DOCTORAL DISSERTATION

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

*by*

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| AC | Appeals Chamber |
| AP | Additional Protocol(s) |
| ASP | Assembly of State Parties |
| AU | African Union |
| CAR | Central African Republic |
| DRC | Democratic Republic of Congo |
| e.g. | For example |
| ECCC | Extraordinary Chambers of the Courts of Cambodia |
| Ed. | Edition |
| EU | European Union |
| GA | General Assembly of the United Nations |
| GC | Geneva Convention(s) |
| i.e. | That is |
| IAC | International Armed Conflict |
| ICC | International Criminal Court |
| ICRC | International Review of the Red Cross |
| ICTBD | International Crimes Tribunal, Bangladesh |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IDF | Israeli Defense Force |
| IER | Independent Expert Review |
| ILC | International Law Commission |
| IMT | International Military Tribunal |
| IMTFE | International Military Tribunal for the Far East |
| KhAD | Khadamat-e Aetla'at-e Dawlati (The Agency in charge of internal security, Afghanistan) |
| KLA | Kosovo Liberation Army |
| MICT | International Residual Mechanism for Criminal Tribunals/Mechanism for International Criminal Tribunals |
| NATO | North Atlantic Treaty Organization |
| NIAC | Non-International Armed Conflict |
| NILD | National Implementing Legislation Database |
| No. | Number |
| OHR | Office of the High Representative |
| OPCV | Office of Public Counsel for Victims |
| OTP | Office of the Prosecutor |
| Para. | Paragraph(s) |

| | |
|---|---|
| Pg./P. | Page |
| PP | Pages |
| PTC | Pre-Trial Chamber |
| Reg. | Regulation(s) |
| Res. | Resolution |
| RoP | Rules of Procedure |
| RPE | Rules of Procedure and Evidence |
| SAARC | South Asian Association for Regional Cooperation |
| SC | Security Council of the United Nations |
| SCSL | Special Court for Sierra Leone |
| SIST | Supreme Iraqi Special Tribunal |
| TC | Trial Chamber |
| UN | United Nations |
| UNMIK | United Nations Mission in Kosovo |
| UNSCR | UN Security Council Resolutions |
| UNTAET | United Nations Transitional Administration in East Timor |
| UNTS | United Nations Treaties Series |
| V. | Volume |

# LIST OF CASES

Attorney General v. Adolf Eichmann
Belgium v. Senegal
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Prosecutor v. Bahr Idriss Abu Garda
Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, And Mohammed Hussein Ali
Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui
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## OVERVIEW OF THE DISSERTATION

Article 1 and 17 of the Rome Statute of the International Criminal Court, 1998 establishes a shared responsibility between national criminal jurisdiction and the ICC to fight impunity. This principle of complementarity ensures national courts have the primary responsibility to investigate and prosecute grave international crimes. The ICC serves as an alternative, intervening only when national courts are *unable* or *unwilling*, due to limitations in resources or political interference. This approach respects national sovereignty, a key factor in gaining widespread support for the ICC. Complementarity fosters cooperation, potentially motivating countries to strengthen their own justice systems while guaranteeing accountability. Ultimately, this two-tiered system creates a safety net, ensuring justice prevails for the most serious international crimes.

The dissertation follows several research questions in order to explore the complementarity regime of the Rome Statute, its historical context, potential ambiguities, practical challenges, and its role in achieving accountability. The guiding research questions are:

- How did the international community respond to core international crimes prior to the establishment of the ICC? Were there any judicial mechanisms for holding perpetrators accountable?
- Does the Rome Statute introduce a genuinely new concept referred to as the 'complementarity principle' or does it build upon existing legal norms and practices?
- To what extent do ambiguities exist within the Rome Statute regarding the criteria for determining whether a State is *unwilling* or *unable* to prosecute core crimes? How have these ambiguities been addressed in ICC jurisprudence through admissibility proceedings?
- What are the key challenges, at both the theoretical and practical levels, in applying the principle of complementarity within the ICC framework? Are there inconsistencies between the intended purpose of complementarity and its actual application in practice?

- Building on the analysis of complementarity, what potential solutions or frameworks can be proposed to address impunity gaps more effectively and ensure accountability for core international crimes?

In order to explore these research questions, the dissertation delves into the concept of complementarity within the International Criminal Court (ICC) framework, adopting an empirical-qualitative approach. Grounded in the Rome Statute of 1998, the research begins by establishing a comprehensive picture of the legal landscape surrounding complementarity. It meticulously analyzes legal sources existing both before and after the ICC's establishment, providing a historical and evolving context.

Next, the dissertation dissects the various models of complementarity that have been proposed or debated. It meticulously examines the underlying principles and norms that underpin each model. This in-depth analysis involves a critical evaluation of how these models align with the different legal sources identified earlier. To further enrich the understanding, the study closely examines the ICC's evolving practice of handling cases through admissibility proceedings. These proceedings determine whether a particular case falls within the Court's jurisdiction, often hinging on the principle of complementarity. By scrutinizing these proceedings, the dissertation aims to gain valuable insights into how the concept of complementarity is being interpreted and applied in real-world scenarios.

Ultimately, the dissertation aspires to propose a framework for addressing the issue of impunity gaps. This framework will be carefully crafted to align with the core objectives and purpose of the ICC, as outlined in the Rome Statute. By proposing a solution grounded in a deep understanding of complementarity's legal and practical complexities, the research aims to contribute to a more effective system of international criminal justice.

The first chapter discusses the customary laws and treaty regulations that deal with the suppression of core crimes before the enforcement of the ICC, as well as the obstacles relating to the implementation, enforcement, and prosecutions of core crimes in the national legal framework. For example, War Crimes find their basis in customary laws and several treaties such as the 1949 Geneva Conventions, its Additional Protocols, etc. Similarly, Genocide finds its basis in the 1948 Genocide Convention. Likewise, Crimes against Humanity are administrated exclusively by customary international law. Additionally, we have major Statutes of the Nuremberg Tribunal, Tokyo Tribunal, ICTY, and ICTR, having significant value, for suppressing core crime.

Numerous impediments are often faced by the State while initiating the process. 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 may be intervened. Thirdly, *undue delay* creates additional hindrances. *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. The same can happen with *prosecutorial discretion*., as discretion varies from country to country, and the domestic authorities may decline to conduct any such proceedings on any number of grounds. *Selectivity* is another impediment factor. The tribunal may bring charges against low-level suspects, but the high-ranking officials may abstain from any such proceedings because of their *immunities*. As mentioned by Gaeta, qualifying the *core crimes as ordinary crimes* may be another form of impediment.[1] 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

[1] Gaeta P, *War Crimes Trials before the Italian Criminal Courts: New Trends*, in FischerH, Kress C, LüderSR (eds), *Current Developments on the Prosecution of Crimes under International and National Level* (Berlin: Verlag, 2001), p. 767.

process, and lack of independence & impartiality may occur, and ultimately it may frustrate the international legal framework.

The second chapter discusses the emergence of the complementary regime of ICC. From the historical narrative, this chapter depicts the journey from the Nuremberg Military Tribunal to today's ICC and its complementarity regime. Throughout the illustration, we can point out some major principles that carry significant value while adjudicating cases such as *Nullum Crimen Nulla Poena Sine Lege* (No crime without law), *Nulla Poena Sine Culpa* (No punishment without crime), etc. Also, we can see the mix of adversarial & inquisitional models of criminal procedures (contest among Common law family, Romano-Germanic family, and Socialist legal family).

International Criminal Court has several limitations as well. Firstly, it only deals with the crimes committed after its entry into force. Therefore, it failed to address many atrocities committed before its emergence, such as the Bangladesh Genocide, the Armenian Genocide, etc. The ICC Statute, being a compromise of many competing interests, reflects many inadequacies and the ICC jurisdiction is yet to be universal, which is its serious limitations. Major powerful States are not parties to the ICC. The Security Council and ICC prosecution dealt with referral cases discriminatorily. ICC is not totally free from the influence of bloc politics, geo-political conflict of interests, and the balance of power of the UNSC. For *ad hoc* tribunals and other internationalized courts, cost inefficiency is another big issue. Even the panels suffered from resource limitations and politics of cooperation. Also, the tension between its national & international divide, chronic delays, political tension, and repeated funding crises threatened the objective of ending impunity gaps. Therefore, mutual inclusivity is necessary to establish a just complementarity system, where ICC and national judicial bodies can work head-to-head to achieve the goal of the Rome Statute.

The third chapter discusses about three emerging models of complementarity. From these emerging models, the author focuses more on the proactive model, as it mirrors the perspective on mutual inclusivity than others. This chapter also implies legal frameworks and institutional

capacity-building concepts for States to implement the Rome Statute domestically through mutual inclusivity.

The three emerging complementarity models are passive, positive, and proactive models of complementarity. The narrow view of the understanding of complementarity is the passive complementarity model where ICC is considered as the last resort, the domestic courts/institutions will have the 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 of assisting the States in three aspects, including legislative support, assistance in technical and capacity building, and physical infrastructure. But, due to the lack of a positive complementarity model, we have 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 by implementing the complementarity features of the Rome Statute. Thus, it involves the States requesting the ICC for their expertise and practical proficiency to make the national judiciary empowered to try the core crimes at the domestic level. A pragmatic collaboration between States and ICC is imperative to make the proactive complementarity model work.

Later on, the author discusses several concepts, including the genuine national proceeding, which is a crucial factor for determining whether the national proceeding is merely a sham proceeding or an authentic one. Then, the rationale for implementing legislation has been discussed. Even though the Rome Statute never expressly obligated its Member States to incorporate the Rome Statute, however, it is not a lacuna. Because the core crimes have already been a part of international law and recognized by States. As a result, the obligation to incorporate such laws derives from customary laws. The author also mentions cooperation legislation where the Member States are expected to cooperate in three areas, which are mechanisms for the arrest & surrender process, adequate support for investigation & prosecution, and lastly general

enforcement. Finally, the author discusses complementarity legislation, where it is the responsibility of the States either to extradite or to prosecute the offender, which is a *jus cogens*. This can be done in two ways, either in a minimalist approach or in an express criminalization process.

The fourth chapter analyzes a few domestic practices where a similar essence of the present day's 'complementarity jurisdiction' can be found. Three aspects of domestic trials of core crimes have been analyzed. Firstly, prosecutions under territorial jurisdiction, which can be seen in 26 countries, including the internationalized domestic tribunals in Bosnia & Herzegovina, Kosovo, and East Timor. Secondly, prosecution under universal jurisdiction, where 13 European nations have begun investigating and prosecuting cases for crimes done overseas from 1994 to date. Thirdly, prosecution under complementarity jurisdiction, where either the Prosecutor has been authorized to initiate the investigation, or the State/UNSC referred the case to ICC after challenging the admissibility ground.

Through the analysis of the State practices, four points can be noted. One, most of the nations have adopted limited jurisdiction over universal jurisdiction which requires the perpetrator to be physically present in the nation conducting the investigation/prosecution. Two, in the cases of *in absentia*, which has different interpretations in different continents. Thirdly, the definition of core crimes has different scopes in different nations, which creates major ambiguity while prosecuting individuals. Lastly, there is always a tension between the idea of legality and retrospectivity. However, the highest courts in Peru and Chile declared that the Statutory limitations should not limit the scope of the jurisdiction if they are based on customary international law.

The final chapter looks at the complementarity principle as a potential tool to fill the gaps. To do so, there should be a mutually inclusive framework, which upholds the aspects of complementarity by safeguarding the State's sovereignty, through effective ICC interference and cooperation. This mutual inclusion requires an effective burden-sharing mechanism. To ensure

that, the author suggested four aspects. One of them is institutional preparedness, where the judiciary is capable enough to deal with the core crimes without bias. Then, to implement legislation properly, where the Government has to ensure that they fully comply with the legislation in accordance with the Rome Statute, then substantial reforms should be taken in police forces, prison services, and judicial bodies. Then, the ICC must provide legislative support which involves crafting the appropriate legal framework and initiating global knowledge-sharing platforms. Finally, the ICC must contribute to the capacity-building of the State to investigate and prosecute core crimes domestically, also providing technical support such as training for judges and defense attorneys, guaranteeing the security and independence of officials.

In conclusion, the author refers to the OTP's new Policy on Complementarity and Cooperation 2024 and Strategic Plan 2023-2025, where the office initiated the integration of various measures and strategies to foster relationships with national authorities on a global scale. This vision entails a transformation of the OTP into a technologically driven, vigilant, field-centric, and victim-centered organization capable of responding effectively to the evolving landscape of international crimes.

The OTP outlines four central pillars upon which it will deepen its collaboration with national authorities: Firstly, by creating a community of practice where the OTP will implement proactive measures to track the progress and actions taken by domestic judicial bodies; secondly, by using technology as an accelerant where the office will not only receive, process and preserve data but also categorize and analyze that information through machine learning and cognitive services; thirdly, by bringing justice closer to communities where OTP shall cultivate trust with all stakeholders; and finally by harnessing cooperation mechanisms where the office will foster for new avenues for cooperation and exchange of knowledge through active engagement and innovative initiatives. The new policy undoubtedly echoes many of the suggestions given by the author. However, it is crucial to integrate international criminal justice into the broader context of

accountability. Therefore, by adopting a mutually inclusive accountability mechanism, the ICC or the State Party, actively involved in the investigation or prosecution, can meaningfully contribute to preventing core crimes in the future.

The question remains how this research is significant and contributes to the sphere of knowledge. The author of this dissertation scrutinized and evaluated the multi-dimensional aspects of the complementarity principle in his study, where he explored the opportunities and notions of this concept in detail. There are ambiguities related to complementarity and its application, which have been explained in this study. The research did not stop only by scrutinizing the lack but also proposed a new framework that adheres to the objective and purpose of the ICC to end the impunity gaps. Finally, this study has opened doors for prospective researchers, academics, and policymakers to further research.

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

## 1.1. Introduction

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.[2] 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).[3] Even though there were some exceptional cases where the United Nations had to step up to establish a justice mechanism[4], *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.

The following chapter discusses 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.

[2] 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.

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

[4] 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.

### 1.2. Applicable Laws Governing the National Suppression of Core Crimes

The legal framework governing core crimes constitutes a distinct facet of public international law, delineating rules and principles collectively embraced by sovereign States for the regulation and restraint of individual behaviors. This realm of international criminal law amalgamates inter-state (horizontal element) standards directed towards States[5] and vertical standards directed towards individuals (vertical element). Through the identification of specific conduct as criminal under international law, the horizontal dimension of such proscriptions recognizes a State's entitlement or obligation to exercise a fundamental aspect of its sovereignty—the enforcement of criminal law—in relation to the proscribed behavior. However, the above statement became ambiguous when it can be seen that the international criminal court is performing its exclusive jurisdiction, which [theoretically] has no basis in positive international law.[6] Apart from these ambiguous elements, it has been acknowledged that when certain crimes are recognized as core crimes, in the absence of any other suitable forum for suppressing those [recognized] core crimes, the national criminal jurisdiction is entitled [obligated] to suppress those crimes by investigating, prosecuting and punishing.[7] A similar idea could be found in *Attorney-general v Eichmann*, where the District Court of Jerusalem stated that "[…] international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminal to trial."[8]

[5] these encompass regulations like the jurisdictional base for such investigation and prosecution, States' obligation to exercise such jurisdiction, implementation of such jurisdiction, etc.
[6] Kleffner, *Complementarity in Rome Statute*, 9.
[7] Kleffner, *Complementarity in Rome Statute*, 9.
[8] *Attorney-general v Eichmann*, District Court of Jerusalem, 36 ILR 5 (12 December 1961), p. 12.

### 1.2.1. War Crimes

War crimes are considered serious violations of international humanitarian law applicable in armed conflicts, which entails individual criminal responsibility. It finds its basis in several treaties and customary laws. In terms of treaties relating to war crimes, the four Geneva Conventions of 1949[9] (GCs), its first and second Additional Protocols[10] (APs), the 1954 Hague Cultural Property Convention[11], the 1994 UN Convention on the Safety of United Nations and Associated Personnel[12] and several other treaties relating to prohibitions of the use of certain weapons[13] - deals with the prohibition of these crimes in the domestic level.[14] The given treaties have been adopted by the States and thus obligated to enact necessary legislations to make the respective crime punishable and prosecutable.[15] Going through the common provisions of the Geneva Conventions[16] *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 grave breaches.[17] Interestingly in GC I: Art 49 (2); GC II: Art 50 (2); GC III: Art 129

[9] **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.

[10] **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.

[11] **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.

[12] **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.

[13] **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)

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

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

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

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

(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.[18] Thus, it reflects that the grave breaches of GCs can prosecuted under any jurisdiction, thus echoing the basis of *universal jurisdiction*.[19]

On the other hand, one high-contracting party can hand over the alleged person to another High-Contracting Party for trial.[20] On this point, Kleffner perfectly mentioned that "the Geneva Conventions thus subject grave breaches to the principle of *aut dedere aut judicare* (either extradite or prosecute)."[21] Along with GCs, the APs also supplemented GCs with substantive provisions *e.g.* description of grave breaches[22], failure to act[23], and the duty of commanders[24]. Moreover, AP I, Article 85 (1), 88, 89, 91 affirms that new enforcement elements such as mutual assistance in respect of criminal proceedings or extradition, cooperation in the situation of serious breaches, liability to pay compensations for violations of the conventions or protocols would be introduced.[25]

Regarding the *jus cogens* status of the principle of *aut dedere aut judicare*, States have expressed their desire to cooperate among themselves and with competent international courts/tribunals in

[18] Kleffner, *Complementarity in Rome Statute*, 11.
[19] 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.
[20] Geneva Convention I: Art 49 (2) second sentence; Geneva Convention II: Art 50 (2) second sentence; Geneva Convention III: Art 129 (2) second sentence; Geneva Convention IV: Art 146 (2) second sentence. Kleffner, *Complementarity in Rome Statute*, 11.
[21] Final Report of the International Law Commission (2014), pp. 8, 16, 18, retrieved from https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf. Also, Kleffner, *Complementarity in Rome Statute*, 11.
[22] AP I: Article 85 (3), (4).
[23] AP I: Article 86.
[24] AP I: Article 87.
[25] Kleffner, *Complementarity in Rome Statute*, 11.

the fight against impunity, especially international crimes,[26] and in accordance with the rule of law.[27] As per the UNGA, the States are committed to "ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, following international law".[28] The idea that member States must either extradite or prosecute individuals accused of serious international crimes is widely supported by different nations.[29] This obligation applies to a variety of crimes that are of great concern to the global community and has been included since 1970 in all sectoral conventions against international terrorism.[30]

The *1994 Convention on the Safety of United Nations and Associated Personnel* provides that the States are obligated to establish *territorial*[31] and *active nationality*[32] jurisdiction on the basis of *aut dedere aut judicare*.[33] Even though the alleged offender is Stateless, the convention suggests that in which territory the alleged offender is residing, that State is obligated to take appropriate measures either for extradition or prosecution under its national law.[34]

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[26] Economic and Social Council resolution 1989/65, retrieved from https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-effective-prevention-and-investigation-extra-legal. Also, General Assembly resolution 3074 (XXVIII), retrieved from http://www.worldlii.org/int/other/UNGA/1973/25.pdf. See also, UNGA Resolution 2840(XXVI), retrieved from https://www.legal-tools.org/doc/2745f2/.

[27] Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels - A/RES/67/1, retrieved from https://www.securitycouncilreport.org/un-documents/document/ares671.php.

[28] A/RES/67/1, Para 22, retrieved from https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_67_1.pdf.

[29] Comments and observations received from Governments - DOCUMENT A/CN.4/612, retrieved from https://legal.un.org/ilc/documentation/english/a_cn4_612.pdf.

[30] Final Report of the International Law Commission, 2014, retrieved from https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf.

[31] Convention on the Safety of United Nations and Associated Personnel, Article 10 (1)(a), that jurisdiction extends to crimes committed 'on board a ship or aircraft registered in that State'.

[32] Convention on the Safety of United Nations and Associated Personnel, Article 10 (1)(b).

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

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

Similarly, in *1954 Hague Cultural Property Convention* (Article 28) and *1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict* (Chapter 4, Article 15-21) directed States to undertake necessary steps to prosecute the alleged persons in their *ordinary criminal jurisdiction*, regardless of their nationality.[35] A similar approach can be seen in the *1993 Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and their Destruction*, where the States are required to adopt penal legislation for prohibition to the convention by both natural and legal persons.[36] Moreover, the *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and their Destruction*,[37] took a similar approach to the Chemical Weapon Convention for violation of the prohibited activities and imposed penal sanctions for such violations. In a similar way, the *1996 Amended Protocol II* to the *1980 Certain Conventional Weapons Convention on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices* adopted similar provisions by obliging States to take appropriate measures for preventing and suppressing the violation of the protocol.[38]

It is important to note that many war crimes not listed in the above-mentioned conventions are not even codified because previously (before the establishment of ICC) those were regulated by *customary international law* in terms of both non-international armed conflict and international armed conflict.[39] Even in customary international law, the *national criminal jurisdiction* is always envisaged as having a *central role* in suppressing the core crimes as conventional regimes mentioned above.[40] However, doubts related to the adjudication process by the national criminal jurisdiction also should be taken into account. Because most of them are less detailed and specific either by

[35] See for further details, Kleffner, *Complementarity in Rome Statute*, 12. See, T Desch, *The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1999) 2 YIHL 63–90, 63–64, 79.
[36] Chemical Weapons Convention, Article I (1)(b), Article VII (1)(a) & (b).
[37] Article 9 of the Mines Conventions.
[38] AP II Conventional Weapons Convention, Article 14 (1) & (2).
[39] Kleffner, *Complementarity in Rome Statute*, 14.
[40] Kleffner, *Complementarity in Rome Statute*, 15.

limiting the scope of the application or over-defining the scope.[41] Thus, questions relating to governing the national criminal jurisdiction, its exact role in suppressing the core crimes, and finally whether they've any obligation to investigate or prosecute [customary] war crimes were raised.[42]

### 1.2.2. Genocide

According to Article V of the *1948 Genocide Convention*[43], the High 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[44] enumerated in Article III".[45] Interestingly when the idea of a supranational or international court did not even exist, during that period of time, the Genocide Convention mentioned an international penal tribunal.[46] 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."[47] 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.[48]

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[41] These perspectives will be discussed later on both the National Implementation in Practice and National Implementation in Perspective.
[42] Kleffner, *Complementarity in Rome Statute*, 16.
[43] Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (adopted 09 December 1948, entry into force 12 January 1951).
[44] 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.
[45] Genocide Convention 1948, Article V.
[46] Genocide Convention 1948, Article VI.
[47] Genocide Convention 1948, Article VI.
[48] Kleffner, *Complementarity in Rome Statute*, 17.

Moreover, a universal practice confirmed the customary status of the prohibition of the crime of genocide, thus it evolved as customary international law[49] and it gained *jus cogens* status.[50] 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.[51] 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.[52]

### 1.2.3. Crimes Against Humanity

Prior to the adoption of the Rome Statute, crimes against humanity[53] were administrated exclusively by customary international law. Even though there were some statutes which dealt with this crime, such as statutes of the Nuremberg tribunal, Tokyo tribunal, ICTY, and ICTR, but yet

[49] *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)].

[50] 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.

[51] 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.

[52] 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].

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

having significant value, they did not have rules for universal reach.[54] 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*[55], 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.[56] Most importantly, according to Article V, any State had the jurisdiction to prosecute the person guilty of the crime of apartheid at a competent tribunal where the jurisdiction was either acquired over the responsible person or through an international penal tribunal.[57] 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.[58]

In addition, the underlying crimes, relating to forced disappearance[59], enslavement[60], and torture[61] are mostly governed by the treaty laws among the signatory States.[62] It should be noted

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

[55] 1973 Apartheid Convention, adopted 30 November 1973, 1015 UNTS 243.

[56] 1973 Apartheid Convention, Article IV.

[57] 1973 Apartheid Convention, Article V.

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

[59] *International Convention for the Protection of All Persons from Enforced Disappearance 2006*, GA Res 61/177, 20 December 2006, A/RES/61/177; 14 IHRR 582 (2007); *Inter-American Convention on Forced Disappearance of Persons* (entered into force 28 March 1996) 33 ILM 1429.

[60] Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253; 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3; 1930 Convention Concerning Forced or Compulsory Labour (ILO Convention No 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55; 1957 Convention Concerning the Abolition of Forced Labour (ILO Convention No 105) (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291. The term 'slavery' has been replaced by 'enslavement' in the provisions defining crimes against humanity of the 'Nuremberg Charter', Charter of the International Military Tribunal (8 August 1945) 82 UNTS 280 (Article 6 (c)); 'Tokyo Charter', Charter of the International Military Tribunal for the Far East (19 January 1946) TIAS No 1589 (Article 5 (c)); ICTY Statute (n 2) (Article 5 (c)), ICTR Statute (n 2) (Article 3 (c)) and the Draft Code (n 5) Article 18 (d)). For the similarities between 'slavery' and 'enslavement' as a crime against humanity, see inter alia Prosecutor v Kunarac, Kovac and Vukovic ('Foca') (Judgment) IT-96-23 (22 February 2001) 518–543 and (Appeals Chamber judgment) IT-96-23/1, Ap Ch (12 June 2002) 106–124.

[61] *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[62] Kleffner, *Complementarity in Rome Statute*, 20.

that the above-mentioned treaties apply in both peacetime and where there is a widespread or systematic attack.[63] Thus, singular and isolated events of torture, or enslavement, or forced disappearance should not be termed as crimes against humanity.

The *1926 Slavery Convention*[64] and similar conventions[65] provide that "the High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage to suppress the slave trade.[66] Moreover, it was mentioned that it is obligatory for the State parties to adopt necessary measures to suppress the slave trade, otherwise, measures of severe punishments may be imposed.[67] Later on, by the supplementary convention[68], the list of prohibited acts was expanded.[69] Afterward, in 1930, the *ILO Convention No. 29*[70] was adopted and it was provided that "the illegal exaction of forced or compulsory labor shall be punishable as a penal offense, and it shall be an obligation on any Member ratifying this convention to ensure that the penalties imposed by law are really adequate and are strictly

[63] Kleffner, *Complementarity in Rome Statute*, 20.
[64] *1926 Slavery Convention* (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.
[65] Schabas, *Genocide in International Law,* 361–368.
[66] *1926 Slavery Convention*, Article 2(a).
[67] *1926 Slavery Convention*, Article 6.
[68] *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3.
[69] *1926 Slavery Convention*, Articles 3 (1) - as regards the 'act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto', Article 5 - as regards the 'act of mutilating, branding or otherwise marking a slave or a person of servile status in order to indicate his status, or as a punishment, or for any other reason, or of being accessory thereto', and Article 6 - as regards the 'act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto', and 'the act of inducing another person to place himself or a person dependent upon him into the servile status resulting from any of the institutions or practices mentioned in Article 1, to any attempt to perform such acts, to being accessory thereto, and to being a party to a conspiracy to accomplish any such acts'.
[70] *1930 Convention Concerning Forced or Compulsory Labour (*adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55, adopted by the General Conference of the International Labour Organization.

enforced."[71] Also, *1957 ILO Convention No 105*[72] further extended the list of prohibited acts[73], which also requires the member States to adopt penalties for any violation of the provisions.

Furthermore, the *1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[74] provides more detailed practices relating to the suppression of the crime of torture. It obliges the parties to ensure proper and adequate punishments and penalties for breaching the convention.[75] Moreover, this convention contains both *active nationality jurisdiction* and *passive nationality jurisdiction*, on the basis of *aut dedere aut judicare* (either extradite or prosecute).[76]

Likewise, for suppressing the crimes of forced disappearance, two conventions[77] criminalized the act as an offense and obliged the State parties to establish jurisdiction to prosecute the perpetrator(s) or to extradite the responsible national(s).[78]

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[71] *1930 ILO Convention No 29*, Article 25.

[72] *1957 Convention Concerning the Abolition of Forced Labour* (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291.

[73] *1957 Convention Concerning the Abolition of Forced Labour*, Article 1(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilizing and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.

[74] *1984 Torture Convention* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[75] *1984 Torture Convention*, Article 4.

[76] *1984 Torture Convention*, Article 5 (1)(2)(3), Article 6 & Article 7.

[77] *2006 International Convention for the Protection of All Persons from Enforced Disappearance*, GA Res 61/177, 20 December 2006, A/RES/61/177; 14 IHRR 582 (2007), and *1996 Inter-American Convention on Forced Disappearance of Persons* (entered into force 28 March 1996) 33 ILM 1429.

[78] *International Convention for the Protection of All Persons from Enforced Disappearance* - Article 4, Article 9, Article 11; *Inter-American Forced Disappearances* - Article III, Article IV, Article VI. Notable differences from the jurisdictional regime established by the Torture Convention are that the Inter-American Convention does not contain any provision on jurisdiction exercised in accordance with internal law, and that it contains an express prohibition of States Parties 'to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other Party by its domestic law'. Such an express prohibition is absent in the Torture Convention

### 1.2.4. Prosecute Human Rights Violations

Along with the aforementioned regimes, many other regional and universal treaties uphold a similar approach to investigating, prosecuting, and punishing human rights violations as an obligation upon the State parties.[79] Many treaties such as the *International Covenant on Civil and Political Rights*[80], *European Convention for the Protection of Human Rights and Fundamental Freedoms*[81], *Inter-American Convention on Human Rights*[82], and the *African Charter on Human and Peoples' Rights*[83] provides that the State parties shall ensure the right to an effective remedy and access to court to all the nationals under their jurisdiction.[84]

In *Velasquez Rodriguez*[85], the IACHR provided that the States are obligated to investigate and punish violations of any rights prescribed in the convention, and in these cases, the responsible State organs have to respond with due diligence.[86] This judgment was later confirmed by subsequent decisions by the court and other human rights bodies, and several decisions clearly indicated that the States are obligated to initiate criminal proceedings for serious human rights violations. In *Bautista de Arellana v Colombia*, the Human Rights Committee provided that "the covenant does not provide a right for individuals to require that the State criminally prosecute another person, and held that the State parties to the ICCPR are 'under a duty to investigate thoroughly alleged violations of human rights, and in particularly forced disappearances of persons and violations of the rights to life, and to prosecute criminally, try and punish those held

[79] Kleffner, *Complementarity in Rome Statute*, 23.
[80] Article 2 (1) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[81] Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively) 213 UNTS 222 (ECHR).
[82] Article 1 (1) of the Inter-American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123 (IACHR).
[83] Article 1 of the African Charter on Human and Peoples' Rights (adopted on 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (AfCHPR).
[84] Articles 2 (3) ICCPR; 13 ECHR; 8 and 25 IACHR; 7 (1)(a) AfCHPR.
[85] Velásquez Rodríguez Judgment of 29 July 1988, Inter-American Court of Human Rights (Series C) No 4 (1998).
[86] Velásquez Rodríguez Judgment, pg. 166 and 172.

responsible for such violations'."[87] In *Río Frío Massacre*[88] and *Barrios Altos*[89], the State of Peru has been recommended to conduct a serious, impartial, and effective investigation into the facts to identify the responsible individuals for assassination and injuries.[90] However it is important to note that the application of the jurisdiction is limited to the territory of States, thus the obligation to investigate, prosecute, and punish applies to the individual where the crimes have been committed and/or subjected to individuals' jurisdiction.[91] Thus it seems the human rights obligations are primarily *territorial*, except in case the effect of the act is triggering other States or performed on other States' territory.[92] Thus even in the suppression of serious human rights violations, the national criminal jurisdiction remains the primary platform in terms of investigation, prosecution, and punishment, even though the question may arise of whether and to what extent the States' exercise of criminal jurisdiction is obligatory, also in cases of extraterritorial violations.

To summarize, before the establishment of the ICC, there was a set of rules (customary international laws) and treaty laws that governed the adjudication of the core crimes in the national legal framework, which played a central role in the prosecution of core crimes. However, uncertainty occurred when different States incorporated diverse sets of laws for specific crimes either by limiting the scope or restricting the underlying offenses or over-defining the crime. Due to this uncertainty, a uniform body of laws was anticipated to bring the investigation and prosecution procedure to a common standard. Furthermore, there are uncertainties related to some endemic factors that cause obstacles in national suppression.

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[87] Human Rights Committee, *Bautista de Arellana v Colombia*, Communication No 563/1993, UN Doc CCPR/C/55/D/563/1993 (1995)

[88] *Río Frío Massacre*, Case 11.654, Report No 62/01, IACmHR, OEA/Ser.L/V/II.111 Doc 20 rev at 758 (2000)

[89] *Barrios Altos Case*, Judgment of 14 May 2001, IACtHR Series C No 75 (2001)

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

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

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

### 1.3. Endemic Factors in National Criminal Jurisdiction

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 normative (by law) or factual forms (by practice).[93] 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.[94]

#### 1.3.1. Implementation of the Legislation/Adoption of Legislation

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.[95]

The absence of the *definition of the [core] crimes* without which the crime cannot be prosecuted under the national criminal jurisdiction is one of the main obstacles.[96] As mentioned by *Kleffner (2008)*, the practice of non-implementation or/and poor implementation of the definition of core crimes are particularly extensive in most of the State parties.[97] Even if the State parties are signatories to treaties and relevant treaties contain an unambiguous provision to incorporate the provisions of the treaty into the national legal framework, a great number of States have not

[93] 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.
[94] Kleffner, *Complementarity in Rome Statute*, 38.
[95] Kleffner, *Complementarity in Rome Statute*, 38.
[96] Kleffner, *Complementarity in Rome Statute*, 39.
[97] Kleffner, *Complementarity in Rome Statute*, 39. See more, A Andries, *Investigations et poursuites des violations du droit des conflits armés: lois et procédures nationals* (1998) 37 *Revue de droit militaire et de droit de la guerre* 179–223, 189 190; ICRC Advisory Service, (n 62) 45. For the impact of the Rome Statute, see 333–337.

implemented such.[98] As the definition of core crimes has not been incorporated, thus the State only can enforce the prohibition by referring to those as ordinary domestic crimes, which is not desirable as there are lots of differences between ordinary crimes and core crimes.[99]

In some cases, the States may only incorporate some elements of crimes that are criminalized as grave breaches of the Geneva Conventions.[100] For example, the Paraguayan Penal Code[101] criminalized some of the grave breaches, however completely ignored the grave breaches of willfully depriving a prisoner of war or other protected person of the rights to fair and regular trial[102] and the taking of hostages[103].[104]

In some scenarios, the State adopts laws for prosecuting core crimes where the words from the international rules are similar but the way the State adopted the law makes it divergent from the original international rules. For example, Article 2 of the Genocide Convention referred to the *actus reus* of "*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*". Germany implemented this international rule in the German Criminal Code[105] which provides "*he who inflicts on the group conditions apt to bring about its physical destruction in whole or in part is liable to punishment.*" Thus, as *Kleffner* mentioned, German law incorporated an objective element by replacing a subjective element.[106]

Moreover, some States incorporate the crimes partially, not fully as described in the treaty.[107] For example, the irrelevance of official capacity, superior/command responsibility,

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98 Kleffner, *Complementarity in Rome Statute*, 39.
99 Kleffner, *Complementarity in Rome Statute*, 39.
100 Kleffner, *Complementarity in Rome Statute*, 39.
101 Article 320 of Paraguayan Penal Code, Law No 1160/97 Penal Code of the Republic of Paraguay, reproduced in (1998) 1 YIHL 621-623.
102 Article 130 of 3rd Geneva Convention.
103 Article 147 of 4th Geneva Convention.
104 Kleffner, *Complementarity in Rome Statute*, 39.
105 Section 220 a (1) No. 3.
106 Kleffner, *Complementarity in Rome Statute*, 40.
107 Kleffner, *Complementarity in Rome Statute*, 41.

exclusion of the defense of superior orders, etc. are features that do not resemble concepts in national criminal jurisdiction.[108] Even though Yugoslavia was a party to the First Addition Protocol[109] and implemented both APs in 1978, in practice, it criminalized the 'commission and ordering' of war crimes but did not have any regulation for superior/command responsibility.[110] Even though Article XX of the 1988 Yugoslavian Military Regulations has the provision of superior command responsibility the provision was not applied during the prosecution.[111]

It is a clear requirement for the Member States to establish *universal jurisdiction* for grave breaches of the Geneva Convention, but most of the members have not established *universal jurisdiction*.[112] Because of these trends, Italy's domestic courts couldn't able to exercise 'extraterritorial jurisdiction' for grave breaches of the Geneva Convention.[113] Even though the universal jurisdiction is established, it has been limited [restricted] by certain periods or places.[114] For example, Australia limited universal jurisdiction to the [war] crimes committed in Europe during the Second World War.[115]

Therefore, the gaps arising from the absence or defective national [criminal] legal framework, direct implementation, or application of international law can fill the gaps.[116] But, the impediments to this could be sovereignty, legal certainty, and separation of power, thus it becomes hard to implement international law directly in the national [criminal] legal framework.[117] However, there are also possibilities for the State parties that if they provide the chance to the international [criminal] jurisdiction to fill the gaps in the national [criminal] legal framework, the international

[108] Kleffner, *Complementarity in Rome Statute*, 41.
[109] Ratified in 1977 - Article 86(2)
[110] Kleffner, *Complementarity in Rome Statute*, 41.
[111] Kleffner, *Complementarity in Rome Statute*, 41.
[112] Kleffner, *Complementarity in Rome Statute*, 42.
[113] Kleffner, *Complementarity in Rome Statute*, 42.
[114] Kleffner, *Complementarity in Rome Statute*, 42.
[115] Kleffner, *Complementarity in Rome Statute*, 42.
[116] Kleffner, *Complementarity in Rome Statute*, 42.
[117] Kleffner, *Complementarity in Rome Statute*, 42.

law actually can complement the national jurisdiction by filling the gaps. So, the national courts can be in the central role where international law can complement them for the national suppression of core crimes.

### 1.3.2. Enforcement

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.[118] Core crimes are most of the time 'system crimes' or 'macro crimes'[119], 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.[120] 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.[121] However, in case of genocide or crimes against humanity, it does not require an armed conflict as a contextual element.[122] 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'."[123]

[118] Kleffner, *Complementarity in Rome Statute*, 43.
[119] Macro Crimes is mostly used by German literature. Reference from Kleffner, *Complementarity in Rome Statute*, 43.
[120] 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.
[121] Kleffner, *Complementarity in Rome Statute*, 43.
[122] Article 1 of the 1948 Genocide Convention, see more Kleffner, *Complementarity in Rome Statute*, 43.
[123] Kleffner, *Complementarity in Rome Statute*, 43.

### 1.3.3. Alternative to Criminal Prosecution

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.[124] It might happen that the lawyers and judges get killed and the court buildings along with necessary documents get destroyed or burned down in an armed conflict. Thus, making the proper atmosphere for investigating or prosecuting the perpetrators of core crimes becomes time-consuming/delayed. Ruckerl mentioned that "despite efforts of the occupying forces to reinvigorate the German domestic legal system, it took until the mid-1950s for it to develop a proactive stance towards prosecuting Nazi crimes."[125] Obviously, the State where the incident occurred is not the only forum where the perpetrators can be brought to justice, however, due to the obstacles mentioned above, the national judicial system remains the sole authority over the investigation and prosecution unless they are inactive, unwilling or unable genuinely to proceed with the process. Sometimes the State might respond to the core crimes, but very often they alternate the trials with amnesty, truth commission, reparations, and other measures, even obstacles may occur in the criminal proceedings as well.[126]

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. It is basically a political settlement as mentioned by Kleffner, and "typically reflects a compromise between the agents of the old regime, which may be potentially prosecuted, and the transitional or new government."[127]

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[124] Kleffner, *Complementarity in Rome Statute*, 44.
[125] A Rückerl, *Die Strafverfolgung von NS-Verbrechen 1945–1978* (C F Müller Publ, Heidelberg, Karlsruhe 1979) p. 41. Also, Kleffner, *Complementarity in Rome Statute*, 44.
[126] Kleffner, *Complementarity in Rome Statute*, 45.
[127] Kleffner, *Complementarity in Rome Statute*, 46.

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.[128] Compared to amnesty and pardon, a truth commission is considerably a new phenomenon, which does not serve the entire purpose of a criminal proceeding but few of them are addressed, such as establishing reliable authority to record the past events of core crimes, establishing a platform for the victims and their family members, sometimes establishing a platform through which the victims and their family members can be compensated.[129]

*Reparation* is another way to substitute criminal prosecution, but it serves a significant role as a remedy for victims of core crimes.[130] 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.[131]

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.[132] In the same way, disciplinary sanctions may be brought up against the individual, if s/he belongs to the military.[133] The third State may exclude him or her from refugee status as well.[134]

[128] Kleffner, *Complementarity in Rome Statute*, 46.
[129] Kleffner, *Complementarity in Rome Statute*, 46.
[130] Kleffner, *Complementarity in Rome Statute*, 47.
[131] Kleffner, *Complementarity in Rome Statute*, 47.
[132] Kleffner, *Complementarity in Rome Statute*, 47.
[133] Kleffner, *Complementarity in Rome Statute*, 47.
[134] Application of Article 1 F of the 1951 Convention Relating to the Status of Refugees.

All these measures, even though not held through proper criminal proceedings, effectuate some of the accountability. However, one issue that is common is these measures that the State always substitutes criminal prosecution by implementing these measures.

### 1.3.4. Impediments Related to Proceedings

Numerous impediments are often faced by the State while initiating the [criminal] proceeding or/and during different phases of such action.[135] Firstly, the *inability* to carry out criminal proceedings is the obstacle faced by many State parties. The State may come out from a violent past or/and armed conflict, thus in general the State may be enmeshed with insecurities, which prevents it from carrying out investigations, evidence collection, etc. due to such uncertainties, searching for the suspected criminals and arresting them might not be possible.[136]

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. For example, the other State might not extradite the suspected criminal, even they might not hand over crucial evidence in their possession.[137] Even through international diplomacy they might intervene in national affairs and interrupt the process.[138]

Thirdly, *undue 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

[135] Kleffner, *Complementarity in Rome Statute*, 48.
[136] Kleffner, *Complementarity in Rome Statute*, 48.
[137] Kleffner, *Complementarity in Rome Statute*, 49.
[138] After 1971 Liberation war between Bangladesh and Pakistan, Bangladesh needed to be a member of UN. At the same time, they wanted to prosecute the Pakistani war criminals. Pakistan was an ally to China, and China had [have] veto power in the security council. Thus, Bangladesh had to drop the process of prosecution to get UN membership.

