The International Criminal Court Statute and State Sovereignty: The Implicit Impact of the Complementarity Principle

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1. Introduction

Article 1 of the International Criminal Court (ICC) Rome Statute specifies the limits of the relationship between domestic and international jurisdictions, and confirms that the priority for jurisdiction is with national courts. (Badar et al., 2014) as follows:

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute. (Lee, 1999).

Based on this provision, a state with jurisdiction to consider a specific case has the opportunity to pursue the criminal case itself without any external interference, particularly since the purpose of establishing the ICC was to ensure that international crimes are punished through the courts within the national judiciary. In order to achieve such trials, national legislation must provide for the punishment of the same acts described in the ICC Statute, so that national courts may prosecute and impose punishment as prescribed in national legislation. (Benedetti & Washburn, 1999) Consequently, ICC jurisdiction is complementary, or, as some prefer, a reserve. Several texts in the statute provide general clarification of the notion of ICC complementary jurisdiction, without examining its legal nature. However, the latter has a clear impact on the sovereignty of the State in terms of the elements of its implementation, and this particularly concerns Article 17 on admissibility and the conditions under which the ICC can accept for review a lawsuit filed before it. (Cisse, 1997) judicial jurisdiction over international crimes before the establishment of the ICC was similarly concurrent or joint jurisdiction, with priority for the International Court over the national. (Bassiouni, 1995) However, the reality of special and interim international criminal courts, such as for Yugoslavia and Rwanda, has proven that the application of the idea of concurrent jurisdiction is unfeasible. (Solera, 2002) This practical application has revealed that the principle of jurisdiction has affected the concept of state sovereignty, and this has led to calls for a new principle or idea on the concept. Moreover, there is also a need to find a new principle or idea to establish the jurisdiction of the permanent ICC with a view to fighting the phenomena of immunity and impunity.

For these reasons, the International Law Commission established the ICC and drafted its statute. Despite objections, it proposed that the complementarity principle (or complementary jurisdiction of the ICC) remained at every stage of the negotiations to ratify the statute, until it was approved. (Magnarella, 1994) The delegations to the Rome Diplomatic Conference which met to draft the ICC Statute agreed that the relationship between national jurisdiction and the International Court would not be similar to the relationship between the national...
The ICC also of international concern. Because it is based on the principle of non-complementarity, the ICC is the first permanent international institution established by treaty to investigate and prosecute serious international crimes of international concern. Its competencies are limited to the responsibility of natural persons, where there are international legal obligations to investigate, prosecute, or extradite the accused. The ICC's jurisdiction is limited to crimes committed after the treaty entered into force, or crimes occurring after the entry into force of a declaration made by a State party. The ICC is only empowered to examine and investigate serious international crimes, such as war crimes, crimes against humanity, and genocide. The ICC is not a substitute for national courts, and its jurisdiction is complementary to national courts, meaning that it only investigates and prosecutes crimes when a State is unwilling or unable to do so.

2.2 The Relationship between Domestic Judicial Jurisdiction and ICC Jurisdiction

The ICC is unique in that it is the first permanent international institution established by treaty to investigate and prosecute serious international crimes of international concern. Its competencies are limited to the responsibility of natural persons, where there are international legal obligations to investigate, prosecute, or extradite the accused. The ICC's jurisdiction is limited to crimes committed after the treaty entered into force, or crimes occurring after the entry into force of a declaration made by a State party. The ICC is only empowered to examine and investigate serious international crimes, such as war crimes, crimes against humanity, and genocide. The ICC is not a substitute for national courts, and its jurisdiction is complementary to national courts, meaning that it only investigates and prosecutes crimes when a State is unwilling or unable to do so.

The ICC adopts the legal principles accepted in criminal law in terms of the principle of nationality, but it also states that there is no crime or punishment except with a provision, as in Article 22(1) of the Rome Statute, and the non-reactoriory principle, stated in Article 24(1) of the Statute of the ICC. The ICC also adopts the principle of individual responsibility for committing a crime, in Article 25(1). Crimes within the jurisdiction of the ICC are not subject to the statute of limitations, and this is outlined in Article 29 of the ICC Statute, and the principle of non-consideration of the official capacity of perpetrators of international crimes.

