

The principle of complementary jurisdiction: Between the idea of national sovereignty and international criminal justice

مبدأ الاختصاص التكميلي : بين فكرة السيادة الوطنية والعدالة الجنائية الدولية

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Abstract:

In order to reconcile the work of the International Criminal Court - which is essentially the achievement of international criminal justice by combating the phenomenon of impunity for criminals - on the one hand, and the need to respect considerations of national sovereignty on the other hand, an important procedural principle on which the court bases itself in order to exercise its competence and encourages States to accept its jurisdiction without invoking to violate its national sovereignty, this principle is the "Principle of complementary jurisdiction", which preserve to States the primary role in the prosecution of crimes under the jurisdiction of the International Criminal Court, because this Court did not come to replace the national judicial authority nor to withdraw its jurisdiction, It rather came to supplement it, so the Court does only Intervenes when states are unwilling or unable to bring criminals to justice.

key words: Principle of complementary, International criminal justice, National sovereignty, International Criminal Court.

المخلص:

من أجل التوفيق بين عمل المحكمة الجنائية الدولية - والمتمثل أساسا في تحقيق العدالة الجنائية الدولية من خلال محاربة ظاهرة إفلات المجرمين من العقاب - من جهة، وضرورة احترام اعتبارات السيادة الوطنية من جهة أخرى، كان لا بد من إعمال مبدأ إجرائي هام تعتمد عليه المحكمة في ممارسة سلطاتها ويحفظ الدول على قبول اختصاصها دون التذرع بالمساس بالسيادة الوطنية، هذا المبدأ هو "مبدأ الاختصاص التكميلي"، والذي يخول للدول من خلال هيئاتها القضائية الداخلية الأولية في التصدي للجرائم الواردة بنظام روما الأساسي، فالمحكمة الجنائية الدولية لم تأت لتحل محل القضاء الوطني أو لتسلبه اختصاصه، بل جاءت لتكون مكملة له، فتتدخل بالتّظّر في الجرائم الدولية المختصة بها إذا كانت الدولة غير راغبة أو غير قادرة على متابعة المجرمين قضائيا.

الكلمات المفتاحية : مبدأ الاختصاص التكميلي، العدالة الجنائية الدولية، السيادة الوطنية،

المحكمة الجنائية الدولية.

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Introduction:

Countries pay great importance to the concept of national sovereignty, and this has been confirmed in the Charter of the United Nations in several articles, for example, which is mentioned in the seventh paragraph of the second article, which states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter ... ", Therefore the authors of the Statute of the international criminal court -created on July 17, 1998- paid attention to the importance of this issue, and the fear that the work of the court could pose for some countries the threat of their national sovereignty, so they decided to clarify this case starting from the preamble of the statute, as it stated that the court will not deprive signatory states of its statute of its sovereignty, but rather encourage states to fight international crimes.

In order to reconcile the work of the court on the one hand - and this is mainly to achieve international criminal justice by combating the phenomenon of impunity for criminals - and the need to respect considerations of national sovereignty, on the other hand, it was necessary to implement an important principle on which the court relies in its work and helps States to accept its jurisdiction without invoking national sovereignty, this principle is "the principle of complementary jurisdiction" which gives states priority in tackling the crimes that enter in the jurisdiction of the court each time they are incriminated by the national legislator.

The International Criminal Court, which is the most important system of international criminal justice, doesn't come to replace national courts or to rob them of their competence, but come to supplement to them, then to judge the authors of these international crimes in some cases.

In the present study, answers to many questions have been done, mainly:

- What is the concept of the principle of complementary jurisdiction?
- What is its legal basis?
- When will the jurisdiction goes back to the International Criminal Court in application of this principle?
- What is the authenticity of national justice criminal decisions ahead the International Criminal Court??
- Are there practical problems facing the application of this principle?

To answer the previous questions, the subject was divided into three main chapters: The concept of the principle of complementary jurisdiction and its ambit (chapter I), the authenticity of criminal decisions of national justice before the International Criminal Court (chapter II), some practical problems facing the application of the principle of complementary jurisdiction (chapter III).

Chapter I: The concept of the principle of complementary Jurisdiction and its ambit

One of the important reasons for the creation of the International Criminal Court is to make its jurisdiction complementary to national courts, and one of the most important reasons for its adoption is to make the court acceptable to the greatest number of countries in order to be able to perform its functions, this is evident in giving the national courts of states the right to initial jurisdiction over actions to crimes within the jurisdiction of the court and in asserting that it does not infringe the concept of state sovereignty.

