

The Relationship between International and National Courts in Prosecuting International Crimes: The Principle of Complementarity Perspective

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Abstract

For protection of human rights and deter the future crimes, criminal prosecution is only the one way. In this perspective, the establishment of the International Criminal Court is a great achievement in the field of international criminal law. However, the perception of the international scholars, the relationship between international criminal court and the national court is ambiguous. Complementarity nature of the ICC is considered as an enemy of state sovereignty in the eye of international criminal lawyers. Although the principle of complementarity put some challenges to state sovereignty, its supervisory element strengthen the implementation and empower international criminal law at national level where state sovereignty remains unaffected. This paper focuses some broader reflection on how the ICC, through its complementarity principle, is maintaining the relationship with national court and continuing its proceedings with the help of the national courts around the world. It will be agreed upon soon that, Complementarity principle not only helps states to uphold their common interest, but also prevent them from abusing their sovereignty and ensures individual and united security.



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Introduction

The establishment of the international criminal court is one of the important achievements in the field of international criminal law. With the purpose to end global impunity and power to exercise jurisdiction over individual perpetrators, who are responsible for heinous international crimes, the statute of the ICC entered into force on 1st July 2002. As a permanent institution in the history of international criminal law, ICC deals with the core crimes which are emerged from the legacy of Nuremberg. According to the article 5 of the Rome statute, perpetrators of war crimes, genocide, crimes against humanity and crimes against aggression will be prosecuted in the ICC. International community considered ICC as a significant advancement in terms of prosecution of international criminals that promote the rule of law as well as deter future atrocities.¹ The most central characteristic of the ICC is its complementarity nature; ascertain that ICC will not replace the jurisdiction of national court in regards to the prosecution of international core crimes.² It will be complementary to the domestic court. The principle of complementarity confers the primacy of national jurisdiction over international crimes. If the ICC wants exercise its jurisdiction, certain criterions have to be fulfilled. These criterions emanate when states are genuinely unwilling and unable to investigate and prosecute offenders who are responsible for the violation of human rights.³ The principle of complementarity has raised issue on the relationship between states and the ICC. For many, the ICC would be a platform for adjudge cases of international concern which are prosecuted by national system. On the other hand, some believe that, this principle not only complicates the relationship of state and the ICC, it also viewed as an erosion of state sovereignty.⁴ Exercise of judicial power being one of the core elements of state sovereignty, interference by an international institution is an intrusion upon state sovereignty. Although primarily complementarity principle is perceived as a tool that exceed the state sovereignty, however, its supervisory element strengthen the implementation and enforcement of international criminal law at national level as for the prosecution of core crimes and work as a forum for establishing interaction between the ICC and national judicial system where stat sovereignty remains unaffected.

The purpose of this paper is to assess the relating concerns of this principle. Discussion will focus on the relationship between national and international criminal court regarding prosecution of international crimes and the complementarity principle is considered as a threat to the national sovereignty or not.

Establishment of International Criminal Court

The idea to establish a permanent international criminal court to punish international crimes arose basically through the adoption of the 1948 Convention on the prevention and punishment of the Crime of Genocide (Genocide Convention). In the late 19th century, Gustav Moynier who was one of the founders of the ICRC demanded for the foundation of an International permanent court.⁵ After the first war world many states raised their voice on

¹ Bruce Broomhall, 'International Criminal Justice and the International Criminal Court: Between Sovereignty and the Rule of Law' (2003) OUP 1

² Rome statute of the International Criminal Court 1998, pmb1, paragraph 6

³ Ibid, preamble, paragraph 10, art 1, 17 and 20 (3)

⁴ John T. Holmes, 'Complementarity : National court v the ICC, in the Rome Statute of the international Criminal court : A commentary' (2002) OUP 667, 670-671

⁵ Christopher Keith Hall, 'the first proposal for an international criminal court' (1998) <<http://www.icrc.org/eng/resources/documents/misc/57jp4m.htm>>

this issue.⁶ As a result of this, a proposal was prepared and submitted by the commission on the responsibility of the author of the war and the enforcement of the penalties. Versailles treaty was also signed by the Victorians nations for prosecuting individuals who committed war crimes during war times.⁷ Following the end of the Second World War the international military tribunal and Tokyo tribunals were established to prosecute the Nazi officers and prominent Japanese officers who were responsible for the heinous crimes during 2nd world war. However the problem was that these two tribunals were completely biased in favour of the victor nations.⁸ Nevertheless both tribunals set a precedent to prosecute international crimes and proved that nobody can use state sovereignty in order to protect themselves from prosecution for serious international crimes. At the beginning of 1948, United Nations General Assembly passed a resolution and established a committee who drafted the statute for the establishment of international court. However, due to the contentious issue of defining the international crimes and on-going Cold War, the issue of establishing international court was postponed⁹ and no further progress was made until 1989. In 1992 ICL presented a preliminary report to GA which related to the prosecution of individuals involved in drug trafficking.¹⁰ After receiving the report from GA, international law commission again started their discussion regarding statute of international criminal court. Unfortunately at that time whole international community was shocked by Yugoslavia and Rwanda's massacre and it was an urgent necessity to take immediate action to prosecute persons who were responsible for violation of international humanitarian law in these two countries. As a result of the emergency, United Nations established ad hoc tribunals in the respective countries which ultimately inspired to constitute a permanent international criminal court.¹¹ Shortly thereafter, in 1994 ILC submitted a draft statute to GA and after considering the report, a Preparatory committee was created. This committee met several time from 1996-1998 and in its 52 session GA finalized and adopted the convention on establishment of ICC. However, the question is that why do international community need the ICC. According to Kofi Annan, due to the cruelty of the 2nd world war the General Assemble realized the necessity to create a permanent international criminal court to try and punish perpetrators who violate the IHL. The preamble of the ICC statute also explain the purpose of the ICC is to help put an end to impunity for perpetrators of the serious crimes and contribute to prevent such kind of crimes. Since ICJ at The Hague deals with only cases between states, not individuals and the perpetrators of international crimes are the individuals, act of human rights violations mostly go unpunished. It can be seen from the history that senior or government officers who violate human rights have not been prosecuted for committing heinous crimes. When the national court tried to prosecute them, either they were effected or biased by situation. As a result of this, victims of these crimes did not get any justice that they deserve. In Pol Pot case, a million Cambodians were killed where Pol Pot was liable for that occurrence. Unfortunately, the Cambodian Government was not willing to prosecute him. This issue was transferred to the UN to put him on trial. China put veto to set up court which would try Pol Pot. Canada who had the legislative power but was not interested to prosecute him. Whereas United States

