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THE DIALECTIC OF THE ROME STATUTE: OPPOSITENESS AND UNITY OF THE COMPLEMENTARITY AND CORRECTIVE FUNCTION OF THE INTERNATIONAL CRIMINAL COURT

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Abstract English: Under international law, it is each State's obligation and responsibility to recognize the most serious crimes committed against the international community, as well as criminalize and conduct effective investigations and prosecution of them. The establishment of a permanent International Criminal Court, whose well-known complementarity principle is one of its central tenets, has finally emerged as a pillar in the fight against the impunity of international crimes. The article derives from various implementations a test for determining the characteristics and functions of the correction function of international law, thus presents the argument that the Rome Statute's complementary role provides a corrective function.

Keywords: International Criminal Court; Rome Statute; complementarity; corrective function; international crimes.

1. Introduction

The subject matter of international criminal law is the accountability of gravest crimes against the international community , which are basically the crime of genocide, violation of humanitarian law including the crime of aggression and war crimes as well as systemic crimes against humanity. The historical attempts to internationally prosecute and punish gross and grave human rights abuses and systematic violations during or related to an armed conflict and threatening international community have failed –or rather have not aimed to- establish

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a permanent international penal law and judicial mechanism[1]. Nuremberg International Military Tribunals was established following the end of World War II by the victorious Allied States with the Charter of the International Military Tribunal signed on 8 August 1945 in London. for the trial and punishment of the major war criminals of the European Axis countries whether as individuals or as members of organisations, committed any of the crimes listed in article 6 of the Charter, namely crimes against peace, war crimes and crimes against humanity. Furthermore, an International Military Tribunal for Far East known as Tokyo Tribunal was established for the trial and punishment of war crimes and crimes against humanity committed by Japanese forces during the WWII. However, unlike Nuremberg Tribunal, Tokyo Tribunal was established not by a Charter but rather by a decision of General Douglas Mc Arthur dated 19 January 1946 who exacted his authority from his mandate which included the competence to create military commissions and tribunals[2]. After the end of the cold war, the international community in its struggle against impunity of grave humanitarian crimes. In this context, new breakthrough came in 1993 and 1994 with the establishment of the two *ad hoc* criminal tribunals respectively for the former Yugoslavia and Rwanda. The main difference of the new *ad hoc* tribunals was their basis of establishment. Both International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were established by a resolution of the United Nations (UN) Security Council (SC) relying on its competence set forth in article 41 of the UN Charter which grant a power to take necessary peaceful measures at its discretion in order to maintain and restore international order[3]. The idea of a permanent World criminal court was inspired by the experiences of *ad hoc* criminal tribunals. The efforts of the UN International Law Commission (ILC) resulted in the establishment of the International Criminal Court (ICC) during a UN Diplomatic Conference that took place in Rome between June 15–17, 1998, and was attended by 160 states and several international organizations. The Rome Statute establishing the first permanent international criminal court, namely the ICC, was adopted on 17 July 1998 by the vote of 120 states to 7 with 21 abstentions and entered into force on 1 July 2002[4].

The Preamble of the Rome Statute provides that the ICC was established to prevent the impunity of the perpetrators of grave international crimes against international community and humanity as whole and to discourage the commission of such crimes in the future. The ICC is based on the principle of complementarity which is well grounded in the idea that international and

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[1] For a detailed review see Zenginkuzucu, 2021, pp. 3-6.

[2] Bantekas and Nash, 2003, pp.334-335.

[3] Sarooshi, 1998, pp. 143-147; Vradenbourgh, 1991, pp. 171-177.

[4] *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 1998.

domestic institutions have a shared responsibility in investigating and prosecuting international crimes[5]. The principle of complementarity recognizes a primary jurisdiction of the national judicial authorities to investigate and prosecute the international crimes and grant the ICC a capacity to exercise jurisdiction only when national courts are unable or unwilling to do so or the concerned States fail to punish the offenders[6].