1- The concept of the principle of complementary jurisdiction:

The relationship between the national judiciary and the International Criminal Court is governed by an important principle which is "The principle of complementary jurisdiction"¹, which requires that priority be given for national justice to the consideration of crimes within the jurisdiction of the International Criminal Court.

The Statute of the International Criminal Court took the principle of complementary jurisdiction expressly in its preamble in its tenth paragraph, which states: " ... Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,..",

and the first article of the Rome Statute also referred to this complementary role, stating: " An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.".²

It is noted through these two texts that the statute of the International Criminal Court has adopted the principle of complementary jurisdiction without giving a specific definition to it, and it may have been deliberate for that the theoretical definition of the principle leads to entering the tunnel of the legal text

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and adhering to its words, which causes confusion and thus paralyzes the work of the court. Therefore, each of the committees concerned with the preparation of the draft International Criminal Court statute - the International Law Commission, the Specialized Committee, and the Preparatory Committee - preferred that there be a common understanding of the practical implications of the principle of complementary jurisdiction that is discerned from the core of the Rome Statute rules as a whole.³ In addition, putting a definition is not the job of the legislator, but it is an inherent legal competence of the doctrine, whether it is national or international law.

This principle has been mentioned in many articles of the Statute of the International Criminal Court, mainly articles 17, 18, 19 and 20, which refer to the main role of the principle in the early stages of judicial proceedings, and there are many other issues closely related to complementarity and At later stages of judicial proceedings, such as judicial cooperation in the field of extradition or their referral to the International Criminal Court, the execution of prison sentences ...etc.

Dr. Abdel-Fattah Mohamed Siraj defined him, based on the court's characteristics, as: "This compromise wording that the international community adopted to serve as a focal point to urge states to try those accused of the most serious crimes, provided that the International Criminal Court supplement this range of jurisdiction in case of inability to The national judiciary from conducting this trial, due to his lack of competence or failure to do so because of the breakdown of his administrative structure, or failure to show seriousness to bring the accused to trial."⁴, through this definition, it is clear that the jurisdiction to consider crimes within the jurisdiction of the International Criminal Court is held for the national judiciary first, If this jurisdiction does not exercise its jurisdiction due to the unwillingness or inability to conduct the trial, then the jurisdiction of the International Criminal Court is held, and it should never be understood from the principle of complementary jurisdiction that the International Criminal Court represents a higher judicial authority than the national judicial authorities because it remains - in all Conditions - complementary to it and an extension of its jurisdiction.

Although many countries oppose the establishment of the International Criminal Court on the pretext that it constitutes an attack on national sovereignty, but the reality is quite the opposite, in addition to the Court's reliance on the principle of complementary jurisdiction, which was found as a solution to

reconcile the considerations of this sovereignty and achieve international justice by combating the phenomenon of impunity for criminals, and the International Criminal Court was created by an international treaty in the sense of an agreement between states based on their consent, nothing obliges a country to engage with its statute against its will, and if the State decides of its own free will and accepts the respect of its provisions, that does not constitute an attack on its sovereignty, because the conciliation with , On the contrary, a treaty constitutes a real exercise of national sovereignty and not abandonment or aggression against it.⁵

The complementary jurisdiction of the International Criminal Court represents the important aspect of the difference that distinguishes between the court and the international criminal tribunals for both the former Yugoslavia and Rwanda, considering that the jurisdiction of these two Tribunals is a common or concurrent jurisdiction with the national jurisdiction, and priority being given to these two tribunals over national jurisdiction, and this is was adopted by article 9 of the statute of the International Criminal Tribunal for the former Yugoslavia, which adopted the principle of common jurisdiction between that Tribunal and the national court, giving priority to the International Criminal Tribunal for the former Yugoslavia, so the tribunal may ask the national courts, when they are settling a case concerning one of the crimes within its jurisdiction, to stop the trial and to refer it as it is to the International Court, as long as this case is linked to one of the crimes which fell within the jurisdiction of the court in accordance with its statute and the list of procedures and special evidence,⁶ and in the same sense, the International Criminal Tribunal for Rwanda included an affirmation of the principle of the priority of its jurisdiction over national courts, in accordance with Article 08 of its statute.

