



Department of Political Science

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Course of International Law

**Where Justice and Sovereignty Collide: The
Principle of Complementarity in the Rome Statute of
the International Criminal Court**

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Introduction

The adoption of the Rome Statute, in 1998, and the subsequent establishment of the International Criminal Court (ICC), in 2002, marked a watershed moment in the evolution of international criminal justice as the birth of such permanent court addressed the issue of prosecuting individuals for the most serious crimes of concern to the international community, symbolizing a global commitment to ending impunity. Differently from the *ad hoc* tribunals earlier instituted, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the International Criminal Court was not designed as the primary forum for criminal prosecutions, but rather as a complementary institution.

At the heart of this vision lies the principle of complementarity, a foundational concept enshrined in the Rome Statute. The principle posits that States bear the primary responsibility for investigating and prosecuting international crimes, while the Court intervenes only when national jurisdictions are unwilling or unable to carry out genuine proceedings. This principle represents a delicate balance between the respect for State sovereignty and the imperative of international justice. It reflects both a legal and political compromise: while asserting the necessity of holding perpetrators accountable, it acknowledges the primacy of national legal systems. Complementarity seeks to promote domestic accountability mechanisms and strengthen the capacity of national judicial systems, aligning with the broader goals of transitional justice and rule of law development. Providing a backstop against impunity where national efforts are insufficient, flawed, or compromised, the main objective of the Court is to temporarily substitute national courts giving them the possibility to strengthen their ability to deliver justice in accordance with international standards.

In order to preserve and respect this principle, the admissibility process is a crucial step in the Court's work as it grants the exceptionality of the Court's intervention.

This thesis explores the principle of complementarity as a cornerstone of the ICC's legal framework and its implications for international and domestic justice. It seeks to analyse how the ICC has interpreted and applied the complementarity principle in its jurisprudence, particularly through the analysis of Articles of the Rome Statute related to the topic.

The first chapter of this thesis will begin by tracing the historical and legal development of the Court, moving from the earliest acknowledgments of the need of an international criminal court to the eventual adoption of the Rome Statute. It will then proceed by examining the drafting process of the Rome Statute in which the principle of complementarity emerges as a *sine qua non* condition for the establishment of the Court since Article 1. Lastly, the chapter

will explore the underlying concept of this cornerstone principle and critically assess the interpretative implications of the absence of a precise definition within the Statute.

The second chapter of this thesis focuses on the analysis of Article 17 of the Rome Statute, the central provision governing the principle of complementarity. The chapter begins by examining the drafting history of the article, underscoring the necessity of incorporating such a principle into the Statute to preserve state sovereignty while ensuring accountability. It then proceeds to a comprehensive legal interpretation of Article 17, particularly addressing the admissibility criteria of the Court articulated through the terms ‘unwilling’ and ‘unable’. These terms have generated extensive legal debate, as they form the main basis upon which the Court determines whether to proceed or not before a case. The analysis draws upon the authoritative commentaries and interpretations offered by scholars such as William Schabas and Markus Benzing, whose contributions provide extremely valuable insight into both the drafting intent and the functional application of the Article within the broader framework of the Rome Statute.

The third and last chapter will explore the practical application of the principle of complementarity, focusing, in particular, on the procedural framework governing the admissibility of cases before the International Criminal Court, as mainly set out in Articles 18 and 19 of the Rome Statute. The chapter commences by identifying the three principal phases during which the admissibility of a case is evaluated within the framework of ICC proceedings. These include: the initial stage where the Prosecutor assesses whether to open an investigation, as outlined in Articles 15 and 53; the stage concerning preliminary admissibility determinations, under Article 18; and the stage involving formal challenges to admissibility, governed by Article 19. The chapter will also include an additional section which will address the operation of complementarity after a case has been deemed admissible, evaluating the degree to which the Rome Statute and the Rules of Procedure and Evidence allow for the reassignment of such cases to domestic judicial systems in order to maintain complementarity alive in each and every possible scenario.

The choice behind the study of this principle lies in its representation of balance between sovereignty and accountability, between national jurisdiction and global justice. It reflects a deeper legal and moral truth: that no single system holds all answers, but together, they form a more complete pursuit of justice. Studying this principle today is not merely a legal necessity, it is a response to an era that demands cooperation over confrontation, shared responsibility over isolation, and the recognition that enduring peace is built not by one authority alone, but through complementary efforts across borders.

Chapter I: The International Criminal Court and the Rome Statute: Foundations and the Establishment of the Principle of Complementarity

Introduction

In the first chapter this thesis will examine the historical and legal evolution of the International Criminal Court and of its foundational Statute.

The first section traces the origins of the ICC, analysing the early, often thwarted attempts to establish an international tribunal capable of addressing atrocities such as genocide, war crimes, and crimes against humanity. These initial efforts, often hindered by political and logistical challenges, culminate in the creation of the ICC, marking a significant milestone in the quest for global justice.

The second section explores the drafting of the Rome Statute, moving from Article 1, which formally establishes the Court's jurisdiction and authority, and introduces the principle of complementarity as a key mechanism for ensuring that national legal systems retain primary responsibility for prosecuting crimes, with the ICC stepping in only under specific circumstances.

In the third section, the concept of complementarity is examined, emphasizing the absence of a clear, universally accepted definition. This section will also explore the rationale behind the inclusion of complementarity in the Rome Statute, examining its role in balancing international justice with state sovereignty.

Through this analysis, the chapter lays the groundwork for a deeper exploration of complementarity's implications, challenges, and its evolving role in the pursuit of international criminal justice in the contemporary world.

1.1. International Criminal Court: Overview of the Attempts Leading to the Creation of the ICC

The creation of the International Criminal Court and its implementation can be linked to a long and complex process related to the presence of a common idea in the international landscape: the establishment of a universal Court able to prosecute perpetrators of international crimes. Before the effective creation of the ICC, in 2002, with the participation of 60 States to the ratification of the Rome Statute, the necessity to establish an international and permanent Court had already been discussed.¹

¹ Zappalà, S. (2005) *La giustizia penale internazionale*. Bologna: Il Mulino, p. 7

After the end of the First World War, during the Paris Conference in 1919, stemming from the will of the victorious powers, the need for a system to punish war crimes perpetuated during the antecedent years was stronger than ever.² A commission of inquiry was therefore established to investigate the responsibilities of those accountable for the war and the application of sanctions. This commission had investigative powers concerning war crimes and crimes against humanity committed by German and Turkish military personnel during the conflict. However, the judicial proceedings did not take place. The *ad hoc* tribunal never actually exercised its power due to the lack of political will among the Allied States. The international community, although willing to present war criminals for a fair and regular trial in view of their responsibility, suffered from the absence of an international body.

Years later, in 1937, the League of Nations again attempted, in Geneva, to create an international criminal court to try acts of international terrorism. However, the Convention for the Prevention and Punishment of Terrorism³ was never ratified by any country due to disputes among the member states over the articles regarding extradition. Once again, it was a failed attempt. In the international community, there was no international body with the *ius puniendi* to hold accountable those responsible for crimes that affect all of humanity and undermine the dignity inherent in every human being.

Only after another global conflict, the idea of a universal *ius puniendi* reemerged: the Second World War served as evidence of the degradation of human rights and of a need for their tutelage, pushing the international community to advance the idea of a global justice.

Before the end of the war, discussions were already underway regarding how to prosecute, and sentence, those responsible for the atrocities committed. In 1943, the United States, the United Kingdom, and the Soviet Union, through the Moscow Declaration, condemned the massacres committed by the Nazis and stated that major criminals, whose offenses transcended specific geographical contexts, would be punished by the Allies in joint decision, while war

² The Avalon Project (2008) *The Versailles Treaty Part VII: Penalties, Article 227*. Available at: <https://avalon.law.yale.edu/imt/partvii.asp>.

The Allied and Associated Powers publicly indict William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties. A special tribunal will be established to try the accused, ensuring him the guarantees essential to the right of defence. This tribunal will consist of five judges, one appointed by each of the following powers: the United States of America, Great Britain, France, Italy, and Japan. The tribunal's decisions will be guided by the highest principles of international policy, with the objective of upholding the solemn obligations of international agreements and the validity of international morality. It will determine the appropriate punishment, and the Allied and Associated Powers will request the Government of the Netherlands to surrender the ex-Emperor for trial.

³ League of Nations (1937) *Convention for the Prevention and Punishment of Terrorism*. Geneva: Library of Congress.

criminals, whose crimes had a defined geographical location, would be prosecuted in the country where the acts were committed.⁴

As soon as the war ended, the London Agreement of August 8th 1945, established the International Military Tribunal for Major War Criminals, the renowned Nuremberg Court, composed of the four victorious countries - France, the United States of America, Great Britain, and the former Union of Soviet Socialist Republics -, which would act in the interest of the international community to prosecute and judge the 'major war criminals' of the European Axis, accused of direct collaboration with the Nazi regime. The London Agreement, which also included the Statute of the Nuremberg Tribunal, addressed crimes that would be judged as international offenses by that Court.

Article 6 of the Tribunal's statute outlined three criminal categories: crimes against peace, war crimes, and crimes against humanity, with the latter only applicable when connected to the other two categories.⁵

⁴ The Avalon Project (2008) *The Moscow Conference; October 1943*. Available at: <https://avalon.law.yale.edu/wwii/moscow.asp>.

At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy. Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages of Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done. The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.

⁵ The Avalon Project (2008) *Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal*. Available at: <https://avalon.law.yale.edu/imt/imtconst.asp#art6>.

Article 6: The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

The International Military Tribunal for the Far East, more commonly known as the Tokyo Tribunal, was established following the adoption, by the Supreme Commander of the Allied Powers in the Far East, of the Charter of the International Military Tribunal for the Far East in January 1946. It is important to note that, unlike the Nuremberg Tribunal, which stemmed from the will of the four victorious states, the Tokyo Tribunal did not arise from an international agreement.

However, like the Nuremberg Tribunal, the Tokyo Tribunal was established to judge war crimes, crimes against peace, and crimes against humanity committed by the former political authorities and military leaders of Imperial Japan.

The Nuremberg Trial and the International Military Tribunal for the Far East represented the concretization of the need of an international criminal jurisdiction not only representing a critical step toward establishing accountability for crimes that transcend national borders, affirming the principle that individuals, including State leaders and military commanders, could be held personally responsible for egregious violations of international law, but serving as a watershed, breaking the monopolistic tradition according to which international crimes could only be prosecuted at the national level, thus paving the way for the establishment of a global framework for justice that transcends individual state sovereignty.

On December 11th 1946, the United Nations General Assembly approved a resolution⁶ recognizing the London Charter and the establishment of the Nuremberg and Tokyo Tribunals, reaffirming international law principles. It also declared genocide an international crime, stating that individuals, including government officials, could be punished for it. The UN urged nations to adopt laws to prevent and punish genocide and promote an international convention.

In 1947, the UN formed the International Law Commission (ILC)⁷ to develop the principles of Nuremberg and draft a Code of Crimes against Peace and Humanity. In 1950, the Commission adopted principles stressing individual responsibility for international crimes and established that neither the role of the offender nor superior orders could exempt them from liability.

(c) crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

⁶ A/RES/95(I).

⁷ A/RES/174(II).

Alongside this, the 1948 Convention on the Prevention and Punishment of Genocide⁸ allowed for genocide prosecution by State tribunals or international courts. The UN General Assembly asked the International Law Commission to explore the creation of a court for genocide and other international crimes.

The Commission concluded that establishing such court was possible, but challenges arose over integrating it into the International Court of Justice.⁹ In 1950, the General Assembly created a committee to draft a statute for an International Criminal Court. However, Cold War tensions and a lack of consensus delayed progress, and discussions were deferred in 1954.

During the 90s, the United Nations Security Council became protagonist in the management of major armed conflicts, such as the one in the former Yugoslavia and in Rwanda.

For the Yugoslavia case, following the atrocities committed after the breakup of the Socialist federal Republic, in 1993, through Resolution 808 adopted through unanimity, the Security Council categorized the conflict as a threat to international peace and security. The Secretary General of the time, Boutros Boutros-Ghali, agreed on the urgency of the case and, again through unanimity of the Security Council, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established.¹⁰

It was the first time that the Security Council created a subsidiary body of judicial nature, and it did so, as established in Resolution No. 827 of 1993, based on Chapter VII of the United Nations Charter, emphasizing that the measure would contribute to the restoration and maintenance of peace.

Similarly, in 1994, in response to the civil war fought in Rwanda between the Hutus and Tutsis, which resulted in the death of approximately 800,000 people, the Security Council established a new Criminal Court: the International Criminal Tribunal for Rwanda (ICTR).¹¹

Both tribunals, as outlined in their statutes, would have concurrent jurisdiction. In this way, crimes could be adjudicated both by international tribunals and by national courts, with

⁸ A/RES/260(III).

⁹ A/CN.4/34.

¹⁰ S/25704 (03/05/1993).

22. In the light of the disadvantages of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression. 23. This approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.

¹¹ S/RES/955 (1994).

primacy granted to the former. In other words, the international court could bring under its jurisdiction a case that was being examined by a national judge.¹² The compatibility between international and national jurisdiction in these courts partially adhered to the principle of *ne bis in idem*: a crime already examined by the international court could not be tried again by a national judge. On the other hand, a case tried by a national judge could be reviewed by the international tribunal if it was found that the national jurisdiction was not impartial or independent, or if it had treated the matter as a common crime or had acted in a way that undermined international competence.¹³

¹² International Criminal Tribunal for Rwanda (1994) *Statute of the International Criminal Tribunal for Rwanda - Concurrent Jurisdiction*. Available at: https://legal.un.org/avl/pdf/ha/ictr_EF.pdf.

Article 8: 1. The International Criminal Tribunal for Rwanda and the national courts have concurrent jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between January 1 and December 31, 1994. 2. The International Criminal Tribunal for Rwanda has primacy over the national courts of all states. At any stage of the proceedings, it may formally request national courts to refrain from exercising jurisdiction in favour of that of the International Tribunal in accordance with this Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

International Criminal Tribunal for the Former Yugoslavia (1993) *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 - Concurrent Jurisdiction*. Available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

Article 9: 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

¹³ International Criminal Tribunal for Rwanda (1994) *Statute of the International Criminal Tribunal for Rwanda*. Available at: https://legal.un.org/avl/pdf/ha/ictr_EF.pdf.

Article 9: 1. No person shall be tried by a national court for acts constituting serious violations of international humanitarian law under this Statute if they have already been tried for the same acts by the International Criminal Tribunal for Rwanda. 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may subsequently be tried by the International Criminal Tribunal for Rwanda only if: a) the act for which they were prosecuted was classified as an ordinary crime; or b) the proceedings were not impartial or independent, the trial before the national court was aimed at shielding the accused from international criminal responsibility, or the prosecution was not diligently pursued. In determining the sentence for a person convicted of a crime under this Statute, the International Criminal Tribunal for Rwanda will take into account the extent to which that person has already served any sentence imposed by a national court for the same act.

