

Striking A Balance: National Sovereignty And The International Criminal Court's Role Under The Principle Of Complementarity

Shalu Tyagi^{1*}, Pankaj Nagar², Prof. (Dr.) Anil Kumar Sharma³, Dr. Arun Kumar Singh⁴

¹Assistant Professor, Greater Noida College of Law, India, Shalutyagi01@gmail.com

²Assistant Professor, CPJ College of Higher Studies and School of Law, New Delhi, India, Mail Id nagars623@gmail.com

³Principal, Greater Noida College of Law, India, dr.anilsharma67@gmail.com

⁴Professor, Greater Noida College of Law, India, advocate.arunsingh@gmail.com, Orcid id: <https://orcid.org/0009-0003-9395-9498>

Citation: Shalu Tyagi et.al (2023), Striking A Balance: National Sovereignty And The International Criminal Court's Role Under The Principle Of Complementarity, Educational Administration: Theory and Practice, 29(3), 413-418

Doi: 10.53555/kuev.v29i3.5220

ARTICLE INFO

ABSTRACT

The International Criminal Court (ICC) stands as a cornerstone of international justice, holding perpetrators of the world's most serious crimes and accountability. Its role is not one of usurping national judicial systems. This abstract explores the critical principle of complementarity that underpins the ICC's mandate. Complementarity dictates that the ICC acts as a court of last resort. National courts have primary responsibility to investigate and prosecute international crimes like genocide, crimes against humanity, and war crimes. The ICC only intervenes when states are "unable or unwilling" to genuinely pursue justice. This ensures respect for state sovereignty while addressing situations where national systems fail. The principle serves multiple purposes. It fosters national ownership of the fight against impunity, encouraging states to strengthen their judicial capacities. It promotes efficiency by allowing the ICC to focus on cases where it's uniquely needed. This study seeks to critically examine the unique feature of 'Principle of Complementarity' in International Criminal Court. The attempt would be to find out the need to have such principle and how it adds to the current scenario in cases of war crimes.

Keywords: International Criminal Courts (ICC), War Crimes, Crime Against Humanity, Principle of Complementarity.

Introduction

The International Criminal Court (ICC) (ICC, n.d.) operates under the Rome Statute, which was adopted on 17 July 1998 by UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC. This statute became effective on July 1, 2002, establishing the ICC as an autonomous international entity. Its purpose is to combat impunity for those responsible for the gravest offenses recognized by the global community. It is headquartered in the Hague, Netherlands (ICC, 2020). The ICC necessity became evident in the aftermath of World War II (Gruppe, n.d.), a period that left the international community which deeply scarred and determined to prevent such atrocities from occurring again, epitomized by the collective pledge of "Never again." Despite this commitment, events like the Bosnian war and the Rwandan genocide, which unfolded half a century later, underscored the world's failure to fulfill this promise. The warlords and dictators continue to orchestrate and carry out mass atrocities, including widespread sexual violence and extrajudicial killings, largely escaping accountability for their actions. The Nuremberg trial (Wood, 1996) and Tokyo trials (Meusum, n.d.) following WW- II (Historian, n.d.) marked rare instances where individuals were held accountable by the global community for crimes against humanity. However, in most cases, perpetrators evade justice due to the lack of a court willing and capable of trying them. Furthermore, national judicial systems are frequently compromised, if not entirely dismantled, by the very crimes they are meant to address, leaving a void in the international arena for adjudication. The WW-II and the establishment of the United Nations in 1945, the need for an ICC became increasingly apparent. The International Law Commission (ILC) (M. Cherif Bassiouni, n.d.) was tasked with codifying the Nuremberg principles (UNO, 1949) and drafting a statute for the creation of such a court. However, progress on this front was hindered for many years due to the divisions of the Cold

War era. It wasn't until the early 1990s, with a thawing in international relations, that ad hoc International Criminal Tribunals were established in response to atrocities in Yugoslavia (UNO, 1993) and Rwanda (UNO, n.d.). These tribunals, alongside other global developments, reignited discussions about a permanent court. In this scenario contour has shift drastically and throughout 1995, the UN deliberated on a draft statute for the ICC prepared by the ILC and next two years, six Preparatory Committee meetings were convened for governments to address various aspects of the court. Non-governmental organizations (NGOs) and international law experts played active roles in shaping the draft statute (Glossop, 1991).