Perhaps the reasons that both the International Criminal Tribunal for the Former Yugoslavia and its counterpart for Rwanda adopt the principle of common jurisdiction between them and the national judiciary with a condition of priority for them to consider the crimes within their jurisdiction over the national jurisdiction are that these two tribunals were formed by a political decision of the Security Council,⁷ consequently, this decision defines the working conditions of the tribunal, which are imposed on states without participating in them, in most cases, unlike the International Criminal Court, which was created by the will of the states,⁸ This priority in the jurisdiction of the tribunals established by a resolution of the Security Council over the national judiciary has caused a great

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deal of controversy, as the states felt a decrease in their sovereignty, so there was an urgent need for a new pattern of relationship in order to preserve the sovereignty of states on the one hand, and reduce the phenomenon of impunity. On the other hand, then the best solution was for the International Criminal Court to be complementary to the national courts rather than to have priority over of them, and to intervene only in the event that the national criminal jurisdiction is not willing or unable to complete its tasks.

2-The ambit of the principle of complementary jurisdiction:

The definition of the ambit of the principle of complementary jurisdiction aims to clarify the cases in which the International Criminal Court exercises its complementary jurisdiction, because it has already been confirmed that the priority of trying the crimes mentioned in article 05 of the Rome Statute⁹ belongs to the national jurisdiction, but if the court discovers that this jurisdiction is unable to perform its task. For one reason or another, jurisdiction returns to the International Criminal Court.

Article 17 of the Rome Statute, entitled “Issues of admissibility”, sets out the cases of jurisdiction of the International Criminal Court, since it included in its first paragraph that jurisdiction rests with the court to judge the case despite its examination by the national courts in two cases:¹⁰

- **The first case** : When the case is being investigated or prosecuted by a State which has jurisdiction over it, and the court discover that this State is unwilling or unable -genuinely- to carry out the investigation or prosecution,

- **The second case**: When the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, and the court discover that this decision resulted from the unwillingness or inability of the State -genuinely - to prosecute.

It is clear from this cases that the jurisdiction of the International Criminal Court over one of the crimes within its jurisdiction takes place only: if it is clear that the State whose courts are examining the linked case to this crime does not want or cannot¹¹ really carry out the task of investigation and judgment.

The burden of proving the State’s unwillingness or inability to carry out an investigation or prosecution rests with the International Criminal Court itself, as it is part of the competence of any judicial system.¹²

The second and third paragraphs of Article 17 have been determined consecutively - matters with one or more of them available - the court concludes the unwillingness or inability to:

- **To determine the unwillingness**, Article 17, Paragraph 2, provides:" In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

Consequently, the Rome Statute has determined specific situations in which the court may conclude that the State concerned does not have a serious and real will to bring the person concerned to justice, or that it seeks to take certain measures or procedures to protect that person from responsibility, However, in practice, there are many obstacles that can obstructing the work of the court when adopting these criteria, because they are personal and not objective criteria related to intentions, which is difficult to prove.¹³

- **To determine the inability**, Article 17, Paragraph 3, provides:" In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

It appears from this paragraph that, in order to find out the inability of the competent State, the court must check whether that State is not at the level to take the appropriate procedures, due to the total absence or partial collapse of its judicial system, or that the justice system is prohibited from acting, which makes it difficult to bring the accused to justice or collect evidence, we cannot - in fact - expect a state which is the scene of an armed conflict or represented by collapsed governments to open an investigation or prosecute serious international crimes such as those within the jurisdiction of the court,¹⁴ it is true to say that proof of the state's inability to investigate or prosecute will be easy for the International

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Criminal Court because inability is part of the objective criterion which can be easily shown to the outside world.¹⁵

One of the other exceptions to the exercise of the priority of national jurisdiction is when the State voluntarily renounces its jurisdiction in favor of the International Criminal Court, this is what happened in the case of the Democratic Republic of the Congo, which the Prosecutor of the International Court began investigating on June 23, 2004, after the letter he received from the President of the Democratic Republic of the Congo, referring the situation in the Congo to the International Criminal Court, knowing that this country is one of the States parties ratifying the Rome statute, as well as the case referred by the Republic of Uganda where the Prosecutor received in December 2003 a letter from the Ugandan President (Museveni), referring the situation in Uganda to the International Criminal Court because of the crimes committed by the (Lord's Resistance Army).¹⁶

Through all of the above, it becomes clear that the two criteria adopted by the International Criminal Court to convene its complementary jurisdiction, "unwillingness" or "inability", may be ambiguous, the provisions of Article 17/2 and Article 17/3 of the Rome Statute are not useful enough to allow clarification of the two terms, but they may rather complicate the problem by referring to other subjective terms.

