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# Examining the Complementarity Principle of the International Criminal Court

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## Abstract

*The Rome Statute of the International Criminal Court adopted on 17 July 1998 established the International Criminal Court (ICC) vested with the inherent jurisdiction over international war crimes and crimes against humanity as outlined in Articles 5 to 7 of its Statute. In the same vein, states within the international community have to prosecute these crimes under international customary law. The resultant effect is that the jurisdiction of national courts runs concurrently with the jurisdiction of the ICC over these crimes, such as the crime against humanity, genocide, war crimes, and the crime of aggression. This, however, raises the issues of precedence of jurisdiction identified with the operation of the previous international criminal tribunal in the former Yugoslavia and Rwanda, which had primacy in the exercise of jurisdiction over national courts of states where they operated. However, the jurisdiction of the ICC is founded on the complementarity principle, which gives importance to the national court over international crimes. Though not necessarily a new concept, the complementarity principle has been espoused in several decisions of the Court. This principle is expounded by the provisions of the establishing instrument of the Court. This article seeks to examine the complementarity principle of the ICC as articulated in the Rome Statute. It also examines the provisions of Article 17 of the Rome Statute concerning the jurisdiction of the ICC over international crimes and the duty of state parties to prosecute these crimes. It concludes on the premise that the ICC only wades in when a state is unwilling to launch an investigation and prosecution of any situation. The research methodology adopted in this study is the doctrinal approach. The doctrinal research method has been adopted for this research because it is conducted in books. Primary and secondary sources of material such as legislation, case law, journal, articles, newspapers, textbooks, and the internet were also read, analysed, and applied to the study.*

**Keywords:** Court, Criminal, Crimes, International, Prosecution, ICC.



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## **Introduction**

The twentieth century witnessed some of the worst atrocities committed in the history of humankind, accounting for more than ten million civilian deaths in over 300 armed conflicts in the last five decades. International Criminal Justice has become a global concern. There is a severe violation of International Humanitarian Law. There is also a significant shift in the global legal landscape since establishing the International Criminal Court. The Court is a product of unprecedented international cooperation geared toward redressing crimes against humanity, war crimes, genocide, and the crime of aggression.

The major factors that stood out to impede the Court's efforts are the challenge of the principle of complementarity that brought about the lack of universal ratification of the Rome Statute. The entire global community has witnessed the effort of the Court exhibited to ensure global peace and harmony and that those responsible for these heinous crimes are brought to justice and punished accordingly. This article, therefore, seeks to examine how the complementarity principle has impeded the function of the International Criminal Court in the administration of justice

## **Jurisdiction and subject matter of the International Criminal Court**

Article 5 of the Rome Statute lists the crimes that will be within the jurisdiction of the Court as genocide, crimes against humanity, war crimes, and the crime of aggression. For the purpose of the Statute, Article 6 defined genocide as it has been defined under article 2 of the Genocide Convention of 1948. Accordingly, both crimes against humanity and war have been carefully defined under articles 7 and 8 of the Rome Statute. By virtue of article 5, the Court has the jurisdiction to entertain crimes of concern to the international community as a whole. This means the Court has jurisdiction over all the crimes provided in the Statute, including aggression which jurisdiction was conferred on the Court to prosecute lately in 2010 after the conclusive definition of the crime was agreed upon by the United Nations General Assembly.<sup>159</sup> The provisions on the crime of aggression set out the conditions under which the Court may exercise jurisdiction over this crime which must be consistent with the UN Charter.

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<sup>159</sup> Resolution RC/Res 6 of 11 June 2010

The procedural provisions of the Rome Statute have been carefully drafted to create an optional balance between the following priorities:<sup>160</sup>

- i. The need for an independent, impartial, apolitical representation in the court, which can function efficiently and effectively to bring to justice those responsible for the most serious crimes of concern to the international community as a whole;
- ii. The right of states to take primary responsibility for prosecuting such crimes if they are willing and able;
- iii. The need to give victims of such crimes adequate redress and compensation;
- iv. The need to protect the rights of accused persons; and
- v. The role of the Security Council in maintaining international peace and security, by its powers under Chapter VII of the Charter of the UN.