⁶ Antonio Casses, '*International criminal law*' (2nd edition, OUP 2008) 18

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Draft code of crimes against the peace and security of mankind, adopted 9dec.1988 GA .res.43/164

¹¹ Ved P.Nanda, 'The establishment of a permanent international criminal court: Challenges ahead' (1998) 20 JHUP 415

despite a will to prosecute did not have legislative authority.¹² Consequently, Pol Pot being in grave violation of human rights was never brought before court. Moreover massacres in the former Yugoslavia and Rwanda persuaded UNSC to establish ad hoc tribunals because SC considered this situation as a threat to international peace and security and believed that these tribunals will be a way to maintain international peace and security. Goldstone supports this idea that, the establishment of ad hoc tribunals is the proper way to deal with the circumstances and give justice who was suffered by the situation.¹³ Since World War II, ICTY and ICTR were the first tribunals who prosecuted the high profile leaders for Crimes against humanity, i.e. Rwandan Prime Minister, the Rwandan Minister of Family and Women's affairs, leaders of the Bosnian Serbs.¹⁴ However, the reality is that, ad hoc tribunals failed to fulfil its mandates because of its political affiliation. These courts were not created only for a need of justice, but also for a political need. These two tribunals were bound by their mandates, especially in terms of time and place. President Navanethem explained that due to the complication of judicial proceeding at international level, trials become more lengthy which is not only problematic for defendants and victims but also creates problem in the matter of national reconciliation.¹⁵ It was hoped that by creation of a permanent international criminal court it would simplify the codification of international criminal law. Further, existence of ICC would ensure the prosecution of potential offenders irrespective of their ranking or location of the occurrence.

Why and where international crimes should be prosecuted

Sixty Years on after the prosecution of Nazi-leaders for heinous crimes during 2nd World War, the contemporary world is still plagued with gross human rights violations. The experiences of the recent past prompted the creation of numerous Ad Hoc Tribunals. By the establishment of Yugoslavia tribunal in 1993 international community set a precedent with respect to the prosecution of international crimes. After that a number of international and national courts tried human rights offenders which attracted the international community.¹⁶ Finally in 1998 through the creation of the ICC people's expectation for world-wide justice has become reality. However why and where international crimes need to be prosecuted remains a living question. Preamble of Universal Declaration of Human Rights explains that, for protection of human rights and in order to promote social progress and deter the future crimes, criminal prosecution is only the one way.¹⁷ If anybody infringes the law of a state, responsible person should be found and tried. German scholar *Franz von Liszt* to this effect stated that social system and the sense of justice are strengthened by the legal system. By imposing responsibility upon liable persons and punishing them, this problem is possible to resolve.¹⁸ Moreover punishing offenders who are responsible for crimes is inevitable to maintain social balance and provide justice for the individual victims.¹⁹

¹² The History place; Genocide in 20th century. Pol Pot in Cambodia 1975-1979,3000.000 deaths <<http://www.historyplace.com/worldhistory/genocide/pol-pot.htm>>

¹³ Goldstone J. Richard, 'justice as a tool for peace- making: Truth Commission and International criminal Tribunals'(1995-1996) 28 New York University journal of International law and politics 48815

¹⁴ Sophie Crocket, 'Are international court effective?' (2007)<www.e-ir.info/2011/11/27/>

¹⁵ ICTR report (1994) A/57/163-s/2002/733,2002p

¹⁶ Cases before the ICTY and ICRT is international level and cases, such as: Pinochet or Djajic at national level

¹⁷ The Universal Declaration of Human Rights, preamble

¹⁸ Chistoph J.M. Safferling, 'Can criminal prosecution be the Answer to massive Human Rights Violations?' (2004) <<http://www.issafrika.org/anicij/uploads/Safferling>>

¹⁹ Jo Stigen, 'The relationship between the International criminal court and National jurisdiction: The principle of complementarity' (34 Martinus Nijhoff Publishers 2008)

The most important purpose of criminal prosecution or criminal justice is the prevention and deterrence of crimes. Besides that reconciliation can be promoted by the possible effect of criminal justice.²⁰ Furthermore the question remains why it is important to prevent international crimes. According to the ICC preamble paragraph 3 international crimes “threaten the peace, security and welfare of the world”. Moreover due to the interconnection of the states there is an increased concern that these hazardous circumstances might spread over states. Prosecution of international criminals help to avoid recurrence of crimes. It also promotes and restores international peace and security and finally protects the conscience of humanity. Indeed a criminal investigation and trial help to prevent future harm, but it is not enough. An appropriate compensation is one of the conditions of fair justice that supports the victims to overcome suffering psychologically and pedagogically. To maintain the international peace and security the role of prosecution and punishment of international crimes is essential. But it is difficult to determine international criminal jurisdiction over international crimes when both national and international criminal courts have jurisdiction over the same issue. With the help of the discussion of advantages and disadvantages national and international prosecution it might be possible to predict qualitative differences between two jurisdictions. On account of practical and legal challenges it is difficult to determine the proper forum for the prosecution of international crimes. Some critics extended their arguments on the basis of crime scene whereas the other prefers international trial considering the independence and impartiality thereof.