Balancing: Sovereignty v. International Crimes

A significant hurdle faced by the ILC was defining the territorial jurisdiction of the ICC. Given that the court operates based on treaties, some argued that states parties effectively relinquish their sovereignty to the ICC in cases of war crimes. Consequently, no state would willingly support surrendering its sovereignty to an international institution, as this would imply an inability to prosecute war crimes within its own jurisdiction (Sarooshi, 1999). In order to tackle this situation ICC, came up with a unique feature of principle of complementarity which cater to the needs of both the States as well the jurisdiction of ICC. ICC assumed jurisdiction over war crimes without encroaching upon the sovereign rights of a State to prosecute war crimes in its own jurisdiction. This feature is place under Article 17 of the Rome Statute in the following wordings:

Challenges of Admissibility

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.

The Statute recognizes that states bear the primary responsibility and right to prosecute international crimes. The ICC's jurisdiction is only invoked when national legal systems fail to act, including cases where they claim jurisdiction but are either unwilling or unable to genuinely conduct proceedings. This framework aims to encourage the prosecution of individuals accused of crimes demonstrate in Article 5 within the domestic legal systems of as many states as possible, enhancing the enforcement of international humanitarian law (IHL). Thus, the ICC respects the sovereignty of states by recognizing their primary jurisdiction. Besides, considerations such as the efficiency and effectiveness of prosecutions by states, as well as their access to evidence, witnesses, and resources it also backings this approach. Therefore, the goal is to ensure that the most serious international war crimes are not left unpunished, thereby ending impunity (Sarooshi, 1999). The principle of complementarity establishes a preference for prosecutions in domestic courts, contrasting with the approach of the Criminal Tribunals established in former Yugoslavia (ICTY) and Rwanda (ICTR). While primacy is shifted to favor the state, Article 17(2) grants the ICC the authority to assess the adequacy of a domestic investigation or prosecution and determine whether to proceed with a case in the Court. Similarly, if a domestic trial has already occurred, the legal stance remains analogous.

