DISSERTATION SUMMARY

A New Paradigm in International Justice: Principle of Complementarity in the Rome Statute

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Hungary, 2024

PRELUDE

For a better understanding of the principle of complementarity of the Rome Statute, it is necessary to understand the role of national criminal jurisdiction in the suppression of core crimes such as war crimes, crimes against humanity, genocide, and crimes of aggression.[1] National criminal jurisdiction has been assumed to be the main platform for suppressing the core crimes where it is primarily the exclusive domain for investigating and prosecuting the core crimes before the establishment of the International Criminal Court (hereinafter ICC).[2] Even though there were some exceptional cases where the United Nations had to step up to establish a justice mechanism[3], e.g. the internationalized courts or tribunals prosecuted the core crimes, the domestic justice mechanism remained the main domain for suppression of core crimes e.g. war crimes, crimes against humanity, genocide, and crimes against aggression.

SUPPRESSION OF THE CORE CRIMES IN NATIONAL JURISDICTION AND THE ENDEMIC FACTORS IN THE NATIONAL CRIMINAL JURISDICTION BEFORE ICC

This chapter has discussed the customary laws and treaty regulation which deals with the suppression of the core crimes before the enforcement of the Rome Statute, as well as the obstacles relating to the implementation, enforcement, and prosecutions of core crimes in the national legal framework. For example, War Crimes finds its basis in several treaties and customary laws. In terms of treaties relating to war crimes, the four Geneva Conventions of 1949[4] (GC), its first and second Additional Protocols[5] (AP), the 1954 Hague Cultural Property Convention[6], the 1994 UN Convention on the Safety of

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[1] Kleffner, Jann K. *Complementarity in the Rome Statute and National Criminal Jurisdictions.* Oxford: Oxford University Press, 2008. Oxford Scholarship Online, 2009. DOI: 10.1093/acprof:oso/9780199238453.001.0001.

[2] Kleffner, *Complementarity in Rome Statute*, 7-8.

[3] The UN has been involved with several tribunals established to bring justice to victims of international crimes. The Security Council established two ad hoc criminal tribunals, the ICTY and the ICTR. The UN has also been involved in various ways with the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and others.

[4] **1949** Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31–83; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85–133; Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135–285; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287–417.

[5] **1977** Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3–608; **1999** Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999) 38 ILM 769–782.

[6] **1954** Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240–288.

United Nations and Associated Personnel[7] and several other treaties relating to prohibitions of the use of certain weapons[8] - deals with the prohibition of these crimes in the domestic level.[9] The given treaties have been adopted by the states thus obligated to enact necessary legislations to make the respective crime punishable and prosecutable.[10] Going through the common provisions of the Geneva Conventions[11] i.e. GC I (Art. 49-91), GC II (Art. 50-52), GC III (Art. 129-131), GC IV (146-148), provides that it is the duty upon every [member] States to promulgate necessary legislations to penalize the gave breaches.[12] Interestingly in GC I: Art 49 (2); GC II: Art 50 (2); GC III: Art 129 (2); and GC IV: Art 146 (2), to search for the person who has committed or to have ordered the commission of the act, which is amount to grave breaches, the each High Contracting Party is obligated to bring such persons, *regardless of their nationality*, before its own court.[13] Thus, it reflects that the grave breaches of GC can prosecuted under any jurisdiction, thus echoing the basis of universal jurisdiction.[14]

Similarly, Genocide finds its basis in the 1948 Genocide Convention where the contracting parties are obliged "to enact in accordance with their respective Constitutions, by adopting necessary legislation to give effect to the provision of the present [Genocide] Convention, and to provide effective penalties for persons guilty of genocide or any of the other acts[15] enumerated in Article III".[16] Interestingly when the idea of a supranational or international court didn't even exist, during that period of time, the Genocide Convention mentioned an international penal tribunal.[17] According to Article VI, "the person charged with genocide or any of the other acts shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."[18]

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[7] **1994** UN Convention on the Safety of United Nations and Associated Personnel (adopted 15 December 1994, entered into force 15 January 1999) 34 ILM 482–493.

[8] **1993** Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (adopted 13 January 1993, entered into force 29 April 1997) 32 ILM 800 (Article VII in conjunction with Article I (1)(b) and (c)); **1997** Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 36 ILM 1507–19 (Article 9)

[9] Kleffner, *Complementarity in Rome Statute*, 10.

[10] Kleffner, *Complementarity in Rome Statute*, 10.

[11] Above note 6.

[12] Kleffner, *Complementarity in Rome Statute*, 10.

[13] Kleffner, *Complementarity in Rome Statute*, 11.

[14] Kleffner, *Complementarity in Rome Statute*, 11. See amongst many others M Henzelin, *Le Principe de l'Universalité en Droit Pénal International, Droit et Obligation pour les États de poursuivre et juger selon le principe de l'universalité* (Helbin & Lichtenhahn, Munich, Geneva, Brussels 2000) 351–356.

[15] Acts includes committed genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity to genocide, Genocide Convention 1948, Article III.

[16] Genocide Convention 1948, Article V.

[17] Genocide Convention 1948, Article VI.

[18] Genocide Convention 1948, Article VI.

Even though such an international penal tribunal was just an idea, consequently the national criminal jurisdiction remained the main platform for exercising the jurisdiction over suppression of the core crimes.[19] Moreover, a universal practice confirmed the customary status of the prohibition of the crime of genocide, thus it evolved as customary international law[20] and it gained *jus cogens* status.[21] Even though it is claimed by many legal scholars that the final draft of the Genocide Convention is purposefully weakened, e.g. dropping political groups, cultural genocide, and universal jurisdiction for securing consensus.[22] Thus as a consequence, the jurisdiction scope over genocide widened in terms of territoriality, active nationality, and universal jurisdiction, however, whether obligatory or not, remains a question.[23]

Prior to the adoption of the Rome Statute, crimes against humanity[24] were administrated exclusively by customary international law. Even though there were some statutes that dealt with this crime, such as statutes of the Nuremberg tribunal, Tokyo tribunal, ICTY, and ICTR, but yet having significant value, they didn't have rules for universal reach.[25] Thus, there were uncertainties relating to the rights and obligations of the states in case of suppressing the crime. According to the *International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973*[26], provides the states to adopt necessary legislative, judicial, and administrative measures for suppressing the encouragement of the crime of apartheid, to punish and prosecute the responsible national.[27] Most importantly, according to Article V, any state had the jurisdiction to prosecute the person guilty of the crime of apartheid at a competent

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[19] Kleffner, *Complementarity in Rome Statute*, 17.

[20] *Reservation to the Convention on the Prevention and Punishment of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23; UN Secretary General also confirmed the customary status [UN DOC S/25704 (45)]; through judgments of international tribunals such as ICTR [Prosecutor v Akayesu, ICTR ICTR-96-4-T (2 September 1998) [495], Prosecutor v Kayishema and Ruzindana ICTR-95-1-T (21 May 1999) [88], Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Yugoslavia) (Preliminary Objections) [1996] ICJ Rep 595 [31]; and through national courts [Federal Court of Australia in Nulyarimma v Thompson [1999] Federal Court of Australia 1192 (1 September 1999)].

