. It should be noted that these crimes fall under the jurisdiction of national criminal courts. However, if it is established that the national judiciary is unable to prosecute the perpetrators of these crimes due to a lack of jurisdiction, a failure resulting from the collapse of its judicial or administrative system, or a lack of seriousness in bringing the accused to trial, jurisdiction then transfers to the ICC, which is tasked with prosecuting offenders of these crimes in accordance with the principle of complementarity.

Keywords---Complementarity of Jurisdiction, International Criminal Court, International Crimes, National Judiciary, Crime of Aggression, War Crimes, Crimes Against Humanity.

Introduction

The world has witnessed numerous attempts to establish an international criminal justice system for adjudicating cases involving serious violations of human rights and international humanitarian law. The first of these efforts began with the Treaty of Versailles in 1919, when the victorious Allies sought to prosecute the German Emperor, Wilhelm II, and his associates for war crimes and crimes against humanity after World War I. This momentum continued after World War II with the signing of the London Agreement on 8 August 1945 by Allied nations, which established an International Military Tribunal to prosecute war criminals from the Axis powers, particularly Germany. This tribunal became

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known as the Nuremberg Trials. Subsequently, the victorious nations created another military tribunal to prosecute Japanese war criminals, known as the Tokyo Trials[1].

These efforts continued to expand the scope of criminal responsibility for the most serious crimes alongside a broadening definition of punishable offences, particularly in the wake of the resolutions issued by the Security Council in the early 1990s. Notable among these were Resolution 808, which established a Special Tribunal for war crimes in the former Yugoslavia on 22 February 1993, and Resolution 955, which formed an International Criminal Tribunal to prosecute war criminals in Rwanda on 8 November 1994[2]. This was followed by United Nations General Assembly Resolution 46/50 on 1 December 1995, which included establishing a preparatory committee to draft the statute for a permanent International Criminal Court. These efforts culminated in the adoption of the International Criminal Court Statute during the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome, Italy, from 15 June to 17 July 1998[3]. It entered into force on 1 July 2002.

This study emphasises the principle of complementarity between the International Criminal Court's (ICC) jurisdiction and that of the national judiciary in combating international crimes. Regarded as a permanent, independent international judicial body established by international treaty, the ICC is responsible for investigating and prosecuting individuals who commit the most serious crimes of international concern, including genocide, crimes against humanity, war crimes and the crime of aggression. Rather than being seen as a substitute for national criminal justice systems, the ICC is considered to complement them, convening only when national systems are unwilling or unable to hold perpetrators of the most heinous international crimes accountable[4]. In this way, the ICC respects state sovereignty while combatting impunity. Consequently, this study addresses a central issue: Is the ICC's jurisdiction original or complementary? What are the limits of the principle of complementarity between the ICC's jurisdiction and that of the national judiciary?

Chapter One: The Nature of the Principle of Complementarity

In order to grasp the essence of the complementarity principle between the International Criminal Court (ICC) and the national judiciary in the fight against international crimes, it is crucial to first define the concept in the first section. The second section should then discuss the justifications for formulating this principle, while the third section should examine its various forms.

Section One: The Concept of the Principle of Complementarity

The drafters of the ICC Statute have emphasised state sovereignty with regard to actions within its territory that constitute the most serious crimes. Consequently, they established the principle of complementarity in the Rome Statute to reconcile state sovereignty with ensuring that perpetrators are not allowed to evade punishment.

Subsection One: Definition of the Principle of Complementarity

It should be noted at the outset that the Rome[5] Statute does not provide a specific definition of the principle of complementarity; rather, it is referenced throughout the statute's various texts. The principle of complementarity is fundamental to the relationship between the International Criminal Court (ICC) and national criminal courts, and is one of the essential pillars of the ICC's jurisdiction. The preamble of the Rome Statute states that 'the International Criminal Court established by this Statute shall be complementary to national criminal jurisdictions'[6]. This is further affirmed in Article 1 of the Statute: '... the Court shall be complementary to national criminal jurisdictions'[7].

The texts of the Rome Statute urge states that ratify the Statute to initiate investigations into any acts that constitute crimes under the treaty's provisions through their national authorities and in accordance with their domestic laws, as this represents the first line of defence against such crimes[8].

The principle of complementarity is effectively embodied in Article 17 of the Rome Statute of the International Criminal Court, which addresses admissibility. It states that "the Court shall determine that a case is inadmissible where:

1. The state is either unwilling or unable to carry out the investigation or prosecution.
2. The State has investigated the case and decided not to prosecute the person concerned, unless this decision was not based on the State's genuine willingness or ability to prosecute;
3. If the person in question has already been tried for the conduct in question, the court shall not conduct a trial according to paragraph 3 of Article 20[9].

