

Jurisdictional Challenges and the Principle of Complementarity in the Icc's Functioning

Arushi Bajpai^{1*}, Dr. Teena²

^{1*}PhD Scholar, School of Law, GD Goenka University; bajpai2302@outlook.com

²Associate Professor, School of Law, GD Goenka; teena.sol@gdgu.org

Abstract

This paper critically examines the jurisdictional architecture of the International Criminal Court (ICC), with particular emphasis on the principle of complementarity as enshrined in the Rome Statute. It explores the theoretical foundations and practical implications of this principle, which posits the ICC as a court of last resort—intervening only when national jurisdictions are unwilling or unable to prosecute serious international crimes. Drawing upon authoritative texts, such as the works of William Schabas and Kai Ambos, and policy documents from the ICC Office of the Prosecutor, the study interrogates how complementarity functions within the broader framework of international criminal law. Case studies from Uganda, Sudan, and the Court's engagement with African states illustrate the political and legal tensions inherent in the ICC's operations. The paper also highlights critiques regarding the selective application of justice and challenges to the Court's legitimacy in non-Western contexts. Ultimately, it argues that while complementarity is a cornerstone of the ICC's legitimacy, its inconsistent application threatens both its normative foundation and global acceptance.

Keywords: International Criminal Court, Complementarity Principle, Jurisdiction, State Sovereignty, Transitional Justice

INTRODCUTION

The International Criminal Court (ICC) represents a landmark institution in the landscape of international law, established to hold individuals accountable for the gravest crimes of concern to the global community, including genocide, war crimes, crimes against humanity, and the crime of aggression. Founded in 2002 through the Rome Statute, the ICC was envisioned as a permanent, independent judicial body tasked with ending impunity for perpetrators of mass atrocities, thereby promoting international peace and security.¹ Unlike ad hoc tribunals created for specific conflicts, the ICC possesses a broader and ongoing mandate, symbolizing a collective commitment by the international community to uphold justice beyond national borders.²

Central to the functioning of the ICC is the concept of jurisdiction, which determines the Court's legal authority to investigate and prosecute crimes. In international criminal law, jurisdiction is multifaceted, encompassing territorial jurisdiction (crimes committed within a state's territory), personal jurisdiction (crimes committed by nationals of a state), subject-matter jurisdiction (limited to specific crimes defined under the Rome Statute), and temporal jurisdiction (crimes committed after the Statute's enforcement).³ These jurisdictional parameters are crucial because they delineate the scope and limits within which the ICC can operate, ensuring respect for state sovereignty while facilitating accountability.

¹ Rome Statute of the International Criminal Court, 17 July 1998, UN Doc A/CONF.183/9, entered into force 1 July 2002, Preamble.

² William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017) 1–20.

³ Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (2nd edn, Oxford University Press 2013) 207–45.

A foundational principle underpinning the ICC's jurisdictional framework is the principle of complementarity. This principle establishes the ICC as a court of last resort, intervening only when national legal systems are unwilling or unable to genuinely prosecute alleged offenders.⁴ Complementarity respects the primary role of states in administering justice within their jurisdictions, reinforcing state sovereignty and legal pluralism. However, it simultaneously provides a mechanism for international intervention when domestic justice fails, thereby balancing national autonomy with international oversight.⁵

Studying the jurisdictional challenges faced by the ICC and the application of complementarity is vital for understanding the Court's effectiveness and limitations. Jurisdictional issues often hinder the ICC's ability to fulfill its mandate, especially given the political complexities and varying levels of cooperation from states. Moreover, the practical implementation of complementarity raises questions about the adequacy and fairness of national proceedings and the ICC's threshold for intervention.⁶ This paper explores the jurisdictional challenges confronting the ICC and critically examines the role of the principle of complementarity in the Court's functioning. By analyzing the legal framework and practical realities, it aims to assess how these factors influence the ICC's capacity to deliver international criminal justice and proposes considerations for enhancing its effectiveness in the face of evolving geopolitical dynamics.