[21] Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda) Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, General List No 121 [64], also see Kleffner, *Complementarity in Rome Statute*, 17.

[22] Islam, M. Rafiqul (2019), *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments*. Martinus Nijhoff Publishers (Netherlands). DOI: https://doi.org/10.1163/9789004389380. p. 108.

[23] W A Schabas, *Genocide in International Law—The Crime of Crimes* (CUP, Cambridge 2000) 361–368 [increasing willingness to accept universal jurisdiction but 'existence of more isolated contrary signals may give some pause to suggestions that an international consensus has developed on the subject. -e law will only develop in the right direction if States attempt to exercise universal jurisdiction over genocide, and here they show little inclination', at 367–368]. A scope wider than territorial jurisdiction has also been confirmed after the entry into force of the Rome Statute: ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro, Judgment of 26 February 2007, General List No 91 [442].

[24] Murder, extermination, torture and imprisonments committed as part of a widespread or/and systematic attack against the civilian population

[25] Kleffner, *Complementarity in Rome Statute*, 18.

[26] 1973 Apartheid Convention, adopted 30 November 1973, 1015 UNTS 243.

[27] 1973 Apartheid Convention, Article IV.

tribunal where the jurisdiction was either acquired over the responsible person or through an international penal tribunal.[28] However such an international penal tribunal remained a dormant idea, and as a result, the national criminal jurisdiction remained the exclusive domain for suppressing the crime of apartheid.[29]

As mentioned above, the national criminal jurisdiction plays a significant role in the suppression of core crimes, i.e. genocide, war crimes, and crimes against humanity, however, while fulfilling its role, it gets obstacles either by law or by practice in normative (by law) and factual forms (by practice).[30] For more clarity, we may say [in a broader context] one obstacle is regarding adopting the law which allows the suppression through prosecution, and another one is enforcing such laws.[31]

Implementing/adopting the international legal framework for the prosecution of core crimes into domestic legislation is challenging. In most of the cases, absence, delays, and flaws in the implementation of such regulations hold back the national criminal jurisdiction from taking necessary steps to prosecute the criminals of the core crimes.[32] Similar to implementation, in enforcement there are ample of obstacles, especially in the suppression of core crimes in domestic proceedings. The nature of the [core] crimes and the context of how it has been committed are the primary causes of the obstacles.[33] Core crimes are most of the time 'system crimes' or 'macro crimes'[34], committed with the involvement of the State or *de facto* authorities of the State, rarely as isolated acts, but rather on a massive or widespread scale.[35] Core crimes are generally committed where there is political unrest, collective violence among/between groups, and political upheaval as far as war crimes are concerned, which amounts to armed conflict.[36]

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[28] 1973 Apartheid Convention, Article V.
[29] Kleffner, *Complementarity in Rome Statute*, 19.
[30] Kleffner, *Complementarity in Rome Statute*, 38. See more, K Ambos, '*Impunity and International Criminal Law - A case study on Colombia, Peru, Bolivia, Chile and Argentina*' (1997) 18 Human Rights Law Journal, 1–15, 1.
[31] Kleffner, *Complementarity in Rome Statute*, 38.
[32] Kleffner, *Complementarity in Rome Statute*, 38.
[33] Kleffner, *Complementarity in Rome Statute*, 43.
[34] Macro Crimes is mostly used by German literature. Reference from Kleffner, *Complementarity in Rome Statute*, 43.
[35] War crimes do not necessarily meet the criterion of system-criminality or of widespread commission, as they can be committed as isolated acts by individual soldiers acting on their own initiative. Overall the fact remains that isolated core crimes are an exception. See more Kleffner, *Complementarity in Rome Statute*, 43.
[36] Kleffner, *Complementarity in Rome Statute*, 43.

However, in case of genocide or crimes against humanity, it does not require an armed conflict as a contextual element.[37] Thus, "the atmosphere of core crimes originates as 'intense social antagonism', organized along with ethnic, religious, political or other groups, which entail a breakup in social structure by making lines of distinction between 'them' and 'us', 'enemy' and 'ally', 'good' and evil'."[38]

Through [completely or partially] paralyzed judicial system, whole or individual members of a nation/society lack the necessary independence and impartiality, and as a consequence, the society does not function as it should be, it gets segregated, thus core crimes could be both the cause and consequence of the paralyzed judicial system in a nation.[39] Through granting *amnesties,* the State may replace the prosecution, even sometimes through decriminalizing it. After WW2, a substantial number of States adopted this measure to deal with the core crimes, instead of prosecuting it. Another way to replace criminal prosecution is the *truth commission*. To draw an overall image of core crimes and their history, trust commissions are always been set up during the political transition.[40] *Reparation* is another way to substitute criminal prosecution, but it serves a significant role as a remedy for victims of core crimes.[41] The State may take measures i.e. *restitution* (rebuilding circumstances for the victims prior to the crime), *compensation* (affording money through damage assessment to the victims or their family members), *rehabilitation* (restoring the dignity of the victim and their relatives by providing legal, medical, psychological care and other services) to relieve the suffering of the victims.[42] Finally, the State may impose *administrative sanctions* by holding individuals accountable for crimes, however imposing *administrative sanctions* upon them, not *criminal.* As a consequence, they might be removed or/and barred from holding certain official posts/positions, which [kind of] guarantee non-repetition.[43]

Numerous impediments are often faced by the State while initiating the [criminal] proceeding or/and during different phases of such action.[44] Firstly, the *inability* to carry out criminal proceedings is the obstacle faced by many State parties. Secondly, the State may *willing* to prosecute and they might have the *ability*, but due to the *non-cooperation* of other States, proceedings might be ached. Thirdly, *undue*

[37] Article 1 of the 1948 Genocide Convention, see more Kleffner, *Complementarity in Rome Statute*, 43.
[38] Kleffner, *Complementarity in Rome Statute*, 43.
[39] Kleffner, *Complementarity in Rome Statute*, 44.
[40] Kleffner, *Complementarity in Rome Statute*, 46.
[41] Kleffner, *Complementarity in Rome Statute*, 47, See more on note 214.
[42] Kleffner, *Complementarity in Rome Statute*, 47.
[43] Kleffner, *Complementarity in Rome Statute*, 47, see more on note 221.
[44] Kleffner, *Complementarity in Rome Statute*, 48.