The fundamental principle of complementarity enshrined in the Rome Statute constitutes "the cornerstone of the Statute" and is a principle that reconciles "the States" persistent duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court with jurisdiction over the same crimes[7]. The Preamble and article 1 of the Rome Statute confirm that the ICC shall be complementary to national criminal jurisdictions and recall that every State has a responsibility to exercise criminal jurisdiction over the offenders of international crimes. Evidently, the ICC is neither a national court having jurisdiction over the crimes falling under the jurisdiction of national courts nor an appellate body for national legal systems[8], but rather an international safeguard mechanism committed to filling the gaps on national level for the enforcement of international criminal law (ICL) in national level. In this sense, the aim of the principle of complementarity as embodied in the Rome Statute is a legal admissibility precondition which serves to limit cases that come before the ICC and to avoid excess case load. This approach is largely described as "complementarity as admissibility" or "gateway function of complementarity"[9]. According to the "positive complementarity" approach, on the other hand, this fundamental tenet of the ICC further serves the additional purposes of promoting effective investigation and prosecution in the national level, by encouraging States to make genuine efforts to hold offenders accountable in accordance with their duty to investigate and prosecute international crimes, and finally encouraging cooperation of States with the Court as well as stimulating the exchange of good practices between international and domestic criminal justice actors. The Report of the Bureau on Complementarity defines "positive complementarity" as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute"[10].

This article argues that the principle of complementarity in the Rome Statute provides the Court more than a supplementary role; and grants it a distinctive

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[5] Cryer et al., 2007, pp. 150-160; Holmes, 1999, pp. 41–78; Benzing, 2003, pp. 591–632; Kleffner, 2003, pp. 86–113; Krings, 2012, pp. 737-763.

[6] Stahn, 2019, p. 221; McGoldrick, 2004, p. 43.

[7] *Prosecutor v Kony,* 2009, para. 34.

[8] UN, 1998; Wexler, 1997, p. 232.

[9] Burke-White, 2011, p. 360.

[10] Assembly of States Parties, 2010, para. 16.

"corrective function" to the Court on the national jurisdictions and equips the ICC with an effective power for upholding the values and dignity of the international community in its fight against impunity of those responsible for serious international crimes.

2. "Corrective Function" of International Law

The legal argument on the doctrine of "corrective function" of international law may be traced back to the well-known discussion between the supporters of "national treatment standard" and "minimum international standards" principles on the treatment of aliens in the territories of a third-State[11]. Thus, the liberal western States struggled for the rights of their own nationals and investors, finally the minorities within the territories of the concerned States to enjoy international standards as recognized largely by the civilized States. The "national treatment" principle, on the other hand, embodied in the "Calvo doctrine" rejects every sort of foreign interference to the national jurisdiction[12] and advocates that the nationals and aliens shall submit their claims to local courts, and enjoy the same treatment.

2.1. Corrective Function of International Law for International Investment Disputes

Beyond the discussions on State sovereignty, the "minimum international standards" principle has been applicable especially in the field of foreign property and investment disputes. In the *Neer Case*, the United States and Mexico Mixed Claims Commission hold "(first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency"[13]. Thus, it is recognized that a violation of the human rights (e.g.: right to property, prohibition of discrimination, denial of justice) of a foreign investor and multinational corporation arises responsibility for the host State[14].

As Aron Broches, General Counsel of the World Bank at the time, explained: international law would apply both in the case of a *lacuna* in domestic law and

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[11] Sornarajah, 2007, pp. 18-20.

[12] Henkin et al., 1987, pp. 1049–1050, 1064–1068; Newcombe and L. Paradell, 2009, p. 13; Garcia-Mora, 1950, pp. 206-209.

[13] *L. F. H. Neer and Pauline Neer (U.S.A.) v United Mexican States*, 1926, pp. 61 – 62. See also *Harry Roberts (U.S.A.) v United Mexican States*, Decision of the General Claims Commission, 1926, p. 80; *Teodoro García and M. A. Garza (United Mexican States) v United States of America*, 1926, p. 120.

[14] Sornarahaj, 2007, pp. 201-202.

in the event of an inconsistency between the two[15]. Aron Broches' approach on behalf of the "corrective function" of international law, which is allegedly incompatible with the literal reading of article 42(1)[16], has been adopted by a larger case law of the ICSID Arbitration Tribunals. The second Tribunal in the resubmitted case of *Amco* v. *Indonesia* clearly demonstrated the corrective function of international law in international investment law[17]:

> This Tribunal notes that article 42/1 refers to the application of host-state law and international law. If there are no relevant host- state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host- state laws, they must be checked against international laws, which will prevail in case of conflict. Thus, international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference.