These considerations are well articulated in the functions and powers of the court and its relationship with other entities, which are provided in the Statute of the Court.<sup>161</sup>

### **The Complementarity Principle in the ICC Statute**

As expressed in its preamble, one of the cardinal aims of the Rome Statute is to put an end to the impunity concerning ‘the most serious crimes of concern to the international community.’<sup>162</sup> In pursuance of this aim, the Statute reaffirms ‘the duty of every state to exercise its criminal jurisdiction’ over the crimes provided for in the Statute and in the same vein, confers the court with jurisdiction over these crimes.<sup>163</sup> The state’s duty to prosecute crimes under international law is an established and recognised principle of international customary law. In other words, it’s a pre-emptive norm (jus cogens), which is also affirmed in the ICC Statute.<sup>164</sup> Thus, national courts of respective states parties and the ICC have concurrent jurisdiction over core crimes under international law. However, the Statute provides that the ICC shall complement national criminal jurisdictions.<sup>165</sup> Consequently, the principle of complementarity relates to the exercise of jurisdiction over crimes under

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<sup>160</sup> Rules of Procedure and Evidence of ICC 2013

<sup>161</sup> Muhammed, T.L. ‘An overview of the Rome Statute of the ICC: Issues in Domestic Implementation’ (NCICC 2008) 5.

<sup>162</sup> Para 5 Preamble of the ICC Statute 2002

<sup>163</sup> Article 1 of the Rome Statute

<sup>164</sup> Ibid.

<sup>165</sup> Article 1 of the Rome Statute.

international law.<sup>166</sup> This principle clarifies any ambiguity relating to precedence in the exercise of jurisdiction by two authorities vested with jurisdiction. In exercising jurisdiction over crimes, the national court shall take precedence over the ICC. It means that the principle of complementarity is a functional principle that gives primacy of jurisdiction to national courts of state parties over ICC. However, where the national court fails in its responsibility to prosecute, the ICC's duty is invoked to prevent impunity. This position was demonstrated in the case of *Prosecutor v Ahmad al Fagi almahdi*<sup>167</sup> within the speculation of the Rome Statute, failure to prosecute by a state party an international crime is marked by the broad term 'genuine unwillingness or inability' of states to prosecute, only then will the ICC jurisdiction be effectively invoked. Therefore, the ICC may prosecute in circumstances of 'genuine unwillingness or inability by states to prosecute as we have seen in quite a number of cases, for instance, in *Prosecutor v Laurent Gbagbo and Mrs. Gbagbo*. While the ICC indicted Laurent Gbagbo on four counts of crimes against humanity and proceeded against him, Mrs. Gbagbo was not transferred to the ICC because the Ivorian government indicted her for the crimes she committed and notified the court of its willingness to proceed against her concerning the post-election violence.<sup>168</sup> The complementarity principle precludes both the ICC and the national courts from concurrently exercising their jurisdiction over crimes. While national courts have primary jurisdiction as a matter of the first instance, the ICC only has complementary jurisdiction (court of last resort). However, this does not imply a hierarchical positioning of the two authorities vested with superior to the other.<sup>169</sup>

### **Height of the Principle of Complementarity in the ICC**

The complementarity principle, as established by the ICC Statute, may be viewed from three different perspectives. First, the complementarity principle of the ICC may be viewed as an admissibility principle as enunciated in the enabling Article 17 of the Rome Statute, which provides for the condition or circumstances for the admissibility of cases by the ICC. Aside from the provisions of Articles 12-14, which cover the requirement for the exercise of jurisdiction by the Court, Article 17 states the circumstances where the court may determine

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<sup>166</sup> Even though, the Rome Statute does not expressly used the term 'complementarity', it has however been adopted by many authors.