delay creates additional hindrances. If a State doesn't initiate the process of investigation, or initiate it after a considerable period of time, there are ample chances that strong evidence may lost, or/and memory of the witnesses may fade away, or/and criminal suspects may get too old and to unfit to stand trial.[45] *Statutory limitation* is another obstacle. Due to this principle, national laws may not permit to initiate of such proceedings after a certain period of time. Even though according to the UN and European Conventions on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity explicitly express for non-applicability of statutory limitation to core crimes, but some parties to this convention still recognize statutory limitation to some extent.[46] The same can happen with *prosecutorial discretion*. Because discretion varies from country to country the domestic authorities may decline to conduct any such proceedings on any number of grounds.[47] *Selectivity* is another impediment factor. The tribunal/court may bring charges against low-level suspects, but the high-level offenders may abstain from any such proceedings. It also may happen because of the *immunities* enjoyed by the high-ranking officials or politicians or diplomates working abroad, where both the domestic law and international law provide them immunities, as a result, they cannot be held liable for their action in system crimes.[48] As mentioned by Kleffner (2008), *qualifying the core crimes as ordinary or domestic crimes* may be another form of impediment. Because international crimes always provide broader criminal responsibility than the ordinary crime. If any State qualifies these core crimes as ordinary crimes, the broader framework and international dimensions of the crimes will be declined. Even due to that, many problems such as *selectivity*, *immunities*, *violation of due process*, *lack of independence, and impartiality* will occur, and ultimately it will frustrate the international legal framework as the international community.[49]

EFFORTS TO END IMPUNITY: JOURNEY FROM IMTS TO THE COMPLEMENTARITY SYSTEM

[45] Kleffner, *Complementarity in Rome Statute*, 49.
[46] Kleffner, *Complementarity in Rome Statute*, 50
[47] Ibid. read J Verhaegen (n 222) 610–611; R Cryer, Prosecuting International Crimes—Selectivity and the International Criminal Law Regime (CUP, Cambridge 2005) 192–194; D D Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 JICJ 124–144, 126–130.
[48] Kleffner, *Complementarity in Rome Statute*, 50
[49] Kleffner, *Complementarity in Rome Statute*, 54.

This chapter has discussed the emergence of complementary international criminal court and a bit of history in brief. From the historical narrative, the obstacles from the national criminal jurisdiction to try international crimes at the domestic courts, also the universality of the core crimes which represent the international community as a whole, enforced the establishment of internationalized criminal courts and tribunals, and finally an international criminal court (ICC). Later on, we will look into the purpose of this international/internationalized court and discuss about its components. Even though it was the desire of the international community to create a system to prosecute the perpetrators of international crimes, yet how to do that was the challenge. Models (or systems) could be of many types. One model could be the international criminal court will supersede the existential domestic court for prosecuting the core crimes, which goes against the idea of the sovereignty of a nation and legal principles such as *ne bis in idem*, *Nullum crimen sine lege*, *nulla poena sine lege*. Another model could be that the court will be *internationalized*, where the international court and the domestic court will share the adjudicative functions. But in practice, it can rarely happen as actions taken by international and domestic courts differ from each other, thus synergy between them is not practical. Again, another model could allow the domestic courts to take action against core crimes and enforce the same prohibitions, over the criminals in both national and international territory, which in other ways can only be done by the international court. Thus, this model would be very idealistic and not practical at all. Finally, the most practical and less idealistic and more approachable model is *mutual inclusivity*, which implied both international and national courts/tribunals will share the responsibility and will ensure that the perpetrator of the core crimes are adjudicated. The idea of mutual inclusivity will be discussed in forthcoming chapters in detail, but it is a sine qua non of complementarity system at the domestic level.

This chapter portrays how the journey was from the Nuremburg Military Tribunal to today's ICC and its complementarity regime. The 1943 Moscow Declaration[50] - 'Statement of Atrocities' expressed the primary competence of the territorial jurisdictions where the crimes have been committed. It expressed that even the perpetrators whose offense has no particular geographical location will be prosecuted by the joint decisions of the Allied governments.[51] However, it hasn't expressed any idea about an international or internationalized tribunal or court. During this conference, the United

[50] Four nation declaration, issued by Roosevelt, Churchill and Stalin, issued on November 1, 1943, retrieved from https://www.cvce.eu/content/publication/2004/2/12/699fc03f-19a1-47f0-aec0-73220489efcd/publishable_en.pdf, dated 26 July 2022.
[51] Kleffner, Complementarity in the Rome Statute, 62.

Nations War Crimes Commission was established as a fact-finding body to investigate the war crimes committed by the Axis forces. In the 1945 London Conference, four Allied forces[52] signed the London Agreement and the Charter.[53] Later on, under Article 5 of the London Agreement, other states[54] expressed their adherence to the agreement.[55] And, this became the basis of the establishment of the first International Military Tribunals (IMTs) in Nuremburg and Tokyo. On 23rd May 1993, upon the decision by the UN Security Council, an international tribunal was established in the territory of Yugoslavia, to prosecute the core criminals for massacre in Yugoslavia. The statute aimed to bring back stability and restore peace in the region. The charter of ICTY has been amended seven times and it instructed all the States to cooperate fully.[56] Rwanda faced a catastrophic violence in 1994. Thus, as a reaction, the UN Security Council established ICTR in Rwanda to prosecute the perpetrators of the core crimes. ICTR charter has the authority to prosecute citizens of Rwanda for committing atrocity crimes in the neighboring countries. According to ICTR Charter[57], article 7, the *ratioine temporis* and *ratione loci* were in the same year[58]. Unlike ICTY, the ICTR also has concurrent jurisdiction[59] with domestic jurisdiction, however primacy over the domestic courts[60].[61]

Along with the *complementarity system*, several challenges also appeared. Firstly, whether a State is genuinely investigating and prosecuting the core crimes or not, that varies from country to country. What is the scale of determining the *inactivity*, which leads to *inability*, that's always a big question(!). A State might be genuinely interested in investigating and prosecuting core crimes, but it might not have the infrastructure, might have limited expertise to carry out the investigation and prosecution process, might not have an effective legislative framework, or/and there could be a lack of judicial resources to address such international crimes in the domestic jurisdiction. Secondly, the State may *unwilling* to prosecute as most of the time there is government complicity to the commission of the core crimes. thus, the government might not be interested to carry out such investigation and prosecution. Therefore, mutual inclusivity is necessary to establish a just and prompt complementarity system,

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[52] United States, United Kingdom, France, and Soviet Union.
[53] Imoedemhe, The Complementarity Regime, 3.
[54] Greece, Denmark, Yugoslavia, Netherlands, Czechoslovakia, Poland, Belgium Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.
[55] Imoedemhe, The Complementarity Regime, 3.
[56] Article 29 of ICTY. Read also, Raimondo, General Principles of Law, 84.
[57] ICTR Charter - https://legal.un.org/avl/pdf/ha/ictr_EF.pdf.
[58] From 1st Jan 1994 to 31 December 1994.
[59] Article 8 of ICTR.
[60] Article 9 of ICTR.
[61] Imoedemhe, The Complementarity Regime, 10.

where ICC and State judicial bodies can work head-to-head to achieve the goal of the Rome statute. It is worth mentioning that the sustainability of ICC rests on the complementarity mechanism, thus empowerment of the domestic institution is necessary. Because it will determine the effectiveness of ICC's complementarity regime without any doubt, which ultimately benefits the international criminal justice system.