2.2. Corrective Function of International Law for Human Rights

In his report submitted to the ILC, Garcia Amador underlined that international recognition of fundamental human rights being one of the most distinguished achievement throughout the history of humanity, affected concurrently the scope of State responsibility. Amador explained in its report how two traditional approaches on the protection of fundamental rights of aliens, more precisely diplomatic protection and the principle of equality of nationals and aliens, had been obsolete by the developments of international law. The main objective of the "internationalization" of fundamental rights and freedoms is to secure the protection of the legitimate interests of the human person, irrespective of his nationality, as a result, "universal respect for, and observance of, human rights and fundamental freedoms referred to in the Charter of the United Nations and in other general, regional and bilateral instruments" shall be followed by all nations[18].

In *Velásquez-Rodríguez v Honduras* judgment, the Inter-American Court of Human Rights (IACtHR) emphasized that "the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State"[19], and consequently concluded that four fundamental obligations of the governments include (i) to take reasonable steps to prevent human rights violations; (ii) to

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[15] ICSID, 1968, p. 804, See also Sornarahaj, 2007, pp. 11, 429-431; Dolzer and Schreuer, 2008, pp. 269-270; Kjos, 2013, pp. 87-91.

16 Douglas, 2010, p. 839.

[17] *Amco v Indonesia,* 1990, para. 40. See also *Klöckner v Cameroon*, 1985; *LETCO v Liberia*, 1986; *SPP v Egypt*, 1992; *CDSE v Costa Rica*, 2000; *Autopista v Venezuela*, 2003, para.s 101-105; *Wena Hotels v Egypt*, 2002, para. 138.

[18] Garcia Amador, 1956, pp. 202–203.

[19] *Velásquez-Rodríguez v Honduras*, 1988, para.165.

conduct a serious investigation of violations when they occur; (iii) to impose suitable sanctions on those responsible for the violations; and (iv) to ensure reparation for the victims of the violations[20]. In *Legal Resources Foundation v Zambia* case, the African Commission on Human and Peoples' Rights (ACHPR) was mindful of "the positive obligations incumbent on State Parties to the Charter in terms of article 1 not only to "recognise" the rights under the Charter but to go on to "undertake to adopt legislative or other measures to give effect to them". The obligation is peremptory"[21]. The judgment of the Inter-American Court of Human Rights (IACtHR) and jurisprudence of the ACHPR establish the positive obligations for States to combat impunity and protect victims' rights as affirmed and endorsed in the jurisprudence of the European Court of Human Rights (ECtHR) and UN human rights bodies' decisions[22].

The supremacy of the ECHR over domestic laws and jurisdiction of the Court over the implementations continues and the Court still holds the competency to examine the scope and reject the counter-claims of the respondent State in terms of the requirements of the situation and compatibility to international law[23], even a reservation or declaration regarding relevant article of the European Convention on Human Rights has been made[24] or the State Party derogated some rights and freedoms in time of a state of emergency[25].

2.3. Characteristics and Features of the Corrective Function of International Law

For over a century, international tribunals observed certain minimum general principles of law inherent in civilized nations driven from municipal legal systems and customs of international law[26]. These principles constituting "minimum international standards" have been enforced as a reflection of "corrective function" of international law to ensure universal substantive justice and international public order. It may be deduced that "corrective function" of international law does not mean direct application of international law or primacy of international tribunals and international law. On the contrary, "corrective function" of international law requires, in the first place, adoption of "minimum international standards" by

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[20] *Ibid.,* para. 174.

[21] *Legal Resources Foundation v Zambia*, 2001, para. 62. See also *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, 1995, para. 20; *Dawda Jawara v The Gambia*, 2000, para. 46;b*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 2001, para.s 43-48.

[22] *General Comment No.* 6, 1982, para. 5; *General Comment No. 15,* 1986, para.s 2-4; *General Comment No.* 20, 1992, para.s 10-14; *General Comment No.* 31, 2004, para.s 6-7.

[23] *Brannigan and McBride v UK*, 1993, para. 68.

[24] *Loizidou v Turkey*, 1995, para. 88; *Põder and others v Estonia*, 2005; *Liepājnieks v Latvia,* 2010, para. 45.

[25] *Ireland v UK,* 1998, para. 84; *Aksoy v Turkey,* 1978, para. 206.