<sup>167</sup> Appeal Case No. ICC-01/12-01/15

<sup>168</sup> Sunday John Apochi, *International Criminal Court in the Eyes of a common Man* (Nigerian Army Welfare Printing Press 2019) 32

<sup>169</sup> Adeyemo, D.D., 'An overview of the principle of complementarity in International Criminal Law' *Journal of Public and Constitutional Practice* [2016] (9) 201-212

that a case is admissible before it.<sup>170</sup> This is in pursuance of the principle of complementarity, which is the basis of ICC's jurisdiction over any matter of international crimes. Ordinarily, admissibility is crucial to exercising jurisdiction over any matter or cause of action. A court will not exercise jurisdiction over a matter where such matter is inadmissible. Admissibility, therefore, works in tandem with jurisdiction.<sup>171</sup>

Secondly, the complementarity of the ICC applies to the exercise of jurisdiction over international crimes. Therefore, as provided in Articles 1 and 17 of the Rome Statute, the principle of complementarity only qualifies in the circumstances of the nature of the jurisdiction of the court. Jurisdiction of the ICC can only be invoked in respect of international crimes on the bedrock of the principle of complementarity.<sup>172</sup> Therefore, the ICC jurisdiction will be described as 'letters without the spirit' without the complementarity principle.

Furthermore, as we have seen in the case of Messrs Gbagbo<sup>173</sup>, the complementarity principle within the ICC only operates in respect of the cooperation of state parties with the ICC on the provisions of the Rome Statute. First, the functional operation of the principle of complementarity depends largely on the cooperation of states with the court. National courts of states have the first instance in exercising jurisdiction over international crimes. The jurisdiction of the ICC cannot just be invoked where a state is unwilling or unable to investigate or prosecute. Consequently, apart from the issues provided in Article 12-15 of the Rome Statute, the ICC must monitor situations in states where international crimes have been committed to ascertain that such States have complied with their duty to prosecute and the goals of the Statute are achieved.<sup>174</sup> A good illustration of this scenario was the situation of the Nigerian State, where the ICC, on 11 December 2020, announced the completion of her preliminary examination of the situation in Nigeria, having concluded that there was a reasonable basis to believe that war crimes and crimes against humanity were committed.<sup>175</sup> In circumstances where a case is held admissible as above, the ICC may only exercise its jurisdiction successfully with the cooperation of the state. The exercise of jurisdiction by the court is largely dependent on state cooperation.

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<sup>170</sup> Rome Statute 2002

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> *supra*

<sup>174</sup> Ibid.

<sup>175</sup> <[http://www.icc-cpi.int/preliminary\\_examination\\_nigeria](http://www.icc-cpi.int/preliminary_examination_nigeria)> Accessed 8 September 2021

As a jurisdictional principle, the complementarity principle is founded upon and implemented through the provision of Article 17 of the enabling instrument of the court. Article 17, as mentioned above, embodies the substance of the principle of complementarity. However, where a state has initiated an investigation or prosecution over a crime or crimes, such a case will be inadmissible before the ICC. Thus, even though the ICC is a competent authority vested with jurisdiction over the same matter, it cannot entertain such a case except such a state is genuinely unwilling or unable to carry out an investigation or prosecution.<sup>176</sup> Secondly, where a state decides not to prosecute the perpetrators of crimes after study, such a case will be inadmissible before the court. It would amount to double jeopardy for the perpetrator of the crimes involved in such a case.

It is also a trite law that where a case is not of sufficient gravity to justify the exercise of the ICC's jurisdiction, then such a case will be inadmissible.<sup>177</sup> This provision is not only ambiguous but also appears rather superfluous. The Statute does not make further provision for what would amount to sufficient gravity or the threshold of measurement of the term. Article 17 (1) subjects the admissibility of a case to a State's genuine willingness or ability to prosecute. The provision of Article 17 generally suggests that even though a state has initiated investigations or even court proceedings regarding a crime within the Statute, such a case may be admissible before the ICC where such a state is found genuinely unwilling or unable.

Article 17 (2) and (3) provides a statutory test of the unwillingness and inability of a state to prosecute. Primarily, the ICC must determine a state's unwillingness or inability to investigate or prosecute. The ICC shall consider any of the three determinant factors in the light of the principles of due process recognised by international law. Any one of the three situations of unwillingness is sufficient for the ICC to conclude that a state is unwilling to investigate or proceed with prosecution. It is also pertinent to note that all the situations laid down by the Statute suggest that a state must have initiated some proceedings purportedly aimed at fulfilling its duty to prosecute international crimes within its territory. Such proceedings could be concluded or ongoing. However, the unwillingness of a state to investigate and prosecute international crimes is measured by the standard and quality of the state proceedings.