There are three mechanisms through which the ICC Prosecutor initiates the investigation process. These are:

1. State party referral under Articles 13 (a) and 14
2. Security Council referral under Article 13 (b)
3. Proprio motu under Articles 13 I and 15

To note, Article 53 (1) and Article 15 (3) provided that these mechanisms cannot trigger a regular investigation process if there's no 'reasonable basis' to proceed. In *proprio motu* circumstances, under Article 15 (4), authorization is compulsory from the Pre-Trial Chamber. The 'reasonable basis' shall be determined by ICC's jurisdiction, admissibility, and prosecutorial discretion on the matter. For example, the Pre-trial chamber authorized the prosecutor to initiate an investigation in Kenya on 31 March 2010. The investigation focused on the post-election violence in 2007/2008 and the 'crimes against humanity' charge has been framed against six suspects. It was the first situation where the ICC prosecutor initiated a *proprio motu* investigation upon the authorization. Also, on 27 January 2016, the Pre-Trial chamber authorized the prosecutor to investigate the situation in Georgia. The investigation focused on armed conflict violence in 2008 and the 'crimes against humanity' and 'war crimes' charges has been framed against the Georgian armed forces, the South Ossetian forces, and the Russian armed forces. However, if the prosecutor got triggered through an external communication, s/he may not seek authorization if there's sufficient basis to the case. Circumstances of State party referral happened in the cases of Uganda, the Democratic Republic of Congo (DRC), the Central African Republic (CAR), Mali, and Cote d'Ivoire. Circumstances of Security Council referral happened in Darfur, Sudan, and Libya. Furthermore, under Article 51 (1) and Rule 104 (1) of the Rules of Procedure and Evidence (RPE), the seriousness of the alleged crimes has to be analyzed by the prosecutor. Under Rule 104 (2), the prosecutor may ask for additional information from the State party, UN organs, intergovernmental or non-governmental organizations, or other reliable sources.

Article 17(2) states three types of unwillingness. Firstly, if the State wants to shield its subject from criminal liability, then it will be a sufficient element of unwillingness. However, in *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*[62], the court observed that a state cannot be held unwilling if they want the accused to be prosecuted, however not in their territory but by ICC. Also, there are two components to 'inability'. Firstly, it refers to the political collapse of the State which makes the judiciary unable to perform its duty. Also, it may be the case where there is lack of expertise of the field e.g., judges, prosecutors, infrastructures, etc. It was the case in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein* where Libya was in political upheaval. The judicial institutions were not prepared because of the political difficulties, and accountability and transparency of the national bodies were in question. Therefore, the chamber found that Libya is *unable* to prosecute such crimes in its territory. Moreover, the interpretation of genuineness is open to the tribunal as it has no parameter in the Statute. It denotes good faith or due diligence.

In *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the Pre-Trial Chamber rejected Kenya's plea because they could not be able to submit a concrete report which charge the suspects for their conduct in post-election hostilities. Even the investigation step was not transparent in the report, submitted to the Pre-Trial chamber. Thus, the matter of '*good faith*' or '*genuinely*' in the process was questionable, therefore the chamber rejected their inadmissibility challenge. In addition, Article 17 (1)(d) of the Rome Statute referred to the sufficient gravity of each case ICC receives. Even when all the jurisdictions related to *ratione materiae*[63], *ratione temporis*[64] *ratione loci*[65], and *ratione personae*[66] are determined, but the case may not be admissible if it has no sufficient gravity. Thus, it is open to the interpretations of the court. According to a *Letter of Prosecutor* regarding the British military's conduct in Iraq, he denoted that there were only 4-12 victims, whereas, in Uganda, LRD killed almost 2200

[62] The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07 OA 8, International Criminal Court (ICC), 25 September 2009, available at: https://www.refworld.org/cases,ICC,4ac9dd592.html [accessed 28 October 2022].
[63] Meaning subject matter, Article 5 – 8 of Rome Statute.
[64] Meaning time, Article 11 of Rome Statute.
[65] Meaning space.
[66] Meaning individual, article 11 of Rome Statute.

victims, thus the case of the UK doesn't form sufficient gravity as it is forming for Uganda.[67][68] Thus number of the victims is one of the dormant elements for determining sufficient gravity.

Articles 18, 19 & 20 of the Rome Statute[69], along with the Rules 48, 52, 53, 55, 58-62 of the RPE[70] are latent frameworks for complementarity systems where the State's primacy is given the highest priority. Article 18 provides a deferral procedure to allow the State to investigate by suspending OTP's action. Article 19 denotes the balance between the State's interest and effective investigation by determination of both jurisdiction and admissibility. Article 20 stipulates the principle of double jeopardy ~ *ne bis in idem*, where it is forbidden to try a person who has been convicted by another [national] court for the same conduct.

In the events of State referral or *proprio motu* action, where 'reasonable basis' has been sufficiently established, the prosecutor must inform all the State parties about its intention to investigate. Under Article 53(a)(b) and Rule 48, the preliminary examination has to be conducted, and after 30 days of such notice, the prosecutor may start a formal investigation. However, under Article 18, the State can obtain deferral. To protect witnesses, and evidence and to prevent the alleged perpetrator from absconding, the prosecutor may keep the information confidential and limited.[71] However, under Rule 52, the State may request more information from the prosecutor if the given information is limited. Article 18(2) and Rule 53 suggests [the prosecutor] to provide detailed information so that the State can perform its investigation. Whereas Article 18(7) and Rule 55 give power to the States to challenge the ruling.

Under Article 18(5), the prosecutor may request the State to provide updated information on the investigation process conducted by the State. However, if the information lacks genuineness, the prosecutor can be granted authorization from the Pre-Trial Chamber to conduct its own investigation process. Article 19 and Rule 58-62 refer to the situation where the jurisdiction and admissibility have been challenged. The questions to the triggering mechanism shall be entertained when the questions

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[67] 'Letter of Prosecutor dated 9 February 2006' (Iraq) http://www.icc-cpi.int/library/organs/otp_letter_to_senders_re_Iraq_9_Febraury_2006.pdf (assessed 29 October 2022), 7–8.
[68] 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties' at The Hague 28 November to 3 December 2005. 2. https://docslib.org/doc/10267381/statement-by-luis-moreno-ocampo-prosecutor-of-the-international-criminal-court.
[69] https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf
[70] https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf
[71] Article 18.

of jurisdiction and admissibility have been resolved. Article 20 deals with *ne bis in idem* which is an internationally accepted principle. However, under Article 20(3), if the prosecutor finds that the action taken by the State was to shield the accused from its criminal liabilities, or/and there's an unjustified delay in the national judicial process, or/and the proceedings were not independent and impartial, then the prosecutor may act in *proprio motu*. It is important to note that the Statute has provided every possible way so that the national jurisdiction can take over and investigate and prosecute the suspects independently and impartially with good faith, thus the primacy remains in the hands of the State itself.