[26] Kotuby, 2013, p. 412.

local authorities and judicial control of them by the national courts, then in case of a violation or contradiction, the international community shall involve and enforce them by different means and ways including international jurisdiction. The past and successful implementations and practices may be used to deduce some specific characteristics demonstrating how and to what extent it is possible to assert the "corrective function" of international law. First, the subject matter shall be the fundamental rights and freedoms of individuals or group of individuals. Undoubtedly, the "corrective function" of international law has been embodied in *jus cogens* rules which are peremptory and non-derogable rules of international law. However, the "corrective function" of international law extends across *jus cogens* norms[27] and covers for example unlawful expropriation[28] or expropriation without effective compensation[29], fair and equitable treatment[30] and others. Secondly, national jurisdiction shall have primacy, but the victims and claimants shall always have an effective remedy before international institution. Thus, the "minimum international standards" shall be adopted primarily by domestic laws directly or through international instruments and the domestic laws shall be applied priorly to the disputes or crimes. However, if the national law or implementation is not compatible with the requirements of "minimum international standards", international law shall be applied by an international tribunal regardless the applicable law to the dispute or crime. Finally, "corrective function" does not count an appeal mechanism which is an express remedy and has a task to review the trials of the first instance courts in terms of procedures, applicable law, and errors in the appreciation of the rules and facts.

When national law primarily governs a claim with an international concern, international law could still be applicable in a corrective capacity either because national law contains lacunae or due to a conflict between a particular national norm and an international norm[31]. This is the enforcement of international law's supplementary, and then corrective functions. The "corrective function" of international law shall accomplish the following features and may be deduced from such a test:

(a) Primary jurisdiction: national courts and authorities.
(b) Applicable law: national law.
(c) Subject matter: fundamental rights and freedoms with international concern.
(d) Corrective procedure: not express.
(e) Corrective jurisdiction: an international institution (commission, court, arbi-

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[27] ILC, 2019, pp. 146-147.
[28] *Affaire relative à L'Usine de Chorzow (Fond)*, 1928, p. 47.
[29] *LG v Argentina*, 2007, para. 29.
[30] *Azurix v Argentina*, 2006, para. 364; *CMS v Argentina*, 2005, para. 270; *El Paso v Argentina*, 2011, para. 336.
31 Kjos, 2013, p. 189.

tration or others) on behalf of international community.

(f) Corrective law: minimum international standards originated from rules and principles generally recognized and accepted by international law.

(g) Aim of corrective function: international public order.

3. Complementarity of the International Criminal Law

International crimes, namely genocide, crimes against humanity and grave violations of humanitarian law including war crimes as well as the crime of aggression are prohibited by a series of international instruments and condemned by a wide range of international judicial decisions[32]. Almost all these international treaties request the States Parties to incorporate such crimes into their national criminal law and prosecute the offenders effectively. As the International Court of Justice (ICJ) as well as other international and national tribunals underlined, the prosecution of the responsible of such international crimes constitutes an obligation *erga omnes partes* for the States Parties[33]. However, as Bridge highlighted, the success of international community in its fight against impunity of such crimes depends on an effective international mechanism for the enforcement of the ICL[34]:

> [T]rying international criminals before municipal courts is haphazard, unjust and militates against the development of a universal criminal law. The administration of international criminal law will only become systematic, just and universal when the organ of its administration is a permanent international criminal court.

Despite early oppositions[35], international law provides the requirement of enacting and prosecuting the crimes concerning the prohibition of genocide, crimes against humanity and war crimes by domestic laws. The enforcement of the legal fight against international crimes falls inherently to the jurisdiction of municipal tribunals as a part of its universal jurisdiction and *erga omnes* obligations[36]. On the other hand, in times of political turmoil and in lack of local

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[32] See among others *Genocide Case,* 1951, p. 1.

[33] See *Case Concerning Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)* 1970, para. 33; *Genocide Case*, 1951, p. 23; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 2012, para.s 68-69; *Application Instituting Proceedings and Request for Provisional Measures (Republic of the Gambia v Republic of the Union of Myanmar)*, 2019, para. 127.

[34] Bridge, 1964, p. 1281.

[35] See *The Case of the S.S. Lotus*, 1927, p. 19; *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 2002, p. 3, Dissenting opinion of Judge *ad hoc* Van den Wyngaert, para. 44.

[36] Joyner, 1996, pp. 153-172; O'Keefe, 2004, pp. 735-760; Bassiouni, 1996, pp. 63-74; Tams, 2005, pp. 9-10; Ragazzi, 1996, pp. 115-116; Reydams, 2004, pp. 4-5. See also Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council,

political authority to prosecute the responsible of such severe and widespread crimes, international community occasionally intervened against a risk of impunity[37], however, the establishment of international criminal tribunals and the adoption of the complementarity principle of the Rome Statute encouraged the fight of international community against impunity in national and international level[38].