International Criminal Tribunal for the Former Yugoslavia (1993) *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*. Available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

Article 10: 1. No person shall be tried before a national court for acts that constitute serious violations of international humanitarian law under this Statute for which they have already been tried by the International Tribunal. 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may subsequently be tried by the International Tribunal only if: a) the act for which the person was tried was considered a common crime; or b) the proceedings conducted by the national court were neither impartial nor independent, aimed at removing the accused from their international criminal responsibility, or if the case was not adjudicated with due diligence. 3. In determining the sentence to be imposed on a person found guilty

Those Tribunals, however, were created as subsidiary organs of the Security Council of the UN, giving them a political connotation.

Despite it was sure that a permanent, independent and *super partes* Criminal Court had to be established to judge breaches of international law and violations of human dignities, the issue of the absence of such institution continued to be felt on the global stage until 1998.

1.2. The Rome Statute: Preparation and Relevance

Between June 15th and July 17th 1998, in Rome, the Plenipotentiary Conference of the United Nations took place, to follow up the request of multiple States to create a permanent and independent institution on the basis of an international treaty which would have been built on the legacies left by the ICTY and the ICTR.

On the evening of July 17th, after a hectic day filled with discussions and negotiations, the Committee of the Whole gathered. With only a few hours remaining before the conclusion of the Conference, the draft was composed of numerous sensitive compromises designed to ease the concerns of certain delegations and potentially isolate others. There was little opportunity left for further amendments or discussions, though India still proposed amendments that challenged the special powers of the Security Council and called for a clear ban on nuclear weapons.¹⁴ These two issues were deliberately selected because they had the potential to divide the Conference. The Indian amendments were rejected through a ‘no-action motion’ proposed by Norway, which passed with 114 votes in favour, 16 against, and 20 abstentions.¹⁵ This vote not only avoided contentious matters that could have had serious consequences but also served as a gauge of the draft statute's acceptance: «the full extent of the support for the Statute had now been made clear.»¹⁶ The United States also put forward two amendments¹⁷ related to the Court's jurisdiction, but they met the same fate as India's proposals.¹⁸ Subsequently, the Committee adopted the draft statute by acclamation. Later that evening, the plenary Conference convened for the final decision.

of a crime under this Statute, the International Tribunal will take into account the extent of any sentence already served by the person for the same act by a national court.

¹⁴ A/45/10, paras. 93-157. See also UN Docs. A/CN.4/PV.2150–2159.

¹⁵ A/CN.4/PV.2158, para. 71.

¹⁶ A/CN.4/L.454 [and Corr.I]. See also UN Docs. A/CN.4/PV.2189, 2192–2194, 2196.

¹⁷ A/45/10, para. 155.

¹⁸ Ibid.

At the end of the conference 120 States were in favour of the establishment of an International Criminal Court, with 7 opposing votes from China, the United States of America, Yemen, Iraq, Israel, Libya and Qatar, and 21 abstaining countries.

Subsequently, in response to the negative international repercussions caused by the opposing votes, Israel and the United States signed the Rome Statute on December 31st 2000. However, their ratifications remained hindered, if not unfeasible, due to the terrorist attacks of September 11th 2001, and the subsequent military operations in Afghanistan and Palestine. For this reason, on May 6th and August 28th 2002, both the United States and Israel formally notified the United Nations Secretary-General that they did not wish to be part of the respective treaty.

However, already on April 11th 2002, the 60 ratifications required for the entry into force of the Rome Statute were reached, and it came into effect on July 1st 2002.

Nowadays, 123 countries have ratified the Rome Statute, still with the exception of Israel, China, Russia and the US, of which the last three are part of the Permanent Members of the United Nations Security Council.

The set of rules contained in the Rome Statute, its Rules of Procedure and Evidence, and the Elements of Crimes document represent an initial official draft of the codification of international criminal law. This normative production includes the essential elements of a penal system and criminal procedure, with principles, strict definitions of jurisdiction, descriptions of punishable offenses, procedural rules, methods for establishing the procedural truth, and penalties. The Rome Statute established the state of the art in international criminal law for the creation of the International Criminal Court.

Article 1 of the Rome Statute affirms the Court establishes as a permanent institution, emphasising its authority to adjudicate the most serious international crimes and its complementarity to national criminal jurisdictions:

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

Special Rapporteur Doudou Thiam's initial draft of Article 1, however, was presented to the International Law Commission in 1990, containing two options:

Version A: There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind.

Version B: There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind, or other offences defined as crimes by the other international instruments in force.

Noting that the concept of international crime was broader than that of crimes against the peace and security of mankind, Thiam indicated a preference for Version B. Otherwise, it might have been necessary to establish two international criminal jurisdictions, «which would lead to complications.»¹⁹ New drafts were further proposed, preferring, for instance, the term ‘criminal’ instead of the term ‘penal’, in order to specify the objective of the court to operate with regards to crimes only and not to ordinary offences. Suggestions to introduce other statements of principle into Article 1 began to emerge in the early sessions of the Preparatory Committee. Entitling Article 1 a ‘declaratory provision’, a UK proposal suggested reference to the principle of complementarity be included:

There is established an International Criminal Court (‘the Court’) which shall be complementary to national criminal justice systems. Its jurisdiction and functions shall be governed by the provisions of this Statute.²⁰

During the drafting of the Rome Statute, in fact, it was unanimously decided that the future Court would intervene only as a secondary measure, in exceptional and limited cases.²¹ Furthermore, it will emerge from the negotiations on the Statute that the Court’s ultimate goal is not to address all criminal justice issues raised at the national level, but to ensure that the States themselves are the primary actors, capable of handling them; thus, the role of the Court, in this configuration, can be likened to that of a *deus ex machina*, intervening in crisis situations

¹⁹ A/CN.4/449 and Corr.1.

²⁰ Preparatory Committee on the Establishment of an International Criminal Court (1996) *Report of the Preparatory Committee on the Establishment of an International Criminal Court. Volume 2, Compilation of proposals*, A/51/22. Available at: <https://digitallibrary.un.org/record/222882?v=pdf>.

²¹ For a historical analysis of the negotiating dimension of this key structural rule between the International Criminal Court and national justice, see, among others, Schabas, W. (1999) ‘Article 17’, in Triffterer, O. (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*. Baden-Baden: Nomos.

and only in cases of utmost urgency, to provide a solution as quickly as possible regarding the causes of the conflict.²²

Complementarity was established as a *sine qua non* compromise, and this clearly influenced both the ratification, the entry into force of the Rome Statute, and the actual functioning of the Court.²³

The Court is competent to address four international crimes, all of which are also imprescriptible: the crime of genocide, war crimes, crimes against humanity, and, since 2017, the crime of aggression, following an amendment to the Statute²⁴. Furthermore, it is emphasized that the mere fact that a crime has an international character, as defined in the Statute, does not automatically confer jurisdiction on the Court.²⁵

In the International Criminal Court, the juxtaposition between national and international jurisdiction is not, as in the previous tribunals for the former Yugoslavia and Rwanda, based on the primacy of the International Tribunal. The International Criminal Court operates in a complementary and subsidiary manner to the judicial systems of States. Notably, the International Criminal Court will step in exclusively when national jurisdictions are unwilling or unable to conduct a case.²⁶

1.3. The Jurisdictional Concept of Complementarity in the Statute of the International Criminal Court

The definition of a term in international law is essential to fully grasp the meaning and significance of concepts. Following the same logic, a definition of the object of complementarity is fundamental. However, one of the very first considerations possible to

²² Reisman, M. (1998) 'Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics', *Tulane Journal of International & Comparative Law*, 6, pp. 46–52.

²³ Lattanzi, F. (1999) 'Compétence de la Cour pénale internationale et consentement des Etats', *Revue Générale de Droit International Public*, 2. Lyon: Université Sciences Po Lyon, p. 426.

²⁴ Schabas, W. (2016) 'International Criminal Justice and the Politics of Power', in Fernandez, J. (ed.) *International Criminal Justice*. Paris: CNRS, p. 33.

²⁵ Della Morte, G. (2002) 'The Boundaries of the Jurisdiction of the International Criminal Court: Critical Observations', *Revue Internationale de Droit Pénal*, 73(1), pp. 23-57.

²⁶ Cassese, A. et al. (2013) *Cassese's International Criminal Law*. Oxford: Oxford University Press, p. 296. Lattanzi, F. (2006) 'The Principle of Complementarity', in Argirò, F., Lattanzi, G. and Monetti, V. (eds.) *The International Criminal Court: Institutions, Jurisdiction, Crimes, and Procedure*. Milan: Giuffrè Editore, pp. 179–214.

Kleffner, J.K. (2008) *Complementarity in the Rome Statute and National Criminal Jurisdictions*. Oxford: Oxford University Press, p. 57.

move when trying to analyse the principle of complementarity, is the lack of a formal and unequivocal definition in the Rome Statute.

The evidence of what has just been stated is immediately given from the analysis of the Preamble of the Statute itself. Specifically, in the sixth paragraph of the Preamble, where it is stated that it's a duty of each State to prosecute, through their national courts, perpetrators of international crimes, it is only possible to derive an implicit reference to the concept of complementarity rather than a proper definition. With 'implicit reference' it is meant that the principle is inferred solely from the norm and specifically from the concept of 'duty', which reaffirms that the ownership of the right and power to punish is firstly detained by States. Since the State is traditionally the holder of this right, it logically falls primarily to it to take all necessary measures to prevent and suppress attacks on legal assets that could be committed within its territory.

Furthermore, in slightly more explicit terms, the principle is again mentioned in paragraph 10 of the Statute's Preamble²⁷ and in Article 1, which stipulates that: «A Criminal Court is established (...) its jurisdiction is complementary to that of national jurisdictions.» Once again, the norm merely refers to the primacy of the State's criminal instruments in relation to the most serious international crimes, and placing, just logically, the intervention of the Criminal Court in second place.

In the work of the International Law Commission regarding the creation of the International Criminal Court, the issue of delineating the competences between the Court and the state organs had only been addressed in a superficial way. At that stage of the project, in fact, discussions essentially focused on the method by which jurisdiction should be conferred by States,²⁸ on the appropriate technique that would have enabled the codification of the relationship between the States and the future International Criminal Court, and, more generally, on the system for accepting the Court's jurisdiction.²⁹

In addressing the interpretation of the Rome Statute and the concept of complementarity, Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides crucial

²⁷ United Nations (1998) *Rome Statute of the International Criminal Court*, Preamble, Provision No. 10. Available at: <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>. Highlighting that the International Criminal Court established under this Statute is complementary to national criminal jurisdictions.

²⁸ United Nations (1953) *Report of the Committee on International Criminal Jurisdiction*, Article 26, 27 July–20 August. Available at: <https://digitallibrary.un.org/record/591815?v=pdf>.

²⁹ Ibid., Article 27.

guidance.³⁰ According to Article 31, a treaty must be interpreted in good faith, according to the ordinary meaning of the terms, in their context, and in light of the treaty's object and purpose. Those criteria shall be used together in every circumstance, without a hierarchical order. This means that when interpreting the Rome Statute, we must consider not only the literal text but also the Statute's broader purpose: ensuring accountability for international crimes while respecting the primary jurisdiction of national courts. The context of the Rome Statute includes its legislative history, the intentions behind its drafting, and the general principles of international criminal law. In this sense, complementarity should be understood as a mechanism that balances the primary role of national jurisdictions in prosecuting international crimes with the ICC's residual role in intervening only when national courts are unable or unwilling to act.

Beyond the considerations outlined above, regarding the absence of a formal definition of complementarity in the *corpus juris* of the Statute, significant attempts in this regard can be found both in doctrine and in jurisprudence.

The first can be summarized as what could be defined as a principle of jurisdictional attribution between two punitive systems, with one prevailing over the other. The *Dictionnaire de droit international public*, edited by Jean Salmon, proposes a definition, describing it as the «accessory character of the jurisdiction of an international criminal court in relation to that of national criminal jurisdictions.»³¹ While acknowledging an important attempt to define the concept, it is interesting to observe how it carries a certain vagueness. Similarly, the Pre-Trial Chamber II, in the case of Kony et al., stated:

Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent International Criminal Court having competence over the crimes.³²

It is surely possible to affirm that complementarity is a jurisdictional principle that expressly recognizes the primacy of national justice, while the International Criminal Court is assigned a residual function. However, this meaning of the concept does not seem complete, as it lacks an essential theoretical and functional aspect. It limits itself, in its linguistic sense,

³⁰ United Nations (1969) *Vienna Convention on the Law of Treaties*, Article 31, 23 May. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

³¹ Salmon, J. (ed.) (2001) *Dictionnaire de droit international public*. Brussels: Bruylant, p. 218.

³² ICC-02/04-01/05-377.

specifying what the place of each criminal system should be within this criminal law architecture.

The second interpretation considers complementarity as a technical-legal principle that produces specific material and formal effects. Complementarity represents a body of articulated rules that defines and organizes, on one hand, the relationship between two legal bodies sharing the same objective (the repression of international crimes), and, on the other, the modalities of its implementation. This becomes more convincing when we accept the evident fact that complementarity, as a jurisdictional principle, is not exhausted in a single provision, but rather in a set of statutory provisions elaborated throughout decades.

The first reference to the complementarity of an international jury can be found in the 1953 Report of the Committee on International Criminal Jurisdiction, as seen in the examination of Article 3 of the draft, which stated:

the court would not meet when it had no work to do but would come together only when there were cases or matters of internal organization and procedure which required its attention.³³

While this provision recognizes a reference to the principle of complementarity, it was, however, too vague and imprecise as a legal basis.

A more explicit reference is made for the first time by the ILC in 1994. In the introduction of the project's draft, it was stated that:

Emphasizing further that such a Court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be effective.³⁴

Undoubtedly, this first appearance of the concept is highly significant in terms of the relationship between national justice and international justice, as it demonstrates the explicit intent of the drafters to assign a precise and defined role to the future Court («intended to be

³³ United Nations (1953) *Report of the Committee on International Criminal Jurisdiction*, Article 3, 27 July–20 August. Available at: <https://digitallibrary.un.org/record/591815?v=pdf>.

³⁴ See International Law Commission (1994) *Draft Statute of an International Criminal Court*, Report of the International Law Commission, Doc. A/49/10, including the text adopted by the Commission at its forty-sixth session in 1994, and presented to the General Assembly as part of the Commission's report covering the work of that session. Available at: <https://undocs.org/A/49/10>.

For a deeper analysis on the topic, see Schabas, W. (2007) *An Introduction to the International Criminal Court*, 3rd ed. Cambridge: Cambridge University Press, p. 175.

complementary»), that is, to reserve cases of international crimes for national courts, while the Court would intervene only in exceptional circumstances.

Despite this concept was not further developed and a proper definition has not yet been established, complementarity is conceived as a jurisdictional principle whose function is to govern the complexity of the relationship between national justice and international justice in criminal proceedings aimed at prosecuting and suppressing international crimes, ensuring their necessary legal unity.