The ICC therefore interferes to complete the shortcomings of the national judiciary that jurisdiction is set for the ICC, when the preconditions set in Article 12 of the ICC Statute are fulfilled. These are: the crime under investigation occurred in a State's territory, and the State's territory is unable to prosecute or investigate the case; and, a State refuses to prosecute the perpetrators, i.e., according to the principle of judicial integration. The ICC’s jurisdiction is characterised by the fact that it requires a set of basic conditions for its jurisdiction to be met. These basic conditions relate in principle to the relationship of the State with the ICC, such that a State should be one of the following three types of country (which means a circumstantial description attached to a State): (Badar et al., 2014)

a) A member of the Rome Statute;

b) A State which accepts the jurisdiction of the ICC by declaration and in accordance with the Statute;

c) A State related to a specific case referred to the ICC by the Security Council.

The second condition requires the adoption of one of the basic principles of jurisdiction: that the illegal act has occurred within the territory of the concerned (territorial) State, or by a person belonging to that (personal) State. The jurisdiction of the ICC is concerned with specific crimes, and yet the means of referral in them deal with a 'case'. This means that certain material conditions are met. For example, when the Security Council or the State concerned is the referree, or a prosecutor initiates an investigation, the case is examined in terms of whether an international crime has been committed according to a set of exclusively defined crimes. Moreover, a reasonable basis must exist upon which to start the investigation with the permission of the court. (Darwish, 2019) This is a secondary condition once it is discovered that the State concerned has conducted, or is conducting, an investigation on the matter. (Asante-Darko, 2003) Following this, the prosecutor resorts to adhering to the condition thoroughly, since the State’s failure to undertake an investigation provides him/her with an ideal opportunity to stick to the condition; this is an essential aspect of the complementarity principle. In this way, the ICC’s jurisdiction constitutes a supervisory role over the jurisdiction of the State through the obligations established in the Statute of the ICC. This restriction is despite the fact that the States have the right to try those who commit crimes falling within the jurisdiction of the court,
where the ICC decides, in a resolution according to Article 19 of the Rome Statute. (Hassan, 2014) At this stage in the lawsuit, the domestic court may appeal for jurisdiction to consider a specific lawsuit. Such an appeal must be accepted at any stage it is raised. (Wandieen, 1987) This resolution is very important, especially regarding the issue of complementarity. At the time a State seeks to challenge ICC jurisdiction, the International Court’s prosecutor examines the evidence and the means to find proof of the admissibility of the case by the court. (Morris, 2001) This matters highly significant, especially in the initial phase of examining the question of admissibility even before performing any investigation or the court’s acceptance of the particular lawsuit. (Heath, 2012) The important and sensitive role of the pre-trial body and the text specified in Articles 15 and Article 19 lead the way to one of two directions, as the primary stage of the jurisdiction system, as follows: (Dörmann, 2003)

a) Strengthening the role of the State concerned, to take the initiative and gain precedence in exercising jurisdiction under the supervision of the ICC, so that no pre-trial body can permit or request the public prosecutor to waive the investigation to the State, if it sees reasonable justification for this;

b) The initial acceptance of the lawsuit grants the public prosecutor permission to initiate the investigation, noting that it has accepted the appeal by the State, the public prosecutor, and/or the accused person and their right to appeal.

The court will immediately revoke its decision when there is a new basis in the lawsuit or new facts that nullify the basis upon which such a decision was issued. Article 17(1) of the Statute stipulates that the ICC may accept a lawsuit in certain cases, or reject it to leave jurisdiction with national courts. This presents a negative picture of the concept of complementarity, as it acknowledges that it is not admissible for the ICC to consider a lawsuit in the following four cases: (Durham, 2017)

a) If the competent State with jurisdiction has initiated an investigation or prosecution in any of the crimes committed according to the Statute;

b) If the State competent to hear the lawsuit has conducted an investigation and preferred not to prosecute the accused person;

c) If the accused person has been tried for the criminal behaviour which is the subject of the lawsuit;

d) If the lawsuit is insufficiently serious, the court is then justified in adopting another action.