Based on the above, it can be concluded that primary jurisdiction lies with national courts and that the International Criminal Court only intervenes in specific cases to achieve justice for victims of genocide, war crimes, crimes against humanity and the crime of aggression. The Rome Statute requires states to take the necessary and appropriate measures at a national level to prevent perpetrators of these crimes from going unpunished. It reminds states of their essential role and emphasises their responsibility in this regard. The Statute also encourages states to exercise their jurisdiction over the crimes specified in Article 5 and to establish the necessary controls for transferring jurisdiction for the prosecution of these crimes to the ICC[10].

The principle of complementarity is therefore the conciliatory formulation adopted by the international community to urge states to prosecute those accused of the most serious international crimes. The International Criminal Court complements this scope of jurisdiction in cases where the national judiciary is unable to conduct the trial due to a lack of jurisdiction or a failure resulting from the collapse of its judicial and administrative structures, or a lack of seriousness in bringing the accused to trial[11].

Subsection Two: The Evolution of the Principle of Complementarity

The principle of complementarity was first articulated in the context of international criminal law in the London Agreement of 1945, the statute that underpinned the Nuremberg Trials[12]. Article 6 of the agreement states: 'Nothing in this Agreement shall be construed as detracting from the authority or jurisdiction of national or occupying courts, whether previously established or yet to be established, for the trial of war criminals in the Allied territories or Germany.' This text clearly acknowledges the original jurisdiction of the national judiciary and indicates that intervention by the Nuremberg Court in this area would infringe upon it. The court complements national judicial authority rather than superseding it. This principle was further reinforced by Articles 10 and 11 of the Nuremberg Statute, which clarified that national courts have priority in jurisdiction, followed by military courts and then occupying courts[13].

Article 10 of the Nuremberg Statute also affirms the principle of complementarity, stating that if the court determines that a group or organisation is criminal in nature, the competent authorities of any signatory state have the right to bring any individual before national, military, or occupying courts.

Notably, this formulation indicates that national courts initially have jurisdiction, which is then supplemented by military courts and finally by occupying courts. This clearly articulates the complementarity between the three types of courts, as established in Article 11, which stipulates: 'Any person convicted by the international court may be tried by a national, military or occupying court.[14]'

The principle of complementarity is also included in various international agreements, most notably the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which states in Article 6 that 'persons charged with genocide or any of the acts enumerated in Article 3 shall be tried by a competent tribunal of the State in whose territory the act was committed, or by an international penal tribunal with jurisdiction over those Contracting Parties that have accepted its jurisdiction'[15].

However, the situation is different for the International Criminal Tribunals for the former Yugoslavia and Rwanda, where their jurisdiction is concurrent with that of national courts. This means that they compete with national jurisdictions for authority, but these tribunals have priority[16].

Section Two: Justifications for the Principle of Complementarity

The inclusion of the principle of complementarity in the Statute of the International Criminal Court (ICC) allows national courts to share jurisdiction with the ICC when prosecuting individuals who have committed crimes as defined in Article 5 of the Rome Statute. Several arguments were presented to justify the principle of complementarity during the Diplomatic Conference in Rome that established the Court. These arguments can be summarised as follows:

Subsection One: Ensuring Respect for State Sovereignty

The principle of equal sovereignty among states is one of the main tenets of contemporary international law, as set out in Article 2(2) of the United Nations Charter[17]. This principle is closely linked to the principle of non-interference in the internal affairs of states, as set out in Article 2(7) of the Charter[18]. However, criticisms of the tribunals for the former Yugoslavia and Rwanda's priority jurisdiction led to the need to establish a new model of relationship between international criminal justice and the national judiciary, balancing the objective of combating impunity with the preservation of state sovereignty.

In the early stages of establishing the ICC, the International Law Commission determined that, to prevent proposals for the creation of a permanent international court facing resistance from states, such proposals should avoid infringing upon state sovereignty or undermining legislative efforts at the national level to enact laws for prosecuting international crimes under the principle of universal jurisdiction[19].

Consequently, in consideration of national sovereignty, states preferred that the Court's jurisdiction be complementary to national judicial authority rather than superseding it. However, they differed on how to implement this principle. Some countries insisted that the Court should have the authority to determine the appropriateness of its solutions instead of national courts in each case. Others insisted that the jurisdiction of the International Criminal Court should be limited to exceptional situations where the national judiciary has collapsed, or is unable or unwilling to fulfil its duties[20].