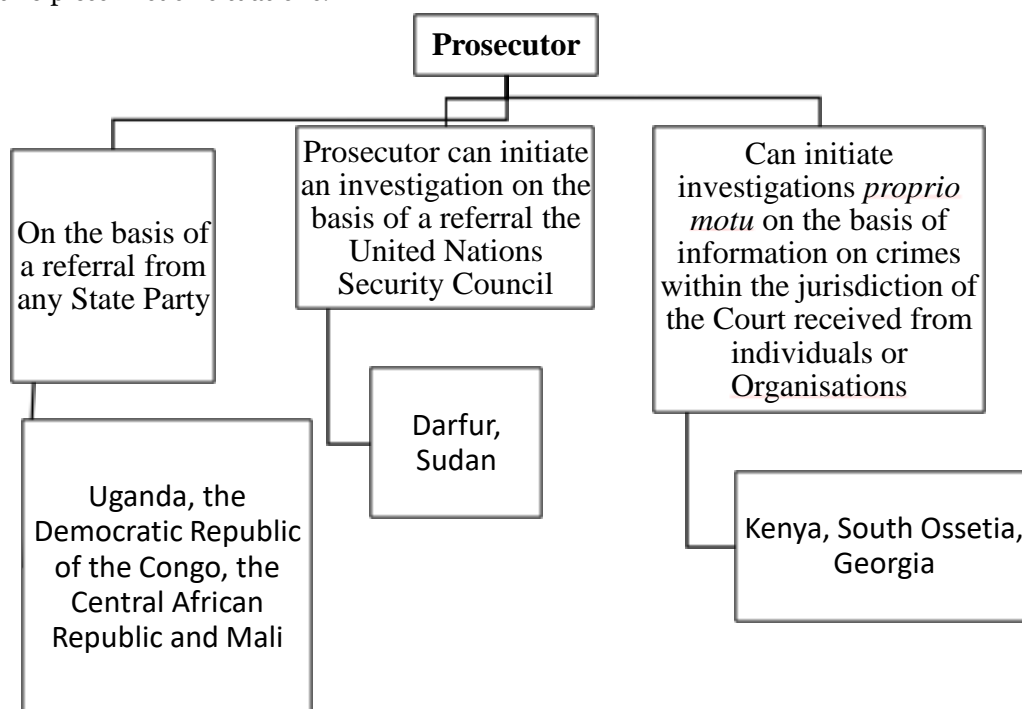
Role of Prosecution in ICC

The most important issue is that when can a matter be taken up to ICC. The question is simple to be answered Article 13¹ of the Statute. States can itself refer the matter to ICC as in the cases of Uganda, Congo in accordance with Article 14 of the Statute or the prosecutor can initiate an investigation at his or her own discretion in accordance with Article 15 of the Statute. The question of prosecution poses the most fundamental challenge when the State has not signed Rome Statute. In such cases, ICC still holds jurisdiction if the matter is referred to the Prosecutor by United Nations Security Council acting under Chapter VII of the UN Charter. The Rome Statute does not fail to prosecute the war criminals in cases where the State is not a party provided the matter

¹ The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

is referred by the UN Security Council. This is one of most significant provisions of statute of ICC which does not leave it helpless in such situations.



Brief History of ICC

The prosecution of international war crimes has historical roots dating back to 1921 with the Leipzig War Crimes Trials (IHL, 2021). These trials intended to hold alleged German war criminals from World War I accountable under the penalties outlined in the Treaty of Versailles. During WW-I Allied leaders introduced the concept that defeated enemy leaders should face criminal charges for violations of international law committed during the conflict. This notion was formalized during the Paris Peace Conference in 1919, where the Allied governments established the Commission of Responsibilities to propose recommendations for this purpose. The article 227 of the Treaty of Versailles envisaged for the creation of a special tribunal, comprised of judges from each major Allied power Britain, France, Italy, the United States, and Japan. Further, the article 228 permitted Allied governments to prosecute German war criminals in their military tribunals, regardless of any ongoing proceedings in German courts, growing concerns about double jeopardy. These military tribunals were set up to handle such cases (IHL, 2021). As a result, the German government was required to comply with any extradition order issued by the Allied powers to that effect. Although in the end, only twelve individuals were brought to trial in Leipzig. In fact, the punishments awarded were very lenient and only 6 people were finally convicted (Menon, 2006). The trial was not effective but it bought in the new concept of punishing international war crimes. The Nuremberg (History, 2019) and Tokyo (Historian, n.d.) Trials followed by WW-II again reiterated that war crimes shall not go unpunished (Walkinshaw, 1949).