From the viewpoint of several researchers, the ICC has no superior judicial authority over national criminal jurisdiction, except for its implicit authority to exercise a ‘supervisory’ role over judicial jurisdiction over the crimes stipulated in the ICC Statute. (Mwai, 2016) In the four abovementioned scenarios, the ICC can decide not to consider a lawsuit and waive its jurisdiction by declaring that the lawsuit inadmissible. Although Article 1 of the Rome Statute of the ICC has explicitly stated that the ICC complements national criminal jurisdictions — i.e. that the ICC is not above the national courts and that true jurisdiction for the crimes in a State is subject to the national courts — the exception to this statement do provide the ICC with a higher authority than the national courts. This conclusion is based on several factors, including that the ICC has the right to monitor national courts, and may seize jurisdiction from national courts and take legal action. Indeed, the ICC directly monitors national courts in the following areas:

a) National investigation and trial procedures. This means that the ICC interferes with domestic judicial work, especially if this work is based on State laws as applied by the national courts. The involvement of the ICC in such monitoring means compromising the independence of the State’s judiciary. If the State itself is unable to monitor the courts’ proceedings, then it is questionable whether an international body can supervise a national judiciary;

b) If the national courts are late in resolving a lawsuit, or if their procedures are slow. In such a case, the ICC monitors the functioning of the national courts and interferes with the investigation and trial procedures. Although such procedures should not be interfered with even by the State’s supreme courts, the ICC may monitor them;

c) If the national judiciary suffers interference from State authorities. Here, the ICC oversees the independence of the judiciary and whether it suffers from political domination by the State. This scenario violates the political sovereignty of the State. For example, executions are only carried out following the decision of the competent authority, and the intervention of the ICC would mean interference in the politics of the State in question;

d) If the judicial system in the State is weak and unable to undertake judicial procedures. This is one of the most common instances of ICC interference; in doing so, the ICC assesses that the State’s judiciary is weak and unable to prosecute persons accused of important crimes. Its subsequent interference is an assault on the judiciary of the State and interference in internal affairs;

e) Where the ICC believes that the measures taken against an accused suggest exemption from criminal responsibility, its supervision over national courts clearly indicates that it interferes even with decisions issued by national courts.

Based on the above, if Article 1 of ICC Rome Statute stipulates a general rule stating that the original jurisdiction belongs to the national courts, and that the ICC has jurisdiction which is ‘complementary’ to the
national courts and an extension thereto, the exceptions permitting the ICC to interfere and prosecute turn these exceptions into rules, and these rules into exceptions. Currently, the ICC is entitled to supervise procedures and determine responsibility, and so the right to seize jurisdiction from the national courts by performing the procedures in their stead renders the ICC with primary jurisdiction. If this rule were fully applied to all countries that consider international crimes, and there are many at present, the ICC would have the right to supervise the functioning of the courts in all countries of the world, so long as crimes of torture, injury, or insult are committed systematically against a specific group of people, resulting in an illegal conclusion. In this case, the principle of the independence of a national judiciary collapses. (Morris, 2001) If a state, with its full legislative and executive powers and authority, does not interfere in the affairs of its judiciary, how can a foreign committee be entitled to interfere in that state’s judiciary. (Hassan, 2014)

3. The Supervisory Role of the ICC over Domestic Judicial Jurisdiction

As noted in the Introduction, Article 1 of the ICC Statute determines the limits of the relationship between domestic and international jurisdictions, and confirms that the former has priority of jurisdiction. However, in Article 17 of the Statute, the ICCs given the right to hear a case or lawsuit, despite its previous consideration by a national judiciary, in the following cases:

- a. When the State with jurisdiction is unwilling or unable to undertake an investigation or prosecution; (Wandieen, 1987)
- b. When the State with jurisdiction decides not to prosecute due to being unwilling or unable. (De Hoon, 2018)

In other words, the ICC may intervene if the State reports an unwillingness or inability to investigate or prosecute. However, the question which arises at this point is whether the ICC Statute has left the determination of these concepts open, without restrictions, or whether these concepts are exclusively specified. While certain cases and examples may be referred to, these may be insufficient in the consideration of the two concepts. In the text of Article 17 of the Statute, as well as the cases in which the court decides on the inadmissibility of the lawsuit and gives jurisdiction to national courts, inadmissibility is restricted by certain conditions.