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.[139]

*Statutory limitation* is another obstacle. Due to this principle, national laws may not permit to initiation 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 still some parties to this convention still recognize statutory limitation to some extent.[140]

Hungary example can serve as an example of dealing with statutory limitations regarding the core crimes. "On February 16, 1993, the Hungarian Parliament enacted a law exempting certain acts committed during the 1956 uprising from the statute of limitations, citing the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. However, on October 13, 1993, the Constitutional Court ruled that such a measure could only be implemented if the conduct in question had not been subject to a statute of limitations under Hungarian law at the time of its commission. The Court further stipulated that this exemption would only be permissible if the conduct was classified as a war crime or crime against humanity under international law, and if Hungary had an international obligation to remove the statute of limitations. Consequently, the Court declared Section 1 of the Act unconstitutional, finding that it sought to exempt conduct that did not qualify as a war crime or crime against humanity from the statute of limitations. Furthermore, per Article 7 of the Constitution and the Constitutional Court's jurisprudence, war crimes were not subject to the statute of limitations. However, this provision was not introduced until 1989, meaning that war crimes and crimes against humanity committed in 1956 were still subject to a statute of limitations. The Geneva Conventions

[139] Kleffner, *Complementarity in Rome Statute*, 49.
[140] Kleffner, *Complementarity in Rome Statute*, 50

did not address the issue of statutory limitations, and the principle of non-applicability was established by the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Consequently, at the time of the accused's alleged crime, neither domestic nor international law prohibited the application of a statute of limitations, as the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity did not have retroactive effect. In adjudicating the case *Korbely v. Hungary*[141], the European Court of Human Rights primarily relied on Article 3 of the European Convention on Human Rights, which the Hungarian Constitutional Court interpreted as characterizing the conduct mentioned in the provision as "crimes against humanity". These courts believed that such crimes were "punishable regardless of whether they were committed in violation of domestic law". Therefore, it was "immaterial whether the Geneva Conventions were properly promulgated or if the Hungarian State fulfilled its obligation to implement them before October 23, 1956. Regardless [of these issues], the perpetrators were liable under international law". Consequently, the crime in question was deemed not to be subject to the statute of limitations."[142]

The same can happen with *prosecutorial discretion*. As discretion varies from country to country, the domestic authorities may decline to conduct any such proceedings on any number of grounds.[143]

*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 happened in the Ad hoc Human Rights Court in Jakarta, where 100 suspects were charged for crimes

[141] Retrieved from https://hudoc.echr.coe.int/eng#{%22appno%22:[%229174/02%22]}.
[142] KORBELY v. HUNGARY (Application no. 9174/02), Grand Chamber, European Court of Human Rights, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-88429%22]}, Para 16, 17, 18, 27, 31, 32, 34, 45, 58, 76.
[143] Kleffner, *Complementarity in Rome Statute*, 50. For more, J Verhaegen (n 222) pp. 610–611; R Cryer, *Prosecuting International Crimes—Selectivity and the International Criminal Law Regime* (CUP, Cambridge 2005) pp. 192–194; D D Ntanda Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals* (2005) 3 JICJ, pp. 124–144, 126–130.

committed in East Timor in 1999, but due to selectivity, only 18 were charged, thus it became a sham trial.[144]

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.[145]

As mentioned by Kleffner, *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.[146]

### 1.4. Closing Remarks

From the international law perspective, it envisions the fundamental role of national criminal jurisdiction to suppress the core crimes, acting simultaneously in the national and international legal framework.[147] A number of States initiated domestic prosecution of international crimes in conformity with the international legal framework.[148]

[144] Kleffner, *Complementarity in Rome Statute*, 50. For more, D Cohen, *Intended to Fail - The Trials before the Ad Hoc Human Rights Court in Jakarta* (2003) 74 International Center for Transitional Justice 5, 8–9.
[145] Kleffner, *Complementarity in Rome Statute*, 50
[146] Kleffner, *Complementarity in Rome Statute*, 54.
[147] Kleffner, *Complementarity in Rome Statute*, 55.
[148] Kleffner, *Complementarity in Rome Statute*, 55.

However, along with the increased number of cases, we also can observe how the national criminal jurisdiction is facing so many obstacles as mentioned above. Frequently the States either do nothing or do something that is different from what international law suggests them to do. Unfortunately, these tendency makes the circumstances complicated and most of the tendencies are influenced by different entanglements such as political, legal, practical, economic, and personal, which may be the cause and consequence of the core crimes.

Even when States make any *bona fide* attempt to suppress the core crimes, those might get hindered because of factual constraints emanating from domestic or/and international law, such as granting impunity, etc. as a result, these obstacles severely limit the potential of national criminal jurisdiction to prosecute international crimes in the domestic level.

Thus, it has both potential and absurdity [in a word paradox]. Questions may arise about how to strengthen the national courts so that they can act in conformity with the international legal framework. In case any State is capable of removing the above-mentioned obstacles and if there is any monitoring system by an international organization (ICC or UN), the domestic court can perform the same duty as the ICC does, which will be beneficial to the State in many ways. However due to the same obstacles, it is hard for the States to carry out the proceedings impartially and independently, thus ICC comes up with the solution to be the *complementary* court to the national jurisdiction, not the court of *primary* jurisdiction.

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# 2. EFFORTS TO END IMPUNITY: JOURNEY FROM IMTS TO THE COMPLEMENTARITY SYSTEM

## 2.1. Introduction

In this chapter, the author discusses the emergence of complementary international criminal courts 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).[149] In addition, the author looks into the purpose of these international/internationalized courts and discusses their components.

## 2.2. Emergence of The Complementary System

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 as such where 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*[150]*, Nullum Crimen Sine Lege, Nulla Poena Sine Lege*[151]. 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

[149] 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.
[150] No legal action can be initiated twice for the same course of action (crime).
[151] There shouldn't be any punishment without pre-existing law.

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.[152] Finally, the most practical, less idealistic, and more approachable model is *mutual inclusivity*, which implies both international and national courts/tribunals will share the responsibility and will ensure that the perpetrators of the core crimes are adjudicated.[153] The idea of *mutual inclusivity* will be discussed in forthcoming chapters in detail, but it is a *Sine Qua Non*[154] of complementarity system at the domestic level.

Complementarity is the dominant feature of the statute where the responsibility to investigate and prosecute is upon the State parties unless and until they lack certain conditions. Although there is a permanent international criminal court established under the Rome Statute 1998, the primary jurisdiction is upon the States, which was a reversal to previously established tribunals or courts, and had primacy over the domestic courts.[155] However, the ICC is complementary to national jurisdiction. This means despite establishing an international forum (ICC), the international community expects the States to take the primary responsibility for investigating and prosecuting the core crimes on their national territory.

## 2.1. Journey so far: From IMTs (Nuremburg and Tokyo), Ad Hoc Tribunals to Complementary ICC

The 1943 Moscow Declaration[156] - '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

[152] Kleffner, *Complementarity in the Rome Statute*, 60.
[153] Imoedemhe, Ovo Catherine. *The Complementarity Regime of the International Criminal Court*. Springer International Publishing (2017), https://doi.org/10.1007/978-3-319-46780-1, p. 197.
[154] Essential condition.
[155] Imoedemhe, *The Complementarity Regime*, 2.
[156] 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.

decisions of the Allied governments.[157] However, it hasn't expressed any idea about an international or internationalized tribunal or court. During this conference, the United 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[158] signed the London Agreement and the Charter.[159] Later on, under Article 5 of the London Agreement, other States[160] expressed their adherence to the agreement.[161] And, this became the basis of the establishment of the first International Military Tribunals (IMTs) in Nuremburg and Tokyo. It is to be noted that "the establishment of the IMTs was perceived as the collective exercise of national jurisdiction granted to the parties to the agreement but effectuated on the international level."[162] It is worth mentioning that both IMTs prosecuted the perpetrators who have been charged with crimes against peace, war crimes, and crimes against humanity.[163] However, in IMT Tokyo, the definition of crimes against humanity was somewhat different.[164] The Nuremburg Tribunal tried 22 German war criminals, from whom some waged and planned aggressive war against 12 nations.[165] Germany was party to several international treaties such as the *1899 Hague Convention*, the *1907 Convention for the Pacific Settlement of International Disputes*, and the *1919 Treaty of Versailles*. By waging the war, Germany breached the treaty obligation, and responsible individuals had to be prosecuted for such violation. Even though many scholars claim the judgments of IMTs as *victors' justice* due to various factors, these judgments created milestone principles in the field of international criminal law, especially for the subsequent jurisprudence of *ad hoc* tribunals. Detailed description and analysis of the individual IMTs are beyond the scope of this chapter, however,

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157 Kleffner, *Complementarity in the Rome Statute*, 62.
158 United States, United Kingdom, France, and Soviet Union.
159 Imoedemhe, *The Complementarity Regime*, 3.
160 Greece, Denmark, Yugoslavia, Netherlands, Czechoslovakia, Poland, Belgium Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.
161 Imoedemhe, *The Complementarity Regime*, 3.
162 Kleffner, *Complementarity in the Rome Statute*, 62.
163 https://legal.un.org/ilc/documentation/english/a_cn4_5.pdf, dated 26 July 2022.
164 Raimondo, Fabián. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, (Leiden, The Netherlands: Brill | Nijhoff, 02 Oct. 2008) doi: https://doi.org/10.1163/ej.9789004170476.i-214, 82.
165 Imoedemhe, *The Complementarity Regime*, 4.

we'll briefly look into some important attempts that laid down some cornerstone principles of international criminal law.

#### *2.2.1.1. International Military Tribunal (Nuremburg Tribunal)*

On 8th August 1945, the agreement for establishing the first IMT in history to prosecute core crimes was concluded in London. It was established solely to try the major war criminals of the European Axis, not the allied, and upon the agreement, they [war criminals] were to be tried under the framework of IMT Statute[166] and Rules of Procedure[167] (hereinafter: RP).[168] As there was no such tribunal before, thus for drafting the Statute and RP, the drafters relied upon their own legal systems and precedents to determine whom to prosecute, how to frame the charge, etc. It was indeed a complex work, as the US and UK belong to the *common law* family, whereas France to the *Romano-Germanic* family, and the Soviet Union to the *socialist* legal family. Thus there was complexity of both *adversarial* and *inquisitional* models for criminal procedure.[169] However, crimes against peace, crimes against humanity, and war crimes were under the jurisdiction of the Nuremburg Tribunal, which was destined to punish the criminals in a 'just and prompt' way, IMT has the power to hold trial *in absentia*.[170] It is to note that, in an adversarial judicial process, the presence of both parties is necessary whereas in the inquisitional justice process, trial in absentia is allowed in certain circumstances,[171] thus it can be said that the tribunal followed the inquisitional model largely.

Even though there were many critics of the trial, several important and significant principles were laid down. Fabián Raimondo emphasized on three most noteworthy principles

[166] IMT Statute, https://satzger.userweb.mwn.de/unterlagen/V1E.pdf, dated 17 October 2022.
[167] IMT RP, https://avalon.law.yale.edu/imt/imtrules.asp, dated 17 October 2022.
[168] Raimondo, *General Principles of Law*, 75.
[169] Raimondo, *General Principles of Law*, 76.
[170] Raimondo, *General Principles of Law*, 76.
[171] Raimondo, *General Principles of Law*, 76.

which will be mentioned below. To note, these principles appeared in the form of judgments, these are not mentioned in the Statute itself.

##### *2.2.1.1.1. Nullum Crimen Nulla Poena Sine Lege*

Most of the time, the defendants submitted the argument that "there can be no punishment without a pre-existing law". As the crimes of 'Aggressive War' were not penalized by the national legal system, therefore, it constituted '*ex-post facto*' retribution, contrary to the *Nullum Crimen Nulla Poena Sine Lege*.[172]

Several scholars argued that the defendant upholds the right defense. However, IMT's view was quite different on the matter of fact that under the 'conclusive' and 'irrevocable' character of the Charter, it was not necessary to consider the character of the crimes, whether international or local, before the execution of the agreement.[173] The tribunal mentioned that the principle of *Nullum Crimen Nulla Poena Sine Lege* is "not a limitation of sovereignty but is in general a principle of justice."[174]

The tribunal further observed that it would be unjust for them to try those who in defiance of treaties and assurances attacked the neighboring States without warning, and the attacker must know that they were doing wrong.[175] Thus, IMT rejected the plea and affirmed that the 'aggressive war' is a crime under international law *ad abundantiam*[176].[177]

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[172] Raimondo, *General Principles of Law*, 78.

[173] Judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August ,1946 to 1st October 1946), page 52. https://crimeofaggression.info/documents//6/1946_Nuremberg_Judgement.pdf, Accessed on 27th Oct 2022.

[174] Judgment of 1 October 1946, pg. 52.

[175] Judgment of 1 October 1946, pg. 52.

[176] Beyond necessity.

[177] Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October, 1946, London, HMSO, 1946, p. 39-41. Also, Raimondo, *General Principles of Law*, 78-79.

In my opinion, the Nuremburg Tribunal was correct in its observations. Regarding the relevance of the maxim to the sovereignty, the maxim itself is not a part of general international law, otherwise, it may limit the sovereignty of the States. Also, the maxim is not a binding principle therefore Nuremburg Tribunal preferred to exercise retribution against the perpetrators which was deemed to be 'more just' than applying the maxim.

#### *2.2.1.1.2. There is No Criminal Responsibility Without Moral Choice*

Concerning Article 8, the IMT observed,

> "The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the International Law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[178]

The rule mentioned in Article 8[179] seems to be an innovative compilation concerning the existing international criminal legal principles. As previously, the superior could be criminally liable, not the subordinates who followed the order. But IMT observed that it cannot be a defense unless proven duress or mistake of law in particular.[180]

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[178] Judgment of 1 October 1946, pg. 56, https://crimeofaggression.info/documents//6/1946_Nuremberg_Judgement.pdf.

[179] IMT, Article 8, "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." https://www.jus.uio.no/english/services/library/treaties/04/4-06/imt-charter.xml.

[180] Raimondo, *General Principles of Law*, 79.

#### *2.2.1.1.3. Nulla Poena Sine Culpa / Individual Criminal Responsibility*

Before IMT, individuals have never been punished for the actions of a sovereign State. The individuals who acted on behalf of a sovereign State were mostly protected by the sovereignty of the State itself. But IMT rejected this principle stating that "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes, the provisions of International Law can be enforced."[181] Also, IMT observed,

> "Article 9, it should be noted, uses the words "The Tribunal may declare," so that the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied with the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to ensure that innocent persons will not be punished."

In my opinion, the IMT was correct in stating the above observation. Because the principle of individual culpability is a well-settled principle in the field of criminal law and upholds the principle ~ *Nulla Poena Sine Culpa*[182]. It is to be mentioned that this 'individual criminal responsibility' principle, upheld by IMT became the cornerstone of international criminal law jurisprudence.

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[181] IMT Judgment (Judgment of 1 October 1946), pg 55. https://crimeofaggression.info/documents//6/1946_Nuremberg_Judgement.pdf.

[182] No punishment without culpability.

#### *2.2.1.2. International Military Tribunal for the Far East*

On 19th Jan 1946, through a special proclamation, the Supreme Allied Commander Gen. MacArthur established the International Military Tribunal for the Far East (hereinafter the IMTFE). IMTFE is highly inspired by the IMT Charter, its jurisdiction, and functions, thus very few differences could be found between these two statutes. Unlike IMT-Nuremburg, the IMTFE covered conventional war crimes, crimes against peace, and crimes against humanity as mentioned in Article 5 of the IMTFE charter.[183] However, the definition of crimes against peace is slightly different from IMT. It adopted the actions done in both *declared* and *undeclared* war of aggression.[184] Thus it broadens the aspect of the application and any hostile activity of aggression, even without prior notice/declaration would be within the scope of Article 5.[185] Upon following IMT precedent, the 'Japanese army' could be termed as a 'criminal organization', however, IMTFE did not recognize any such organization as criminal, thus it is a difference too, if compared with the IMT charter.[186] According to Article 9 (a), "The indictment shall consist of a **plain, concise, and adequate statement of each offence charged**. Each accused shall be furnished, inadequate time for defense, a copy of the indictment, including any amendment, and of this charter, in a language understood by the accused."[187] However in IMT, the charge has to be specified in detail, so this is another difference. All other rules were similar to IMT except in the provision of proceedings (Article 15), where the accused were guaranteed certain rights like making an opening statement, examining witnesses, and addressing the IMTFE.[188]

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[183] Article 5, IMTFE Charter. https://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml.

[184] Raimondo, *General Principles of Law*, 82.

[185] Article 5 (a) of the IMTFE Charter: Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

[186] Raimondo, *General Principles of Law*, 82.

[187] Article 9, https://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml.

[188] Article 15 (c), (e) & (f) respectively.

As there was no such substantive difference between IMT and IMTFE, thus the IMTFE prosecuted the accused based on the precedents given by the Nuremburg tribunal. It recognized the principle ~ *Nullum Crimen Nulla Poena Sine Lege*, however reluctant to discuss other principles like *Nulla Poena Sine Culpa*, or no responsibility without moral choice.[189]

Thus, it could be said that, unlike IMT, the IMTFE did not contribute that much to the field of international criminal law, but rather echoed the precedents provided by IMT mostly.

#### *2.2.1.3. Establishment of the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR)*

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.[190]

To avoid any doubt, the report annexed with the ICTY Charter mentioned that it will follow the principle of international humanitarian law in order to tackle the issues relating to the principle of *Nullum Crimen Nulla Poena Sine Lege*. The Charter[191] cited four categories of crimes: (i) Grave breaches of the Geneva Conventions of 1949[192], (ii) Violations of the laws or customs of war[193], (iii) Genocide[194], and (iv) Crimes against humanity[195].

The principles of ICTY significantly developed international criminal law jurisdiction. Although both the domestic and ICTY jurisdiction were parallel, however, ICTY jurisdiction was

[189] Raimondo, *General Principles of Law*, 83.
[190] Article 29 of ICTY. Read also, Raimondo, *General Principles of Law*, 84.
[191] ICTY Charter - https://www.icty.org/en/documents/statute-tribunal.
[192] Article 2 of ICTY.
[193] Article 3 of ICTY.
[194] Article 4 of ICTY.
[195] Article 5 of ICTY.

given primacy over domestic jurisdiction.[196] As mentioned by Imoedemhe, the ICTY was **situation-specific** unlike the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.[197]

Though the establishment of ICTY was arguably a quick response by the international community to the mass atrocities committed in former Yugoslavia[198] and to restore peace and stability, it could not be able to stop hostility in other parts of the world.

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 the ICTR Charter[199], Article 7, the *ratioine temporis* and *ratione loci* was the same year[200]. Unlike ICTY, the ICTR also has concurrent jurisdiction[201] with domestic jurisdiction, however primacy over the domestic courts[202].[203]

Although the mandate of both tribunals has been considerably accomplished, but for some residual functions, the Security Council passed Resolution 1966 on 22 December 2010, which created the Residual Mechanism for future trials if remaining fugitives are captured. Also, it will function for continuing the *ad hoc* activities, getting the petition for early release by the convicted person, it may issue protective measures to the witnesses, and archiving and safeguarding important and confidential documents. Residual Mechanism contains two branches. One branch

[196] Article 9 of ICTY.
[197] Imoedemhe, *The Complementarity Regime*, 8.
[198] Imoedemhe, *The Complementarity Regime*, 9.
[199] ICTR Charter - https://legal.un.org/avl/pdf/ha/ictr_EF.pdf.
[200] From 1st Jan 1994 to 31 December 1994.
[201] Article 8 of ICTR.
[202] Article 9 of ICTR.
[203] Imoedemhe, *The Complementarity Regime*, 10.

is located in Arusha, Tanzania, which commenced operation on 1 July 2012. The other branch is located in the Hague, Netherlands which commenced operating on 1 July 2013.

It is important to note that both the ICTY and ICTR contributed significantly to the development of international criminal law jurisprudence. In chapter 4, the author will discuss several important case laws of ICTY and ICTR in detail.

#### *2.2.1.4. Establishment of the International Criminal Court*

Due to the heavy maintenance and procedural costs and nature of the *ad hoc* tribunals, it was a time demand to establish a permanent court that deals with atrocity crimes. arguably, it was the desire of the international community from the very beginning. Thus, on 17 July 1998, the Rome Statute of the International Criminal Court[204] was adopted, which was effected from 01 July 2002. To avoid any jurisprudential questions (read argument) such as *Nullum Crimen Nulla Poena Sine Lege* and other general legal maxims, the Statute clearly provided that it will be dealing with the crimes committed after it enters into force. It is because previously in IMT, IMTFE, ICTY, and ICTR, the defendant at all times upholds *Nullum Crimen Nulla Poena Sine Lege* maxim, and due to the nature of the Statutes, the court had to overrule the plea, which was highly criticized by legal scholars. ICC successfully hopped the arguments, but it failed to address many atrocities committed before its emergence, such as the Bangladesh Genocide, 1971, the Armenian Genocide, etc. The latent feature of the ICC is complementary to the national jurisdiction, which means the ICC may only intervene when the national jurisdiction is *unable* or *unwilling* to address the matter of crime.

Along with the complementarity system, several challenges also appeared. Firstly, whether a State is genuinely investigating and prosecuting the core crimes or not, varies from country to country. What is the scale of determining the inactivity, which leads to inability, that's always a big

[204] ICC Charter - https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

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 be unwilling to prosecute as most of the time there is government complicity in the commission of the core crimes. thus, the government might not be interested in carrying out such investigation and prosecution.

Therefore, **mutual inclusivity** is necessary to establish a just and prompt complementarity system, 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.

### 2.3. Complementarity System and its Components

According to the Collins Dictionary, complementarity represents "the State or fact of being complementary; necessary interrelationship or correspondence"[205]. It is a maxim that won't overlap with national legislation, administration, and prosecution of crime.[206] In effect, according to the Rome Statute, it provides primacy of national jurisdiction over international institutions (*e.g.*, ICC) for investigating and prosecuting atrocity crimes. ICC will only intervene when the State is *unwilling* or *unable* to do such. Thus, through the complementarity system, one is completing or

[205] https://www.collinsdictionary.com/dictionary/english/complementarity.
[206] Imoedemhe, *The Complementarity Regime*, 21.

complementing, or improving on others' actions or qualities. Therefore, according to the meaning, both the ICC and the national judicial body will run simultaneously and complement each other.

However, Schabas argued that due to this principle, the States that are undertaking the prosecution or investigation may work in opposite. He quoted that "complementarity is inherently antagonistic."[207] The same notion has been raised by Tallgren. She mentioned complementarity as an 'open container of contradiction', and inconsistent with international criminal jurisdiction.[208] In my opinion, both scholars provided their monistic view on international criminal law jurisprudence. From the liberal point of view, this is one of the best mechanisms the Rome Statute came up with, which is providing members of the international community (read States) to end the impunity gaps through their own efforts. Also, it obliges both parties to adopt a mutual inclusive framework to fight against impunity, also it is keeping the sovereignty of the State, and compelling them to investigate and prosecute without disrupting the national sovereignty.

In Chapter 1, the author briefly discussed the challenges of national implementation of international crimes such as challenges in *due process*, *institutional capacity*, etc. It is almost the same while applying the complementarity principle as well. In Chapter 4, the author will be discussing more about the national implementation through the complementarity system of justice. We will now assess the complementarity principle using the mechanism outlined in the Rome Statute.

[207] Schabas, William (2007). *An Introduction to International Criminal Court*. 3rd Ed. CUP. Pg.6.
[208] Tallgren, I (1998) *Completing the International Criminal Order*. Nor. J. Int'l. L 67(2). Pg. 107 – 137, 123.

### 2.3.1. Jurisdiction & Admissibility

In the Rome Statute of 1998, it refers to four jurisdictions, which are *ratione materiae*[209], *ratione temporis*[210] *ratione loci*[211], and *ratione personae*[212]. Also, Article 12 prescribed the preconditions for exercising the jurisdiction, which is as follows:

> "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."[213]

[209] Meaning subject matter, Article 5 – 8 of Rome Statute.
[210] Meaning time, Article 11 of Rome Statute.
[211] Meaning space.
[212] Meaning individual, article 11 of Rome Statute.
[213] Article 12, https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

Moreover, under Article 13 of the Rome Statute, the UNSC can refer a non-party actor to be under ICC jurisdiction under UN Charter Chapter VII. So, the jurisdiction of ICC is about identifying the court's [legal] authority over a situation.[214]

Regarding admissibility, it is the mechanism to try the matter under which ICC has its jurisdiction. Thus, the ICC has to perform an admissibility test before entertaining a case, and even before performing an admissibility test, the court has to establish its jurisdiction over the subject matter. Correspondingly, ICC may have established but the subject may not be admissible if certain pre-requisites are fulfilled under Article 17 (1):

> "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State that has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State that has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court."[215]

So, in case a domestic investigation and prosecution are in process, or a domestic investigation has been concluded but the domestic court decided not to prosecute, or the prosecution has been

[214] Imoedemhe, *The Complementarity Regime*, 28.
[215] Article 17 (1) of Rome Statute.

concluded, or the case has no sufficient gravity, in these cases, the matter will be inadmissible before the ICC, even though it may be the jurisdiction over the matter.

In *The Prosecutor v Thomas Lubanga Dyilo*, the court observed that there must be an assessment to see whether a State can perform the investigation and prosecution genuinely or not.[216] On the other hand, the ICC may not try the case even though it has jurisdiction by considering other facts mentioned above paragraph. So here, deciding on admissibility or inadmissibility actually depends on the **trigger mechanism** of the ICC investigation.

### 2.3.2. Triggering Mechanism

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.[217] The 'reasonable basis' shall be determined by ICC's jurisdiction, admissibility, and prosecutorial discretion[218] on

[216] *The Prosecutor v Thomas Lubanga Dyilo,* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_03189.PDF.

[217] Article 15 (4): If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

[218] Whether serving the 'interest of justice' or not.

the matter.[219] For example, the Pre-Trial chamber authorized the prosecutor to initiate an investigation in Kenya on 31 March 2010.[220] 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 have been framed against the Georgian armed forces, the South Ossetian forces, and the Russian armed forces.[221] However, if the prosecutor got triggered through an external communication, s/he may not seek authorization if there's sufficient basis to the case.[222] 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.[223] Circumstances of *Security Council referral* happened in Darfur, Sudan, and Libya.[224]

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.[225] 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.[226]

By establishing such Admissibility and triggering mechanism, sovereign State's right has been well-established in enforcing international criminal law. For example, in the *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, the Appeal Chamber accepted the plea of the

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[219] Stigen, J. (25 Jul. 2008). *The Relationship between the International Criminal Court and National Jurisdictions*. Leiden, The Netherlands: Brill | Nijhoff. doi: https://doi.org/10.1163/ej.9789004169098.i-536. Pg. 103.
[220] https://www.icc-cpi.int/situations/kenya.
[221] https://www.icc-cpi.int/situations/georgia.
[222] Article 15 (3) of Rome statute.
[223] Imoedemhe, *The Complementarity Regime*, 29.
[224] Imoedemhe, *The Complementarity Regime*, 30.
[225] https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf.
[226] Imoedemhe, *The Complementarity Regime*, 30.

Government of Kenya by referring to the case as inadmissible and quite successfully resolved the cases of conflict between a sovereign State and ICC. It denoted that the State has the primacy to investigate and prosecute the atrocity crimes unless waived or rescinded.[227] To evaluate the waived or rescinded process, some elements of the complementarity process such as inability, unwillingness, sufficient gravity, and genuineness, play a vital role.

### 2.3.3. Elements of Complementarity

For interpreting or analyzing the elements of complementarity, there is specific jurisprudence prescribed by the Statute. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*[228], the Pre-Trial Chamber observed that for qualifying inadmissible, it needs to be proved that the same person has already been investigated/prosecuted for the same conduct at the domestic forum.[229] We can find the same notion in the cases of *Prosecutor v Germain Katanga*[230], *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*[231], *Prosecutor v. Mathieu Ngudjolo Chui*[232], *Prosecutor v. Omar Hassan Ahmad Al Bashir*[233], *Prosecutor v. Bahr Idriss Abu Garda*[234].

But, in *Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, And Mohammed Hussein Ali*[235], the ICC mentioned that national authorities are not compelled to prosecute or convict a particular person by the 'same person same conduct' test, rather it only compels the genuine investigation or prosecution of that subject.[236] Kenya argued that it was investigating the suspects

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[227] *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_04320.PDF.
[228] ICC-01/04-01/06-8-Corr. https://casebook.icrc.org/case-study/icc-prosecutor-v-thomas-lubanga-dyilo.
[229] Popularly known as 'same person same conduct' test.
[230] ICC-01/04-01/07-1497.
[231] ICC-02/05-01/07-1- Corr.
[232] ICC-01/04-01/07-262.
[233] ICC-02/05-01/09-2-Conf.
[234] ICC-02/05-02/09-l-Conf.
[235] ICC-01/09-02/11, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF.
[236] Imoedemhe, *The Complementarity Regime*, 31.

at the same hierarchical level, however, ICC rejected that notion because they (Kenya) failed to establish it was the same suspect.

We can find a different notion in the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein*[237], where the Pre-Trial Chamber considers the 'same person same conduct' test but alters that with the unwillingness and inability element. Because the chamber noted that Libya cannot proceed with genuine investigation and prosecution.

Thus, there is no interpretative guide to complementarity, however, it is abstractedly solving the overlapping issues of national and international jurisdiction.[238] ICC only examines the unwillingness and inability when it appears that either the prosecution or investigation process is ongoing, or it has been concluded with the decision not to prosecute or investigate the subject in concern. Therefore, evaluating these elements in connection with admissibility is vital.[239]

#### *2.3.3.1. Unwillingness*

According to Article 17 (2) of the Rome Statute,

> "2. 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:

[237] ICC-01/11-01/11-344-Red, Augustínyová, G. (2014). *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*: Decision on the Admissibility of the Case Against Abdullah Al-Senussi (INT'L CRIM. CT.). International Legal Materials, 53(2), 273-340. doi:10.5305/intelegamate.53.2.0273.

[238] Imoedemhe, *The Complementarity Regime*, p. 32. Even the unwilling or unable features can be traced in recent terrorist attacks where the terror groups are operating from a State(s) that is unable or unwilling to prevent these sorts of attacks, however being part of jus ad bellum, the author will limit the paper by focusing on jus post bellum only. For more, see, Kis Kelemen, Bence. *Targeted Killings and Human Rights Law*. Hungarian Yearbook of International Law and European Law, (2018): 245-259., Available at SSRN: https://ssrn.com/abstract=3512854, and Bence Kis Kelemen. *Human Shielding, Subjective Intent, and Harm to the Enemy*, Journal of Conflict and Security Law, no. 25/3, (2020): 537–564, https://doi.org/10.1093/jcsl/kraa015.

[239] *Prosecutor v Germain Katanga,* ICC-01/04-01/07-1497.

(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;

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."

Article 17(2) provides 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 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*[240], the court observed that a State cannot be held unwilling if they want the accused to be prosecuted, not in their territory but by ICC. It has hardly been seen in the State Practices where the State wants to prosecute its subject, not in their own territory but in ICC. However, in my opinion, it seemed that in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the DRC was not unwilling but unable, thus it referred the case to ICC under the self-referral system (Article 13 (a) and 14). The *second* crucial aspect of unwillingness occurs when there is an unjustified delay in the proceeding. In *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, Kenya was delaying the investigation process without any justification, thus Kenya's delay made the ICC intervene in the process. *Lastly*, if the domestic prosecution doesn't occur independently and impartially, then it will formulate the notion of unwillingness, and the ICC may intervene.

[240] *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].

The *Informal Expert Paper: 'The Principle of Complementarity in Practice'* mentioned that there is always a chance of 'selective willingness', where the State is likely to prosecute its subject from the rebel or opposition group, but is reluctant to investigate its own governmental subjects.[241] Moreover, according to El Zeidy, "the phrase 'genuinely' in the context of the provision introduces an element of ambiguity. While it could be interpreted to modify the State's unwillingness or inability to investigate or prosecute, the prevailing legal consensus is that it more likely qualifies the act of carrying out the investigation or prosecution itself. This suggests that the Court must be satisfied that the State's proceedings are genuinely conducted before deferring to its jurisdiction. Any interpretation to the contrary could potentially undermine the ICC's mandate by allowing States to shield themselves from scrutiny through merely inadequate, rather than genuinely non-existent, investigations or prosecutions. The inclusion of 'genuinely' thus raises the bar for assessing the quality of States' domestic proceedings."[242]

#### *2.3.3.2. Inability and Inactivity*

According to Article 17 (3) of the Rome Statute,

> "3. 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."[243]

[241] Informal Expert Paper: The Principle of Complementarity in Practice. ICC-01/04-01/07-1008-AnxA. 30 March 2009 ('Informal Expert Paper') http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf.
[242] El Zeidy, Mohamed. *The Principle of Complementarity in International Criminal Law*, (Leiden, The Netherlands: Brill | Nijhoff, 17 Sep. 2008) doi: https://doi.org/10.1163/ej.9789004166936.i-368, p. 165. For more, Stigen, Jo. *The Relationship between the International Criminal Court and National Jurisdictions*, (Leiden, The Netherlands: Brill | Nijhoff, 25 Jul. 2008) doi: https://doi.org/10.1163/ej.9789004169098.i-536, p. 163.
[243] Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

A keen study of this article will show, that 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 a lack of expertise in the field *e.g.,* judges, prosecutors, infrastructures, etc. It was the case in *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. *Secondly*, if there is any act to apprehend the accused by obtaining necessary evidence or/and testimonies, which are essential to the investigation and prosecution process, then it will formulate the notion of inability. In the case of *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein*, the defendant mentioned that they were getting expertise from the Bar Association of Tunisia and Egypt, but the Pre-Trial Chamber rejected that plea by mentioning that Libya did not take any concrete step to overcome its deficiencies.[244]

According to El Zeidy, "Inability is a distinct criterion from unwillingness in the context of the provision. While unwillingness often involves a subjective assessment of a State's intent, inability concerns objective factors that hinder a State's capacity to investigate, prosecute, or try a case. A State may genuinely desire to pursue justice but be unable to do so due to factors such as public disorder, natural disasters, civil war, or a dysfunctional judicial system. These circumstances can prevent a State from conducting a full, effective domestic criminal process."[245]

Inactivity is closely related to inability. In *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Uganda appeared not to take any steps to investigate or prosecute the atrocity crimes by State institutions. They acknowledged that the institution may not be able to render justice to the

[244] Imoedemhe, *The Complementarity Regime*, 36.

[245] El Zeidy, Mohamed. *The Principle of Complementarity in International Criminal Law*, (Leiden, The Netherlands: Brill | Nijhoff, 17 Sep. 2008) doi: https://doi.org/10.1163/ej.9789004166936.i-368, p. 222. For more, Stigen, Jo. *The Relationship between the International Criminal Court and National Jurisdictions*, (Leiden, The Netherlands: Brill | Nijhoff, 25 Jul. 2008) doi: https://doi.org/10.1163/ej.9789004169098.i-536, p. 222.

suspects who may have greater criminal responsibility, to put it simply, neutrality and impartiality were the challenging factors, thus they waived their right to primacy and referred the case to ICC.[246] Thus, it formulates the notion of inactivity where the State is not performing its active role either intentionally or by its lack of competence.

#### *2.3.3.3. Genuineness*

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 *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 that charged 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, a matter of 'good faith' or 'genuinely' in the process was questionable, therefore chamber rejected their inadmissibility challenge.

#### *2.3.3.4. Sufficient Gravity*

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*[247], *ratione temporis*[248] *ratione loci*[249], and *ratione personae*[250] 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

[246] Paper on Some Policy Issues before the Office of the Prosecutor. ICC-OTP September 2003 1-9, 5. http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.
[247] Meaning subject matter, Article 5 – 8 of Rome Statute.
[248] Meaning time, Article 11 of Rome Statute.
[249] Meaning space.
[250] Meaning individual, article 11 of Rome Statute.

killed almost 2200 victims, thus the case of the UK does not form sufficient gravity as it is forming for Uganda.[251] Thus number of the victims is one of the dormant elements for determining sufficient gravity.[252]

### 2.3.4. Complementarity Framework under Articles 18, 19 & 20

Articles 18, 19 & 20 of the Rome Statute[253], along with the Rule 48, 52, 53, 55, 58-62 of the RPE[254] 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

[251] Letter of Prosecutor dated 9 February 2006 (Iraq). Retrieved from http://www.icc-cpi.int/library/organs/otp_letter_to_senders_re_Iraq_9_Febraury_2006.pdf (assessed 29 October 2022), pp. 7–8.
[252] 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. P. 2. https://docslib.org/doc/10267381/statement-by-luis-moreno-ocampo-prosecutor-of-the-international-criminal-court.
[253] Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[254] Retrieved from https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf.

limited.[255] 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 about the triggering mechanism shall be entertained when the questions of jurisdiction and admissibility have been resolved. However, under Article 19 (5), the States must make challenges to the admissibility at the earliest opportunity, therefore it may not be applicable for a person challenging the admissibility.[256] To note, there is no express provision in the Statute or rules where the sanction against the States can be found, who haven't filed the challenges to the admissibility at the earliest possible opportunity.[257]

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*.

[255] Article 18.
[256] Kleffner, *Complementarity in Rome Statute*, 186.
[257] Kleffner, *Complementarity in Rome Statute*, 186.

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 primacy remains in the hands of the State itself.

## 2.4. Closing Remarks

Complementarity lacks a precise definition, but it remained an overriding theme of the whole Rome Statute.[258] However, the theme protected the ICC from encroachment on the national sovereignty of the member States. As the word was never even mentioned in the Statute, the interpretation remains in the hands of the court itself. However, through the understanding of the questions relating to jurisdiction, admissibility, elements, and relevant articles and rules, the essence of complementarity can be explored. Due to its broader nature, it was even described as a 'double-edged sword'.[259] But from a point of liberal view, it is providing the primary power to States in order to take the lead in bringing perpetrators to justice and to end impunity gaps.

However, there are numerous questions related to the application of the complementarity principle. Many cases could be found in ICC that are self-referral. So, the question comes whether or not, the complementarity principle is actually encouraging self-referral by burdening one single institution instead of taking the lead.

Also, how the Rome Statute will react to the pro-active complementarity regime, is not determined. Rendering justice to the historical atrocities is not even the subject matter of the court, which is technically well determined, but practically puts ICC and its role in question.

[258] Imoedemhe, *The Complementarity Regime*, 24.
[259] Jon Heller K (2006) *The Shadow Side of Complementarity: The Effect of Article 17 Of The Rome Statute On National Due process*. CLF 17, pp. 255–280.

To end, it is worth mentioning that there may be various criticisms of the role and function of the ICC, but yet it remains a great phenomenon in the field of international criminal jurisdiction. It should not be forgotten that an international court for prosecuting atrocity crimes was the dream of many decades. The duty of the State does not end with the ratification of the Rome Statute only, but the effective burden sharing and mutual inclusivity are the key points to running international criminal jurisdiction simultaneously.

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# 3. TRENDS OF NATIONAL IMPLEMENTATION OF THE ROME STATUTE: FROM [THEORETICAL] PERSPECTIVES

## 3.1. Introduction

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 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 relationship between the State and ICC.

To avoid the [expected] lacuna, many international legal scholars suggest keeping the power to ICC so that obstacles such as the adoption of legislation in national law. Issues related to enforcement, alternatives to criminal prosecutions, issues relating to proceedings, etc. may not arise, 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 the negotiation phase of the Rome Statute, the member States envisage complementarity to be the core element because of the 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, the author will be discussing different trends of national implementation of the Rome Statute based on the principle of complementarity to understand the perspective from its core. Also, three emerging models of complementarity will be mentioned, which are 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 going to imply legal frameworks and institutional capacity-building concepts for States to implement the Rome Statute nationally through mutual inclusivity.

### 3.2. Emerging Models of Complementarity

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[260] 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.[261]

For Nuremburg IMT and Tokyo IMT, the 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,[262] where it is mentioned that it was mandatory for the States to investigate and prosecute the cases arising from their jurisdiction. The penalty provisions of the Treaty of Versailles held that if the German trials were unsatisfactory, the Allied authorities would carry out their proceedings. Thus, the primary responsibility has been given to the State party where the crimes have been committed. Similarly, the Rome Statute echoed these provisions in 1998. On the other hand, the optional model is that when the State waives its right to investigate and prosecute the crime in a

[260] 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.
[261] 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).
[262] Imoedemhe, Ovo Catherine. *The Complementarity Regime of the International Criminal Court* (2017). Springer International Publishing. https://doi.org/10.1007/978-3-319-46780-1, p. 43.

way of self-referral to an international tribunal, *e.g.,* ICC. It is opposite to the mandatory model however it is voluntary practice.

So, from the above models represented by ElZeidy, we can find the most mutually inclusive interpretation of the complementarity system is an 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 find three emerging models which are passive, positive, and proactive models of complementarity.

### 3.2.1. Passive 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 primary jurisdiction to investigate and prosecute the core crimes. While drafting the Rome Statute, it was the same view of other nations too. However, Anne-Marie[263] mentioned it differently, "One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice – either a nation tries its own or they will be tried in The Hague – it strengthens the hand of domestic parties seeking such

[263] Dean, Woodrow Wilson School of Public and International Affairs, Princeton University.

trials, allowing them to wrap themselves in a nationalist mantle."[264] This means if the domestic courts/institutions are meant to deal with the justice process, then what ICC stand for? Isn't it become a meaningless institute for nothing?

The narrow view not only confers the duty upon the States to investigate and prosecute but also provides a big responsibility and obligation to have national preparedness and expertise to confer justice. Also, it is an obligation upon the States to define international crimes in their national legal system. As mentioned in the Rome Statute 1998[265], there are some triggering factors when ICC can start its investigation and prosecution process. The passive complementarity model suggests that the ICC remain dormant until and unless its jurisdiction is triggered by States or by UN Security Council referrals.[266] In these circumstances, the ICC prosecutor uses the *Proprio motu* power and initiates an investigation of the crime which leads to prosecution. It was perceived that rarely the prosecutor may use its power to initiate investigation and prosecution because that may interrupt with principle of States' sovereignty and non-intervention. Even though the *Ad hoc* mindset was that States have to take primary jurisdiction to carry out the justice process however their action was passive as they have seen ICC only as an institute with expertise and ingenious organization to investigate and prosecute the core crimes. Thus, during that period of time, it has been seen that the establishment of *Ad hoc* tribunals conferring justice at the domestic level with international expertise and resources. As the States' responsibility is quite passive because of their lack of knowledge and understanding about complementarity which ultimately leads to State referrals, thus we're calling this model as Passive Complementarity Model.

[264] Slaughter AM (2003). *Not The Court of First Resort*. The Washington Post, 21 December 2003, retrieved from https://archive.globalpolicy.org/intljustice/general/2003/1221resort.htm#author, accessed on 14 December 2022.
[265] Unwillingness, inability, undue delay, Statutory limitations, etc.
[266] Imoedemhe, *The Complementarity Regime*, 45.

The situation in some African countries is representing the passive complementarity model. Countries like Uganda[267], the Democratic Republic of Congo[268], the Central African Republic[269], and Mali[270], due to their lack of knowledge and understanding of complementarity, national preparedness, and expertise, referred the cases to the ICC as State referrals. Even the Prosecutor granted the request to initiate *the proprio motu* investigation process in the situation in Kenya[271] and Georgia[272], which is beyond the *Ad hoc* mindset of the parties. Thus, these situations lead to the positive complementarity model.

### 3.2.2. Positive Complementarity

On 16 June 2003, the very first Chief Prosecutor, Luis Moreno-Ocampo, at the ceremony for his Solemn undertaking of the duty, expressed the idea of a positive complementarity model. He mentioned,

> "The Court is complementary to national systems. This means that whenever there is genuine State action, the court cannot and will not intervene. But States not only have the right but also the primary responsibility to prevent, control, and prosecute atrocities. Complementarity protects national sovereignty and at the same time promotes state action. The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence

[267] Retrieved from https://www.icc-cpi.int/news/icc-president-uganda-refers-situation-concerning-lords-resistance-army-lra-icc. (Accessed on 15 December 2022).
[268] Retrieved from https://www.icc-cpi.int/drc. (Accessed on 15 December 2022).
[269] Retrieved from https://www.icc-cpi.int/news/icc-prosecutor-receives-referral-concerning-central-african-republic. (Accessed on 15 December 2022).
[270] Retrieved from https://www.icc-cpi.int/news/icc-prosecutor-fatou-bensouda-malian-state-referral-situation-mali-january-2012. (Accessed on 15 December 2022).
[271] Retrieved from https://www.icc-cpi.int/situations/kenya. (Accessed on 15 December 2022).
[272] Retrieved from https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants. (Accessed on 15 December 2022).

of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[273]

It is very clear from his statement that he is putting the national jurisdiction ahead of ICC, rather than competing with the national criminal jurisdiction. On 12 February 2004, at the Diplomatic Corps, he mentioned, key strategic decision includes:

"1. A collaborative approach with the international community, including cooperative states, international organizations, and civil society;

2. a positive approach to complementarity, rather than competing with national systems for jurisdiction, we will *encourage national proceedings wherever possible*;

3. While states have the *first right to prosecute*, and *we will encourage them to do so*, there may be situations where a state and the Office agree that consensual "division of labour" is appropriate (for example where a national system is fractured or where the impartiality or expertise of the. Court is needed). There is no doubt of admissibility in such scenarios since Article 17 is clear that cases are admissible in the absence of national proceedings;

4. At times, the territorial state may oppose the ICC investigation. In such cases, I can use my proprio motu power, but it will be difficult to deploy investigators to the field, and difficult to carry out arrests. Thus, the *positive approach to cooperation and complementarity is indispensable*. Uganda and Congo are two examples of this approach.