3.1. From the Primacy of ad hoc *Criminal Tribunals to the Complementarity of the ICC*

Due to their establishing resolutions and Statutes, the ICTR and ICTY had a primary jurisdiction over the cases falling into their mandate. Unlike the *ad hoc* criminal tribunals, the subsidiary characteristic of the ICC grounds on a series of fact. First, the pioneer *ad hoc* criminal tribunals were established by UNSC resolutions relying on its competence set forth in article 41 of the UN Charter, which grants a power to take necessary peaceful measures at its discretion to maintain and restore international order which equips the *ad hoc* tribunal with primary and supranational jurisdiction at the extent of their aim and scope described in the resolutions. On the other hand, the ICC is established by a multilateral treaty following long-term consultations and as a result of a reconciliation developed by the Contracting and non-Contracting States. Then the establishment of the letter was fundamental to States' willingness and concession to accept and accede the ICC at all[39]. Another difference between the ICTR and ICTY with the ICC justifying the inclusion of "complementarity principle" in the Rome Statute is structural. The ICTR and ICTY are *ad hoc* tribunals established each in special situations and temporarily, however, the ICC is established in "peace time" and permanently. It was not possible to discuss and provide complementarity to the *ad hoc* Tribunals, as at the extraordinary conditions of establishment, there were no rule of law in the territories of Rwanda and Former Yugoslavia and no willingness to prosecute and punish such crimes.

A further distinction between the *ad hoc* Tribunals and the ICC is the functional difference. The *ad hoc* Tribunals were established for the prosecution of persons responsible for serious and grave violations of international humanitarian law after their commission, thus the primary purpose of the *ad hoc* Tribunals were prosecution and punishment. On the other hand, the ICC is established to exercise its jurisdiction over persons with respect to the most serious crimes of international concern crimes committed after the entry into force of this Statute (article 11). In that respect, beyond avoiding impunity in such crimes, the ICC has an exceptional function to contribute to the universal recognition and adoption

1994, para. 88.

[37] Mégret, 2002, pp. 1261-1262.

[38] Pejic, 2002, pp. 14-15.

[39] Cameron, 2004, p. 83.

of ICL and to enhance deterrence through threat of punishment, even in case of unwillingness or inability of the national authorities. In this point of view, the complementarity function of the Court approaches progressively to its supposed "corrective function".

3.2 International Criminal Court and Complementarity

Under the Preamble, article 1 and article 17/1, the Rome Statute gives primacy in criminal jurisdiction to the national laws and requests the Court to dismiss a case which is being investigating or duly prosecuted by a State as well as when the person concerned has already been tried properly. As a result of the complementarity of the Court, a State may request the Court by a notification within one month after the initiation of the investigation, to defer an investigation in case this State is investigating or has investigated the persons within its jurisdiction by a notification in writing within one month of the commencement of the investigation. In such a case, the Prosecutor shall suspend and defer the case unless the Pre- Trial Chamber decides otherwise (article 18/2). The Court confirmed that a State that challenges the admissibility of a case needs to prove that it is conducting "a genuine investigation or prosecution"[40]. The principle of complementarity is also applicable regarding "internationalised" national Courts or Tribunals, like the examples of the Court of Sierra Leone, the Tribunal of East Timor, Kosovo, Cambodia or Bosnia and Herzegovina. The complementarity of the Rome Statute encourages and promotes full functioning of sovereign national entities and laws to take precedence over international institutionalism. Hypothetically, the complementarity function of the Court is activated in case of a dysfunction or aberrant national jurisdiction that forfeits its claim of primacy over the Court[41].

The ICC shall have jurisdiction over a grave international crime in the scope of the Rome Statute in case a State which has jurisdiction over it is unwilling or unable to carry out genuinely the investigation and prosecution (article 17/2(a)) or has decided not to prosecute the person concerned because of unwillingness or inability to genuinely prosecute (article 17/2(b)). The term "genuinely" was chosen in preference to "effectively"[42], that the latter could have given the impression that a case would be admissible if the national system was, for example, proceeding more slowly (less effectively) than the ICC would or if the ICC could do a better job[43]. Furthermore, in the line with the complementarity principle, the Court is supposed to freeze its proceedings in case an effective

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[40] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 2011, para. 62; *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* 2011, para. 61; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 2014, para. 166; *The Prosecutor v. Simone Gbagbo,* 2015, para. 28.