Article 17 states two conditions to determine admissibility: unwillingness and inability. With regard to unwillingness, the Statute mentions three cases used to determine unwillingness to consider a specific lawsuit, through the ICC’s consideration of the availability of one or more of the following: (1) The undertaking of an investigation or issuance of a national decision in the lawsuit protected the accused from criminal responsibility for crimes within the jurisdiction of the ICC; (2) Undue delay in the performance of litigation and investigation procedures, in contradiction with the intention to bring the person concerned to justice; and, (3) Failure to initiate litigation procedures independently or impartially, or procedures were initiated or conducted in a manner inconsistent with the circumstances or intention of bringing the person concerned to justice. (Burens, 2016) Regarding inability, the ICC identifies a state’s inability as a total or fundamental collapse of its national judicial system, its inadequacy in bringing or obtaining the necessary evidence and affidavits, or the inability to conduct procedures for any other reason. (Vinjamuri, 2016) These criteria refer to the concept of bad faith they restrict states from exercising jurisdiction in such cases where the ICC concludes they are unwilling or unable considering those criteria. (Tallman, 2004) They ensure that the most important and supreme principles of criminal justice are represented, by bringing perpetrators of international crimes to justice. (Okurut, 2018).

On the grounds of vagueness, some have criticised certain of these criteria, such as that of undue delay in taking necessary measures, or behaving in a manner inconsistent with the aim of bringing the person concerned to justice in order to protect that person from criminal responsibility. (Badar et al., 2014) However, the responsibility for proving unwillingness or inability lies with the ICC, and moreover the State itself has the right to prove its ability or willingness, in accordance with the provisions of the Statute and the rules and procedures for proof before the Court. In other words, the State which exercises judicial jurisdiction over a specific lawsuit, and which conducts proper investigation and prosecution, may decide, on sound grounds, to preserve or end the investigation; in a such case, the lawsuit shall not be accepted before the ICC. (Lee, 1999; Tallman, 2004) We may also go further in this response by stating that, while it is the ICC which decides that adelay is unjustified based on the provisions of its Statute, such a criterion is difficult to control. In addition, there is no justification for delaying the prosecution of international crimes, and indeed any delay against this lofty goal is unjustified. (Moffett, 2013).

At the drafting conference for the Rome Statute, there was wide debate among the State representatives on how to determine the concepts of unwillingness and inability. Some States opined that their use narrowed the competence of the Court, since both terms carry a broad meaning dominated by subjective, rather than objective, criteria. (Zvobgo, 2019) Those who agreed with this opinion preferred the term ‘ineffective’ to ‘unwilling’, and the term ‘unavailable’ to ‘unable’. (Bower, 2019) This preference was justified by saying that ineffectiveness is based on national judicial procedures, while unavailability is focused on the national judicial system as a whole,
and that the latter embodies an objective criterion that determines whether the national system is qualified to exercise jurisdiction in considering crimes within the Rome Statute. (Okurut, 2018) The stance in this paper is in agreement with this opinion, because the criterion is set by the public prosecutor, whereby inefficiency and unavailability encompass a broader space in which national systems may adopt measures that are prejudicial, and hold sham trials. (Vinjamuri, 2016) These measures thus provide impunity. Moreover, these criteria constitute a restriction on state jurisdiction as they grant the public prosecutor with the authority to define the criteria themselves. (Mwai, 2016).

3.1 Conclusion and future research

First, the ICC has a supervisory role in the abovementioned cases of apparent unwillingness or inability. It works by monitoring the national judiciary without prejudice to the sovereignty of States, and thus the complementarity principle embodies a kind of ICC supervision of the national judiciary in lawsuits of high risk. (Heath, 2012) Second, the complementarity principle assumes that the international crimes stipulated in the Rome Statute are included in the national laws of the States parties, in line with the international obligations of being party to a treaty, and within the framework of the so-called harmonisation of a State’s national legislation with international agreements. (Wandieen, 1987) In addition to these international obligations, States are committed to amending their domestic laws in accordance with the obligations arising from these international agreements. (Asante-Darko, 2003) In other words, one natural result of the complementarity principle is that it constitutes a strong incentive for States party to the Rome Statute to amend their domestic legislation and law, to ensure their ability to exercise national jurisdiction in line with international obligations resulting from their entry into the Rome Statute. (Dörmann, 2003) This is a stable principle in international law and it imposes an obligation on States to perform appropriate amendments to their legislation, with a view to compliance with the international treaty or obligation, when there is inconsistency with international obligations. These States must amend their domestic legislation, or create new legislation which criminalises acts constituting the elements of crimes as set out in the Rome Statute. (Okurut, 2018)