5. A policy of targeted prosecution, focusing on those who bear the greatest responsibility;

[273] Moreno-Ocampo L (2003), Prosecutor, International Criminal Court, statement made at the Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003). Available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (Assessed on 15 December 2022).

> 6. A small and flexible office, relying on extensive networks of support with States, civil society, multilateral institutions, academics, and the private sector. This approach enables us to better represent 92 States Parties and to benefit from ideas and perspectives from around the world."[274]

In the report on Prosecutorial Strategy[275] (14 September 2006), OTP is bringing the aspects of the positive complementarity model. On the Report of the Bureau on Stocktaking[276], it mentioned:

> "Positive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support, and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis."

To uphold positive complementarity, the ICC is assisting 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

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[274] Moreno-Ocampo L (2003), International criminal court, statement made at the Diplomatic Corps at The Hague, Netherlands (12 February 2004). Available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf. (Assessed on 15 December 2022).

[275] The Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006). https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf. (Assessed on 15 December 2022).

[276] 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).

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.[277]

The question may arise whether the ICC is acting as a 'development agency' or not. ICC does not have enough resources nor financial solvency to act as an organization for developing physical infrastructure or technical-capacity building entities. It has its limited judicial mandate which is investigation and prosecution of the core crimes.

However, we can find a shift in the first review conference held in Kampala, Uganda in 2010.[278] The very notion of positive complementarity by the first Chief Prosecutor was limited to the cooperation between the State and ICC, whereas the *Report of the Bureau on Stocktaking* (on Review Conference 2010), formulated by OTP suggested cooperation among State parties, civil societies, and NGOs.[279] However, it is unclear how the interdependency actually works among the parties, which needs further clarification. But it is quite clear that the States need [some] assistance to be able to investigate and prosecute core crimes. The question remains who will ensure and how that entity will ensure that the coordination is working well or needs more exertion.

Therefore, 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 have to turn towards a proactive complementarity model.

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[277] 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).

[278] ICC - Summaries and reports. https://asp.icc-cpi.int/reviewconference/summaries-and-reports. (Accessed on 15 December 2022).

[279] Stocktaking of international criminal justice-Cooperation, https://asp.icc-cpi.int/sites/asp/files/asp_docs/RC2010/RC-11-Annex.V.d-ENG.pdf. (Accessed on 15 December 2022).

### 3.2.3. Proactive Complementarity

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 playing twofold role: where it is motivating States to strengthen their national judicial system, and supporting member States to deliver justice, in accordance with the Rome Statute.[280] OTP is also suggesting a similar approach by establishing external relations and outreach tactics to encourage and facilitate States to perform their responsibility to render justice.[281] Due to the *principle of non-intervention* and *State sovereignty*, the Member States do not want ICC's intervention at their national level, so ICC's triggering factors act as the catalyst.

However, this approach could be seen as coercion and sometimes may create an unintended distance between the Member States and ICC, which may result in non-compliance or/and non-cooperation by the parties. For example, two scenarios may occur. First, after getting the prosecutor's notification, if the State does not take any steps to carry out the investigation process, the case may return to the Prosecutor after one month. Secondly, after getting the prosecutor's notification, the State may initiate the investigation process, but the question remains

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

[281] 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).

whether the action then be termed as genuine or not. In *Saif Al Islam*[282] and *Muthaura et al*[283] case, the State could not be able to produce a proper investigation process and sufficient evidence of specificity and probative value. Therefore, their pleas for inadmissibility were rejected by Pre-Trial Chamber I.

So here we can see the 'complementarity paradox', a perfect phrase by Paola Benvenuti[284], where [most of the time] the States are connected with the crime itself, but for making complementarity work effectively, States' cooperation is also needed. She raised the question of why would they (the State) carry out the investigation process willingly on the first hand, and subsequently cooperate with ICC?[285]

Now the question is how to conceptualize the catalyst effect of ICC in a proactive complementarity regime. To address this question, we have to look at *Article 93 (10) ~ Other forms of Cooperation*:

> "10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court, or which constitutes a serious crime under the national law of the requesting State.
>
> (b) (i) The assistance provided under subparagraph (a) shall include, inter alia:
>
> a. The transmission of statements, documents, or other types of evidence obtained in the course of an investigation, or a trial conducted by the Court;
>
> b. The questioning of any person detained by order of the Court;

[282] Accessed from https://www.icc-cpi.int/court-record/icc-01/11-01/11-695 on 11 January 2023.
[283] Accessed from https://www.icc-cpi.int/defendant/muthaura on 11 January 2023.
[284] Benvenuti, P. *Complementarity of the International Criminal Court to National Criminal Jurisdictions*. (1999), p.21.
[285] Benvenuti, *Complementarity of the International Criminal Court*, 50.

(b) (ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents, or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of Article 68.

I The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute."[286]

Here it is clear that the ICC and the State have to ensure a *mutually inclusive* – independent relationship by providing cooperation and assistance for conducting investigations and trials. Here the ICC Statute mentions the assistance from ICC to States, but the reverse assistance is also needed to ensure effective proactive complementarity, which is known as 'reverse cooperation', termed by Feberica Gioia.[287]

According to the above discussion, 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.[288] The assistance may include the transmission of statements, documents, or other types of evidence obtained for an investigation or trial.[289] It is provided that

[286] Article 93(10), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[287] Gioia, Federica. *Complementarity and 'Reverse Cooperation'*. Chapter in *The International Criminal Court and Complementarity: From Theory to Practice*, edited by Carsten Stahn and Mohamed M. El Zeidy, 807–29. Cambridge: Cambridge University Press, 2011. doi:10.1017/CBO9781316134115.034.
[288] Article 90(10) (a), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[289] Article 90(10) (b) (i), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.

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.[290] Furthermore, in case of non-State parties, upon request, ICC may assist them the same.[291] 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.

To understand the assistance more clearly, we can go through the case of *Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*[292], where Kenya filed a request for assistance under Article 90(1) and Rule 194, The scope of the request was "for the transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the ICC", however the appeal got rejected.[293] The Trial Chamber provided that the 'request for assistance' under Article 90(10) and Rule 194 cannot be invoked when the case is at the court, rather it has to be submitted *in advance* while requesting for the admissibility challenge.

Importantly, any such assistance and cooperation can be filed as a "request", because of safeguarding the States' sovereignty and independence. Therefore, the ICC cannot intervene unless and until the State formally and expressly requests the ICC for their assistance and cooperation. The State may or may not take that advantage, it's completely up to them. Initial understanding of proactive complementarity may sound coercive but according to Gioia, she suggested a friendly approach of complementarity where the ICC doesn't act as a censor to the domestic courts but

[290] Article 90(10) (b) (ii), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[291] Article 90(10) (c), accessed from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf on 11 Jan 2023.
[292] Accessed from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_13819.PDF on 11 Jan 2023.
[293] Para 114, accessed from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_13819.PDF on 11 Jan 2023.

encourages effective circulation of competence and capability between States and ICC.[294] For facilitating constructive interplay between the ICC and States, proactive complementarity indeed provides operative and efficient means to allow the ICC to fulfill its mandate. It may face difficulties while coordinating between the States and ICC and there are ample legal risks for compromising the consequent admissibility of a case before ICC. Therefore, as Imoedemhe suggested, a *vigilant tactic* needs to be adopted with an apt perimeter to attain its full benefits by minimizing the possible challenges.[295]

### 3.3. Concept of Genuine National Proceedings in International Law

The term "genuine" is one of the crucial factors determining whether a national proceeding of international crimes is merely a sham proceeding or an authentic one. The admissibility aspects of the 1998 Rome Statute already discussed the issue of "genuineness". However, this term plays a vital role in determining the jurisdiction of the Member States and the international institutions (*e.g.*, ICC). From the State's perspective, it always tries to show that the trial and investigation process is genuine, therefore no interference from international institutes is required, whereas from the ICC's perspective if the performance of genuineness is below the threshold, the ICC's interference is expected by setting aside the national process. Therefore, it is one of the [most important] qualifiers for representing States' requirement to perform and ICCs' limit for exercising its jurisdiction.

Before [briefly] discussing the concept of genuineness, it is important to note that a qualifier like "genuineness" is very important in international proceedings and cannot be ignored

[294] Gioia, Federica. *Complementarity and 'Reverse Cooperation*. Chapter, page 817. In *The International Criminal Court and Complementarity: From Theory to Practice*, edited by Carsten Stahn and Mohamed M. El Zeidy, 807–29. Cambridge: Cambridge University Press, 2011. doi:10.1017/CBO9781316134115.034.
[295] Imoedemhe, Ovo Catherine. 2017. *The Complementarity Regime of the International Criminal Court*. Springer International Publishing. https://doi.org/10.1007/978-3-319-46780-1, 50.

for any purpose. To bring the perpetrators to justice, a genuine legal proceeding whether national or international, is required to establish justice in a society. Otherwise, through the non-genuine adjudication, there will be impunity gaps, leading to injustice and international interference. Here the caveat is not all the national proceedings can be termed as "not genuine" only because of some shortcomings in the national effort if the States' are acting in good faith. However, if the suspect is escaping the trial by abusing the national proceeding, then it is again creating impunity gaps, and international interference is required. Therefore, we see the threshold of the concept – "genuineness" is very subtle yet plays a significant role in the justice process.

The term "genuineness" means true, legitimate, authentic, sincere, not counterfeit, and not feigned which means it is something that is truly what it purports to be.[296] Accordingly, we can see two aspects of the meaning. The subjective aspect is the sincerity or authenticity, whereas the objective aspect represents it should be something that is claimed to be. Thus factually, if a State carries out the national proceedings through the objective aspect, even with wrong intention, it may pass ICCs' intervention, whereas with good intention, if a State fails to apply the objective aspects to its national process, it may pre-empt ICC interference.[297]

### 3.3.1. Process and Outcome

The Article 17 of the 1998 Rome Statute provides:

> "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

[296] Accessed from https://www.oxfordlearnersdictionaries.com/definition/english/genuine, on 17 Jan 2023.
[297] Stigen, Jo. *The Relationship between the International Criminal Court and National Jurisdictions*, (Leiden, The Netherlands: Brill | Nijhoff, 25 Jul. 2008) doi: https://doi.org/10.1163/ej.9789004169098.i-536, pg. 216.

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

I The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. 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;

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.

3. 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."[298]

The reading of article 17 [Issues of Admissibility] delivers an idea that it focused more on the "genuine" proceeding, rather than the outcome. Even though according to Article 17(3), it may require certain outcomes such as the inability of a State to carry out the proceedings or obtain the evidence or/and testimony, etc. However, some jurists claimed that here the word – "genuinely" does not refer to as a verb [in order to carry out the proceeding] but as an adverb to the words – unable and unwillingness – for example, genuinely unable and genuinely unwilling.[299] By the definition, theoretically, the genuine proceeding shall produce genuine, acceptable, and correct findings. However, the correctness of the material will not determine the admissibility of such a case, rather it is the law and fact made in the proceeding that matters. Therefore, a few aspects are to be checked to determine whether the criminal proceeding is genuine or not. First, whether the State has ensured a legal and institutional framework or not; second, resorting to the truth of the crime being committed; thirdly whether the State incorporated substantial and procedural legislations or not; fourthly, whether the State is applying the given legislation in an impartial and independent way or not to establish justice.

### 3.3.2. National Limitations and Cultural Differences

Essentially the idea of the complementarity regime of the Rome Statute acknowledged the fact that the national criminal proceedings might be different from each other as the 1998 Rome Statute is a blend of both civil law and common law. Another fact is each country has its own legal and cultural differences. Therefore, the checkpoint for determining whether the State has any intention to bring the perpetrators of atrocity crimes to justice or not has to be the intent. If there is a clear

[298] Retrieved from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf, on 18 Jan 2023.
[299] Stigen, *The Relationship between the International Criminal Court*, 216.

idea that there is a lack of such characteristics which can hardly be called a process based on the complementarity regime such as if the State is trying to shield the perpetrator/s, only that time the ICCs' intervention is required, as per the complementarity principle.

But always it must be remembered that the proceedings can be drastically different from State to State, and in these circumstances, whether the States are performing their subjective duties (sincerely and authentically) and objective (to what it has purport to be) duties to bring the perpetrators to justice in good faith or not, has to be the key point. It is very likely that the State may have a clear sign to establish justice through such proceedings but the proceeding itself is different from the "sophisticated" proceedings which are referred to the Rome Statute as a standard.

According to the *Papers on some policy issues*, the ICC prosecutor has said, "A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes. In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions, and cultures. The Office will develop formal and informal networks of contacts to encourage States to undertake State action, using means appropriate in the particular circumstances of a given case. For instance, in certain situations, it might be possible and advisable to assist a State genuinely willing to investigate and prosecute by providing it with the information gathered by the Office from different public sources."[300]

Article 17(2) (a)(b)(c) identifies the subjective aspects of the term – "genuinely" as the main intention behind the criminal proceedings. It also identifies there must not be any delay, and the process must be independent and impartial. Article 17(3) identifies the objective aspects of the

[300] Paper on Some Policy Issues before the Office of the Prosecutor, Retrieved from https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf, dated on 18 Jan 2023.

word – "genuinely". It provides that the State must be able to obtain the perpetrator and/or necessary evidence and testimony for carrying out its criminal proceeding. However, it is worth mentioning that the idea of genuineness is not fully explained by the Statute or is ill-defined, in comparison with the ideas of "unwillingness" and "inability". Whether a single statute is capable of clarifying the definition wholly or not, remains a question, but it is open to interpretation through the guidance outside the Statute.

One can argue why not take ICC's own substantive and procedural framework as a standard. If we look deeply, the 1998 Rome Statute is basically a blend of both civil law and common law, thus application of such an instrument is tough in every possible jurisdiction. Moreover, the national jurisdiction is not well-equipped with various resources like ICC. Furthermore, the standard ICC is holding, the same standard should not be expected at the domestic level. But impliedly the standard can be followed by the States as an ideal standard to keep the proceeding in its optimum form, however, a strict regulation of standard is not needed because of the above-mentioned underlying purposes.

### 3.4. Rationale for Implementing Legislation

The 1998 Rome Statute does not provide any express obligation on the State parties to implement its provisions on the national level, except in a few circumstances under Article 70(4)(a)[301] – regarding penalizing offenses against the administration of justice, and Articles 86 to 92[302] - regarding the obligation to cooperate. Therefore, incorporation of the atrocity crimes in the national criminal jurisdiction is not an express obligation on the member States. Even some jurists

[301] Article 70(4)(a): Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals, retrieved from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf, dated 18 Jan 2023.

[302] Article 86-92, https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf, dated 18 Jan 2023.

suggested that the integration of the Rome Statute in the national criminal jurisdiction is not even needed.[303][304]

So, do these lacunas justify the non-incorporation of the States for applying the 1998 Rome Statute? Not necessarily. Even before the incorporation of the ICC Statute, the crimes mentioned in the Rome Statute were already a part of general international law and recognized by the States, as the obligation to bring perpetrators to justice. Article V of the Genocide Convention 1948, Articles 49, 50, 129 and 146 of the four Geneva Convention 1949 respectively, Articles 85 to 87 of the Additional Protocol I, Article 6 of the Torture Convention 1984 and other international treaties expressly convey this obligation to enact the provision in the national jurisdiction. As a result, the obligation to incorporate such laws derives from the treaty laws customarily. Reference can be made from Article 1 of the 1998 Rome Statute that it does not expressly require national implementation; however, it echoed the idea of the complementarity principle through which the primary duty has been given to the member States. Therefore, it implied the need for implementation whether the States can investigate and prosecute such crimes mentioned in Article 6 - 8 of the Statute in their national jurisdictions, unless and until the State is unwilling or unable to carry out such responsibility.

According to the case of *Saif Al Islam Gaddafi*[305], the Pre-Trial Chamber I (PTCI) clarified that the lack of legislation on crimes against humanity doesn't render the case admissible before the ICC, however, the PTCI mentioned that the reason for the admissibility was Libya's inability to prosecute such crimes in their own territory.[306] Moreover, the PTCI stated that Libya was unable

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[303] Nouwen S (2011) *Complementarity in Uganda: domestic diversity or international imposition?* In: Stahn C, ElZeidy M (eds) *The International Criminal Court and Complementarity: From Theory To Practice*, vol 2. CUP, pg. 1127.

[304] Megret F (2011) *Too much of a good thing? Implementation and the uses of complementarity*. In: Stahn C, ElZeidy M (eds) *The International Criminal Court and Complementarity: From Theory To Practice*, vol I. CUP, pg. 361–390

[305] Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", accessed from https://www.icc-cpi.int/court-record/icc-01/11-01/11-695, dated 19 Jan 2023.

[306] Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", para 134, 135, 2019.

to provide an adequate degree of evidence and probative value which validates that the investigation process has covered the *same conduct*.[307] The PTCI referred to two Kenyan cases (*Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,*[308] and *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*[309]) which was dealing with the "*same person same conduct"* principle. The chamber mentioned,

> "The defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under Article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court"[310]

So, if we go through both the aspects of the Statute itself and the court's ruling, it seems that the comprehensive legislation is quite indispensable for the ICC to perform its complementarity mechanism. The two pillars – the State and the ICC – are balancing the interplay of cooperation and implementation. By implementing the legislation, the State has the primacy over the ICC to perform investigation and prosecution in their national sovereign territory. When international crimes are reflected in the domestic jurisdiction, it becomes easier to investigate and prosecute the case/s with international legal characterization.

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[307] Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", para 88.

[308] Accessed from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01004.PDF, dated 19 Jan 2023.

[309] Accessed from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_02586.PDF, dated 19 Jan 2023.

[310] Accessed from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_02393.PDF, dated 19 Jan 2023.

### 3.5. Cooperation Legislation

Parts 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.

A careful reading of Parts 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.[311] Unlike ICTR and ICTY, the ICC doesn't allow trials *in absentia*.[312] 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 their appearance in the court.

According to *Blaskic*[313] case, the ICTY stated that "enforcement powers must be expressly provided and cannot be regarded as inherent in an international tribunal".[314] However the ICC cannot have its own police force, or/and, it cannot arrest somebody from a different State. So basically, there is no such enforcement mechanism of the international criminal legal jurisprudence. Thus, for such a cooperation regime, the court has to rely upon the horizontal cooperation mechanism among the States. As a result, it solely depends on the sovereign decision of the State itself whether they want to cooperate or not.

[311] 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)

[312] Art 63.

[313] https://www.icty.org/x/cases/blaskic/cis/en/cis_blaskic.pdf, dated 19 Jan 2023.

[314] https://ucr.irmct.org/scasedocs/case/IT-95-14#appealsChamberDecisions, dated 19 Jan 2023.

The 1998 Rome Statute mostly talks about such mutual horizontal assistance from the States to the court. However, through the complementarity regime, it also came up with the idea of *sui generis* nature of cooperation among the like-minded States. That means the Statute has a mixed regime of cooperation mechanisms, which is more horizontal, not vertical as ICTR or ICTY. As the ICC Statute is basically a treaty thus reconciling the conflicting interests are must to do. Even the ICC can seek help (cooperation) from a non-State party to provide assistance in the criminal proceeding on an appropriate basis.[315]

As mentioned before, it is not always the ICC that 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[316], 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 to 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 section will discuss the complementarity legislation and how the State can incorporate atrocity crimes into their national criminal jurisdiction.

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315 Art 93(10).

316 Gioia, Federica. *Complementarity and 'Reverse Cooperation*. Chapter, pp. 807-828. In *The International Criminal Court and Complementarity: From Theory to Practice*, edited by Carsten Stahn and Mohamed M. El Zeidy, pp. 807–29. Cambridge: Cambridge University Press, 2011. doi:10.1017/CBO9781316134115.034.

### 3.6. Complementarity Legislation

Incorporation of the atrocity crimes referred by the 1998 Rome Statute in the national criminal jurisdiction is not only an expectation but also makes the legal basis for the States to perform their duty to try such crimes at their domestic level. We have to understand that the main differentiating point for the trial of an ordinary crime and an international crime is its intention with international classification and characterization. And to balance any possible lacunas, complementarity legislation is an imperative mechanism. It definitely carries some potential challenges at the domestic level. Furthermore, atrocity crimes are already recognized as *jus cogens* internationally, thus it is imposing the duty upon the States to ratify the legislation. So, either the State can extradite the perpetrators or prosecute them at their domestic level, and in complementarity, the latter is more focused.

Hence, this idea of *aut dedere aut judicare*[317] brings twofold requirements. *Firstly*, development of the legislative competence is the primary duty to ensure, that national criminal jurisdiction explicitly criminalizes atrocity crimes – genocide, crimes against humanity, war crimes, and crimes of aggression. Without such legislative competence, prosecution or investigation will not be possible in the domestic jurisdiction. *Secondly*, ensuring the institutional capacity building to prosecute and investigate the atrocity crimes domestically. Therefore, the State must ensure that the institute has the capacity, adequate training, proper access to international resources, etc. In the next segments, the integration methods will be discussed which a State can follow to incorporate the atrocity crimes into the national criminal jurisdiction.

[317] Either extradite or prosecute.

### 3.6.1. Minimalist Approach

When a State applies the ordinary [or military] criminal jurisdiction to address the conduct in question by solely relying upon domestic crimes such as murder, rape, destruction of property, etc., that is called the minimalist approach. So here the State is not incorporating any international crimes, but they are simply applying its categorizations in conduct.

The Supreme Court of Peru, in 2009 convicted former president Alberto Fujimori for murder, serious bodily harm, and kidnapping, however, they recognized that the accused could have fallen under the crimes against humanity too, but due to their limited jurisdiction, they followed the ordinary criminal code to adjudicate the case.[318] To note, Peru is a member State of the 1998 Rome Statute, they signed the Statute on 7 December 2000, and deposited their instrument of ratification on 10 November 2001,[319] yet they did not have the crimes incorporated in their national criminal jurisdiction.

Similarly, Libya's connection with the International Criminal Court is complicated by the fact that it is not a signatory to the Rome Statute, which established the ICC. It is debatable whether a nation that is not a signatory to the treaty is obliged by the ICC's mandates or not. Akande interpreted this issue by pointing out that the basis of Libya's responsibility to the ICC is the UN Security Council Resolution 1970, which refers Libya's case to the Court and obligates Libya to comply with the Court's requests.[320]

It is evident that Libya and Sudan have an international legal responsibility to assist the Court, and that obligation comes under the UN Charter. Akande mentioned, that despite the fact that Libya is not a signatory to the ICC Statute, it is a UN member State and hence subject to

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[318] Accessed from https://img.lpderecho.pe/wp-content/uploads/2016/12/Sentencia-del-Tribunal-Constitucional-caso-Fujimori-Legis.pe_.pdf, dated 19 Jan 2023.

[319] https://asp.icc-cpi.int/states-parties/latin-american-and-caribbean-states/peru, dated on 19 Jan 2023.

[320] Akande, D. (2012). *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*. Journal of International Criminal Justice, 10(2), 299–324. doi:10.1093/jicj/mqs019.

Resolution 1970. A non-party State is not normally bound by the ICC's demands since it has not accepted the Rome Statute. However, in the instance of Libya, the State's responsibilities to the court are settled because UN Security Council Resolutions are enforceable on all UN member States. As the Rome Statute expressly specifies that the Security Council has the authority to submit matters to the ICC, UNSCR 1970 binds Libya to the Rome Statute even though the State of Libya is not a party to it.[321] Afterward, even though Libya approached the court with this minimalist approach to investigate and prosecute *Saif Al-Islam Gaddafi*, the Pre-Trial Chamber I held that they were unable to perform their duties, and the admissibility challenge was rejected.

It is important to note that the approach could most be found in dualist States. There might be some cases where the States incorporated the atrocity crimes with harsher sentences, i.e., Denmark, however, it does not always reflect the scale, conduct, and pattern of the international crimes. The dilemma of the minimalist approach is – that the crime and its prerequisites along with conformity of the penalty – do not act according to international standards, as it does not serve the best interest of the States which are reluctant to incorporate the core crimes in their jurisdiction.

### 3.6.2. Express Criminalization Process

The Rome Statute may be specifically incorporated into local legislation through a wide and open-ended reference as a means of expressing the criminalization of international crimes. The static or literal transcribing technique and the dynamic criminalization approach – both forms of express criminalization can be taken into consideration in State practice.

The static method entails repeating the definitions of genocide, crimes against humanity, and war crimes found in Articles 6, 7, and 8 of the Rome Statute when transposing international

[321] Christian Rodriguez, *Libya and the International Criminal Court: A Case Study for Shared Responsibility*, accessed from https://www.pitjournal.unc.edu/article/libya-and-international-criminal-court-case-study-shared-responsibility, dated 19 Jan 2023.

crimes into domestic law. The law specifies the punishments that apply to the offenses in question and contains phrasing that is exactly the same as that of the Rome Statute. This approach has been used by countries including the United Kingdom, Malta, Jordan, and South Africa among others to adopt complementarity legislation. The static transcription method complies with the legality principle since it specifies precisely and reliably whatever conduct is regarded as an international crime and what penalties are associated with it. Additionally, it makes the task easier for those responsible for enforcing the law. Assistance about the fundamental components of international crimes as set forth in the 1998 Rome Statute is provided by adopting the identical terms of the Statute in domestic legislation. The drawback is that it could not account for recent advancements in international criminal law. As a result, modifications would need to be made to adjust for relevant developments.

Criticism of this method could be the States may incorporate only the crimes and its definition, as New Zealand, Uganda, and Kenya did; however, variation could be found where the State (Australia), not only adopted the text of the given crime but also adopted the ICC Elements of Crime in whole.[322]

Another method is the dynamic criminalization method where the conduct of the crime mentioned in the Rome Statute has been reformulated, rearticulated, and reworded in order to make the integration process with domestic crimes easier. Thus, the legislation may provide some clarification to the atrocity crimes, however, there are chances for limiting the scope of the crime/s, or/and overly defining the crime/s and its conduct. All the core crimes *i.e.,* genocide, crimes against humanity, war crimes, and crimes of aggression obtained *jus cogens* status and became a part of general international law. However, while domesticating the atrocity crimes, we can expect the definition of the crimes to be identical to the standard definition. Unfortunately, we can see notable

[322] 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, 74.

examples of differences in the definition of the crime itself, which significantly expands or limits the scope of the application of the crime.

Hoffmann[323] looks at the crime of genocide in its almost countless domestic varieties to show how the international definition may be integrated into States' national and international practice. He briefly discussed the limiting scope of the crime of genocide where he mentioned that "racial" groups are not included in the definition of genocide in Bolivia, Ecuador, Guatemala, Paraguay, and Peru; "national" groups are missing from the criminal code of Nicaragua; while "ethnic" groups are excluded from the criminal law frameworks of Costa Rica, El Salvador, and Oman. He even mentioned some countries omitted or restricted the underlying offenses of the crime of genocide, such as the Czech Republic, Georgia, Guinea Bissau, Poland, and the Special Administrative Region of Macao have completely omitted the mental harm requirement by only criminalizing "serious bodily injury". Moreover, he stated that some countries seemingly expand the list of protected groups, but these additions do not actually result in a different scope of application, such as Australia, Liechtenstein, and the US. In his article, he provided three reasons for such changes in the definition which are the domestic version of genocide as a means to ensure historical justice, domestication of international criminal law, path dependency where States followed another State's legal instrument, and blindly incorporated it, finally the translation and drafting error. In his paper, he identified out of 196 countries, only 41 countries have identical definitions of the crime of genocide, whereas 100 countries have varying degrees of differences and 55 countries have not even implemented the crime of genocide in their national criminal jurisdiction. Therefore, the method could be criticized for its lenient approach that may end up with uncountable means of practicing the same crime by the States.

[323] Tamás Hoffmann, *The crime of genocide in its (nearly) infinite domestic variety*, in Odello, M., & Łubiński, P. (Eds.). (2020). *The Concept of Genocide in International Criminal Law: Developments after Lemkin* (1st ed.). Routledge. https://doi.org/10.4324/9781003015222.

Through the above-mentioned discussion, the best possible approach could be the "dynamic criminalization method", even though it poses risks of speculation of a variety of practices of the same crime. And this approach is quite compatible with the 1998 Rome Statute and its complementarity principle as well.

### 3.7. Closing Remarks

The article focused on different theoretical concepts and trends of complementarity to understand the [theoretical] perspective from its core. Although it is not an obligation of the member States to adopt the 1998 Rome Statute, however for implementing the legislation and proper functioning of international [criminal] justice, it is imperative to incorporate such legislation in the national criminal jurisdiction. We have already discussed the case of *Saif Al Islam Gaddafi* to demonstrate that implementing legislation plays an important part, and it also upholds the principle of the *same conduct same person* test.

Above the three emerging models of complementarity, the proactive model mirrors the perspective on mutual inclusivity more than others. For proactive complementarity to function, the two pillars of the International Criminal Court have to be well established, which are cooperation and complementarity. Schabas mentioned once that complementarity is basically a double-edged sword, thus we see that implementing legislation through the dynamic criminalization method poses risks of speculation of various national practices of the same crime, however, it seemed the best possible way so far.

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# 4. STATE PRACTICE OF THE DOMESTIC PROSECUTION OF THE CORE CRIMES[324]: AN ANALYSIS

## 4.1. Introduction

To end the recurrence of atrocities, ending the impunity of such heinous crimes is an important part, and the international community must come forward to close the impunity gaps.[325] 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. To do so, the author analyzes 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, the author examines various mechanisms employed to achieve this objective. The analysis starts 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.[326] Subsequently, the author focuses on recent trends in prosecutions of core crimes, including cases based on *territorial jurisdiction*[327], *active nationality jurisdiction*[328], and *universal jurisdiction*[329].[330] This comprehensive overview of different mechanisms assess the application of

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[324] Atrocity crimes or international crimes, i.e. Genocide, War Crimes, Crimes against Humanity and Crimes of Aggression.

[325] 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.

[326] 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 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.

[327] Where crimes occurred within the prosecuting country.

[328] Involving perpetrators who are nationals of the prosecuting country

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

[330] 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.

international criminal law in various countries.[331] The author delves into evolving patterns in domestic prosecutions and discusses emerging legal challenges related to universal jurisdiction and the defining fundamentals of international crimes such as crimes against humanity, genocide, and war crimes.[332]

The legal parameters governing international crimes and their application by national and international institutions have experienced historical fluctuations. A significant motivation occurred after World War II, continuing until around 1950. However, there was a considerable lull until the mid-1990s, despite ongoing conflicts involving international crimes through this phase.

Most of the laws concerning war crimes and crimes against humanity were established immediately after World War II.[333] This development included the creation of the Nuremberg and Tokyo IMTs, legislative measures empowering national courts to address criminals accused of core crimes in Asia and Europe, development of the jurisprudence of the special tribunals/courts, the enactment of the Geneva Conventions regulating wartime conduct and its violations and the adoption of the 1948 Genocide Convention[334] - virtually most of the essential principles in this legal domain can be traced back to this time.[335] Several significant cases, for example, the Menten

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[331] 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.

[332] 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.

[333] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction*, 2010, pg. 24. See also, https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf. See also, Dixon, Martin, Robert McCorquodale, and S. Williams. *Cases & Materials on International Law*. Oxford University Press eBooks, 2017. https://doi.org/10.1093/he/9780198727644.001.0001.

[334] 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. 16. doi: https://doi.org/10.1163/ej.9789004163089.i-1122.

[335] Dixon, Martin, Robert McCorquodale, and S. Williams. *Cases & Materials on International Law*. Oxford University Press eBooks, 2017, pg. 72. https://doi.org/10.1093/he/9780198727644.001.0001.

case[336], the Barbie, Papon, and Touvier cases[337], and the Eichmann Case[338] contributed significantly to this new legal domain. For example, the cases from the courts of Canada, Australia, and Britain in the 1980s and 1990s, where a direct link was established between the post-World War II legal framework and the cases under consideration.[339] This connection was there not only because individuals investigated by the above-mentioned countries had committed their acts during WW2, but because of no substantial novel legal developments in the interim.

Over the past 30 years, a substantial surge in international developments within the realm of war crimes law, notably, the establishment of the ICTY[340] in 1994 and ICTR[341] in 1995 marked pivotal milestones.[342] 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).[343] 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

[336] *Public Prosecutor v. Menten*. International Law Reports. 1987; 75, 331-368. doi:10.1017/CBO9781316152034.019.
[337] "Trial of Nazi Criminal Klaus Barbie." n.d. www.jewishvirtuallibrary.org. https://www.jewishvirtuallibrary.org/trial-of-nazi-criminal-klaus-barbie. See also, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-24071%22]}.
[338] *Attorney General v. Adolf Eichmann*, retrieved from https://www.legal-tools.org/doc/aceae7/pdf.
[339] Morten, *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, 2010. Pg. 109. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.
[340] International Criminal Tribunals for the Former Yugoslavia.
[341] International Criminal Tribunals for Rwanda.
[342] 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.
[343] Retrieved from https://www.icty.org/node/9590.

trial.[344] These developments have significantly shaped the landscape of international law related to war crimes.[345]

Apart from the two *ad hoc* tribunals, significant efforts have been undertaken within the framework of the UN to create an international criminal court.[346] 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.[347] This includes five leaders of the Lord Resistance Army[348] (Uganda)[349], four individuals related to the Darfur situation (Sudan)[350], one person for the situation in the Central African Republic[351], and four individuals from the DRC[352]. Notably, three of the four indictees from the DRC situation are in ICC custody. The first trial at the ICC was scheduled to commence on 23 June 2008; however, it was temporarily halted on 13 June 2008 due to irregularities in the prosecution case[353].[354] Nonetheless, the stay was lifted on 18 November 2008, and the trial commenced on 26 January 2009[355].[356]

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[344] Retrieved from https://unictr.irmct.org/en/tribunal.

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

[346] 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.

[347] 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.

[348] two of whom have passed away since the indictment

[349] Rojo, Enrique Carnero, and Julieta Solano McCausland. *Developments at the International Criminal Court*, in *The Law & Practice of International Courts and Tribunals*: 9, 1 (2010): 127-241, doi: https://doi.org/10.1163/157180310X502368.

[350] including Sudan's head of State, with one in custody.

[351] Alexander Heinze and Viviane E. Dittrich (editors). *The Past, Present and Future of the International Criminal Court*. Torkel Opsahl Academic EPublisher, Brussels (2021). Pg. 24. https://www.toaep.org/nas-pdf/5-dittrich-heinze.

[352] concerning war crimes in the Ituri region.

[353] decision upheld by the Appeals Chamber on 21 October 2008.

[354] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction*, 2010. Pg. 129. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[355] The second trial began on 24 November 2009.

[356] Grover, Sonja C. *Prosecuting International Crimes and Human Rights Abuses Committed against Children*. Springer eBooks, 2010. Pg. 81. https://doi.org/10.1007/978-3-642-00518-3.

Additionally, the UN has played a pivotal role in creating five hybrid courts to address core crimes.[357] These include the Special Panel for Serious Crimes of the Dili District Court in East Timor[358], the courts in Kosovo, the Special Court for Sierra Leone[359], the War Crimes Chamber of the State Court of Bosnia and Herzegovina, and the Extraordinary Chambers of the Courts of Cambodia.[360] Importantly, the abovementioned courts feature a combination of local and international judges in their composition.[361]

On 16 January 2002 through an agreement between the UN and the Sierra Leone Govt., **the Special Court for Sierra Leone** was established.[362] Its jurisdiction encompasses core crimes that constitute a breach of the common Article 3 of the Geneva Conventions.[363] These offenses are almost as outlined in the present-day ICC Statute.[364] 12 individuals have been indicted by this court.[365] At the Trial Chamber, four trials have taken place, with three of them, namely the AFRC, CDF, and RUF cases which involved eight indictees, The Appeals Chamber issued judgments in these cases[366] and transferred them to Rwanda to serve their sentences.[367]

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[357] 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.

[358] along with its Court of Appeal.

[359] comprising Trial Chambers and an Appeals Chamber.

[360] 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/.

[361] 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

[362] Jones, John, and Steven Powles. *International Criminal Practice*, 3rd Edition, (Leiden, The Netherlands: Brill | Nijhoff, 25 Oct. 2021), pg. 995. doi: https://doi.org/10.1163/9789004480032.

[363] retrieved from https://www.iclklamberg.com/Statute.htm.

[364] Knoops, Geert-Jan. *Surrendering to International Criminal Courts: Contemporary Practice and Procedures*, (Leiden, The Netherlands: Brill | Nijhoff, 01 Oct. 2021), pg. 38-41. doi: https://doi.org/10.1163/9789004479616

[365] two have passed away following their indictment, and the whereabouts of one remain uncertain.

[366] AFRC case on 22 February 2008, in the CDF case on 28 May 2008, and in the RUF case on 26 October 2009

[367] Beigbeder, Yves. *International Criminal Tribunals*. Palgrave Macmillan UK eBooks, 2011. Pg. 85-106. https://doi.org/10.1057/9780230305052.

In the same manner, under an agreement between the UN and the Cambodian Govt., the **Extraordinary Chambers of the Courts of Cambodia** have been established[368], granting jurisdiction over core crimes and grave breaches of the 1949 Geneva Conventions, mirroring the provisions of the ICTY & and the ICTR. The Chambers commenced their operations in 2006. Presently, five individuals are in custody, one of whom has been indicted for committing war crimes and crimes against humanity.[369] The trial for this individual commenced on 17 February 2009. The other detainees also face charges. Similar to the Sierra Leone Special Court, these Chambers can be perceived as a "*nationalized international court*".[370] They were established with international community involvement and maintained an international presence throughout the judicial process. However, aside from this international aspect, they function as an extension of the regular judicial system.[371]

On 6 June 2000, **the East Timor Special Panels** were established, through the issuance of their founding instrument by the United Nations Transitional Administration in East Timor (UNTAET), these panels were granted jurisdiction over international offenses. The definitions of these crimes closely mirrored those outlined in the ICC. The panels completed their mandate by convicting 84 defendants in 60 trials[372].[373] These trials stemmed from 95 indictments, which covered 440 individuals. The Court of Appeal of East Timor adjudicated seven cases. Notably, these panels functioned as "*internationalized domestic courts*", with their international dimension

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[368] Adopted on 2 January 2001, 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. 39. https://www.fichl.org/fileadmin/fichl/FICHL_PS_23_web.pdf.

[369] 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. 58. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[370] Morten, *Complementarity and the Exercise of Universal Jurisdiction,* 58.

[371] Rikhof, J. *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, pg. 32 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

[372] acquitted three.

[373] Rikhof, J. *Fewer Places to Hide*. 2009. Pg. 40-51. https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

limited to the presence of international staff in the courts and prosecution office. This arrangement aimed to facilitate the transitional justice[374] process in society.[375]

Through collaboration between the ICTY and the OHR[376], a domestic court with an international dimension has been established in **Bosnia and Herzegovina**, this court began its operations in 2005 and holds jurisdiction over cases involving core crimes. Chamber I indicted 84 individuals in 48 cases. Among these cases, 11 were transferred from the ICTY as part of its completion strategy. The court convicted 28 individuals in 33 trial judgments, including seven cases transferred from the ICTY, and acquitted five persons.[377] Notably, in 2008, seven individuals were convicted (and four others acquitted) for the *crime of genocide*, marking a significant milestone.

The Court of Bosnia and Herzegovina issued the first-instance verdict for committing *crimes against humanity, genocide as part of a joint criminal enterprise,* and charges of *murder, unlawful confinement, torture, sexual violence, and other inhumane acts such as forced labor, harassment, humiliation, or psychological abuse* against Marko Radić, Dragan Šunjić, Damir Brekalo, Mirko Vraĉević, and Milorad Trbić for participating in a systematic and widespread attack against the Muslim civilian population, including children, women, and the elderly in between 1993 to 1994.[378]

**Kosovo** established a court similar to Bosnia and Herzegovina's on June 10, 1999, under the United Nations Mission in Kosovo (UNMIK).[379] This court holds jurisdiction over war crimes

[374] A smooth transition from a conflict situation to a peaceful society, more at https://www.ictj.org/what-transitional-justice.

[375] Heller, Kevin, and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford, 2013; online edn, Oxford Academic, 1 Jan. 2014), pg. 381. https://doi.org/10.1093/acprof:oso/9780199671144.001.0001, accessed 18 Nov. 2023.

[376] Office of the High Representative in Bosnia and Herzegovina

[377] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal*, 2010. Pg. 124. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[378] Morten, *Complementarity and the Exercise of Universal Jurisdiction,* 124. See also, Rojo, Enrique Carnero, and Maria Nybondas. *INTERNATIONAL CRIMINAL COURTS ROUND-UP*. In the *Yearbook of International Humanitarian Law:* 9 (2006): 311–61. doi:10.1017/S1389135906003114.

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

and genocide cases.[380] A total of 12 persons have been indicted in the Kosovo Specialist Chambers. Of those indicted, all have been arrested and transferred to the Chambers' custody. The cases against two are in the pre-trial stage[381], five people are in the trial stage[382], and three persons are serving sentences[383].

In 2009, the European Union justice mission initiated its first war crimes trial since taking over from the UN mission.[384] The District Court Priština accused an ethnic Albanian named Gani Gashi who was charged with killing another ethnic Albanian "by shooting him in the back" and injuring another person during the fight between Kosovo Liberation Army (KLA)[385] and Serbian forces near Pristina.[386] Finally, in 2009, the European Union initiated an investigation of 1,119 unresolved Kosovo war crimes cases, a decade after the conflict ended, and the documents were transferred to EULEX[387].[388] EULEX was launched in December, replacing the UN mission, which had administered Kosovo, ousting Serbian forces engaged in a violent crackdown on ethnic Albanian separatists.

Another form of a domestic hybrid tribunal, albeit one with more limited international involvement as it only allows for international advisors, is the **Supreme Iraqi Special Tribunal.** This tribunal holds jurisdiction over the core crimes, has and indicted 20 individuals. One of the

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

[381] Ismet Bahtjari, Sabit Januzi, Isni Kilaj, Haxhi Shala, retrieved from https://www.scp-ks.org/en/cases?title=&field_case_number_value=&field_case_status_tid_i18n=14.

[382] Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, Pjetër Shala, retrieved from https://www.scp-ks.org/en/cases?title=&field_case_number_value=&field_case_status_tid_i18n=13.

[383] HYSNI GUCATI & NASIM HARADINAJ, Salih Mustafa, retrieved from https://www.scp-ks.org/en/cases?title=&field_case_number_value=&field_case_status_tid_i18n=43.

[384] retrieved from https://www.scp-ks.org/en/cases?title=&field_case_number_value=&field_case_status_tid_i18n=43.