Chapter II: The authenticity of criminal decisions of national justice before the International Criminal Court

The texts of the Rome Statute have recognized the priority of the national judiciary to investigate and prosecute crimes within the jurisdiction of the court, and this is through articles relating to admissibility (Article 17, 18, 19 of the Rome Statute), also the principle that "A person may not be tried more than once for the same crime" - which was adopted by the court in Article 20 of its statute - is an important foundation that supports the authenticity of judgments issued by the national judiciary before the International Criminal Court, so we will study firstly the principle of "A person may not be tried more than once for the same crime", and secondly "The principle of respecting the judicial rulings issued by the national criminal judiciary by the International Criminal Court.

1- The principle of a person may not be tried more than once for the same crime:

We can consider that the principle of "A person may not be tried more than once for the same crime" as one of the bases which proves the importance of national criminal judgments before the International Criminal Court, this principle is one of the fundamentals principles established in all national legislations, and it is considered one of the most important guarantees to protect the fundamental rights of individuals, therefore, it has become recognized among the national and international judiciary alike, as it was adopted by some international conventions¹⁷ before that the International Criminal Court explicitly adopts it in its statute.

The International Criminal Court held that the principle that A person may not be tried more than once for the same crime applies to the relationship between it and the national authorities, where article 20 of the Rome Statute affirmed that a person should not be tried twice, a simple analysis of Article 20¹⁸ shows that it includes two main possibilities:

a- First possibility: if the first (previous) judgment has been rendered by the International Criminal Court, this possibility -is in turn- is divided into two cases.

a-1- The first case: It is not permissible for the International Criminal Court to try a person before it for conduct which has been the source of crimes for which it has itself been convicted or acquitted.

a-2- The second case: It is not permitted to judge a person by another court for one of the crimes mentioned in article 05 of the Rome Statute if the international criminal court has already convicted this person for these crimes or acquitted him.

b- Second possibility: If the first (previous) judgment has been rendered by another court (national or international court), It is also not permissible here to retry a person before the International Criminal Court for behavior prohibited by Articles 6, 7, 8 and 8bis of the Rome Statute if he was tried before another court for the same behavior, and this is one of the most important bases of respecting national rulings before the International Criminal Court.

It is not permissible to retry a person before the International Criminal Court for the same crime in which a final criminal judgment was issued by the national criminal judiciary, or the criminal procedures were ended by not proceeding according to the rules of the Criminal Procedure Law.

It is worth noting that the framers of the Rome Statute were very keen on to apply the rules of international criminal justice to the extreme, to ensure that criminals do not go unpunished, and this is reflected in the stipulation of the principle that " A person may not be tried more than once for the same crime " without neglecting the exceptions. Linked to this principle, the Rome Statute listed two exceptions to this principle set forth in the third paragraph of Article 20m, which are two:

- Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
- Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

At first glance, it appears that the third paragraph of article 20 of the Rome Statute referred to above raises suspicion or constitutes a legal loophole, and it is because of these two exceptions, because it contradicted the special constitutional rules, but I think that article 20, entitled: " Ne bis in idem ", came to affirm this principle and confirm its respect by the international criminal court, and these two exceptions are a way for the international community represented by the International Criminal Court to fight impunity for criminals, their role is also to ensure that the national criminal trials that examined international crimes were conducted in a good faith.

2- Respecting the judicial rulings issued by the national criminal judiciary by the International Criminal Court:

The legal texts of the Rome Statute related on "Admissibility" affirmed the principle of the complementary jurisdiction of the International Criminal Court, at the same time there are many other texts scattered in the Rome Statute - alongside them - which affirm respect of the International Criminal Court of internal legal systems and therefore its commitment to the provisions issued by national authorities, and the respect of the International Criminal Court for internal legal systems appears on several points, the most important are:

- Article 17 of the Rome Statute concerning Issues of admissibility, refer to paragraph 10 of the preamble and article 1, which relate to the principle of complementarity.

- All the provisions of article 17 of the Rome Statute indicate that the general rule for the trial of crimes falling under the substantive jurisdiction of the International Criminal Court subject to national criminal jurisdiction.