Third, regarding the vagueness of the criteria of unwillingness or inability, the ICC plays a ‘supervisory’ role over domestic jurisdiction. The principle of the complementary jurisdiction of the ICC was affirmed in Article 1 of the Statute, which describes how States party to the Statute confirm that the criminal court established under this system will be complementary to the national criminal jurisdiction. (Bower, 2019) From this, it follows that the ICC may not initiate proceedings in relation to a crime if the national judiciary has already initiated a proper investigation, or has taken a sound and express decision therein. (Vinjamuri, 2016) In doing so, the State exercises national sovereignty and meets the conditions for a serious and impartial decision. (Vinjamuri, 2016) However, because of the objections to the potential impact of the ICC on the sovereignty of States, the ICC’s complementary jurisdiction was established with regard to the principle of sovereignty. (De Hoon, 2018) The impact of this was that such sovereignty was no longer absolute, as some members of the Statute Drafting Committee emphasised, in order not to impinge national efforts to punish the perpetrators of international crimes, based on the principle of universal jurisdiction. (Bower, 2019) Attendees in Rome thus agreed on the principle of complementary jurisdiction of the ICC. From this, it appears that the basis for investigation and prosecution under the ICC Statute is the State’s duty according to its national criminal jurisdiction, where the role of the ICC complements the national criminal judiciary, as it exercises jurisdiction only in certain cases and conditions. (Durham, 2017).

Fourth, through these characteristics and terms of reference, the concept of the jurisdiction of the ICC under the Rome Statute can be understood. The ICC, when exercising its jurisdiction as an international judicial entity, is not considered a foreign criminal jurisdiction, nor an alternative jurisdiction to the national jurisdiction of States for the consideration of an international crime. (Moffett, 2013) This is because describing a crime as international is not enough to justify the jurisdiction of the ICC, and because the basis of the Statute is that it is the duty of every State to prosecute the perpetrators of international crimes under its own criminal jurisdiction. (Holmes, 2002).

Lastly, the original principle in jurisdiction is that it is a national concept, and that international judiciary does not intervene, except in certain cases, to achieve justice for the victims of genocide, war crimes, crimes against humanity, and the crime of aggression. (Hassan, 2014) The Rome Statute requires party States to take appropriate measures at the national level to end impunity for the perpetrators of these crimes, reminding such States of their primary role, stressing their responsibility in this regard, and encouraging them to exercise their jurisdiction in view of the crimes under the ICC Statute. (Wandieen, 1987) The Statute has also developed the necessary controls to transfer jurisdiction to the ICC to prosecute these crimes. (Tallman, 2004) The nature of the relationship between national and ICC jurisdictions can thus be used to determine the concept of complementarity because it suits this relationship, which is characterised as a complementary relationship with respect to the jurisdiction of the ICC since priority is given to national jurisdiction. (Hassan, 2014; Holmes, 2002).
4. Conclusion and future research

The following general conclusions may be drawn:

a) Article 1 of the ICC Rome Statute stipulates as a general rule that original jurisdiction lies with national courts and that the ICC is a ‘complementary’ jurisdiction to these courts, and an extension thereto. Exceptions to this rule have given the ICC the right to interfere and prosecute, and as such have turned the exception into a rule, and the rule into an exception. Currently, the ICC is entitled to supervise procedures, rule, and determine responsibility, and thus it has the right to seize jurisdiction from national courts by performing such procedures instead; this fact renders the ICC the entity with primary jurisdiction.

b) The ICC may not initiate proceedings in relation to a crime if the national judiciary has already initiated an investigation or taken a sound and express decision therein, expressing the national sovereignty and meeting the conditions for a serious and impartial decision.

c) The criteria of unwillingness and inability are vague. An example is the criterion of delay, without justification, in taking the necessary measures or behaving in a manner inconsistent with the objective of bringing the accused to justice, as a measure to protect that person from criminal responsibility; this means that the ICC plays a ‘supervisory’ role over domestic jurisdiction.

The paper makes two recommendations: A State should enact new legislation which includes the criminalisation of acts constituting the elements of crimes set out in the Rome Statute, to ensure the enactment of that State’s national jurisdiction, in line with its international obligations; as well as the criteria for unwillingness and inability should be based on subjective judgement, and not left to the judgement of the ICC.

References

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