Jurisdiction of the International Criminal Tribunals and International Criminal Court over International Crimes: Shift from Primacy to Complementarity

Avik Ghatak[1]

I. Introduction:

The International Criminal Court is a court of last resort. The Court is intended to supplement, not to supplant, national jurisdictions[2] and the Rome Statute recognizes that every state has a responsibility to exercise its own criminal jurisdiction over international crimes[3]. In the words of Kofi Annan, former Secretary General of the United Nations Organisation, people demand justice 'from their own courts if possible, from international courts if no credible alternative exists. The ICC does not supplant the authority of national courts. Rather, it is a court of last resort, governed by the principle of complementarity – it is there to support people and nations in their pursuit of justice.'[4]

Hence, it is not hard to determine exactly what 'complementarity' in connection with the International Criminal Court means and what does the 'complementarity regime' of the International Criminal Court deals with[5]. However, before delving into the law and practice relating to the complementarity regime of International Criminal Court, it becomes important to discuss, in short, the existence of national jurisdiction over international crimes, before the international tribunals and courts came into being and the international jurisdiction of the international forums, as it existed before the complementarity regime was introduced into the Rome State of the International Criminal Court.

II. Jurisdiction:

Jurisdiction is the power of the State, or the concerned international body[6], to regulate affairs pursuant to its laws. Exercising jurisdiction involves asserting a form of sovereignty.[7]

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[1] . LL. M. Student, University of Exter, Exeter, Devon, United Kingdom of Great Britain and Northern Ireland.

[2]. The Rome Statute of the International Criminal Court [1998] Preamble and Article 1.

[3]. Ibid., Preamble.

[4]. Kofi Annan and Nader Mousavizadeh, Interventions: A life in War and Peace (1st edn, The Penguin Press 2012) 152.

[5]. Dr. H.O. Agarwal, International Organisations (1st edn, Central Law Publications 2011) 213.

[6]. South Asian Human Rights Documentation Centre , Human Rights and Humanitarian Law (1st edn, Oxford University Press 2008) 92.

II. I. National Jurisdiction over International Crimes:

Jurisdiction over a crime is claimed by a State under one of the accepted heads of jurisdiction, active personality or nationality and passive personality or nationality[8]. The principle of territoriality is grounded in ideological and political reasons, i.e, the need to affirm territorial sovereignty which evolved in the age of reason and was linked to the consolidation of modern states.[9] The principle of active personality or nationality is implemented in one of two forms, i.e. in some countries courts have jurisdiction over certain criminal offences committed by their nationals abroad whereas in other countries, jurisdiction of crimes committed by their nationals abroad is subordinated to the crime being punishable under the law of the territorial state.[10] Lastly, the principle of passive personality or nationality allows states to exercise jurisdiction over crimes committed abroad against its nationals.[11]

Apart from these 'traditional' heads of jurisdiction[12], Universal jurisdiction has come up in recent years as a controversial principle of jurisdiction in international criminal law.[13] The term is used to exercise jurisdiction over a crime without reference to the place of perpetration, nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State.[14] However, States have been known to refer to the Principle of Subsidiarity when asserting universal jurisdiction by deferring to the territorial State or the State of nationality of the presumed offender if the latter is (genuinely) able and willing to prosecute. It has been argued that universal jurisdiction is precisely based on the subsidiarity principle, and that it thus only functions as a last resort solution so as to prevent impunity from arising.[15] This has

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7. Robert Cryer and others, An Introduction to International Criminal Lawand Procedure (2nd edn, Cambridge University Press 2010) 43.
8. Antonio Cassese and others, International Criminal Law (2nd edn, Oxford University Press 2008) 336.
9. Ibid.
10. Ibid., 337.
11. Ibid.
12. Robert Cryer and others, An Introduction to International Criminal Lawand Procedure (2nd edn, Cambridge University Press 2010) 46.
13. Ibid., 50.
14. Ibid., 51.
15. Cedric Ryngaert, 'Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle' (2006) Institute for International Law Working Paper

similarity with the principle of complementarity followed by the International Criminal Court, as far as giving primacy to national courts is concerned. Prosecutions with respect to the American Civil War in the 1860s and Anglo-Boer Wars in the late Nineteenth Century and early Twentieth century, prosecutions in Germany and Turkey after the first World War, thousands of cases in Germany, France and many other European States after the Second World War, were all conducted under domestic laws.[16]

II. II. Problems with National Jurisdiction over International Crimes

Apprehension of the accused becomes a major issue in such cases for, e.g. Eichmann was abducted in another state[17], Barbie was expelled but not extradited from Bolivia[18], Touvier was in hiding in France[19] etc.