[41] Simpson, 2004, pp. 55-56.

[42] ILC, 1994, pp. 27, 37.

[43] Holmes, 2002, pp. 674-675.

national authority duly prosecutes the persons concerned[44]. Even in case of UNSC referral, the Court is not exempted from the examination of admissibility under article 17 and declare the case inadmissible if the Court is satisfied with the national authorities that has already exercised its jurisdiction properly[45].

The ICC shall not investigate or prosecute a person who has already been tried for a crime included in the Rome Statute unless it is observed that the trial was an erroneous trial to acquit the person concerned from criminal responsibility or the proceedings in the trial were not conducted independently or impartially in accordance with the norms of due process recognized by international law (article 20/3). Where an accused has already been tried for the same offense, for the determination of the unwillingness of the national authorities, the Court shall consider whether national proceedings are intended to shield the accused or avoid impartial prosecution.

Furthermore, the last three criteria in article 17/3 of the Rome Statute, namely inability to obtain the accused or the evidence and testimony, or other inability to carry out the criminal proceedings properly, must result from the collapse or unavailability of the legal system, not from any other factor such as absence of an extradition agreement resulting in difficulties in obtaining the presence of the accused. Absence of the necessary legislation to enable prosecution of the Statute crimes shall give rise to "inability" in the sense of article 17/3. Furthermore, if a person is prosecuted only for "ordinary" crimes, that should be treated. as a question of unwillingness, with the requirement that shielding from justice be proven, rather than inability[46].

4. From Complementarity to Corrective Function

A complementary role of an international tribunal refers to the authority to obtain jurisdiction and replacing it in case of a lack of proper jurisdiction in national level. The corrective role of international law, on the other hand, indicates the superior status of international law and the power of international tribunal exercising it to national courts or authorities acting in official capacity. In that respect, the corrective function of international law and the power to exercise this superior law does not emerge solely in case of *lacunae in law* or unwillingness and stagnancy of national jurisdictions but covers additionally the competence of international tribunals to involve on behalf of well-established rules of international law in different occasions in case of controversial national jurisdictions.

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[44] Alhagi Marong, 2011, pp. 87-91.

[45] On 11 October 2013, the Pre-Trial Chamber declared the case Abdullah Al-Senussi inadmissible and the Appeals Chamber confirmed the decision of the Pre-Trial Chamber on 24 July 2014; *The Prosecutor v Saif Al-Islam Gaddafi*, 2014, p. 5.

[46] Cryer, 2007, p. 130.

4.1. The Corrective Function of the Rome Statute

In order to understand the relationship between the complementary role of the ICC and the corrective role of the Rome Statute, it is necessary to ascertain a three-stage justification; First of all, the national tribunals and authorities shall have primary jurisdiction, secondly the national tribunals and authorities or sometimes other international or hybrid institutions shall exercise national jurisdiction, thirdly international tribunals and authorities shall have the competency to hear the case and deliver a judgement in accordance with national and international rules but in case of a contradiction with national law, international law shall prevail and be binding on the concerned States. Nevertheless, the corrective function of international law and the capacity of international tribunals to exercise it does not mean acting as an appellate authority, in other words, to change and replace national judgements and have the power to abolish or amend automatically national legislations. However, the judgment of the international tribunal or authority rendered in line with an international legal principle that conflicts with domestic law shall be enforceable. On the other hand, international law and its enforcement bodies do not involve directly and automatically, rather are triggered by a concerned party or alternatively, by an international institution or authority in the name of international community. The above mentioned two characteristics of the corrective function of international law may be deduced from its very nature to be a commitment between States, otherwise it would be a claim on behalf of supranational law.

In addition to the failure of national legal systems to exercise jurisdiction over international crimes or unwillingness to do so, inability to carry out genuinely the investigation or prosecution also is another basis of complementary jurisdiction of the ICC. It is more suitable to discuss the "complementarity" role of the Court in relation with its aims and purposes, that is obviously "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and establish rule of international criminal law. In this point of view, the basic role of the ICC shall be, in collaboration with the other actors, to be a supervisor on behalf of the international community to safeguard an effective and international justice. This is certified in the *travaux préparatoires* of the Rome Statute as follows[47]:

> [I]t is not a question of the Court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an exceptional character. There may be instances where the Court could obtain jurisdiction quickly over a case because no good-faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case.

[47] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 1996, para. 154.