[385] the ethnic Albanian separatist

[386] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

[387] an EU rule-of-law mission in Kosovo, from its predecessor UNMIK.

[388] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

Notable figures is Saddam Hussein[389], the former president, Tariq Aziz, the former minister of foreign affairs, and Ali Hassan al-Majid[390], known as 'Chemical Ali'.[391]

Over the last 25 years, almost 113 individuals have been convicted out of 279 indictments in the international or internationalized courts – the ICTY, ICTR, SLSC, and ECCC.[392] These convictions are related to charges of the core crimes – genocide, crimes against humanity, and war crimes in conflicts that have resulted in thousands of perpetrators and an uncountable number of victims.[393] Due to the temporal jurisdiction, there has been a significant increase in the number of individuals indicted and convicted by these institutions. Furthermore, only those individuals were tried who had greater responsibility. Even though there is not yet any analysis where sentencing by the internationalized courts and the potential for preventing core crimes are linked offenses. However, it is reasonable to assume that a stronger causal link would be established if more perpetrators could be apprehended, tried, convicted, and sentenced to severe penalties in line with the gravity of such crimes.[394] Any increase in mechanisms for dealing with those responsible for atrocities is expected to primarily occur at the domestic level. This approach is explicitly acknowledged in the ICC Statute, which is entitled to exercise jurisdiction only when a State party is unwilling or unable to take action against perpetrators.[395] Consequently, the ICC can be viewed as an alternative jurisdiction concerning domestic actions in this context.

[389] Later on, executed.
[390] Later on, executed.
[391] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.
[392] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.
[393] Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (editors). *Quality Control in Criminal Investigation*. Torkel Opsahl Academic Epublisher, Brussels (2020), pg. 529. https://www.toaep.org/ps-pdf/38-qcci
[394] Xabier (*et al*). *Quality Control in Criminal Investigation*. 529.
[395] Xabier (*et al*). *Quality Control in Criminal Investigation*. 529.

### 4.2. Trends of Domestic Trials

The implementation of domestic prosecutions for core crimes gained significant momentum with the establishment of the Rome Statute. Many countries, including Denmark and Norway, employed various strategies. Some nations combined broad extraterritorial jurisdiction, conventional criminal laws (such as those addressing torture or murder), and stricter sentencing methods to address the distinct and international nature of these offenses.[396] While this approach allowed familiarity for domestic legal professionals and negated the need for extensive evidence or arguments regarding the international aspects of these crimes, it came with challenges. Although harsher sentencing reflected the gravity of the offenses, it did not equate to the same societal stigma associated with similar sentences for domestic crimes. Moreover, unlike domestic offenses, international crimes were not subject to statutory limitations. This aspect was underscored by the ICTR in the Bagaragaza case, where Norway sought to transfer the case from the ICTR to its jurisdiction as part of the ICTR completion strategy. Despite arguments made by the defendant (Norway), and the prosecutor, both the ICTR Trial and Appeal Chambers rejected the transfer.[397] The reason was Norway's lack of legislation criminalizing international offenses, and a harsher sentencing regime was not considered sufficient to overcome this legal gap. Consequently, the case was transferred to the Netherlands, prompting Norway to amend its legislation on March 7, 2008.[398]

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

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[396] Rikhof, J. Fewer *Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, 40–51 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

[397] Rikhof, *Places to Hide,* 51.

[398] retrieved from https://www.scp-ks.org/en/cases?title=&field_case_number_value=&field_case_status_tid_i18n=13.

Rome Statute (Articles 6, 7, and 8 respectively). Within this approach, there are three variations.[399] The first precisely replicates the wording of these Rome Statute articles, as seen in the legislation of the United Kingdom, Malta, and Jordan. 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.[400] 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.[401]

This approach utilizes the Statute's text, its preparatory work, and the jurisprudence of the ICTY and ICTR up to the Statute's agreement on July 17, 1998.[402] However, a drawback of this method is its inability to accommodate new developments in this evolving field of law without amending the original legislation. Such scenarios can be seen where new crimes are being introduced in the field of international criminal law, including crimes like slavery, forced labor, and terrorism, as well as the crime against humanity of forced marriage.[403]

The *dynamic model*, an alternative approach to domestic implementation of the Rome Statute, entails revising the conduct criminalized within its framework to align with existing domestic criminal offenses.[404] This revision seeks to establish stronger linkages between the Rome Statute's provisions and those already in place domestically, while also clarifying certain concepts that may be vague or imprecise. Such vagueness often arises from the incorporation of customary international law principles, such as the crimes against humanity of inhumane acts or persecution,

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399 Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction*, 2010. Pg. 60-75. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

400 Morten, *Complementarity and the Exercise of Universal Jurisdiction*, 75.

401 retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.

402 Morten Bergsmo (ed), Complementarity and the Exercise of Universal Jurisdiction, 2010. Pg. 65-70. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

403 Morten, *Complementarity and the Exercise of Universal Jurisdiction*, 75.

404 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

or a lack of consensus during the Statute's negotiations. For instance, the crime against humanity of imprisonment includes the qualifier "in violation of fundamental rules of international law".[405]

Countries that have adopted the *dynamic model* include Germany[406], the Netherlands, and Uruguay where the targeted groups for genocide encompass national, ethnic, racial, religious, political, union, or groups defined by gender, sexual orientation, culture, social, age, disability, or health, and where instigating genocide is also criminalized[407]; Argentina which raised the age in the war crime of forcible recruitment from 15 to 18 years and introduced forced hunger as a grave violation of international law; Ecuador where the draft legislation expands the genocide victim groups to include gender, sexual orientation, age, health, and conscience, and makes ordering, planning, or instigating genocide an offense, even if genocide is not committed; the Republic of Congo (which broadens the genocide definition to include groups defined by arbitrary characteristics, and under crimes against humanity, replaces the crime of apartheid with "*crimes de discrimination: tribale, ethnique ou religieuse*"[408]; and the Democratic Republic of the Congo which raises the age in the war crime of forcible recruitment from 15 to 18 years.[409]

The *dynamic model* presents advantages and disadvantages similar to those of the literal model. However, as most legislation based on this model has been adopted more recently than the Rome Statute text was agreed upon, the previously noted disadvantage of potential inconsistencies between domestic and international law is less prominent in this model.[410]

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[405] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

[406] 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. 843-861. doi: https://doi.org/10.1163/ej.9789004163089.i-1122

[407] Jalloh, Charles Chernor, and Alhagi B.M. Marong, eds. *Promoting Accountability under International Law for Gross Human Rights Violations in Africa*, (Leiden, The Netherlands: Brill | Nijhoff, 14 Jul. 2015), pg. 103-117. doi: https://doi.org/10.1163/9789004271753

[408] Decaux, Emmanuel, Adama Dieng, and Malick Sow, eds. *From Human Rights to International Criminal Law / Des droits de l'homme au droit international pénal*, (Leiden, The Netherlands: Brill | Nijhoff, 05 Jun. 2007), Pg. 519-530. doi: https://doi.org/10.1163/ej.9789004160552.i-776

[409] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

[410] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

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.[411] 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.[412] In contrast, the Finnish statute extends its purview to both treaty and customary international law, specifically for war crimes.[413] The Canadian model, characterized by its comprehensiveness, defines the three core international crimes through direct references to international treaty law, customary international law, and general principles of law.[414] Notably, it recognizes the Rome Statute as a benchmark for customary international law as of July 17, 1998, while also acknowledging independent developments in this area.[415]

These hybrid approaches offer distinct advantages and disadvantages. On the positive side, the close alignment of core crime regulation with international law ensures that these countries remain synchronized with global advancements. This connection automatically incorporates these changes into their domestic laws without necessitating legislative amendments, streamlining the process of legal adaptation. However, this connection also imposes an ongoing responsibility on all participants in criminal prosecutions to maintain constant awareness of evolving international

[411] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.
[412] 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
[413] Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts,* 190-230
[414] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.
[415] Rikhof, J. Fewer *Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, pg. 1–51 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas.

jurisprudence, demanding a commitment to continuous legal education and professional development.

### 4.2.1. Proceedings Based on Territorial Jurisdiction

Prosecution of international crimes under *territorial* or *active nationality* jurisdiction[416] has been conducted in 26 countries, encompassing internationalized domestic courts in Bosnia and Herzegovina, Kosovo, and East Timor.[417] These cases have been brought in seven European countries, nine Latin American countries, three Asian countries, and seven African countries, resulting in over 10,000 convictions.

#### *4.2.1.1. Europe*

Beyond the national courts of Bosnia and Herzegovina and Kosovo, which have been previously discussed due to their international dimensions, other war crimes prosecutions have been undertaken within the former Yugoslavia, including in Serbia, Croatia, Montenegro, and Macedonia.[418]

Serbia has witnessed the indictment of 113 individuals in 24 distinct cases for international crimes. Among these individuals, 25 have been convicted in eight judgments issued by the **War**

[416] Active nationality refers to a state's jurisdiction over the conduct of its nationals overseas. As noted in Zerk's report for the Harvard Corporate Social Responsibility Initiative, states regard the active nationality principle as the strongest basis for direct extraterritorial jurisdiction, retrieved from https://classic.austlii.edu.au/au/journals/MelbJIL/2012/5.html#:~:text=Active%20nationality%20refers%20to%20a,basis%20for%20direct%20extraterritorial%20jurisdiction (dated 165 March 2024).

[417] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction*, 2010. Pg. 19. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[418] Rikhof, J. Fewer *Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, pg. 40-51 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

**Crimes Chamber of the Belgrade District Court**.[419] Additionally, two judgments have been handed down by general jurisdiction courts involving three individuals, and 12 persons were convicted in seven final judgments, resulting in a total of 40 individuals convicted.[420] At the trial stage, 11 individuals have been acquitted, and nine cases involving 43 individuals are currently ongoing. Of the 40 convictions secured in Serbia, five arose from a single trial involving individuals linked to the paramilitary group known as the Scorpions. This group operated in Bosnia during the 1992-95 war and in Kosovo during the late 1990s.[421] Its members were suspected of participating in the capture of Srebrenica and the subsequent killing of approximately 8,000 Muslim men and boys.

Apart from other cases, one dissimilar case arose where Sinan Morina, part of the Orahovac group case, faced indictment on July 18, 2007, for crimes committed in Kosovo.[422] Concurrently, Vladimir Kovaĉević, referred to Serbia by the ICTY in 2006, found himself indicted on July 30, 2007, for war crimes committed in Dubrovnik, Croatia. In the latter instance, charges were dismissed in December 2007 due to the accused's mental incapacity to stand trial, while Morina received acquittal on the 20th of December 2007.[423]

In Macedonia, on March 4, 2008, four investigations into crimes committed by ethnic Albanian guerrillas during the armed conflict in 2001 were officially reopened.[424] These cases were initially presented before the International Criminal Tribunal for the former Yugoslavia (ICTY).

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[419] Morten, *Complementarity and the Exercise of Universal Jurisdiction*, 75.
[420] Morten, *Complementarity and the Exercise of Universal Jurisdiction*, 75.
[421] 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. 35-37. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.
[422] Morten, *Complementarity and the Exercise of Universal Jurisdiction*, 36-75.
[423] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.
[424] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.

However, in mid-February, these cases were returned to the Macedonian judiciary after the ICTY prosecutor opted not to proceed with them.[425]

In Montenegro, on August 1, 2008, war crimes charges were formally filed against eight former soldiers. They were implicated in the killing of 23 ethnic Albanian refugees during the 1998-99 conflict in Kosovo. These individuals, former soldiers of the Yugoslav army, were alleged to have committed these crimes in the village of Kaludjerski Laz near the Montenegrin town of Roţaje on April 16, 1999.[426] Additionally, on August 15, 2008, seven more individuals faced indictment for the torture of 169 Croatian prisoners of war and civilians at the Morinj camp near the coastal town of Kotor, Montenegro, during the 1990s conflict in Croatia. Among these, four had been apprehended, while two remained in Belgrade. Furthermore, on January 16, 2009, charges were brought against nine former policemen.[427] They were accused of deporting 79 Muslims who had sought refuge from the Bosnian war of 1992-95. Tragically, they were sent back to Bosnian Serb custody, where the majority of them met their untimely fate.

#### *4.2.1.2. Central and South America*

In the regions of Central and South America, various nations have commenced legal actions against individuals implicated in offenses of crimes against humanity and genocide during prior administrations including Chile, Peru, Colombia, Argentina, Uruguay, Bolivia, and Mexico.[428]

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[425] 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. 209-225. doi: https://doi.org/10.1163/ej.9789004163089.i-1122

[426] Kleffner, *Complementarity in Rome Statute*, 41.

[427] Kleffner, *Complementarity in Rome Statute*, 41.

[428] 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), 210-219. doi: https://doi.org/10.1163/ej.9789004163089.i-1122.

Conversely, Paraguay and Brazil have opted for an extradition strategy in addressing analogous criminal allegations.

In Chile, notwithstanding the demise of former President Augusto Pinochet in 2006, approximately twenty members of his military junta presently find themselves incarcerated within the jurisdiction, with an additional cohort of approximately 400 individuals undergoing legal proceedings. A particularly noteworthy instance pertains to Manuel Contreras, a retired army general who held a leadership role within Chile's secret police, DINA, during the tenure of Pinochet's regime.[429] Contreras and eight other senior members of DINA faced charges in 2003 in connection with the 1974 abduction of a Spanish priest, a case marked by subsequent allegations of torture and forced disappearance. In April 2008, Contreras received a 15-year prison sentence for his involvement in this incident. Preceding this, he had already been sentenced to 15 years for the kidnapping and disappearance of a left-wing activist in 1975.[430] Furthermore, in January 2008, Contreras was handed a 10-year sentence for his role in the abduction of seven additional individuals. Notably, Contreras was concurrently serving time for his complicity in orchestrating the 1976 car bomb assassination of a Chilean diplomat in Washington.[431] The legal trajectory continued in January 2009, when an appellate court affirmed two consecutive life sentences for Contreras and imposed lesser sentences for the other eight members of DINA implicated in the aforementioned proceedings. Another noteworthy legal proceeding involves Miguel Krassnoff Marchenko, an army brigadier general, DINA member, and overseer of the Villa Grimaldi torture center. In 2003, Krassnoff received a 15-year sentence for his involvement in several forced disappearances. Subsequently, he faced additional legal consequences, receiving sentences of 10 years in June 2006 and four years in December 2006 for similar crimes. Six others, including

[429] Rikhof, J. Fewer *Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, pg. 35–40 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

[430] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

[431] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

Marcelo Moren Brito, a colonel and head of one of the DINA brigades, also found themselves subject to sentencing.[432] Notably, France sought the extradition of Krassnoff and Brito in 1998. Moreover, on August 29, 2007, the Chilean Supreme Court affirmed a life imprisonment sentence against General Hugo Salas Wenzel, the former head of the intelligence service under Pinochet, in connection with the murder of 12 regime opponents.[433] On April 18, 2008, several retired admirals and navy captains, namely Sergio Barros, Guillermo Aldoney, Adolfo Walbaum, Sergio Barra, and Ricardo Riesgo faced formal charges related to the abduction, torture, and murder of British-Chilean priest Michael Woodward and other dissidents in the aftermath of Chile's 1973 military coup.[434] Additionally, navy doctor Carlos Costa was among those indicted. Further legal actions unfolded on May 26, 2008, when nearly 100 former soldiers and secret service agents, including Manuel Contreras, faced indictments in connection with Operation Colombo.[435] Executed in 1975, this operation constituted an endeavor by Chilean security services to falsely attribute the deaths of dissidents to internal strife among radical leftists during the Pinochet regime.[436]

In a momentous legal judgment, on October 15, the venerable 88-year-old Sergio Arellano Stark received a six-year prison sentence from Chile's Supreme Court. This verdict was rendered following his conviction for the murder of four individuals who opposed the rule of dictator Augusto Pinochet in the aftermath of the 1973 coup that brought Pinochet to power. The killings in question transpired at the military prison of Linares in southern Chile. Previously, Arellano Stark had been found culpable of these grave offenses. Notably, the Criminal Chamber of the Supreme Court of Chile issued a decisive ruling in the Lejderman case on May 25, 2009.[437] This judgment implicated three former members of the armed forces—Fernando Polanco Gallardo, Héctor

[432] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.
[433] Rikhof, *Places to Hide,* 40-51.
[434] Rikhof, *Places to Hide,* 40-51.
[435] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.
[436] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.
[437] Grover, Sonja C. *Prosecuting International Crimes and Human Rights Abuses Committed against Children*. Springer eBooks, 2010. Pg. 98-135. https://doi.org/10.1007/978-3-642-00518-3.

Vallejos Birtiola, and Luis Fernández Monjes—in the murders of Bernardo Lejderman and his wife María del Rosario Avalos.[438] The aforementioned individuals were subsequently sentenced to five years in prison. Conversely, another accused party was acquitted due to the absence of conclusive evidence establishing their criminal responsibility beyond a reasonable doubt.[439] The ruling passed with a majority of three votes to two, addresses several significant aspects of international criminal law:

- It affirms that a non-international armed conflict occurred in Chile in 1973, falling within the scope of common Article 3 of the Geneva Conventions.[440]
- According to Article 146 of Geneva Convention IV, Chile was obligated to search for individuals accused of committing serious breaches of the conventions and bring them before its own legal system.[441] This obligation, the court indicated, applied even in the context of a non-international armed conflict.[442]
- The court clarified that the amnesty law does not cover grave breaches of the Geneva Conventions, including those occurring during non-international armed conflicts.
- Crimes under international law are not subject to statutory limitations.[443]
- Killings carried out by armed forces members were deemed crimes against humanity due to their involvement in a "massive" and systematic pattern of violence against a civilian population.[444]

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[438] Rikhof, *Places to Hide,* 40-51.

[439] Gill, T.D., Tim McCormack, Robin Geiß, Heike Krieger, Christophe Paulussen, and Kelly Pitcher. *Yearbook of International Humanitarian Law:* Volume 18, 2015. T.M.C. Asser Press eBooks, 2016. Pg. 181-200. https://doi.org/10.1007/978-94-6265-141-8.

[440] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41.

[441] 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. 719-745. doi: https://doi.org/10.1163/ej.9789004163089.i-1122.

[442] Rikhof, *Places to Hide,* 40-51.

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

[444] Kleffner, *Complementarity in Rome Statute*, 41.

- The ruling emphasized that the prohibition of amnesty and statutory limitations concerning crimes against humanity constitutes a peremptory norm of international law or jus cogens.[445]
- Despite Chile not being a State party to the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, the principle outlined in Article 1, which renders the rule inapplicable "irrespective of the date of their commission," was considered customary international law at the time the killings took place.[446]

In Argentina, on September 19, 2006, Miguel Etchecolatz, a former deputy within the Buenos Aires police during the 1976-83 "dirty war," received a life imprisonment sentence—a landmark ruling that marked the first instance of a defendant being found guilty of crimes against humanity, directly invoking principles of international law.[447] Significantly, these transgressions were perpetrated "within the context of a genocide that occurred in Argentina between 1976 and 1983".[448] This verdict followed the revocation of amnesty laws for crimes against humanity in 2005.[449] Subsequently, on February 13, 2007, the Argentine government formally indicted and sought the extradition of Isabel Perón, a former president, to Spain. Furthermore, Jorge Videla, the former chief of staff to Perón and subsequent president, also faced indictments. On November 24, 2008, Videla, along with 20 other individuals, confronted indictments for crimes committed in police facilities and the San Martín prison in Córdoba, situated southwest of Buenos Aires in the Andes foothills. However, on April 28, 2008, a Spanish court rejected the extradition request in

[445] Kleffner, *Complementarity in Rome Statute*, 41.
[446] Kleffner, *Complementarity in Rome Statute*, 41.
[447] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction*, 2010. Pg. 34. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.
[448] Knoops, Geert-Jan. *Surrendering to International Criminal Courts: Contemporary Practice and Procedures*, (Leiden, The Netherlands: Brill | Nijhoff, 01 Oct. 2021), pg. 35-41. doi: https://doi.org/10.1163/9789004479616
[449] Rikhof, *Places to Hide,* 40-51.

the Perón case, asserting that the alleged crimes did not satisfy the criteria for crimes against humanity, a prerequisite for the acceptance of such extradition requests.[450]

The charges were linked to the kidnapping and disappearance of an Argentine senator, resulting in their conviction on September 4, 2008. In the northeastern province of Corrientes, Argentina, a court pronounced sentences on August 6, 2008, ranging from 18 years to life imprisonment for four former soldiers convicted of torturing and murdering political prisoners. Julio Barreiro was handed a life sentence, while Carlos de Marchi and Horacio Losito received 25 years each.[451] Raul Reynoso faced an 18-year prison term, and Carlos Piriz was acquitted.

In Colombia, a judicial process unfolded on December 14-15, 2006, wherein 59 paramilitary leaders faced legal scrutiny. Salvatore Mancuso, the foremost paramilitary figure confronting trial in Colombian courts, saw the resumption of his trial on January 15, 2007, in Medellin. Notably, during the proceedings, Mancuso admitted to his complicity in no less than 55 assassinations and six massacres. Further legal actions transpired on May 27, 2008[452], when retired army general Ivan Ramirez faced arrest on charges linked to the forced disappearance of 11 individuals during a violent episode in Colombia's civil war in 1985. On November 26, 2009, Colombian officials indicated the potential reclassification of specific crimes perpetrated by Pablo Escobar's drug cartel as crimes against humanity. This prospective reclassification aimed to facilitate the continued prosecution of these offences. Pablo Escobar, the orchestrator of numerous kidnappings, bombings, and even the downing of a passenger jet during the 1980s and early 1990s might potentially face charges of crimes against humanity. This reclassification would,

[450] Kleffner, *Complementarity in Rome Statute*, 41-50.
[451] Kleffner, *Complementarity in Rome Statute*, 41-50.
[452] Rikhof, J. Fewer *Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, 20–35 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

crucially, circumvent the 20-year time limit for pursuing offences committed by Escobar and other members of his notorious Medellin drug cartel.[453]

In Peru, accusations of human rights violations and corruption were faced by former President Alberto Fujimori. Following an extradition request, Chile arrested him. Despite the initial denial of the request by a lower court on July 12, 2007, his surrender was agreed upon by the Supreme Court on September 21, 2007. Subsequently, he was extradited the next day and subjected to trial in Peru. On April 7, 2009, a conviction was handed down, accompanied by a 25-year prison sentence.[454]

On December 30, 2009, a judgment confirming all the determinations made by the Special Criminal Chamber, the initial court of instance, and imposed penalty. Almost all conclusions reached by the Supreme Court were unanimous, with a singular exception related to specific aggravating circumstances in the kidnapping of Samuel Dyer and Gustavo Gorriti.[455] Legal contentions before the appeals court by Fujimori primarily centered on procedural matters within Peruvian law, rendering the ruling fundamentally an interpretation of domestic legal principles. In its assessment of international criminal law, the Supreme Court made several key points:

- "The Supreme Court affirmed that Alberto Fujimori exerted effective control over Peru's Armed Forces and Police.
- Crimes against humanity, unlike other offences, do not have a statute of limitations and must be thoroughly investigated and prosecuted.
- While Fujimori was convicted of three standard crimes (murder, kidnapping, and severe bodily harm) according to the Penal Code applicable at the time (1991 and 1992), the court

[453] Kleffner, *Complementarity in Rome Statute*, 41-50.
[454] Morten, *Complementarity and the Exercise of Universal Jurisdiction*, 34.
[455] Kleffner, *Complementarity in Rome Statute*, 41-50.

correctly determined that these offences qualify as crimes against humanity. This classification arises because they were perpetrated as part of a widespread or systematic assault on a civilian population.[456]

- Even though the Fujimori case is grounded in territoriality, the Supreme Court emphasized that crimes under international law and offences of international concern fall under universal jurisdiction.
- Universal jurisdiction serves as the fundamental basis (*raison d''être*) of international criminal law, highlighting its paramount importance".[457]

On December 14, 2007, the Special Criminal Chamber of the Supreme Court of Peru reasserted the convictions of Abimael Guzman and other leaders of the MMSP (Maoist Movement Shining Path).[458] The court handed down life imprisonment and substantial terms, holding them accountable for violations of international humanitarian and human rights laws. The basis for their individual culpability was anchored in the concept of perpetration by means, as none of the accused directly committed the egregious acts. This form of liability hinges on the notion of wielding functional power over an act within a hierarchical organizational structure—a concept revived by the International Criminal Court (ICC) following its rejection by the International Criminal Tribunal for the former Yugoslavia (ICTY).[459]

On the 8th of April 2008, members of the Army Intelligence Service (SIE) and the Army Intelligence Directorate (DINTE) were convicted by the Higher Justice Court of Lima in the La Cantuta case. Their culpability was established for detaining, murdering, and surreptitiously

[456] Dubler SC, Robert, and Matthew Kalyk. *Crimes against Humanity in the 21st Century*, (Leiden, The Netherlands: Brill | Nijhoff, 23 Jul. 2018), pg. 157-190. doi: https://doi.org/10.1163/9789004347687
[457] Rikhof, *Places to Hide,* 40-51.
[458] Rikhof, *Places to Hide,* 40-51.
[459] Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (editors). *Quality Control in Criminal Investigation*. Torkel Opsahl Academic Epublisher, Brussels (2020), Pg. 395-401. https://www.toaep.org/ps-pdf/38-qcci. See also, Bayefsky, Anne. *Situation in Palestine* (ICC-Pre-Trial Chamber). International Legal Materials 60, no. 6 (2021): 1038–1111. doi:10.1017/ilm.2021.28.

burying nine students and one professor from the National University in 1992.[460] This trial addressed several consequential legal issues. Utilizing the perpetration by means approach, the court established criminal liability, drawing inspiration from the Guzman case. Moreover, it determined that in cases with overlapping charges of kidnapping and enforced disappearance, the latter should take precedence due to its graver nature. Finally, the defense of superior orders was refuted, guided primarily by the evolving standards of this defense in the realm of international criminal law.[461]

On the 30th of June 2008, the 16-year sentence against Juan Carlos Mejia León for the forced disappearance of university student Ernesto Castillo Páez in 1990 was upheld by the Supreme Court of Peru.[462] This judicial decision carried paramount significance, shedding light on the elements of the crime of forced disappearance. It accentuated the illicit deprivation of the victim's freedom and highlighted the continuous nature of the crime, enduring until the fate or whereabouts of the victim were ascertained.[463] This perspective assisted the court in addressing the matter of retroactivity, especially considering that Peruvian law only incorporated this offense into its criminal code in 1991.

On December 17, 2007, in Uruguay, three individuals were apprehended due to their involvement in crimes against humanity during the "dirty war" period spanning from 1976 to 1983. Among the detainees was Gregorio Alvarez, a former military dictator, who, on October 22, 2009, received a 25-year prison sentence. Intriguingly, on October 25, 2009, Uruguayan voters rejected

[460] Kleffner, *Complementarity in Rome Statute*, 41-50.

[461] Heller, Kevin, and Gerry Simpson (eds*), The Hidden Histories of War Crimes Trials* (Oxford, 2013; online edn, Oxford Academic, 1 Jan. 2014), pg. 193-212. https://doi.org/10.1093/acprof:oso/9780199671144.001.0001, accessed 18 Nov. 2023.

[462] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal*, 2010. Pg. 38. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[463] Dubler SC, Robert, and Matthew Kalyk. *Crimes against Humanity in the 21st Century,* (Leiden, The Netherlands: Brill | Nijhoff, 23 Jul. 2018), pg. 639 – 650. doi: https://doi.org/10.1163/9789004347687

a proposal aimed at terminating the country's black law.[464] This law grants amnesty to military officials accused of human rights violations during the nation's 1973-1985 dictatorship.[465] Notably, this decision transpired despite the Supreme Court of Uruguay having declared the law unconstitutional a week prior. In February 2005, former President Gonzalo Sánchez de Lozada and 16 ministers from his administration in Bolivia found themselves facing charges of genocide.

In the historical narrative, accusations were leveled against the former Mexican President, Luis Echeverria Alvarez, suggesting his command to the Mexican army to open fire on a demonstration in Mexico City on October 2, 1968, during his tenure as the Minister of the Interior.[466] A federal tribunal delivered a significant ruling on July 12, 2007, classifying the incident, which led to the deaths of approximately 200 to 300 individuals, as genocide, intended to eradicate a national student group.[467] However, embedded within the same ruling, the charges against the President were dismissed due to the absence of evidence directly linking him to the massacres.[468]

In Paraguay, an extradition order for Argentine doctor Norberto Atilio Bianco was issued on August 5, 2009. He stood accused of child trafficking and forced disappearances of children born in a military hospital during the dictatorship in his country.[469] In another noteworthy extradition case, a former Uruguayan military officer suspected of involvement in Argentina's "Dirty War" was extradited from Brazil to Argentina on January 23, 2010. Major Juan Cordeiro

[464] Kleffner, *Complementarity in Rome Statute*, 41-50.
[465] Kleffner, *Complementarity in Rome Statute*, 41-50.
[466] Rikhof, J. Fewer *Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, 40–51 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas
[467] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.
[468] Kleffner, *Complementarity in Rome Statute*, 41-50.
[469] Kleffner, *Complementarity in Rome Statute*, 41-50.

Piacentini faced charges linked to his alleged participation in Operation Condor, a scheme aimed at suppressing opposition during Argentina's dictatorship in the 1970s, a period famously known as the "Dirty War." Specifically, Piacentini faced accusations of kidnapping in connection with the abduction of a 10-year-old boy in 1976.[470]

#### *4.2.1.3. Asia*

To address the same issues as the special courts in East Timor, Indonesia formed the Ad Hoc Tribunal for East Timor in 2000. Six military and police officials have been found guilty of crimes against humanity out of the twelve indictments including eighteen defendants; the remaining defendants were found not guilty.[471]

An important war crimes conviction took place in Afghanistan. After the pro-Communist Najibullah regime fell in 1992, Assadullah Sarwary, the former leader of the Afghan intelligence agency KhAD, was imprisoned in Kabul for fourteen years.[472] He was given a death sentence by the national security court on February 25, 2006. Sarwary is the first person to stand trial in an Afghan court for war crimes.

Since 2008, there have been growing calls in Bangladesh for the establishment of a war crimes tribunal to look into atrocities committed during the nation's 1971 independence war.[473] Bangladesh, previously East Pakistan, accuses Pakistan of unleashing a ruthless crackdown during its war for independence, resulting in the deaths of up to three million people within nine months.

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[470] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal*, 2010. 38-50.

[471] Rikhof, J. *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, 25–45 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas, see also, Morten Bergsmo (ed), *Complementarity and the Exercise of Universal*, 2010. 38-50.

[472] Rikhof, *Places to Hide,* 25–45

[473] Rikhof, *Places to Hide,* 25–45

On April 3, 2008, the Bangladeshi War Crimes Facts Finding Committee (WCFFC), a research group, published a list of 1,597 war criminals who were responsible for rapes, mass murders, and other atrocities committed during the Liberation War of 1971. 369 of the people on the list are military personnel from Pakistan, while 1,150 are local allies, such as members of Al Badr and Razakar (groups established to support the occupying troops). The security forces in Bangladesh were given orders by the government on January 31, 2009, to stop any suspected war criminals who assisted the Pakistani military in the 1971 independence war from leaving the nation.[474] In 2012, two tribunals were established to prosecute the criminals. As of 2024, the International Crimes Tribunal, Bangladesh – 2 adjudicated 11 cases[475], whereas the International Crimes Tribunal, Bangladesh – 1 adjudicated 44 cases[476].

#### *4.2.1.4. Africa*

In the African context, legal proceedings related to the core crimes have commenced in several countries, namely the Republic of the Congo, Sudan, Ethiopia, Rwanda, Burundi, DRC, and, Uganda slated to follow suit.[477]

A significant incident happened on August 17, 2005, when 15 officers implicated in the Beach case—which entailed the forced disappearance of 350 returning refugees at the Beach port in Brazzaville in 1999—were cleared by a criminal court in Brazzaville, Democratic Republic of the Congo (DRC).[478] The court ruled that they were not guilty of the crimes against humanity, war crimes, and genocide that had previously been attributed to them.[479]

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[474] Rikhof, *Places to Hide,* 25–45.
[475] Retrieved from https://www.ict-bd.org/ict2/judgments.php.
[476] Retrieved from https://www.ict-bd.org/ict1/judgments.php.
[477] Kleffner, *Complementarity in Rome Statute*, 41-50.
[478] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.
[479] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

A court in Addis Ababa, Ethiopia, found former dictator Mengistu Haile Mariam, who is currently living in exile in Zimbabwe, guilty of genocide on December 12, 2006.[480] On January 11, 2007, he was first given a life sentence. On May 26, 2008, his sentence was subsequently extended to death. Of the 54 people found guilty of genocide, 35 were important figures in the Derg, the Marxist revolutionary dictatorship that ruled Ethiopia from 1977 until 1991. The remaining condemned persons were officials of urban dwellers' groups (Kebeles) and regular Derg members. Furthermore, on April 5, 2008, 19 more people were found guilty; five of them were given the death penalty. Notably, beginning in 1994, the Office of the Special Prosecutor carried out investigations that resulted in the prosecution of nearly 5,000 people connected to the Mengistu Derg government's Red Terror campaign.

Two separate judicial techniques are used in Rwanda to address the enormous extent of the 1994 massacre. First, 2,100 of the principal culprits charged with genocide have gone through standard criminal court trials, while the remaining ones have gone through special gacaca proceedings. These gacaca proceedings, which were started in 2005, have resulted in about 60,000 trials and almost 800,000 suspects who were waiting for hearings. As part of its completion strategy, Rwanda also received 30 case files from the International Criminal Tribunal for Rwanda (ICTR) including significant criminals.[481]

Managing so many people who are suspected of being the offenders was quite difficult. 818,564 people are allegedly responsible for genocide. Of them, 432,557 were in the second group, which carried terms ranging from one to thirty years and included community service for accepted confessions, while 77269 were in the first category, where they could face life in prisonment. 308,738 persons were classified as having committed crimes against property, which are settleable through compensation payments or friendly agreements. These cases fall into the first and second

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

[481] Olásolo, Héctor. *The Triggering Procedure of the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 23 Sep. 2005), pg. 35-47. doi: https://doi.org/10.1163/9789047415749

categories and were handled by 1,545 district courts and 1,545 appeals courts.[482] In addition, property crimes were handled by 9,008 gacaca cell courts. Roughly 60,000 verdicts have been rendered by the gacaca courts. Remarkably, depending on local circumstances, almost 50% of the punishments range from 15 to 30 years in prison, 3% entail community service, and 20–40% end in acquittals.[483] There were 120,000 convicts at the end of 2002, and by February 2007, that number had dropped to 92,000. Thirty thousand cases settled through the gacaca courts are included in this decline. Furthermore, from 2003 to 2007, there were about 60,000 conditional releases. Conventional courts initially heard cases of "Category I" genocide, which included offenders who held positions of authority or engaged in particularly heinous authorization. Nonetheless, the Rwandan government moved several high-profile cases involving genocide from traditional courts to community-based gacaca tribunals in 2008. Up until September 2008, the Rwandan government released statistics showing that 1,127,706 cases related to the genocide had gone through gacaca courts, with just 4,679 cases still awaiting trial.

On October 13, 2008, a major arrest took place in Sudan, which was a key development in the Darfur crisis. Tribal chieftain and former Janjaweed militia commander Ali Kushayb was captured. He was accused of 51 charges of war crimes and crimes against humanity, and the International Criminal Court has issued an arrest warrent for him.[484]

Transitioning to Burundi, a momentous legal development transpired on October 23, 2008. A military court sentenced Colonel Vital Bangirinama to death in absentia and three other officers to life in jail. Their role in the deaths of thirty people during operations against rebels led to the imposition of these penalties.[485]

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[482] Kleffner, *Complementarity in Rome Statute*, 41-50.

[483] Rikhof, J. Fewer *Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*. Crim Law Forum 20, 25–41 (2009). https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

[484] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

[485] Kleffner, *Complementarity in Rome Statute*, 41-50.

A specialized legal body was established by Uganda in response to human rights breaches resulting from the 20-year insurgency in the north. Established in May 2008, this special war crimes court functioned as a separate branch of the Uganda High Court. Its main objective was to handle complaints involving abuses of human rights carried out by LRA members.

### 4.2.2. Prosecution Based on Universal Jurisdiction

#### *4.2.2.1. Europe*

Regarding international crimes, 13 European nations have begun looking into and prosecuting cases for crimes done overseas from 1994 to date. Over 50 indictments and over 85 percent of arrest warrants issued since 2000 are the results of these efforts. Furthermore, in 20 cases spanning 11 nations, 30 people have been found guilty; in contrast, five people have been found not guilty, one of which came about as a result of an appeal.

The United Nations establishes international tribunals to prosecute war criminals. The Netherlands is the host country for a number of these tribunals, including the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone's (SLSC).[486] As part of the International Criminal Tribunal for Rwanda's (ICTR) completion strategy[487], the Netherlands almost became the first nation to accept a transferred case.[488] The Dutch government has advanced

[486] 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), pg. 81-110. https://pure.uva.nl/ws/files/8879321/Thesis.pdf

[487] Salinas Cerda, Ania Carola del Carmen. 2015. *Guarding the Gates: The Essential Role of a Robust Pre-Trial Chamber in Ensuring the International Criminal Court's Impartiality, Independence and Legitimacy*. PhD thesis, University of Glasgow. Pg. 51-55. https://eleanor.lib.gla.ac.uk/record=b3109688

[488] Bassiouni, M. Cherif, eds. *International Criminal Law*, Volume 2: Multilateral and Bilateral Enforcement Mechanisms, (Leiden, The Netherlands: Brill | Nijhoff, 21 Nov. 2008), pg. 175-180. doi: https://doi.org/10.1163/ej.9789004165311.i-602

significantly on a national scale.[489] Six people have been found guilty of international crimes since 2001. A year later, one conviction was overturned, although there have been setbacks to this progress, including two acquittals in 2007.

Due to their involvement in crimes during the former Yugoslavia conflict, four people were prosecuted and found guilty in Germany. Four people were found guilty in their first trials between 1997 and 1999, named Novislav Djajić, Maksim Sokolović, Djuradj Kušljić, and Nikola Jorgić.[490] Djajić, a former soldier in the Bosnian Serb army, was first charged with genocide but was later found guilty of aiding and abetting manslaughter and given a five-year prison sentence in May 1997. For his role in facilitating genocide and war crimes, Sokolović was sentenced to nine years in jail in November 1999. In December 1999, Kušljić was found guilty of genocide and given a life sentence. This conviction was later upheld on appeal in February 2001, however, the offence was classified as grave breaches rather than genocide. Jorgić was found guilty of genocide and murder in 1997.[491] An appellate court upheld his life sentence in April 1999, and on July 12, 2007, the European Court of Human Rights confirmed it.[492]

On November 16, 2009, police in Germany arrested two leaders of Rwandan militias who were allegedly involved in criminal activities in the Democratic Republic of the Congo's eastern area.[493] The FDLR rebel group's head, Ignace Murwanashyaka, and his collaborator, Straton Musoni, were taken into custody on accusations of war crimes and crimes against humanity.[494] Following the 800,000 ethnic Tutsi who perished in the Rwandan genocide, the commanders of

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[489] Decaux, Emmanuel, Adama Dieng, and Malick Sow, eds. *From Human Rights to International Criminal Law / Des droits de l'homme au droit international pénal*, (Leiden, The Netherlands: Brill | Nijhoff, 05 Jun. 2007), pg. 55-80. doi: https://doi.org/10.1163/ej.9789004160552.i-776

[490] Kleffner, *Complementarity in Rome Statute*, 41-50.

[491] Kleffner, *Complementarity in Rome Statute*, 41-50.

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

[493] Ferstman, Carla, and Mariana Goetz, eds. *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, (Leiden, The Netherlands: Brill | Nijhoff, 17 Feb. 2020), pg. 416-445. doi: https://doi.org/10.1163/9789004377196

[494] 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), pg. 181-183, 311-313. https://pure.uva.nl/ws/files/8879321/Thesis.pdf.

the FDLR fled to the Democratic Republic of the Congo. For many years, the main source of instability in the DRC had been the existence of FDLR.[495]

Furthermore, for the murder of a German citizen in Argentina during the bloody conflict era, of 1976-83, an arrest warrant was issued for former president Jorge Videla on January 20, 2010. Additionally, the German Ministry of Justice announced on April 20, 2009, the establishment of three positions within the General Prosecutor's Office specifically designated for the investigation of cases falling under Germany's law of universal jurisdiction.[496] Additionally, the Federal Criminal Police developed a dedicated unit for war crimes, consisting of seven investigators who are assigned to cases involving international crimes.[497]

Since 2003, the Danish International Crime Investigation Section (SICO), a specialized team made up of police detectives and prosecutors, has played a key role in the prosecution of charges in two cases involving international crimes in Denmark.[498] In one instance, a former commander under Saddam Hussein's rule named Nizar al Khazraji escaped before being apprehended and is thought to have died. The second case concerned Sylvaire Ahorugeze, a former chairman of the Civil Aviation Authority and a native of Rwanda, who was detained in September 2006 on allegations of genocide.[499]

There has been one international criminal conviction in Spain, along with other indictments and arrest warrants for people who are not in the country. In certain situations, Spanish nationals were the victims and the case was based on the theory of passive nationality. Adolfo Scilingo was found guilty on April 19, 2005, of attempting genocide and other crimes

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[495] Ferioli, *The impact of cooperation on the rights of defendants before the International Criminal Court*, 181-183.

[496] Atilano, Tania Ixchel. *International Criminal Law in Mexico*. T.M.C. Asser Press eBooks, 2021. Pg. 75-80. https://doi.org/10.1007/978-94-6265-455-6.

[497] Bassiouni, M. Cherif, eds. *International Criminal Law*, Volume 2: Multilateral and Bilateral Enforcement Mechanisms, (Leiden, The Netherlands: Brill | Nijhoff, 21 Nov. 2008), pg. 535-540. doi: https://doi.org/10.1163/ej.9789004165311.i-602

[498] retrieved from https://iccforum.com/forum/Africa

[499] Kleffner, *Complementarity in Rome Statute*, 41-50.

committed during Argentina's dirty war, and he was sentenced to 640 years in jail. Scilingo voluntarily showed up in court. Extradited from Mexico to Spain, ex-military officer Ricardo Miguel Cavallo was involved in another case related to Argentina's dirty war. He was accused of 128 kidnappings and 228 disappearances. On July 17, 2007, the Spanish Supreme Court decided to allow his trial for terrorism and genocide. The Spanish government then deported him to Argentina on March 31, 2008.[500]

Regarding China's atrocities, 13 investigations have also been started recently, some of which include officials from China and the United States. One investigation, from 2006, is about suspected genocide that occurred in 1950 while China was occupying Tibet. Another, introduced in 2007, criticizes the Chinese government for its mistreatment of Falun Gong adherents. Beginning on August 5, 2008, a third inquiry examines China's actions in Tibet in March of that same year.[501] In the Falun Gong case, charges of torture and genocide were approved on November 13, 2009.