TRENDS OF NATIONAL IMPLEMENTATION OF THE ROME STATUTE: FROM [THEORICAL] PERSPECTIVES

As the complementarity system provides the primary responsibility to investigate and prosecute the core crimes, thus it envisages a strong collaboration between the national justice system and the ICC. Theoretically, it might be impressive however how the interaction may be achieved remains the question. Even the existing procedural setting of complementarity suggests the relation between the State and ICC. To avoid the [expected] lacuna, many international legal scholars suggested keeping the power to ICC so that obstacles such as the adoption of legislation in national law, issues related to enforcement, an alternative to the criminal prosecutions, issues relating to proceedings, etc. may not raise, and international justice for international crimes can be achieved through an international court. Another segment of scholars suggests empowering the national courts solely to try international crimes nationally, without any influence and pressure from international institutes e.g., ICC. This is avoiding the conflict of national sovereignty issue which is very prominent if the international court remains the only institute for prosecuting international crimes internationally.

Even during negotiation phase of the Rome Statute, the member States envisage the complementarity to be the core element because of sovereignty aspect. However, in some national cases, we also found that the national judicial system accepted the definition of the core crimes in whole or in part or by extending it, but prosecuted the crime domestically without any international involvement and influence. In this chapter, we discussed different trends of national implementation of the Rome Statute based on the principle of complementarity to understand the perspective from its core. In this article, three emerging models of complementarity will be discussed, which is quite a new

phenomenon in the present world. From these emerging models, the author will focus more on the proactive model as it mirrors the perspective on mutual inclusivity than others. Finally, this chapter will imply legal frameworks and institutional capacity-building concepts for States to implement the Rome Statute nationally through mutual inclusivity.

After observing the customary State practices, three models emerge, which are passive, positive, and proactive complementarity models. However, the models are not a new idea, but ElZeidy (2011)[72] suggested that the idea of these emerging models of complementarity system dates back to 1919 from the peace treaties of World War 1. He mentioned three models which are amicable, mandatory, and optional models.[73]

For Nuremburg IMT and Tokyo IMT, amicable model was the best option considering the nature of the crime, where the task has been divided and accomplished by both authorities in an amicable means. An example of the mandatory model can be found in the chapeau of Article 17,[74] where it is mentioned that it was mandatory for the States to investigate and prosecute the cases arising from their jurisdiction. On the other hand, the optional model is when the State waives its right to investigate and prosecute the crime in a way of self-referral to the international tribunal, e.g., ICC. It is opposite to the mandatory model however it is voluntary practice. we can find the most mutually inclusive interpretation of the complementarity system is the amicable model. This model suggests interaction and performance done by both national and international institutions mutually in an amicable manner. Thus, it is also suggested that the State should incorporate the provisions of the Rome statute and prepare its institution for performing the tasks of investigation and prosecution of international crimes by ensuring prompt and proper way of justice. In case the State has institutional preparedness to perform its tasks, then the emergence of the optional model of complementarity will not even occur.

Similarly, in light of ICC, we found three emerging models which are passive, positive, and proactive models of complementarity. The narrow view of the understanding of complementarity is the passive complementarity model where ICC is the last resort, the domestic courts/institutions will have the

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[72] Stahn, Carsten, and Mohamed M. El Zeidy, eds. The International Criminal Court and Complementarity: From Theory to Practice. Cambridge: Cambridge University Press, 2011. doi:10.1017/CBO9781316134115.

[73] Article 228-230 of the Treaty of Versailles 1919, retrieved from https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf. (14 December 2022).

[74] Imoedemhe, Ovo Catherine. 2017. The Complementarity Regime of the International Criminal Court. Cham: Springer International Publishing. https://doi.org/10.1007/978-3-319-46780-1, 43.

primary jurisdiction to investigate and prosecute the core crimes. While drafting the Rome Statute, it was the same view of other nations too. On the other hand, the positive complementarity comes with the idea to assist the States in three aspects. First, *legislative support*, which involves guidance in formulating the necessary legislative framework and assistance to get through national obstacles for adopting such legislation. Second, *Assistance in technical and capacity building*, where ICC may render assistance in training the national defense forces like police, also judges, investigators, forensic experts, and prosecutors to carry out their duties, building national capacity for victim and witness protection. Even by providing international judges and prosecutors, the ICC can help the national legal jurisdiction or the formation of hybrid courts for prosecuting core crimes. The idea is to make the national justice process international standard and transparent. Third, *physical infrastructure*, where ICC may assist the State in building courthouses and prison facilities and building capacity to keep their operation sustainable.[75] for making positive complementarity work, OTP's action is not only limited to inspiring the State parties to undertake the responsibility to investigate and prosecute the core crimes but also to have a methodical tactic to empower the national criminal jurisdiction.

It is worth mentioning that the aspiration from OTP is significant without any doubt, but to make it [positive complementarity model] work, that is not enough at all. Thus, we've to turn towards a proactive complementarity model. The basic idea of the proactive complementarity model is to enable both member States and the ICC to be involved in the investigation and prosecution process at the domestic level by implementing the complementarity features of the Rome Statute. Thus, it involves the States requesting to ICC for their expertise and practical proficiency to make the national judiciary empowered to try the core crimes at their domestic level. A pragmatic collaboration between States and ICC is imperative to make the proactive complementarity model work.

In this model, complementarity works as a catalyst, as it provides serious responsibility to try core crimes upon the national authorities, and the court plays twofold role: where it's motivating States to strengthen their national judicial system, and supporting member States to deliver justice, in accordance with the Rome Statute.[76] OTP is also suggesting a similar approach by establishing external relations and outreach tactics to encourage and facilitate States to perform their responsibility to

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[75] Report of the Bureau on Stocktaking: Complementarity (25 March 2010). https://www.icc-cpi.int/sites/asp/files/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (Accessed on 15 December 2022).

[76] Security Council 4835 meeting. https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PKO%20SPV%204835.pdf. (Accessed 15 December 2022).

render justice.[77] Due to the *principle of non-intervention* and *State sovereignty*, the Member States don't want ICC's intervention at their national level, so ICC's triggering factors act as the catalyst. it is clear that the *principle of complementarity* and the *principle of cooperation* are the two important factors for ICC to function effectively and proactively. Rome Statute does mention a two-way process to address cooperation, from State to ICC and from ICC to State. As mentioned in Article 92(10), upon request from the State, ICC may cooperate with and provide assistance to the State Party for conducting an investigation or trial of the cases which constitute core crimes and may also constitute a serious crime under the national law of the requesting State.[78] The assistance may include the transmission of statements, documents, or other types of evidence obtained for an investigation or trial.[79] It is provided that for such assistance (for example, the transmission of documents, etc.), States' consent is necessary and in some cases subject to the provisions of Article 68.[80] Furthermore, in case of non-State parties, upon request, ICC may assist them the same.[81] By taking this assistance and support from the ICC, the State party can establish their genuine willingness to carry out the investigation and prosecution nationally.