According to the Rome Statute, principle of complementarity gives the national courts priority over a case.²¹ ICC can prosecute international crimes listed in Rome statute but it's bound by the complementarity principle. Crimes be it international or domestic in nature, states have the primary obligation to investigate and prosecute within their sovereign territory.²² States have the best access on gathering evidence and testimonies and local investigators may have the better understanding of reading the conflict. Further witnesses, victims and sometimes perpetrators will be more comfortable and cooperative within a local and familiar environment. Moreover judiciaries also prefer to work with an active judicial system rather than newly established legal procedure. Supporters of the national trial claim that democratic court by judging their own people help to diminish political, ethnical and religious conflict and try to unify groups within an umbrella. Commentators in favor of national trial argue that international courts have more constrains than domestic courts²³ and international interference might cause the procedure less harmonious where key actors stay away from peace negotiations. In addition, international courts are aloof from the crime scene which might deprive investigators and judges from truth. For example, in Eichman case IMT did not enlighten the image of Jews victims. It only focused on Jewish resistance and Heroism.²⁴ Likewise, Nuremberg tribunal passed judgment on the basis of partial truth. On the other hand, argument in favor of international proceeding is that international courts convey a message of universality. International investigation and proceeding can never be partial; there is no chance of intimidation that might prevent justice.²⁵ When these kind of

²⁰ Ibid ,12

²¹ Ibid(n 1) s 17(1)

²² Vienna convention on the law of treaties 1969, 26 art asserts every treaty in force is binding upon the parties to it and must be performed by them in good faith

²³ Ibid , (n 1) art 11, ICC only has jurisdiction over crimes committed after 1 July 2002

²⁴ Martti Koskeniemi, 'Between impunity and Show Trial' (2002) Max Plank UNYBY 6 22

²⁵ Ibid (n32) p 22

problems arise as to local trial, the proceeding seems non genuine which is incompetent in accordance to complementarity principle. Cassese, former judge of ICTY stated that, international criminal courts are the appropriate forum to prosecute grave crimes committed by the political or military leaders. For such cases the complementarity rule seems to be questionable.²⁶ Professional efficiency is the most important factor in terms of criminal proceedings. Judge's legal knowledge contributes markedly to the development of international criminal law. National system may lack the legal expertise available in an international court. There is a risk that national court can be biased, either more protective or more punitive or court can be used as a forum of political settlement.²⁷ In addition international proceedings grab more international attention. The parties involved in a case which is dealt with the international criminal court may receive additional support from international community; for example, various human rights watchdog may provide aid to ingather evidence.²⁸ Even some times international court digs up the forgotten issue, like; northern Uganda case which the national court may feel disinterested to deal with.²⁹ In addition every national judicial system prosecutes international crimes as per their national rules and regulations; different outcomes may ensue for the breach of same international rules. However, the outcome of a prosecution could be harmonized by trying the offences under international jurisdiction. In any event, national prosecution is set aside by ICC under the complementarity principle if it is satisfied that the proceeding is not genuine. However even a properly decided national trial cannot always withstand the criticisms due to its credibility. Therefore, it can be stated that international courts may be the acceptable and harmonised forum to try for international crimes even though whether an international criminal case will be held nationally or internationally depends on the circumstances or the desired effect of the prosecution.³⁰

Principle of complementarity and its scope

The principle of complementarity which is the base of the Rome statute concedes primacy of state jurisdiction over international crimes. This principle is explicitly emphasised in preamble and article 1 of the Rome statute that the jurisdiction of ICC is complementary to national criminal court. Articles 15-20 and art 53 also buttress this principle but the substantive elements of this principle are explained in art 17. In short regarding international cases ICC does not exercise its jurisdiction if a national court vindicates its jurisdiction over the same person. The case is admissible before the ICC when national court is unwilling and unable to bring the person for trial.³¹ The prerequisite of complementarity principle is the participation of national and international court establishing international justice by following secondary method where due to the failure of the former, latter can intervene and continue the prosecution. The Rome statute did not specify the definition of unwillingness or inability, but in the second and third paragraphs of art 17 explained the criterion of determination of these two tests that make a case admissible in front of ICC which will be critically assessed below.

²⁶ Ibid (n 19)

²⁷ Ibid, p 354

²⁸ Ibid (n 32)

²⁹ Boustany Nora, 'An Insistent Appeal for Aid to Africa' Washington Post(22nd December 2004)18

³⁰ Report of the ad hoc committee on the establishment of an international criminal court,1995,A/50/22,para 932

³¹ Ibid (n, 19) p 297

Unwilling

The notion of unwillingness which is not explicitly defined under article 17 may seem easy to understand but complicated to assess.³² According to article 17(2) of the statute, the terms unwillingness is considered on the basis of three factors; (1) a case is investigated with a view to shielding a person from proper prosecution (2) Existence of unjustified delay and (3) absence of independence or impartiality as to national proceedings. Since unwillingness does not have specific value, this term can be deliberated through different degrees. However, in light of the factors which are listed in 17(2), it can be said that the issue is not lack of interest of the state, but a deceptive tactic whereby the public are presented with a fictitious proceedings in the façade of a genuine trial. The essence of this term is the prevention of justice by a state. Furthermore, the three criteria which are explained for determination of unwillingness, criteria (1) is more reflective determining the meaning of unwillingness. The first criteria indicates the intention of the national authority while second and third criterion in reality are direct the purpose to shield the person concerned for justice.³³ Second criteria, 'unjustified delay' indicates a case is carried on without any reasonable clarification. Third criteria can be assessed by lack of neutrality and existence of corruption. According to Henzenlin, Heskaren & Mettraux, political effects, official insufficiencies, domination of judicial authority can conclude unwillingness or it can be disclosed any sector of the government, like: executives, legislative and adjudicative division.³⁴ ICJ said that domestic law reflect the intention and activities of a state.³⁵ Every state has their own rules and regulations and it depends on them how they organise power and how they practise international law. In that perspective there are no clear rules under international law determining unwillingness. However it is suggested that the attitude which determines the unwillingness should not be decided upon by the action or inaction of a judge or police, it must be must demonstrate a pattern of disinterest within a state's branch of power. Another important criticism regarding unwillingness is the lists which are explained in art 17(2) exhaustive or other unusual factors can be conceived by court. In the matter of determining the states unwillingness, the lack of clarifying the additional term 'inter alia' or 'including but not limited' in article 17 (2) which found in art 90(6) and 97 of the statute might give an indication that art 17(2) list is exhaustive.³⁶ The phrases 'in order to determine' and 'for the determination of' also may be taken for indication of exhaustiveness.