Four investigations have been launched about the United States. In the beginning, three US soldiers in Iraq were charged with murder and crimes against the international community in 2007. On March 28, 2008, action was launched to look into six former senior Bush administration officials who were accused of breaking international law by providing justification for the abuse of detainees at Guantanamo Bay.[502] Among them are former Secretary of defence for policy – Douglas Feith and attorney John Yoo, who wrote confidential legal opinions claiming presidential power to circumvent the Geneva Conventions. In addition, declassified records indicating systematic procedures prompted an investigative magistrate to open an investigation into the Bush administration on April 29, 2009, over allegations of torture of terror suspects at Guantanamo

[500] Kleffner, *Complementarity in Rome Statute*, 41-50.
[501] Kleffner, *Complementarity in Rome Statute*, 41-50.
[502] Kielsgard, Mark D. *Reluctant Engagement: U.S. Policy and the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 24 Sep. 2010), pg. 125-132. doi: https://doi.org/10.1163/ej.9789004182806.i-396

Bay.[503] Finally, on January 30, 2010, word spread that Baltasar Garzon, Spain's main investigating judge, would look into allegations of torture and mistreatment of detainees at the US jail at Guantanamo Bay.[504] The investigation, which centers on a particular prisoner named Ahmed Abdulrahman Hamed, a Spanish national, was started in response to complaints from a number of associations.

Under the concept of universal jurisdiction, investigations have been conducted in a number of instances.[505] The murders of six Jesuit priests and two others during El Salvador's civil war in 1989 against 14 former military officials on January 13, 2009; and the possible genocide committed by Morocco in the West Sahara in 2007; as well as mass murder and crimes against humanity after the 1994 Rwanda genocide involving 40 Rwandan army officers in February 2008.[506] The torture and murder of UN diplomat Mr. Carmelo Soria in 1976 against three former Chilean ministers, five generals, and several officers on November 20, 2009; the killing of a Hamas militant and fourteen others, including nine children, in the Palestine Occupied Territories against Israeli IDF members on January 26, 2009 (although this case was dismissed on July 17, 2009, by the National Criminal Court of Appeals, as it was already subject to a legal procedure in Israel).[507]

Rwandans participating in the 1994 genocide were the subject of several legal procedures. Due to his involvement, Laurent Bucyibaruta was charged and taken into custody in June 2007. In 1995, a French investigation was launched investigating the involvement of Rwandan priest Wenceslas Munyeshaka in crimes against humanity and genocide.[508] Despite being detained in France in July of 2007, he was freed because of problems with the warrants. In the end, these cases

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[503] Kielsgard, *Reluctant Engagement*, 125-132.
[504] Soler, Christopher. *The Global Prosecution of Core Crimes under International Law*. T.M.C. Asser Press eBooks, 2019. Pg. 403-409. https://doi.org/10.1007/978-94-6265-335-1.
[505] Lattimer, Mark, and Philippe Sands, eds. *Justice for Crimes Against Humanity*. Oxford: Hart Publishing, 2003, pg. 445-450. https://www.bloomsbury.com/uk/justice-for-crimes-against-humanity-9781841135687/
[506] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.
[507] Kleffner, *Complementarity in Rome Statute*, 41-50.
[508] Kleffner, *Complementarity in Rome Statute*, 41-50.

were moved to French courts in November 2007 and approved by them in February 2008. Based on an ICTR warrant, Dominique Ntawukuriryayo, a former deputy governor, was taken into custody in October 2007. In May 2008, the European Court of Human Rights rejected an urgent motion filed by former Rwandan Deputy Governor Dominique Ntawukuriryayo against the French decision authorizing his transfer to the Arusha-based International Criminal Tribunal for Rwanda (ICTR), where he was accused of genocide and crimes against humanity and in June of that same year, he was transferred to the ICTR.[509] A large number of people in France became involved in court cases concerning foreign offenses. 2008 saw the release of Isaac Kamali, who had been detained in the US in 2007 on the basis of a Rwandan warrant.[510] Similar to Marcel Bivugabagabo, Claver Kamana was also detained but later freed by French courts because of worries about a fair trial in Rwanda, particularly with regard to witness protection.[511]

The case against Afghan militia leader Faryadi Zardad effectively utilized universal jurisdiction in the United Kingdom. He received a 20-year prison sentence after being found guilty in 2005 of torture and hostage-taking in Afghanistan in the 1990s. Furthermore, on November 11, 2008, Damir Travica, charged with war crimes, was extradited to Croatia.[512] For their roles in the 1994 genocide, four Rwandans—Célestin Ugirashebuja, Vincent Bajinya, Emmanuel Nteziryayo, and Charles Munyaneza—began extradition procedures in 2006.[513] Notwithstanding a 2008 court order that supported their transfer to Rwanda, this decision was reversed on appeal in April 2009 because of worries about the safety of defense witnesses and uncertainties about the integrity of the Rwandan judiciary—similar to situations in Germany and France.

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[509] Kleffner, *Complementarity in Rome Statute*, 41-50.

[510] Nouwen, Sarah M. H. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*. Cambridge Studies in Law and Society. Cambridge: Cambridge University Press, 2013, pg. 145-150. doi:10.1017/CBO9780511863264.

[511] "CORRESPONDENTS' REPORTS: A Guide to State Practice in the Field of International Humanitarian Law." *Yearbook of International Humanitarian Law:* 12 (2009): pg. 453–695. doi:10.1017/S1389135909000166.

[512] Lattimer, *Justice for Crimes Against Humanity*, retrieved from https://www.bloomsbury.com/uk/justice-for-crimes-against-humanity-9781841135687/

[513] Atilano, *International Criminal Law in Mexico*, 75-80.

The UK deported Serb Milan Španović, who was condemned to 20 years in prison for war crimes, back to Croatia on August 20, 2009. Croatia's promises of a fair retrial, guaranteeing no discrimination based on nationality and protecting his human rights, were acknowledged by the London Supreme Court.[514] The government of the United Kingdom declared on October 26, 2009, that it would extend the jurisdiction for crimes against humanity, war crimes, and genocide back to 1991.[515]

In connection with the disappearance, torture, and deaths of Italian nationals during a crackdown on dissent in the 1970s and 1980s, Italy requested the extradition of more than a hundred former South American leaders and others connected to them. Allegedly implicated in the kidnapping and murder of twenty-five Italian dissidents during Operation Condor, Italy requested the extradition of 139 people in 2008 who were part of military dictatorships in Chile, Uruguay, Argentina, Brazil, Bolivia, and Paraguay.[516] Notable individuals included Juan Bordaberry, the former dictator of Uruguay, and Jorge Videla, the commander of the previous junta in Argentina. Nestor Jorge Fernandez Troccoli, a former naval intelligence officer from Uruguay, was one of the suspects who was detained in Italy; nevertheless, a Rome court refused to extradite him. Muharem Gashi, a Kosovo Albanian, was detained by Italian police on July 11, 2009, on suspicion of war crimes committed by Serbia. During the 1999 conflict, Gashi, a member of the Kosovo Liberation Army, was charged with the murder of two Serb civilians.[517] Furthermore, Emmanuel Uwayezu, a Catholic priest, was detained by Italy on October 20, 2009, on the basis of a Rwandan warrant, for his alleged role in the 1994 Rwandan genocide.[518]

[514] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.
[515] retrieved from http://www.africaresearchcentre.eu/files/JusticeDeniedText.pdf.
[516] Kleffner, *Complementarity in Rome Statute*, 41-50.
[517] Šturma, Pavel, eds. *The Rome Statute of the ICC at Its Twentieth Anniversary*, (Leiden, The Netherlands: Brill | Nijhoff, 03 Jan. (2019), pg. 65-81. doi: https://doi.org/10.1163/9789004387553.
[518] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

In the late 1990s, two instances in Switzerland proceeded to trial, with one conviction. Accused of war crimes against detainees in the Omarska and Keraterm camps between May and August, 1992, Goran Grabeț was found not guilty on April 18, 1997, for lack of proof. Fulgence Niyonteze was charged in July 1998 with genocide, crimes against humanity, and war crimes for his involvement in the genocide in Rwanda.[519] On April 30, 1999, he was found guilty solely of war crimes because, at the time, Swiss law did not cover the other two types of crimes. He was given a life sentence, but on May 26, 2000, an appeals court decision reduced it to 14 years.[520] Citing concerns about human rights, Switzerland refused to extradite a suspected genocidaire to Rwanda on June 30, 2009. 1994 saw the acquittal of Bosnian Serb Duško Cvjetković after he was accused of murder and genocide in Austria. An investigation was conducted into another instance involving a Croatian citizen residing in Austria; however, in 2001, he was deported back to Croatia and sentenced to ten years in jail for war crimes. Austria ceased to be involved in this matter.[521]

Norway has a dedicated war crimes unit, just like Denmark. They detained Bosnian nationals Sakib Dautović and Mirsad Repak in 2007. Dautović was suspected of crimes held in Velika Kladuša's prison camps. Also, in a camp near Ćapljina, under the authority of Croatian forces (HOS) in 1992, Repak was linked to crimes against eighteen Bosnian Serb civilians. In 1993, Repak entered the country as an asylum seeker and was accused of crimes against humanity, rape, torture, and illegal detention.[522] On August 27, 2008, his trial commenced, and on December 2, 2008, he was found guilty and given a five-year prison term. Nonetheless, it was decided that part of the modified war crimes law's retroactivity was invalid. Repak was convicted guilty of thirteen

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

[520] Ashiru, Margaret Olatokunbo. *Seeking the best forum to prosecute gender-based violence in armed conflict situations in Africa*. PhD thesis, University of KwaZulu-Natal, 2017, Pg. 124. https://researchspace.ukzn.ac.za/bitstream/handle/10413/18141/Ashiru_Margaret_Olatokunbo_2018.pdf?sequence=1&isAllowed=y

[521] Knoops, *Surrendering to International Criminal Courts,* pp. 38-41. Also, Doria, *The Legal Regime of the International Criminal Court*, 719-745.

[522] Meisenberg, Simon M., and Ignaz Stegmiller. *The Extraordinary Chambers in the Courts of Cambodia.* International Criminal Justice Series, 2016, pg. 293-319. https://doi.org/10.1007/978-94-6265-105-0.

counts of war crimes on March 8, 2010, although he was exonerated on one count by an appellate court. The decision was challenged by both sides.

A Serbian warrant for war crimes in Vukovar led to the arrest of Croatian Damir Sireta in November 2006. May 2008 saw his extradition to Serbia. In April 2007, François Bazaramba, a citizen of Rwanda, was detained in Finland on charges of genocide. He was accused of genocide and murder in June 2009, despite the decision not to send him to Rwanda in February of that same year. September of that year saw the start of his trial.

A suspect in the Rwandan genocide, Sylvere Ahorugeze was arrested in Sweden in July 2008, and an order for his extradition to Rwanda was later issued. Ahorugeze filed an application to the European Court of Human Rights, arguing that the ICTR was offering unfair trial prospects.[523] In July 2009, the ECHR ordered the Swedish government to refrain from deporting him until the case had been reviewed by the European Court. Furthermore, Ahmet Makitan, a 43-year-old Bosnian-Herzegovinian, was detained in Sweden on January 12, 2010, on suspicion of gravely violating the Geneva Conventions in 1992 in his native country. Makitan, a Swedish national, was accused of killing and torturing civilian Bosnian Serbs while they were being held in detention. In the fall of 2007, Sweden formed a special unit dedicated to war crimes.

#### *4.2.2.2. Africa*

Senegal passed a law in February 2007 that permits the prosecution of crimes against humanity, war crimes, genocide, and torture—even when they are committed outside of the country. On July 23, 2008, a constitutional amendment confirmed Senegalese courts' jurisdiction to try cases

[523] Jalloh, Charles C., Kamari M. Clarke and Vincent O. Nmehielle, dir. *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*. Cambridge: Cambridge University Press, 2019, pg. 180-197. doi:10.1017/9781108525343.

involving crimes against humanity that occurred prior to the 2007 Statute.[524] This opened the door for Senegal to prosecute Hissène Habré, the former president of Chad who was exiled, who has committed *crimes against humanity* and *torture* between 1982 and 1990.[525] After Belgium requested extradition from Senegal in 2005, the African Union asked Senegal to comply in 2006.[526] Fourteen abuse victims filed complaints against Habré in Senegal on September 16, 2008, with the help of international and African rights groups.[527] On February 19, 2009, Belgium brought the case before the International Court of Justice in an attempt to force Senegal to prosecute or extradite Habré.[528] On May 28, the ICJ rejected Belgium's request for temporary restrictions, citing Senegal's guarantees that Habré would not escape.[529]

#### *4.2.2.3. America*

Désiré Munyaneza was accused in October 2005 in Canada for his participation in the genocide in Butare, Rwanda.[530] His trial began in May 2007, and in May 2009, he was found guilty of all charges. In October 2009, he was given a life sentence. On November 6, 2009, Jacques Mungwarere, another Rwandan genocide perpetrator, was taken into custody in Canada.[531]

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[524] Retrieved from https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas

[525] Dubler SC, Robert, and Matthew Kalyk. *Crimes against Humanity in the 21st Century*, (Leiden, The Netherlands: Brill | Nijhoff, 23 Jul. 2018), pg. 959-970. doi: https://doi.org/10.1163/9789004347687

[526] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

[527] Kleffner, *Complementarity in Rome Statute*, 41-50.

[528] Schlütter, Birgit. *Developments in Customary International Law*, (Leiden, The Netherlands: Brill | Nijhoff, 17 May. 2010), pg. 175-182. doi: https://doi.org/10.1163/ej.9789004177727.i-370

[529] Beigbeder, Yves. *International Criminal Tribunals*. Palgrave Macmillan UK eBooks, 2011, pg. 264-273. https://doi.org/10.1057/9780230305052.

[530] "CORRESPONDENTS' REPORTS: A Guide to State Practice in the Field of International Humanitarian Law." *Yearbook of International Humanitarian Law* 12 (2009): 453–695. doi:10.1017/S1389135909000166.

[531] Retrieved from doi:10.1017/CBO9780511863264.

#### *4.2.2.4. Australia*

Dragan Vasiljković, an Australian citizen hailing from Belgrade, was approved for extradition to Croatia by an Australian court in April 2007. Was also known as "Kapetan Dragan", made his way back to Serbia in 1991 amid Croatia's attempt to become an independent nation. He founded an organization known as the "Kninjas" or the "Red Berets," and he allegedly participated in war crimes by running a paramilitary training camp close to Knin. He is charged with killing and torturing Croatian army and police prisoners in the Knin and Benkovac districts in June and July of 1991.[532] The High Court is currently reviewing the extradition ruling, which was maintained by the Federal Court of Australia in February 2009. Furthermore, Anvil Mining Limited, a mining firm, is being investigated by the Australian Federal Police for possible facilitation of a military offensive in Kilwa, Democratic Republic of the Congo.[533]

### 4.2.3. Prosecution under ICC's Complementary Jurisdiction

Now we will look into some cases where the ICC referred to the complementarity principle to adjudicate the cases.

[532] Retrieved from doi:10.1017/CBO9780511863264.

[533] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

#### *4.2.3.1. Philippines*[534]

The International Criminal Court (ICC) has decided to authorize the Prosecutor to resume its investigation into the situation in the Philippines[535], where alleged crimes against humanity were committed in the context of the government's 'war on drugs' campaign.[536]

The decision, issued on 26 January 2023, follows a request by the Philippines to defer the investigation, claiming that it was conducting its own national proceedings. The ICC rejected the request, finding that the Philippines had not shown that it was investigating or prosecuting the same conduct as the Court.[537]

The ICC had previously authorized the commencement of an investigation into the Philippines on 15 September 2021, covering crimes within its jurisdiction allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019.[538] The investigation was initiated by the Prosecutor based on information from various sources[539], including victims, human rights groups, and media reports.[540]

The ICC found that there was a reasonable basis to believe that crimes against humanity of murder, torture, and other inhumane acts were committed as part of a widespread and systematic attack against civilians suspected of being involved in the illegal drug trade.[541] The ICC

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[534] Retrieved from CR2023_00245.PDF (icc-cpi.int).

[535] Uddin Khan, Borhan, and Md. Jahid Hossain Bhuiyan, eds. *Human Rights and International Criminal Law*, (Leiden, The Netherlands: Brill | Nijhoff, 16 Mar. 2022), pg. 120-125. doi: https://doi.org/10.1163/9789004447462

[536] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

[537] Margaret M. deGuzman, James E. Beasley and Valerie Oosterveld (editors). *Introduction: Narratives and Counter-Narratives of the International Criminal Court*. In *Elgar Companion to International Criminal Court*. Edward Elgar Publishing, Temple University Legal Studies Research Paper No. 2021-42 (2020), pg. x-xi. https://www.e-elgar.com/shop/gbp/the-elgar-companion-to-the-international-criminal-court-9781785368226.html

[538] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

[539] 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. http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf

[540] Grover, Sonja C. *Prosecuting International Crimes and Human Rights Abuses Committed against Children*. Springer eBooks, 2010. https://doi.org/10.1007/978-3-642-00518-3.

[541] retrieved from https://pchrgaza.org/en/wp-content/uploads/2015/11/SubmissionICC-ProtectiveEdge.pdf.

also found that there were reasonable grounds to believe that these crimes were committed pursuant to a State policy[542], endorsed by the highest levels of the government, to target and kill drug suspects.[543]

The Philippines, which withdrew from the ICC in 2019, challenged the Court's jurisdiction and the gravity of the alleged crimes.[544] It also argued that the Court should not intervene in its domestic affairs and that the criticism of its anti-drug campaign was politically motivated. The ICC dismissed these arguments, noting that the Philippines had accepted the Court's jurisdiction at the time of the alleged crimes and that the motive of the perpetrators was irrelevant in international criminal law.[545]

The ICC also examined the various domestic initiatives and proceedings relied on by the Philippines[546], such as administrative reviews, human rights inquiries, and criminal investigations. The ICC concluded that these measures did not amount to tangible, concrete, and progressive steps being carried out with a view to conducting criminal prosecutions, in a way that would sufficiently mirror the Court's investigation.[547] The ICC noted that the domestic proceedings were very limited in number and scope, focused mainly on low-level and physical perpetrators, and did not address the possible patterns or policy behind the killings.[548]

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[542] Rojo, Enrique Carnero, and Julieta Solano McCausland. *Developments at the International Criminal Court*, in The Law & *Practice of International Courts and Tribunals* 9, 1 (2010): 127-241, doi: https://doi.org/10.1163/157180310X502368

[543] Soler, Christopher. *The Global Prosecution of Core Crimes under International Law*. T.M.C. Asser Press eBooks, 2019. https://doi.org/10.1007/978-94-6265-335-1.

[544] The Office of Public Counsel for Victims. *Representing Victims before the International Criminal Court: A Manual for legal representatives* (5th Ed.) International Criminal Court (2019). https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf

[545] retrieved from http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf.

[546] The Office of Public Counsel for Victims. *Representing Victims before the International Criminal Court: A Manual for legal representatives* (5th Ed.) International Criminal Court (2019), pg. 33. https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf

[547] The Appeals Chamber, *Situation in The Republic of The Philippines*. Retrieved from https://www.courthousenews.com/wp-content/uploads/2023/07/Judgment-on-the-appeal-of-the-Republic-of-the-Philippines.pdf.

[548] Megret, *Too much of a good thing,* In Stahn C, ElZeidy M (eds) *The International Criminal Court,* 361–390.

The ICC also considered the views and concerns of the victims, who supported the resumption of the Court's investigation.[549] The victims indicated that they sought a genuine and impartial investigation into the extrajudicial killings in order to bring perpetrators to justice and end impunity gaps.[550] They also expressed their mistrust and dissatisfaction with the domestic proceedings, which they said were slow, non-existent, or marred by various obstacles and risks.

The ICC authorized that its investigation would be conducted in accordance with the principle of complementarity[551], which gives priority to national jurisdictions unless they are unwilling or unable to genuinely carry out investigations or prosecutions.[552] The ICC also stressed that its investigation would be independent, impartial, and objective, and would respect the rights of all parties involved.[553]

The ICC's decision is a significant step in the pursuit of accountability and justice for the victims of the alleged crimes in the Philippines.[554] It also sends a clear message that the Court will not tolerate impunity for the most serious crimes of international concern, regardless of the status or position of the perpetrators.[555]

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[549] Safferling, Christoph, and Gurgen Petrossian. *Victims before the International Criminal Court*. Springer eBooks, 2021. https://doi.org/10.1007/978-3-030-80177-9, pg. 240-245. https://link.springer.com/book/10.1007/978-3-030-80177-9

[550] Megret, *Too much of a good thing,* In Stahn C, ElZeidy M (eds) *The International Criminal Court,* 361–390.

[551] Dixon, Martin, Robert McCorquodale, and S. Williams. *Cases & Materials on International Law*. Oxford University Press eBooks, 2017, pg. 540-545. https://doi.org/10.1093/he/9780198727644.001.0001.

[552] Global Rights Compliance. *Ukraine and the International Criminal Court* (updated). April 2021, pg. 249. https://www.asser.nl/media/794859/ukraine-and-the-icc.pdf.

[553] Retrieved from https://doi.org/10.1163/ej.9789004163089.i-1122

[554] Uche, M.C. *Victim-oriented Complementarity is the Key: A proposal for a Policy and Structural Change in the Interpretation and Application of the International Criminal Court's Principle of Complementarity for the Achievement of Victim-oriented Justice*. Doctoral Thesis, Essex Law School (2022), pg. 352-355. https://repository.essex.ac.uk/35122/1/Dr%20MC%20Uche%20Doctoral%20Thesis.pdf

[555] Bekou, Olympia, and Daley Birkett, eds. *Cooperation and the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 26 Apr. 2016), pg. 210-216. doi: https://doi.org/10.1163/9789004304475

The decision is based on Article 18(2) of the Rome Statute[556], which allows the Prosecutor to request the Chamber to authorize the resumption of an investigation if a State has requested a deferral of the investigation on the grounds that it is conducting its own investigations or prosecutions.[557] The Chamber must consider the factors in Article 17 of the Statute, which sets out the criteria for the admissibility of a case before the Court.[558] These criteria include whether the case is being investigated or prosecuted by a State with jurisdiction, unless the State is unwilling or unable genuinely to do so; whether the case has been investigated and the State has decided not to prosecute, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; whether the person has already been tried for the same conduct; and whether the case is of sufficient gravity to justify further action by the Court.[559] The Chamber must also examine the information provided by the State, the Prosecutor, and any observations submitted by the State seeking a deferral, and compare the scope and subject matter of the national and the Court's investigations.[560] The Chamber requires sufficient information of a sufficient degree of specificity and probative value to demonstrate that the State is indeed investigating the case.[561] The State has the burden of proof to show that its investigations or prosecutions are taking place or have taken place. The Chamber may also consider the nature and power of the institutions in charge of the national proceedings, and whether they are capable of conducting genuine criminal investigations and prosecutions.[562]

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[556] Vogel, Ryan. *Situation in the Islamic Republic of Afghanistan* (ICC Appeal Chamber). International Legal Materials 60, no. 1 (2021): 30–52. doi:10.1017/ilm.2020.57. See also, retrieved from https://iccforum.com/forum/Africa

[557] Retrieved from doi: https://doi.org/10.1163/ej.9789004169098.i-536 , see also, THE APPEALS CHAMBER, *situation in the republic of the Philippines*. Retrieved from https://www.courthousenews.com/wp-content/uploads/2023/07/Judgment-on-the-appeal-of-the-Republic-of-the-Philippines.pdf.

[558] Retrieved from https://www.casematrixnetwork.org/activities/

[559] Retrieved from https://www.toaep.org/ps-pdf/38-qcci

[560] THE APPEALS CHAMBER, SITUATION IN THE REPUBLIC OF THE PHILIPPINES. Retrieved from https://www.courthousenews.com/wp-content/uploads/2023/07/Judgment-on-the-appeal-of-the-Republic-of-the-Philippines.pdf.

[561] Giorgetti, Chiara, eds. *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, (Leiden, The Netherlands: Brill | Nijhoff, 01 Jan. 2012), pg. 189-192. doi: https://doi.org/10.1163/9789004194830

[562] Retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf

The Chamber first dismisses the Philippines' preliminary challenges to the Court's jurisdiction and the gravity of the alleged crimes, as they are not relevant for the purpose of Article 18(2) proceedings and have already been addressed by the Chamber in its previous decision authorized the investigation.[563] The Chamber then examines the various types of materials and information provided by the Philippines to substantiate its claim that it is conducting national investigations or prosecutions that sufficiently mirror the Court's investigation. The Chamber finds that the materials are either incomplete, insufficient, irrelevant, or unconvincing to demonstrate that the Philippines is genuinely investigating or prosecuting the alleged crimes within the jurisdiction of the Court.[564] The Chamber also considers the views and concerns of the potential victims, who support the Prosecution's request and highlight the obstacles and challenges they face in seeking justice and redress at the domestic level.[565] The Chamber concludes that the Philippines has not shown that the situation is inadmissible under Article 17 of the Statute, and therefore authorized the Prosecution to resume its investigation into the Philippines Situation.[566]

Regarding the complementarity in the Public Redacted Version of "Authorization pursuant to Article 18(2) of the Statute to resume the investigation"[567], The Pre-Trial Chamber mentioned,

> "In order to satisfy the complementarity principle, a State must show that in addition to being 'opened', its investigations and proceedings also sufficiently mirror the content of the Article 18(1) notification, by which the Prosecution notified the concerned State of the

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[563] Stahn, Carsten, eds. *The International Criminal Court in Its Third Decade*, (Leiden, The Netherlands: Brill | Nijhoff, 07 Nov. 2023), pg. 299-307. doi: https://doi.org/10.1163/9789004529939

[564] Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf

[565] Guellali, Amna, and Enrique Carnero Rojo. *International criminal courts round-up*. In the *Yearbook of International Humanitarian Law* 11 (2008): 255–372. doi:10.1017/S1389135908002559.

[566] Diver, Alice, and Jacinta Miller. *Justiciability of Human Rights Law in Domestic Jurisdictions*. Springer eBooks, 2016, pg. 200-208. https://doi.org/10.1007/978-3-319-24016-9.

[567] ICC Case Law Database | Public Redacted Version of "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (legal-tools.org).

opening of an investigation and its scope. Since, at the Article 18 stage, no suspect has yet been the subject of an arrest warrant, and similar to what is done in the context of Article 15 proceedings, admissibility can only be assessed against the backdrop of a situation and the 'potential cases' that would arise from this situation (para. 16)." [568]

"This conclusion [that the State's investigations do not sufficiently mirror the Court's investigation] does not preclude the [State] from providing material in the future in order for the Prosecution, or the Chamber, to determine inadmissibility based on complementarity, if and when needed. Moreover, when any actual case is brought by the Prosecution, a further admissibility assessment may take place. Assessing the state of domestic proceedings is an ongoing process and requires continued dialogue between the State and the Court, to ensure that the principle of complementarity is upheld with respect to the Court's authorized investigations and prosecutions (para. 99)." [569]

#### *4.2.3.2. Afghanistan*

An appeal by the Prosecutor against a decision of the Pre-Trial Chamber II on the scope of the investigation in the situation in Afghanistan was made on 05 April 2023[570]. The Prosecutor challenged the Pre-Trial Chamber's limitation of the investigation to crimes and parties that existed at the time of the request for authorization, and its qualification of the Islamic State-Khorasan

[568] Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf

[569] Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf

[570] Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation" | International Criminal Court (icc-cpi.int). See also, Pikis, Georghios M. *The Rome Statute for the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 07 Dec. 2010), pg. 50-57. doi: https://doi.org/10.1163/ej.9789004186132.i-344

Province as a new party to the conflict.[571] The Prosecutor argued that these errors disregard the Appeals Chamber's previous judgment on the same issue and affect the Court's jurisdiction and the Prosecutor's investigative powers.[572] The victims supported the Prosecutor's request to reverse and amend the decision of the Pre-Trial Chamber and to confirm the scope of the Court's jurisdiction as determined by the Appeals Chamber.[573] They also expressed their concerns about the delays and uncertainties caused by the Pre-Trial Chamber's decision and the Prosecutor's statement on prioritizing parts of the investigation.[574] The government of Afghanistan stated that it advocates for appropriate measures to serve justice and prevent future atrocities.

The Appeals Chamber explained that it will not defer to the Pre-Trial Chamber's legal interpretation, but will arrive at its own conclusions and determine whether the Pre-Trial Chamber misinterpreted the law or made factual errors.[575] The Appeals Chamber also considered that an appeal can be directed against part of a decision, if the challenged part impacts the clarity or understanding of the decision and its operative part.[576] The Appeals Chamber found that the language used in paragraph 59 of the Impugned Decision is ambiguous and creates uncertainty as to the precise scope of the Court's jurisdiction and the Prosecutor's investigation.[577] The Appeals Chamber recalled that it had already authorized the Prosecutor to commence an investigation in

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[571] Retrieved from doi: https://doi.org/10.1163/ej.9789004163089.i-1122. See also: Babaian, Sarah. *The International Criminal Court – An International Criminal World Court?* Springer eBooks, 2018. https://doi.org/10.1007/978-3-319-78015-3, Zaker Hossein, M. *Situation selection regime at the international criminal court: Law, policy, practice*. Doctoral Thesis, Tilburg University (2017) Intersentia. https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la

[572] Laucci, Cyril, eds. *The Annotated Digest of the International Criminal Court*, 2008, (Leiden, The Netherlands: Brill | Nijhoff, 15 Oct. 2010), pg. 414-417. doi: https://doi.org/10.1163/ej.9789004191686.i-796

[573] Nigro, Raffaella. "International Criminal Justice (2019)", *The Italian Yearbook of International Law* Online 29, 1 (2020): 305-330, doi: https://doi.org/10.1163/22116133-02901017.

[574] THE APPEALS CHAMBER, SITUATION IN THE REPUBLIC OF THE PHILIPPINES. Retrieved from https://www.courthousenews.com/wp-content/uploads/2023/07/Judgment-on-the-appeal-of-the-Republic-of-the-Philippines.pdf.

[575] Retrieved from https://www.courthousenews.com/wp-content/uploads/2023/07/Judgment-on-the-appeal-of-the-Republic-of-the-Philippines.pdf.

[576] Retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf

[577] Retrieved from https://doi.org/10.1163/ej.9789004191686.i-796 , see also, Rainey, B., Wicks, E. and Ovey, C. 2017. *The European Convention on Human*. Oxford: Oxford University Press. https://orca.cardiff.ac.uk/id/eprint/106327/

relation to alleged crimes committed in Afghanistan and other States Parties since 1 May 2003 and 1 July 2002 respectively, and that the Pre-Trial Chamber was bound by this determination.[578] The Appeals Chamber also found that the Pre-Trial Chamber erred in fact by referring to the Islamic State-Khorasan Province as an example of a new party to the conflict, as this group was explicitly mentioned in the Article 15 Request.[579] The Appeals Chamber therefore reversed and amends paragraph 59 of the Impugned Decision, and confirmed the scope of the Court's jurisdiction in the situation in Afghanistan as previously determined by its judgment.[580]

Referring to the Complementarity principle, On 08 October 2021, the Pre-Trial Chamber II[581] mentioned,

> "The Chamber notes that Article 18 of the Statute as a whole is at the heart of the complementarity regime which underpins the Statute and governs the relationship and the sharing of responsibilities between the Court and the States in the investigation and prosecution of the most serious crimes.[582] More specifically, Article 18(2) of the Statute, on which the Request is premised, encapsulates the idea of a process of dialogue, between the Court and the Prosecutor on the one hand, and the relevant State, from whom observations can and should be sought pursuant to Rule 55(2) of the Rules, on the other.[583] It is of the essence, for this dialogue to take place and the principle of complementarity to

[578] Vogel, Ryan. *Situation in the Islamic Republic of Afghanistan* (Int'l Crim. Ct. App. Chamber). International Legal Materials 60, no. 1 (2021): 30–52. doi:10.1017/ilm.2020.57.

[579] Global Rights Compliance. *Ukraine and the International Criminal Court* (updated). April 2021. https://www.asser.nl/media/794859/ukraine-and-the-icc.pdf.

[580] Bayefsky, Anne. *Situation in Palestine* (ICC- Pre-Trial Chamber). International Legal Materials 60, no. 6 (2021): 1038–1111. doi:10.1017/ilm.2021.28. s

[581] on Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor's 'Request to authorize resumption of investigation under article 18(2) of the Statute', https://www.legal-tools.org/decision/m81sm8. See also, Stahn, Carsten, and Göran Sluiter, eds. *The Emerging Practice of the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 10 Dec. 2008), pg. 31-53. doi: https://doi.org/10.1163/ej.9789004166554.i-774.

[582] Olásolo, Héctor. *The Triggering Procedure of the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 23 Sep. 2005), pg. 121-125. doi: https://doi.org/10.1163/9789047415749

[583] Retrieved from http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf

be orderly, meaningfully, and effectively implemented, that there be no uncertainty as to the representation and competent authorities of the concerned State. Contrary to what was stated by the Prosecutor, the Request cannot therefore be legally adjudicated without addressing the 'question of which entity actually constitutes the State authorities of [the State] since 15 August 2021'; rather, this question is central to the triggering of the procedure under Article 18(2) of the Statute."[584] (para. 16)

Also, on 24 February 2022, the Pre-Trial Chamber mentioned[585],

"The Chamber recalls that in its 8 October 2021 Decision it stated that 'Article 18 of the Statute […] is at the heart of the complementarity regime which underpins the Statute' and that 'it encapsulates the idea of a process of dialogue, between the Court and the Prosecutor on the one hand, and the relevant State, from whom observations can and should be sought pursuant to Rule 55(2) of the Rules [of Procedure and Evidence (the 'Rules')], on the other'.[586] In this context, the Chamber also stressed that the Application for resumption of investigation 'cannot […] be legally adjudicated without addressing the "question of which entity actually constitutes the State authorities of Afghanistan since 15 August 2021"; rather, this question is central to the triggering of the procedure under Article 18(2) of the Statute'."[587]

"Moreover, the Chamber considers that observations from a State for the purposes of Rule 55(2) of the Rules are sought in the context of the complementarity principle: accordingly,

[584] Retrieved from https://doi.org/10.1163/ej.9789004165311.i-602

[585] Order setting the schedule for the filing of submissions in the proceedings pursuant to article 18(2) of the Rome Statute and rule 55(2) of the Rules of Procedure and Evidence, CR2022_01551.PDF (icc-cpi.int). see also, Zakerhossein, M. *Situation selection regime at the international criminal court: Law, policy, practice*. Doctoral Thesis, Tilburg University (2017) Intersentia. https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la

[586] Retrieved from https://www.toaep.org/ps-pdf/38-qcci,

[587] Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf

> any government in place is the relevant entity to inform the Court on whether that particular State 'is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States' within the meaning of article 18(2) of the Statute."[588]

In the Decision setting the procedure pursuant to Rule 55(1) of the Rules of Procedure and Evidence (RoPE) following the Prosecutor's "Request to authorize" resumption of investigation under Article 18(2) of the Statute[589], the Pre-Trial Chamber mentioned[590],

> "The Chamber notes that Article 18 of the Statute as a whole is at the heart of the complementarity regime which underpins the Statute and governs the relationship and the sharing of responsibilities between the Court and the States in the investigation and prosecution of the most serious crimes.[591] More specifically, Article 18(2) of the Statute, on which the Request is premised, encapsulates the idea of a process of dialogue, between the Court and the Prosecutor on the one hand, and the relevant State, from whom observations can and should be sought pursuant to Rule 55(2) of the Rules, on the other.[592] It is of the essence, for this dialogue to take place and the principle of complementarity to be orderly, meaningfully and effectively implemented, that there be no uncertainty as to the representation and competent authorities of the concerned State.[593] Contrary to what was stated by the Prosecutor, the Request cannot therefore be legally adjudicated without

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[588] Meloni, Chantal, and Gianni Tognoni. *Is There a Court for Gaza?* T.M.C. Asser Press eBooks, 2012, pg. 470-485. https://doi.org/10.1007/978-90-6704-820-0. See also, https://doi.org/10.1017/CBO9780511863264.

[589] Retrieved from https://repository.essex.ac.uk/35122/1/Dr%20MC%20Uche%20Doctoral%20Thesis.pdf

[590] ICC Case Law Database | Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor's 'Request to authorise resumption of investigation under article 18(2) of the Statute' (legal-tools.org).

[591] Retrieved from doi: https://doi.org/10.1163/9789047415749

[592] Retrieved from http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf

[593] Van den Wyngaert, Christine, and Guy Stessens. *International Criminal Law*, (Leiden, The Netherlands: Brill | Nijhoff, 28 Feb. 2022), pg. 250-255. doi: https://doi.org/10.1163/9789004507869.

addressing the 'question of which entity actually constitutes the State authorities of [the State] since 15 August 2021'; rather, this question is central to the triggering of the procedure under Article 18(2) of the Statute."[594] (para. 16).

#### *4.2.3.3. Central African Republic*[595]

Mr Yekatom, accused of war crimes and crimes against humanity by the International Criminal Court[596], is a former militia leader in the Central African Republic.[597] He challenged the admissibility of his case, arguing that the national authorities were willing and able to prosecute him in their own Special Criminal Court.[598] His challenge was rejected by the Trial Chamber and he appealed to the Appeals Chamber.[599] The Appeals Chamber unanimously confirmed the decision of the Trial Chamber[600], rejecting Mr Yekatom's admissibility challenge, finding that there was no ongoing investigation or prosecution against him before the Special Criminal Court, Bangui.[601] "The Trial Chamber noted that, based on the Appeals Chamber's legal decisions, the issue of whether a State was willing or able to investigate or prosecute arises only when there are or were investigative or prosecutorial activities by a State with jurisdiction. In the absence of such activities, a case is admissible before the Court (inactivity test). Consequently, the Trial Chamber rejected the admissibility challenge because it was undisputed that the authorities of the CAR were not investigating and/or prosecuting Mr. Yekatom at the time he filed his Admissibility

[594] Wyngaert, *International Criminal Law*, 250-255.
[595] https://www.legal-tools.org/doc/mpqdbm/pdf/.
[596] retrieved from https://internationalcrimesdatabase.org/home/newsarchive.
[597] retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf
[598] retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf
[599] retrieved from https://doi.org/10.1163/9789004479616
[600] retrieved from https://doi.org/10.1163/9789004447462
[601] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction*, 2010. Pg. 129. https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

Challenge."[602] The Trial Chamber also refused to adopt a sequential approach that would give the CAR an opportunity to start an investigation or prosecution against Yekatom within a fixed period of time. Yekatom appealed against the decision of the Trial Chamber, claiming that it violated the principle of complementarity and the rights of the accused.[603] The Prosecutor and the Victims responded to his appeal, defending the decision of the Trial Chamber.[604] Therefore, The Appeals Chamber unanimously confirmed the decision of the Trial Chamber and dismissed Yekatom's appeal.[605] The Appeals Chamber held that the Trial Chamber correctly applied the inactivity test and did not err in its assessment of the evidence.

The Appeals Chamber also rejected the sequential approach proposed by Yekatom, finding that it was inconsistent with the Statute and the case law of the Court.[606] "As for Mr. Yekatom's specific request for the Trial Chamber to invite the CAR to make observations, the Trial Chamber decided that further observations were unnecessary to decide the Admissibility Challenge. The Trial Chamber made its decision based on two factors: (i) the Defense admitted that there are currently no proceedings against Mr. Yekatom before the SCC, and (ii) based on the available information, there was no indication that the CAR authorities have any intention to investigate or prosecute Mr. Yekatom. In relation to the second factor, the Trial Chamber pointed out that since referring the situation in its territory to the Court and subsequently implementing the Court's arrest warrant against Mr. Yekatom, the Central African Republic has not, to date, challenged the Court's jurisdiction. In addition, the Trial Chamber noted that in the context of the recent interim release proceedings in which the CAR had made observations, nothing therein indicated that the CAR

[602] Para 23, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01261.PDF.
[603] Retrieved from http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf.
[604] Salinas Cerda, Ania Carola del Carmen. 2015. *Guarding the Gates: The Essential Role of a Robust Pre-Trial Chamber in Ensuring the International Criminal Court's Impartiality, Independence and Legitimacy*. PhD thesis, University of Glasgow, pg. 178-179. https://eleanor.lib.gla.ac.uk/record=b3109688 , see also Calvo-Goller, Karin. *The Trial Proceedings of the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 01 Dec. 2005), pg. 126-130. doi: https://doi.org/10.1163/ej.9789004149311.i-564.
[605] Retrieved from https://doi.org/10.1163/ej.9789004160552.i-776
[606] Retrieved from https://doi.org/10.1163/ej.9789004166554.i-774

authorities intend to challenge the Court's jurisdiction or to investigate or prosecute Mr. Yekatom in the future."[607] The Appeals Chamber further held that the Trial Chamber did not violate Yekatom's rights by not inviting the CAR to submit its views on the admissibility challenge.[608]

Referring to the complementarity principle, on the publicly redacted version of 'Judgment on Yekatom's appeal against Trial Chamber V's "Decision on the Yekatom Defence's Admissibility Challenge'[609], the Trial Chamber mentioned,

> "When a suspect or accused person challenges admissibility on the basis of complementarity, that person bears the burden of demonstrating that the case is inadmissible and is expected to identify which State or States may be genuinely exercising their jurisdiction (para. 44)."[610]

#### *4.2.3.4. Sudan*[611]

The Pre-Trial Chamber II confirmed the charges against Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb)[612], a former Sudanese militia leader accused of war crimes and crimes against humanity in Darfur, Sudan. The Chamber confirmed that the suspect and the man known as Ali Kushayb are the same person, based on various sources of evidence and the suspect's own

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607 Para 24, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01261.PDF.

608 retrieved from https://doi.org/10.1163/9789004271753

609 retrieved from https://repository.essex.ac.uk/35122/1/Dr%20MC%20Uche%20Doctoral%20Thesis.pdf, also, retrieved from https://www.icc-cpi.int/court-record/icc-01/14-01/18-493.

610 https://www.legal-tools.org/clddoc/6256c2e7558ec96685a3933f/ , see also, Bates, Elizabeth Stubbins. *The International Criminal Court Appeals Chamber: Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali: Situation in Kenya, Prosecutor V. Muthaura, Kenyatta & Ali (ICC)*. International Legal Materials 51, no. 1 (2012): 17–43. doi:10.5305/intelegamate.51.1.0017.

611 CR2021_06131.PDF (icc-cpi.int).

612 retrieved from https://researchspace.ukzn.ac.za/bitstream/handle/10413/18141/Ashiru_Margaret_Olatokunbo_2018.pdf?sequence=1&isAllowed=y. See also http://www.africaresearchcentre.eu/files/JusticeDeniedText.pdf.

surrender.[613] The Chamber also found that there was sufficient evidence to establish that an armed conflict and an attack on the civilian population took place in Darfur, and that the suspect played a significant role in the commission of the crimes as a direct perpetrator, co-perpetrator, or instigator.[614] The Chamber confirmed 31 counts of war crimes and crimes against humanity, including murder, rape, torture, persecution, and pillaging, committed by the suspect and/or other militia members in Kodoom, Bindisi, Mukjar, and Deleig and surrounding areas.[615] The Chamber relied on the testimonies of victims[616], witnesses, and experts, as well as documentary and other material evidence, to establish the facts and circumstances of the crimes.[617] The Chamber explained the nature and purpose of the confirmation of charges procedure, the evidentiary standard and the burden of proof applicable at this stage, and the individual criminal responsibility of the suspect under Article 25 of the Rome Statute.[618] The Chamber also addressed the objections and observations raised by the defence and the legal representatives of victims and rejected the Defence's claims of mistake of law or fact, duress, and superior orders as grounds to exclude the suspect's responsibility.[619] The Chamber also decided to suspend the time limit for filing a leave to appeal until the translation of the decision into Arabic is notified.[620]

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[613] Kuczyńska, Hanna. *The Accusation Model before the International Criminal Court*. Springer eBooks, 2015, pg. 195-198. https://link.springer.com/book/10.1007/978-3-319-17626-0.