Current Development

The establishment of the ICC is a milestone in international criminal law, there were numerous trials which took place within its umbrella. Although, there were few, which were based on domestic in nature but also carried the international colors? One such example is Bangladesh International War Tribunal formed after the Bangladesh Liberation War, a revolution and armed conflict encouraged by the Bengali nationalist movement in East Pakistan, culminated in the independence of the People's Republic of Bangladesh and the Bangladesh genocide in 1971 (Q.C., 2015). In response, the Bangladesh Parliament established the International Crimes Tribunal (Tribunal, n.d.) to prosecute individuals involved in atrocities during the 1971 in Bangladesh Liberation War, regardless of nationality or affiliation with armed forces. However, key perpetrators, such as Pakistani soldiers, remained beyond the reach of these courts. The War Crimes Fact Finding Committee, tasked with investigating and gathering evidence, concluded its report in 2008, identifying 1,600 suspects. This tribunal had a distinctive hybrid nature. The most significant case involved the prosecution of Omar Hassan Ahmad al-Bashir (Scharf, 2018), President of Sudan and leader of the National Congress Party, by the ICC. Al-Bashir rose to power in 1989 through a military coup that ousted the democratically elected government of Prime Minister Sadiq al-Mahdi. The UN Security Council can refer situations to the ICC's Chief Prosecutor. In July 2008, the ICC prosecutor accused Bashir of genocide, crimes against humanity, and war crimes in Darfur. In March 2009, Al-Bashir became the first sitting president indicted by the ICC, accused of orchestrating a

campaign involving mass killings, rape, and looting against civilians in Darfur (Ssenyonjo, 2010). Moreover, sometimes prosecution of war crimes in domestic courts can pose a great risk. For e.g. in Iraqi Special Tribunal for murder of 148 Iraqi (2006) wherein Raouf Abdul Rahman sentenced dictator Saddam Hussein to death by hanging in 2006. The judge was reportedly captured and killed by militants. Iraqi government is hitherto to confirm his death. But have not denied his capture (CROSSLEY, 2014). Judge thought to have been killed in retaliation for death of Saddam Hussein. Also, sometimes, the country itself or other factors may play a role and make the trial in domestic court infeasible (Watch, 2004). Another incident also took place in Kenya when General election was held in Kenya, in 2007 and rejection of election results on account of large scale electoral fraud. As a result, violence spread throughout the country. An estimated 1,200 people died and more than 500,000 were displaced from their homes. Violence was mainly perpetrated along tribal lines. Waki Report submitted, Charged for Crime against humanity (BATES, 2012). In 2012, Mr. Kenyatta became the first head of state to face charges before the court. The prosecution requested additional time to strengthen their case, citing instances of witness bribery and intimidation, as well as the Kenyan government's reluctance to provide crucial documents. Human Rights Watch (HRW) also criticized the Kenyan government for hindering the pursuit of truth. Prosecutors stated that the evidence had not sufficiently improved to establish Mr. Kenyatta's alleged criminal responsibility beyond a reasonable doubt. The tussle between Kenya and ICC was finally resolved via principle of complementarity. The proposed alternative of suspensions of the ICC investigations and transfer of the cases to Kenya, possibly on condition that the prosecutor monitor the cases and report back to the pretrial chamber every six months, would have better respected those goals while maintaining safeguards against the risk of allowing impunity to prevail for the heinous crimes against humanity committed in Kenya (Jalloh, 2012). During Sri Lankan Civil War (2009), Sri Lankan military forces and the rebel Liberation Tigers of Tamil Eelam were involved in war crimes during the conflict in 2009. These crimes included attacks on civilians and civilian structures, executions of combatants and prisoners, enforced disappearances by the military and paramilitary groups, and the recruitment of child soldiers by the Tamil Tigers. While Sri Lanka is a signatory to the Geneva Conventions, it is not a party to the Rome Statute. The UN has found compelling evidence indicating war crimes were committed in Sri Lanka during the final stages of the civil war and has called for the establishment of a special "hybrid" international court to investigate those accountable for the most egregious atrocities (Perera, 2009). Former Sri Lankan President Mahinda Rajapaksa has expressed opposition to the international war crimes mechanisms created by the United Nations and has urged all parties in the country to reject the passage of new laws aimed at prosecuting members of its armed forces, seemingly out of concern for potential repercussions for his alleged involvement in war crimes against ethnic Tamils during the 26-year-long civil war that concluded in 2009 (UNHRC, n.d.). The ICC could significantly investigate and prosecute war crimes in Sri Lanka if the UN Security Council decides to refer the matter to the ICC. In 2010, UN Secretary-General Ban Ki-Moon established a panel of experts known as the "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka". The Sri Lankan government intensely opposed the panel's appointment, denouncing it as an unjustified interference in its sovereignty. There is most significant external pressure on Sri Lanka to address these allegations and ensure fair prosecution of perpetrators. ICC in 2023 issued a warrant for Russian President Vladimir Putin on March 17, 2023, for alleged war crimes related to the deportation of Ukrainian children to Russia during the 2022 invasion of Ukraine (Khan, 2023). It was most significant development as Putin is a sitting head of state, which complicates the enforcement of such warrants due to issues of diplomatic immunity and international relations. ICC also seeking arrest warrants against Sinwar and Netanyahu for war crimes over October 7 and Gaza (Araujo, 2024)