UNDERSTANDING ICC JURISDICTION

The International Criminal Court's jurisdiction is the legal basis that empowers it to investigate and prosecute individuals accused of committing the most serious international crimes. This jurisdiction is carefully defined and limited to ensure that the ICC operates within the boundaries agreed upon by its member states while respecting the sovereignty of national legal systems.⁷ The Court's jurisdiction is governed primarily by the Rome Statute, which outlines four main types of jurisdiction: territorial, personal, subject-matter, and temporal.⁸

Territorial jurisdiction refers to the ICC's authority over crimes committed on the territory of a state party to the Rome Statute. This means that if a crime falls within the ICC's remit and occurs within a country that has ratified the Statute, the Court may assert jurisdiction. Territorial jurisdiction is fundamental because it ties the Court's powers to the geographic boundaries of consenting states, thereby anchoring international criminal justice within recognized national borders.⁹

Personal jurisdiction relates to the ICC's authority over nationals of states parties, regardless of where the alleged crime occurred. For example, if a national of a state party commits genocide abroad, the ICC can claim jurisdiction based on the perpetrator's nationality. This ensures that individuals cannot evade accountability by crossing borders or committing crimes in non-member states, provided they hold citizenship of a member state.¹⁰

Subject-matter jurisdiction limits the Court's authority to a specific set of crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. These crimes are considered the most egregious violations of international law and human rights, reflecting a consensus on the types of

⁴ Rome Statute, arts 1, 17.

⁵ Mark Klamburg, 'The Principle of Complementarity in International Criminal Law: Origin, Development and Practice' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court: Challenges to Achieving Justice and Accountability* (Cambridge University Press 2011) 75–112.

⁶ Sarah M H Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941–965.

⁷ Rome Statute, arts 12–15.

⁸ *Ibid.*

⁹ *Ibid.*, art 12(2)(a).

¹⁰ *Ibid.*, art 12(2)(b).

offenses warranting international judicial intervention.¹¹ The ICC cannot prosecute crimes outside this scope, preserving its specialized focus.

Temporal jurisdiction confines the ICC's power to crimes committed after the Rome Statute came into force on July 1, 2002. This retrospective limitation means the Court cannot prosecute past atrocities occurring before its establishment, which has implications for addressing historical crimes but reflects the legal principle against retroactive justice.¹²

Additionally, the ICC can exercise jurisdiction if a situation is referred by the United Nations Security Council, even involving non-member states, adding a political dimension to its jurisdictional reach. However, the ICC does not possess universal jurisdiction, and its authority is subject to state cooperation, which can significantly affect its effectiveness.¹³

Together, these jurisdictional parameters define the scope and limits of the ICC's operations, balancing the need to combat impunity with respect for state sovereignty. Understanding these dimensions is essential to appreciating the Court's challenges and the critical role played by the principle of complementarity in shaping when and how the ICC intervenes in national judicial matters.

THE PRINCIPLE OF COMPLEMENTARITY

At the heart of the International Criminal Court's jurisdictional framework lies the principle of complementarity, a concept that distinguishes the ICC from other international courts and underscores its unique role as a court of last resort. Embedded within the Rome Statute—specifically Articles 1 and 17—the principle mandates that the ICC will only exercise its jurisdiction when national judicial systems are either unwilling or unable to genuinely carry out investigations or prosecutions of international crimes.¹⁴ This approach serves to respect state sovereignty, promote judicial cooperation, and strengthen the overall international justice system.