- In accordance with the requirements of the principle of complementary jurisdiction between national jurisdiction and the International Criminal Court, article 18, paragraph 2, of the Rome Statute indicates that when the Prosecutor notifies that the court is carrying out investigations or prosecutions in a specific case, so any State which has carried out an investigation may inform the prosecutor who can stop any action until the national criminal authorities continue its procedures.

- An inadmissibility of a case may be brought before the International Criminal Court because of the authenticity of judgments issued by national authorities, it was mentioned in paragraph 2 of Article 19:"2- Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12."

- It is also evidence on the recognition by the International Criminal Court of judgments issued by the judicial authorities of the states parties is the provisions of Article 80 of the Statute of the Court,¹⁹ which it recognizes the sanctions contained in these provisions even if they are not stipulated in the ICC statute itself, what is stated in the text of this article is only an application of the principle of complementary jurisdiction of the International Criminal Court, which ,was previously mentioned, as the State can apply penalties other than those stipulated in the statute of the International Criminal Court, such as the death penalty, or the trial of individuals under the age of eighteen, likewise, if the accused is tried before the national judiciary, he may not demand the application of the rule " the law more favorable to the person " based on the Rome Statute.

- Complementary can also be found through the " enforcement of punishment " in Chapter 10 of the Rome Statute, which clarified the relations between the international criminal court and the country in which the penalty will be executed, The court has given the supervision of the execution of the prison

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sentence according to the conditions prevailing in the country where the International Criminal Court will decide to apply the penalty,²⁰ the appointment of the country in which the penalty is to be carried out shall be at the request of this court, this request is not obligated on the State, rather, the state can compare its approval with specific conditions of implementation that are compatible - of course - with the conditions of implementation prevailing in its territory,²¹ In return, the State may not amend the International Criminal Court's prison sentence for any reason.

In sum, many of the articles of the Rome Statute, which the study cannot accommodate, all confirm this court's respect for internal regulations and legislation.

Chapter III: Some practical problems facing the application of the principle of complementary jurisdiction

The application of the principle of complementary jurisdiction to the International Criminal Court during the exercise of its jurisdiction practically faces some problems, and this is due to some drafting methods in the Rome Statute that constitute an obstacle to the application of the principle of complementary jurisdiction.

The problem of the authority conferred to the Security Council over the International Criminal Court is one of the most important problems facing the implementation of the principle of complementary jurisdiction, there is also another set of problems that hinder the execution of the principle, such as: problems related to immunity, the problem of absentee judgments, the problem related to the issuance of the amnesty decision by the internal courts, and finally the problem of extending the jurisdiction of the court to non-parties.

1- The problem of the authorities conferred to the Security Council facing the International Criminal Court:

In order to find equilibrium between the willingness of the major powers to give the Security Council broad authority over the International Criminal Court, and the will of many other countries to reduce that authority, the Rome Statute included certain texts which confer on the Security Council certain authorities, including the authority of referral stipulated in article 13 Paragraph B, and the authority of Deferral of investigation or prosecution stipulated in article 16 of the

Rome Statute, and those authorities granted to the Security Council constitute an exception to the principle for complementary jurisdiction and limit its application.

a- The referral authority confer to the Security Council:

The Security Council may refer any case to the International Criminal Court, acting under the provisions of Chapter VII of the Charter of the United Nations relating to the maintenance of international peace and security, so if persons belonging to a State commit a crime within the jurisdiction of the International Criminal Court which the Security Council considers as threat to international peace and security may refers the case to the court.

The problem of the referral authority granted to the Security Council emerges by asking the following question: Would the referral authority vested in the Security Council limit the competence of the national authorities to Performing its initial and original role in investigation and prosecution of crimes within the jurisdiction of the International Criminal Court?

There are two different doctrinal approaches that attempted to answer this question:

- **The first doctrinal approach:** The work of the Security Council in issues of referral is governed by the principle of the complementary jurisdiction of the court, in this sense when the Security Council refers a case which has a link with the jurisdiction of the International Criminal Court, it must take into account the extent to which the state concerned is willing and able to prosecute the perpetrators of these crimes, If the Security Council does not take this into consideration, it may be faced with the failure of the International Criminal Court to accept this referral, in application of the text of Article 17 of the Rome Statute, whose provisions must be taken into account, whether in the case of referring the case to the court by member states or by the Security Council.²²

- **The second doctrinal approach:** Whenever the Security Council refers a case to the International Criminal Court, acting under Chapter VII, this stops the work of the national authorities from addressing that situation, Especially if the Security Council's resolution on that situation includes one of the items that requires states to refrain from interfering in the presented case or to take certain actions in that regard, this means that the principle of complementary jurisdiction is limited to two cases: referral by a state party or the prosecutor initiating the investigation on his own initiative, but for the case of referral by the Security Council, this would reduce the role of national authorities in this regard.