But if the relevant national system was investigating or prosecuting a case in good faith, according to this view, the Court's jurisdiction should not come into operation. A view was also expressed that a possible safeguard against sham trials could also be for the Statute to set out certain basic conditions relating to investigations, trials and the handling of requests for extradition and legal assistance.

From this point of view, the fulfilment of the function of the ICC to prevent impunity for serious international crimes and effective enforcement of ICL universally on behalf of international public order require the Court to involve in case not only no State is willing or able to exercise its jurisdiction, but also and especially when if the national proceedings are a sham.

The expression "unwilling or unable genuinely to carry out the investigation or prosecution" in article 17/1(a) of the Rome Statute generated some confusions and discussion on the scope of the jurisdiction of the Court. The inclusion of such a qualifier, the Rome Statute provided the Court with, at some level, the competence to assess the objective quality of the national investigations and proceedings. This assessment shall extend to the availability and adequacy of national legislations to avoid impunity of the offenders of such crimes and, consequently, the legal assessment on the States' ability to fulfil their *erga omnes* obligations. On the other hand, the phrase "genuinely" refers to an investigation and prosecution of such offenses "having regard to the principles of due process recognized by international law" (article 17/2). Furthermore, it is widely compromised that the function of the complementarity of the Court shall be a contribution to the exercise and implementation of ICL universally. In that respect, the Court shall be empowered to act on a complementary basis, when national criminal justice systems failed to function effectively to prevent impunity[48]. In this manner, the complementarity of the Court does not consist of a simple "opt in/opt out" mechanism. Indeed, that is the main reason why some States objected the powers of the Prosecutor to initiate an investigation and insisted on the consent of the concerned State as a precondition of the complementarity of the Court.

The ICC with complementary jurisdiction can accomplish its core objective to enhance the effective suppression and prosecution of crimes of international concern, only if a trigger mechanism allows it to assume jurisdiction whenever necessary to provide a fair and diligent prosecution of the persons accused of violations of fundamental international norms[49]. Accordingly, as a part of its complementary role, the ICC will obtain jurisdiction whenever a proceeding already working in national level is not responding to the international requirements to avoid impunity of grave international crimes, such as no available legislation

[48] UN, *supra* note 12, pp. 64, 81, 82, 85, 88, 91, 110.

[49] B.S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals* 23(2) Yale J. Int'l L. 384 (1998), p. 431.

provided, crimes are considered as ordinary ones, the accused persons are under the protection of immunities etc. In such cases, even if a national proceeding is commenced and the host State is unwilling to surrender its jurisdiction to the ICC, the Court may claim jurisdiction *post litem motam* upon a referral by the UNSC, a State Party or request of the Prosecutor. A claim of jurisdiction based on the unavailability of the national legal systems justifies the corrective function of the Rome Statute upon national laws.

The corrective function of the Rome Statute appears more clearly in the subparagraph 3 of article 20 on *ne bis in idem*. In this regard, it is certified that the Court has jurisdiction over persons accused to commit an international crime under the Rome Statute even if they are already or currently prosecuted and tried before another court if these courts are carrying a sham trial inconsistent with the well-established principles of international law to avoid impunity. During the *travaux préparatoire* of the Rome Statute, it is also underlined that the principle *ne bis in idem* shall not be applied for fake trials, that is incompatible with international law[50].

4.2. Diplomatic Immunities

Nuremberg and Tokyo trials had a significant contribution to the development of ICL, especially on the establishment of the principle of personal responsibility on their conducts during war[51]. Article 21 of the Rome Statute recognizes jurisdiction of the Court for every person equally regardless official capacity and states clearly that especially a Head of State or Government, a member of a Government or parliament, an elected representative or a government official or equivalents shall not enjoy, in national or international level, absolute immunities from criminal responsibility for the crimes covered in the Rome Statute, article 27 subsequently provides that immunities or special procedural rules, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. Furthermore, if the pertinent case is referred to the Court by the UNSC, the Court may call the attention of the UNSC to a State Party's non-compliance and lack of cooperation under article 87/5(2). From the ICTR and ICTY's experiences that in such a cases, all States, even not parties to the Rome Statute, must abide by the resolutions of the UNSC. In *Blaksic* case, the ICTY stated that the obligation to comply with the arrest warrant issued by the Tribunal has an inherent nature and content for the States[52]. As a result, they are bound to cooperate with the Court in all matters, including the arrest and surrender of accused persons upon the Court's request, even if they are granted diplomatic immunity. Otherwise, the UNSC has the power to consider the non-

[50] UN, 1996, para. 215.
[51] Boas, Biscoff and Reid, 2009, p. 2007.
[52] *Blaškić case* 1996, para. 8.

conformity and take necessary coercive measures against such non- compliant States under Chapter VII[53].