Conclusion

The principle of complementarity within the ICC provides states with the flexibility to affirm their sovereignty within their territorial jurisdiction while still upholding the international imperative to prosecute perpetrators of war crimes. This safeguards that those responsible for such crimes are held accountable and not allowed to evade justice. The existence of the ICC serves as a pressure point on domestic courts to pursue cases involving war crimes, thus potentially saving time that would otherwise be spent establishing ad-hoc tribunals. It significant advantage of the ICC is its assertion of individual criminal liability, which serves as a deterrent and sets an example for society at large. It also demonstrates that perpetrators of war crimes will face severe consequences and that the international community will not remain mere speculator. The ICC prosecution also important in a situation where national courts are unwilling or unable to prosecute, providing justice for civilians who have lost faith in their own judicial systems.

References

1. Araujo, I. K. a. M., 2024. *Exclusive interview: ICC prosecutor seeks arrest warrants against Sinwar and Netanyahu for war crimes over October 7 and Gaza*. [Online] Available at: <https://edition.cnn.com/2024/05/20/middleeast/icc-israel-hamas-arrest-warrant-war-crimes->

- [intl/index.html#:~:text=The%20decision%20puts%20Netanyahu%20in,of%20his%20capture%20and%20killing](#) [Accessed 27 May 2024].
2. BATES, E. S., 2012. INTRODUCTORY NOTE TO THE INTERNATIONAL CRIMINAL COURT APPEALS CHAMBER: PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI. 51(1), pp. 1-17.
 3. CROSSLEY, L., 2014. *Judge who sentenced Saddam Hussein to death 'is captured and executed by ISIS'*. [Online] Available at: <https://www.dailymail.co.uk/news/article-2665360/Judge-sentenced-Saddam-Hussein-death-captured-executed-ISIS.html>[Accessed 13 May 2024].
 4. Glossop, R. J., 1991. "Creating an International Criminal Court: Giant Step Forward for World Law". *Peace Research*, 31(1), pp. 1- 12.
 5. Gruppe, S., n.d. *Genocide Since 1945: Never Again?*. [Online]Available at: <https://www.spiegel.de/international/genocide-since-1945-never-again-a-338612.html> [Accessed 12 April 2024].
 6. Historian, O. o. t., n.d. *The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)*. [Online]Available at: <https://history.state.gov/milestones/1945-1952/nuremberg>[Accessed 12 April 2024].
 7. History, 2019. *Nuremberg Trials*. [Online] Available at: <https://www.history.com/topics/world-war-ii/nuremberg-trials> [Accessed 2 May 2024].
 8. ICC, 2020. *Understanding the International Criminal Court*. [Online]Available at: <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> [Accessed 12 April 2024].
 9. ICC, n.d. *The ICC at a Glance*. [Online]Available at: <https://www.icc-cpi.int/sites/default/files/Publications/ICCAatAGlanceENG.pdf> [Accessed 12 April 2024].
 10. IHL, 2021. *the Report of Proceeding befor Supreme Court in Lipzig*. [Online]Available at: <https://ihl-databases.icrc.org/en/national-practice/report-proceeding-supreme-court-leipzig> [Accessed 1 May 2024].
 11. Jalloh, C. C., 2012. Situation in the Republic of Kenya",. *The American Journal of International Law*, , 106(1), pp. 118-125.