Documentary and physical evidence are normally difficult to secure while national prosecutions having been regularly taken place long after the commission of the alleged crime, live evidence becomes impossible to obtain. Also, many countries do not have laws concerning genocide or crimes against humanity and hence the accused would end up only being tried for murder and serious violations of the Geneva Conventions. Other than the fact that the continuance of parallel investigation could be detrimental to an international trial due to loss of credibility and threatening of witnesses, once such a trial were to be finished, the international tribunals would not be able to try the accused persons for those same acts for which they have already been convicted or acquitted.[20]

II. III. Jurisdiction of International Courts and Tribunals

The above mentioned problems with universal jurisdiction by individual states led to the shift of the jurisdiction over international crimes from States to international courts and tribunals that were set up after

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98/2006, 5 <http:// http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP98e.pdf> accessed 18 July 2013.

16. Timothy McCormack, 'Their Atrocities and Our Misdemeanours: The reticence of States to Try Their 'Own Nationals' for International Crimes in Mark Lattimer and Phillipe Sands (eds)., Justice for Crimes Against Humanity (Oxford 2003) 121-125.

17. 'The Eichmann Case' [2011] 23 MLR 507.

18. 'Barbie extradition case, Judgement of 11 December 1974' [1975] 79 RGDIP 778.

19. M.Cherif Bassiouni, Crimes Against Humanity: Historical evolution and Contemporary Application (1st edn, Cambridge University Press 2011) 355.

20. Prosecutor v. Theoneste Bagosora, No. ICTR-96-7 (I.C.T.R. May 17, 1996).

the Second World War. The type and extent of such jurisdiction has varied widely from Tribunal to Tribunal.

II. IV. The International Military Tribunal at Nuremberg

Under the scheme followed at the IMT at Nuremberg, the Tribunal was entrusted with the task of dealing with the major leaders accused of international crimes, whereas national courts were called upon to handle the criminal offences of minor culprits, i.e. those crimes committed by Germans against Germans whereas those that were committed by Germans against foreigners were dealt with by the International Military Tribunal.[21]

II. V. The International Criminal Tribunal for the former Yugoslavia (ICTY)

The ICTY Statute states that the Tribunal and national courts have concurrent jurisdiction over serious violations of international humanitarian law within the tribunal's competence.[22] This concurrent jurisdiction, however, is subject to the Tribunal's primacy which can be invoked 'at any stage of the procedure' when the national courts can be formally requested by the Tribunal to defer to its jurisdiction.[23] Rules 8 through 13 of the Rules of Procedure and Evidence expound upon the primacy of the Tribunal over the national courts and sets out the process by which it may assert the primacy.[24]

The primacy of the Tribunal has been challenged in cases such as those of Karadzic and Tadic wherein claims were made to the effect that the accused should be tried locally by the courts of their homelands.[25] While in the Karadzic case[26] it was dismissed as a transparent case to circumvent justice, in the Tadic case[27], the Trial Chamber held that the Tribunal was far from being an institution designed for the purpose of

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[21]. Antonio Cassese and others, International Criminal Law (3rd edn, Oxford University Press 2013) 291-292.

[22]. Statute of the International Criminal Tribunal for the former Yugoslavia [1993] Article 9(1).

[23] Ibid.

[24]. Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' [1998] 23 YJIL 395-6.

[25]. Antonio Cassese and others, International Criminal Law (3rd edn, Oxford University Press 2013) 292-3

[26]. Prosecutor v. Karadzic, No. IT-95-18-I (I.C.T.Y. Nov. 16, 1995); Prosecutor v. Karadzic, No.IT- 95-5-I (I.C.T.Y. July 25, 1995).