[614] Marchuk, Iryna. *The Fundamental Concept of Crime in International Criminal Law*. Springer eBooks, 2014. https://doi.org/10.1007/978-3-642-28246-1. Also, retrieved from https://researchspace.ukzn.ac.za/bitstream/handle/10413/18141/Ashiru_Margaret_Olatokunbo_2018.pdf?sequence=1&isAllowed=y

[615] Beigbeder, Yves. *International Criminal Tribunals*. Palgrave Macmillan UK eBooks, 2011. Pg. 85-106. https://doi.org/10.1057/9780230305052.

[616] retrieved from https://doi.org/10.1163/9789004377196

[617] retrieved from https://doi.org/10.1057/9780230305052.

[618] Guellai, Amna, and Enrique Carnero Rojo. "INTERNATIONAL CRIMINAL COURTS ROUND-UP." *Yearbook of International Humanitarian Law* 10 (2007): 133–197. doi:10.1017/S138913590700133X.

[619] retrieved from https://doi.org/10.1163/9789004304475

[620] retrieved from https://doi.org/10.1163/ej.9789004163119.i-673

On the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled "Decision on the Defence Request for Interim Release"[621], Judge Luz del Carmen Ibáñez Carranza argued that regulation 51 imposes a general obligation on the Pre-Trial Chamber to seek observations from the host State and/or the State on whose territory release is sought, regardless of whether the chamber is minded to grant interim release or not.[622] The judge relies on the "plain meaning" of the term 'shall', the "consistency" of the different language versions of the regulation, and the principles of the VCLT[623] to support her interpretation.[624] The judge highlights the fundamental difference between the concept of consultations, which are executive procedures to ensure proper execution of an order, and the concept of observations, which are informative views and concerns to enable the chamber to take an informed decision on interim release.[625] The judge notes that the appellant wrongly refers to consultations, while regulation 51 clearly uses the term observations. The judge considers that seeking observations prior to taking a decision on interim release is an essential procedural step in light of the principle of **complementarity**, as enshrined in Articles 1 and 17 of the Statute, and the system of State cooperation established by the Statute.[626] The judge explains that observations allow a State to provide, and the Chamber to consider, a wide range of information that is crucial for an informed and reliable decision, such as the presence of supporters, witnesses or victims, matters of security, or issues that might obstruct the investigations. The judge concludes that the

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[621] Le Floch, Guillaume, Marie Lemey, and Lucie Paiola. *Procedural Developments at the International Criminal Court* (2020), in *The Law & Practice of International Courts and Tribunals* 20, 3 (2021): 611-623, doi: https://doi.org/10.1163/15718034-12341459

[622] retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf, and https://doi.org/10.1163/15718034-12341459.

[623] Vienna Convention on the Law of Treaties

[624] O'Sullivan, Eugene, and John E. Ackerman. *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, (Leiden, The Netherlands: Brill | Nijhoff, 15 Nov. 2021), pg. 317-319. doi: https://doi.org/10.1163/9789004502796.

[625] retrieved from https://doi.org/10.1163/ej.9789004191686.i-796

[626] Bates, Elizabeth Stubbins. *The International Criminal Court Appeals Chamber: Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali: Situation in Kenya, Prosecutor V. Muthaura, Kenyatta & Ali (ICC)*. International Legal Materials 51, no. 1 (2012): 17–43. doi: 10.5305/intelegamate.51.1.0017. Also, https://doi.org/10.1163/ej.9789004163089.i-1122

Pre-Trial Chamber erred in law by failing to seek observations from the host State before deciding on the request for interim release.[627] However, the judge agrees with the outcome of the Judgment to reject the appeal and confirm the Impugned Decision, as she considers that the error did not materially affect the Impugned Decision, which was based on factors that are independent from any observations that could have been provided by the host State.[628]

#### 4.2.3.5. *Union of Comoros*[629]

The International Criminal Court (ICC) conducted a preliminary examination of the situation on the registered vessels of the Union of Comoros, the Hellenic Republic, and the Kingdom of Cambodia regarding the alleged crimes committed by the Israeli Defence Forces (IDF) on 31 May 2010, when they intercepted and took over a humanitarian aid flotilla bound for Gaza, especially one of the vessels, the Mavi Marmara.[630] The Prosecutor decided not to open an investigation into the alleged war crimes committed by the Israeli Defence Forces (IDF) during the boarding of the Mavi Marmara as there was no potential case that was sufficiently grave to be admissible before the Court, according to Articles 17(1)(d) and 53(1)(b) of the Statute[631].

The Prosecutor's decision followed several rounds of litigation before the Pre-Trial Chamber and the Appeals Chamber, which clarified the scope and nature of the Prosecutor's

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[627] THE APPEALS CHAMBER, SITUATION IN THE REPUBLIC OF THE PHILIPPINES. Retrieved from https://www.courthousenews.com/wp-content/uploads/2023/07/Judgment-on-the-appeal-of-the-Republic-of-the-Philippines.pdf., see also, https://doi.org/10.1163/ej.9789004166554.i-774.

[628] retrieved from https://doi.org/10.1163/22116133-03101019.

[629] https://www.icc-cpi.int/news/situation-registered-vessels-comoros-greece-and-cambodia-icc-appeals-chamber-rejects, also read CR2019_07299.PDF (icc-cpi.int).

[630] retrieved from https://doi.org/10.1093/he/9780198727644.001.0001. See also, Beigbeder, Yves. *International Criminal Tribunals*. Palgrave Macmillan UK eBooks, 2011. https://doi.org/10.1057/9780230305052; Fergal Gaynor, Katerina I. Kappos, Patrick Hayden, *Current Developments at the International Criminal Court*, Journal of International Criminal Justice, Volume 14, Issue 3, July 2016, Pages 689–737, https://doi.org/10.1093/jicj/mqw028

[631] retrieved from https://eleanor.lib.gla.ac.uk/record=b3109688. Also, https://www.toaep.org/nas-pdf/5-dittrich-heinze. For more, Nigro, Raffaella. *International Criminal Justice* (2019), The Italian Yearbook of International Law Online 29, 1 (2020): 305-330, doi: https://doi.org/10.1163/22116133-02901017.

obligation to reconsider its determination of gravity under Article 53(3)(a) of the Statute and rule 108(3) of the Rules of Procedure and Evidence.[632] The Prosecutor applied the legal interpretations of the majority of the Pre-Trial Chamber in 2015, as directed by the Appeals Chamber, but retained its discretion to evaluate the facts and assign weight to the relevant factors for the gravity assessment. The Prosecutor reconsidered its reasoning with regard to the likely objects of any investigation, the scale of the identified crimes, the nature of certain identified crimes, the impact of the identified crimes, and the manner of commission of the identified crimes.[633] The Prosecutor explained how it took into account the legal analysis of the Pre-Trial Chamber and the information made available, and how it reached its conclusions on each issue.[634]

The Prosecutor weighed the five issues identified by the Pre-Trial Chamber and concluded that there was no potential case of sufficient gravity so as to be admissible before the Court.[635] The Prosecutor emphasized that it conducted a careful analysis, in good faith, within the legal framework as it has been elaborated in this situation.[636]

The Prosecutor accepted the possibility that the identified crimes of willful killing, willful causing of serious injury, and outrages upon personal dignity were committed according to a plan among some but not necessarily all of the IDF troops who carried out the boarding of the Mavi Marmara.[637] This was based on the Appeals Chamber's direction to apply the legal interpretations

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[632] retrieved from https://www.e-elgar.com/shop/gbp/the-elgar-companion-to-the-international-criminal-court-9781785368226.html, also, Senier, Amy. *International Criminal Court: Prosecutor v. Katanga and Chui*. International Legal Materials 49, no 1 (2010), 45–70. doi:10.5305/intelegamate.49.1.0045.

[633] retrieved from doi:10.1017/9781108525343.

[634] retrieved from https://doi.org/10.1163/ej.9789004163089.i-1122.

[635] Guellali, Amna, and Enrique Carnero Rojo. "INTERNATIONAL CRIMINAL COURTS ROUND-UP." *Yearbook of International Humanitarian Law* 11 (2008): 255–372. doi:10.1017/S1389135908002559, also, retrieved from https://internationalcrimesdatabase.org/home/newsarchive.

[636] Moeckli, Daniel, Sangeeta Shah, and Sandesh Sivakumaran, eds. *International Human Rights Law*. 4th ed. Oxford: Oxford University Press, 2023, pg. 585-600. https://global.oup.com/ukhe/product/international-human-rights-law-9780198860112?q=moeckli&cc=gb&lang=en.

[637] Retrieved from https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf, also, Margaret M. deGuzman, James E. Beasley and Valerie Oosterveld (editors). *Introduction: Narratives and Counter-Narratives of the International Criminal Court*. In *Elgar Companion to International Criminal Court*. Edward Elgar Publishing, Temple University Legal Studies Research Paper No. 2021-42 (2020). https://www.e-elgar.com/shop/gbp/the-elgar-companion-to-the-

of the majority of the Pre-Trial Chamber, which required the Prosecutor to consider all information that is not manifestly false, even if it is unclear or conflicting.[638] The Prosecutor revised its position on the timing of the use of live fire by the IDF and acknowledged that live rounds may have been fired on a more than isolated and exceptional basis in the period of approximately three minutes before the IDF attempted for the second time to board the Mavi Marmara. This possibility was taken into account in assessing the existence of a plan. The Prosecutor maintained its view that the alleged mistreatment of the Mavi Marmara passengers on Israeli territory after the boarding is not relevant to the existence of a plan[639], as there was no sufficient nexus between the perpetrators of the alleged conduct on Israeli territory and the perpetrators of the identified crimes on the Mavi Marmara. The Prosecutor also noted that it is not obliged to accept the factual conclusions drawn by the majority of the Pre-Trial Chamber on this issue, as they are not based on the information available.[640] The Prosecutor took into account other factors that the majority of the Pre-Trial Chamber considered to be relevant, such as the degree of force used in taking control of the Mavi Marmara, the alleged conduct to conceal the identified crimes, and the unique occurrence of the identified crimes aboard the Mavi Marmara.[641] However, the Prosecutor found that these factors do not add significantly to the conclusion concerning the possible existence of a plan or policy, nor do they require greater weight to be given to this factor in assessing the gravity of the potential case(s) arising from this situation.[642]

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international-criminal-court-9781785368226.html, also, Lubin, Asaf, *Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations* (2018). Books & Book Chapters by Maurer Faculty, pg. 219. https://www.repository.law.indiana.edu/facbooks/219.

[638] "Situation in the Central African Republic; Prosecutor v. Bemba; ('Bemba Case')." *International Law Reports* 199 (2022): 1–562. doi:10.1017/ilr.2022.8.

[639] retrieved from https://doi.org/10.1163/9789004447462.

[640] retrieved from https://doi.org/10.1007/978-3-319-46780-1, and https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[641] retrieved from https://doi.org/10.1163/ej.9789004160552.i-776

[642] retrieved from https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la, also, https://www.toaep.org/ps-pdf/38-qcci.

In summary, the Prosecutor's response to the Pre-Trial Chamber's request to reconsider the decision not to investigate the alleged crimes committed by the Israeli Defence Forces (IDF) on the Mavi Marmara vessel in 2010 was a detailed and nuanced assessment of the legal and factual issues involved.[643] The Prosecutor accepted some of the Chamber's directions and clarifications but also maintained its discretion to evaluate the facts and assign weight to the relevant factors for the gravity assessment.[644] The Prosecutor's response was likely to be the subject of further litigation and debate, as the Chamber and the parties will have to assess whether the Prosecutor has complied with the Chamber's directions and whether the Prosecutor's decision not to investigate was reasonable and lawful.[645]

#### *4.2.3.6. Libya*[646]

In the case of Saif Al-Islam Gaddafi and Abdullah Al-Senussi[647], the Libyan Government argued that it is actively investigating and prosecuting Gaddafi for the same crimes as those before the ICC and that it is willing and able to conduct a genuine and fair trial.[648] It also provided information on the progress of the investigation, the charges contemplated, the evidence collected, and the rights and protections of the accused under Libyan law. In the admissibility challenge, the Prosecutor, the Opposition, the OPCV, and the *amici curiae* provided their submission on the

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643 retrieved from https://doi.org/10.1093/he/9780198727644.001.0001.

644 retrieved from http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf

645 Weatherall, Thomas. *Prosecutor v. Omar Al-Bashir, Judgment in the Jordan Referral Re Al-Bashir Appeal (ICC)*. International Legal Materials 58, no. 6 (2019): 1177–1233. doi:10.1017/ilm.2019.50. Also *Ashiru, Margaret Olatokunbo. Seeking the best forum to prosecute gender-based violence in armed conflict situations in Africa*. PhD thesis, University of KwaZulu-Natal, 2017. Pg. 508. https://researchspace.ukzn.ac.za/bitstream/handle/10413/18141/Ashiru_Margaret_Olatokunbo_2018.pdf?sequence=1&isAllowed=y.

646 legal-tools.org/doc/339ee2/pdf/.

647 ICC Case Law Database | Decision on the admissibility of the case against Saif Al-Islam Gaddafi (legal-tools.org)

648 Owuor, Milton Odhiambo. *The International Criminal Court and Positive Complementarity: Legal and Institutional Framework*. Doctoral thesis, University of Pretoria, 2017, pg. 180-189. http://www.icla.up.ac.za/images/about/staff/tladi/Owuor_International_2018.pdf

admissibility challenge, the burden and standard of proof, the type and quality of evidence, and the willingness and ability of Libya to investigate and prosecute Gaddafi.[649] It reported the additional information and evidence provided by Libya after the admissibility hearing in October 2012, in response to the requests and questions of the Chamber.[650]

The main points of the arguments were:

- The admissibility of the case depended on whether Libya was investigating or prosecuting the same case as the ICC, which involved the same person and substantially the same conduct.[651]

- The conduct referred to the alleged crimes against humanity of murder and persecution committed by Gaddafi and the security forces under his control against civilian demonstrators and dissented in Libya from 15 February 2011 to at least 28 February 2011.[652]

- The legal characterization of the conduct was not determinative of the admissibility challenge. Libya could prosecute Gaddafi for ordinary crimes under national law, as long as the material elements of the crimes were covered.[653]

- The parties and participants have different views on the burden and standard of proof for Libya to show that it was investigating or prosecuting the same case as the ICC. The

[649] retrieved from https://www.bloomsbury.com/uk/justice-for-crimes-against-humanity-9781841135687/, also see http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf.
[650] retrieved from https://eleanor.lib.gla.ac.uk/record=b3109688.
[651] retrieved from https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.
[652] retrieved from https://doi.org/10.1007/978-3-319-24016-9, also Frulli, Micaela. *Some Reflections On The Functional Immunity Of State Officials*, In the *Italian Yearbook of International Law* Online 19, 1 (2009): 91-99, doi: https://doi.org/10.1163/22116133-90000121.
[653] retrieved from https://www.iclklamberg.com/Statute.htm.

> Chamber would assess the evidence provided by Libya and determine whether it was taking concrete and progressive steps to ascertain Gaddafi's responsibility.[654]

Libya claimed that it is investigating and prosecuting Gaddafi for the same conduct as that alleged by the ICC Prosecutor and that it was willing and able to do so.[655] Libya provides various documents, witness statements, and intercepts as evidence of its national investigation. The Prosecutor, the Defence, and the Office of Public Counsel for Victims (OPCV) contested Libya's admissibility challenge and argued that Libya has failed to provide sufficient and reliable evidence to demonstrate that it is investigating the same case as the ICC.[656] They raised concerns about the scope, specificity, probative value, and reliability of the evidence submitted by Libya, as well as the human rights situation and the lack of control over Gaddafi by the Libyan authorities.[657]

The Chamber provided that Libya has shown that it is taking steps to investigate Gaddafi's criminal responsibility, but that it has not sufficiently demonstrated that it is investigating the same conduct as that alleged in the ICC case.[658] The Chamber also found that the Libyan legislation might sufficiently capture Gaddafi's conduct, but that some aspects of the crimes charged by the ICC were not covered by the Libyan investigation. The Chamber concludes that the case against Gaddafi is admissible before the ICC.[659] In the case of Saif Al-Islam Gaddafi, Libya unsuccessfully

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[654] retrieved from https://doi.org/10.1163/9789004271753. Also Guellali, Amna, and Enrique Carnero Rojo. *International criminal courts round-up*. In the *Yearbook of International Humanitarian Law* 11 (2008): 255–372. doi:10.1017/S1389135908002559.

[655] retrieved from https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la. Also read DOI: 10.1017/CBO9780511863264.

[656] retrieved from https://doi.org/10.1007/978-3-319-24016-9. Also NSEREKO, DANIEL. *The ICC and Complementarity in Practice*. Leiden Journal of International Law 26, no. 2 (2013): 427–47. doi:10.1017/S0922156513000101.

[657] THE APPEALS CHAMBER, SITUATION IN THE REPUBLIC OF THE PHILIPPINES. Retrieved from https://www.courthousenews.com/wp-content/uploads/2023/07/Judgment-on-the-appeal-of-the-Republic-of-the-Philippines.pdf, also see https://doi.org/10.1163/9789004447462.

[658] Bates, Elizabeth Stubbins. *The International Criminal Court Appeals Chamber: Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali: Situation in Kenya, Prosecutor V. Muthaura, Kenyatta & Ali (ICC)*. International Legal Materials 51, no. 1 (2012): 17–43. doi:10.5305/intelegamate.51.1.0017.

[659] retrieved from https://doi.org/10.1163/9789004322097

challenged the admissibility of the case at the ICC based on the principle of complementarity.[660] The Pre-Trial Chamber I of the ICC found that Libya had not sufficiently demonstrated that it was investigating the same conduct as that alleged in the ICC case, but that it was taking steps to investigate Mr Gaddafi's criminal responsibility.[661] The Appeals Chamber of the ICC confirmed the admissibility of the case against Saif Al-Islam Gaddafi before the Court and rejected his appeal against the Pre-Trial Chamber I's decision dismissing his challenge to the admissibility of this case.[662] The Appeals Chamber found that the Libyan judgment against Gaddafi was rendered in absentia and thus could not be considered final under Libyan law. The Appeals Chamber also agreed with Pre-Trial Chamber I's decision that Libyan Law No. 6 (2015) in respect of amnesty is not applicable to the crimes for which Gaddafi was convicted by the Tripoli Court.[663]

#### *4.2.3.7. Kenya*[664]

In the case of the *Prosecutor v. William Samoei Ruto et el.*, the defendants were suspected of being involved in the crimes against humanity committed during the post-election violence in Kenya in 2007-2008.[665] The Government of Kenya filed an application challenging the admissibility of the case pursuant to Article 19(2)(b) of the Rome Statute.[666] The Government argued that it has the capacity and willingness to investigate and prosecute the case domestically and that it has

[660] Saif al-Islam Gaddafi | Coalition for the International Criminal Court (coalitionfortheicc.org).
[661] Saif Al-Islam Gaddafi case: ICC Appeals Chamber confirms case is admissible before the ICC | International Criminal Court (icc-cpi.int). See also, http://www.icla.up.ac.za/images/about/staff/tladi/Owuor_International_2018.pdf.
[662] Saif Al-Islam Gaddafi case: ICC Appeals Chamber confirms case is admissible before the ICC | International Criminal Court (icc-cpi.int), also retrieved from https://internationalcrimesdatabase.org/home/newsarchive, See also, 531, http://eprints-phd.biblio.unitn.it/3569/1/Thesis.pdf.
[663] Retrieved from legal-tools.org/doc/dbb0ed/pdf/.
[664] retrieved from https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.
[665] Newton, Michael A. *Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations*. Israel Law Review 54, no. 2 (2021): 143–73. doi:10.1017/S0021223720000278. Also see, https://repository.essex.ac.uk/35122/1/Dr%20MC%20Uche%20Doctoral%20Thesis.pdf.
[666] retrieved from https://www.iclklamberg.com/Statute.htm.

undertaken various constitutional, judicial, and institutional reforms to ensure the effectiveness and impartiality of the national proceedings.[667] The Government also requested an oral hearing and the assistance of the Court in obtaining the evidence collected by the Prosecutor. The Prosecutor and the Office of Public Counsel for Victims (OPCV) opposed the admissibility challenge and claimed that the Government has not shown any genuine investigations or prosecutions against the same persons and conduct as those before the Court.[668] The Defence of the suspects supported the admissibility challenge and reserved their right to challenge the admissibility at a later stage.[669] The Pre-Trial Chamber rejected the challenge and determined that the case was admissible based on the principles of complementarity, gravity and same person-same conduct.[670]

By referring to the principle of complementarity, the Chamber held[671],

> "The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so, as explicitly stated in the Statute's preambular paragraph 6. However, it should be borne in mind that a core rationale underlying the concept of complementarity aims at "strik[ing] a balance between safeguarding the primacy of domestic proceedings vis-à-vis the [...] Court on the one hand, and the goal of the Rome

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667 retrieved from https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la.

668 NSEREKO, DANIEL. *The ICC and Complementarity in Practice*. Leiden Journal of International Law 26, no. 2 (2013): 427–47. doi:10.1017/S0922156513000101.

669 Newton, Michael A. *Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations*. Israel Law Review 54, no. 2 (2021): 143–73. doi:10.1017/S0021223720000278., also https://www.iclklamberg.com/Statute.htm.

670 Le Floch, Guillaume, Marie Lemey, and Lucie Paiola. *Procedural Developments at the International Criminal Court (2020)*, In the *Law & Practice of International Courts and Tribunals* 20, 3 (2021): 577-623, doi: https://doi.org/10.1163/15718034-12341459.

671 retrieved from https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la

Statute to 'put an end to impunity' on the other hand. If States do not [...] investigate [...], the [...] Court must be able to step in". Therefore, in the context of the Statute, the Court's legal framework, the exercise of national criminal jurisdiction by States is not without limitations. These limits are encapsulated in the provisions regulating the inadmissibility of a case, namely Articles 17-20 of the Statute (para. 44)."[672]

"The Chamber has previously stated that the admissibility test envisaged in Article 17 of the Statute has two main limbs: (i) complementarity [Article 17(1)(a)(b)(c) of the Statute]; and (ii) gravity [Article 17(1)(d) of the Statute] (para. 47)."[673]

"With respect to the first limb (complementarity), the Chamber underscores that it concerns the existence or absence of national proceedings. Article 17(1)(a) of the Statute makes clear that the Court "shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". In its judgment of 25 September 2009, the Appeals Chamber construed Article 17(1)(a) of the Statute as involving a twofold test."[674] (para. 50)

#### *4.2.3.8. Georgia*[675]

The Pre-Trial Chamber I authorized the Prosecutor to investigate the situation in Georgia between 1 July 2008 and 10 October 2008, for war crimes and crimes against humanity allegedly committed

[672] ICC Case Law Database | Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (legal-tools.org)
[673] ICC Case Law Database | Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (legal-tools.org)
[674] ICC Case Law Database | Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (legal-tools.org)
[675] legal-tools.org/doc/a3d07e/pdf/

in and around South Ossetia, on the conflict between Georgia and the Russian Federation, involving South Ossetian and Abkhaz forces and irregular armed groups, which resulted in civilian casualties, displacement, destruction of property and attacks on peacekeepers.[676] Based on the request and the supporting material provided by the Prosecutor concludes that there was a reasonable basis to believe that war crimes and crimes against humanity have been committed by South Ossetian forces against ethnic Georgians and that the potential cases were admissible and in the interests of justice.[677] The Chamber found that the Russian authorities have taken some steps to ascertain the criminal responsibility of those involved, but also noted some reasonable doubts and limitations in their investigations.[678]

The Chamber addressed the two integral elements of case admissibility before the Court, as outlined in Article 17 – **complementarity and gravity**. At this juncture, the Chamber deemed the complementarity assessment necessitates an evaluation of whether any State has undertaken or conducted domestic proceedings related to the individuals or groups, as well as the alleged crimes apparent from the available information. These proceedings collectively would constitute the subject of investigations and potentially form the basis for cases before the Court. If (some of) these potential cases remain uninvestigated or unprosecuted by national authorities, the criterion stipulated in Article 53(1)(b) of the Statute, concerning complementarity, is deemed fulfilled.[679]

The Chamber decided not to make a final determination on the admissibility of these potential cases at this stage, but to allow the Prosecutor to conduct its own investigation and review the situation later if needed.[680] The Chamber also assessed the gravity of the potential cases arising

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[676] retrieved from http://amsdottorato.unibo.it/view/dottorati/DOT523/., also, retrieved from http://dspace.ashoka.edu.in/bitstream/123456789/8252/1/cambridge-core_an-introduction-to-the-international-criminal-court_9Nov2022.pdf.

[677] retrieved from https://doi.org/10.1163/9789004347687 , also Koskimies, Emanuela Piccolo. *Norm Contestation, Sovereignty, and (Ir)Responsibility at the International Criminal Court. Norm Research in International Relations*, 2022. https://doi.org/10.1007/978-3-030-85934-3.

[678] retrieved from https://doi.org/10.1163/9789004480032

[679] retrieved from https://doi.org/10.1163/ej.9789004186132.i-344, also, para. 39, legal-tools.org/doc/a3d07e/pdf/

[680] retrieved from https://doi.org/10.1163/ej.9789004163119.i-673

from the situation, taking into account the nature, scale, manner, and impact of the alleged crimes.[681] The Chamber authorized the Prosecutor to proceed with an investigation of crimes within the jurisdiction of the Court, committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008.[682] The Chamber clarified that the authorization extends to all crimes within the jurisdiction of the Court, as long as they are sufficiently linked to the situation.[683]

#### *4.2.3.9. Democratic Republic of Congo*[684]

In the case of *Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, the convicted Germain Katanga, accused of crimes against humanity in the DRC, requested the Trial Chamber to declare the case inadmissible before the ICC.[685] The Defence argued that the DRC has already investigated and prosecuted the same conduct that the ICC is pursuing.[686] The Defence also proposed alternative tests for determining the admissibility of the case. The Prosecutor, the Legal Representatives of the Victims, and the Office of Public Counsel for Victims responded to the Defence's motion and opposed the challenge to admissibility.[687] They support the "same conduct test" that has been applied by the Court and contend that the DRC has not taken any action in relation to the crimes committed in Bogoro on 24 February 2003.[688] The Chamber noted that the authorities of the DRC have not submitted any observations on the matter, despite being invited

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[681] retrieved from https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la

[682] retrieved from https://eleanor.lib.gla.ac.uk/record=b3109688, also see https://link.springer.com/book/10.1007/978-3-030-80177-9.

[683] retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf

[684] https://www.legal-tools.org/doc/e4ca69/pdf/

[685] retrieved from https://doi.org/10.1007/978-94-6265-335-1.

[686] retrieved from https://doczz.net/doc/2632062/the-system-of-the-international-criminal-court---unitn.

[687] retrieved from https://researchspace.ukzn.ac.za/bitstream/handle/10413/18141/Ashiru_Margaret_Olatokunbo_2018.pdf?sequence=1&isAllowed=y

[688] Senier, Amy. *International Criminal Court: Prosecutor v. Katanga and Chui*. International Legal Materials 49, no 1 (2010), 45–70. doi:10.5305/intelegamate.49.1.0045. Also, Ovo Catherine Imoedemhe, *The Complementarity Regime of the International Criminal Court*, Springer eBooks, 2017, https://doi.org/10.1007/978-3-319-46780-1.

to do so. The Chamber decided to convene a public hearing on 1 June 2009 with the attendance of the DRC authorities.[689]

The Chamber examined whether the motion is admissible under Article 19(4) of the Statute, which allows a challenge to admissibility only once and prior to or at the commencement of the trial. The Chamber considered the meaning and use of the term "commencement of the trial" in the Statute, the Rules, and the Regulations of the Court. For the purposes of Article 19 of the Statute, which deals with challenges to the admissibility of a case, the Statute provided a three-phase approach: before the confirmation of charges, all types of challenges are permissible; after the confirmation of charges, only challenges based on the *ne bis in idem* principle are allowed; and after the constitution of the Trial Chamber, challenges based on the *ne bis in idem* principle are permissible only in exceptional circumstances and with leave of the Trial Chamber.[690] The Prosecutor was not required to provide the Pre-Trial Chamber with information pertaining to the admissibility of the case when applying for a warrant of arrest unless it was decisive for the Pre-Trial Chamber to exercise its discretion to conduct a *proprio motu* review of the admissibility of the case.[691]

The Defence argued that the Prosecutor failed to provide the Pre-Trial Chamber with relevant information that indicated that the case was inadmissible.[692] The Chamber rejected this argument and found that the information was not decisive and did not affect the validity of the warrant of arrest.[693] The Chamber also explained that the complementarity principle does not mean

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689 Senier, *International Criminal Court,* 45–70.

690 BATROS, BEN. *The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC*. Leiden Journal of International Law 23, no. 2 (2010): 343–62. doi:10.1017/S0922156510000075., also from https://www.iclklamberg.com/Statute.htm. Also, Soler, Christopher. *The Global Prosecution of Core Crimes under International Law*. T.M.C. Asser Press eBooks, 2019. https://doi.org/10.1007/978-94-6265-335-1.

691 Senier, Amy. *International Criminal Court: Prosecutor v. Katanga and Chui*. International Legal Materials 49, no 1 (2010), 45–70. doi:10.5305/intelegamate.49.1.0045.

692 Senier, *International Criminal Court,* 45–70.

693 Retrieved from https://doi.org/10.1163/ej.9789004163089.i-1122, The Office of Public Counsel for Victims. *Representing Victims before the International Criminal Court: A Manual for legal representatives* (5th Ed.) International Criminal

that the ICC must defer to national jurisdictions in all cases, but only when the State is willing and able to prosecute the same case genuinely.[694] The Trial Chamber II held,

> "In fact, it appears to the Chamber that this second form of "unwillingness" is in line with the object and purpose of the Statute, in that it fully respects the drafters' intention "to put an end to impunity", while at the same time adhering to the principle of complementarity. This principle is designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so. As holder of this right, the State may waive it, just as it may choose not to challenge the admissibility of a case, even if there are objective grounds for it to make a challenge. (para. 78)."[695]

> "The Chamber considers, however, that the mere fact that a State is "unwilling", as described above, does not mean that the case is therefore ipso facto admissible. The Chamber must still determine its admissibility by ascertaining, as provided for under Article 17(1)I, whether the person has not been tried already for the same conduct by another court, or whether the case is of sufficient gravity to justify further action by the Court, as provided for under Article 17(1)(d). (para. 81)."[696]

The Chamber also rejected the idea of a "waiver of complementarity" by the State. The Chamber concluded that the DRC clearly expressed its unwillingness to prosecute Germain Katanga before its own courts, based on the statements of its representatives and the fact that it did not object to

Court (2019). https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition-rev1.pdf

[694] Retrieved from https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la, also see https://doi.org/10.1163/ej.9789004160552.i-776.

[695] https://www.legal-tools.org/doc/e4ca69/pdf/

[696] https://www.legal-tools.org/doc/e4ca69/pdf/

his surrender or challenge the admissibility of the case.[697] The Chamber therefore declares the case admissible before the ICC.

#### *4.2.3.10. Uganda*[698]

The case was referred to the ICC by Uganda in 2003, based on the alleged crimes committed by the Lord's Resistance Army (LRA) in Northern and Western Uganda.[699] In the case of the *Prosecutor V. Joseph Icony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, the ICC issued warrants of arrest for the four suspects in 2005, but none of them has been arrested or surrendered to the Court so far.[700] The Pre-Trial Chamber initiated proceedings under Article 19(1) of the Statute in 2008 to determine the admissibility of the case and invited observations from the Government of Uganda, the Prosecutor, the Defence, the victims, and the *amici curiae*.[701] The defence claimed that representing four different suspects without their consent or instructions violates the Code of Professional Conduct for Counsel and may harm their individual interests. The defence argues that Article 19(1) does not allow the Chamber to determine the admissibility of the case in the absence of the suspects, as this would infringe on their right to participate in the proceedings under Article 67(1) of the Statute.[702] The defence contends that the proceedings are unfair because the defence does not have access to the same information and resources as the Prosecutor and the

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[697] 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. Also, Zakerhossein, M. *Situation selection regime at the international criminal court: Law, policy, practice*. Doctoral Thesis, Tilburg University (2017) Intersentia. https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la

[698] Uganda | International Criminal Court (icc-cpi.int).

[699] Retrieved from https://doi.org/10.1163/9789004304475.

[700] Retrieved from https://doi.org/10.1057/9780230305052., also, Babaian, Sarah. *The International Criminal Court – An International Criminal World Court?* Springer eBooks, 2018. https://doi.org/10.1007/978-3-319-78015-3.

[701] Retrieved from https://doi.org/10.1163/9789004529939, and, https://pure.uva.nl/ws/files/8879321/Thesis.pdf.

[702] Retrieved from https://doczz.net/doc/2632062/the-system-of-the-international-criminal-court---unitn, also, https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf..

State, and because the Chamber has not provided clear criteria for exercising its discretion under Article 19(1). The defence maintained that the Chamber's decision on admissibility at this stage may prejudice the suspects' right to challenge the admissibility of the case in the future, especially if the decision is appealed and confirmed by the Appeals Chamber.[703]

#### *4.2.3.11. Burundi*[704]

In the case of the Republic of Burundi, the Prosecutor requested authorization from the Pre-Trial Chamber III[705] to investigate the situation in Burundi, where alleged crimes against humanity and war crimes have been committed since April 2015.[706] The Prosecutor filed her request under seal and *ex parte*, and provided additional information upon the Chamber's order. The Prosecutor asked the Chamber to issue its decision with the same level of classification as her request.[707] The Chamber agreed that the Republic of Burundi had no participatory rights at this stage, but disagreed that the victims' right to make representations were subject to the Prosecutor's duty to provide notice.[708] The Chamber held that the victims had an independent, direct avenue to make representations before the Chamber.[709] The Chamber examined whether the alleged crimes fell within the jurisdiction of the Court.[710] The Chamber found that there was a reasonable basis to believe that the contextual elements of crimes against humanity were met and that the crimes of murder, imprisonment, torture, rape, enforced disappearance, and persecution were committed as

[703] Retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf. Also, https://doi.org/10.1163/9789004479616.
[704] Burundi | International Criminal Court (icc-cpi.int)
[705] https://www.legal-tools.org/doc/44f5b3/pdf/
[706] Retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf, also https://www.toaep.org/ps-pdf/38-qcci.
[707] Retrieved from https://pure.uva.nl/ws/files/8879321/Thesis.pdf, also https://www.toaep.org/ps-pdf/38-qcci.
[708] Retrieved from https://researchspace.ukzn.ac.za/bitstream/handle/10413/18141/Ashiru_Margaret_Olatokunbo_2018.pdf?sequence=1&isAllowed=y
[709] Retrieved from https://doi.org/10.1163/9789004529939
[710] Guellai, Amna, and Enrique Carnero Rojo. *International Criminal Courts Round-Up*. Yearbook of International Humanitarian Law 10 (2007): 133–97. doi:10.1017/S138913590700133X.

part of a widespread and systematic attack against the civilian population.[711] The Chamber also found that there was a reasonable basis to believe that the crime of murder as a war crime was committed in the context of a non-international armed conflict in Burundi.[712]

The Chamber assesses whether the case is admissible based on the criteria of **complementarity** and **gravity**. Complementarity refers to the principle that the ICC is a court of last resort and that it should only intervene when national jurisdictions are unwilling or unable to investigate or prosecute the crimes within its jurisdiction.[713] The Chamber examined whether the national authorities have genuinely investigated or prosecuted the case and whether they are willing or able to do so in the future. Gravity refers to the seriousness of the crimes, and whether they are of sufficient magnitude to justify the intervention of the ICC.[714] In the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, the Pre-Trial Chamber initiated proceedings under Article 19(1) of the Statute to determine the admissibility of the case. The Prosecutor argued that the case is admissible, while the Defence questioned the legitimacy and timing of the proceedings and refrained from raising substantive arguments on admissibility. The Chamber found that the case met the criteria of admissibility under Article 17(1) of the Statute, namely that it was of sufficient gravity to justify further action by the Court and that it was not being investigated or prosecuted by a State with jurisdiction over it.[715] The Chamber also rejected the Defence's objections to the proceedings and found that the suspects' right to participate in the proceedings was not violated.[716]

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[711] Worboys, Jonathan P. *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (Int'l Crim. Ct.)" International Legal Materials 59, no. 2 (2020): 280–301. doi:10.1017/ilm.2020.18.

[712] Retrieved from https://eleanor.lib.gla.ac.uk/record=b3109688, also https://doi.org/10.1007/978-3-642-40689-8.

[713] https://academic.oup.com/book/10871/chapter/159089306.

[714] Retrieved from https://doi.org/10.1007/978-3-030-85934-3. also, https://doi.org/10.1163/ej.9789004163089.i-1122

[715] Retrieved from https://doczz.net/doc/2632062/the-system-of-the-international-criminal-court---unitn,

[716] Retrieved from doi:10.1017/9781108525343.

The Chamber considered whether there were any reasons to believe that an investigation would not serve the interests of justice, taking into account the gravity of the crime and the interests of victims.[717] It found no such reasons and notes that the victims overwhelmingly support the investigation. The Chamber set out the parameters of the authorized investigation. The Prosecutor requests to investigate the crimes committed in Burundi from 26 April 2015 to 26 October 2017, the date of Burundi's withdrawal from the Rome Statute.[718] The Chamber allowed the Prosecutor to extend her investigation to crimes committed before 26 April 2015 or after 26 October 2017, if they are related to the crimes within the jurisdiction of the Court and the contextual elements of the crimes are fulfilled.[719] The Chamber also allowed the Prosecutor to investigate other crimes against humanity, war crimes or genocide, based on the evidence, as long as they remain within the parameters of the authorized investigation.[720] Moreover, the Chamber allowed the Prosecutor to extend her investigation to crimes committed outside Burundi by Burundian nationals, if they are related to the crimes within the jurisdiction of the Court and the contextual elements of the crimes are fulfilled.[721] As the Burundi authorities were not willing or able genuinely to carry out investigations or prosecutions of the alleged crimes, and that the case was of sufficient gravity to justify further action by the Court, thus the Chamber authorized the Prosecutor to initiate the investigation.[722]

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[717] retrieved from https://pchrgaza.org/en/wp-content/uploads/2015/11/SubmissionICC-ProtectiveEdge.pdf.

[718] Retrieved from https://doi.org/10.1163/9789004529939. Also Worboys, Jonathan P. *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (Int'l Crim. Ct.). International Legal Materials 59, no. 2 (2020): 280–301. doi:10.1017/ilm.2020.18.

[719] Retrieved from https://doi.org/10.1007/978-3-319-78015-3, pg. 133-135.

[720] Retrieved from doi:10.1017/CBO9780511863264. See also, https://www.toaep.org/ps-pdf/38-qcci

[721] Retrieved from https://doi.org/10.1007/978-3-319-78015-3. Also, https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.

[722] 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. 40-45. https://www.fichl.org/fileadmin/fichl/FICHL_PS_23_web.pdf, also from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06720.PDF, also, https://research.tilburguniversity.edu/en/publications/situation-selection-regime-at-the-international-criminal-court-la.

#### *4.2.3.12. Israel / Palestine*

An investigation into possible crimes committed in Palestine is underway at the International Criminal Court.[723] This process began in 2015 when the State of Palestine[724] authorized the ICC to investigate crimes occurring there since June 13, 2014. In 2018, after officially joining the ICC[725], the State of Palestine[726] formally requested an investigation into specific crimes.[727] Based on the 2018 request, the ICC prosecutor launched the investigation in 2021 following a court ruling on legal matters.[728] The announcement of the investigation also included the results of a preliminary examination by the prosecutor.[729] In the context of the investigation into Israel, the Prosecutor's preliminary examination focused on three main events[730]:

- The 2014 Gaza conflict (Operation Protective Edge),
- Israel's settlement policy in the West Bank,

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[723] Palestine declares acceptance of ICC jurisdiction since 13 June 2014, Retrieved from https://www.icc-cpi.int/news/palestine-declares-acceptance-icc-jurisdiction-13-june-2014.

[724] Yaël Ronen, *Palestine in the ICC: Statehood and the Right to Self-determination in the Absence of Effective Control*, Journal of International Criminal Justice, Volume 18, Issue 4, September 2020, Pages 947–966, https://doi.org/10.1093/jicj/mqaa051.

[725] ICC welcomes Palestine as a new State Party, retrieved from https://www.icc-cpi.int/news/icc-welcomes-palestine-new-state-party.

[726] Roth, Clare. *Is Palestine Considered a State?* Deutsche Welle, November 6, 2023. https://www.dw.com/en/is-palestine-considered-a-state/a-67310981.

[727] Referral by the State of Palestine Pursuant to Articlesl3(a) and 14 of the Rome Statute, retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/2018-05-22_ref-palestine.pdf. See also, https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf.

[728] Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, retrieved from https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine. See more, *Situation in the State of Palestine, by Pre-Trial Chamber 1*, retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF. See more, Ambos, Kai. 2021. *Solid Jurisdictional Basis'? The ICC's Fragile Jurisdiction for Crimes Allegedly Committed in Palestine*. EJIL: Talk! March 2, 2021. https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine/.

[729] *Situation in Palestine: Summary of Preliminary Examination Findings*, retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf.

[730] *Report on Preliminary Examination Activities 2020*, retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf, pg. 55.

- The use of lethal force during the 2018-2019 Great March of Return protests on the Gaza border.

Following the decision to open an investigation, the Prosecutor sent notification letters (Article 18 letters) to both Israel and Palestine, however, Israel did not respond to the letter within the allotted one-month timeframe.[731] In May 2024, Karim Khan, the current ICC Prosecutor, requested arrest warrants against three Hamas leaders[732] – Yahya Sinwar[733], Mohammed Deif[734], and Ismail Haniyeh[735] and Israel's Prime Minister Benjamin Netanyahu and Israel's Minister of Defence Yoav Gallant, related to the ongoing situation in Palestine.[736] While this builds on the existing ICC investigation, it focuses on a new set of events compared to what former Prosecutor Bensouda pursued in 2021 and related to different temporal frameworks.[737] To note, the recent statement is convoyed by a "Report of the Panel of Experts in international law".[738]

The next step for the Pre-Trial Chamber I to decide on the arrest warrants. They will use Article 58 of the ICC Statute, which requires them to find "reasonable grounds to believe" the suspects committed the crimes or not.[739] To make this decision, the Chamber will focus solely on the evidence presented by the Prosecutor and won't consider whether the case is ultimately

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[731] Reuters. *ICC Letter Triggering Deferral Deadline Sent to Israel, Palestinians*. Reuters, March 19, 2021. https://www.reuters.com/article/idUSKBN2BB2A8/.

[732] Situation in the State of Palestine, https://www.icc-cpi.int/palestine.

[733] Head of Hamas in Gaza.

[734] Commander of Hamas's military wing.

[735] Head of Hamas's political bureau, based in Qatar

[736] International Criminal Court. *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine*, 2024. https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

[737] Shany, Yuval and Cohen, Amichai. *The Prosecutor's Circumvention of Article 18 Complementarity? A Flaw in the ICC's Palestine Investigation*. Just Security, June 2024. https://www.justsecurity.org/96296/icc-article-18-complementarity/.

[738] Report of the Panel of Experts in International Law (2024). https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf. Moreover, the ICJ advisory opinion States that Israel's continued presence in the Occupied Palestinian Territory is illegal and does not absolve it of its obligations under international law, including the law of occupation. Israel is responsible for its actions affecting the Palestinian population and other states, regardless of the legal status of the territory. The court found Israel's policies and practices to be in violation of international law, constituting a continuing unlawful act. Retrieved from https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-sum-01-00-en.pdf.