 12. Khan, K., 2023. *Arrest warrant against Vladimir Putin: What powers does the ICC have against the Russian president*. [Online]Available at: <https://indianexpress.com/article/explained/explained-global/arrest-warrant-putin-power-icc-russian-president-8505138/> [Accessed 27 May 2024].
 13. M. Cherif Bassiouni, ' A. H. i. I. C. L., n.d. *Crimes Against Humanity in International Criminal Law*. p.179 ed. 1992: Martinus Nijhoff Publishers.
 14. Menon, T., 2006. Reflections on the Prosecution of War Crimes by International Tribunals. *The American Journal of International Law*, 100(1), pp. 551-579.
 15. Meusum, N. W.-I., n.d. *Tokyo War Crimes Trial*. [Online]Available at: <https://www.nationalww2museum.org/war/topics/tokyo-war-crimes-trial>[Accessed 13 April 2024].
 16. Perera, J. B. i. D. a. A., 2009. *UN calls for Sri Lanka war crimes court to investigate atrocities*. [Online] Available at: <https://www.theguardian.com/world/2015/sep/16/un-seeks-special-court-to-investigate-sri-lanka-war-atrocities> [Accessed 12 January 2024].
 17. Q.C., G. R., 2015. *REPORT ON THE INTERNATIONAL CRIMES TRIBUNAL OF BANGLADESH*. [Online] Available at: <https://barhumanrights.org.uk/wp-content/uploads/2015/02/REPORT-ON-THE-INTERNATIONAL-CRIMES-TRIBUNAL-OF-BANGLADESH.pdf> [Accessed 13 May 2024].
 18. Sarooshi, D., 1999. "The Statute of the International Criminal Court". *The International and Comparative Law Quarterly*,, 48(2), pp. 387-404.
 19. Scharf, M. P., 2018. The International Criminal Court's Arrest Warrant for Omar Al Bashir, President of the Sudan. *International Legal Materials*, 48(3).
 20. Ssenyonjo, M., 2010. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan",. *The International and Comparative Law Quarterly*, V, 59(1), pp. 205-225.
 21. Tribunal, I. C., n.d. *International Crimes Tribunal-1, Bangladesh*. [Online] Available at: <http://www.ict-bd.org/ict1/>[Accessed 13 May 2024].
 22. UNHRC, n.d. *30th session of the Human Rights Council: Reports*. [Online] Available at: <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session30/list-reports> [Accessed 14 May 2024].
 23. UNO, 1949. *A/CN.4/5 The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General*. [Online]Available at: https://legal.un.org/ilc/documentation/english/a_cn4_5.pdf[Accessed 13 April 2024].

24. UNO, 1993. *International Criminal Tribunal for the former Yugoslavia*. [Online] Available at: <https://www.icty.org/>[Accessed 14 April 2024].
25. UNO, n.d. *United Nations International Residual Mechanism for Criminal Tribunals*. [Online] Available at: <https://unictr.irmct.org/>[Accessed 16 April 2024].
26. Walkinshaw, R. B., 1949. The Nuremberg and Tokyo Trials: Another Step Towards International Justice”,. *American Bar Association Journal*, , 35(4), pp. 299-302, 362-363.
27. Watch, H. R., 2004. *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*. [Online] available at: <https://www.hrw.org/report/2004/10/13/justice-risk/war-crimes-trials-croatia-bosnia-and-herzegovina-and-serbia-and> [Accessed 14 May 2024].
28. Wood, S., 1996. “Should We Have a Permanent International Criminal Court?” Human Rights,. *American Bar Association*), 23(1), pp. 30-31 .