In the absence of a formal definition, the right understanding of the principle of complementarity must necessarily be drawn from its *ratio legis*, which will clarify, accordingly to the aforementioned Article 31 of the VCLT, the objective that complementarity seeks to serve, in other words, its purpose.

Beyond being fundamentally a mechanism for the distribution of penal competences, protective of the penal competence of States (*jus puniendi*), the principle of complementarity as conceived by the drafters of the Rome Statute is intended to encourage State to fulfil the traditional duty of repression, by putting in place the necessary instruments to prosecute and punish *crimina juris gentium*.

More precisely, the *ratio* of the principle in question seems to be found in the doctrine of *forum conveniens*, the explanation of which, found in the words of Antonio Cassese's *The Statute of the International Criminal Court: some preliminary reflections*, can be summarized as follows.³⁵

First, «National institutions are in the best position to do justice, for they normally constitute the *forum conveniens*, where both the evidence and the alleged culprit are to be found.»

Secondly, «Under international law, National or territorial states have the right to prosecute and try international crimes, and often even a duty to do so.»

Thirdly, «National jurisdiction over those crimes is normally very broad, and amercers even lesser international crimes, such as sporadic and isolated crimes, which do not make up, not are part of, a pattern of criminal behaviour. Were the ICC also to deal with all sorts of international crimes, including those of lesser gravity, it would soon be flooded with cases and become ineffective as a result of an excessive and disproportionate workload.»

Regarding the latter instance, the justification must essentially be seen as a pragmatic one. Indeed, it proves itself to be particularly relevant in the case envisaged in Article 17(1)(d),

³⁵ Cassese, A. (1999) 'The Statute of the International Criminal Court: Some Preliminary Reflections', *European Journal of International Law (EJIL)*, 10(1), p. 158.

which, as will be shown later, governs the inadmissibility of a case when it is not sufficiently serious to justify further action by the ICC. Such a provision would evidently serve the function of preventing international jurisdiction from being overwhelmed by an excessive caseload, but also because it would otherwise be deemed as unreasonable and unsustainable. Considering that, from an economic perspective, the International Criminal Court has limited resources, there is a clear need to filter these proceedings and prioritize the national courts in less significant cases. In this sense, the doctrine being discussed becomes a true manifestation of a dynamic of complementarity, operating through the dual role of selecting and incentivizing judicial vigilance by the States.

However, it is important to note that the Court may, in some cases, become the *forum conveniens*. This could arise, for example, in cases in which the State fails to fulfil its duty to repress crimes of international significance (*delicta iuris gentium*), as defined under certain specific circumstances in the Statute's legal framework, particularly in Article 17, which covers the lack of will or legal and factual inability of the State in whose territory the alleged international crimes have been committed. In this case, the exceptional intervention, as an additional expression of the same principle, whereby the jurisdiction of the International Criminal Court operates only in cases of extreme urgency, akin to a *deus ex machina*, is intended to fill a punitive system that is flawed, completely inoperative, or on the brink of collapse.

Complementarity would, therefore, through the regulated exercise of the dual penal system (primary punitive function of the State and residual punitive function of the Court), have the fundamental task of eliminating, or more accurately reducing, the spaces for impunity of heinous crimes.

Conclusion

This chapter has provided a comprehensive exploration of the history of the International Criminal Court, its foundational document, the Rome Statute, and an introduction to the pivotal principle of complementarity. Through examining these sections, we have seen how the principle of complementarity emerged as a crucial framework for balancing state sovereignty with the need for international criminal accountability.

The first part of the chapter traced the origins of the ICC back to post-World War I discussions, where the need for a permanent international court capable of prosecuting crimes that transcend national borders began to take shape. From the Nuremberg and Tokyo Tribunals to the *ad hoc* tribunals for the former Yugoslavia and Rwanda, the international community slowly recognized the importance of holding individuals accountable for crimes against

humanity, war crimes, and genocide. These early tribunals, however, were limited in scope and time, pointing to the necessity for a permanent institution. This laid the groundwork for the creation of the ICC, which would need to address not just the crimes committed during particular conflicts but any crimes that posed a threat to international peace and security.

The second section focused on the drafting and adoption of the Rome Statute, the treaty that formally established the ICC. The principle of complementarity was central to the design of the Court since Article 1. The Rome Statute enshrined this principle, which was seen as a way to respect the sovereignty of states while ensuring that justice could be served when national systems fail to hold perpetrators accountable.

However, the third part of the chapter delved into the complexities and challenges of understanding complementarity. The absence of a precise definition of the principle has led to disputes over whether the ICC should intervene in certain cases. Furthermore, the relationship between national jurisdictions and the ICC remains complicated.

While the principle of complementarity is vital in ensuring that the ICC does not overstep its mandate and respects state sovereignty, it has also exposed the tension between state control over their judicial processes and the need for international justice in cases where national courts are either unwilling or unable to provide accountability.

Chapter II: The Interplay of Complementarity and Admissibility in the Rome Statute

Introduction

The principle of complementarity, referenced in both the Preamble and Article 1 of the Rome Statute, is a fundamental pillar to the Court's architecture. Article 17 outlines the mechanism to ensure that the Court complements, rather than replaces, national judicial systems. As one Chamber noted, the principle of complementarity is crucial to respecting States' sovereign rights. Article 17 was meticulously negotiated to guarantee that States Parties could have confidence that their sovereign right to prosecute crimes occurring within their borders would not be undermined by the Court. Without Article 17, it is unlikely that the Rome Statute would have been adopted.

Article 17 establishes three criteria for determining admissibility: complementarity, double jeopardy (*ne bis in idem*), and gravity. The Court is prohibited from proceeding with a case if the relevant States are genuinely investigating or prosecuting the matter.

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; (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; (c) 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.

During the negotiations of the Rome Statute, the general consensus was that the Court would not have had primacy over national justice systems, as with the *ad hoc* tribunals, but rather would function as a complement to them. The importance of complementarity was reinforced by the first Prosecutor of the International Criminal Court in his public statements. Prosecutor Moreno-Ocampo emphasized that, «as a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned». He asserted that:

The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise

criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.³⁶

Additionally, the Prosecutor noted that the system of complementarity is grounded in the recognition that the exercise of national criminal jurisdiction is both a right and an obligation for States. More recently, the concept of ‘positive complementarity’ has emerged, according to which the Court plays an active role in encouraging national justice systems to fulfil their responsibilities. Highlighting the significant impact that a preliminary examination can have at the domestic level, the Prosecutor described it as potentially «one of the most cost-effective ways for the Office to fulfil the Court’s mission. » However, the complementarity framework established in Article 17 may also lead to considerable tension between States and the Court, tensions that are far from trivial.

2.1. The Rome Statute: Drafting Article 17

As previously seen, the relationship between the proposed international court and national legal systems went through a number of changes and developments, evolving through time. In 1993, it was noted that the Court’s jurisdiction would not be exclusive; instead, it would exist alongside national jurisdictions, allowing each State to either handle cases themselves or refer accused individuals to the international court. However, this reliance on State consent suggested that countries would ultimately have the final say.³⁷ As discussions progressed, there was a growing preference for a model where states would subject themselves to an international body, like the European Court of Human Rights, which raised concerns about national sovereignty. The 1994 report of the International Law Commission revealed differing opinions about the Court’s relationship to national courts:

There were different views as to whether the nature of the court in terms of its relationship to national courts was adequately addressed in the present draft. Some envisaged the court as a facility for States that would supplement rather than supersede national jurisdiction; others envisaged it as an option for prosecution when the States concerned were unwilling or unable to do so, subject to the necessary safeguards against misuse of the court for political purposes. Still other members suggested that it might be appropriate to provide the court with limited inherent jurisdiction for a core of the most serious crimes. The view was expressed that further consideration should be given to existing treaty obligations

³⁶ Schabas, W. (2016) *The International Criminal Court: A Commentary on the Rome Statute*. 2nd ed. Oxford: Oxford University Press, pp. 448-451.

³⁷ International Law Commission (1993) *Report of the International Law Commission on the work of its forty-fifth session*, A/48/10, 3 May–23 July. Available at: <https://digitallibrary.un.org/record/173549>.

to try or extradite persons accused of serious crimes, the absence of an implied waiver of national court jurisdiction by virtue of the establishment of the court, the residual nature of the court's jurisdiction as an additional element to the existing regime based on the options of trial, extradition or referral to the court, as well as the possibility of advisory jurisdiction to assist national courts in the interpretation of the relevant treaties, as in the case of the Inter-American Court of Human Rights. There were also suggestions that the court should have discretion to decline to exercise its jurisdiction if the case was not of sufficient gravity or could be adequately handled by a national court. This suggestion was explained in terms of ensuring that the court would deal solely with the most serious crimes, it would not encroach on the functions of national courts, and it would adapt its caseload to the resources available. In this context, attention was drawn to the experience of the European Court of Human Rights.³⁸

Despite different points of view, the general aim was to ensure that the international court would focus on the most serious crimes without undermining national judicial systems.

In 1994, the ancestor of Article 17 of the Rome Statute was Article 35 adopted by the International Law Commission in its *Final Report*. Entitled 'Issues of admissibility', it reads as follows:

The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

- a. Has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
- b. Is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
- c. Is not of such gravity to justify further action by the Court.³⁹

Despite the final text created in Rome was more detailed, the main ideas and principles from the International Law Commission's draft remained largely unchanged during the drafting process. The Ad Hoc Committee believed that the Statute should have clearly stated the

³⁸ International Law Commission (1994) *Final Report*, A/49/10, 2 May–22 July. Available at: <https://digitallibrary.un.org/record/161940?v=pdf>.

³⁹ Ibid.

principle of complementarity.⁴⁰ This means that the principle should have been included not just in the introduction, but also in a specific section of the document. Many people supported changing the word ‘may’ to remove any discretion from the Court regarding this principle.⁴¹ Another topic of concern was the term ‘interested State.’⁴² This issue was resolved in Articles 18 and 19, but discussions about complementarity were still early on.

Throughout the Preparatory Committee sessions, ideas about complementarity began to align. While the principle itself wasn’t questioned, suggestions were made to elaborate on it.⁴³ For instance, focusing only on a State’s decision to not prosecute missed other ways a case could end, like acquittal or delay. There were also discussions about whether the Court should have the power to declare a case inadmissible, and the idea of defining the gravity of crimes was also raised.⁴⁴

By August 1997 meeting, many constructive proposals were discussed, leading to a text that closely resembled the final version, with minor adjustments made before it was formally adopted in April 1998.

At the Rome Conference, the Coordinator opened the discussion by reviewing the work done by the Preparatory Committee. Article 35 of the ILC, ‘Issues of admissibility’, represented the agreement of almost all countries on the importance of the principle of complementarity. Despite the belief that if a country couldn’t or wouldn’t take a case, then the Court should step in, the idea wasn’t for the Court to be a backup option for national courts but rather to get involved when a country fails in its responsibility. Those key concepts needed to be reported in Article 17.

The first paragraph of Article 17 explains that a case would be considered ‘inadmissible’ if a country was already investigating or prosecuting it, had decided not to move forward with it, or if the case wasn’t serious enough. There are exceptions if a country is unwilling or unable

⁴⁰ Ad Hoc Committee on the Establishment of an International Criminal Court (1995) *Recommendations of the Bureau Concerning the Work of the Ad Hoc Committee*, A/50/22, paras. 29-51, 14-25 August. Available at: <https://digitallibrary.un.org/record/188889?v=pdf>.

⁴¹ Ibid., para. 159.

⁴² Ibid., para. 160.

⁴³ Preparatory Committee on the Establishment of an International Criminal Court (1996) *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1, Proceedings of the Preparatory Committee during March-April and August 1996*, A/51/22, para. 159. Available at: <https://digitallibrary.un.org/record/222404?v=pdf>.

⁴⁴ Ibid., paras. 164-169 and 246-252.

to do its job. The terms ‘unwillingness’ and ‘inability’ are explained in the Article respectively by the second and the third paragraph.⁴⁵

Article 17 of the Rome Statute establishes which are the useful criteria for the determination of which authority, between the International Criminal Court and national courts, should exercise jurisdiction in a specific case. It is designed to implement Preamble Provision No. 10 and Article 1 of the Statute, both of which assign the International Criminal Court a complementary role (‘shall be complementary’) with respect to national jurisdiction. Thus, having witnessed a long path of evolution and built on the legacy of articles in the ICTY and ICTR Statutes, the accepted and current version of Article 17 reflects the perfect balance between national courts and the ICC and establishes a clear framework for determining the admissibility of cases.

2.2. The Interpretation and Application of Article 17 in the Case Law of the Court

The principle of complementarity was primarily created to balance state sovereignty in exercising jurisdiction with the understanding that, to effectively prevent crimes and impunity, the international community must intervene to achieve these goals and maintain its credibility in pursuing them.

At the same time, complementarity implicitly limits state sovereignty, not by imposing a duty to prosecute, but by preventing states from remaining passive when a duty to prosecute exists under other international laws, even if they violate those laws. This principle thus supports and completes the idea of effectively decentralizing the prosecution of international crimes.

Article 17 outlines the criteria for determining the admissibility of a case under the jurisdiction of the Court. Notably, it is not phrased in a positive form (‘a case is *inadmissible*’), creating a presumption of inadmissibility in a strict sense. A case is inadmissible if any of the four factors listed in the first paragraph of Article 17 applies. In determining the conditions of admissibility, the Appeals Chamber of the Court has adopted a technical approach, explicitly presented in the Gaddafi’s case. Here, a comparative assessment is conducted between the criminal proceedings held by the interested State and the competent organs of the ICC:

In assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently ‘mirrors’ the one that the Prosecutor is investigating. To be able to carry out the assessment as to whether the same case is being investigated, it will be necessary for a chamber to

⁴⁵ A/CONIF.183/C.1/SR.11, para.19.

know the contours or parameters of the investigation being carried out both by the Prosecutor and the State.⁴⁶

However, interpretative rigidity is usually counterproductive, consequently, all cases and situations before the Court must be carefully evaluated to ensure compliance with the Article's requirements, reflecting the balance between state sovereignty and the effective pursuit of justice.

2.2.1. Article 17(1)(a): State Investigations or Prosecutions

‘The case is being investigated or prosecuted by a State which has jurisdiction over it.’

The first condition under Article 17(1)(a) requires that a State, whether a States Party or a non-States Party, must either be actively investigating or prosecuting a case related to the alleged crime, or it must have conducted an investigation and refrained from prosecuting. This provision reflects the principle of complementarity, meaning that the ICC's jurisdiction is secondary to that of the State in question. The ICC will not entertain cases where a State is already engaged in investigations or prosecutions.