Part 9 & 10 of the 1998 Rome Statute expressly discussed the cooperation legislation where the [member] States are expected to cooperate in good faith. Whether a new cooperation mechanism needs to be established or not, remains a matter of debate. Arguments may arise that the States may use the pre-existing cooperation mechanism available to them already.

Careful reading of the Part 9 & 10 gives us three areas of cooperation, which are (1) mechanism for arresting and surrendering with the request of the court, (2) adequate and prompt support to the court for investigation and prosecution, and (3) general enforcement.[82] Unlike ICTR and ICTY, the ICC doesn't allow trials *in absentia*.[83] Thus ICCs' success depends on how the partner States reciprocate their compliance with the provisions related to arrest and surrender of the suspects in order to ensure

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[77] Paper on some policy issues before the Office of the Prosecutor. https://www.icc-cpi.int/sites/asp/files/asp_docs/library/organs/otp/030905_Policy_Paper.pdf. (Accessed 15 December 2022).
[78] Article 90(10) (a), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[79] Article 90(10) (b) (i), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[80] Article 90(10) (b) (ii), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[81] Article 90(10) (c), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[82] The forms of cooperation include general compliance with the ICC requests for cooperation (Art 87); Surrender of persons to the Court (Art 89); Provisional arrests pursuant to ICC requests (Art 92); identification or location of persons or items, taking and production of evidence, service of documents, facilitating witnesses' and experts' attendance before the ICC, temporary transfer of persons, examination of sites (e.g. mass graves), execution of search and seizure Orders, protection of witnesses, freezing of sequestration of property and assets (Art 93); and enforcement of sentences (Arts 103–107)
[83] Art 63.

their appearance in the court. it is not always the ICC will seek cooperation from the [member] States, but it may be the case that the State is seeking the same, which is termed as "revered cooperation", according to Gioia (2011).[84] And this factor is quite essential to perform proactive complementarity. Thus, the cooperation regime is not just there to benefit the ICC, but it is the vis-à-vis element for both the court and the State. And for such to happen there must be a bridge to refill the gap, and incorporation of such legislation may be the way to establish such cooperation regime.

It is important to note that without cooperation, the ICC cannot perform its duty in the fullest. However, the mechanism differs from State-to-State practices – how they will be cooperating with each other. Therefore, it can be suggested that along with the Rome Statute, a cooperation legislation/mechanism has to be incorporated as well to keep the inter-play sustainable. The next chapter will discuss the complementarity legislation and how the State can incorporate atrocity crimes into their national criminal jurisdiction.

STATE PRACTICE OF THE DOMESTIC PROSECUTION OF THE CORE CRIMES: AN ANALYSIS

This chapter discussed the practices, ending the impunity of such heinous crimes is an important part, and the international community must come forward to close the impunity gaps.[85] Apart from early IMTs, ICTR, ICTY, and ICC, several examples of complementarity jurisdiction can be seen in the history where States performed their jurisdictions to prosecute core crimes. In doing so, this chapter analyzed a few domestic practices where a similar essence of the present day's "complementarity jurisdiction" can be found. Beginning with the global and historical context, we will examine various mechanisms employed to achieve this objective. The analysis will start by investigating how countries have adapted their legal systems to enable the investigation and prosecution of international offenders, especially in light of the widespread acceptance of the Rome Statute.[86] Subsequently, we will focus on

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[84] Gioia (2011), pg. 807-828

[85] Chautauqua Declaration, 1st IHL Dialogs (2007), https://www.asil.org/international-humanitarian-law-roundtable, dated 15 May 2023. For more info about the Responsibility to Protect, see United Nations Office on Genocide Prevention and the Responsibility to Protect, dated 15 May 2023.

[86] Sophie Rigney, Carsten Stahn (ed.), The Law and Practice of the International Criminal Court, Journal of International Criminal Justice, Volume 14, Issue 3, July 2016, Pages 742–744, https://doi.org/10.1093/jicj/mqw031. See also, Sophie Rigney, Carsten Stahn (ed.), The Law and Practice of the International Criminal Court, Journal of International Criminal Justice, Volume 14, Issue 3, July 2016, Pages

recent trends in prosecutions of core crimes, including cases based on *territorial jurisdiction*[87], *active nationality jurisdiction*[88], and *universal jurisdiction*[89].[90] This comprehensive overview of different mechanisms will assess the application of international criminal law in various countries.[91] We will delve into evolving patterns in domestic prosecutions and discuss emerging legal challenges related to universal jurisdiction and the defining fundamentals of international crimes such as crimes against humanity, genocide, and war crimes.[92] Over the past 30 years, a substantial surge in international developments within the realm of war crimes law. Notably, the establishment of the ICTY[93] in 1994 and ICTR[94] in 1995 marked pivotal milestones.[95] These tribunals, each equipped with their Trial and Appeal Chamber, have played a vital part in shaping international law concerning core crimes.

As of 2024, 161 individuals have been indicted, in ICTY, where 90 individuals have been convicted and sentenced, 19 individuals have been acquitted, 13 individuals have been referred to countries in the former Yugoslavia for trial, and two are in retrial before the International Residual Mechanism for Criminal Tribunals (MICT).[96] Similarly, the ICTR has indicted 93 individuals, leading to 62 sentenced, 15 acquitted, 10 referred to national jurisdiction for trial, three fugitives referred to the MICT, two deceased prior judgment, and two indictments were withdrawn before trial.[97] These developments have significantly shaped the landscape of international law related to war crimes.[98]

742–744, https://doi.org/10.1093/jicj/mqw031, Beatrice, Pisani. "The System of the International Criminal Court: Complementarity in International Criminal Justice" April 20, 2017. https://doczz.net/doc/2632062/the-system-of-the-international-criminal-court---unitn.

87 Where crimes occurred within the prosecuting country.

88 Involving perpetrators who are nationals of the prosecuting country

89 Where the prosecuting country has no direct connection to the crime location, except that the perpetrator seeks refuge there

90 Beatrice, Pisani. The System of the International Criminal Court: Complementarity in International Criminal Justice. April 20, 2017, pg. 47. https://doczz.net/doc/2632062/the-system-of-the-international-criminal-court---unitn.

91 Morten Bergsmo (ed), Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes, FICHL Publication Series No. 7, Torkel Opsahl Academic EPublisher, 2010. Pg. 08. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

92 WILLIAMS, SARAH, JANE (2009) Hybrid and Internationalized Criminal Tribunals: Jurisdictional Issues. Doctoral thesis, Durham University, pg. 14. http://etheses.dur.ac.uk/38/. See also, Ferioli, M. L. The impact of cooperation on the rights of defendants before the International Criminal Court. Doctoral Thesis, Universiteit van Amsterdam, Università di Bologna (2016) https://pure.uva.nl/ws/files/8879321/Thesis.pdf.