Inability

Inability and unwillingness both terms are separate criteria in the matter of admissibility of a case before ICC. Unwillingness relies on subjective assessment where inability stimulated by fact, not motivation.³⁷ In terms of inability a state might be willing to prosecute criminal in an ethical belief but due to the lack of capacity the state might unable to proceed the trial.³⁸ According to article 17(3), state's inability to prosecute or investigate a case means the state is incapable to find accused or collect essential evidence because of idol or substantial

³² Xavier Philippe, 'The principle of Universal Jurisdiction and complementarity: how do the two principle intermesh?' (2006) International Review of the Red Cross 88 862

³³ Ibid (n 5)

³⁴ Henzelin M and others, 'Reparation to victims before the ICC: Lessons from international mass claims process' (2006) 17 CLF 317-344

³⁵ Ibid (n 32)

³⁶ Ibid

³⁷ Ibid (n 28) p 232

³⁸ Ibid (32) p 313

collapse or unavailability of its judicial system. This situation might be appeared from chaotic situation, natural disasters, war which damages the judicial system. So it can be said that ICC only can apply its jurisdiction after identification of deficiency of state judicial institution.³⁹

State's inability related to the conditions of total or substantial collapse or unavailability of the national judicial system where if a state fails to provide custody of a perpetrator or unable to achieve evidence still will be capable to challenge ICC's jurisdiction on the ground of complementarity. Critics explained that cessation of state's judicial systems in one region will not degenerate the judicial system of other regions. Ultimately this term can block the ICC's exercise in connection with certain situation. The third case in relation to inability is broad which is based on the unavailability of the national judicial system. Linguistically the term unavailability is related to the nonexistence of something regardless of its existence or usefulness. One argument regarding this issue is, if unavailability of judicial systems means non-existence it can also be created by total or substantial collapse. That means the former situation creates latter one. If the argument is accepted then this phrase would be superfluous. The reason is that total collapse can cover this situation. In light of the object and purpose of the Rome statute, this provision needs to be explained. It may be interpreted by the lack of substantive and procedural regulation where state facing some problems relating to implementation of legislation such as arrest, surrender or state cooperation. Secondly deficiency of domestic law in the matter of defining or prescribing crimes in a proper way which correspond those defined under the statute. Although in terms of former situation the principle of complementarity may easily be applicable, the latter situation is still debatable.⁴⁰ ECHR stated that right to access is institutional proceedings, if there is a lacking of accessibility before domestic court, it may raise question of states inability.⁴¹ In reality the assessment of unwillingness and inability is very complex matter. Though the Rome statute does not delineate the notion of unwillingness and inability, determination of these two criteria should be considered on basis of specific conditions and circumstances of particular case. Although it is perceived that principle of complementarity, in a certain stages creates tension in the sphere of state sovereignty, yet among others admissibility test of a case, the unwillingness and inability tests reinforces the primacy of national investigation and prosecution system and as such, the Rome statute is not a threat to state sovereignty.

Relationship between national and international criminal system

International criminal tribunals and courts are significant development in international criminal law, but these tribunals assert complication on the harmonization of their activity with national courts, especially when national and international courts both are competent to prosecute the same crimes within their jurisdiction. The problem arises when national courts pronounce their jurisdiction on the basis of personality, nationality and territoriality and at the same time international courts is authorized to exercise their jurisdiction on account of statute. In this regards, there is no straight forward guideline as to which court under what condition will enjoy the primacy over other. The relationship of International criminal tribunal and court with national court is an intricate matter. For many international scholars, international criminal court should enjoy the primacy over national judicial system whereas some claim that domestic court should try their own offenders according to their judicial system and international court should work as subsidiary. By the establishment of the ICTY

³⁹ Ibid (28)

⁴⁰ Ibid (n 28)

⁴¹ Multiplex v Croatia , application no.58112/00 ,10th july.2003

and ICTR, 'primacy' relationship was created in international judicial system. The article 9 and 8 of the ICTY⁴² and ICTR⁴³ explicitly set out this principle. Both articles provide that ICTY and ICTR shall have concurrent jurisdiction with national court, but in paragraph 2 explains that tribunals shall have primacy over national court. Primacy regime creates the judicial hierarchy over national court and ensures that on the basis of tribunal's request at any stage of the proceeding national court are obligated to defer cases to the competent international tribunal.⁴⁴ Most of the international scholars were against the primacy of international tribunal over national court. They believed that any sovereign state will not accept the precedency of any judicial authority over their judicial power. Even Yugoslavia did not accept the legitimacy and supremacy of International tribunal.⁴⁵ Moreover, permanent members of Security Council were trying to restrict primacy to the ICTY. In the first case of ICTY tribunal's primacy was challenged by the defendant and claimed that primacy violated state sovereignty and defendant's right.⁴⁶ It also explained that article 10 (2) (a), (b) can be used for political purpose.⁴⁷ Further, the primacy of tribunal oversteps the efficiency of a state judicial power, curbs the exercise of national jurisdiction and most importantly attacks on state sovereignty.⁴⁸ On the other hand, the complementarity principle which is occupied by the ICC ensures the primacy of national jurisdiction over the prosecution of the international crimes. International community was not ready to accept a permanent court with power of primacy that would constitute a threat to their sovereignty and complicate the relationship between states. Due to the complementarity nature, national court can enforce its judicial power at criminal proceedings. By ensuring the national prosecution of international crimes, complementarity principle promotes and enhances the national judicial system. If national judiciaries carry out the trial adequately, complementarity ensures the non- interference of the ICC. Brown Summer considered that complementarity principle is an ineluctable for global assurance of international criminal court by states.⁴⁹ That was the main reason to dismiss the idea of primacy for the establishment of the ICC.⁵⁰

In this section, relationship and problems between ICC and national court will be discussed regarding the prosecution of international crimes.