[739] Article 58. Rome Statute 1998, https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf.

admissible in court or, if there are ongoing investigations conducted by Israel. To counter the ICC, former Prosecutor Luis Moreno-Ocampo suggested Israel to initiate the investigation process as this will show their due diligence to the principles of international humanitarian law.[740] Therefore, to halt the ICC proceedings further[741], Israel or the accused individuals need to file a motion before the Pre-Trial Chamber I under Article 19 by challenging the admissibility of the case.[742]

After the arrest warrant[743], sharp reactions can be seen from different allies. Mr. Thomas Obel Hansen took a close look over the objection raised by the Allies[744], which are:

- It's unfair to compare Hamas and Israeli leadership. Their actions should be judged on their own merits.
- ICC doesn't have any jurisdiction over Israel, as Israel is not a party to the ICC, also Palestine cannot be considered as a State.
- Whether the ICC should pursue a case if there is a genuine investigation happening in Israel under the principle of complementarity, or not.
- There are questions about the fairness of the process leading to the arrest warrant requests.

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[740] Luis Moreno Ocampo. *As the ICC's First Chief Prosecutor, This Is How Israeli Leaders Can Still Avoid a Trial for War Crimes.* Haaretz.com. Haaretz, June 3, 2024. https://www.haaretz.com/opinion/2024-06-03/ty-article-opinion/.premium/as-iccs-first-chief-prosecutor-heres-how-israeli-leaders-can-avoid-war-crimes-trial/0000018f-c9d7-db12-a3ff-cbf7fe470000.

[741] Kevin Jon Heller. *An Overview of the Principle of Complementarity*, Opinio Juris. May 24, 2024. https://opiniojuris.org/2024/05/24/an-overview-of-the-principle-of-complementarity/.

[742] Toby Cadman and Tomas Hamilton. *Complementarity in the Palestine Situation at the ICC: Could Article 70 Conduct Render Israel 'Unwilling' to Investigate Genuinely.* OpinioJuris. June 7, 2024. https://opiniojuris.org/2024/06/07/complementarity-in-the-palestine-situation-at-the-icc-could-article-70-conduct-render-israel-unwilling-to-investigate-genuinely/.

[743] International Criminal Court. *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine*, 2024. https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

[744] Thomas Obel Hansen. *State Objections to the ICC Prosecutor's Request for Arrest Warrants in the Palestine Investigation,* EJIL Talk. May 27, 2024. https://www.ejiltalk.org/state-objections-to-the-icc-prosecutors-request-for-arrest-warrants-in-the-palestine-investigation/.

- Issuing arrest warrants now could hinder efforts towards a ceasefire, releasing hostages held by Hamas, and/or delivering humanitarian aid to Gaza, therefore the timing is counterproductive.

As of June 2024, it is now up to the Pre-Trial Chamber I to decide whether the issuance of warrants of arrest has met the necessary standard or not. In order to counter this proceeding, upholding the admissibility argument on the grounds of the complementarity principle is the only way out, where Israel can prove that they are *willing* and *able* to investigate [and prosecute] the alleged perpetrators for the same criminal conduct, subjected to ICC Statute, by following *same person-same conduct* principle.[745]

### 4.3. Evaluation

Attempts to prosecute those responsible for grave human rights breaches in national courts have given rise to a number of legal problems.[746] Universal jurisdiction is one of the important issues. Even after adopting the Rome Statute, the majority of nations have chosen a limited jurisdiction that requires the perpetrator to be physically present in the nation conducting the investigation, even though this jurisdiction has been available since the 1950s, primarily because of the Eichmann case in Israel. Different countries have different ideas about presence; some are reluctant to intervene during brief trips and want a longer stay. However, **universal jurisdiction in absentia**

[745] Retrieved from https://www.ejiltalk.org/state-objections-to-the-icc-prosecutors-request-for-arrest-warrants-in-the-palestine-investigation/.

[746] 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. 720-725. doi: https://doi.org/10.1163/ej.9789004163089.i-1122. also, Sadat, Leila. *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium*, (Leiden, The Netherlands: Brill | Nijhoff, 01 Oct. 2021), pg. 224-230. doi: https://doi.org/10.1163/9789004479739.

which holds that there need not be a link between the State launching an investigation and the perpetrator of an international crime, is a concept that is gaining traction in Europe.

A Statute enacted in 1993 by Belgium authorized the prosecution of serious violations of the Geneva Conventions even in cases where there was no physical connection to Belgium. This resulted in cases involving not only Rwandans but also individuals such as Yasser Arafat, Ariel Sharon, Fidel Castro, and Tommy Franks. In 2003, the law was changed to require a territorial connection, restrict the power of private individuals to file prosecution, and give public prosecutors more latitude.[747]

Spain emerged as a major player for universal jurisdiction in absentia after Belgium's reforms. At first, Spanish courts required evidence of a relationship between Spain and the foreign offender, frequently via Spanish victims. The Spanish Constitutional Tribunal, however, expanded this interpretation in 2005, allowing for the examination of issues pertaining to Chile, Guatemala, China, the US, Iraq, Rwanda, the Occupied Palestine Territories, and the Western Sahara.[748] 2009 saw both legislative changes and higher courts impose restrictions on this broad approach to universal jurisdiction, restricting it to crimes committed by Spaniards or those who were committed in Spain—albeit only in future instances.

The concept of the crime of genocide is the subject of the second legal dispute. According to the 1948 Genocide Convention, victims are defined as members of particular racial, ethnic, national, or religious groups.[749] This term, upheld in Article 6 of the Rome Statute, was followed by international judicial bodies like the ICTY, ICTR, SLSC, and ECCC. [750] Nonetheless, this concept was broadened by certain domestic regulations. For example, Uruguay added political

[747] Retrieved from https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.
[748] Retrieved from https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf.
[749] Retrieved from https://doi.org/10.1163/9789004529939
[750] Retrieved from https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas, also from https://tinyurl.com/5n6t76ks.

party, gender, sexual orientation, cultural, social, age, disability, or health-based groupings; Ecuador added gender, sexual orientation, age, health, and conscience.[751] Ethiopia included political groupings and population dispersal or transfer, whereas the Republic of the Congo expanded it to include groups defined by arbitrary qualities. In Canada, "an identified group of persons" took the place of customary groupings.

The 1994 Rwandan genocide, the Srebrenica massacre, Argentina's dirty war (1976–1983), the 1968 Mexico City massacre, the 2003 incident in Bolivia, the crimes committed by the Derg in Ethiopia (1977–1991), the Anfal campaign against Iraqi Kurds (1988), human rights violations against indigenous people in Guatemala (1982–1983), China's occupation of Tibet since 1951, and ethnic cleansing events in the former Yugoslavia are just a few examples of the cases that national courts have determined constitute genocide based on broad group definitions (apart from Srebrenica).[752] Court rulings in various States differed from one another, giving rise to varying interpretations of what constitutes "genocide."

In the beginning, the crime of genocide was used in some situations because law enforcement officers wanted to prosecute major offenders. National laws pertaining to war crimes and crimes against humanity, however, limited their actions.[753] It was impossible to rely on the national implementation provisions of the Geneva Conventions, which do not hold people personally liable for war crimes in non-international armed conflicts, because most cases involved civil wars rather than international armed conflicts. Furthermore, the Rome Statute's application in the new millennium prevented many national legislations from regulating crimes against humanity, making it impossible to apply the rules pertaining to these crimes.[754]

[751] Retrieved from https://doi.org/10.1163/9789004271753.
[752] Retrieved from https://doi.org/10.1163/9789004479739.
[753] Retrieved from https://doi.org/10.1163/9789004479739.
[754] Bassiouni, *International Criminal Law*, 500.

Since the Rome Statute was adopted in 1998, a growing body of customary international law has arisen as a result of the extension of victim groups under genocide under national legislation and tribunals.[755] This development might influence how other countries make use of this growth and might even have an impact on organizations like the ICC. The definition of genocide has expanded in terms of the groups that are targeted, but *mens rea*—the necessary mental component—remains the same.[756] Recent decisions show that this mental prerequisite has a significant impact on domestic verdicts, as evidenced by the exoneration of former Mexican President Echeverria and the finding of non-guilty for Dutch businessman Van Anraat on charges of genocide. However, this mental component had a considerable part in the conclusions made in court, as evidenced by the convictions in cases involving the leadership of the Ethiopian Derg and Yugoslav soldiers in Germany.

The legal idea of legality and retroactivity, particularly in Europe, was the main reason why domestic prosecutions involving crimes against humanity were uncommon until recently. Since this crime was usually prosecuted after the Rome Statute was adopted in 2000, it was difficult to charge it for events that occurred before national legislation.[757] In an effort to solve this problem, ingenious prosecutors brought indictments based on war crimes and genocide. But if crimes against humanity had been easily accessible, the possible range of inquiries—especially in extraterritorial contexts—might have been greatly increased.[758] Additionally, there has been limited debate concerning the potential application of crimes against humanity under Article 15 of the 1966 International Covenant on Civil and Political Rights[759], which mentioned:

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[755] Tan, Yudan. *The Rome Statute as Evidence of Customary International Law*, (Leiden, The Netherlands: Brill | Nijhoff, 29 Jul. 2021), pg. 15-18. doi: https://doi.org/10.1163/9789004439412

[756] Retrieved from https://doi.org/10.1163/ej.9789004165311.i-602

[757] retrieved from http://dspace.ashoka.edu.in/bitstream/123456789/8252/1/cambridge-core_an-introduction-to-the-international-criminal-court_9Nov2022.pdf

[758] Retrieved from https://doi.org/10.1163/9789004347687.

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

"1. No one shall be held guilty of any criminal offense on account of any act or omission that did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby"[760];

"2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[761]

Customary international law is identical to the phrase "according to the general principles of law recognized by the community of nations" in Article 15(2) of the Covenant, as stated in the Covenant's preparatory work.[762] It is surprising that, despite the fact that 160 countries have ratified the Covenant and that crimes against humanity have been recognized in international law since the 1948 Nuremberg Trials, there hasn't been much debate over whether or not crimes against humanity become part of national law after a country ratifies the Covenant. Notably, the highest courts in Chile and Peru have decided in recent times that crimes against humanity are not covered by the statute of limitations because they are based on customary international law.[763]

With the exception of a few trials in the Netherlands involving KhAD officers in Afghanistan from 1979 to 1989, most war crimes prosecutions have relied on the Geneva Conventions' system for grave breaches.[764] War crimes were the basis for the indictments because

[760] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.
[761] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.
[762] Bassiouni, *International Criminal Law*, 535-540. 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), pg. 183-185, 312-315 https://pure.uva.nl/ws/files/8879321/Thesis.pdf.
[763] Retrieved from https://doi.org/10.1163/9789004347687
[764] Retrieved from https://global.oup.com/ukhe/product/international-human-rights-law-9780198860112?q=moeckli&cc=gb&lang=en.

genocide and crimes against humanity were not relevant.[765] The Afghan conflict was deemed a non-international armed conflict by the Dutch courts, rendering the regime for grave violations irrelevant.[766] Rather than using ordinary Article 3 of the Geneva Conventions, which provides a basic description of authorization during non-international armed situations, they held the offenders criminally accountable.[767] In contrast to other areas of international law, this ruling reflects the evolution of individual criminal liability in non-international armed conflicts.[768] Significantly, until after 1991, neither Additional Protocol II (1977) nor the Geneva Conventions contained any provisions requiring the individual application of Common Article 3. In the 1995 Tadic case, the ICTY Appeals Chamber defined individual culpability for these disputes starting in 1991; nonetheless, the years 1977–1991 were not covered.[769] No evidence of this proposition's validity in customary international law prior to 1990 was discovered in a 2005 study conducted by the International Committee of the Red Cross.[770]

The Dutch appeals courts made the decision not to take into account international legal precedents, such as the ICTY's justification for classifying the Afghan conflict as an international non-international armed conflict in the Tadić case.[771] Furthermore, they avoided discussing whether the participation of foreign actors may change this classification, in line with the International Court of Justice's position in the *Bosnia and Herzegovina v. Serbia and Montenegro* case.[772] Rather than offering a prescriptive guideline, international law provides a minimum level, and the Dutch courts argued that national law could surpass it. The court held that the Dutch parliament

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[765] Retrieved from https://doi.org/10.1163/ej.9789004149311.i-564.
[766] Retrieved from https://doi.org/10.1163/9789004322097
[767] Retrieved from https://doi.org/10.1163/9789004480032.
[768] Eriksson, Maria. *Defining Rape: Emerging Obligations for States under International Law*, (Leiden, The Netherlands: Brill | Nijhoff, 28 Oct. 2011), pg. 20-30. doi: https://doi.org/10.1163/9789004225954.
[769] 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
[770] Retrieved from https://www.bloomsbury.com/uk/justice-for-crimes-against-humanity-9781841135687/
[771] Retrieved from https://doi.org/10.1007/s10609-008-9092-7. https://link.springer.com/article/10.1007/s10609-008-9092-7#citeas, also see https://doi.org/10.1163/9789004231696.
[772] Bassiouni, *International Criminal Law*, 535-540.

possessed the power to extend individual accountability outside the framework of the regime for grave breaches of the Geneva Conventions.[773]

A society's ability to move past a traumatic past and toward a peaceful and just future cannot be guaranteed by international criminal justice alone. It is only one aspect of transitional justice. It also lacks solid proof that sentencing in domestic and international institutions has a retributive or deterrent effect—a criticism that, despite domestic criminal and penal systems' long histories, also holds truth. A number of conditions need to be satisfied before the international criminal justice system can make a meaningful contribution to transitional justice. The first requirement is that the system continues to be predictable and consistent within.[774] Reputed and popular institutions *e.g.* the ICTY and ICTR, have reasonable influence over the other offshore or hybrid tribunals. As a result, in their discussions of international criminal law, other international organizations like the Special Court of Sierra Leone and the East Timor Special Panels have closely followed the guidelines and principles provided by the ICTY and ICTR, especially those established by their shared Appeals Chamber.[775]

The evolving landscape of international justice is marked by the increasing involvement of domestic entities. This diversification, while potentially challenging, is not inherently problematic as it allows international law to consider local customs and conditions. Given the significant influence of domestic practices on international law, States engaging in this arena bear a crucial responsibility. They must adhere to the fundamental principles of international criminal law while incorporating their unique cultural aspects.[776] Certain countries have broadened the scope of groups covered under international legal frameworks like the Genocide Convention and the Rome Statute. This expansion is legitimate as long as it doesn't compromise key aspects of crimes like

[773] Retrieved from https://doi.org/10.1163/9789004347687.
[774] Bassiouni, *International Criminal Law*, 535-540. doi: https://doi.org/10.1163/ej.9789004165311.i-602.
[775] retrieved from http://www.isrcl.org/Papers/2008/Rikhof.pdf.
[776] Bassiouni, *International Criminal Law*, 535-540. doi: https://doi.org/10.1163/ej.9789004165311.i-602.

genocide. Rather than altering essential elements of genocide, it would be wiser to address retroactivity concerns concerning crimes against humanity and customary international law.[777] Despite potential divergences in international criminal law, the involvement of 43 countries in prosecuting international crimes over the past 15 years is a positive development.[778] Efforts from 26 countries where these crimes occurred have led to the prosecution of over 10,000 perpetrators. This surpasses the combined efforts of the five international institutions and 17 countries utilizing universal jurisdiction.[779]

To foster the maturation of the international legal system, a well-organized division of responsibilities is essential. States capable of prosecuting crimes within their jurisdiction should do so, and fugitives should be returned through extradition. When prosecution in the perpetrator's home country is not possible, other nations should employ passive or universal jurisdiction. At the highest level, when no other options are available, the ICC, potentially the sole international institution could intervene. While perpetrators of international crimes often escape justice, the remarkable progress made by international criminal law in the past 15 years is noteworthy.[780] This progress, though gradual, has reduced the number of safe havens for those seeking refuge from accountability.

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[777] Retrieved from https://doi.org/10.1163/ej.9789004163089.i-1122.
[778] Retrieved from doi: https://doi.org/10.1163/9789004271753.
[779] Bassiouni, M. Cherif, eds. *International Criminal Law*, Volume 2: Multilateral and Bilateral Enforcement Mechanisms, (Leiden, The Netherlands: Brill | Nijhoff, 21 Nov. 2008), pg. 535-540. doi: https://doi.org/10.1163/ej.9789004165311.i-602.
[780] Shelton, Dinah. *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 01 Oct. 2021), pg. 47-63. doi: https://doi.org/10.1163/9789004479746.

# 5. CONCLUSIONS

## 5.1. Introduction

This chapter will look at the complementarity principle as a potential tool to fill the impunity gaps. To do so, the author referred to some countries' examples, 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.[781] 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.[782]

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.[783] 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.

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[781] 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.

[782] 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.

[783] 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.

### 5.2. A Way Forward: Mutual Inclusivity as a Solution?

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.[784]

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[785] 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.

Up until recently, the ICC has mostly used complementarity in situations where it needed to determine whether a particular investigation satisfied the requirements mentioned in Article 19. It also addressed circumstances in which States asserted that they were carrying out independent inquiries. According to the provisions of the Statute, the ICC also has to check whether the

[784] 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.

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

governments are looking into the "**same person and substantially the same conduct**" in response to complaints from those countries or not.[786]

But complementarity seems to be turned on its head by this method. Article 17 of the Statute specifies that complementarity standards such as "**unwillingness**", "**inability**", or "**sufficient gravity**" must be established by the ICC, while nations are expected to take the lead in investigating and prosecuting crimes. However, what we have seen is the ICC claiming jurisdiction first, particularly in the instances involving some nations, e.g. Kenya and Libya. The States must then demonstrate their preparedness and capacity to address those matters, as evidenced by the challenges these governments have raised. Crucially, none of these cases have reached a conclusion. In the Kenyan context, the first "Ocampo Six" were dropped because Kenyan officials refused to assist in obtaining evidence for prosecution.

There are also five cases that the various governments self-referred out of the ten cases that are presently before the ICC.[787] This shows that the lack of appropriate procedures in place in these States to carry out independent investigations and prosecutions may have contributed to the referrals that took place. This raises an important question: was the complementarity scheme created to promote self-referrals? Though self-referrals are thought to be a sign of a misinterpretation of the complementarity principles, two of the three procedures to initiate ICC involvement require referrals, made either by State parties or the UNSC. These self-referrals may also compromise the Rome Statute's primary objectives. It is suggested that complementarity be applied and interpreted thoroughly and inclusively in order to address these problems.

[786] Angelo Dube, *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.
[787] Angelo, *Prosecuting the Three Core Crimes,* 2019.

### 5.2.1. A Comprehensive Approach to Complementarity: Its Significance and Implications

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 go beyond simply ratifying the Rome Statute. States and the ICC must fulfill certain conditions in order to enable efficient burden-sharing. To do this, States must make sure their legal systems are coherent and that they are institutionally prepared to investigate and prosecute crimes.

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.

The ICC intervenes only when necessary, stepping in to address impunity gaps left by States, especially in cases where State authorities themselves are alleged perpetrators. It is important to understand that States' jurisdictional priority does not mean they have exclusive rights. High-ranking officials, such as presidents or vice presidents, can be held accountable through the International Criminal Court too. This justification explains why cases from Sudan and Kenya, involving implicated leaders such as presidents and vice presidents, are currently adjudicated by the ICC. Issues come up, especially with witness testimony. The accusations against the Kenyan president and vice president were dismissed despite their voluntary appearance before the ICC. In a similar vein, President Al-Bashir of Sudan has not been taken into custody or turned

over to the International Criminal Court since March 2009[788]. Even though the ICC's objective is to bring the most serious offenders to justice, the institution's ability to carry out its mission depends largely on the State and international collaboration.[789]

The ICC should place special emphasis on collaboration and domestic law as two essential elements of the complementarity regime if it is to function as a true "**complement**".[790] Particularly African States ought to embrace these elements. According to complementarity, States are required to investigate and prosecute core crimes domestically. Enacting laws that incorporate offences covered by the Rome Statute into domestic criminal legislation is essential, even though it isn't mentioned expressly in the Statute. This measure guarantees that governments have the institutional capacity to competently adjudicate these offences, avoiding the need to refer cases to the International Criminal Court, which is meant to be their principal authority.[791]

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.[792]

A thorough analysis of the Pre-Trial Chamber I's ruling from May 31, 2013, concerning the admissibility of the Libyan Government in the *Saif Al-Islam Gaddafi* case emphasizes how important it is for the governments to enact laws in order to use their criminal jurisdiction.[793] The

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[788] the date of the first arrest order for him.
[789] Dube, *Prosecuting the Three Core Crimes*, 2019.
[790] Dube, *Prosecuting the Three Core Crimes*, 2019.
[791] Anders Henriksen. *International law*. 4th Ed. Oxford: Oxford University Press, 2023. https://tinyurl.com/m9d5m2uz.
[792] 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.
[793] *Prosecutor V. Saif Al-Islam Gaddafi*, retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00904.PDF.

Chamber reached a different result even though it recognized Libya's authority to investigate and prosecute Saif Al-Islam in accordance with its own laws. Libya's incapacity, resulted from its inability to pass the "same person – same conduct" standard because the crimes were not incorporated into the national law. Libya might have been successful if it had followed international criminal laws. However, Libya lacked implementing legislation and its internal laws did not recognize *crimes against humanity* because it was not a signatory to the Rome Statute.[794]

Crucially, while ratifying the Rome Statute quickly, many States failed to pass legislation (incorporation) in line with it. However, the incapacity of those States to investigate and prosecute the core crimes may not be entirely due to a lack of enacting legislation.[795] States' ability and willingness to act are demonstrated by their ability to implement laws. Those States can gain a lot from complementarity, which is developed and implemented by States when they include crimes covered by the Rome Statute into their legal systems.

It is undeniable that many developing countries have substantial difficulties in passing and executing the laws. These difficulties include the drawn-out process of integrating crimes, the challenge of getting expert assistance, the absence of prioritizing, and the deficiency of political will. Further obstacles came from corruption and political leaders' ambition to hold onto power permanently.[796] It is advised to take an *express criminalization* stance in light of these problems.

Embracing a stance of *mutual inclusion* is suggested to enhance the proactive complementarity paradigm, which involves offering nations assistance from the ICC upon request. This approach is rooted in the specific provision of Article 93 (10), allowing the ICC to cooperate with and aid governments in reciprocity. By adopting complementarity from this angle, national

[794] Dube, *Prosecuting the Three Core Crimes*, 2019.
[795] Dube, *Prosecuting the Three Core Crimes*, 2019.
[796] Cases can be found here: https://www.icc-cpi.int/cases?f%5B0%5D=situation_name_colloquial_cases%3A678.

[criminal] jurisdictions and the ICC could collaborate to address the impunity gaps outlined in the Rome Statute.

### 5.2.2. The Emerging Landscape: International Criminal Justice's New Frontier through Complementarity-Based Prosecution in Domestic Jurisdictions

The fundamental idea underlying a thorough implementation of the complementarity regime is that in order to facilitate domestic prosecution of the offences listed in the Statute, governments must incorporate such crimes into their domestic legislation. The foundation of this argument is the notion that complementarity cannot work well with two different sets of laws. The Rome Statute would not have been needed if pre-existing national laws were adequate to deal with international crimes. Therefore, relevant legislation must be incorporated in order to pursue domestic prosecutions based on complementarity.

*Complementarity-based prosecution* is the term used to describe how States handle international crimes domestically while adhering to the Rome Statute's guidelines.[797] The goal of this strategy is to guarantee the institutional preparedness of governments to prosecute international crimes as well as the conformity of the legal framework with the Rome Statute.[798] The United Kingdom's prosecution serves as an illustrative example, demonstrating how domestic prosecution can align with international standards through appropriate implementing legislation.

There is an important dissimilarity between ordinary domestic offences and core crimes. *Crimes against humanity*, for example, fall within the category of international crimes since they are "**widespread or/and systematic**", they target civilian populations, and the accused must have

[797] Greppi, Edoardo. *Inability to Investigate and Prosecute under Article 17*, in Gioia, F. (2008). *The International Criminal Court and National Jurisdictions* (M. Politi, Ed.) (1st ed.). Routledge. https://doi.org/10.4324/9781315238944.
[798] Gioia, *The International Criminal Court*, 2008.

been aware of the attack. Therefore, in ordinary criminal law, crimes such as murder that constitute a crime against humanity cannot be equated with ordinary domestic murder under domestic law.[799]

The prosecutions in African States were based on ordinary crimes as specified by their national legislation, which did not meet the conditions of complementarity. Moreover, these domestic prosecutions were responses to cases already under ICC scrutiny. While such prosecutions are valid, considering the ICC focuses on those with the greatest responsibility, States are also responsible for prosecuting intermediate and lower-level perpetrators.

African State prosecutions have predominantly relied on local legislation, an approach that appears to undermine rather than reinforce the International Criminal Court's (ICC) endeavors. This division is particularly apparent in Uganda, where the use of alternative justice techniques and amnesty is common.[800] While proceedings in the Democratic Republic of Congo (DRC) could be viewed as complementarity-based prosecutions, the use of military courts may pose issues. Military jurisdictions do not guarantee due process, and mobile courts, not envisioned in the Rome Statute, further complicate matters.[801]

In the midst of continuous discussions over domestic prosecution, complementarity-based prosecution was given careful consideration, regardless of whether it was based on international classification or national laws. Several domestic prosecution ideas were taken into consideration, such as the "**soft mirror theory**". This viewpoint contends that the international classification of the trial is immaterial, provided that perpetrators are tried for crimes that are just as serious as committed domestically. However, this view suggests that governments are not required to ratify

[799] Gioia, *The International Criminal Court*, 2008.
[800] See *Thomas Kwoyelo* case.
[801] Tsilonis, Victor. *The Jurisdiction of the International Criminal Court*. Springer eBooks, 2019. https://doi.org/10.1007/978-3-030-21526-2.

the Rome Statute or pass legislation making its offences part of their own domestic laws. Essentially, supporting the soft mirror thesis questions the relevance of the Rome Statute.

However, States should abide by the main guidelines outlined in the Rome Statute. States should prosecute atrocity crimes *specially* rather than treating them as regular offences in order to effectively meet the complementarity criterion.[802] This is consistent with the "**hard mirror thesis**" viewpoint, which maintains that domestic prosecutions should concentrate on crimes classified internationally rather than just ordinary offences. The goal is to prevent States from being labeled as "unwilling" or "unable", which could trigger ICC intervention.

However, Jon Heller put forth a different viewpoint referred to as a "**sentence-based theory of complementarity**".[803] This concept asserts that domestic prosecutions should be acknowledged irrespective of the categorization of the crime if they result in a sentence that is equal to or exceeds what is specified in the Rome Statute or what the ICC would have imposed for the same case.

This *sentence-based approach*, while focusing solely on the severity of the sentence, contradicts Rome Statute provisions. For example, it might allow the death penalty, a punishment applied by some States for particularly serious crimes, whereas the Statute's maximum penalty is life imprisonment. Furthermore, this method ignores variations in the scope and gravity of offences. Furthermore, it ignores the potential for acquittal in domestic prosecutions, which is a legitimate result. There is no penalty that can be compared to the Rome Statute in acquittal situations. Additionally, this strategy suggests delaying judgment until the conclusion of the prosecution to

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[802] Braga da Silva, Rafael. *Chapter 8 Collaboration between the Office of the Prosecutor and Third-Party Investigators*. In *The International Criminal Court in Its Third Decade*, (Leiden, The Netherlands: Brill | Nijhoff, 2023) doi: https://doi.org/10.1163/9789004529939_009. See more at https://core.ac.uk/download/pdf/74210271.pdf.

[803] Heller, Kevin Jon, *A Sentence-Based Theory of Complementarity* (2011). Harvard International Law Journal, Vol. 53, No. 1, Winter, *Ashgate Research Companion to International Criminal Law: Critical Perspectives*, 2012, Available at SSRN: https://ssrn.com/abstract=1857428.

see whether it is acceptable, which could be in opposition to the *ne bis in idem* rule, which forbids the ICC from trying the same person twice.[804]

Darryl Robinson put up a "**process-based**" strategy in opposition to Jon Heller's sentence-based theory, focusing more on the genuineness of the proceedings than the outcome. Robinson contends that the key question is whether a State is actually pursuing or has pursued prosecutions connected to a case.[805] He contends that in the context of Article 17(2)(3), the "process" ought to take precedence, with accusations and punishments offering information about the genuineness of the process.[806]

Nonetheless, the *process-based approach* is unable to discern between ordinary domestic crimes and core crimes. States are required to incorporate definitions of international crimes found in the Rome Statute into their national criminal jurisdiction. This method also offers a useful way to stop crimes that are not protected by domestic law from happening. This problem is demonstrated, for example, by Pre-Trial Chamber I (PTCI) rejecting Libya's admissibility argument in the Saif Al-Islam Gaddafi case. The PTCI rejected Libya's recommended harsher punishment because the crime of persecution—which is regarded as a crime against humanity—was not included in the Libyan Criminal Code.[807]

Complementarity-related issues also include the conflict between the ICC and the African Union, which is seen as a kind of neo-colonialism that targets African nations. However,

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[804] Heller, *A Sentence-Based Theory of Complementarity*, 2011. See more at https://core.ac.uk/download/pdf/74210271.pdf.

[805] Robinson, Darryl. *Three Theories of Complementarity: Charge, Sentence or Process? A Comment on Kevin Heller's Sentence-Based Theory of Complementarity*, in McDermott, Y. (2013). The Ashgate Research Companion to International Criminal Law: Critical Perspectives (W.A. Schabas, Ed.) (1st ed.). Routledge. https://doi.org/10.4324/9781315613062.

[806] Robinson, Darryl, *Three Theories of Complementarity: Charge, Sentence or Process?* (June 1, 2014). Schabas, McDermott & Hayes, eds, Ashgate Research Companion to International Criminal Law (2012), Harvard International Law Journal Online, Vol. 53, 2012, Available at SSRN: https://ssrn.com/abstract=2455932.

[807] 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) doi: https://doi.org/10.1163/ej.9789004163089.i-1122.

investigation reveals that the real issue is between the AU and the UNSC, not the AU and the ICC directly.

International politics and laws such as international criminal law are closely related, particularly when it comes to cases involving the ICC. The involvement of the UNSC with the authority to refer cases to the International Criminal Court (ICC) under the Statute makes this particularly clear. Tamás Lattmann in his article, rightly mentioned that the ICC possesses a crucial characteristic: its procedures strike a balance between State sovereignty and the global demand for criminal justice, potentially reinforcing the international rule of law.[808] However, the Security Council's power to refer cases can disproportionately politicize the court, akin to the *ad hoc* tribunals. This vulnerability in the ICC Statute system raises concerns about its transformation into an *ad hoc* judicial forum, reminiscent of the Yugoslavia or Rwanda Tribunals.[809] From an African perspective, the main source of contention can be the UNSC's decision to send the Darfur (Sudan) case to the ICC, even though the African Union later asked for a rearrangement. The argument that the ICC disproportionately targets African States first appeared to be supported by an analysis of the "scapegoat theory" and "selectivity". However, demonstrating selectivity does not mean that the person selected for prosecution cannot face justice.[810]

There are still more areas of miscommunication between the ICC and the AU that have their roots in both legal and political issues. These include the immunities of heads of State and the ICC's authority over citizens of Non-States party, both of which have been cited as areas of misunderstanding that could intensify tensions between the AU and the ICC as well as between other State parties and non-party States. In addition to undermining the ICC's credibility, Article

[808] Lattmann, Tamás. S*ituations Referred to the International Criminal Court by the United Nations Security Council – "ad hoc Tribunalisation" of the Court and its Dangers*. https://ceere.eu/pjiel/wp-content/uploads/2016/12/4.pdf.
[809] Lattmann, S*ituations Referred to the International Criminal Court*, 2.
[810] 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) doi: https://doi.org/10.1163/ej.9789004163089.i-1122

98 also goes against State parties' commitments to the Statute and the idea of equality before the law.[811]

From the African point of view, this argument is significant because it highlights the necessity of African States' ongoing support and cooperation for the ICC to prosecute cases in Africa. Furthermore, in order to prosecute lower-level and intermediate offenders and close the impunity gap, African States require reliable institutions in addition to enacting laws, as the ICC is only able to handle a certain amount of cases.[812] Thus, improving ties between the ICC and the AU would eventually improve the criminal justice system on a global scale.

#### *5.2.2.1. Institutional Preparedness*

The complex interplay between national criminal justice systems and local environments, along with the differences across them, make complementarity a persistent challenge. The complementarity system makes the assumption that State legal systems, which replicate the ICC's competencies, will be accessible and capable of handling the investigation and prosecution of atrocity crimes.[813]

Nonetheless, there are a lot of dangers associated with domestically prosecuting atrocity crimes. First, in contrast to the ICC, local courts may be more vulnerable to prejudices or political influences. The fairness of the procedures may be jeopardized by the crime scene's proximity to the community, local media coverage, and interactions with the victims. Second, there are

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[811] Achebe, Chinua. *The trouble with Nigeria* (Heinemann Educational Publishers, 1984) https://books.google.com.bd/books?hl=en&lr=&id=AA8ut32-If8C&oi=fnd&pg=PP1&ots=zU-8hFJ25Q&sig=vNG_S2AB_bGzgqM4eSsZIseE9WY&redir_esc=y#v=onepage&q&f=false.

[812] Ntanda Nsereko, Daniel D. *The African Charter on Human and Peoples' Rights: An Overview*. African Human Rights Law Journal, vol. 4, no. 2, 2004, pp. 212-235. https://www.ahrlj.up.ac.za/images/ahrlj/2004/ahrlj_vol4_no2_2004_daniel_d_ntanda_nsereko.pdf.

[813] Šturma, Pavel, eds. *The Rome Statute of the ICC at Its Twentieth Anniversary*, (Leiden, The Netherlands: Brill | Nijhoff, 03 Jan. 2019) doi: https://doi.org/10.1163/9789004387553.

significant differences in the standard of justice among national courts. Some States have highly developed legal systems, yet many African countries do not even have the most basic judicial framework. Third, while prosecuting international crimes, there is often a requirement to persuade both local and international polity of the fairness of the proceedings and the legitimacy of the justice dispensed.[814]

Complementarity in practice presupposes that national courts and the ICC are comparable. But often, there are no necessary domestic institutions in place to work well with the ICC. This difference is visible in terms of both institutional structures and physical attributes. Antoine Garapon raised doubts about the viability of complementarity when he observed the striking contrast between the Hague's opulent glass architecture and the frequently unstable circumstances of the local courts.[815] In actuality, complementarity presupposes that national courts and the ICC are comparable. Nonetheless, the absence of necessary domestic infrastructure frequently hinders effective collaboration with the ICC.

The emergence of a reliable domestic judiciary that can carry out prosecutions in accordance with the complementarity principle is critical to the success of the global criminal justice system. Using Nigeria as an example, it is clear that many African States do not have institutional capacities that are either functional or significantly competent to properly investigate and prosecute atrocity crimes. The Ugandan situation serves as further evidence that evaluating institutional preparedness at the State level involves more than just physical infrastructure. Uganda has difficulties looking into core crimes, particularly those involving members of the Lord's

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[814] Seth Kaplan (2014) *Identifying Truly Fragile States*, The Washington Quarterly, 37:1, 49-63, DOI: 10.1080/0163660X.2014.893173. https://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F0163660X.2014.893173. Also, Kaplan, S., *Strengthening the Rule of Law in Developing Countries*, available at: <http://www.fragilestates.org/2012/06/17/rule-of-law-developing-countries/>.

[815] Garapon A (2012) *What does complementarity commit us to?* In: *Tenth anniversary of the international criminal court: the challenges of complementarity*. Politorbis (2/2012) 54, pg. 21. https://pierrehazan.com/wp-content/uploads/2014/01/DwP-Hazan-Politorbis_No54.pdf.

Resistance Army, even after creating a Special War Crimes Division of the High Court and implementing laws enabling domestic courts to pursue such crimes (LRA).[816] Elizabeth Nahamya-Ibanda claims that although the War Crimes Division is a big step in the right direction, Uganda needs assistance immediately since it lacks the resources and manpower to look into and prosecute international crimes.[817]

Furthermore, having judges and prosecutors who are knowledgeable about international criminal law is essential to institutional preparation. This requirement was brought to light in the Saif Al-Islam case, where the Libyan government invited judges and attorneys with experience in international criminal law from various jurisdictions in an attempt to get expertise.[818]

Moreover, circumstances in which proceedings lack impartiality or independence may be taken into consideration when determining "unwillingness" and "inability" under Article 17(2). Even though these obligations are not mentioned in the Statute specifically, the primacy of jurisdiction carries implicit responsibilities that are essential for States to carry out their complementarity function in light of the complementarity regime.[819] Due to the lack of a strong judiciary, which is essential to the complementarity system, the majority of the country is not prepared institutionally to prosecute atrocity crimes.

A closer look at issues like biasness, corruption, insecurity, and the subordination of the judiciary reveals major roadblocks that impede the development of the rule of law as well as the

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[816] Nahamya-Ibanda E (2010) *The mandate and activities of the special war crimes division of the high court Uganda*. Paper delivered on "*Challenges of complementarity under the Rome Statute System and the role of lawyers: lessons and prospects*", organized by Advocats Sans Frontiere, in collaboration with Ugandan Law Society, Kampala, Uganda, 1 January 2010.

[817] Soares PP. *Positive Complementarity and the Law Enforcement Network: Drawing Lessons from the Ad Hoc Tribunals' Completion Strategy*. Israel Law Review. 2013;46(3):319-338. doi:10.1017/S0021223713000149. Also, https://asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf.

[818] Nkosi, Mfundo, *Prosecuting the three core crimes: Complementarity in light of Africa's new international criminal Court* (LLD Dissertation, University of the Western Cape, 2019). https://etd.uwc.ac.za/xmlui/handle/11394/6990. Also, Dube, Buhle Angelo. *Universal jurisdiction in respect of international crimes: theory and practice in Africa*. University of the Western Cape, 2015. http://hdl.handle.net/11394/4819.

[819] Article 17 (2) (c), The Rome Statute 1998. https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

particular application of complementarity. These problems—corruption, instability, and lack of judicial independence—are pervasive and have deep roots in many different countries. It is suggested that addressing these problems in addition to passing implementing laws and adding international criminal law specialists to the judiciary is an essential implementation approach. Any State that experiences comparable difficulties in carrying out its commitments as a party to the Rome Statute must find a comprehensive solution. A system like this can be tailored to meet the unique requirements of other countries facing similar challenges.

#### *5.2.2.2. Strategies for National Implementation*

It has been discussed that there are benefits to depending on national criminal jurisdiction. The International Criminal Court (ICC), like other international tribunals, is dependent on State assistance to obtain and transmit evidence and to bring witnesses, suspects, and accused parties before it. The Court's remote location from the crime locations frequently causes delays or impediments in the pursuit of justice, even in cases where States cooperate. It is also a factor that if national jurisdictions can prosecute such perpetrators, it demonstrates the robustness and independence of the national judicial system.

Not every facet of complementarity has been well understood and implemented, as evidenced by a review of ICC case law. For example, the Pre-Trial Chamber I (PTCI) in the admissibility decision of Saif Al-Islam concluded that Libya could not investigate and prosecute the suspect legitimately.[820] Thus, similar to other admissibility challenges before the ICC, the only question that was looked at was whether or not a domestic investigation was being carried out to establish the "**same person – same conduct**" criteria.

[820] Dube, *Prosecuting the Three Core Crimes*, 2019.

The Appeals Chamber of the ICC identified two crucial questions to consider when determining whether a case is inadmissible under Article 17(1)(a) (b). First, if there are any active domestic investigations or prosecutions. Second, if the State having jurisdiction over the matter has previously conducted inquiries and chosen not to prosecute the accused party. The Appeals Chamber holds that an analysis of unwillingness and incapacity is only required in cases when these inquiries provide positive responses. Since these factors—as well as authenticity and serious gravity—are separate from the analysis of existing investigations, it is clear that the ICC has not yet thoroughly assessed every aspect of complementarity.[821]

To showcase their willingness to comply with the minimum threshold of complementarity, African States are advised to take two fundamental steps. First, it is suggested that these governments completely amend their legislation to bring them into compliance with the Rome Statute, including any provisions pertaining to special immunity and the Constitution.[822] As was previously mentioned, it is not desirable to prosecute atrocity crimes as ordinary domestic offenses, which is why this alignment is crucial. The Rome Statute's national application may be hampered by conflicting domestic laws.

Second, to guarantee institutional preparedness, countries should undergo substantial reforms within their police forces, prison services, and judiciaries.[823] These reforms should aim to enhance the protection of citizens' rights and equip these institutions adequately for the investigation and prosecution of international crimes. As part of this effort, international criminal law experts, including judges, should be appointed to the judiciary. Continuous training in international criminal law for judges and other court staff would also prove beneficial. Additionally,

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[821] Tsilonis, Victor. *The awakening hypothesis of the complementarity principle*. In Essays in Honour of Nestor Courakis, Ant. N. Sakkoulas Publications L.P., 2017. https://tinyurl.com/4sru9rfc.

[822] Angelo Dube, *Prosecuting the Three Core Crimes*, 2019. Retrieved from https://etd.uwc.ac.za/xmlui/handle/11394/6990.

[823] Imoedemhe, *The Complementarity Regime of the International Criminal Court*, 2017.

governments must ensure security for all individuals, particularly judges, enabling them to fulfill their roles effectively.[824]

Implementing this minimum threshold of complementarity is vital for every signatory State to be prepared, both legally and institutionally, to adhere to complementarity principles. This is important because it highlights issues that domestic institutions face, like faltering economies, a lack of trust in the legal system, a lack of knowledge about international criminal law, and doubts about the independence and objectivity of national courts. It is crucial to address these operational capacity challenges, especially in scenarios involving a substantial accumulation of cases, often occurring in the aftermath of mass atrocities.

#### *5.2.2.3. Legislative Support*

The International Criminal Court's (ICC) role has been made clearer since the first Rome Statute Review Conference, which took place in 2010 in Kampala, Uganda. The role is now to concentrate on strengthening national capacities instead of influencing judicial functions or taking financial resources away from ongoing ICC investigations and prosecutions. Consequently, it is the responsibility of States, international organizations, and civil society to take the lead in supporting and aiding national jurisdictions. Their role is to ensure these jurisdictions have the institutional capacity and legal framework needed to look into and prosecute core crimes.[825]

To establish the potential for enhancing domestic capabilities for the implementation of complementarity, the Review Conference (2010) emphasized the necessity of legislative support.

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[824] Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?*, 12 WASH. U. GLOBAL STUD. L. REV. 451 (2013), https://openscholarship.wustl.edu/law_globalstudies/vol12/iss3/8.

[825] Lewis, Peter. *Chapter 15 Behind the Scenes: the Essential Role of Cooperation in an Effective Trial*. In *The International Criminal Court in Its Third Decade*, (Leiden, The Netherlands: Brill | Nijhoff, 2023) doi: https://doi.org/10.1163/9789004529939_016.