93 International Criminal Tribunals for the Former Yugoslavia

94 International Criminal Tribunals for Rwanda

95 Bergsmo, Morten, eds. Human Rights and Criminal Justice for the Downtrodden, (Leiden, The Netherlands: Brill | Nijhoff, 04 Aug. 2021), pg. 23. doi: https://doi.org/10.1163/9789004482111.

96 Retrieved from https://www.icty.org/node/9590.

97 Retrieved from https://unictr.irmct.org/en/tribunal.

98 Morten, Complementarity and the Exercise of Universal Jurisdiction, 2010. Pg. 216. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

Apart from the two *ad hoc* tribunals, significant efforts have been undertaken within the framework of the UN to create an international criminal court.[99] Finally, on 17 July 1998, the Statute of the International Criminal Court was adopted, which provides contemporary definitions of core crimes. Commencing its operations, 14 individuals have been indicted.[100] Additionally, the UN has played a pivotal role in creating five hybrid courts to address core crimes.[101] These include the Special Panel for Serious Crimes of the Dili District Court in East Timor[102], the courts in Kosovo, the Special Court for Sierra Leone[103], the War Crimes Chamber of the State Court of Bosnia and Herzegovina, and the Extraordinary Chambers of the Courts of Cambodia.[104] Importantly, the abovementioned courts feature a combination of local and international judges in their composition.[105]

Three other approaches involve distinct methods of integrating international criminal law into national criminal jurisdiction. One approach, termed *static implementation*, involves national laws reiterating the definitions of genocide, crimes against humanity, and war crimes outlined in the Rome Statute (Articles 6, 7, and 8 respectively). Alternatively, some countries using the *static model* merely refer to these articles without reproducing their text, a practice observed in South Africa, Kenya, Uganda, and New Zealand. Australia employs a variation of this model, including not only the text from the Rome Statute but also the comprehensive details outlined in the ICC Elements of Crime.[106] The benefit of this static model, in its various forms, lies in providing clear guidance on the crucial elements of international crimes by directly referencing the Rome Statute.[107] The *dynamic model*, an alternative approach to domestic implementation of the Rome Statute, entails revising the conduct criminalized within its

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[99] Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors), Historical Origins of International Criminal Law: Volume 4, Torkel Opsahl Academic EPublisher, Brussels. Pg. 18. https://www.fichl.org/fileadmin/fichl/FICHL_PS_23_web.pdf.

[100] Doria, Jose, Hans-Peter Gasser, and M. Cherif Bassiouni, eds. The Legal Regime of the International Criminal Court, (Leiden, The Netherlands: Brill | Nijhoff, 24 Jun. 2009), pg. 346. doi: https://doi.org/10.1163/ej.9789004163089.i-1122. See also, Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors), Historical Origins of International Criminal Law: Volume 4, Torkel Opsahl Academic EPublisher, Brussels. Pg. 19. https://www.fichl.org/fileadmin/fichl/FICHL_PS_23_web.pdf.

[101] Bergsmo, Morten, eds. Human Rights and Criminal Justice for the Downtrodden, (Leiden, The Netherlands: Brill | Nijhoff, 04 Aug. 2021), pg. 92. doi: https://doi.org/10.1163/9789004482111, see also, Morten Bergsmo (ed), Complementarity and the Exercise of Universal, 2010. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[102] along with its Court of Appeal

[103] comprising Trial Chambers and an Appeals Chamber

[104] Rossetti, Luca Poltronieri. Prosecutorial Discretion and its Judicial Review at the International Criminal Court: A Practice-based Analysis of the Relationship between the Prosecutor and Judges, Doctoral Thesis, Universita Degli Studi Di Trento. Pg. 97. http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf. See also: WILLIAMS, SARAH, JANE (2009) Hybrid and Internationalized Criminal Tribunals: Jurisdictional Issues. Doctoral thesis, Durham University. Pg. 109. http://etheses.dur.ac.uk/38/.

[105] May, Richard, and Marieke Wierda. International Criminal Evidence, (Leiden, The Netherlands: Brill | Nijhoff, 25 Oct. 2021), pg. 326. doi: https://doi.org/10.1163/9789004479647

[106] Ibid.

[107] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.

framework to align with existing domestic criminal offenses.[108] This revision seeks to establish stronger linkages between the Rome Statute's provisions and those already in place domestically, while also clarifying certain Rome Statute concepts that may be vague or imprecise. Various countries, including Canada, Costa Rica, and Finland, have implemented a *hybridized approach* to domestic implementation of the Rome Statute, combining elements of both static and dynamic methodologies.[109] This model entails a judicious blend of precisely defined crimes and references to international law, with varying degrees of specificity tailored to the unique legal framework of each nation. For instance, Costa Rican legislation confines its references to international treaty law, encompassing international humanitarian law treaties for war crimes and human rights conventions, as well as the Rome Statute for crimes against humanity.[110]

CONCLUSIONS

The final chapter looks at the complementarity principle as a potential tool to fill the gaps. To do so, few countries' examples have been referred especially from African regions, solely for their availability and resourcefulness. If we look into the case history of the ICC, we can see that most of the cases are from African regions.[111] Therefore the author largely focused on the African examples to analyze the idea of complementarity, its practice, and possible solutions for its effective application worldwide. The Rome Statute delineates specific duties for individuals falling under the ICC jurisdiction. This aspect of international law, concentrating on individuals, deviates from traditional international law, which is primarily centered around States. Despite this shift, the ICC's framework acknowledges the persistent involvement of States. Consequently, the Rome Statute relies on States' capability and willingness to investigate and prosecute international crimes domestically, thereby forming the foundation of international criminal justice.[112]

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[108] Chernor Jalloh, Charles, and Olufemi Elias, eds. Shielding Humanity, (Leiden, The Netherlands: Brill | Nijhoff, 12 Jun. 2015), pg. 426-445. doi: https://doi.org/10.1163/9789004293137

[109] Ibid.

[110] Giorgetti, Chiara, eds. The Rules, Practice, and Jurisprudence of International Courts and Tribunals, (Leiden, The Netherlands: Brill | Nijhoff, 01 Jan. 2012), pg. 190-230. doi: https://doi.org/10.1163/9789004194830

[111] Retrieved from https://www.icc-cpi.int/cases. Also in https://espace-mondial-atlas.sciencespo.fr/en/topic-regulatory-efforts/map-6C30-EN-international-criminal-court-%28icc%29-june-2018.html.

[112] Stahn, Carsten, eds. *The International Criminal Court in Its Third Decade*, (Leiden, The Netherlands: Brill | Nijhoff, 07 Nov. 2023) doi: https://doi.org/10.1163/9789004529939.