The term investigation is interpreted under the Statute as a procedure to determine whether a crime under the jurisdiction of the Court has been or is being committed and to gather sufficient evidence for criminal prosecution. National investigations are not limited to criminal law enforcement efforts but may include inquiries into the broader scope of crimes and the actors involved. Investigations can be formal or preliminary, depending on the State's domestic legal system. However, an investigation must be pursued with the intent of leading to the prosecution of the accused («unless the State is unwilling or unable to genuinely carry out the investigation or prosecution»).

It is important to distinguish between the procedural requirements for investigation and prosecution. Prosecution refers to the legal process of formally charging an individual and attempting to bring them to trial, while investigation is the preliminary step of gathering evidence to determine whether charges should be filed. A State must take tangible steps toward justice, whether through law enforcement or judicial proceedings, before the ICC is considered as an alternative venue for adjudicating the case. Thus, mere inaction or failure to initiate any legal steps may lead to admissibility before the ICC.

⁴⁶ International Criminal Court (2014) *Appeal Chamber, The Prosecutor v. Saif Al-Islam Gaddafi*. Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’. Available at: <https://www.icc-cpi.int/court-record/icc-01/11-01/11-695>.

Schabas states that for national investigations to prevent ICC jurisdiction, they do not need to be exhaustive or conclusive; they only need to be genuine and not aimed at shielding the accused from justice.⁴⁷ The ICC can only assert jurisdiction if the state has taken sufficient steps to pursue accountability, and the failure to do so will allow the Court to step in.

A State's jurisdiction under this provision encompasses more than territorial jurisdiction. It may also involve active personality jurisdiction, where the perpetrator is a national of the State, or universal jurisdiction, where a state may prosecute crimes such as genocide or war crimes regardless of where they occur or the nationality of the perpetrator. In addition, Benzing clarifies that universal jurisdiction is a principle recognized under international law that allows states to prosecute crimes of international concern, such as torture or terrorism, regardless of where the crimes are committed or the nationality of the perpetrator.⁴⁸

The differentiation between 'unwillingness' and 'inability', has stirred up interest and perplexities about the matter regarding the 'admissibility test' moved by the Court: being the condition of admissibility composed by two distinct scenarios, will a two-step-test considered to be necessary? Here, the Court has often stated that the verification of admissibility conditions relies on a dual technical assessment, that is about the research of any determination of inability or unwillingness relevant only where the existence of investigative or judicial activity in the concerned State has been previously established.

The ICC's role is not to sit as a supreme tribunal for all crimes but rather to intervene in cases where a state fails to uphold its duties under international law. Thus, States must demonstrate genuine jurisdictional competence to investigate and prosecute such crimes before the ICC can be considered.

2.2.2. Article 17(1)(b): Decision Not to Prosecute Following Investigation

'The case has been investigated by the State, but the State has decided not to prosecute the person concerned, despite having jurisdiction over the case.'

The second subparagraph of Article 17(1) focuses on situations where a State has conducted an investigation but has decided not to pursue prosecution. This provision is a critical element in ensuring that the ICC does not interfere in matters where national systems are engaged in justice processes, but also in cases where a State fails to bring perpetrators to justice even after an investigation.

⁴⁷ Schabas, W. (2016) *The International Criminal Court: A Commentary on the Rome Statute*. 2nd ed. Oxford: Oxford University Press, pp. 453-461.

⁴⁸ Benzing, M. (2003) 'The Complementarity Regime of the International Criminal Court', *Max Planck Yearbook of United Nations Law*, Vol. 7, pp. 591-632.

The key issue here is whether the State's decision not to prosecute is based on genuine legal grounds, such as the lack of sufficient evidence or the application of immunities under national law, or whether it is due to political motives or unwillingness to prosecute. A genuine refusal is acceptable under the Rome Statute, but if the decision is based on bad faith or an intention to shield the accused from justice, the ICC can assert its jurisdiction. For instance, if a State refrains from prosecuting due to political pressures, or if powerful groups within the State's territories are deliberately obstructing justice, this could be grounds for admissibility before the ICC.

A central concern is whether the State has acted in good faith, pursuing the case with the genuine intention to prosecute. The ICC is not a court of appeal for States' decisions but is rather tasked with assessing whether those decisions respect the principles of international justice. This requirement is not merely procedural; it is about the quality of the legal actions undertaken by the State, and whether the prosecution was prevented for reasons that are contrary to international obligations.

The notion of unwillingness refers to cases in which a State's judicial system fails to function because of political interference or a lack of capacity. If the decision to refrain from prosecution reflects the State's unwillingness to pursue justice due to these reasons, the ICC may intervene. It is noted that unwillingness to prosecute is not just a matter of avoiding prosecution; it is often the result of systemic failures, including a lack of political will to address grave crimes.⁴⁹ Here, the ICC has a role in ensuring that no party abuses the principle of complementarity to shield perpetrators from accountability by claiming domestic legal procedures that are intended to protect them from facing trial. In these cases, the decision not to prosecute could be seen as a failure of the State to uphold its international obligations.⁵⁰

2.2.3. Article 17(1)(c): Prior Prosecution by Another State

'The person concerned has already been tried for the same conduct by another State.'

Subparagraph (c) introduces a mechanism of *ne bis in idem*, meaning that an individual cannot be tried for the same offense twice by different jurisdictions. This provision ensures that the ICC does not become an international court of second instance. If a State has already prosecuted an individual for the same acts, the ICC will generally not entertain the case unless the initial prosecution was not genuine.

⁴⁹ Schabas, W. (2016) *The International Criminal Court: A Commentary on the Rome Statute*. 2nd ed. Oxford: Oxford University Press, pp. 453-461.

⁵⁰ Benzing, M. (2003) 'The Complementarity Regime of the International Criminal Court', *Max Planck Yearbook of United Nations Law*, Vol. 7, pp. 591-632.

A critical element under this subparagraph is whether the prior prosecution was conducted genuinely and effectively. The ICC will assess whether the national legal proceedings were carried out in a manner consistent with international standards, including due process, the right to a fair trial, and the protection of the accused's rights. Prosecution conducted in bad faith, such as under laws or systems that shield perpetrators from accountability, can trigger the Court's jurisdiction.

It is also important to note that a conviction or acquittal is not required for the application of this provision. The mere fact that proceedings have been initiated and conducted, even if dismissed or resolved on procedural grounds, may preclude the ICC from intervening. Good faith, however, is the key determinant here. The ICC will analyse whether the State has engaged in a legitimate attempt to hold the individual accountable or if the legal proceedings were a mere sham. The provision's language, in fact, does not require the accused to be convicted, but merely that they have been tried. This creates a broad interpretation of 'trial,' encompassing cases where proceedings were terminated for reasons other than the merits of the case, such as procedural or technical grounds.⁵¹

2.2.4. Article 17(1)(d): Gravity of the Case

'The case is of sufficient gravity to justify further action by the Court.'

The final criterion for admissibility is the gravity with which the case is classified, and it is one of the most subjective provisions in the Rome Statute. This clause ensures that the Court only deals with cases that are of sufficient significance to justify its intervention. The concept of gravity has evolved over time and can be interpreted through both quantitative and qualitative elements.

Quantitative gravity refers to the number of victims, the scale of the crimes, and their impact on the international community. Crimes such as genocide or war crimes, by their very nature, involve large numbers of victims, and their effects extend far beyond the immediate victims to destabilize entire societies.

On the other hand, qualitative gravity concerns the manner in which the crime was perpetrated, for instance, whether it involved systematic and coordinated actions, such as those found in acts of genocide or crimes against humanity.

⁵¹ Schabas, W. (2016) *The International Criminal Court: A Commentary on the Rome Statute*. 2nd ed. Oxford: Oxford University Press, p. 462.

The Court does not only consider the crimes committed but the nature of the criminal conduct and its social and cultural impact on the affected regions.⁵² This broader interpretation allows the Court to weigh factors like the detrimental impact of the crimes on the cultural, economic, and social fabric of a community, state, or region.

The ICC has broad discretion in evaluating sufficient gravity, as there is no fixed threshold or specific numerical requirement. Factors such as the intent behind the crimes, their systematic nature, and their long-term societal effects will all be relevant in assessing whether the case merits the Court's intervention. In the early practice of the ICC, cases that involved high-level perpetrators of large-scale crimes or widespread abuses were deemed to meet the gravity threshold.

2.2.5. Unwillingness as an Exception to Complementarity

The general framework established by Article 17(2) points to the need for the Court to assess whether domestic proceedings genuinely aim to prosecute and convict perpetrators of serious international crimes or whether they are, in reality, designed to obstruct the course of justice. This determination of 'unwillingness' is an exception to the principle of complementarity, which presumes that the state is capable of handling such cases.

Article 17(2) provides three distinct and well limited grounds upon which the Court can determine unwillingness: (a) shielding the person from prosecution, (b) unjustified delay, and (c) lack of independence or impartiality. Each of these factors must be considered in the context of the specific case, bearing in mind the principles of due process as recognized by international law.

The reference to due process rights in the *chapeau* of Article 17(2) guides the Court in making its assessment, ensuring that the national legal proceedings are consistent with international standards of fairness and justice. The likelihood that defendants will receive due process in national proceedings remains, however, limited to one of the 'grey areas' of law being often referred to as a 'shadow side' of complementarity. While the ICC is a model of due process that aims to guarantee to defendants all the procedural protections required by the International Covenant on Civil and Political Rights, most national juridical systems, do not follow the same conduct, particularly those States in which serious atrocities have been so evident to alarm the Court itself. This issue, however, is usually overlooked as many scholars identify the failure of a State to guarantee a defendant due process as a case of admissibility for the Court's intervention under Article 17. Nonetheless, Article 17, if properly understood, only

⁵² Benzing, M. (2003) 'The Complementarity Regime of the International Criminal Court', *Max Planck Yearbook of United Nations Law*, Vol. 7, pp. 591-632.

permits the Court to find a State ‘unwilling or unable’ if its legal proceedings are designed to make a defendant more difficult to convict. On the other hand, if its legal proceedings are designed to make the defendant easier to convict, the provision requires the Court to defer to the State no matter how unfair those proceedings may be.⁵³ This leaves a legal vacuum in the interpretation of Article 17(2), of which this thesis is about to discuss, remarking that the ICC is not a forum for adjudicating human rights violations in isolation but rather for ensuring that domestic proceedings are conducted in a manner that allows the Court to fulfil its mandate of ensuring international criminal justice, while at the same time leaves the floor open to debates about specific applications .

The Court’s role is, either way, to prevent impunity for grave crimes and to ensure that States genuinely pursue justice on first stance, adhering to the highest standards of fairness and integrity in their legal proceedings through their national courts.

2.2.5.1. Shielding the Person from Prosecution

The first criterion, as set out in Article 17(2)(a), requires proof that the domestic proceedings were initiated or conducted for the express purpose of shielding the person concerned from criminal responsibility for crimes under the ICC’s jurisdiction. This criterion imposes a high threshold, requiring not merely the existence of an intent to obstruct justice, but a clear purpose to shield the accused from facing trial or punishment for grave international crimes. The intent to shield must be substantiated by credible evidence indicating that the domestic proceedings are a façade, rather than a legitimate attempt to bring the accused to justice.⁵⁴

Importantly, this criterion does not penalize a State merely for attempting to prevent the ICC from intervening through its own investigations or prosecutions, as the complementarity principle enshrined in the Rome Statute allows national proceedings to take precedence. The fact that a State may prefer to handle a case domestically does not, in itself, constitute an intent to shield the accused. Rather, the inquiry focuses on whether the proceedings are genuinely aimed at establishing the facts of the case, applying the law, and imposing an appropriate penalty, or whether the proceedings are instead designed to prevent external scrutiny and safeguard the accused from international justice.

A relevant case for the criterion set out in Article 17(2)(a) of the Rome Statute is the case of Sudanese President Omar al-Bashir. Bashir was indicted by the ICC in 2009 for crimes

⁵³ Heller, K.J. (2006) ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’, *Criminal Law Forum*, 17(3), pp. 255–280.

⁵⁴ Carden, S.R. and Sadat, L.N. (2000) ‘The New International Criminal Court: An Uneasy Revolution’, *Geo*, p. 381.

against humanity, war crimes, and genocide committed in Darfur. In response to the ICC's investigation, Sudan initiated domestic proceedings against Bashir, claiming that he would be tried under Sudanese law for similar charges. However, the ICC determined that these proceedings were not conducted in good faith and were a façade intended to shield him from international prosecution. The Sudanese proceedings lacked credibility, as they did not substantively address the serious charges brought against Bashir or genuinely attempt to prosecute him for the grave international crimes. This was evidenced by the fact that the national authorities did not take meaningful steps toward his prosecution, and the domestic legal system was largely ineffective in holding him accountable. The ICC's ruling underlined that Sudan's actions were aimed at obstructing justice and protecting Bashir from facing trial for the charges under international law, thereby triggering the ICC's jurisdiction. This case exemplifies the threshold under Article 17(2)(a), where the intent to shield the accused was substantiated by the lack of legitimate judicial proceedings, and the domestic legal process was seen as a tool to avoid external scrutiny and international accountability.⁵⁵

2.2.5.2. Unjustified Delay

The second factor under Article 17(2)(b) refers to 'unjustified delay' in the proceedings, which, when considered in the circumstances, is inconsistent with an intent to bring the person to justice. This criterion reflects the concern that prolonged inaction or delay in criminal proceedings may serve to deprive victims of justice and the accused of a fair and timely trial. There are, however, specific circumstances under which delays may be justified, such as those arising from the complexity of the case or the necessity of conducting thorough investigations.

The Court must consider whether the delay is reasonable in light of the specific circumstances, including the legal and institutional framework of the domestic system. This implies that the Court may look to international standards or jurisprudence related to human rights in assessing the reasonableness of the delay.⁵⁶ For example, the European Court of Human Rights has established that a 'reasonable time' for legal proceedings is context-

⁵⁵ See International Criminal Court (2009) *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09. Available at: <https://www.aba-icc.org/accused/omar-hassan-ahmad-al-bashir/>.

⁵⁶ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 51. Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

Information provided under Article 17: In considering the matters referred to in Article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, inter alia, information that the State referred to in Article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

dependent, considering factors like the complexity of the case, the conduct of the parties, and the importance of the matter at hand. Thus, any unjustified delay must be assessed against an international standard that aims to balance procedural fairness with the protection of sovereignty in the national legal system.

The delay must not be exceeding a period of 18 months without a legitimate, justifiable and consistent reason, with the State's genuine intent to bring the person concerned to justice. On the other hand, delays caused by adherence to human rights principles, such as ensuring the accused's right to a fair trial, will not be considered unjustified.⁵⁷

2.2.5.3. Lack of Independence or Impartiality in Proceedings

The final factor, found in Article 17(2)(c), addresses the issue of whether the proceedings are conducted in an independent and impartial manner. This is a critical element, as the credibility of any domestic legal process hinges on its ability to ensure fairness and justice, free from external influence or bias. Under this provision, a State may be deemed unwilling if the legal proceedings are tainted by a lack of impartiality or independence, thereby undermining the State's capacity to genuinely prosecute the individual for the alleged crimes.