State cooperation and cooperation in practice

The successful prosecution of international crimes be it national or international, depends on state cooperation. Traditionally legal cooperation is regulated by international agreement which can be differentiated by dichotomy between state sovereignty and one's own system. As an independent, autonomous and legal person, ICC has power to ask cooperation from state parties.⁵¹ According to ICC statute, state will cooperate fully with the court and ensure that national law will not conflict with the form of cooperation.⁵² The ICC is not allowed to ask

⁴² Statute of the international criminal tribunal for the former Yugoslavia 1993,s 9

⁴³ Statute of the international tribunal for Rwanda 1994,s 8

⁴⁴ Micheal A.Newton, 'Comparative Complementarity: Domestic jurisdiction Consistent with the Rome statute of the International Criminal Court'(2001) 167 MIL.L.REV.20,42

⁴⁵ Bartram S. Brown, ' primacy or complementarity: Reconciling the jurisdiction of national criminal tribunals' (1998) The Yale Journal of International law ,23,2,383-436,403

⁴⁶ Posecuto v Tadic, No IT-94-1-TAC,ICTY,2 october 1995,para 58

⁴⁷ ibid

⁴⁸ Ibid

⁴⁹ Ibid (n 19)

⁵⁰ Ibid (n 19)

⁵¹ Ibid (n 1) art 4 and part 9

⁵² Ibid (n 1)art 86 and 88

any help beyond the requirement of the statute. Voluntarily states can provide additional assistance. As per the nature of the ICC, its field of cooperation is affected by complementarity principle. Accordingly local authorities have privilege regarding investigation and prosecution in accordance with national procedural system. Moreover due to the complementarity principle state may challenge the investigation of the prosecutor. In practice the cooperation regime of ICC is more complicated and has numerous limitations. The ICC should be obliged to assist a country which is a logical consequence of the principle of complementarity. But cooperation between state and the ICC seems to be oppressing because of the discretionary power of the ICC regarding the compliance of national request.⁵³ Furthermore, in terms of transferring an accused to a state ICC need the approval of the surrendering state⁵⁴ which makes this field more complicated. Another concern regarding cooperation is the compliance with the court's request. Because in some situations by refusing cooperation, state try to protect individuals from criminal responsibility, or due to the lack of judicial system states are unable to provide proper assistance. In this situation, there is a potential chance of involvement of Security Council. Furthermore, delegates are differing on the issue whether states should simply respond or be bound by the request of the ICC for cooperation.⁵⁵ On the issue of transfer or surrender of an accused, there is no option for refusal. But a challenge can be brought by an accused against ICC's request regarding arrest or surrender in the national court of the offenders'. Further a state can deny cooperation on the ground of national security.⁵⁶ It is true that states are obligated by the international law and they cannot refuse a request because of absence of domestic legislation. It is state's responsibility to execute the request in accordance with the national law. Where there is a lack of enforcement power, the state should be bound to comply with the request for cooperation in terms of collecting evidence, witness and transfer of accused.

Obstacle in terms of national prosecution

When states prosecute any international perpetrators, it is perceived that states are able to punish international criminal by means of own national criminal law.⁵⁷ However in prosecuting of the international crimes, national judicial authorities face varieties of hindrances. States inability is a major obstacle hampering national prosecution. In every judicial system, on the basis of some grounds, states have power to select cases for prosecution. Such selectivity may lead the state to bring charge against junior level suspects though crimes are ultimately committed by highest level officer.⁵⁸ Moreover, there is a high possibility that judicial authority and witness can be intimidated and evidence can be tampered.⁵⁹ Another obstacle is that some crimes are not criminalized under domestic law, like aggression. By considering these crimes as petty crimes, state may avoid prosecution despite its duty to legislate with the aim of exposing the seriousness of the crimes. Furthermore, for the prosecution of international crimes, some states adopt international law directly; some rely upon implementing regulation where some enact special laws regarding international crimes. However, the principle of complementarity opens an opportunity for

⁵³ Ibid (n 24) 413-428

⁵⁴ Rule of Procedure and Evidence-ICC, rule 185

⁵⁵ Ibid(n 24)

⁵⁶ Ibid (n 1) art 72, 73

⁵⁷ Helmut Kreicker, 'National prosecution of international crimes from a comparative perspective'(2005) ICLR 5

⁵⁸ J Veraegen, 'Legal obstacle to prosecution of breaches of humanitarian laws'(1998) 27 IRRC 607-620,611

⁵⁹ N Heasley and others, 'Impunity in Guatemala: the state's failure to provide justice in the Massacre cases' (2001)16 Am U Intl Rev 1115-1194

states to codify and accept jurisdiction over heinous international crimes which is explained in the Rome Statute.⁶⁰ National court can also consider foreign case law and decision of international courts regarding the prosecution of international crimes. In practice these decisions help to develop the international criminal law. But to what extent national courts are allowed to depend on international jurisprudence within the national legal system varies from country to country. For example, in United Kingdom, national courts can consider judgements of the ICC or any other legal interpretation. On the other hand, some states that incorporated international crimes as domestic crimes are obliged to interpret domestic law in accordance with international law. It is known to that; due to the state's statutory limitations it is really difficult to get impunity from the most heinous international crimes. International scholar suggested that, State should pass laws for non-applicability of statutory limitation to such crimes.⁶¹ For example, in Barbie case, French court of Cassation interpreted the inapplicability of statutory limitation in terms of crimes against humanity. However while many states accept the non-applicability of such limitation, on the other hand some states apply to the international crimes. Furthermore, for the prosecution of crimes which are committed abroad, court needs special security and international cooperation for effective prosecution thereof.

Enforcement of the ICC's decision

When a national or international court prosecutes a case, the proceeding will be brought to an end after the enforcement of the court's order. Without the enforcement of the court's verdict, it is worth not more than the paper it is written on. Enforcement has been controversial issue from the inception of the ICC. According to judge Phillippe Kirsch, ICC statute is based on two pillars where ICC impersonate the judicial system and states plays the important role to implement court's order.⁶² National court for the enforcement of judgement depends on their law enforcement agency, i.e; local police or local detention system to imprison anyone on conviction. However due to the lack of enforcement system, ICC's enforcement mechanism completely relies on states. According to the part 9 of the Rome Statute state parties shall cooperate as per the provisions of the statute with the court regarding the legal matter; investigation or prosecution of case. Generally ICC relies on two methods for the implementation of its judgement. Firstly, the obligation of all state parties to assist the court taking necessary steps concerning enforcement of verdict or other related issues. And secondly as a reputed and trusted international organisation, ICC encourages states to adopt Rome statute or jurisdiction over a particular case which ultimately help ICC to implement its orders. Moreover, pressure can be put by Security Council on UN member states to enforce the ICC's decision. In practice ICC faces so many difficulties to execute its decisions. If any state agrees to provide the facility, the state always try to put conditions in accordance with the domestic law which sometimes lead a transfer of the enforcement to another state.⁶³ Even though, in terms of non-compliance of request of the court, the matter can be transmitted to the Assembly of State Parties for the enforcement of the decision. But in light of the Al Bashir case it can be said that practically the Assembly does not have any power of enforcement. Moreover, Security Council did not take any step on the ground of state refusal.⁶⁴ In Darfur