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<sup>176</sup> Article 17 (1) (a) of the Rome Statute 2002.

<sup>177</sup> Article 17 (2)

## **Importance of the Complementarity Principle of the ICC in the Fight against International Crimes**

The complementary principle of the ICC promotes the willingness of states to prosecute international crimes even when the State is unwilling to do so. National courts must not just make a shallow attempt at investigating or prosecuting the crimes but also do so genuinely and not just as a show trial. Otherwise, the ICC will declare genuine unwillingness or inability, thereby triggering the court's jurisdiction over such crimes. Where a state fails to prosecute due to unwillingness or inability, the ICC will not proceed to prosecute any case without effectively determining the admissibility of such case irrespective of the considering issues of jurisdiction as highlighted in the Rome Statute.<sup>178</sup> Article 19 (1) of the Statute provides that the ICC must satisfy itself that it has jurisdiction over a case brought before it.<sup>179</sup> Therefore, the substantive provision on complementarity principle discourages impunity and encourages the investigation and prosecution of international crimes.

Furthermore, the complementarity principle encourages the domestication of treaties on international crimes and national prosecution of these crimes. The Rome Statute affirms a State's duty to prosecute crimes under international law. The duty to prosecute necessarily presupposes that states must have the legal and judicial mechanisms to prosecute and give life to the intent of the Statute. Primarily, the competency to investigate and prosecute crimes lies with the states. Whether a party to the Rome Statute or not, States need not domesticate international treaties on international crimes within their national criminal justice system before exercising jurisdiction over international crimes committed within its jurisdiction. The complementarity principle also acknowledges and respects the national judicial system. Hence, it encourages domestic prosecution of international crimes.

## **The International Criminal Court and State Sovereignty**

The question of sovereignty regarding the activities of ICC remains constant. However, opponents of the ICC argue that an international court that tries and sentences individuals is simply incompatible with the conception that international law governs only the relationships between states.<sup>180</sup> Also, critics point to the absence of positivist law for violations of which potential defendants could be charged. Some contend that the ICC would worsen

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<sup>178</sup> Article 5

<sup>179</sup> It makes extensive provision for challenge of the jurisdiction of the ICC with respect to the admissibility of cases. A state party may challenge the admissibility of a case on the provisions of Article 17 of the Statute. Article 18 equally requires the ICC prosecutor to inform a state in confidence of a referral from the United Nation. This effectively allows a state to assert its jurisdiction or demonstrate sufficient willingness to prosecute.

<sup>180</sup> Malcolm N Shaw, *International Law* (Cambridge University Press 2003) 695

international relations.<sup>181</sup> The Nuremberg decision laid to rest the belief that the constitution of an international criminal tribunal contravenes the sovereignty of states. It stated that individuals, including heads of states and those acting under orders, could be criminally responsible under international law.<sup>182</sup> The principles of international law recognised in the Nuremberg Tribunal's charter and the Tribunal's judgment formulated seven principles that were adopted on 29 July 1950. The essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by individual states.

The Nuremberg principles helped overcome objections to the ICC based on sovereignty. However, the ICC created by the Rome Statute ultimately depends upon states for assistance concerning the investigation of offences, arrest of suspects, the location and procurement of evidence and witnesses, including enforcement and recognition of its judgments. Besides the complementarity principle, the court's jurisdiction essentially is subordinate to the jurisdiction of national courts.

### **Limitation factors to the Complementarity principle**

Article 17 of the Rome Statute is the statutory back born of the complementarity principle in the ICC Statute. While Article 19 expressly states that the ICC must determine the admissibility of a case before it,<sup>183</sup> invariably, the provision of Article 17 is the precise threshold for the operation of the conditions for admissibility.<sup>184</sup> In principle, the ambiguity of some of the terms and phrases used to qualify the provisions of Article 17 and the subject nature of their interpretation is one of the practical limitations of the complementarity principle. Secondly, Article 17 of the Rome Statute describes genuine unwillingness or inability to prosecute through the subjective test of the intention of the state actions. However, it does not state whether the ICC shall be restrictive in its interpretation or recourse to the other factors not expressly stated in the Statute. This makes the situation doubtful as to whether the ICC can rely solely on the provisions of the Statute in an actual practice scenario.