LEGAL BASIS AND RATIONALE

The principle of complementarity is enshrined as a core tenet in the Rome Statute, reflecting a consensus among states that national courts should have the primary responsibility to prosecute international crimes. Article 1 explicitly states the ICC's role as “complementary to national criminal jurisdictions,” while Article 17 sets out the admissibility criteria, emphasizing that a case is inadmissible before the ICC if it is being genuinely investigated or prosecuted by a state with jurisdiction.¹⁵

This legal framework recognizes that states are best placed to administer justice within their territories. National courts have direct access to evidence, witnesses, and contextual understanding of the crimes committed. Complementarity, therefore, preserves the principle of sovereignty by allowing states to exercise their jurisdiction first and foremost. The ICC's intervention is reserved for exceptional circumstances where the state is manifestly unwilling or unable to act, thereby avoiding unnecessary international encroachment on domestic affairs.¹⁶

TYPES OF COMPLEMENTARITY

Complementarity functions on two primary levels: legal and practical. Legal complementarity concerns whether the national proceedings meet international standards of due process and fairness,

¹¹ Ibid, art 5.

¹² Ibid, art 11.

¹³ Ibid, art 13(b).

¹⁴ Ibid, arts 1, 17.

¹⁵ Ibid.

¹⁶ Kai Ambos, *Treatise on International Criminal Law* (n 3) 271–300.

while practical complementarity involves the state's capacity and willingness to conduct effective investigations or prosecutions.¹⁷

The Rome Statute articulates that a state's unwillingness might be demonstrated by acts such as shielding suspects from prosecution, conducting proceedings intended to shield individuals from criminal responsibility, or unjustified delays. In contrast, inability might be shown through a collapse or unavailability of the national judicial system, making genuine prosecution impossible.¹⁸

THRESHOLD FOR ICC INTERVENTION

The complementarity principle sets a high threshold for the ICC to intervene. The Court must be convinced that domestic proceedings are either nonexistent or deficient in genuine intent or capability. This creates a delicate balance—on one hand, ensuring that the ICC does not undermine national legal systems; on the other, preventing impunity where states fail to act.¹⁹

In practice, determining unwillingness or inability is complex and fact-specific, often requiring thorough examination of national legal processes, political contexts, and evidentiary standards. The ICC's Office of the Prosecutor plays a critical role in assessing complementarity before deciding to initiate investigations or prosecutions.²⁰

SIGNIFICANCE OF COMPLEMENTARITY

Complementarity is crucial for several reasons. It promotes respect for sovereignty, thereby encouraging states to develop and strengthen their domestic legal systems for prosecuting international crimes. It also enhances cooperation between the ICC and states, fostering a collaborative approach to global justice. Moreover, complementarity helps the ICC manage its limited resources by focusing only on cases where national jurisdictions fail.²¹

However, the principle is not without criticism. Some argue that complementarity may allow states to manipulate or conduct sham prosecutions to avoid ICC scrutiny, thus enabling impunity. Others highlight challenges in objectively assessing unwillingness or inability, particularly in politically sensitive or fragile states.²²

JURISDICTIONAL CHALLENGES FACED BY THE ICC

Despite its ambitious mandate to hold perpetrators of the gravest international crimes accountable, the International Criminal Court faces significant jurisdictional challenges that affect its ability to operate effectively. These challenges stem from political, legal, and practical obstacles inherent in the ICC's unique position as a permanent international criminal tribunal dependent on state cooperation and complex jurisdictional rules.²³

NON-COOPERATION BY STATES AND NON-MEMBER PARTIES

One of the foremost challenges is the ICC's reliance on states to cooperate with investigations and enforcement. The ICC does not have its own police force and depends on member states to arrest suspects, provide evidence, and facilitate witness protection. When states refuse or delay cooperation, the Court's ability to proceed with cases is severely compromised. For example, the ICC has issued

¹⁷ Mark Klamberg (n 5).

¹⁸ Rome Statute, arts 17(2)–(3).

¹⁹ Sarah M H Nouwen and Wouter G Werner (n 6).

²⁰ Office of the Prosecutor, International Criminal Court, 'Policy Paper on Preliminary Examinations' (November 2013).

²¹ William A Schabas (n 2).