⁶⁰ Ibid (n 5) 63

⁶¹ Convention on the non-applicability of statutory limitation to war crimes and crimes against humanity, 26.11.1968

⁶² Hiram Abtahi & Steven Arrigg Koh, 'The Emerging Enforcement Practice of the International Criminal Court' (2013) CILJ 45

⁶³ Ibid (n 5) 511

⁶⁴ The Prosecutor v Omar Hassan Ahmad Al Basir, [2011] PTC 1, no ICC-02/05-01/09

case, ICC's request for arrest and surrender of President Al Bashir was rejected by the authorities of Chad and Malawi. So the enforcement inability of the ICC sometimes makes its trial an ineffective prosecution. In Darfur case, ICC's request for arrest and surrender of President Al Bashir was rejected by the authorities of Chad and Malawi. So the enforcement inability of the ICC sometimes makes its trial an ineffective prosecution. Furthermore if any political issue is related with the prosecution or states have their own political and diplomatic interest which may conflict with the enforcement mechanism, on that case states are not only reluctant to enforce the court's decision but also influence other states for non-cooperation. Justice Richard Goldstone explained that, "rely on the media and public opinion to increase pressure on those parties to act in a manner consistent with justice and morality."⁶⁵ For this reasons Richard Garden described the rules relating to the enforcement of ICC's request and orders as 'paltry, at best'.⁶⁶

Enforcement of International law at National Level

It is known that there is no general rule or obligation regarding applicability of international law at domestic level; it depends on decision of national courts. Usually international law is incorporated in national legal system or national courts often rely on international law for the construction of domestic legal regulations. It is also acknowledged that, national court can apply international norms and rules by treaties or customs. However, the application of international criminal law in domestic proceeding poses some challenges. Such as, the conditions for applicability of international law and the mechanisms to deal with the inconsistency between national and international law at the domestic court are not straightforward. According to the complementarity principle, states courts have primacy over ICC to uphold international criminal law and state parties of ICC interpreted rules and regulation of the statute in a way that is consistent with national criminal law. But the problem is that the ICC does not mention any mechanism on preventing inconsistency of international law with national legislation. It is state's responsibility to seek the solution and in this way domestic court can achieve to remove the obstacles regarding the implementation of international law, but sometimes domestic politics influence to originate more impediments in this matter.⁶⁷ Jurisdictions Nationals reported that, due to the infrequency of the prosecution of international crimes at national court, the ambit of the implication of international law in national court is still not clear. Where several states have refused to enforce international criminal law directly, other states position regarding this matter is complicated or not crystalized.⁶⁸ But a noticeable rule is given by the Hungarian Constitutional Court on this issue that the prosecution of international crimes will be regulated by article 7(2) of ECHR and article 15 (2) of ICCPR, not by the national law.⁶⁹ As mentioned earlier that the legal framework of international criminal court and tribunal does not have any obligation to provide any guidance in respect of enforcing international criminal law, national court apprehended such guidance from treaties and customs. However when a treaty is executed between states, it may concern certain crimes and proceeding, for instance, war crimes. It does not contain any rules and regulations as to essential elements of

⁶⁵ Cedric Thornberry, 'Saving the War Crimes tribunal' (1996) Foreign Policy 104, 83

⁶⁶ Leila Sadat and Richard Garden, 'The international criminal court; An uneasy revolution' (2000) 88 GLJ 381, 389

⁶⁷ Alexander Zahra, 'International Criminal Law' (Oxford University Press 2008) 489

⁶⁸ Ward Fardinandusse, 'The interaction of national and international approaches in the repression of international crimes' (2004) EJIL 15

⁶⁹ L.Solyom and G.Brunner, 'Constitutional judiciary in a new democracy: the Hungarian constitutional court' (UMP 2000) 273-283

substantive criminal law. Moreover non-ratifying nations face complications by treaty obligations for establishing international criminal justice which is the ultimate aim of international judicial system and legal environment.⁷⁰ The Hague District court in the Van Anrrat case stated regarding this issue that, effective prosecution and penalization of international crimes depend on the proper application of international law by national court. Because where national law consider a crime as an offence under international law, international criminal law might not conceive it the same way. In this regard, court prefers the international liability to the national liability.⁷¹

The principle of complementarity: weakness or strength or state sovereignty need to be surrendered

The ICC forms a connection between national legal system and the international criminal court through the principle of complementarity. This complementarity relationship means, in terms of the prosecution of international crimes states have the primacy over ICC and ICC stands as a backup court. The court acts only when national authorities fail to take proper steps or unwilling or unable to prosecute any crimes incorporated under the article 5 of the Rome statute.⁷² Having the first opportunity to try international cases, national court plays a vital role to control the criminal matters and put an end to impunity which is the ultimate goal of the ICC. In spite of the positive view, this principle is one of the controversial issues in international criminal law. It is argued that due to this principle there is a tension between ICC and national court over exercising the criminal jurisdiction. Another criticism is that being a party of ICC, states sovereignty has to be surrendered on account of the court or the principle of state sovereignty is undermined.⁷³ Some commentators considered the complementarity as a weakness of the ICC, because significant control is given to the national court over international prosecution. On the other hand some believe that complementarity is the strength for ICC as it protects not only the sovereignty of state parties of ICC but also third states.⁷⁴ Generally international criminal scholars believe that there is a clash between state sovereignty and international accountability. Cassess explained the relationship of international criminal law and state sovereignty in a way that, these two concepts are not compatible to each other. No one can support rule of law and state sovereignty simultaneously. It is difficult to determine for international tribunal that they should proceed the prosecution or they should respect state sovereignty.⁷⁵

In this section, an attempt would be made to explain the relationship between state sovereignty and international criminal court in light of the principle of complementarity which is a most debating issue in the field of international criminal law.