[27]. Prosecutor v. Tadic, No. IT-94-I (I.C.T.Y. Feb. 13, 1995).

removing, for political reasons, certain criminal offenders from fair and impartial justice and have them prosecuted for political crimes before prejudiced adjudicators.[28] Incidentally, it was in Tadic's case that primacy proved to be most effective since he had been arrested and was awaiting trial in Germany when the ICTY requested the German government to defer the case to the ICTY's jurisdiction, to which the concerned government complied with.[29]

II. VI. The International Criminal Tribunal for Rwanda

The Statute of the ICTR provided that the tribunal shall have concurrent jurisdiction with national courts but it also stated that the Tribunal would have primacy over national courts.[30] In the Joseph Kanyabashi case, the primacy of the Tribunal was challenged that the ad hoc tribunals are 'political institutions' established to prosecute individuals from a particular conflict. The Defence Counsel's contention was that the establishment of the ICTR violated the principle of *jus de non evocando* which established the right of persons accused of certain crimes to be tried before the regular domestic criminal courts rather than by politically founded ad hoc criminal tribunals, which in times of emergency, may fail to provide impartial justice.[31]

The Tribunal held that the primacy was exclusively derived from the fact that the Tribunal was established under Chapter VII of the UN Charter, which in turn enables the Tribunal to issue directly binding international legal orders and requests to States, irrespective of their consent, to the extent that the President of the Tribunal could report a State to the Council for further action in case of non-compliance with the request of the Tribunal. Hence, the Tribunal concluded that the principle of *jus de non evocando* has not been violated in the concerned case.[32]

II. VII. Special Tribunal for Lebanon (STL) and Special Court for Sierra Leone (SCSL)

While the ICTY and ICTR have primacy over any national court, the STL and the SCSL have been granted primacy only over the courts

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[28]. Ibid.

[29]. Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' [1998] 23 YJIL 403.

[30]. The Statute of the International Criminal Tribunal for Rwanda [1998] Article 8.

[31]. Prosecutor v. Joseph Kanyabashi, No. ICTR-96-15-T (I.C.T.R. Jun. 18, 1997).

[32]. Antonio Cassese and others, International Criminal Law: Cases and Commentary (Oxford University Press 2011) 526

of Lebanon[33] and Sierra Leone[34] respectively. This effectively allowed the courts of countries other than those of Lebanon and Sierra Leone respectively, to bring to trial, persons who stand accused before any one of these two International Tribunals without breaching the Statute.[35] Also, such trial at a national court of a 'third country' wouldn't prevent the person from having to undergo a second trial at any of the two Tribunals since the principle of *ne bis* in idem wouldn't apply to such trials by the two Tribunals if it is found that the national trial wasn't fair and effective.[36] [37]

II. VIII. The Complementarity of the International Criminal Court (ICC)

The Rome Statute of the ICC, keeping in mind the principle of complementarity enshrined in paragraph 10 of the Preamble and Article 1 of the Statute, states that the Court is barred from exercising its jurisdiction over a case and must declare it inadmissible whenever a national court exerts its jurisdiction, as per its national law, over the same accused person or persons for the commission of the same crime and if the case is being duly investigated or prosecuted by the national authorities or when the authorities have decided, in a proper manner, not to prosecute the person concerned.[38] In addition to the above the Court is barred from prosecuting any person who has already been convicted of or acquitted by another court with respect to the same act, if the trial was fair and proper.[39]

III. Major Reason for the Shift from Primacy to Complementarity:

The one question that comes to the mind regarding complementarity is what was the need for the introduction of this principle replacing the primacy that the Ad Hoc Tribunals enjoy? The answer to this would perhaps lie in the fact that the ICTY and the ICTR were intended to be a substitute for the national criminal courts of the concerned regions, which were deemed to be unwilling or unable to dispense justice.[40] Also, since the ad hoc Tribunals were to focus on crimes arising out of a single conflict or a set of related conflicts the fear that these tribunals would

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[33]. Statute of the Special Tribunal for Lebanon [2009] Article 9(2).