In any case, granting this authority to the Security Council does not contain the risk that some imagine, because the International Criminal Court has discretion in accepting the referral request or not, and this after reviewing the referral decision, especially the point related to the availability of a threat to international peace and security.

b- The Deferral authority confer to the Security Council:

The Rome Statute has given the Security Council dangerous authority - along with the authority of referral - that is, the authority to deferral investigation and prosecution, and this is in accordance with Article 16 of the statute,²³ the Security Council will have, under this article, the possibility of suspending or obstructing the work of the Court concerning the opening of the investigation or of the trial for a period of twelve months renewable.

It should be noted that the deferral has the effect of putting an end to all actions taken against those accused of crimes within the jurisdiction of the International Criminal Court, so, the principle of complementary jurisdiction loses its effectiveness, especially since the court does not intervene until it is assured that the national judiciary is not able or not willing to conduct an investigation or prosecution, then the criminal escapes punishment twice, once before the national court and another before the International Criminal Court if the Security Council seeks to defer judicial procedures for political considerations - which often characterizes its work -.

2-Some other problems that hinder the application of the principle of complementary jurisdiction:

There are many problems that hinder the application of the principle of complementary jurisdiction, and I will try to touch upon some of them, namely: problems related to immunity, the problem of absentee rulings, the problem related to the issuance of the amnesty decision by the internal courts, and finally the problem of extending the jurisdiction of the court to non-parties.

a- Problem related to immunity:

The Rome Statute stipulated that immunity should not be recognized (Articles 27 and 28), but rather that it aimed to eliminate all traces of immunity, Article 98 (01) of the Rome Statute had created a major flaw in this statute which allowed criminals to escape punishment behind the veil of immunity, as Article 98 states in its first paragraph: " The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State

or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

It seems clear that the text referred to above was drafted in order to remove the embarrassment from the country in which the accused resides in order not to enter into a conflict with the country to which this person belongs. The framers of the Rome Statute took into account those relations between the states and could be affected by the practice of the court. On the one hand, it also took into consideration the principle of state sovereignty over its citizens on the other hand.

b- Problem related to the absence judgments:

The problem of absence judgments is in the event that a judgment is passed in absentia from the national judiciary of the accused country, in which case the person has already been tried, and it is not permissible to retry him before the international judiciary, this person resides in the territory of another country - other than that which pronounced the judgment against him - and if this last country will arrest him and present him to the International Criminal Court, does the court refer this person to the national court which rendered the absent judgment against him, or does it open an investigation against him in accordance with the principle of complementary jurisdiction?

The answer to this question can be deduced from Article 1/17 / c which states that the lawsuit is not admissible before the International Criminal Court if the person concerned has already been tried for the behavior in question, this article did not distinguish between the judgments when the accused is present or urban or absente, Thus, the complementary jurisdiction of the International Criminal Court may not be held in the event of a lawsuit in which the accused is a person against whom an absence judgment has been issued in the national courts because of the same behavior that the criminal court is suing for, Also, the retrial of this person is an explicit violation of the text of Article 20, which stipulates that a person may not be tried twice for the same crime.

c- The problem related to the issuance of the amnesty decision by the national courts:

The consequence of the amnesty decision is that the perpetrator becomes free as if no sanction had been imposed on him, whether it be an amnesty for the sentence or an amnesty for the crime, The question arises of the impact of the amnesty decision issued by the national authorities against a person accused of having committed one of the crimes within the jurisdiction of the International Criminal Court, is this decision considered a trick to deny responsibility for the

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perpetrators and protect them from appearing before the International Criminal Court on the grounds that the person may not be punished for the same crime twice.