The stance of constitutional courts on this issue has varied. In its decision dated 22 January 1999, the Constitutional Council of France leaned towards the view that there is no conflict between the statute of the International Criminal Court and the exercise of national sovereignty. It concluded that respect for national sovereignty would not prevent France from entering into international commitments based on the provisions of the 1946 Constitution's preamble, which aim to promote international peace and security and ensure respect for the general principles of public international law. These commitments may stipulate the establishment of a permanent international court to protect the fundamental rights of all individuals by prohibiting the most serious violations of these rights. This court would have the authority to prosecute individuals responsible for the most serious crimes that concern the entire international community. The obligations imposed by such commitments are binding on all parties, regardless of the circumstances in which they are implemented by other states[21].

However, in another part of its decision, the French Constitutional Council acknowledged a conflict regarding the exercise of the Court's jurisdiction in cases where the state party is unable or unwilling to conduct an investigation or prosecution, or where its judicial system has collapsed. The Council decided that, considering that the prosecutor can initiate some investigative actions in the absence of the national judicial body within the territory of that state pursuant to paragraph 4 of Article 99 of the Statute, and that he can collect witness statements and conduct inspections of public sites or any other location, the prosecutor's authority to carry out these actions in the absence of the relevant French judicial authorities would undermine the necessary conditions for exercising national sovereignty[22].

Subsection Two: Ensuring No Double Jeopardy

The principle of complementarity is linked to the application of the principle of non bis in idem, which prohibits a person from being tried twice for the same act. This principle serves as a guarantee of the right to a fair trial, as embodied in Article 20(2)[23] of the Rome Statute. Consequently, if a national court issues a judgment against an individual, the International Criminal Court (ICC) is obliged not to retry the same person for the same crime[24].

In this context, state parties have expressed concerns about granting the ICC wide-ranging powers and exclusive jurisdiction over international crimes, fearing that it may not succeed in prosecuting and punishing those responsible for serious violations. Thus, supporter states of the Court consider that they have achieved significant success in adopting the ICC's statute[25].
However, the mechanisms for enforcing international law are inadequate to deter perpetrators of international crimes. The issuance of numerous international agreements criminalising serious violations has not been accompanied by the establishment of judicial bodies responsible for implementing these agreements. Even the courts themselves are not equipped to prosecute international criminals.

The purpose of establishing the principle of complementarity in the ICC's jurisdiction is to eliminate impunity. Most states involved in creating the Court agreed that its jurisdiction is not based on priority, precedence or superiority, but rather that primary and original jurisdiction lies with national judiciaries before that of the ICC. The most serious crimes concerning the international community must be punished, as they threaten peace, security and welfare worldwide. It is therefore essential to ensure that perpetrators are effectively prosecuted through measures taken at national level, as well as through enhanced international cooperation[26].

However, if the national judiciary fails to exercise its jurisdiction in punishing perpetrators of international crimes due to a lack of willingness to conduct a trial, an inability to do so, or if the trial is merely nominal or formal and not based on the principles of a fair trial, then jurisdiction shall rest with the International Criminal Court, based on the principle of complementarity, to ensure that perpetrators are not able to escape punishment[27].

Section Three: Forms of the Principle of Complementarity
The principle of complementarity takes many forms, encompassing substantive and procedural aspects, as well as the enforcement of penalties. This will be illustrated in the discussion below.

Subsection One: Substantive Complementarity
Substantive complementarity concerns the types of crimes within the jurisdiction of the International Criminal Court (ICC). Jurisdiction is established when national courts are competent to prosecute these crimes. Here, the substantive aspect relates to the crimes in question. This means that if national criminal law does not criminalise the offences listed in Article 5 of the Rome Statute, international criminal law is considered to have original jurisdiction to investigate and prosecute defendants for these crimes[28].

However, if a state begins to criminalise the offences mentioned in Article 5 of the Rome Statute, then jurisdiction directly resides with the national judiciary and the ICC cannot intervene. This is particularly the case if national courts have commenced their jurisdiction over the prosecution and trial of perpetrators of crimes against humanity, genocide, war crimes and the crime of aggression. These crimes are regarded as some of the most serious offences of concern to the international community. These offences are included in subparagraph (d) of paragraph one of Article 5 of the Statute. However, during the adoption of the Statute in 1998, they were not defined in the same manner as the other three crimes (genocide, crimes against humanity and war crimes)[29].