²² M Cherif Bassiouni, *International Criminal Law* (3rd edn, 2018) 373–400.

²³ Philippe Kirsch, 'The International Criminal Court: A First Step Towards International Criminal Justice' (2003) 1 *Journal of International Criminal Justice* 1–14.

arrest warrants for figures like Sudan's former president Omar al-Bashir, but he traveled freely for years because some states declined to arrest him.²⁴

Moreover, several influential countries, including the United States, Russia, China, and India, have not ratified the Rome Statute. Their non-membership limits the ICC's jurisdiction, particularly when crimes are committed on their territories or by their nationals.²⁵ This lack of universal acceptance hampers the ICC's claim to global legitimacy and creates gaps in its jurisdictional reach. The ICC's inability to act decisively in conflicts involving these states or their allies reveals the limits imposed by geopolitical realities.²⁶

POLITICAL INTERFERENCE AND THE SECURITY COUNCIL

The ICC's jurisdiction can be triggered by referrals from the United Nations Security Council (UNSC), which adds a political dimension to its operations. However, the use of veto powers by permanent members often results in deadlock, preventing investigations or prosecutions in certain situations. For example, UNSC referrals have been selective and politically motivated, undermining perceptions of impartiality and universality.²⁷

This politicization challenges the ICC's independence and contributes to accusations of bias, particularly from African states that argue the Court disproportionately targets their continent.²⁸ Such perceptions weaken support for the ICC and complicate its cooperation with affected states.

COMPLEMENTARITY AND ASSESSING GENUINE NATIONAL PROCEEDINGS

Applying the complementarity principle is fraught with difficulty. Determining whether national jurisdictions are genuinely prosecuting international crimes or conducting sham proceedings involves deep legal and factual assessments. Some states undertake superficial investigations or trials without intent to hold perpetrators accountable, creating "false complementarity" scenarios that hinder ICC intervention.²⁹

Furthermore, weak judicial institutions, corruption, and lack of resources in some states make it challenging to evaluate the sincerity and capacity of national prosecutions. This uncertainty complicates the ICC's decision-making and sometimes delays or precludes justice for victims.³⁰

TEMPORAL AND SUBJECT-MATTER LIMITATIONS

The ICC's jurisdictional scope is also limited by its subject-matter and temporal jurisdiction. The Court cannot prosecute crimes committed before July 1, 2002, excluding many historic atrocities. Additionally, the focus on four core crimes excludes other serious offenses, such as terrorism or drug trafficking, which may also have international impact.³¹

These limitations restrict the ICC's ability to address the full range of international criminality and often necessitate reliance on complementary national or regional mechanisms.

CONCLUSION

The International Criminal Court embodies a significant advancement in international criminal justice by providing a permanent forum to prosecute the most serious crimes against humanity. Its

²⁴ Human Rights Watch, 'Justice for Darfur? The ICC's First Year' (July 2006).

²⁵ William A Schabas (n 2) 60–85.

²⁶ Sarah M H Nouwen and Wouter G Werner (n 6).

²⁷ Kai Ambos (n 3).

²⁸ African Union, 'The ICC and Africa: Toward a More Effective and Accountable Court' (2017).

²⁹ Mark Klamberg (n 5).

³⁰ Sarah M H Nouwen and Wouter G Werner (n 6).

³¹ Rome Statute, art 5; William A Schabas (n 2).

jurisdictional framework and the principle of complementarity collectively seek to balance respect for state sovereignty with the imperative of ending impunity for mass atrocities. However, the ICC's effectiveness is constrained by jurisdictional challenges, including non-cooperation by states, political interference, and difficulties in assessing genuine complementarity.

To enhance the ICC's impact, reforms may be needed to strengthen enforcement mechanisms, promote wider state participation, and refine the assessment of national proceedings. Addressing these challenges is essential to realizing the Court's foundational goal: delivering impartial, effective justice for victims of the world's gravest crimes and contributing to lasting international peace and security.