Inherent and implementation problem

Principle of complementarity put the ICC in a secondary position in the sphere of international prosecution. In that sense complementarity is a weakness for the ICC, where

⁷⁰ Report of the secretary General on ICTY, para 34

⁷¹ The Hague District court ,judgement of 23 December,2005,case no LJN:AU8685

⁷² Ibid (n 1) art 5

⁷³ Manuela Melandri, 'The relationship between state sovereignty and the enforcement of international criminal law under the Rome statute:A complex interplay' (2009) International Criminal Law Review 9,531-545

⁷⁴ Markus Benzing, 'The complementarity Regime of the Internatioanl Criminal Court: International Justice between state sovereignty and the Fight against Impunity'(2003) Max Planck UNYB 7

⁷⁵ Ibid (n 99) 531-545

other international tribunal like, ICTY and ICTR have the supremacy over national courts. Due to this weakness ICC has become subordinate institution and it leaves a choice for domestic court whether to obey the ICC. Another issue need to be taken into consideration, ICC should try some cases which focus on the fairness of the proceeding. Further, Complementarity sometimes indirectly creates tension between domestic court and the ICC on the ground of admissibility. In light of Prosecutor v Muthuara case, it can be said that ICC's prosecutor decision on admissibility can be challenged by the national judicial authority.⁷⁶ A state can stand against Office of the prosecutor on the issue that who will investigate and prosecute a case, the ICC or the state. In above mentioned case, Kenya challenged two prosecutions which were rejected by the Pre-trial chamber II and Appeal chamber set aside Pre-trial chamber's decision and validated Kenya's challenge. In addition, more critical issue regarding implementation relate to ICC's willingness to prosecute weaker countries, for example African countries. On account of political issue, the ICC has shown their interest on African Region that led to a perception of inequality.⁷⁷ However, critics argued that a nation with flourished legal system should prosecute by their own legal system instead of referring the matter to the ICC. ICC does not prefer to receive self-referral case from developed countries which were done by three African nations.⁷⁸ Another major concern is that, many states especially non state parties of the ICC claim that complementarity principle is a threat to state sovereignty. The reason behind this fear is, according to article 17.2 (a-c) the ICC has the power to ascertain its jurisdiction over national court and take over a case from domestic court which is clearly an infringement of state sovereignty and violation of non-intervention concept.⁷⁹

Promote and increase the national criminal proceeding

For establishment of the international criminal justice Rome statute emerged a procedural system where national judicial authorities hold a significant role. Complementarity can be considered as strength for national court because it's not only giving the first opportunity to adjudicate international crimes but also motivate and increase national capacities to prosecute core crimes. For example, by incorporating ICC's statute, Uganda established international crimes division in their High court. By virtue of the principle of complementarity it is now easy to decide to actual allocation of a case.⁸⁰ Moreover the ICC can assist states, especially the nation who is not judicially strong, concerning the prosecution in accordance with ICC statute.⁸¹ With a great control in the hands of states will encourage to becoming a party of Rome statute. One can argue that, after the ratification of Rome statute, states are forced to re-examine their penal legislation. Debates have arisen on the appropriateness of domestic rules and regulations. This debate can lead the ICC to take step against the international rule of non-interference.⁸² However, according to international lawyers and scholars, revision of domestic legislation enables state to try genuinely. In light of article 6-8 of Rome statute, many nations modified their penal law in respect of international crimes. Further a positive effect may inspire other states to adopt same rules regardless of the matter whether they are the party of Rome statute or not. In addition, complementarity

⁷⁶ Prosecutor v Muthuara et al. case no ICC-01/09-02/11

⁷⁷ Charles Jalloh, 'Africa and the International Criminal Court: collision or Cooperation?' (2012) 34 N.C.CENT.REV.203

⁷⁸ ICC, the court today, Doc. ICC-PIDS-TCT-01-018/12_ENG, Nov 2012

⁷⁹ Ibid (n 103)

⁸⁰ Ibid (n91) 309-312

⁸¹ Ibid

⁸² Ibid (n32) 474

principle not only helps to detect national failure regarding prosecution of international crimes and but also ensure the ICC's interference in an effective way. Before interference, ICC prosecutor may request state to give information for assessing their criminal proceeding. Although in accordance with the statute states are not obligated to keep the prosecutor informed, the prosecutor is allowed to create any mechanisms such as, assistance of NGO's, by ensuring the respect of state sovereignty. Benzing and Bergsmo explained that it is very embarrassing for a state when an international institute raises a question on genuineness of their proceedings.⁸³ National court always tries to avoid this stigma which may ultimately encourage states to prosecute genuinely. Another significant aspect of the complementarity principle is its positive approach where the prosecutor has an opportunity to participate into discussion and cooperation to motivate and assists states to take proper measures nationally. Prosecutor Luis Moreno stated that, by establishing an external relationship prosecutor may facilitate for states to perpetrate its investigation and prosecution of crimes.⁸⁴ Moreover, since the aim of international and national court is to establish truth and peace, it will be easy to achieve this goal if International and national judicial system work as an integrated institution.⁸⁵ Further, the ICC prosecutor by creating a little bit pressure upon a state who is unwilling to proceed a suit, can enrich the effectiveness of the complementarity principle. When the ICC prosecutor suspects that there is a scope of impartiality in national prosecution and consider to start his or her investigation, this decision pursue national court to be more genuine in proceeding. Kleffner stated that, for the facilitation of criminal proceedings and give justice to victims, conversation between prosecutor and states is very important. Because this conversation may encourage state to complete its prosecution and simplify to resolve the matter. Kleffner further explained that, procedural setting of complementarity not only improves national judicial system, but also focuses on universal deliberation on dealing of the international crimes at national level and establishment of global justice.⁸⁶