Furthermore, the Court's jurisdiction over the crime of aggression was suspended until amendments to the Rome Statute were made, as specified at the beginning of 2009. In accordance with Articles 121 and 123 concerning the amendment of the provisions of the ICC statute, the Review Conference for the definition of the crime of aggression convened in Kampala, Uganda, from 31 May to 11 June 2010. This occurred seven years after the statute came into force. The Conference proposed a definition of the crime of aggression and the conditions under which the Court exercises its jurisdiction, particularly with regard to the rules of procedure and evidence before the Court. The Review Conference resulted in Article 8 bis being added to the Rome Statute, providing a comprehensive definition of the crime of aggression and specifying its various forms[30].

However, the ICC is only permitted to exercise its jurisdiction concerning the crime of aggression for acts committed at least five years after the amendments related to the crime of aggression are ratified and one year after the amendments are accepted by at least thirty state parties, as set out in Article 8 bis of the Rome Statute[31].

Notably, the potential to expand the definitions of crimes specified in Article 5 of the Rome Statute prompted the drafters to impose two significant constraints, to prevent the application of its provisions based on personal whims and standards. The first of these is found in Article 9, which outlines the elements of crimes. The first paragraph states that the Court shall use these elements when interpreting and applying Articles 6, 7 and 8, and that they shall be adopted by a two-thirds majority of the Assembly of States Parties. The second paragraph adds that any amendments to these elements must also be adopted by a two-thirds majority of the Assembly of States Parties[32].

The second constraint is defined in Article 2(22) of the Statute, which states that the definition of a crime must be interpreted strictly and cannot be extended by analogy. In cases of ambiguity, the definition shall be interpreted in favour of the individual under investigation, prosecution or conviction[33]. This serves as a guarantee against states expanding the interpretation of acts as international crimes falling within the ICC's substantive jurisdiction[34].

This is relevant in the case of Lebanon, where the decision not to refer the assassination of Rafik Hariri and 22 of his companions on 14 February 2004 to the ICC is attributed to the crime being classified as terrorism, which falls outside the ICC's substantive jurisdiction. Furthermore, Lebanon, the country in which the crime was committed, is not a party to the Rome Statute[35].

Subsection Two: Procedural Complementarity

This refers to the way in which the International Criminal Court (ICC) integrates its own procedures when adjudicating cases brought before it. The principle of complementarity grants original jurisdiction to national criminal courts. However, in exceptional cases, the ICC may be granted jurisdiction at the request of state parties to the statute, as outlined in Articles 12, 13(a) and 14. Alternatively, a non-party state may confer jurisdiction upon the ICC by submitting a declaration to the Court's Registrar under Article 12(3), or through a referral of a situation from the Security Council to the Prosecutor in accordance with Article 13(b)[36]. The Prosecutor may also initiate proceedings at their own discretion under Article 15. According to Article 19(1), the Court must verify its jurisdiction, and investigations or prosecutions cannot proceed if a state with jurisdiction has already conducted an investigation into the case (Article 17(1)(a)) or investigated the case (Article 17(1)(b))[37].

Furthermore, Article 20 of the Rome Statute truly expresses procedural complementarity by preventing the ICC from exercising jurisdiction over a particular case in three scenarios:
If the ICC has previously considered and ruled on the case, whether by acquittal or conviction, as stated in the first paragraph of Article 20.
- if the ICC has tried a specific person and issued a decision of conviction or acquittal, no other criminal court may try that person for the same crime (Article 20(2)).

If another criminal court has tried the same defendant for the same offence, provided that those proceedings were not biased or undertaken to protect the defendant. Such trial procedures must be characterised by independence and integrity, and be in accordance with recognised procedures in international law. In such cases, the ICC shall not have jurisdictio[38].

Additionally, under Article 18(2), states are obliged to notify the Court within one month of receiving notice that they are conducting, or have conducted, an investigation into criminal acts that may constitute crimes referred to in Article 5 and that are related to the information provided in the notification sent to states, whether these acts were committed by their nationals or others within their jurisdiction. At the state's request, the Prosecutor may relinquish the investigation of those individuals, unless the Pre-Trial Chamber authorises the investigation at the Prosecutor's request[39].

However, the term 'relinquish' in the above article is inconsistent with the concept of complementarity. Another issue that contradicts the principle of complementarity is that the Prosecutor may reconsider the decision to relinquish within six months of doing so by submitting a written request to the Pre-Trial Chamber that includes the basis for the request. Even when the Prosecutor relinquishes an investigation under Article 18(2), they may request that the state to which they have relinquished the investigation periodically informs them about it and that responses to this request should be provided without unjustified delay[40].