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<sup>181</sup> Falana, F. 'The Universal Jurisdiction of the International Criminal Court' Nigerian Coalition on the International Criminal Court Journal [2008] 127-140

<sup>182</sup> Philippe Coureur, The International Court of Justice: custodian of the International Military Tribunal at Nuremberg (United States Holocaust Memorial Museum Publication 2018) 21

<sup>183</sup> Article 19 (1) of the Rome Statute

<sup>184</sup> The precise threshold for the admissibility condition will be developed by case laws as the ICC continues in its operations.

Article 17 (1) (b) refers to a state's decision not to prosecute but makes no express provision on what would amount to a proper decision by a state not to prosecute. Furthermore, the conditions laid out in Article 17 (1) (d) in determining the admissibility of a case by the ICC relates to the sufficient gravity of the case. The challenge of this provision in respect of this provision to complementarity is that the nature of ICC jurisdiction and the provision of Article 5 (1) does not define what the phrase 'sufficient gravity' is. It, therefore, remains within the discretion of the court to determine what it means.

### **Prospects/way forward**

The entire premise of the ICC is based on the principle of complementarity, which means that the court will extend and use its jurisdiction when the national court is unable or unwilling to investigate or prosecute international crimes genuinely. The priority is given to national jurisdictions. There is a need to review the aspect of the principle of complementarity within the premise of ICC. There is a direct need for the States referring cases to the ICC to enact complementarity provisions in their municipal laws to demonstrate a real commitment to the ICC.

States' cooperation is one factor that determines the ICC's international credibility as an unbiased umpire and independent institution. For the court to act greatly, it will require vibrant cooperation from states at all stages of proceedings, such as execution of arrest warrants issued by the court, providing evidence, and enforcement of sentences of the convicted persons. Cooperation is a crucial mechanism and should be implemented to enforce the arresting and surrendering of persons on the court's wanted list.

States parties to the Rome Statute have to reaffirm their commitment to combat impunity for the most severe atrocities. Universality and implementation of the Rome Statute play a fundamental role in that regard; the fight against impunity is the joint responsibility of all States whether or not they are parties to the Rome Statute. States should desist from paying lip service to the fight against the commission of international crimes. States should sign, ratify, domesticate and implement the Rome Statute.

The ICC should expand its horizon. There is wide speculation that the court's investigations are mostly focused on Africa, even when atrocities are also committed in other countries such as Iraq, Afghanistan, Syria, North Korea, Israel, etc. There should be a mechanism for speedy investigation and conclusion of trials. There is apparent overwhelming concern over the

speed at which the court and trial are carrying out investigations; the general view is that the court is slow in handling cases, and more proactive measures ought to be taken to facilitate these processes. The United States of America should become a party to the Rome Statute. The US is more particular about possible charges against its citizens and has not supported the Court. The US wields excellent powers, and it is a superpower in the comity of nations. Article 43 (6) of the Rome Statute provides victims with witness protection. However, there is the need for the court to intensify more efforts in providing more protective measures and security arrangements, and other forms of assistance for witnesses and victims during the investigation, prosecution, and after

## **Conclusion**

The establishment of the International Criminal Court in 2002 is a breakthrough in the restitution of sanctity to humanity. It also guarantees the sanctity of humankind. The Court has significantly entrenched in ensuring, protecting, and advancing international criminal justice by ensuring that the perpetrators and violators of war crimes face sanctions. The cardinal objectives of the court are to deter genocide, war crimes, crimes against humanity, and the crime of aggression. It is evident that the court cannot, within 19 years of existence, put a total end to these crimes. However, it has undoubtedly brought remarkable success in prosecuting individuals who have committed war atrocities in the past few years. The court's establishment has also provided a mechanism to address the massive human rights abuses committed and still being committed worldwide. However, national courts enjoy priority over the ICC in exercising jurisdiction over international crimes, which fosters national prosecution and state sovereignty. Therefore, states need to reaffirm their commitment to combat impunity for the most severe atrocities. In this regard, the fight against impunity should be regarded as a common responsibility of all states. Without any lip service to the fight against the commission of international crimes.