To assess independence, the Court may consider various factors, such as the appointment and tenure of judges, the protection of judicial officers from outside influence, and whether there are adequate guarantees to preserve the impartiality of the judiciary. The European Court of Human Rights has provided valuable insights into what constitutes an independent tribunal, focusing on the manner of judicial appointments, security of tenure, and the institutional safeguards in place to protect against improper external interference. Similarly, impartiality requires that the tribunal be free of personal biases and prejudices, ensuring that the accused is judged based on the facts of the case and the law.⁵⁸

In practice, this provision requires a dual assessment: the proceedings must not only be independent and impartial but must also be conducted in a manner that is consistent with the intent to bring the accused to justice. If the proceedings are designed in such a way as to shield the accused or to render the trial ineffective, this can be indicative of unwillingness. The Court will assess whether the lack of independence or impartiality serves the purpose of protecting the accused, rather than serving the interests of justice.

⁵⁷ Schabas, W. (2016) *The International Criminal Court: A Commentary on the Rome Statute*. 2nd ed. Oxford: Oxford University Press, pp. 453-461.

⁵⁸ European Court of Human Rights (2002) *Morris v. United Kingdom*, Application No. 38784/97, Judgment of 25 February, para. 58. Available at: <file:///C:/Users/Amministratore/Downloads/001-60170.pdf>.

2.2.6. Defining Inability in the Context of International Criminal Jurisdiction

The concept of ‘inability’ under Article 17(3) of the Rome Statute plays a critical role in determining whether the International Criminal Court has jurisdiction to prosecute cases of international crimes when national legal systems are incapable of carrying out proceedings. This provision is a cornerstone of the principle of complementarity. In this context, the notion of ‘inability’ is broad, encompassing scenarios where a State is unable to obtain the accused, secure the necessary evidence and testimony, or is otherwise incapable of conducting the required judicial proceedings due to the breakdown or dysfunction of its national legal system.

In addition to the support that Article 31 of the VCLT may give regarding the interpretation of treaties based on their purpose, Article 17(3) outlines three distinct criteria under which a State may be considered ‘unable’ to carry out its proceedings: the inability to apprehend the accused, the inability to obtain the necessary evidence or testimony for prosecution, and a more general category where a State is ‘otherwise unable’ to conduct proceedings. The latter is a broad and inclusive provision designed to capture any other scenario in which the State’s judicial system is rendered ineffective, even if it does not directly relate to the other two criteria. The State’s inability must be the result of a total or substantial collapse or unavailability of its judicial system, which requires a clear causal link between the judicial breakdown and the State’s inability to prosecute.

The terms ‘total collapse’ and ‘substantial collapse’ are central to understanding when a State is considered unable to prosecute under the Rome Statute.

A total collapse refers to a situation in which a State loses control over its territory to such an extent that the administration of justice ceases to function entirely. This may occur due to severe civil conflict, widespread unrest, or the complete breakdown of governmental structures. In these circumstances, the national authorities are incapable of maintaining the rule of law or administering justice, rendering the judicial system completely ineffective.⁵⁹ Libya’s situation in 2011 exemplifies a total collapse of its judicial system, leading to ICC intervention. The civil war and the fall of Muammar Gaddafi’s regime caused severe instability, leaving the country without a functioning government or judicial system. The national authorities were unable to prosecute war crimes committed by both Gaddafi loyalists and opposition groups, due to the dysfunctional judicial system. Total collapse in Libya was evident, as the central government was no longer operational, and the national justice system had disintegrated. The ICC’s involvement, specifically in the case of Saif al-Islam Gaddafi, is notable since the Court

⁵⁹ Benzing, M. (2003) ‘The Complementarity Regime of the International Criminal Court’, *Max Planck Yearbook of United Nations Law*, Vol. 7, pp. 591-632.

determined that Libya was unable to conduct a fair trial due to the absence of a functioning judicial system and the lack of a proper legal framework to handle such a high-profile case.⁶⁰

In contrast, a substantial collapse refers to a situation in which a State retains some degree of control over its territory but lacks the necessary resources, infrastructure, or stability to prosecute crimes effectively. This may include scenarios where the State's judicial system is overwhelmed by competing priorities, lacks the necessary personnel or expertise, or faces severe security challenges that prevent the proper administration of justice. Importantly, a substantial collapse is more stringent than a mere 'partial collapse,' as it reflects a significant but not complete breakdown of judicial functions.⁶¹ In the Democratic Republic of the Congo, particularly during the Second Congo War (1998–2003) and the subsequent years, the judicial system was severely overwhelmed by the scale of violence and the breakdown of law and order in large parts of the country. Armed groups, militias, and foreign forces committed widespread atrocities, including war crimes and crimes against humanity. Although the DRC retained control over certain regions, the judicial infrastructure was insufficient to investigate, prosecute, and adjudicate cases of such crimes. The substantial collapse in the DRC was due to factors such as a lack of judicial resources, insufficient personnel, and a lack of infrastructure in conflict areas, as well as the overwhelming political and security challenges facing the government. In such an environment, the DRC was unable to effectively hold perpetrators accountable for crimes committed during the conflict, leading to the involvement of the ICC to prosecute those most responsible for the crimes, of which Thomas Lubanga.⁶²

Nonetheless, inability is not limited to the total or substantial collapse of a judicial system, but it also encompasses situations where the national legal system is unavailable. The term 'unavailability' is considered as a separate case and refers to circumstances where a State's judicial system, though technically functional, is incapable of processing a specific case due to legal, factual, or practical limitations. For instance, a State may have a functioning judiciary but may lack the necessary legal infrastructure, such as adequate laws or provisions to address certain international crimes, or it may face capacity overload due to a high volume of cases, preventing it from investigating or prosecuting complex international crimes effectively. This

⁶⁰ International Criminal Court (2019) *Pre Trial Chamber I, The Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_01904.PDF.

⁶¹ Holmes, J.T. (2002) 'Complementarity: National Courts versus the ICC', in Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds.) *The Rome Statute of the International Criminal Court. A Commentary*. Cambridge: Cambridge University, p. 667.

⁶² International Criminal Court (2006) *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06. Available at: <https://www.icc-cpi.int/drc/lubanga>.

concept is important because it distinguishes situations where the national system is not broken but is still unable to fulfil the obligations required under international law. A judicial system may be deemed unavailable when it is insufficient in terms of resources, expertise, or capacity to address cases involving international crimes, even if the institutions themselves remain intact.

The inability of a State to prosecute under Article 17(3) is also connected to broader considerations of international criminal law, particularly the need to ensure that States are held accountable for serious crimes. The ICC's intervention in such cases ensures that perpetrators of international crimes do not evade justice simply because the national system is incapable of addressing these crimes. This reflects a broader concern in international law to ensure that the most egregious offenses, set out in Article 5 of the Statute, are prosecuted in accordance with international standards, rather than being treated as lesser offenses under national legal systems. In this regard, the question of a State's legal framework is crucial.

A State may be unable to prosecute international crimes if its domestic legal system treats these crimes as ordinary crimes,⁶³ thus failing to recognize the severity and international nature of the conduct. In such cases, the national legal system's inability to appropriately classify or penalize such offenses may trigger the ICC's jurisdiction.

In addition to these concerns, the legal framework of a State is also examined in relation to its adherence to the principles established by the Rome Statute. A national legal system that lacks the necessary legal provisions to prosecute crimes under the Statute, or that offers insufficient penalties, may be considered unable to carry out its proceedings. This interpretation ensures that national legal systems are held to a standard that reflects the gravity of the crimes under international law.

Furthermore, the interpretation of 'inability' under Article 17(3) raises important questions regarding sovereignty and the complementarity principle. While the ICC must respect the sovereignty of States, it must also ensure that States meet their obligations under international law to prosecute international crimes. The distinction between inability and unwillingness is significant; a State may be unwilling to prosecute due to political reasons, but when its inability to prosecute is due to genuine systemic or institutional failure, the ICC may step in to ensure accountability.

⁶³ A definition of the category of 'ordinary crimes' may be found in the ILC Report, note 98, 118: The Commission understands that the term 'ordinary crimes' refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in Article 20 of the Statute.

The principle of complementarity requires that States have the capacity and willingness to prosecute international crimes within their national systems. However, the issue of ‘inability’ may arise when national systems fail to meet these standards due to systemic flaws. In such cases, the ICC’s role becomes essential in ensuring that individuals accused of international crimes are prosecuted and held accountable, even if the national system is unable to do so. This ensures that justice is not denied due to national incapacity, particularly in situations where a State’s judicial system is overwhelmed, lacks resources, or is otherwise unable to meet the standards required for effective prosecution of international crimes.

In conclusion, the concept of ‘inability’ under Article 17(3) of the Rome Statute serves as a critical safeguard in the international legal system, ensuring that justice is not withheld when national systems are incapable of prosecuting international crimes. It recognizes the complex realities faced by States with compromised judicial systems and allows the ICC to step in to uphold accountability for the most serious offenses. At the same time, it balances the need to respect national sovereignty with the necessity of ensuring that perpetrators of international crimes are held accountable, even when national jurisdictions are unable to prosecute effectively. Through this framework, the ICC reinforces the complementarity principle, ensuring that justice is not contingent on the capabilities of national systems but is instead a universal pursuit of accountability for international crimes.

Conclusion

This chapter has explored the detailed construction of Article 17 of the Rome Statute, offering a thorough analysis of each paragraph and its implications for the relationship between the ICC and national legal systems. By examining the drafting process and the text of Article 17 itself, this chapter has illustrated how the principle of complementarity seeks to strike the delicate balance between national sovereignty and ensuring the effective prosecution of international crimes.

Each paragraph of Article 17 was carefully dissected to analyse all the presented different scenarios in which the Court could exercise jurisdiction over a case. Being set as a *sine qua non* condition for the adoption of the Statute, each word composing Article 17 was not left to the case, trying to address at its best all the legal gaps that such a delicate topic could neglect.

The first paragraph sets the stage by establishing the ICC’s jurisdictional threshold, which requires an assessment of whether the State involved is genuinely investigating or prosecuting the relevant crime. This triggers the ICC’s involvement only when a State’s legal system fails to meet the standards of impartiality, independence, or ability to prosecute in good faith. Thus, the provision’s drafting ensures that the ICC’s intervention is targeted and conditional,

reinforcing the preference for national systems to exercise their responsibilities without undue interference.

Moving to the second paragraph, the detailed criteria for determining whether a State is unwilling or unable to prosecute were analysed. These criteria provide a clear framework for assessing situations where the State's legal system might be compromised, either by an unwillingness to pursue prosecution due to political motives or a lack of capacity, such as in cases of collapsed state structures. The article's drafting reflects an effort to create a rigorous yet flexible mechanism to determine these situations, taking into account a wide range of factors that may affect a State's capacity or willingness to carry out justice. Moreover, a critical view is set forward in regard to the actual application of the principle of 'due process' in national jurisdictions and the *misapplication* of Article 17 for the intervention of the Court.

The third paragraph further clarifies the threshold for the ICC's involvement, specifically outlining situations where a case is inadmissible due to national proceedings already underway.

Chapter III: The Application of Complementarity in the Procedure of the ICC

Introduction

This chapter focuses on how the principle of complementarity is applied by the International Criminal Court. Understanding how complementarity is operationalized requires an examination of when and how the ICC determines whether a case is admissible, who the relevant actors are in this determination, and how this principle shapes the overall relationship between national courts and the Court.

Analysing the procedural steps of complementarity begins with examining the three key stages of ICC's proceedings where the admissibility of a case is evaluated, as outlined in the Rome Statute. First, the phase during which the Prosecutor is considering whether to initiate an investigation (Article 15 and Article 53). Second, the preliminary rulings on admissibility (Article 18). Third, the context of formal challenges to admissibility (Article 19). This chapter will, in fact, be divided into three sections reflecting the aforementioned stages.

The procedural setting varies slightly depending on the way the ICC's jurisdiction is triggered, as described in Article 13 of the Statute. The Court's involvement can begin through a referral by a States Party⁶⁴ under Article 13(a), by the United Nations Security Council⁶⁵ under Article 13(b), or through the Prosecutor acting on their own initiative, known as *proprio motu*,⁶⁶ under Article 13(c) and Article 15. Some situations involve States referring to the Court crimes that took place on their own territory, called 'auto-referrals', which have become common in practice but are not specifically regulated in the Statute and will thus not be discussed in this thesis.

In this chapter a further section will then examine complementarity at the post-admissibility stage, analysing to what extent the Statute and the Rules of Procedure and Evidence allow for the possibility of transferring cases, even after they have been deemed admissible, back to domestic criminal jurisdictions.

⁶⁴ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 13(a). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁶⁵ Ibid., Article 13(b).

⁶⁶ Ibid., Article 13(c). The procedural setting for *proprio motu* investigations of the Prosecutor extends to ad hoc declarations of accepting the jurisdiction of the Court by non-States Parties in accordance with Article 12 (3) of the Statute.

3.1. Admissibility and the Initiation of an Investigation

The first procedural step in which the issues of admissibility for the application of complementarity are considered arises when the Prosecutor evaluates whether there is a reasonable basis to «proceed with»⁶⁷ or «initiate»⁶⁸ an investigation according to Article 17. Rule 48 of the Rules of Procedure and Evidence⁶⁹ confirms that the Prosecutor must evaluate admissibility at this early stage, regardless of whether the trigger mechanism was a referral or a *proprio motu* action.⁷⁰ This evaluation includes determining whether a national legal system is already handling the case in a genuine, independent, and effective manner or not.

However, some argue that when the Security Council refers a situation under Article 13(b), this may override the usual complementarity rules. It has been suggested that a Security Council referral under Chapter VII of the United Nations Charter could allow the ICC to take precedence over national courts, especially if the Council asserts that domestic systems are not functioning properly.⁷¹ Yet this interpretation is controversial, as the UN Charter, particularly in Articles 25 and 103, binds only «Members of the United Nations», not independent international organizations like the ICC, which is not a UN body but a separate legal entity. Therefore, even when the Security Council refers a case, the ICC must still follow its own legal rules, including those found in Article 53, and must assess admissibility in accordance with Article 17.

Even though the Prosecutor makes the initial decision on whether a case is admissible, that decision is not final and may be reviewed by the Pre-Trial Chamber, depending on how the case was initiated.⁷² When the Prosecutor acts *proprio motu*, the Pre-Trial Chamber must authorize the start of the investigation under Article 15(4) if

⁶⁷ Ibid., Article 15(3).

⁶⁸ Ibid., Article 53(1).

⁶⁹ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 48. Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c).

⁷⁰ Informal Expert Paper for the ICC Office of the Prosecutor (2002) ‘The Principle of Complementarity in Practice’ in Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds.) *The Rome Statute of the International Criminal Court: A Commentary*. Cambridge: Cambridge University, pp. 1137–1180, specifically pp. 1146–1147.