Subsection Three: Complementarity in the Imposition of Penalties

This refers to the relationship between national legislation and the penalties established by the Rome Statute of the International Criminal Court (ICC). According to Article 80 of the Rome Statute, nothing prevents states from imposing penalties prescribed by their national laws, nor from applying the laws of states that do not specify the penalties outlined in this section. This means the following:

The existence of a penalty in the law of one state that is not found in the Court's statute, or the absence of a penalty in the law of a state despite its presence in the statute, does not constitute a conflict between the statute and national law.

- A defendant cannot invoke the application of the more favourable law principle, as stated in the Court's statute, if tried before a national court, unless it is provided for by national legislation.

Chapter 10 of the Rome Statute outlines the relationship between the Court and the state in which the penalty is to be enforced. The Court is granted the authority to supervise the execution of prison sentences in accordance with the conditions prevailing in the designated state for the enforcement of the penalty[41]. This complementarity gives the Court broad powers without infringing the statute's rules, while not interfering with the national legislation and administrative systems that determine how penalties imposed by the Court are executed[42].

It is noteworthy that the state in which the penalty will be executed is designated at the request of the Court. This designation is not binding on the state in question, which may refuse the request and specify its reasons, as stated in Article 103(1)(c). However, the state may outline specific execution conditions that do not contravene the statute's provisions and rules (Article 103(1)(b)). These conditions must, of course, align with those prevailing in the state designated by the Court (Article 106(2)), and the state is obliged to apply international standards regarding the treatment of prisoners as established by widely accepted international treaties[43].

Furthermore, according to Article 104 of the Rome Statute, the Court may, at any time, decide to transfer the convicted person to a prison in another state. The convicted person may also submit a request to the Court at any time for transfer from the executing state[44].

Regarding the enforcement of fines and confiscations imposed by the ICC on the convicted individual, the Rome Statute obliges state parties to execute these penalties according to the procedures set out in their national legislation, provided that the rights of bona fide third parties are not infringed, as set out in Article 109(1) of the Rome Statute[45].

However, if a state party is unable to carry out a confiscation order, it must take measures to recover the value of the proceeds, property or assets ordered by the Court for confiscation, without affecting the rights of bona fide third parties[46].
With regard to reducing penalties, the executing state may not release the individual before the penalty period set out in the Court's judgment has expired, and only the Court has the authority to reduce a penalty[47].

Section Two: The Limits of Applying the Principle of Complementarity
In this section, we will address the limits of applying the principle of complementarity. First, we will identify the cases in which this principle applies, as well as the jurisdiction of the International Criminal Court (ICC) instead of national courts. The second subsection examines the evidentiary value of national court judgements before the ICC, and the third subsection concludes with a discussion on the impact of the Security Council's authority on the principle of complementarity.

Subsection One: Cases of Application of the Principle of Complementarity
Article 17 of the Rome Statute establishes two primary criteria upon which the Court's jurisdiction is based for considering the crimes specified in Article 5 instead of national courts, in accordance with the principle of complementarity: unwillingness or inability to conduct an investigation or prosecution. Article 17(1) of the Rome Statute states:
"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 genuinely unwilling to carry out the investigation or prosecution or unable to do so.
B. The case has been investigated by a State which has jurisdiction over it and that State has decided not to prosecute the person concerned, unless the decision resulted from the State's unwillingness or inability genuinely to prosecute.
C. The person concerned has already been tried for conduct which is the subject of the complaint, and the Court shall not have jurisdiction to try the case in accordance with paragraph 3 of Article 20.
D. The case is not of sufficient gravity to justify further action by the Court.[48]"

This text sparked an extensive debate among state representatives at the Rome Conference about the meanings of 'unwilling' and 'unable'. Some argued that the terms allow for broad and flexible interpretation, which could limit the Court's jurisdiction. Additionally, proving 'unwillingness' is challenging as it relates to intent, and proving 'inability' can also be difficult in some cases due to a lack of sufficient information regarding the partial or total collapse of the national judicial system. During negotiations concerning the establishment of the Court, some preferred the terms 'ineffective' and 'unavailable' on the grounds that they provide an objective standard for assessing the performance of national courts. 'Ineffectiveness' would pertain to judicial procedures before national courts, while 'unavailability' would relate to the entire national judicial system. However, these views were not adopted, and the terms 'unwilling' and 'unable' were retained in the text[49].