Safeguarding State Sovereignty

The relationship between the ICC and state sovereignty on the ground of admissibility of a case is still unsteady. Due to the ICC's interference in national prosecution, most of the states think several times before the ratification of the Rome statute. Most international scholars explain that complementarity principle is considered as a safeguard of state sovereignty where other commentators argue that this principle completely infringe state sovereignty. According to the Department of Treaty and Law of the Chinese Ministry of Foreign affairs, 'if the ICC wants to establish its dominion, trust and confidence among the international community, it needs to be ensured that the ICC is following its own relevant provisions. The principle of complementarity is the base of the Rome statute where domestic court will enjoy primacy over ICC. The reason behind the inclusion of this principle is to establish international justice through the domestic judicial system.'⁸⁷It is not only controversial but

⁸³ Markus Benzing and Bergsmo Morten, 'Some Tentative Remarks on the Relationship Between internationalized Criminal Jurisdiction and the International Criminal Court' (2004) OUS 414

⁸⁴ Statement of the prosecutor Luis Moreno to Diplomatic Crops, 12th February 2004,p4 <http://www.icc-cpi.int/otp_events.html>

⁸⁵ Building a future on peace and justice ,address by Luis Moreno-Ocampo at Nuremberg,25th June 2007,<http://www.icc-cpi.int/otp/otp_events/LMO_20070624.html>

⁸⁶ Ibid(n 83)

⁸⁷ China and the international criminal court, Department of treaty and law (MFA), 28 October 2003, <<http://www.fmprc.gov.cn/engwjb/zjg/tyfls/2626/2627/t15473.htm>>

also complicated to measures whether complementarity principle is a threat for state sovereignty or not. Some key points will be discussed below regarding this issue.

As stated previously in this paper, according to the complementarity principle domestic court and authority take judicial precedence over international criminal court on the prosecution of international crimes. However in practice according to article 17, 19(2) and 20, national judicial system is interfered by the ICC. These articles allow the ICC to take part in the prosecution of crimes. The statute defines that, if a state is unwilling or unable to prosecute crimes ICC can take over this prosecution from national court. The question is who will decide that state is unwilling and unable. According to article 19(2), in this regard ICC will be the supranational authority and its word will be final. By holding this power ICC is becoming a supreme judicial body of all national court. Dempsey stated that, analyzing the genuineness of the domestic criminal proceeding ICC indirectly imposes a burden upon state to revise their penal law and exalt the case before court which ultimately detract the notion of state sovereignty.⁸⁸ However, the apologist for the ICC argues that the traditional notion of the state sovereignty is not a barrier for taking a step of establishing an international judicial authority.⁸⁹ According to Legal scholar Sandra Jamison, although a state is superior within its own dominance where national or international affairs is not essential to take into consideration. But some part of traditional state sovereignty need to be dedicated to the potential ICC for the establishment of international criminal justice. Furthermore, regarding the admissibility issue Rome statute hold some provisions where state and individual can challenges the admissibility of a case at its early stage.⁹⁰ Article 19(7) provides that, on the basis of state's challenge prosecutor shall suspend the investigation until court makes a determination on its admissibility. After deferral of the investigation Prosecutor can make a request for information. Article 18 paragraphs 2 stated that if investigations and prosecution is started by the national court, state also can ask to stop investigation within one month from accepting the notifications.⁹¹ By achieving sovereignty, a state can obtain some rights as well as it has to fulfil some responsibility for the interest of international community. Principle of complementarity is recognized as burden sharing mechanism⁹² where national court and the ICC accomplish their responsibilities through mutual interaction. Since the ICC crimes are jus cogens crimes, national courts have obligation for global interest to prevent this crimes by ensuring their participation. At the time of the interlocution with the ICC, many states perceived that provisions of the Rome statute especially regarding jurisdiction and admissibility criterion should be assemble with states judicial system. By analyzing the art 18 and 19, it can be said that statute leaves wide space for states on admissibility issue⁹³ and this is difficult to say that state sovereignty is not protected by the ICC statute. Complementarity principle not only helps states to uphold their common interest, but also prevent them from abusing their sovereignty and ensures individual and united security.

⁸⁸ Dempsey Jack, 'Reasonable doubt: The case against the Proposed International Court'(1998) Cato policy Analysis no 36

⁸⁹ Benjamin B. Ferencz , 'Address at the Rome conference at the pace peace centre'(1998)

<<http://www.un.org/ic/speeches/616ppc.htm>>

⁹⁰ Ibid(n 4) 672

⁹¹ Ibid (n 1) art 18

⁹² Carsten Stahn, 'Complementarity; A Tale of Two Notions' (2008) CLF 19:87-113

⁹³ Ibid (n 32) 472

Conclusion

Without any doubt, most states demand that for the interest of the international community individuals should be tried who violate the human rights and international criminal law. To fulfil this international determination, the ICC or national judicial authority is not sufficient that call for an integrated judicial system. As an international organization, ICC by means of complementarity nature constitutes an interaction with national court to achieve its purpose. The principle of complementarity is the soul of the ICC, but this concept contains many unexplained characteristics. It is still a debatable issue that under what conditions and when this principle is applicable. In spite of its weakness, this principle is considered to be strength for the ICC, because the notion of complementarity systematizing the relationship between the ICC and the national court in respect of the prosecution of international crimes and helps to allocate jurisdiction. When the national judicial authority fail to investigate and try any crimes, through the cooperation activities ICC detect national failure and promote national court to carry out the prosecution. Further, it can be said that priority of state sovereignty over the human rights sits oddly with international demand for justice.⁹⁴ Moreover due to the conceptual changing of state sovereignty in modern society where the states are still not prepared to waive their rights, complementarity tries to maintain a balance among sovereign rights of a state at the time of exercising criminal jurisdiction over universal core crimes. Eventually it can be said that, complementarity principle in some way advantage for the ICC and in other way a challenge. Besides that the present ideology of complementarity may not be ultimate; but its conformity will be significant not only for the ICC with regard to trials, but also for national judicial system in terms of prosecuting international core crimes. On the other hand, by increasing national capacity and building a relationship with state judicial authority, it would be easy to achieve ICC's object; the international justice.

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⁹⁴ Prosecutor v Tadic , [1995] AC case no IT-94-I –AR72

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