⁷¹ Arbour, L. and Bergsmo, M. (1999) ‘Conspicuous Absence of Jurisdictional Overreach’, in von Hebel, H., Lammers, J. and Schukking, J. (eds.) *Reflections on the International Criminal Court—Essays in Honour of Adriaan Bos*. The Hague: TMC Asser Press, pp. 139–140.

⁷² International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 50. Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

According to Rule 50 (4) and (5), the Pre Trial Chamber may request additional information from the Prosecutor and from victims and ‘shall issue its decision, including its reasons, as to whether to authorize the

upon examination of the request [of the Prosecutor] and the supporting material, [it] 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.⁷³

While neither the Statute nor the Rules of Procedure and Evidence do clearly define what constitutes a ‘reasonable basis’, it is generally understood that since the Prosecutor must consider whether a case is or would be admissible, the Pre-Trial Chamber would also look at admissibility when deciding if there is a reasonable basis to proceed. This is supported by the wording in Article 15(4), which states that the authorization does not affect future decisions about jurisdiction or admissibility, implying that these issues have already been considered at this stage.

In contrast, when the ICC’s jurisdiction is triggered by a referral from a States Party or the Security Council, the Prosecutor does not need prior approval from the Pre-Trial Chamber to begin an investigation. In these cases, the Prosecutor alone determines whether there is a reasonable basis to proceed under Article 53(1). However, if the Prosecutor decides not to move forward, for example because the case is inadmissible, then the referring party can request the Pre-Trial Chamber to review that decision under Article 53(3)(a).⁷⁴ *Proprio motu* investigations are excluded from this review process.

Importantly, the Prosecutor also has the authority to «reconsider a decision whether to initiate an investigation or prosecution, at any time, based on new facts or information», as stated in Article 53(4). For instance, if a State initially appears to be conducting its own investigation but later stops or fails to do so adequately, the Prosecutor may reconsider the case’s admissibility. The opposite is also true: if the Prosecutor starts a case because there were no national proceedings, but the State begins a serious investigation later, the Prosecutor may decide the case is no longer admissible.

The latter case happened on June 27th 2011, when the Pre-Trial Chamber issued warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah

commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. e Chamber shall give notice of the decision to victims who have made representations.’ e involvement of victims also bears the potential of supplying additional information relating to admissibility, as it may for instance reveal their efforts to obtain justice in the national criminal jurisdiction concerned and any obstacles that they have encountered.

⁷³ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 15(4). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁷⁴ Ibid., Article 53(2) and (3)(a).

Al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya in 2011. On April 2nd 2013, the Libyan authorities filed a challenge to the admissibility of the case with regard to Abdullah Al Senussi before Pre-Trial Chamber I of the ICC. On October 11th 2013, Pre-Trial Chamber I decided that the case against Mr Al-Senussi was inadmissible before the Court as it was subject to on-going domestic proceedings conducted by the competent Libyan authorities and that Libya was willing and able to genuinely carry out such investigation. On October 17th 2013, the Defence appealed this decision. On July 24th 2014, the Appeals Chamber of the International Criminal Court unanimously confirmed Pre-Trial Chamber I's decision which declared the case against Abdullah Al-Senussi inadmissible before the ICC.⁷⁵

However, if the Prosecutor decides that the case is admissible under Article 53(1)(b) and chooses to proceed, the next stage where admissibility may be examined is during preliminary rulings under Article 18. At that point, States may inform the Court that they are already investigating and request a deferral of the ICC's investigation. This again demonstrates the central role of complementarity in the procedural structure of the Court and how it ensures that national systems always detain the primary responsibility to prosecute serious crimes, with the ICC stepping in only when necessary.

3.2. Preliminary Rulings Regarding Admissibility

Article 18 of the Rome Statute defines the obligation of the Prosecutor to notify States in the case in which

a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13(c) and 15.⁷⁶

Under Article 18(1) of the Rome Statute, the Prosecutor notifies all States Parties and non-States Parties which, based on available information, «would normally exercise jurisdiction over the crimes concerned».⁷⁷ This step initiates a crucial dialogue between the

⁷⁵ International Criminal Court (2014) *Appeal Chamber, Al-Senussi case: Appeals Chamber confirms case is inadmissible before ICC*, ICC-CPI-20140724-PR1034. Available at: <https://www.icc-cpi.int/news/al-senussi-case-appeals-chamber-confirms-case-inadmissible-icc>.

⁷⁶ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 18(1). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁷⁷ Ibid.

Prosecutor and relevant States,⁷⁸ allowing for potential deferrals of the investigation in favour of national proceedings, thus allowing state sovereignty to be preserved as a basis of complementarity.

Although the wording of Article 18 might appear ambiguous in regard of the definition of the qualifier that ‘would normally exercise jurisdiction’, it actually applies only to non-States Parties. States Parties are, in fact, notified regardless of their direct jurisdictional connection to the crimes because they are part of what is seen as an enforcement community, which shares collective responsibility for the investigation and prosecution of core international crimes. This reflects the assumption that their participation in the Rome Statute system entitles them to engage with such proceedings, even through supportive means other than exercising jurisdiction directly. In contrast, non-States Parties retain the ability to engage in the process through complementarity, without assuming any binding obligations to the Court, and may still challenge admissibility under Article 19.⁷⁹

However, identifying which non-States Parties ‘would normally exercise jurisdiction’ is practically difficult. If the term ‘normally’ was merely understood in reference to those States that have historically prosecuted such crimes, very few, if any, States would qualify, given the generally poor record of national proceedings for core crimes. Thus, the determination of the aforementioned States could not be based on historical practice nor on general jurisdictional basis under international law, such as territoriality or active nationality, as nothing in the Statute suggests such interpretation. Not even Article 12(2) of the Statute, which governs the ICC’s own jurisdiction, can be used to infer domestic jurisdictional reach, as it merely outlines preconditions for the Court’s exercise of jurisdiction, not the limits or obligations of States.

A more appropriate and practical interpretation focuses on whether a State is capable of undertaking an effective investigation or prosecution based on jurisdiction it has lawfully established under national law, combined with factors like its factual and legal connection to the alleged crimes, availability and accessibility of relevant evidence, and the presence of suspects.⁸⁰ These are the kinds of considerations that typically inform national prosecutorial decisions and should guide the assessment of whether a non-States Party ‘would normally exercise jurisdiction’. Understood this way, such States are those whose domestic prosecutors

⁷⁸ Young, S.N.M. (2000) ‘Surrendering the accused to the International Criminal Court’, *British Yearbook of International Law*, 71, pp.317–356, specifically p.334.

⁷⁹ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 19. Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁸⁰ United Nations (1969) *Vienna Convention on the Law of Treaties*, Article 31, 23 May. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

could reasonably be expected to contemplate legal proceedings in relation to the crimes at issue. Importantly, even non-States Parties that fall outside this category, thus not requiring notification, may still engage later in the admissibility process under Article 19.⁸¹

The notification procedure reflects the Statute's careful balance between encouraging States participation and preventing misuse. While it assumes good faith from States and acknowledges their legitimate interest in pursuing justice, it also recognizes that information shared by the Prosecutor might be abused, for example, to destroy evidence, intimidate witnesses, or warn suspects. To mitigate these risks, the Prosecutor may issue notifications confidentially and limit the details provided when necessary to protect individuals and preserve evidence.⁸² Nonetheless, Rule 52 of the Rules of Procedure and Evidence requires that the notifications include relevant information about the acts that may constitute crimes under the Court's jurisdiction.⁸³ This enables States to assess whether to request a deferral under Article 18(2), and also allows them to request additional information to support such a decision.

Despite these safeguards, the system is not without significant drawbacks. For instance, in cases where there is clear evidence of a State's unwillingness to investigate, the Prosecutor is still formally required to notify the State and provide it with information about the alleged crimes. Even if there is strong reason to believe that this information will be misused, the Prosecutor cannot withhold notification altogether. This creates a dilemma:⁸⁴ although withholding notification would not guarantee that evidence destruction or witness intimidation would be avoided, providing notification may actively facilitate such abuses. The problem is particularly acute in the case of non-States Parties, who have no legal obligations towards the Court and are not subject to the same procedural safeguards that apply to States Parties. As a result, any subsequent ruling or request from the Court may be ignored by such States, reducing the effectiveness of the process.

Nonetheless, in situations where a State shows genuine willingness and capacity to investigate and prosecute, Article 18's notifications serve as a meaningful expression of the complementarity principle. They encourage national jurisdictions to take responsibility for addressing core crimes and support the broader aim of international justice. The challenge,

⁸¹ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 19. Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁸² Ibid., Article 18(1).

⁸³ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 52(1) and (2). Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

⁸⁴ Benzing, M. (2003). 'The Complementarity Regime of the International Criminal Court', *Max Planck Yearbook of United Nations Law*, Vol. 7, pp. 591-632.

however, lies in the uniformity of the procedure: all States, regardless of their intentions or capacity, are treated equally under the notifications framework. This risks to undermine the procedure's effectiveness, as it fails to distinguish between cooperative and obstructive actors within the international legal landscape.

A logical consequence of the idea of complementarity is also strongly present in the second step of the preliminary rulings regarding admissibility, *videlicet*, the assessment of whether an investigation should be deferred in accordance with Article 18(2) and Rules 53 to 55 of the Rules of Procedure and Evidence. The notifications issued in accordance with Article 18(1), in fact, aim to inform and alert States to allow them to act consequently and exercise their jurisdiction, making the ICC's intervention unnecessary and maintaining, in this way, the core basis of complementarity.

Both States Parties and non-States Parties may respond to this notification. Within one month of receiving it, a State may inform the Court that it is conducting, or has conducted, an investigation into the acts described in the notification.⁸⁵ This applies whether the State's investigation was already underway or completed before receiving the notification, or if it began in response to it. In such cases, the State may formally request the Prosecutor to defer the investigation in favour of the national proceedings.⁸⁶ This request must be submitted in writing and should include information about the ongoing or completed investigation.⁸⁷

The Prosecutor has the authority to request additional information from the State.⁸⁸ It has been argued that States should be allowed, like the Prosecutor, to withhold certain information to protect the integrity of their investigations. While this may hold true for non-States Parties not bound by the Statute, the Rules are silent on whether States Parties have the same privilege. Conversely, the Prosecutor's ability to limit disclosure is clearly defined and must be justified by the need to safeguard persons and secure evidence. If such a power were to be extended to States, it would need to be similarly regulated and justified under comparable conditions.

The obligation of the Prosecutor to defer to a State's investigation following a valid request, becomes exceptionable in the case in which the Prosecutor applies to the Pre-Trial Chamber for authorization to proceed with the ICC's investigation despite the deferral

⁸⁵ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 18(2). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁸⁶ Nsereko, D. (2008) 'Article 18', in Triffterer, O. (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*. 2nd ed. Munich: C.H. Beck, pp.400, margin 12.

⁸⁷ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 53. Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

⁸⁸ *Ibid.*

request,⁸⁹ due to reasons that will be explained through supporting evidence.⁹⁰ The State of the application will thus be notified from the Prosecutor which will also present a summary of the basis of the application.⁹¹

Despite the Rules of Procedure and Evidence grant the Pre-Trial Chamber significant flexibility in managing deferral requests, the Chamber has to mandatorily review the Prosecutor's application, consider any observation from the State requesting deferral, and apply the admissibility criteria outlined in Article 17.⁹² Moreover, the Chamber's decision and its reasoning must be promptly shared with both the Prosecutor and the requesting State.⁹³

Each step clearly shows the dialogic character of the procedure continuously involving States' cooperation with the Court. However, the process may become more adversarial in the case in which the Prosecutor challenges a State's deferral request.

A part of the deferral procedure that needs to be further analysed is the issue about which States are eligible to request deferral. Article 18(2) reads as follows:

a State may inform the Court that it 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.⁹⁴

As suggested by Article 31 of the VCLT, a contextual interpretation shall be conducted in order to better understand the term 'jurisdiction' and the expression 'investigating or has investigated': the State here mentioned has to detain both legal authority and actual involvement in investigating the alleged crimes, while the physical custody of the suspect is not required.

A discrepancy arises from those rules: more than one State is allowed to request a deferral for a same crime. The fact that more than a State may hold investigative authority over actions connected to the details submitted in the notification under Article 18(1)⁹⁵ suggests that multiple

⁸⁹ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 18(2). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁹⁰ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 54(1). Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

⁹¹ *Ibid.*, Rule 54(2).

⁹² *Ibid.*, Rule 55(2).

⁹³ *Ibid.*, Rule 55(3).

⁹⁴ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 18(2). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁹⁵ Such investigative jurisdiction may be vested in the territorial State, the State of active or passive nationality, or States exercising universal jurisdiction.

States may request a deferral. While this is uncommon, it can still happen. In such cases, the Prosecutor then has to decide which State's request to accept. Since the Rome Statute and international law offer no *a priori* clear order of priority among overlapping claims, such situations are typically resolved through *a posteriori* cooperation and mutual agreement between States, often via the transfer of criminal proceedings.⁹⁶

In the case in which a deferral to a State's investigation has taken place, a third step in the procedure governing preliminary rulings regarding admissibility concerns of complementarity, needs to be considered.⁹⁷

At this stage, the Prosecutor is provided with a number of supervisory tools under Article 18(3) and (5) to (7) in order to safeguard the integrity and the efficiency of investigations against the abuse of the deferral procedure.

The Prosecutor may review a deferral six months after it is granted, or sooner if there is a significant change in circumstances, particularly concerning a State's unwillingness or inability to conduct a genuine investigation.⁹⁸ This ensures that a deferral can be reconsidered based on how the State behaves during the investigative process, thus obliging the State to respond adequately during the course of the proceeding. Article 18 outlines specific actions that may trigger such a review. For example, if a States Provides incomplete, inaccurate, or delayed information under Article 18(5), or if it obstructs the Prosecutor's investigative efforts as permitted under Article 18(6), these could be signs that the State is not genuinely willing or able to investigate, justifying a reassessment of the deferral.

In addition to the review power, Article 18(5) allows the Prosecutor to request periodic updates from the State on the progress of its investigations and any prosecutions. These reports must be provided 'without undue delay' and should include concrete actions taken, such as evidence collection, witness interviews, arrests, and updates on procedural stages. Once again, the dialogical character of the procedure is highlighted.

⁹⁶ Henzelin, M. (2000) *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*. Brussels: Helbing & Lichtenhahn, pp.227–234.

Ad Hoc Committee on the Establishment of an International Criminal Court (1995) *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, A/50/22, p.20, para. 92, 6 September. Available at: <https://digitallibrary.un.org/record/188889?v=pdf>.

⁹⁷ If, in contrast, the Pre-Trial Chamber authorizes an investigation, and the Appeals Chamber has confirmed the authorization provided the State concerned has appealed against such a ruling in accordance with Article 18 (4), the Prosecutor may investigate in accordance with Articles 54 et seq. The same applies when the State does not request a deferral, either because it does not or did not investigate or because it simply refrains from requesting a deferral despite an investigation.