[34]. Statute of the Special Court for Sierra Leone [2002] Article 8(2).

[35]. Antonio Cassese and others, International Criminal Law (3rd edn, Oxford University Press 2013) 296.

[36]. Statute of the Special Tribunal for Lebanon [2009] Article 5(2).

[37]. Statute of the Special Court for Sierra Leone [2002] Article 9(2).

[38]. The Rome Statute of the International Criminal Court [1998] Article 17.

[39]. Ibid., Article 20(3).

[40]. Antonio Cassese and others, International Criminal Law (3rd edn, Oxford University Press 2013) 292.

encroach upon national sovereignty were minimum because of their specific jurisdiction. Lastly, it is also to be stated that the ad hoc Tribunals had the mandate and capacity to prosecute a broad range of cases due to which it was pertinent that the Tribunals be given the possibility of control over all cases to ensure that the national prosecutions would not disrupt a broader prosecutorial strategy.[41]

In the case of the ICC, it was never quite the intention to substitute national judicial systems with the ICC and hence it was made such that it could step in only when the national courts did not act or prove to be unwilling or unable to do justice.[42] Moreover, unlike the ad hoc Tribunals, the ICC was built on the basis of an international Treaty that required much larger consensus among the family of nations at the UN than the Tribunals, which were created vide the powers of the Security Council under Chapter VII of the Charter.[43] The ICC being a permanent body, created a greater concern among the nations about protecting their sovereignty and the intention of the States to ensure that they have a first opportunity to investigate and prosecute alleged crimes occurring within their jurisdiction. This pushed the authorities concerned to replace primacy with complementarity.[44]

This concern of the States regarding the ICC eating into their sovereignty is also evident from the use of the word 'genuinely' in preference to other terms such as 'effectively' whereby the latter could have had given the impression that a case was admissible if the national system was, for example, proceeding more slowly than the ICC would or if the ICC could do a better job.[45] Alternative texts were also suggested, e.g. by the representative of Mexico.[46]

III. I. Practice Related to Admissibility and Non-Admissibility of Case on the Basis of the Principle of Complementarity

The admissibility of a case to the ICC based on the principle of complementarity has become a source of jurisprudence in this regard based on the decisions of the Pre-Trial and as well as other Chambers during

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41. Antonio Cassese and others, International Criminal Law: Cases and Commentary (Oxford University Press 2011) 526.
42. Dr. H.O. Agarwal, International Law and Human Rights (17th edn, Central Law Publications 2010) 715.
43. Ibid.
44. Antonio Cassese and others, International Criminal Law: Cases and Commentary (Oxford University Press 2011) 526.
45. Robert Cryer and others, An Introduction to International Criminal Lawand Procedure (2nd edn, Cambridge University Press 2010) 154.
46. Vol III of the Official Records of the Rome Conference, 28.

trial and appeal.[47] One of the most important case laws in this regard is the Joseph Kony case.[48]

In 2005, the ICC issued arrest warrants against Joseph Kony and other leaders of the Lord's resistance Army of Uganda for crimes against humanity and war crimes. In the backdrop of such an issuance, there had been discussions in Uganda about creating special courts to try war accused. Without any motion on the part of the accused, who are yet to be apprehended, the Pre-Trial Chamber of the ICC in 2009, used its *proprio motu* power to consider whether the case against the accused was still admissible under Article 17 or not and whether it was still the case that the government of Uganda was unwilling or genuinely unable to carry out investigation or prosecution in the case. The Chamber concluded that despite moves to create war crimes courts in Uganda, it remained speculative whether the accused in this case would be prosecuted in the State and therefore the case remained admissible.[49]