In criminal law, it is established that the prosecution must provide evidence against the accused, while the accused must provide evidence of their innocence. We will present the issues that the ICC must address to prove 'unwillingness' and 'inability' in accordance with Article 17 of the Statute as follows:[50]

Subsection One: Proving Unwillingness
For the Court to establish a state's unwillingness to investigate or prosecute a case, the provisions of Article 17(2) must be adhered to. This involves considering whether measures have been or are being taken, or if a national decision has been made to protect the individual from criminal liability for crimes within the Court's jurisdiction. The Court should also examine whether there has been an unjustified delay to these measures that contradicts the intention to bring the individual concerned to justice. The Court must also consider whether the state is undertaking these measures independently and impartially, or in a manner that does not align with the intention to present the individual for trial[51].

One example of this could be a state conducting a trial while reclassifying an international crime as a domestic crime, such as reclassifying genocide as murder. Another example would be the use of delaying tactics to evade the ICC's jurisdiction, such as the Serbian judicial authorities pursuing embezzlement charges against President Milošević as a pretext to avoid genocide prosecution before the International Criminal Tribunal for the former Yugoslavia[52].

This scenario also applies to the situation in Darfur, Sudan, where impunity and a lack of judicial accountability mechanisms are characteristic of crimes against humanity. This persists despite special criminal courts being established by the Sudanese Chief Justice under a decree issued on 7 June 2005; these courts do not pursue responsible officials, military leaders and high-ranking individuals.
Moreover, the Sudanese special criminal courts impose lenient sentences for serious human rights violations, but these are often swiftly overturned. For example, in a case concerning the torture and murder of children in detention, the military intelligence officer responsible was sentenced to two years in prison, a sentence that was subsequently quashed by a presidential pardon issued on 11 June 2006[53].

Subsection Two: Proving Inability

The Court may infer an inability on the part of a national judiciary to consider a particular case under Article 17(3) of the Rome Statute. In this context, the Court will examine whether the state is unable to do so due to a total or substantial collapse of its judicial system, or whether it is unable to bring the accused to trial, obtain the necessary evidence and testimony, or carry out the proceedings for any other reason[54].

Examples of an inability to pursue cases include general or special amnesty decrees, or similar measures, that create opportunities for impunity for perpetrators of international crimes and prevent the discovery of the truth. Such measures also hinder the prosecution of offenders before the ICC. This was evident in Uganda, where the president referred a case concerning the northern rebellion movement known as the Lord's Resistance Army to the ICC. He justified this by reference to an amnesty law issued in 2000 that prevents prosecution in national courts[55].

It should be noted that the International Criminal Court's jurisdiction does not adhere to the principle of complementarity if the referral to the Court is made by the Security Council through a Chapter VII resolution of the United Nations Charter. This applies to the situation in Darfur[56], as set out in Security Council Resolution 1593 of 31 March 2005. In this resolution, the Security Council affirmed that the situation in Darfur posed a threat to international peace and security. It then decided to refer the situation in Sudan to the ICC, even though Sudan is not a party to the Rome Statute[57].

Therefore, the Court can exercise its jurisdiction in cases referred by the Security Council under Chapter VII of the Charter, regardless of whether the state in which the crime was committed or the state of nationality of the accused accepts this jurisdiction or is a party to the Court's statute. Legal scholars justify the Court's jurisdiction under Article 13(b), despite the principle of complementarity, by asserting that the referral in this case is based on Chapter VII of the UN Charter, to which most countries in the world belong. Therefore, a referral from the Council is considered to be issued by the member states of the United Nations, since the Council acts on their behalf in maintaining international peace and security[58]. Furthermore, the UN Charter takes precedence over any other international agreement, including the Rome Statute of the ICC[59].

Subsection Two: The Evidentiary Value of National Court Judgments Before the International Criminal Court

This subsection addresses the International Criminal Court's (ICC) position on judgments issued by national courts for crimes within its jurisdiction[60].

Subsection One: The ICC's Position on Judgments Issued by National Courts

The Rome Statute of the ICC acknowledges the validity of national court judgments in cases falling under the ICC's jurisdiction, as set out in Article 20. The first paragraph of this article specifies that 'no person shall be tried before this Court for conduct that formed the basis of crimes for which the Court has already convicted or acquitted that person, except as provided in this Statute'[61].

Therefore, if national authorities have properly prosecuted an act that falls within the ICC's jurisdiction, the ICC may not try that individual again. Conversely, the second paragraph of Article 20 prohibits the trial of any person before another court for any of the crimes referred to in Article 5 if the ICC has acquitted or convicted that person of the same crime[62].