⁹⁸ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 18(3). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

In the case in which the Prosecutor concludes, based on these updates, that the complementarity criteria have been met, meaning the State is unwilling or unable to genuinely proceed, he or she may seek authorization from the Pre-Trial Chamber to initiate an investigation under Article 18(2).⁹⁹

Furthermore, Article 18 contains several safeguards to protect the integrity of ICC proceedings. Under Article 18(6), the Prosecutor may, in exceptional circumstances, request permission to carry out essential investigative steps to preserve evidence that may otherwise be lost. Such requests are considered confidentially (*ex parte* and *in camera*) and are quickly reviewed by the Pre-Trial Chamber.¹⁰⁰

Article 18(7) restricts repetitive challenges by States, preventing the misuse of procedural rights to delay ICC proceedings.

A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.¹⁰¹

The effectiveness of these provisions depends on the Prosecutor's ability to assess State cooperation and act swiftly when deferrals are no longer justified.

3.3. Challenges to the Admissibility of a Case

The process of challenging the admissibility of a case, outlined in Article 19 of the Rome Statute and Rules 58 through 62, represents the final measure to question whether a case meets the complementarity threshold. This procedural step, while resembling the mechanism under Article 18, provides a structured approach regarding the appeal to complementarity by different actors.

Article 19(1) gives the ICC the authority to independently assess whether a case is admissible, based on the complementarity principle set out in Article 17. This allows the Court to intervene and determine if it should take jurisdiction over a case, regardless of the stance taken by other parties.¹⁰² However, this authority is not exclusive to the Court. Other parties,

⁹⁹ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 56(1). Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

¹⁰⁰ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 17(2)(b). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

¹⁰¹ Ibid., Article 18(7).

¹⁰² Ibid., Article 19(1).

such as the accused or individuals for whom arrest warrants or summonses have been issued under Article 58, have the right to challenge the admissibility of the case as well.¹⁰³ Furthermore, States that have jurisdiction over the case, whether they are investigating, prosecuting, or have already taken action, can also raise challenges regarding admissibility. This includes non-States Parties, making it clear that even countries that are not signatories to the Rome Statute can play a role in invoking complementarity.¹⁰⁴ Finally, the Prosecutor retains the power to request a ruling from the Court on whether a case is admissible.¹⁰⁵

Being strongly related to Article 18, Article 19 needs a further explanation in relation to the former Article in order to highlight their consequentiality and their differences.

Article 19 distinguishes itself from Article 18 through its contesting character as its main purpose is to provide a framework for the exchange of claims and counter-claims as to the admissibility of a case.

Another key distinction between Article 19 and Article 18 lies in the scope of participants. While Article 18 limits participation primarily to States, Article 19 allows individuals, including the accused, to directly challenge the admissibility of a case.¹⁰⁶ This is an innovative feature in international criminal law, as it provides individuals with a specific right to invoke the Court's jurisdiction based on the principle of complementarity.¹⁰⁷

Moreover, Article 19 allows multiple States to challenge admissibility either consecutively or simultaneously. In addition to the right of States that are investigating or prosecuting, or have already taken action to contest the admissibility of a case, the possibility of non-Party States to challenge admissibility as well, reflects the negotiation dynamics of the Rome Statute, where some States sought to retain full control over their domestic legal processes, while others emphasized the importance of an effective ICC.¹⁰⁸ Additionally, Article 19(2) grants States that require the Court's acceptance of jurisdiction under Article 12, the territorial or nationality States, the right to challenge admissibility. However, to do so, these States must demonstrate that they are actively involved in investigating or prosecuting the case.

¹⁰³ Ibid., Article 19(2)(a).

¹⁰⁴ Ibid., Article 19(2)(b) and (c).

¹⁰⁵ Ibid., Article 19(3).

¹⁰⁶ Ibid., Article 19(2)(a).

¹⁰⁷ Kor, G. (2006) 'Sovereignty in the dock', in Kleffner, J.K. and Kor, G. (eds.) *Complementary Views on Complementarity—Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court*, The Hague: TMC Asser Press, pp. 66–67.

¹⁰⁸ Kleffner, J. K. (2008) *Complementarity in the Rome Statute and National Criminal Jurisdictions*. Oxford: Oxford University Press, pp. 91-92.

This requirement ensures that States invoking complementarity are meaningfully engaged with the case rather than simply relying on procedural technicalities.

Challenges to admissibility are triggered once the Prosecutor identifies one or more individuals following the initiation of an investigation in a given situation.¹⁰⁹ The Court's practice aligns with this, as the Pre-Trial Chambers assess admissibility in the context of arrest warrant requests under Article 58, ensuring the case satisfies the complementarity criteria laid out in Article 17.

Similarly to the deferral mechanism under Article 18(2), the procedures for admissibility challenges of Article 19 are designed to be flexible. Rule 58 gives the Chamber discretion in determining the specific procedures to be followed in admissibility proceedings. The mandatory requirements include that any request made under Article 19 must be submitted «in writing» with a clear explanation of the grounds for the challenge. Additionally, the Court must first address jurisdictional challenges before considering the issue of admissibility. The Court is also required to notify both the Prosecutor and the accused when a request or application is received, allowing them to submit written responses within a specified time.¹¹⁰

Article 19(3) and Rule 59 further clarify who can participate in admissibility proceedings. In addition to those directly challenging admissibility, such as States and the accused, other parties like those who referred the situation to the ICC under Article 13, as well as victims, are also entitled to make observations.¹¹¹ This provision highlights the importance of ensuring that victims' interests are represented in the Court's proceedings, which is consistent with the broader goals of the Rome Statute.¹¹²

Several safeguards are built into the admissibility process to ensure the integrity of investigations. When notifying participants about a challenge, the information must be given in a manner that respects confidentiality, protects individuals, and preserves evidence, limited to a 'summary of the grounds'.¹¹³ Only one admissibility challenge can be brought by each party

¹⁰⁹ Hall, C.K. (2018) 'Commentary on Article 19', in Triffterer, O. and Ambos, K. (eds.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 3rd ed. Munich/Oxford/Baden-Baden: C.H. Beck/Hart Publishing/Nomos, pp. 407-408, margin 3.

¹¹⁰ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 58(1) and (3) to (4). Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

¹¹¹ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 19(3). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

¹¹² Donat-Cattin, D. (1999) 'The role of victims in ICC proceedings', in Lattanzi, F. and Schabas, W. (eds.) *Essay on the Rome Statute of the International Criminal Court*. Il Sirente, pp. 251–277.

¹¹³ International Criminal Court (2013) *Rules of Procedure and Evidence*, Rule 59(2). Available at: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

for a specific case.¹¹⁴ Third, challenges raised after the commencement of the trial can only rely on Article 17(1)(c), ensuring that they are timely.¹¹⁵ States are encouraged to raise challenges as early as possible, as doing so broadens the range of grounds, listed in Article 17(1)(a) to (c), on which admissibility can be contested.¹¹⁶ Article 19(9) spells out an additional safeguard which provides that challenging the admissibility of a case «shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge».

Similarly to Article 18, Article 19 provides specific supervisory tools: if a case is declared inadmissible, Article 19(10) allows the Prosecutor to request a review if new facts that could alter the decision have emerged. This provision ensures that the Court's decision can be reconsidered if new information that could change the assessment of the case's admissibility comes to light.

Article 19(11) addresses the Prosecutor's ability to request, in a confidential way, information from States when an investigation has been deferred. If the Prosecutor later decides to resume the investigation, they must notify the State where the case was deferred.¹¹⁷ While this provision evidently shares similarities with Article 18(5), it differs with it as it does not explicitly require States to respond promptly. However, this obligation doesn't apply when an investigation is deferred due to an admissibility challenge, making the Prosecutor's oversight role weaker under Article 19. Moreover, Article 19(11) does not expressly specify the information that can be requested contrasting with Article 18(5) which, instead, specifies that the Prosecutor may request «that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions».

The safeguards and monitoring tools in Article 19 may not completely prevent delays or misuse. While delays can sometimes result from a legitimate effort by a State to exercise jurisdiction, they can also be caused by attempts made in *male fide* to hinder the Court's proceedings. Furthermore, Article 19, combined with Article 18, may lead to multiple admissibility challenges, which can cause additional delays.

Delays in proceedings can arise from different circumstances. A State may dispute the admissibility of a case even after a decision by the Pre-Trial Chamber, particularly when it

¹¹⁴ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 19(4). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

¹¹⁵ Ibid.

¹¹⁶ Ibid., Article 19(5).

¹¹⁷ Ibid., Article 19(11).

claims that new, relevant facts or changed circumstances justify a renewed challenge. For instance, a State that initially sought a deferral under Article 18(2) might later argue that its ongoing investigation still lacks the necessary evidence to advance. After the Prosecutor assesses the situation under Article 18(3), they may request authorization from the Pre-Trial Chamber to begin an investigation. If the Chamber concludes that the State is unwilling or unable to carry out genuine proceedings, the State can appeal through the Appeals Chamber under Article 18(4) and may later initiate another admissibility challenge under Article 19 if further evidence becomes available.

Delays can also result from the broad range of parties allowed to challenge admissibility. This can lead to multiple objections, especially when several States are involved in the matter. If multiple challenges are successful, the Court must then determine which State should proceed with the case, contributing to further delays.

Article 19(4) suggests that the admissibility of a case «may be challenged only once by any person *or* State referred to in paragraph 2». However, the use of *or* rather than *and* in the text implies that each party may challenge admissibility individually. This interpretation allows for challenges to be made at different times, which may not necessarily align with the aforementioned ‘earliest opportunity’¹¹⁸ requirement. Different States may face different timelines to initiate their challenges, depending on their role in the case. A State already investigating may challenge admissibility sooner than another, like the State of active nationality, still determining whether to open an investigation.

Although this discussion does not imply the Court should not address successive admissibility challenges, States are permitted to make such challenges as they see fit. While delays caused by legitimate or illegitimate challenges are a possibility, the structure of Article 19 enables States to pursue these opportunities.

Article 19 represents the final procedural step for determining a case’s admissibility. Once a ruling on admissibility is made, it generally concludes the matter. The exceptions provided in Articles 19(4) and 19(10) offer limited flexibility for revisiting admissibility decisions.

What remains uncertain is whether the Statute and the Rules allow for the reconsideration of cases already declared admissible and their potential referral back to national jurisdictions.

¹¹⁸ Ibid., Article 19(5).

3.4. Complementarity at the Post-Admissibility Stage: Referral of Cases Back to National Criminal Jurisdiction

Determining whether, and to what extent, the Rome Statute and the ICC's Rules of Procedure and Evidence allow the referral of previously admissible cases back to national jurisdictions is a matter of significant legal and practical consequence. Such a mechanism would offer the advantage of taking into account evolved circumstances, which may significantly influence a State's willingness or ability to conduct genuine prosecutions of international crimes. Political transformations, judicial reforms, or peace processes may lead to enhanced domestic capacity or commitment to accountability, thereby altering the initial conditions that necessitated international intervention.

An illustrative example is the Central African Republic (CAR), which has undergone notable judicial development in response to longstanding impunity. Following periods of intense conflicts and governance collapse, CAR took concrete steps to reassert national responsibility for international crimes through the establishment of the Special Criminal Court (SCC) in 2015. This hybrid tribunal, composed of both national and international judges and staff, was designed to investigate and prosecute war crimes and crimes against humanity committed since 2003.¹¹⁹ This initiative directly reflects CAR's renewed determination to address impunity domestically. The SCC emerged out of domestic and international consensus that accountability should not be outsourced entirely to The Hague, especially when some perpetrators and victims remain within reach of the national system.¹²⁰

This development demonstrates a shift in CAR's judicial system, mirroring the earlier situation in Uganda, where the peace process with the Lord's Resistance Army led to the establishment of national structures aimed at prosecuting serious crimes domestically to prevent

impunity and promoting redress in accordance with the Constitution and international obligations, and recall[ed], in this connection, the requirements of the Rome Statute of the International Criminal Court and in particular the principle of complementarity.¹²¹

¹¹⁹ American Society of International Law (2018) *The Special Criminal Court in the Central African Republic*. Available at: <https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic>.

¹²⁰ United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (2021) *CAR Special Criminal Court (SCC) now fully operational*. Available at: <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational>.

¹²¹ United Nations (2007) *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (LRA/M)*. Available at: <https://peacemaker.un.org/en/node/9297>.

In CAR, the hybrid structure of the SCC also aims to reinforce the domestic judiciary by building local capacity and restoring trust in national legal institutions, previously eroded by decades of instability. Notably, the SCC began hearings in 2022, despite resource constraints, showing real progress on the ground.¹²²

In other contexts, political change, such as the ousting of regimes hostile to judicial independence, or the sustained assistance of international donors may revitalize a previously weak or dysfunctional national judicial system. In such cases, the principle of complementarity, which underlies the ICC's operational framework, suggests that national proceedings should regain primacy over international adjudication, especially when they become genuinely feasible after the ICC has declared a case admissible.

A practical example of such changed circumstances is reflected in the ICC's approach to the situation in the Democratic Republic of the Congo (DRC). In the early 2000s the DRC was emerging from years of protracted armed conflict and institutional collapse following the Second Congo War (1998–2003), which had deeply undermined state authority and the functioning of its judiciary.¹²³ Although President Joseph Kabila had initiated the process of political stabilization and judicial reform, the State's ability to investigate and prosecute crimes under the Rome Statute was still severely constrained, especially in conflict-affected areas such as the region of Ituri. A self-referral, under Article 14 of the Rome Statute, was submitted from President Kabila to the ICC.¹²⁴ Since March 2004, however, the DRC's national judicial system had been undergoing certain reforms, notably in the Ituri region, where the Tribunal de Grande Instance had been reopened in the town of Bunia.¹²⁵ In light of these events, the Chamber concluded that the Prosecutor's general assertion that the DRC remained entirely unable to act in the sense of Article 17(1)(a) to (c) and (3) of the Statute no longer fully reflected the actual situation on the ground.¹²⁶

¹²² Human Rights Watch (2024) *Central African Republic: Step Toward Accountability*. Available at: <https://www.hrw.org/news/2024/07/02/central-african-republic-step-toward-accountability>.

¹²³ Council on Foreign Relations (2025) *Conflict in the Democratic Republic of Congo*. Available at: <https://www.cfr.org/>.

¹²⁴ International Criminal Court (2004) *Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo*, ICC-01/04, 5 July. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_02088.PDF.

¹²⁵ Human Rights Watch (2004) *Contribution to maintaining peace and security in Ituri*. Available at: <https://www.hrw.org/legacy/background/africa/drc0904/2.htm>.

¹²⁶ International Criminal Court (2006) *Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr*

A procedure akin to the Rule 11 *bis* mechanism employed by the ICTY and ICTR Rules of Procedure and Evidence, where cases could be transferred back to national courts under specific conditions, would thus be both practical and desirable in the Rome Statute.

The Statute, however, does not explicitly foresee such a mechanism. Nevertheless, several provisions provide procedural flexibility that could potentially be used to reallocate admissible cases back to national jurisdictions.