The answer to this question is that if the relevant authorities in the State issue a decision to pardon the crime or pardon the punishment, the International Criminal Court cannot reconsider the same case, but complementary jurisdiction is held if it discovered that this amnesty has been issued with the aim of circumventing criminal responsibility against the accused.²⁴

d-the problem of extending the jurisdiction of the court to non-parties:

Article 12 of Rome Statute of the International Criminal Court entitled "Preconditions to the exercise of jurisdiction" states:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9. "

Through this article, it is obvious that the court automatically exercises its jurisdiction over the States Parties without the requirement of prior approval, taking into account the cases of its complementary competence, and that is when the Security Council refers a case to the Prosecutor in which it appears that one or more crimes within the jurisdiction of the court were committed in accordance with the provisions of Chapter VII of the Charter of the United Nations (Article 13, paragraph B, of the Rome Statute), and if a State party refers to the Prosecutor a situation in which it appears that one or more crimes within the jurisdiction of the court have been committed (Article 13 / a), finally, if the Prosecutor has initiated an investigation on his own initiative in connection with one of these crimes (Article 13 / c).

Provided that the crime in the last two cases was committed on the territory of a State party or on board a ship or aircraft registered with it, or the crime was committed by a citizen of the State party, but the first case is general and applies to all countries, whether they are parties to the Rome Statute or not, as the Security Council has been granted general jurisdiction (applies to all countries), and automatically (does not need the consent of States).²⁵

Conclusion:

The principle of complementary jurisdiction is considered like the cornerstone of the creation of the International Criminal Court, as it came as a compromise solution to the problem of national sovereignty, on the grounds that the court will not affect the sovereignty of States parties but will encourage them to fight international crimes in accordance with their national laws, the court does not examine the case previously dealt with by the national authorities, unless it has been established that these authorities cannot or do not wish to try the accused, in particular if they demonstrate a certain degree of independence and impartiality, or if their judicial system is marred by total or partial collapse.

Finally, all of the problems - mentioned previously- can limit the effectiveness of the court's work, but International Criminal Court the mainly aims to combat international crime, and deterring its perpetrators by applying criminal punishment to them, also restrict the criminals to the corner of the national criminal justice, If they are able to escape from it because of the State's inability or unwillingness to do so, they will not escape the grip of the international criminal judiciary represented by the International Criminal Court after it has the competence in accordance with the principle of complementary jurisdiction.

Bibliography:

¹ - The term of "**complementary**" was mentioned in the Rome statute in the English language, this term does not exist in the English language, but was quoted from the French term "**Complémentarité**" and this is to explain the relationship between the International Criminal Court and national judicial systems, see this: Dr. Mahmoud Sharif Bassiouni, **the International Criminal Court is an introduction to studying the provisions and mechanisms of national enforcement For the Basic Law**, Dar Al-Shorouk, Cairo, 2004, p. 19.(Arabic book)

² - Rome Statute of International Criminal Court online:

<https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³- Oscar Solera, "**Complementary Jurisdiction and International Criminal justice**," **International Review of the Red Cross** , March 2002, Vol 84, N^o 845M, p.148.

⁴ - Abdel-Fattah Muhammad Siraj, "**The Principle of Complementary in the International Criminal justice, An analytical and original study**", Dar Al-Nahda Al-Arabiya, Cairo, 2001, p.6. .(Arabic book)

⁵ - Ahmed Abu Al-Wafa, "**The Main Features of the International Criminal Court**", in **Collective book : The International Criminal Court Constitutional and Legislative Harmonies**, Fourth Edition, International Committee of the Red Cross, Cairo, 2006, p. 64. .(Arabic book)

⁶ - The first person to whom the principle of referral of national justice to the International Criminal Tribunal for the former Yugoslavia has been applied is the accused "Tadic", where the prosecutor asked the German government to end the proceedings investigation against him in 1995, and to hand him over to the International Criminal Tribunal for the former Yugoslavia to trial him, the German government responded to this request after taking certain legislative measures which enabled it to do so. See: Dr. Adel Abdullah Al-Masadi, **International Criminal Court (jurisdiction and referral rules)**, Arab Renaissance House, Cairo, 2002, p. 214. (Arabic book).

The Ardemovic trial is also an example of the principle of the priority of the jurisdiction of the International Criminal Tribunal for Yugoslavia over national jurisdiction, Whereas, on 14/05/1996, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia asked the Trial Chamber to file an official request to the Republic of the former Yugoslavia concerning the possibility of referral of the investigations and criminal proceedings of Ardemovic, On 29/05/1996, the Chamber accepted the Prosecutor's request and informed the Ministry of Foreign Affairs of Yugoslavia, this latter announced its acceptance to the International Criminal Tribunal for the former Yugoslavia and handed over the accused Ardimovic to the tribunal with a file of the results of investigations on 11/11/1996. See: Dr. Hossam Ali Abdel-Khaleq Al-Sheikha, **Responsibility and Punishment for War Crimes with an Applied Study on War Crimes in Bosnia and Herzegovina**, New University Publishing House, Alexandria, 2004, p. 309.(Arabic book)

⁷ - The International Criminal Tribunal for the former Yugoslavia was created in accordance with Security Council resolution number 808 of 22/02/1993, and its competence is to try persons accused of serious violations of the rules of international humanitarian law in the territory of the former Yugoslavia since 1991, and after the Secretary-General of the United Nations prepared the statute of the tribunal , its legal presence began on May 25, 1993.