This involves crafting the appropriate legal framework and provision. However, this process is vulnerable to the unpredictability of international politics if national capacities for complementarity implementation are only developed through the efforts of States, international organizations, and civil society. It was proposed by the conference that Article 93(10) be extended and used by States in order to resolve this. States would be able to actively pursue a proactive, mutually inclusive complementarity strategy with this enlargement.[826] Under this strategy, States could ask the ICC for capacity building, legislative support, and technical assistance for providing aid to overcome local challenges in enacting such legislation.[827] This is particularly relevant for those nations striving to surmount barriers in passing and implementing laws. In this context, other countries could benefit from the experiences of States like South Africa, where implementing legislation is accessible through the ICC Legal Tools Project. Concerns encompass aspects related to amnesties and immunities, ensuring that the definitions and penalties for international crimes align with the standards set forth in the Rome Statute, and the imperative to embrace procedural fair trial norms.[828] Essentially, the ICC has offered avenues for States to develop the functional capabilities crucial for complementarity, as demonstrated through its Legal Tools Project[829]. This initiative, originating from the ICC's Office of the Prosecutor, has been extended to governments, judges, prosecutors, defence counsels, NGOs, and various other entities globally, in the spirit of the Court's complementary role. Initially conceived as part of the ICC's Legal Tools Project, these resources have gained recognition for their utility in bolstering States' capacities, leading to their accessibility to external entities. These tools, designed by legal experts well-versed in international criminal justice, serve as an electronic repository. A specialized search engine included in the legal

[826] Bergsmo, Morten & Bekou, Olympia & Jones, Annika. (2010). *Complementarity After Kampala: Capacity Building and the ICC's Legal Tools*. 10.3249/1868-1581-2-2-Bergsmo. https://www.legal-tools.org/doc/067928/pdf.

[827] Kleffner, Jann K., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, In the International Courts & Tribunals Series (Oxford, 2008; online edn, Oxford Academic, 1 May 2009), https://doi.org/10.1093/acprof:oso/9780199238453.001.0001, accessed 18 Nov. 2023.

[828] More in https://www.legal-tools.org/what-are-the-icc-legal-tools.

[829] https://www.legal-tools.org/

tools database allows users to find particular parts of national laws that apply the Rome Statute. It is also used for the dissemination of legal knowledge concerning the ICC's operation.[830]

An essential resource in the Legal Tools framework is the National Implementing Legislation Database (NILD)[831], which was created by the Human Rights Centre at the University of Nottingham in partnership with the OTP. With an emphasis on international criminal law and justice, this online knowledge transfer platform seeks to provide the public with unfettered access to the most extensive electronic library. There is a vast and constantly updated collection of national legislation related to the Rome Statute in the NILD.[832]

All things considered, national lawmakers who are considering or drafting legislation get great assistance from the NILD. This tool improves the ability of State parties to create legislation that works by utilizing the experiences of other States. It is recommended to the signatory parties to look into the NILD to get help with the legislative procedures, in addition to looking at models like Kenya's and South Africa's laws on International Crimes. The NILD is not just important during the drafting stage. This platform allows governments to monitor the effects of their implementing legislation even after they have passed it and to make the required revisions in response to changes made to the Rome Statute.

Moreover, the NILD holds relevance for judges, law enforcement agencies, and correctional authorities, who are tasked with implementing such legislation but might face limitations in accessing pertinent information. This accessibility gap could potentially compromise individuals' rights and the admissibility of trials. Both the NILD and similar tools stand as

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[830] Stigen, Jo. *The Relationship between the International Criminal Court and National Jurisdictions*, (Leiden, The Netherlands: Brill | Nijhoff, 25 Jul. 2008) doi: https://doi.org/10.1163/ej.9789004169098.i-536.

[831] https://www.legal-tools.org/national-implementing-legislation-database.

[832] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009. https://doi.org/10.1093/acprof:oso/9780199238453.001.0001, accessed 18 Nov. 2023.

pragmatic and cost-effective transfer platforms, enabling States to access essential legal information related to core international crimes.

#### *5.2.2.4. Capacity Building & Technical Support*

Technical assistance encompasses a wide array of support services, including training for law enforcement personnel such as police, investigators, and prosecutors. This support encompasses enhancing the capability to protect witnesses and victims, offering expertise in forensic matters, conducting training for judges and defense attorneys, and guaranteeing the security and independence of officials. This assistance can take the form of supporting specialized domestic war crimes divisions that are suited to particular requirements or deploying judges and prosecutors to support national courts. Support can also be given to improve reciprocal legal support in criminal cases, strengthening cooperation in continuing investigations.

Contributing to the building of courtrooms and prison facilities and making sure these establishments run sustainably are examples of physical cooperation. However, it is imperative to establish continuous training programs to uphold international standards in the functioning of these institutions.

Undeniably, these endeavors require significant financial and other resources. The responsibility for funding such initiatives does not fall upon the ICC. The United Nations and the Assembly of States Parties (ASP) are the main sources of funding for it. Finding willing donors is still difficult, despite the fact that the ICC can accept voluntary contributions from governments, international organizations, people, businesses, and other groups. Consequently, it is proposed that

individual States seeking technical assistance and capacity building should consider contributing funds to specific projects.[833]

In this regard, the Rome Statute's Article 93(10) offers a way for States to request the ICC for help in building capacity at other institutions in accordance with the complementarity principle. Given that strong domestic institutions are crucial to the future of international criminal justice, cooperation between nations and the ICC is crucial to the success and efficacy of these measures.[834]

The realization of these proposals encounters a significant obstacle in the form of corruption, a deeply rooted issue not only in many other nations. The foundation of the complementarity regime relies on functional domestic criminal justice systems. As the saying goes, 'one cannot build something on nothing and expect it to endure'. Without effective domestic institutions, the tendency for self-referrals will persist. This will further strain the already stretched resources of the ICC and weaken the complementarity system.

The success of the complementarity regime hinges on efforts at the national level. Although many countries from different regions have demonstrated their support for the ICC through ratifications and referrals, successful implementation of the complementarity regime requires suitable legal frameworks and competent institutions that meet specific standards. This is essential for the future of international criminal justice in general as well as for building the ICC's legitimacy and credibility.

It is recommended to interpret complementarity inclusively in order to achieve national implementation for the success of the ICC and the endurance of international criminal justice. This means that core crimes must be aggressively investigated and prosecuted in national courts. Consequently, it becomes essential to set a minimum complementarity level, which includes

[833] Dube, *Prosecuting the Three Core Crimes*, 2019. Retrieved from https://etd.uwc.ac.za/xmlui/handle/11394/6990.
[834] Nicholson, Joanna, eds. *Strengthening the Validity of International Criminal Tribunals*, (Leiden, The Netherlands: Brill | Nijhoff, 17 Apr. 2018) doi: https://doi.org/10.1163/9789004343771

incorporating offences covered by the Rome Statute into national laws and guaranteeing that State courts are well prepared.

This strategy is expected to promote the essential cooperation the ICC needs in its ongoing cases, even though it might not completely address the challenges developing nations and the ICC are facing in implementing the complementarity regime into operation. Additionally, it could strengthen the genuine capacity and willingness of those States to prosecute international crimes. Instead of referring situations in their regions to the ICC, these States might authentically exercise jurisdiction. Additionally, this strategy would enable those nations to successfully assist the ICC in carrying out its prosecution activities. In the end, complementarity that embraces mutual inclusivity will strengthen accountability for the worst crimes and close impunity gaps worldwide.

### 5.2.3. Complementarity: Bridging the Gap and Future of Accountability

According to the Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*), by Dire Tladi, Special Rapporteur[835], the international crimes – genocide[836], crimes against

[835] Fourth report on peremptory norms of general international law (jus cogens), by Dire Tladi, Special Rapporteur, prepared for the seventy-first session of the International Law Commission, 29 April–7 June and 8 July–9 August 2019, UN Doc. A/CN.4/727, retrieved from https://digitallibrary.un.org/record/3798216?ln=en&v=pdf.
[836] The International Court of Justice has unambiguously recognized the prohibition of genocide as a norm of *jus cogens*, retrieved from https://digitallibrary.un.org/record/3798216?ln=en&v=pdf, p. 35.

humanity[837], crimes of aggression,[838] and war crimes[839] – that rise to the level of *jus cogens* constitute *obligatio erga omnes*[840] which are in-derogable. When considering the implications of defining international crimes as *jus cogens*, one key question is whether this status imposes obligations on all States or simply grants them specific rights to take action against the perpetrators of these crimes. The fundamental question of whether *obligatio erga omnes* fully encompasses the meaning of the Latin word *obligatio*, or if it has been altered in international law to indicate only the presence of a right rather than a legally binding obligation, remains unresolved in international law and has not been adequately addressed in ICL doctrine. However, Ulf in his article mentioned that "while States are obligated not to commit international crimes under *jus cogens*, this does not automatically mean they have a duty under *jus cogens* to relieve other States from liability for such crimes."[841] This is a contentious issue among legal scholars, but it's important to note that States have consistently upheld the universality of international crimes.[842] Most importantly, in terms of State practices,

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[837] The Commission has recognized the prohibition of crimes against humanity as a norm of *jus cogens* in the preamble of the draft articles on crimes against humanity, Report of the International Law Commission, retrieved from https://documents.un.org/doc/undoc/gen/g17/237/29/pdf/g1723729.pdf. Also, *Prosecutor v Nyiramasuhuko* (ICTR-98-42), Appeals Judgement, 14 December 2015, para. 2136, the court Tribunal noted that the discretion of the Security Council in defining crimes against humanity was "subject to respect for peremptory norms of international law (*jus cogens*)", First report on Jus Cogens by Dire Tladi, Special Rapporteur, retrieved from https://documents.un.org/doc/undoc/gen/n16/063/77/pdf/n1606377.pdf, p. 27.

[838] "The prohibition of the use of force as a norm of *jus cogens* is recognized in practice as the Commission has broadly defined it. As a terminological matter, the present report will, from this point onwards, refer to the prohibition of aggression in lieu of the possible alternatives, i.e., the prohibition of the use of force, prohibition of aggressive force, and the law of the Charter on the prohibition of force, save in cases of direct quotes", Fourth report on peremptory norms of general international law (*jus cogens*), retrieved from https://digitallibrary.un.org/record/3798216?ln=en&v=pdf, p. 27. For more, Report of the International Law Commission, retrieved from https://documents.un.org/doc/undoc/gen/g17/237/29/pdf/g1723729.pdf.

[839] The *jus cogens* status of basic rules of international humanitarian law has been affirmed in the jurisprudence of international courts and tribunals, ", Fourth report on peremptory norms of general international law (*jus cogens*), retrieved from https://digitallibrary.un.org/record/3798216?ln=en&v=pdf, p. 52.

[840] "Obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the guilty state committing the internationally wrongful act. It has been suggested that an example of an erga omnes obligation is that of a people's right to self-determination", Oxford Reference, retrieved from https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095756413.

[841] Linderfalk, Ulf. *The Legal Consequences of Jus Cogens and the Individuation of Norms*. Leiden Journal of International Law 33, no. 4 (2020): 893–909. https://doi.org/10.1017/S0922156520000357.

[842] Heller, Kevin Jon. *What Is an International Crime? (A Revisionist History)*. Harvard International Law Journal, vol. 58, no. 1, 2018, retrieved from https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/HLI205_crop.pdf.

nearly 150 States have adopted legislation that allows their courts to exercise universal jurisdiction over war crimes, crimes against humanity, genocide, or aggression.[843] Why are States obligated to prosecute international crimes committed on their territory? The defining characteristic of an international crime is that all states have a *jus cogens* obligation to domestically criminalize the act in question. It is widely acknowledged, upon the ICJ's proposition in *Barcelona Traction*[844] and *Belgium v. Senegal*[845], where *jus cogens* norms give rise to correlative *erga omnes obligations*. A state's failure to criminalize an international crime on its territory violates both *jus cogens* and *erga omnes obligations*, allowing all States to exercise universal jurisdiction over the crime.[846] Furthermore, the ICJ emphasizes that the obligation to criminalize a core crime applies not only to States that have ratified the Convention by choice but also equally binds all States as a matter of general international law, even those without any conventional obligation.[847] Therefore, it's clear that international law imposes a *jus cogens* obligation on States to criminalize core crimes domestically, justifying their status as international crimes.[848]

From the *jus cogens* perspective, complementarity has the potential to instigate a compelling impact, fostering adherence to the duty of investigating and prosecuting. This stems not only from its recognition by States as a principle endowed with a heightened level of legitimacy but also because of its function as a conduit for conferring legitimacy to domestic proceedings.[849] Additionally, certain facets of complementarity suggest its conceptualization as a coercive mechanism. In this regard, a State failing to fulfill its obligation to investigate and prosecute is

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[843] Amnesty International, retrieved from https://www.amnesty.org/en/documents/ior53/019/2012/en/.
[844] *Barcelona Traction*, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), retrieved from https://www.icj-cij.org/case/50, paras. 33–34.
[845] *Belgium v. Senegal*, retrieved from https://www.icj-cij.org/case/144, para. 68.
[846] Heller. *What Is an International Crime*. 2018, retrieved from https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/HLI205_crop.pdf, p. 405.
[847] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, retrieved from https://www.icj-cij.org/case/12. Also see, https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/HLI205_crop.pdf, p. 360.
[848] Heller. *What Is an International Crime*. 2018, retrieved from https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/HLI205_crop.pdf, p. 406.
[849] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.

subject to reprimand. Furthermore, complementarity exhibits characteristics akin to those of a managerial compliance model. This involves the ICC actively engaging with State Parties to the Rome Statute, participating in a cooperative endeavor aimed at ensuring accountability for perpetrators. Notably, complementarity is evolving as the focal point of a process wherein its fundamental premise gradually permeates domestic legal systems and the political processes of States.[850]

It is imperative to highlight that the manifold rationales for States' compliance with international law are not comprehensive. However, it is beyond the purview of this study to provide an exhaustive account of compliance theories for all intricacies. Instead, this analysis is circumscribed to the primary strands of explanations that, while acknowledging the relevance of international law in influencing States' conduct, have significantly shaped contemporary perspectives on compliance with international legal norms and principles.

Furthermore, the diverse theories utilized in scrutinizing complementarity's capacity as a catalyst for compliance are rather mutually inclusive. Certain theories address the non-compliance phenomenon at distinct levels, exhibiting overlaps or interdependencies. It is not suggested that the factors under consideration[851] possess equal efficacy in prompting compliance, let alone be [individually] sufficient to explicate complementarity's potential as a mechanism for such inducement. Instead, the amalgamation of their strengths and weaknesses delineates the extent to which complementarity can function as a catalyst. The delineation between these serves predominantly analytical purposes.[852]

[850] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.
[851] legitimacy, sanctions, cooperation and consultation, and norm internalization.
[852] Kleffner*, Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.

#### *5.2.3.1. Legitimacy of Complementarity*

A primary aspect affirming the characterization of complementarity as a catalyst for compliance is its dual connection to legitimacy. This dual connection encompasses the inherent legitimacy of complementarity and the capacity of complementarity to confer legitimacy on domestic proceedings. Initially, complementarity as an entity is imbued with a heightened level of legitimacy. This inherent legitimacy is posited to exert a compelling influence, fostering a gravitational pull toward compliance. This legitimacy is derived from the procedural genesis of complementarity and its substantive nature. Concerning the procedural aspect, the ICC system, with complementarity as a foundational principle, is constructed based on the precise consensus of Member States to the Vienna Convention. Non-State Parties bear no obligations under the convention.[853] Challenges asserting that the ICC, and its role in determining a State's 'unwillingness' or 'inability,' have arisen from an improper process carry significantly less weight—if any—than analogous challenges directed at the UN *ad hoc* tribunals. The latter were imposed externally and lacked the specific consent of the former Yugoslavia and Rwanda for their establishment. The notion that complementarity has undergone a proper procedural course does not imply that this facet of legitimacy deviates from other treaties. This encompasses treaties imposing upon member States an obligation to investigate and prosecute. Even historical precedents make a compelling effect on compliance. The potency of the compliance pull generated by the procedural legitimacy of the ICC Statute surpasses that of Statutes governing international criminal tribunals that are not established with the explicit consent of the concerned States. Beyond procedural genesis, the legitimacy of complementarity is grounded in substantive aspects.

Primarily, complementarity serves as a guardian of State sovereignty by reaffirming rather than infringing upon their paramount role in investigating and prosecuting core crimes. As long as

[853] except for the limited circumstances of Security Council referrals, where complementarity similarly applies in principle.

States fulfil their designated function in suppressing atrocity crimes, they hold the vital independent privilege to exercise jurisdiction over those as they deem appropriate. These characteristics position complementarity as a pivotal argument against the assertions that the International Criminal Court (ICC) undermines State sovereignty. Secondly, complementarity indicates a significant degree of determinacy.[854] The core message is that the ICC is 'complementary to national criminal jurisdictions', coupled with the assertion that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', which leaves no room for ambiguity.[855] It is unequivocally established that States retain their primary role in investigating and prosecuting core crimes, and the ICC's sole function is to address deficiencies in national criminal jurisdictions and to act as a subsidiary forum. In the third instance, complementarity exhibits a heightened level of coherence by aligning itself with the fundamental concept underpinning the allocation of regulatory and judicial authority between national and international domains. Generally, this concept posits that actions on the international stage gain legitimacy because of the inherent shortcomings of regulatory or adjudicative measures at the domestic level. When a matter is subjected to international law and regulation, States opt to shift from the domestic sphere to the international sphere. This decision is grounded in States' perception that such regulation is imperative to safeguard collective interests, including the peaceful coexistence of States, collaboration in areas beyond the capacity of individual States, and the protection of meta-national values such as peace, human dignity, and the universal needs of humanity. The ongoing debate on State sovereignty revolves around the critical assessment of whether grounds for international regulation are robust and persuasive. In the absence of such grounds, international regulation is deemed unnecessary and matters are left within the realm of

[854] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.
[855] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.

national regulation. By way of example, the concept of 'subsidiarity' within the framework of the European Union provides a clear articulation of this idea.[856]

The distribution of simultaneous judicial authority between international and national courts when explicitly regulated by States adheres to a consistent framework. International adjudicative forums become superfluous when national courts can achieve effective adjudication proficiently. In instances where both international and national courts possess competency, the latter typically retains the opportunity to rectify grievances before a matter is brought before an international judicial entity. This principle is most prominently exemplified by the requirement to exhaust local remedies[857].

In a compelling expression, Switzerland characterizes complementarity as an embodiment of the federalist principle, wherein issues should be addressed at the level where they can be most efficiently resolved.[858] While the preceding analysis underscores that complementarity inherently possesses a substantial degree of legitimacy, engendering a pull towards compliance, the second nexus between legitimacy and complementarity takes on a totally distinct character. This pertains to complementarity's function as a conduit for legitimizing national proceedings. When the Court, in accordance with Article 17(1)(a)(b)(c), deems a case inadmissible, complementarity confers upon

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856 "The Principle of Subsidiarity | Fact Sheets on the European Union | European Parliament," n.d., https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity#:~:text=In%20areas%20in%20which%20the%20EU%20does%20not%20have%20exclusive,States%2C%20but%20can%20be%20better. Also, subsidiarity is of course not an EU invention, and has much older roots. In international law see: https://jeanmonnetprogram.org/paper/the-principle-of-subsidiarity-as-a-constitutional-principle-in-international-law/. In a theoretical sense, subsidiarity is usually traced back to Pope Leo XIII and his edict 'Rerum Novarum' Cf. https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1162&context=jcls.

857 The European Court of Human Rights is a good example in this sense. The exhaustion of all available domestic appeal procedures is essential in the system of the European Convention of Human Rights (ECHR). Failure to appeal a case to all national courts up to and including the State's court of last resort may result in an application being declared inadmissible by the ECtHR, in accordance with Article 35 of the ECHR. Retrieved from "*THE EUROPEAN COURT of HUMAN RIGHTS: Questions & Answers for Lawyers 2020 Council of Bars and Law Societies of Europe*." n.d. https://www.echr.coe.int/documents/d/echr/q_a_lawyers_guide_echr_eng; and "*Practical Guide on Admissibility Criteria*" n.d. https://www.echr.coe.int/documents/d/echr/Admissibility_guide_ENG.

858 Message on the Rome Statute of the International Criminal Court, the Federal Law on Cooperation with the International Criminal Court and a revision of criminal law (in German), retrieved from https://www.fedlex.admin.ch/eli/fga/2001/133/de.

national proceedings the status of 'willingness' and 'ability'. This legitimizing mechanism, which arises from its practical application has the potential to motivate and facilitate States to exercise their jurisdiction over core crimes. This renders domestic proceedings less susceptible to challenges from entities other than the International Criminal Court (ICC), asserting their flaws. If the ICC determines that domestic proceedings satisfy the criterion of 'willingness', any claim regarding the shielding of the individual from criminal responsibility can be considered definitively debunked.

#### *5.2.3.2. Sanctionist Features of Complementarity*

Complementarity encompasses distinct sanction-oriented attributes that can prompt States to investigate and prosecute. These attributes are primarily manifested in the fact that the failure to conduct adequate investigations and prosecutions by the State results in the issuance of a declaration of admissibility. In this understanding, complementarity can be conceived as a mechanism for the enforcement of the broad international responsibility of State Parties for breaching the *erga omnes partes*[859] obligation for investigation and prosecution of atrocity crimes.[860]

The State parties to the Convention to whom this obligation is owed, the International Criminal Court goes beyond merely assessing whether a State has inadequately addressed crimes within its jurisdiction. Such an assessment, in isolation, would contribute little beyond what is already available through existing international supervisory mechanisms in the human rights realm.[861] The novelty of complementarity lies in its groundbreaking feature—the proactive agreement among State Parties that failure to meet this obligation shall result in a tangible legal

[859] *Erga omnes partes* is a legal term that refers to treaty obligations owed towards a group of states parties to the same treaty, which all have a legal interest in.
[860] Stigen, Jo. *The Relationship between the International Criminal Court and National Jurisdictions*, (Leiden, The Netherlands: Brill | Nijhoff, 25 Jul. 2008) doi: https://doi.org/10.1163/ej.9789004169098.i-536.
[861] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.

consequence, such as the States being forfeited from the claim to exercise its jurisdiction over its subjects.

The potential imposition of such action, entailing the authoritative determination[862], grips the power to coerce member States to investigate and prosecute atrocity crimes. The latent coercion is augmented by the accompanying reputational costs in the international arena. The branding of a State as failing to meet the criteria for cases to be deemed inadmissible carries significant repercussions, further reinforcing the efficacy of this sanction-driven aspect of complementarity.[863]

The potential for inducing compliance by ICC's coercion to declare a case admissible hinges on a critical condition, where both the prosecutor and the State concerned must share an inclination and capability to investigate a given number of cases. In the absence of such alignment, the pressure applied on States via the ICC's intervention remains unrealized. However, the likelihood of such an alignment has two pivotal limitations. In summary, the potential influence of the ICC through complementarity faces limitations on two fronts. First, the concept of 'unwillingness' in Article 17(2) constrains the ICC's reach, as it does not comprehensively cover all instances where States can intentionally abstain from leading effective, fair, and impartial proceedings. Article 17(2) excludes certain cases, especially those involving violations of due process, from being declared admissible unless under specific circumstances. Consequently, the Court cannot leverage complementarity to pressure States with a declaration of admissibility when proceedings violate due-process norms outside the exceptions outlined in Article 17(2). Secondly, under Article 17(1)(d) limits the Court's capacity to handle only a small number of cases in each situation due to the practical necessity, prosecutorial policy, and mandatory admissibility requirement of sufficient gravity.[864] Therefore, the sanction-oriented aspects of complementarity

[862] of failure in the form of a declaration of admissibility.
[863] Dube, *Prosecuting the Three Core Crimes*, 2019.
[864] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.

can only apply pressure on States to perform their due responsibilities. This holds even when States have an anticipatory response to the possibility of a case being declared admissible, as complementarity's catalyst effect is confined to cases falling within the court's criteria for selection. In cases outside these criteria, the ICC lacks the ability to enforce its pressure of admissibility of cases, thereby compelling States to fulfil their duty to exercise jurisdiction.

In summary, complementarity incorporates components characteristic of a "coercive" mechanism designed to censure States that neglect the due responsibilities within the dominion of the International Criminal Court.[865] This mechanism holds the potential to compel compliance by offering a deterrent against the repercussions of losing dominion over atrocity crimes, coupled with the associated reputational costs linked to a declaration of admissibility. However, the capacity of complementarity to foster compliance is restricted to some aspects:

- It applies primarily to States that have consciously chosen inactivity or are deemed 'unwilling' per Article 17(2);
- its efficacy relies on States weighing the benefits of investigation and prosecution against the associated costs;
- its influence is contingent on the alignment of the jurisdictional scopes of States and the ICC.

#### *5.2.3.3. Role of Complementarity in Compliance and Cooperation*

The managerial facets inherent in complementarity possess the potential to influence, rather than coerce, non-compliant States to alter their behavior and surmount impediments hindering effective national investigations and prosecutions. More precisely, these facets encompass the

[865] Bassiouni, M. Cherif, and William A. Schabas, eds. *The Legislative History of the International Criminal Court* (2 vols.), (Leiden, The Netherlands: Brill | Nijhoff, 05 Oct. 2016) doi: https://doi.org/10.1163/9789004322097

communicative interchange between ICC and member States (and, to a certain extent, non-State Parties), along with the oversight exercised by the ICC over the actions of the States. In contrast to a coercive strategy, these aspects generate a more collaborative *modus vivendi*[866], shifting the relationship between States and the ICC from antagonism to collaboration.[867]

The complementarity procedural framework promotes contact between the ICC and States, and the nature of this interaction is dependent on the triggering mechanism. In the context of *proprio motu* investigations, the incumbent prosecutor described his policy as follows:

> In light of the complementarity regime set out in the Statute and the central role accorded to it in the general policy of the Office, the Prosecutor will generally seek to alert the relevant State of the possibility of taking action very early in the process. For this reason, when the office receives sufficiently detailed and credible information about alleged crimes, the office will, in general, consult and seek additional information from the States that would normally exercise jurisdiction, unless there is reason to believe that such consultations may prejudice the future conduct of an analysis or investigation or jeopardize the safety of persons.[868]

Moreover, in the context of State referrals and investigations *proprio motu*, the interactive process is initiated through the notification outlined in Article 18(1). This triggers a reciprocal exchange between the Prosecutor and States seeking a deferral, a process overseen and conducted before the Pre-Trial/Trial/Appeals Chamber. Under Article 19, in the cases of UNSC referral, two crucial issues are discussed: first, is the State actively investigating and prosecuting atrocity crimes under

[866] an arrangement or agreement allowing conflicting parties to coexist peacefully, either indefinitely or until a final settlement is reached

[867] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.

[868] Retrieved from https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf.

ICC jurisdiction? Second, do the criminal proceedings fulfill the necessary conditions regarding 'willingness' and 'ability'?

The collaborative facets of complementarity are reinforced by the supervisory role of the court. This authority also encompasses the Prosecutor's capacity to examine the deferral to a State's investigation or a determination of inadmissibility. It also involves the Prosecutor's capacity to request information regarding the status of its investigations and any ensuing prosecutions from the State to which the case has been deferred.[869] Furthermore, if the Prosecutor determines that the complementarity requirement has been met based on the evaluation, s/he has the power to request authorization from the Pre-Trial Chamber to initiate an investigation.

Simultaneously, the collaborative procedures of interaction and monitoring clarify complementarity as a means of enabling the court's interaction with States. States are required to provide justifications for alleged non-compliance where "reasonable grounds" suggest that a State may be inactive, unwilling, or unable.[870] The implicated State is provided the opportunity to rectify its conduct, aligning it with the obligation prescribed by ICC. The State is also given the chance to persuade the Court that it is genuinely pursuing investigations and prosecutions for the relevant cases. However, the Court autonomously evaluates the efforts of the States in this regard. If the State persistently fails to fulfill the mandate, the Court shall declare the case admissible.

#### *5.2.3.4. Process of Incorporation*

The final rationale supporting the characterization of complementarity as a catalyst for compliance focuses on its function in norm internalization. In this method, the fundamental notion that the

[869] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.
[870] Nimigan, Sarah. *The Problems Facing the International Criminal Court: African Perspectives*. Scholarship@Western, n.d. https://ir.lib.uwo.ca/etd/8186/.

States carry the primary responsibility for addressing core crimes becomes ingrained in their domestic legal and political mechanisms.[871] This internalization holds the potential to ultimately foster compliance with the obligation to investigate and prosecute atrocity crimes.

The norm-internalization process is facilitated by the collaboration among various players engaged in ICC-related matters, shaping and steadily forming a mutual understanding of the complementarity. The procedural framework involves States, the ICC, accused parties, victims, and intergovernmental and non-governmental organizations, all of whom – in their own, very different ways – contribute to interpreting complementarity. This interaction occurs in diverse forums, with the ICC being the most remarkable one. Additionally, all the actors engage with complementarity in less formal ways and various contexts collectively building the substance for interactive dialogue, fostering the evolution of a shared understanding of complementarity.

While the ICC's jurisprudence on complementarity is still in development, a discernible consensus among actors emerges: States carry the key responsibility for investigating and prosecuting atrocity crimes, with an emphasis on enhancing their capability to do so. This shared understanding is not only reflected in Statements but is also progressively adopted into the domestic legal processes of States.

Upon becoming Parties to the Rome Statute, States routinely review their laws governing the national prosecution of core crimes, evaluating their alignment with the Statute's provisions. In several instances, these reviews have led to the adoption and implementation of legislation, enabling States to investigate and prosecute core crimes as a response to the complementary regime.

According to the Swiss Explanatory Report,

[871] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2009.

> [ . . . ] -at the States [ . . . ] have to reflect on the matter [of incorporating the crimes in the Statute into their domestic criminal codes and penalizing them in the same manner, JK] derives mainly from the principle of complementarity as embodied in Article 17. If States do not want to run the risk of losing their primary competence to the ICC in a particular case, they must ensure that the crimes within the jurisdiction of the Court are penalized in their internal legal orders in one way or another [ . . .][872]

The explanatory memoranda accompanying draft ICC implementation laws in Uruguay and Australia underscore the crucial link between the principle of complementarity and the alignment of crimes within the jurisdiction of the ICC with punishable conduct under national laws. In Uruguay, it is emphasized that for complementarity to be operational, crimes falling under the ICC's jurisdiction must also be established in national law. Similarly, in Australia, the Parliament's intent is articulated through amendments to the Criminal Code, making it clear that the ICC's jurisdiction is complementary to Australia's. The explanatory memorandum to Australia's 2002 ICC Act[873] clarifies that by mirroring crimes from the Rome Statute in national law, Australia retains the ability to prosecute individuals domestically, rather than surrendering them to the ICC for trial. This principle is echoed in Statements from various other countries, including Belgium, Germany, Norway, Senegal, South Africa, Spain, the Netherlands, and Venezuela, emphasizing the direct relationship between the adoption or review of domestic legislation and complementarity, thereby aligning with the provisions of the convention.

Most of these declarations indicate that the motivation behind implementing laws is driven by States' motivation to avoid admissibility of cases before the International Criminal Court. Implementation is perceived as a protection against ICC's intervention, reducing the risk of losing

[872] Switzerland, Botschaft über das Römer Statut des Internationalen Strafgerichtshofs, das Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof und eine Revision des Strafrechts vom 15 November 2000, Bundesblatt Nr. 7, 20. February 2001, 391–570, available at https://www.fedlex.admin.ch/eli/fga/2001/133/de. (In German, translated by the Author.)

[873] Retrieved from https://www.legislation.gov.au/Details/C2004A00992.

the ability to try the cases, and avoiding the label of 'unable' due to the absence/inadequacies of substantive legislation that would make a national judicial system unavailable. However, the incorporation of such provisions does not ensure compliance with the obligation to investigate and prosecute, unless they are actually applied and enforced. Achieving this goal requires not only legislative internalization, but also internalization through adjudication, executive action, and political and social acceptance. The success of complementarity as a catalyst for compliance hinges on its role as a converging point for norm internalization in the realm of actual enforcement, where challenges comparable to those previously mentioned are likely to persist.

While complementarity possesses the potential to catalyze the domestic investigation and prosecution of International Criminal Court (ICC) crimes under specific circumstances, substantial barriers to effective national suppression of these crimes will probably persist. The systemic nature of such offenses remains unchanged, thereby perpetuating obstacles to national suppression inherent in this systemic nature. This is evident in current ICC situations, such as those in Uganda Sudan, and DRC where impediments to national suppression closely align with those observed in situations predating the enforcement of the Rome Statute involving the commission of core crimes.

The drafters of the Statute envisioned a court that reconciles the imperative for ensuring the accountability of perpetrators of atrocity crimes, with States' concerns regarding their sovereign prerogative to enforce prohibitions against such crimes domestically. Given its complementary nature, this foundational intent has shaped an institution designed to address deficiencies in national criminal jurisdictions and fill the gap left by inactive, unwilling, or unable States. However, the question remains: Does the regulatory framework of complementarity in the Statute equip the ICC with the necessary tools to fulfill this intended purpose?[874]

[874] Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 2008.

When examining this question in the context of admissibility criteria, the answer is likely affirmative in the most conceivable scenarios. If States exhibit complete inactivity concerning such crimes, cases would meet the admissibility requirements, enabling the ICC to intervene and ensure the prosecution of perpetrators. Additionally, the notions of 'unwillingness' and 'inability' encompass a broad range of obstacles that have historically impeded effective national suppression of core crimes and are anticipated to persist in the future. This acknowledgment exists despite the consideration that a more expansive and adaptable concept of 'ineffectiveness' could have achieved the same objective, potentially avoiding conceptual and practical challenges inherent in the current regulation of admissibility criteria. On balance, the existing criteria often empower the ICC to fill the void left by national criminal jurisdictions. Though, it's essential to note that this assertion may not apply universally, particularly in scenarios where the rights of the accused are violated, or convicted individuals are granted clemency post-trial, satisfying the criteria of willingness and ability.

Addressing the effects of complementarity on the national suppression of atrocity crimes, it becomes apparent that the Rome Statute establishes an international criminal justice system where national criminal jurisdiction maintains a central role. From a normative standpoint, the obligation to investigate and prosecute delineated in the Statute is fundamentally categorical, allowing limited room to reconcile instances of non-investigation and non-prosecution with the Statute's legal framework. The general principles of international law do not offer grounds to excuse the international wrongfulness of failing to investigate and prosecute, except under specific and typically temporary circumstances. This reinforces the overarching trend in international law, emphasizing criminal proceedings rather than alternative accountability methods for those suspected of core crimes. While States retain maneuverability within the constraints of the Court, they must recognize that many cases fall beyond the ICC's purview. Consequently, the Statute unequivocally affirms that States Parties are legally obligated to investigate and prosecute.

## 5.3. Final Thoughts

The enactment of the Rome Statute represents a crucial milestone in the pursuit of accountability for genocide, crimes against humanity, and war crimes. ICC and national criminal jurisdictions play pivotal roles, with the principle of complementarity delineating their respective competencies.[875] However, the term 'complementarity' should not be misconstrued to imply that the ICC and national jurisdictions collectively form a seamlessly integrated accountability system. The idea of such a unified system may be considered impractical in a world where sovereign States remain primary actors, and the diversification of international law contributes to fragmentation rather than unification.

Despite this, acknowledging these realities should prompt rather than discourage systemic contemplation of the interplay between different forums addressing core crimes' prohibition and their incorporation into a broader framework of international criminal justice. Such systemic reflections on international criminal justice should, in turn, be part of a comprehensive accountability scheme for these crimes, encompassing avenues beyond individual criminal responsibility to address the various implicated actors.[876] However, both judicial bodies represent only a part of the broader landscape of the international criminal justice system.[877] Other mechanisms, such as *ad hoc* internationalized criminal courts and tribunals, have played significant roles in the past and are likely to remain relevant in the future. The ICC's ability to address the shortcomings of national criminal jurisdictions will inevitably be incomplete.[878] The ongoing

[875] Victor Tsilonis, *The Jurisdiction of the International Criminal Court*, Springer eBooks, 2019, https://doi.org/10.1007/978-3-030-21526-2.

[876] Nimigan, Sarah. *The Problems Facing the International Criminal Court: African Perspectives*. Scholarship@Western, n.d. https://ir.lib.uwo.ca/etd/8186/.

[877] Braga da Silva, Rafael. *Chapter 8 Collaboration between the Office of the Prosecutor and Third-Party Investigators*. In *The International Criminal Court in Its Third Decade*, (Leiden, The Netherlands: Brill | Nijhoff, 2023) doi: https://doi.org/10.1163/9789004529939_009.

[878] Imoedemhe, *The Complementarity Regime of the International Criminal Court*, 2017

pursuit of accountability for genocide, crimes against humanity, and war crimes continues to drive the exploration of various forums for individual criminal responsibility, leading to the potential for overlapping jurisdictions. The increasing diversity of these international legal entities raises pressing questions about how to regulate their relationships vertically and horizontally. The dynamics between domestic courts of different States, as well as between different *ad hoc* internationalized criminal courts and tribunals, need careful consideration. Questions regarding the competencies of domestic courts in relation to these entities and the conceptualization of the relationship between the ICC and *ad hoc* internationalized courts and tribunals highlight that complementarity, while crucial for the relationship between ICC and national jurisdictions is just one organizational principle in the broader context of establishing a comprehensive international criminal justice system.[879]

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".[880] 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. Prosecutor Khan has emphasized the policy's potential to serve as a central hub for collective accountability efforts.[881] This hub would solidify the OTP's position as a robust and effective partner to national authorities. By providing prompt and impactful assistance in addressing grave crimes falling under the Rome Statute's cooperation framework, the OTP can demonstrate its multifaceted relevance and value.[882]

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[879] Olásolo, Héctor. *The Triggering Procedure of the International Criminal Court*, (Leiden, The Netherlands: Brill | Nijhoff, 23 Sep. 2005) doi: https://doi.org/10.1163/9789047415749

[880] 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.

[881] International Criminal Court, *Policy on Complementarity and Cooperation,* 2024, Preface.

[882] International Criminal Court, *Policy on Complementarity and Cooperation,* 2024, paragraph 2.

The policy embodies a strategic approach to complementarity, acknowledging the evolving landscape of core international crimes. It recognizes the increasing willingness of national authorities to assert jurisdiction over such crimes within their domestic legal systems, potentially utilizing universal jurisdiction principles.[883] Additionally, the policy underscores the importance of joint efforts in information exchange and complementary evidence-gathering activities.

This strategic approach reflects the emergence of a global ecosystem – a network of international justice actors.[884] It presents a significant opportunity to expand the collaborative capacity of international judicial institutions and national authorities. Interestingly, the proactive and dynamic measures outlined in the policy resonate with the arguments presented throughout this dissertation.[885] The dissertation contends that the OTP, in addition to fulfilling its core investigative mandate, can also enhance its ability to interact with and support the efforts of other criminal jurisdictions and accountability actors. It is crucial to recognize the inextricable link and mutual dependence between the principles of cooperation and complementarity. By strengthening its cooperation capabilities with national authorities, the OTP can provide tangible support for domestic proceedings.[886] This, in turn, will bolster the foundation for national actors to uphold their primary responsibility to investigate and prosecute international crimes.

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.[887] 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.[888] The Strategic Plan further emphasizes the importance of close

[883] International Criminal Court, *Policy on Complementarity and Cooperation,* 2024, paragraph 4.
[884] International Criminal Court, *Policy on Complementarity and Cooperation,* 2024, paragraph 5.
[885] International Criminal Court, *Policy on Complementarity and Cooperation,* 2024, paragraph 6.
[886] International Criminal Court, *Policy on Complementarity and Cooperation,* 2024, paragraph 7.
[887] 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.
[888] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, p. 4.

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 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.[889]

This policy document serves a fourfold purpose. Firstly, it elucidates the Office's implementation strategy for its "two-track approach". This approach entails fostering partnerships with other accountability actors while maintaining unwavering vigilance in fulfilling its core mandate.[890] Secondly, the document underscores the mutually reinforcing nature of these two tracks. It demonstrates how cooperation with other actors strengthens the Office's ability to fulfill its investigative and prosecutorial responsibilities.[891] Thirdly, the document outlines the ongoing transformations the Office is undertaking to equip itself as a robust and tangible partner for domestic authorities. Concrete examples from the Office's practice are provided to illustrate this transformation.[892] Finally, the document explores avenues for advancing collective efforts amongst a diverse range of accountability actors, mechanisms, and processes.[893] This collaborative approach aims to achieve comprehensive redress for victims and survivors of international atrocities.

[889] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, p. 4.
[890] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 7, p. 4.
[891] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 7, p. 4.
[892] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 7, p. 4.
[893] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 7, p. 4.

The document acknowledges the potential absence of a willing or able partner at the national level in certain situations.[894] This could be due to a lack of activity, unwillingness, or even hostility on the part of the relevant State(s).[895] Nevertheless, the Office remains committed to its duties and strives for consistent engagement across all situations, actively seeking and inviting opportunities for collaboration at every juncture.[896]

The OTP outlined four central pillars upon which it will deepen its collaboration with national authorities:

- **By Creating a community of practice[897]**: To maximize the potential benefits of cooperation and complementarity, and to strategically determine the most opportune moments for the OTP's intervention, a comprehensive understanding of domestic legal landscapes is paramount.[898] This understanding will inform the OTP's collaborative efforts with national authorities. The OTP will achieve this enhanced understanding by establishing new forums and platforms that facilitate the exchange of information and ideas with its national counterparts. Additionally, the OTP will implement proactive measures to track the progress and actions undertaken by domestic jurisdictions in relation to international crimes.[899]
- **Technology as an accelerant[900]**: In its pursuit of becoming a central hub for cooperation in international criminal justice, the Office recognizes the importance of demonstrating tangible value to national investigators and prosecutors.[901] To achieve this objective, the Office is undertaking a comprehensive overhaul of its technological infrastructure. This

[894] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 8, p. 4.
[895] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 8, p. 4.
[896] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 8, p. 4.
[897] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 12.
[898] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 12.
[899] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 12.
[900] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 12.
[901] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 12.

transformation will empower the Office to not only receive, process, and preserve increasingly voluminous datasets, but also to effectively categorize and analyze this information through the utilization of advanced tools, including machine learning and cognitive services.[902] This enhanced technological capacity will position the Office in a unique position to contribute to national proceedings. Subject to essential parameters such as confidentiality and source consent, the Office will be able to share evidence and analytical products in a manner that directly supports the work of national authorities.[903]

- **Bringing justice closer to communities[904]**: By fostering a deeper integration with the local environment, the Office of the Prosecutor (OTP) can cultivate trust with all stakeholders, including national authorities.[905] This approach will also enhance the Office's capacity to identify new avenues for synergy and cooperation in the pursuit of international criminal justice. To achieve this objective, the Office is actively pursuing a significant expansion of its field presence in a number of situation countries.[906] This enhanced presence will serve to bolster the Office's investigative activities and facilitate a more profound engagement with national stakeholders and local civil society organizations (CSOs). The imperative for the International Criminal Court (ICC) to maintain unwavering relevance to the victims and survivors of atrocities necessitates a policy of close physical proximity and regular interaction with affected communities. The logical starting point for this enhanced engagement should be the conduct of activities geographically proximate to these communities whenever possible.[907]
- **Harnessing cooperation mechanisms[908]**: The current global landscape presents a unique opportunity to fundamentally reshape the relationship between the Office of the

[902] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 12.
[903] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 12.
[904] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.
[905] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.
[906] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.
[907] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.
[908] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.

> Prosecutor (OTP) and international or regional organizations.[909] Through active engagement and the pursuit of innovative collaborative initiatives, the Office is fostering new avenues for cooperation and the exchange of information.[910] Furthermore, the Office is actively seeking to strengthen strategic discussions with these organizations. This collaborative dialogue will explore various mechanisms for a more effective distribution of cases across the international, regional, and national levels.[911]

In summary, 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.[912] 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

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[909] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.
[910] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.
[911] International Criminal Court, *Policy on Complementarity and Cooperation*, 2024, paragraph 27, p. 13.
[912] 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/.

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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