Article 19(1) of the Statute allows the Court to make *proprio motu* determinations regarding admissibility, without temporal restriction, implying that it could revisit a previous admissibility decision should national conditions improve. Rule 58(2) of the Rules of Procedure and Evidence supports this interpretation by granting the Court the necessary procedural leeway.

Additionally, Article 19(3) authorizes the Prosecutor to seek rulings on admissibility at any stage, which could include a reassessment in light of new national developments.

Furthermore, under Article 53(4), the Prosecutor may reconsider any decision to initiate investigations or prosecutions based on new facts or information, again allowing for the possibility of halting an ICC proceeding in favour of renewed domestic action.

Still, these procedural pathways are relatively underdeveloped when compared to the detailed framework established by the *ad hoc* tribunals. The ICC's legal instruments lack clarity on critical aspects such as the process for transferring an accused already in ICC custody back to national authorities, or the modalities for information-sharing with domestic institutions (with the limited exception of Article 93(10)¹²⁷), and mechanisms for monitoring national proceedings following a case referral. The Rome Statute does not provide clear conditions under which a decision to refer a case back to domestic jurisdiction could be reversed, nor does it lay out safeguards to ensure fair trial standards in domestic courts.

Contrarily to the ICC, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia developed a robust procedural framework under Rule 11*bis*, which allowed for the referral of intermediate and lower-level accused to national jurisdictions, provided that the referring chamber was satisfied that the receiving State guaranteed the right to a fair trial. Notably, these tribunals retained jurisdiction and could rescind the referral prior to final judgment if fair trial conditions deteriorated, thereby

Thomas Lubanga Dyilo, ICC-01/04-01/06, 23 February. Available at: <https://www.icc-cpi.int/court-record/icc-01/04-01/06-8-corr>.

¹²⁷ International Criminal Court (1998) *Rome Statute*, A/CONF.183/9, Article 93(10). Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. The Article provides the Court with the possibility to cooperate with and provide assistance to a State conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court.

establishing a dynamic mechanism for procedural oversight and correction. Additionally, the ICTR authorized monitoring of domestic proceedings by international observers, ensuring continued oversight and accountability. Unlike the ICC, which has no systematic approach to evaluating trial conditions post-referral, the ICTR made detailed determinations concerning the adequacy of detention conditions, judicial independence, and protection of defence witnesses, even refusing transfers where such guarantees were deemed insufficient.¹²⁸ This model of conditional delegation, coupled with continued supervisory competence, not only strengthened the legitimacy of the ICTR's referral decisions but also reinforced the integrity of the international justice system as a whole. The Rome Statute's silence on comparable procedural safeguards risks transforming complementarity into abdication rather than cooperation.

These features represent mature procedural tools, reflecting a dynamic jurisprudence from which the ICC could draw inspiration to enhance the credibility and effectiveness of its complementarity regime. These reforms could be enacted through amendments to the Statute or its procedural rules, thereby bringing the ICC's framework in line with the more robust models of its *ad hoc* predecessors and ensuring better synergy between international and national justice systems.

Conclusion

The procedural framework governing admissibility fully operates to ensure that complementarity remains a consistent and preserved element during the initial stages of proceedings before the ICC. Each step enshrined in the Articles and Rules of Procedure and Evidence, represents the strongest attempt of the Court not to interfere with cases that can be handled autonomously by States. The procedure provides multiple stages and aims to consider as many cases as possible in order not to hinder state sovereignty.

The Prosecutor's independence, for instance, appears to be limited in launching investigations as an approval from the Pre-Trial Chamber is asked, particularly when the Prosecutor initiates an investigation *proprio motu* or proceeds despite a State's request for deferral based on its own investigation into crimes under ICC jurisdiction. To balance this aspect, the involvement of the Pre-Trial and Trial Chambers acts as a safeguard, helping prevent accusations of political bias or manipulation against the Prosecutor.

Articles 18 and 19 represent the core of the procedural setting. Although those Articles share certain procedural aspects, Article 18 is primarily characterized by its dialogical nature

¹²⁸ Schabas, W. (2009) 'Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Court for Rwanda', *Max Planck Yearbook of United Nations Law*, Vol. 13, pp. 29-60.

with only minor adversarial features, whereas Article 19 is more litigious, even though both allow the Court and the Prosecutor to independently address admissibility.

These provisions establish a structured interaction between States and the Prosecutor, overseen by the Pre-Trial or Trial Chamber, and, if appealed, the Appeals Chamber. The Prosecutor is also given some oversight responsibilities regarding domestic proceedings. Most importantly, in both Articles it is clear how everything has been thought with the principle of complementarity in mind.

Some parts of the Statute, however, may need changes. Firstly, the Statute and the Rules of Procedure and Evidence provide minimal flexibility to distinguish among States based on their willingness or capacity to investigate effectively. Procedurally, all States are treated similarly, regardless of whether the admissibility issue stems from unwillingness, inability, or even if the case was self-referred. Secondly, a process through which the ICC can defer admissible cases back to domestic courts when suitable conditions are met still should be defined.

Conclusions

The principle of complementarity occupies a unique and indispensable position within the architecture of the International Criminal Court, functioning as both a legal doctrine and a practical mechanism through which international and domestic jurisdictions interact in the pursuit of justice. While the Rome Statute does not offer a singular, comprehensive definition of complementarity, its operational contours emerge through a nuanced network of procedural and substantive provisions, most prominently through Articles 17, 18, and 19, reflecting the Court's foundational commitment to respecting the primacy of national legal systems. This concluding analysis aims to reflect critically on the concept's legal significance, institutional challenges, normative trajectory, and prospective evolution, especially as it pertains to reconcile global justice imperatives with the enduring centrality of State sovereignty.

At its core, complementarity is premised on the recognition that States retain the primary responsibility for investigating and prosecuting international crimes, while the ICC functions as a court of last resort, intervening only when national jurisdictions are demonstrably unwilling or unable to carry out genuine proceedings. This formulation reflects a deliberate balancing act, allowing the Court to operate without encroaching unduly on sovereign prerogatives, while simultaneously upholding the imperative that serious violations of international law must not go unpunished. It is a manifestation of legal subsidiarity at the international level, reinforcing the dual objectives of accountability and deference within a single operational framework.

In theoretical terms, complementarity is more than a procedural filter: it represents a shift in the allocation of criminal jurisdiction on the global stage. It enshrines a vertical relationship between the ICC and national systems, in which deference is not merely a matter of procedural priority, but an expression of international legal pluralism. This enables complementarity to act as a catalyst for the enhancement of domestic legal capacity, incentivizing States to strengthen their legal institutions so as to retain jurisdictional primacy. As discussed in the first and second chapter of this thesis, this principle was not an incidental feature of the Court's framework, but rather the result of deliberate negotiation during the drafting process of the Rome Statute. From the earliest stages of deliberation, complementarity emerged as a compromise mechanism designed to secure broad State's participation by preserving national sovereignty while ensuring international accountability. Its codification was crucial in aligning the divergent interests of States wary of supranational intrusion with the normative aims of a permanent international criminal tribunal. In doing so, complementarity reconfigures the traditional State-centric architecture of international law, giving rise to a more cooperative, dialogic model of transnational justice.

Nonetheless, the application of complementarity has revealed considerable operational complexities, particularly in the interpretative ambiguity surrounding the terms ‘unwilling’ and ‘unable’ as found in Article 17(1)(a) and (b) of the Rome Statute. Analysed in the second chapter, these criteria, while essential to preserving the principle’s theoretical integrity, have given rise to significant legal and practical uncertainties. The requirement to assess a State’s genuine capacity and intent necessitates a deeply context-sensitive inquiry that blends legal contextual analysis with factual investigation. The Court is thus compelled to make determinations that often verge on evaluating the adequacy, independence, and impartiality of national judicial systems and governments, judgments that are inherently sensitive and politically charged.

This procedural complexity is compounded by the multi-phase structure through which admissibility is assessed. The complementary framework not only demands a high evidentiary threshold at the investigatory stage but also provides multiple procedural avenues for States to challenge the Court’s jurisdiction. Articles 18 and 19 of the Statute, studied in the third chapter of this research, establish a structured and extremely complex, although essential, pathway through which admissibility determinations can be contested, revisited, and reconsidered. This multilayered approach is not arbitrary, rather, it reflects the Court’s fundamental commitment to the principle of complementarity, ensuring that national jurisdictions are afforded each and every reasonable opportunity to assert and exercise their primary responsibility to investigate and prosecute international crimes. By incorporating several procedural safeguards and stages of review, the Rome Statute aims to fully maximize deference to domestic legal systems. Despite this architecture is ostensibly designed to safeguard due process and respect for State sovereignty, it also risks prolonging proceedings, undermining the efficiency of the Court, and potentially weakening its deterrent effect.

The principle of complementarity raises normative and functional tensions regarding its implementation in politically fraught contexts. The ICC’s determinations of admissibility, particularly in finding ‘unwillingness’, can be perceived by States as affronts to their sovereign integrity, thereby straining diplomatic relations and complicating cooperation with the Court. The Office of the Prosecutor is thus placed in a delicate position, where it must navigate the legal imperative to pursue justice against the geopolitical reality of international relations. The decision to investigate or prosecute shall be legally justified, but it must also be diplomatically feasible, lest it provoke backlash that undermines the legitimacy or operability of the Court itself.

As shown in the last chapter, these challenges are further exacerbated in cases in which States, in order to sidestep the issue, initiate domestic proceedings for the express purpose of blocking the ICC's jurisdiction. The Rome Statute anticipates such possibilities, allowing the Court to assess whether national proceedings are conducted with the requisite independence, impartiality, and diligence. However, distinguishing between genuine and pretextual efforts is often a formidable task, requiring access to sensitive internal judicial processes, political information, and administrative records. Such inquiries inevitably test the limits of the Court's investigative reach and its reliance on State cooperation, rendering the effective application of complementarity contingent on both legal acumen and diplomatic tact.

At the same time, a contradiction arises as the procedural structure itself which, under Article 18, obliges the Prosecutor to notify States before proceeding with an investigation, can unintentionally facilitate procedural manipulation. While this notification requirement is intended to respect the primacy of domestic jurisdictions and to operationalize complementarity in good faith, it risks being generalized in a way that ignores the diverse capacities and political intentions of different States. This potential for manipulation underscores the tension between legal formalism and practical reality in the application of complementarity.

Despite the equality with which States are notified, a dimension that warrants critical attention is the uneven application of complementarity across different cases and situations. While the Statute establishes uniform legal standards, in practice, the complementarity regime has not been immune to accusations of selectivity and inconsistency. Disparities in the Prosecutor's engagement with various States, particularly between those with established judicial infrastructures and those without, have raised questions regarding the equitable application of the principle. This perceived unevenness threatens to erode the credibility of the ICC, particularly in regions where its interventions are seen as neo-colonial or politically motivated. As such, the normative promise of complementarity as a neutral, objective mechanism for balancing sovereignty and accountability must be matched by its consistent and principled application.

However, it would be reductive to interpret complementarity merely through the lens of institutional critique. Despite its flaws, the principle has had a measurable impact on the landscape of international criminal justice. In practice, the spectre of ICC intervention has prompted numerous States to initiate or accelerate domestic proceedings against perpetrators of international crimes, thereby reinforcing their own national judicial systems, as seen in the case of Uganda, where the 2008 Annexure to the Agreement on Accountability and Reconciliation with the Lord's Resistance Army led to commitments for domestic prosecutions

of serious crimes, or in the Central African Republic, where the establishment of the Special Criminal Court reflects a national effort, under ICC's oversight, to exercise primary jurisdiction over core international crimes.

In this sense, complementarity has functioned not merely as a gatekeeping device, but as a transformative force in the development of domestic legal orders. The principle, therefore, does not only demarcate the jurisdictional limits of the ICC but it also operationalizes a strategy of international legal engagement that empowers domestic systems.

Yet, for complementarity to fully realize its transformative potential, certain reforms and conceptual recalibrations may be necessary. One area ripe for improvement lies in enhancing the transparency and consistency of admissibility assessments. Greater clarity in the Prosecutor's decision-making criteria, perhaps through the adoption of interpretative guidelines or the publication of detailed policy papers, could alleviate concerns of arbitrariness and foster greater predictability. Similarly, procedural reforms aimed at streamlining admissibility challenges could reduce delays and promote efficiency without compromising fairness.

Importantly, the Court should also make greater use of the possibility, already foreseen in the Statute and Rules of Procedure and Evidence, of reassessing and potentially returning cases to national jurisdictions even after admissibility has been initially confirmed. This flexible and ongoing evaluation of jurisdiction aligns with the spirit of complementarity, allowing States that demonstrate genuine willingness and capacity at a later stage to reclaim responsibility for prosecution. Such an approach would reinforce the Court's subsidiary role while encouraging domestic accountability and reducing the institutional burden on the ICC.

In addition, the Court should be more proactive in engaging with domestic jurisdictions, not merely as passive recipients of admissibility assessments, but as partners in a shared justice project. This could involve expanded technical assistance, capacity-building programs, and institutional dialogues aimed at strengthening national legal systems. While such initiatives already exist under the rubric of positive complementarity, they could be further formalized and expanded to reflect a more collaborative vision of international criminal justice.

The future trajectory of complementarity will also be shaped by broader developments in transnational legal cooperation. The increasing entrenchment of international criminal norms within regional legal frameworks, as well as the proliferation of hybrid tribunals and mutual legal assistance treaties, signal a growing convergence between international and domestic legal orders. In this context, complementarity may evolve from a vertical principle of deference to a more horizontal, network-based model of shared responsibility. Such a shift would require

reimagining the ICC not as a solitary arbiter of justice, but as a node within a decentralized, multi-level system of accountability.

At the same time, this evolution must be carefully managed to avoid diluting the Court's mandate or undermining its independence. The ICC must remain vigilant against the instrumentalization of complementarity by States seeking to shield powerful actors from scrutiny. In this regard, the integrity of complementarity depends on the Court's continued willingness to assert its jurisdiction where warranted, even in the face of political resistance. It must resist the temptation to defer excessively in the name of pragmatism, lest it betray the very principles upon which it was founded.

In conclusion, the principle of complementarity is both a cornerstone and a crucible of the ICC's legal regime. It embodies a delicate equilibrium between the sovereign prerogatives of States and the universal imperative of accountability for international crimes. While its procedural complexity and interpretive ambiguities present significant challenges, these are not insurmountable. Rather, they invite continued refinement, innovation, and engagement, both within the Court and among the broader community of international legal actors. As the international system becomes increasingly multipolar and juridically pluralistic, the principle of complementarity will continue to evolve, shaping and being shaped by the dynamics of transnational justice. Its ultimate success will not only depend on the fidelity of its legal application but also on the collective political will to uphold justice beyond borders. In this respect, complementarity is not merely a legal doctrine, it is a test of our global commitment to the rule of law.

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