However, due to the ease with which the judicial system can be circumvented, a state that is unwilling to punish a perpetrator of a crime may fail to exercise its jurisdiction effectively, thereby subjecting the individual to a nominal trial. Article 20(3) of the Rome Statute permits the retrial of an individual for a crime referred to in the Statute, even if they have already been tried for the same act in a national court, provided that certain conditions are met.:

If the national court proceedings were intended to protect the individual from criminal liability.

If the proceedings were not conducted independently and impartially in accordance with the due process standards recognised in international law, or if they were conducted in a manner inconsistent with the intention of bringing the person concerned to justice.

This text makes it clear that if national courts do not administer criminal justice correctly, in accordance with international fair trial standards, the ICC has the authority to intervene in such cases and retry the individual responsible for the crime. Examples of situations in which the ICC could intervene include cases where a state takes all legal measures regarding a perpetrator but aims to protect that individual from criminal responsibility for the crime committed, or where the national court disregards legal procedures and violates recognised criminal procedural norms to prevent the responsible individual from facing justice[63].

Subsection Two: The Nature of the Exception in Article 20 of the Rome Statute

The exception outlined in paragraph 3 of Article 20 regarding the principle of 'non bis in idem' permits the International Criminal Court (ICC) to prosecute an individual for offences within its jurisdiction, even if they have already been tried in a national court for the same offences. This exception is driven by considerations of justice, aiming to prevent the manipulation of trial proceedings that could result in acquittals for the most serious crimes against society, and to avoid nominal proceedings that do not adjudicate criminal cases impartially[64].

It also serves as a necessary safeguard to ensure fair and impartial trials for perpetrators of the most serious international crimes, while enhancing the effectiveness of national judicial systems in imposing sanctions on individuals who commit serious violations of international law. It follows that this exception empowers the ICC to review national court judgments to determine whether they aimed to protect the individual responsible for the crime and whether they were conducted with independence and integrity. This demonstrates that the ICC holds a higher status than national courts, acting as a supervisory court over national court decisions. However, it does not retry individuals who can demonstrate that national courts have correctly adjudicated their cases.

The ICC does not recognise judgements that fall outside the general framework of recognised criminal procedural norms. Thus, the ICC is responsible for directing national court judgements within the context of imposing deterrent penalties on serious offenders and preventing impunity, thereby ensuring the fair application of the law and achieving international criminal justice. However, the ICC does not undertake this role alone; rather, it occurs through the referral of a new case against the same individual for the same acts that were previously considered by the national cour[65].

The Rome Statute outlines the process by which a case is referred to the ICC for the prosecution of individuals accused of one of the international crimes listed in Article 5. According to Article 13, 'The Court may exercise its jurisdiction with respect to a crime referred to in Article 5, in accordance with the provisions of this Statute, in the following situations:

(a) if a State Party refers a situation to the Prosecutor in accordance with Article 14, in which one or more of these crimes appear to have been committed;
(b) if the Security Council refers a situation to the Prosecutor, acting under Chapter VII of the United Nations Charter, in which one or more of these crimes appear to have been committed;
(c) if the Prosecutor has initiated an investigation into a crime under Article 15.'
Accordingly, each State Party to the Rome Statute, the Security Council under Chapter VII of the United Nations Charter and the Prosecutor acting on their own initiative have the right to refer cases to the ICC.

Subsection Three: The Impact of the Security Council's Authority on the Principle of Complementarity
The Security Council's exercise of its authority to refer a specific situation to the International Criminal Court (ICC) is based on the provisions of Chapter VII of the United Nations Charter, alongside the Rome Statute of the ICC. The powers granted to the Security Council in this context are a manifestation of its primary responsibilities for maintaining international peace and security, and such authority will significantly contribute to combating international crimes[66].

Subsection One: The Basis of the Security Council's Referral Authority
Article 13 of the Rome Statute outlines the Security Council's referral authority, stating that the Court may exercise its jurisdiction with respect to crimes referred to in Article 5, provided that the Security Council refers a situation to the Prosecutor under Chapter VII of the United Nations Charter, where one or more of these crimes appear to have been committed. Some scholars argue that the Security Council's authority to refer a situation to the ICC reflects the integration and coordination between the Council and the Court, particularly when the Council fulfils its duties in maintaining international peace and security, given the close relationship between international crimes and the preservation of peace[67].

The conditions under which the Security Council may refer a situation in which one or more of the crimes listed in Article 5 of the Rome Statute appear to have been committed are as follows:[68]
The referral must involve a crime specified in Article 5 of the Statute, including genocide, crimes against humanity, war crimes and the crime of aggression, the latter of which came into force in 2017.
The referral decision must be made under Chapter VII of the Charter, which outlines the procedures and measures taken by the Security Council in cases threatening international peace and security or in the event of aggression. This occurs after the Security Council determines that the situation falls within one of the cases outlined in Article 39 of the Charter.