- The International Criminal Tribunal for Rwanda was established on the basis of Security Council Resolution number 955 of 08/11/1994, which is specialized in the prosecution of persons accused of serious violations of the rules of international humanitarian law - Article 03 common to the four Geneva Conventions of 1949 and the Second Additional Protocol of 1977 because the armed conflict in Rwanda was Internal conflict - in the Rwandan region and neighboring countries (from 01/01/1994 to 12/31/1994.).

⁸ - Abdel-Fattah Muhammad Siraj, Op Cit, p.31.

⁹ - Article5 of the Rome Statute, entitled" Crimes within the jurisdiction of the Court" , states: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression".

¹⁰ - See Article 17 of the Rome Statute, Paragraph 1 (Items a and b).

¹¹ - The question of defining what is meant by unwillingness or inability aroused a wide debate between the representatives of the States during the Diplomatic Conference in Rome which was held from June 15 to July 17, 1998, Some representatives have noted that the use of the two terms unwilling and unable cannot be correct, because they are flexible terms and their interpretation is large, which causes a limitation of the jurisdiction of the court, furthermore, proving the "unwilling of the state" is question of intention, that is to say a personal criterion, which makes it difficult to prove to the court, Hence, proponents of this view prefer to use the term ineffective rather than unwilling, and the term unavailable instead of unable, so " ineffective " relates to judicial procedures before national courts, while " unavailable " relates to the entire national judicial system, this provides an objective criterion which helps to confirm whether national justice is able to try these crimes or not. see: Adel Abdullah Al-Masadi, Op Cit, p.216-217.

¹² - about the question of who decides whether the ICC has jurisdiction, see: Oscar Solera, Op Cit,, p. 174-175.

¹³ - Sawsan Tamrakhah Bakkah, **Crimes Against Humanity According to the Provisions of the Statute of the International Criminal Court**, Al-Halabi Human Rights Publications, Beirut, 2006, p. 102. .(Arabic book)

¹⁴ - André DULAIT, "**The role of the security council on the functioning of the international criminal court**", Information report, www.senat.fr.

¹⁵ - Sawsan Tamrakhah Bakkah, Op Cit, p.103.

¹⁶ For cases suggest before the International Criminal Court, see the court website: <http://www.icc-cpi.net/cases.html>

¹⁷ - This principle was mentioned, for example, in the International Covenant on Civil and Political Rights in Article 14, paragraph 7 thereof. This Covenant was adopted and submitted for signature, ratification and accession in accordance with United Nations General Assembly Resolution 2200 A (XXI) of December 16, 1966.

¹⁸ - Article 20 of Rome Statute of the International Criminal Court entitled "**Ne bis in idem**" states:"

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;

or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

¹⁹ - Article 80 of Rome Statute of the International Criminal Court entitled "**Non-prejudice to national application of penalties and national laws**" states:" Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part."

²⁰ - See Article 106, Paragraph 01 of the Rome Statute.

²¹ - See Article 106, Paragraph 02 of the Rome Statute.

²² - Adel Abdullah Al-Masadi, Op Cit, p.226.

²³ - Article 16 of Rome Statute of the International Criminal Court entitled "Deferral of investigation or prosecution" states: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

²⁴ - Abdel-Fattah Muhammad Siraj, Op Cit, p.54.

²⁵ - The referral of the Security Council the situation in Darfur to the International Criminal Court is the first case of its kind to be presented to the International Criminal Court since the entry into execution of its statute on the first of July 2002, As the Security Council used the authority conferred on it in Article 13, paragraph 2 of the Rome Statute, and issued its Resolution No. 1593 on March 31, 2005, it is worth noting that the State of Sudan is not a party to the Rome Statute, but serious violations of the rules of international humanitarian law and law of human rights in the Darfur region that led to such a decision.