The forefront of international crime prosecution has shifted towards domestic legal systems. The concept of complementarity, as outlined in the Rome Statute, emphasizes the priority of activating domestic courts' jurisdiction before resorting to the ICC.[113] Therefore, a comprehensive understanding and implementation of the principles of complementarity that is mutually inclusive and encompasses all aspects is essential for State parties, to effectively integrate this principle at the domestic level, which will safeguard the State's sovereignty, promote national criminal proceedings, and ensure effective ICC interference & cooperation.

This chapter emphasizes the significance of the States carrying out their duties under the Rome Statute by managing domestic prosecutions of international crimes, with a particular focus on the complementarity principle's pivotal role in the ICC's framework. Even though complementarity is a dynamic concept, it is essential to raise the legitimacy of both the ICC and the international criminal justice system. Thus, a domestic prosecutorial strategy is required for the future of international criminal justice.[114]

Nonetheless, a number of obstacles stand in the way of complementarity's successful practice. The notion that national criminal laws correspond with transnational crimes is one such difficulty. In actuality, national laws pertaining to State authority hardly ever include international crimes. This begs the question of whether States ought to punish core crimes in accordance with their domestic legal systems. It is suggested that the definitions, elements, characters, scale, and gravity of these two kinds of crimes[115] are very different from one another. As a result, it would be inconsistent for States to carry out their Rome Statute requirements without enacting domestic legislation that criminalizes the acts listed in the Statute.

It may be difficult to define complementarity precisely, therefore, it is suggested that adopting a strategy that is inclusive for all parties may be beneficial. In order to ensure that those guilty of core crimes are brought to justice, mutual inclusion requires that the ICC and State institutions share this accountability. This implies that nations have obligations under the complementarity framework that

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[113] Dube, Angelo. *Prosecuting the Three Core Crimes: Complementarity in Light of Africa's New International Criminal* Court, 2019. https://etd.uwc.ac.za/xmlui/handle/11394/6990.

[114] Imoedemhe, Ovo Catherine. *The Complementarity Regime of the International Criminal Court*. Springer eBooks, 2017, p. 195. https://doi.org/10.1007/978-3-319-46780-1.

[115] Ordinary crimes under national legislation and international criminal law under Rome Statute.

go beyond simply ratifying the Rome Statute. States and the ICC must fulfill certain conditions in order to enable efficient burden-sharing. It is crucial to recognize that ratification alone does not sustain the complementarity regime, although it does indicate a State's denouncement of the crimes it encompasses and its dedication to participating in global endeavors to combat them. This holds particularly true for several States, as demonstrated by their ratifications and numerous self-referrals to the ICC. The objective of the Statute is not to refer every case or situation to the ICC. The primary aim of the Statute, which prioritizes State authorities as the principal mechanism for ensuring accountability, could be compromised if self-referrals are not effectively managed, potentially inundating the ICC with cases. Support for implementing legislation rests on two grounds. *Firstly*, complementarity inherently requires individual States to handle prosecutions domestically. *Secondly*, the Rome Statute mandates States to fully cooperate with the ICC. To fulfill this obligation, national mechanisms must exist to arrest and surrender suspects within a State's jurisdiction, whom the ICC seeks to prosecute.[116]

It is noteworthy that the Office of the Chief Prosecutor (OTP), under the leadership of Prosecutor Karim A.A. Khan KC, recently adopted a groundbreaking "Policy on Complementarity and Cooperation".[117] This policy represents the OTP's first comprehensive initiative to integrate various measures and strategies aimed at fostering a paradigm shift in its relationships with national authorities, other accountability mechanisms, and victims/survivors of international atrocities on a global scale. The Office of the Prosecutor's (OTP) Strategic Plan 2023-2025 outlines an ambitious vision for the OTP to serve as a global hub for international criminal justice.[118] This vision entails a transformation of the OTP into a technologically-driven, agile, field-centric, and victim-centered organization capable of responding swiftly and effectively to the evolving landscape of international crimes.[119]

The Strategic Plan further emphasizes the importance of close collaboration with situation countries, other States, accountability mechanisms, and relevant partners. This collaborative approach aims to achieve a coordinated and impactful response in narrowing the impunity gap for core international crimes. The envisioned joint efforts encompass a multifaceted approach, including: offering assistance

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[116] Note to 12.
[117] International Criminal Court, *Policy on Complementarity and Cooperation*, Netherlands: Office of the Prosecutor, April 2024, https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf, Preface from the Prosecutor.
[118] International Criminal Court, *Strategic Plan 2023-2025*, Netherlands: Office of the Prosecutor, 2024, https://www.icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf, Introduction.
[119] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, p. 4.

to national jurisdictions in their domestic proceedings; facilitating the exchange of information, knowledge, and best practices; establishing common operational standards in areas of mutual interest; deploying expert personnel; and engaging with local, regional, and international partners. Collectively, these initiatives represent a significant shift in the OTP's approach to complementarity and cooperation. This renewed strategy signifies the OTP's commitment to a more collaborative and impactful model of international criminal justice.[120] The OTP outlined four central pillars upon which it will deepen its collaboration with national authorities: By Creating a community of practice[121], Technology as an accelerant[122], Bringing justice closer to communities[123], and Harnessing cooperation mechanisms[124].

To conclude, the new policy undoubtedly echoes many of the suggestions given by many scholars, however, there is a need for further development of complementarity to structure the realm of international criminal justice, it is crucial to integrate international criminal justice into the broader context of accountability for war crimes, crimes against humanity, and genocide. The creation of a permanent international criminal court signifies significant progress in holding individuals accountable for these crimes.[125] However, addressing core crimes requires a multifaceted approach, including individual civil responsibility, truth commissions, lustration processes, traditional justice, and similar measures. It is essential to systematically examine the relationships between these accountability methods and individual criminal responsibility. Additionally, a cohesive and all-encompassing accountability system should consider the collective context of core crimes, involving State apparatus, organizations with de facto control, parties to armed conflicts, and various groups. Improving existing methods of collective accountability, particularly State responsibility for ICC crimes, and devising new approaches for non-state entities involved in core crimes are critical. The effective functioning of the evolving system, along with complementary mechanisms, within a comprehensive accountability framework, is necessary for international law to meaningfully contribute to preventing ICC crimes in the future.

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[120] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, p. 4.
[121] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, p. 12, paragraph 27.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Robinson, Arthur. 2002. "Address on the International Criminal Court Delivered by His Excellency Arthur N.R. Robinson, President of Trinidad and Tobago." Nuclear Age Peace Foundation. October 25, 2002. https://www.wagingpeace.org/address-on-the-international-criminal-court-delivered-by-his-excellency-arthur-n-r-robinson-president-of-trinidad-and-tobago/. See also, https://www.wagingpeace.org/the-holocaust-and-the-nuremburg-trials/, https://www.wagingpeace.org/ten-years-of-the-international-criminal-court/, https://www.wagingpeace.org/the-future-of-international-law/.