The Security Council exemplified this authority through Resolutions 1593, issued on 31 March 2005, which referred the situation in Darfur to the ICC, and 1970, issued on 26 February 2011, which referred the situation in the Libyan Arab Jamahiriya, as of 15 February 2011, to the ICC Prosecutor[69].
However, the right of veto could potentially obstruct the Security Council's referral authority, since the decision to refer a situation to the Court is a substantive matter requiring the approval of nine members, including the five permanent members, and cannot be vetoed[70].

Subsection Two: The Effects of the Security Council's Referral Authority on the Jurisdiction of the International Criminal Court
Some scholars criticise the referral authority granted to the Security Council under Article 13 of the Rome Statute, emphasising the dangers of a referral from the Council automatically undermining the International Criminal Court's (ICC) principle of complementarity and thus depriving national courts of their original jurisdiction to adjudicate crimes. Furthermore, a referral issued by the Security Council is applicable to all state and non-state parties to the Statute[71].
A referral of a situation to the ICC Prosecutor by the Security Council is subject to the preconditions for exercising jurisdiction, as set out in Article 12 of the Rome Statute. Article 12(2) states that, in cases referred to in paragraphs (a) and (c) of Article 13, the Court may exercise its jurisdiction if one or more

of the following states are parties to the Statute or have accepted the Court's jurisdiction in accordance with paragraph 3.
- The state in whose territory the conduct in question occurred; or
- The state in which the vessel or aircraft was registered if the crime was committed on board a vessel or aircraft.
- The state of which the person accused of the crime is a national.'

As paragraphs (a) and (c) of Article 13 relate to referrals by a State Party or the Prosecutor acting of their own accord, Article 12(2) implies that the relevant state does not need to be a party to the Rome Statute or accept the Court's jurisdiction for referrals made by the Security Council under Chapter VII of the Charter, as per Article 13(b).

Therefore, the Court can exercise its jurisdiction in cases referred by the Security Council, regardless of whether the state in which the crime was committed or the state of nationality of the accused accepts this jurisdiction, or whether it is a party to the Statute. Scholars justify the applicability of the Court's jurisdiction under Article 13(b), despite the principle of consent being contravened, by arguing that the referral in this case is based on Chapter VII of the United Nations Charter, to which nearly all countries belong. Therefore, the referral issued by the Council is effectively equivalent to one issued by the United Nations' member states, as the Council acts on their behalf in maintaining international peace and security[72].

Nevertheless, international practice has affirmed the ICC's commitment to the principle of complementarity, despite the referral being made by the Security Council under Chapter VII of the Charter. An example of this is the prosecution of Saif al-Islam Gaddafi and Abdullah al-Senussi in Libyan national courts, which occurred after the ICC's Pre-Trial Chamber issued arrest warrants on 27 June 2011 for their involvement in crimes against humanity and war crimes against civilians in Libya since 15 February 2011.

Conclusion

This study has revealed that the principle of complementarity is the fundamental cornerstone of the International Criminal Court's (ICC) jurisdiction to prosecute perpetrators of the most serious international crimes: war crimes, crimes against humanity, genocide and the crime of aggression. However, the ICC's jurisdiction is supplementary to that of national courts, which primarily hold this authority. Unlike other courts, the ICC has explicitly defined the relationship between international and national criminal justice, whereas the Nuremberg Trials only implicitly addressed this issue. Furthermore, the statutes of the tribunals for the former Yugoslavia and Rwanda do not include this principle, instead emphasising the supremacy of international law over national law. The circumstances surrounding the establishment of these two tribunals likely led to the exclusion of the principle of complementarity from their jurisdictions.

Finally, the establishment of the ICC is a significant step towards protecting human rights and reinforcing the foundations of international criminal justice. Based on the principle of complementarity, the Court's jurisdiction serves as a guarantee against double jeopardy, aiming to eliminate impunity while reconciling the fight against international crimes with state sovereignty. However, the ICC's jurisdiction can be exercised without restriction if the Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the ICC in which one or more of these crimes appears to have been committed. The Sudanese government overlooked this issue when criticising Security Council Resolution 1593 of 31 March 2005, which referred the situation in Darfur to the ICC. The Sudanese government argued that the jurisdiction belonged to the Sudanese judiciary, despite not being a party to the Rome Statute, and relied on the principle of complementarity.

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