Another very important issue regarding the complementarity regime of the ICC that came up in this case was with regard to the relevance of the determination of the admissibility at the pre-trial stage of the case, especially in the absence of the accused.[50] To this question, the Court held that the Statute does not rule out the possibility that multiple determinations of admissibility may be made in a given case. The power to bring a challenged under this heading vests with the accused and a State which has jurisdiction over the case or whose acceptance of jurisdiction is required under Article 13 of the Statute.[51] Moving ahead, the Chamber further held that in a case where there are many parties with each of them having been vested with the power to challenge the admissibility of the case, especially based on the principle of complemenetarity, the Court may need to address the issue of admissibility of the case more than once, including as a result of multiple challenges brought by different parties at different points in time.[52] Provisions of the Statute explicitly allows for a challenge to the jurisdiction

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47. Jelena Peic, 'Accountability for International Crimes: from Conjecture to Reality' in Larry Maybee and others (eds), International Humanitarian Law- A Reader for South Asia (1st edn, International Committee of the Red Cross, Regional Delegation 2008) 366.

48. *The Prosecutor v. Kony et al., No. ICC-02/04-01/05 (I.C.C. Mar. 10, 2009).*

49. Ibid.

50. Markus Benzing, 'The Complementarity regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity' [2003] 7 Max Planck UNYB 615.

51. Dragana Radosavljevic, 'An Overview of the ICC Complementarity Regime' [2003] 3 UHVP 102.

52. Antonio Cassese and others, International Criminal Law: Cases and Commentary (Oxford University Press 2011) 533.

or the admissibility to be brought 'more than once', prior to the commencement of the trial, on leave to be granted by the Court, 'in exceptional circumstances'.[53]

In the Kony case it was also held that the determination of admissibility of a case is subject to change as a consequence of change in circumstances.[54] This idea, in fact, underlines the whole regime of complementarity at the pre-trial stage since the multiple provisions of the Statute allow the same.[55] While one provision allows a State to challenge the determination of the findings of the Pre-Trial Chamber on the ground of significant facts or significant change in circumstances[56], others lay down the principle that a State or an accused may bring a challenge only once but nevertheless provides that 'in exceptional circumstances' the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.[57] Also, provisions allow for the reconsideration of a case found to have been inadmissible on the basis of the complementarity principle enshrined under Article 17 in the light of a request submitted by the Prosecutor for a review of the decision when he or she is fully satisfied that new facts have arisen which negates the basis on which the case had been previously found to be inadmissible.[58]

The question regarding what would happen if a national court, despite being capable enough to prosecute an accused, for whatever reasons, has not initiated investigation into a case has been answered in judgments[59] by the ICC Appeals Chamber wherein it was held that such cases would be admissible regardless of motivation on the part of the State.[60]

IV. Conclusion:

It is beyond any reasonable doubt that the complementarity regime enshrined in the Statute encourages the States to prosecute criminals by themselves which is evident from provisions which state that every State has a responsibility to exercise its own criminal jurisdiction over

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[53]. The Rome Statute of the International Criminal Court [1998] Article 19(4).
[54]. Antonio Cassese and others, International Criminal Law: Cases and Commentary (Oxford University Press 2011) 533.
[55]. Dragana Radosavljevic, 'An Overview of the ICC Complementarity Regime' [2003] 3 UHVP 104.
[56]. The Rome Statute of the International Criminal Court [1998] Article 18(7).
[57]. Ibid. Article 19 (4).
[58]. Ibid. Article 19 (10).
[59]. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, No. ICC-01/04-01/07 OA 8 (I.C.C. Sep. 25, 2009).
[60]. Ibid.

international crimes.[61] Questions still remain regarding the procedure to be followed in cases where a national court reasserts its jurisdiction over a case after the accused having been charged by the ICC. Possibilities have already arisen in relation to the ICC cases in Uganda[62] and Darfur[63], and in time is certain to raise difficult questions of whether such national proceedings are in good faith or they are in fact designed to derail the ICC proceedings.[64]

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61. Mahnoush Arsanjani and Michael Resiman, 'The Law in action of the International Criminal Court' [2005] 99 AJIL 395-7.

62. The Prosecutor v. Kony et al., No. ICC-02/04-01/05 (I.C.C. Mar. 10, 2009).

63. ***The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")***, *No. ICC-02/05-01/07.*

64. Antonio Cassese and others, International Criminal Law: Cases and Commentary (Oxford University Press 2011) 534.