It is a certainty that the *jus cogens* itself recognizes the absolute personal immunities of those who personify and represent State sovereignty and diplomatic immunity is undoubtedly protected by the international community for the maintenance of global peace and order. On the other hand, it is unquestionably not allowed for personal immunity to be free to jeopardize global peace by committing crimes against the community as a whole. It is a reality that the worst atrocities in the history have been committed under the direction of or with cooperation from senior State authorities. The Court's jurisdiction over the responsible of the grave crimes without exception is crucial as an evidence of the accountability of the perpetrators of such crimes.

Although international community believes that it is crucial to keep a balance between two international principles, namely diplomatic immunities of the foreign Heads of States or Governments and their personal responsibilities of international crimes, the State practice supports highly personal immunities and refrains from arresting, detaining, surrendering them or freezing the properties and taking any further legal actions.

On 31 March 2005, the UNSC referred alleged genocide, war crimes and crimes against humanity committed in Darfur, Sudan since 1 July 2002 to the ICC.[54] Accordingly, the office of the prosecutor opened an investigation in June 2005 and issued two warrants of arrest against Sudan's Former President Omar Al Bashir on 4 March 2009[55] and 12 July 2010[56]. Two arrest warrants, though, have not yet been carried out as of today, that means suspension of the proceedings till, he is in the court custody. Today Al Bashir does not enjoy diplomatic immunities, however, when he was President of Sudan, he visited several States Parties to the ICC including Chad, the Democratic Republic of the Congo, Djibouti, Malawi and Uganda. The ICC requested the Republic of South Africa to arrest Al Bashir and surrender him to the ICC while he was on its territories between 13 – 15 June 2015 to attend 25th African Union Summit, however, South Africa did not comply with the Court's request. Despite the Pre-Trial Chamber of the ICC concluded that South Africa acted against its duties under Rome Statute, it refrained from referring South Africa to the Assembly of States Parties (ASP) as South Africa had invoked the Court and engaged in consultation on its international obligations and subsequently it had accepted its duty to cooperate with the Court[57]. Furthermore, the Former Sudan President attended to the Summit of the League of Arab States in Amman in March 2017, however, Jordan authorities also refrained from the

[53] Zenginkuzucu, 2021, p. 16.
[54] SC Res. 1593, 31 March 2005.
[55] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 2009.
[56] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* 2010.
[57] ICC, 2012, para. 9.

enforcement of the warrants of arrest. The Pre-Trial Chamber decided to refer Jordan to the ASP and to the UNSC, however, the Appeals Chamber reversed this decision[58].

Article 98 of the Rome Statute accepts desperately the possibility of non-Contracting third States to refrain from cooperation with the Court and surrendering a person enjoying diplomatic immunities. As a matter of fact, the Assembly of African Union decided to the thirteenth Ordinary Session hold on 1–3 July 2009 that[59]:

> [I]n view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of the Sudan.

As a result, many States Parties and non-Parties to the Rome Statute refrained from arresting and surrendering Al Bashir hiding behind the general international obligation based on personal immunities.

Although the enforcement mechanism against non-compliant States has not yet been triggered, the Prosecutor and the Court have stated several times that States Parties' failure to comply with the cooperation request on the ground of diplomatic immunities of the accused persons is in violation with international law and the States Parties shall comply with the rules of international law. Therefore, the general obligation of States Parties to comply with the Court's requests for cooperation including the execution of arrest warrants constitutes a contractual and *erga omnes partes* obligation, reflecting the corrective function of international law applied by the ICC. The corrective function of international law is nevertheless effective for States non-Parties due to their international obligation to comply with the UNSC resolutions, and their inherent obligation to cooperate with the prosecution and punishment of the perpetrators of grave crimes against whole international community.

4.3.Amnesties

Throughout the history, it is usual to see that political leaders or institutions have granted amnesties to former political competitors or members of conflicting groups after long running internal and international conflicts. From an optimistic point of view, amnesties may be considered as a political conciliation and a break with the past aimed at reconstructing a common and peaceful future. In the recent past South Africa, Argentina, Sierra Leone, Cambodia and many others granted amnesties to the members of old regimes even accused of grave crimes against humanity and peace. Some of these amnesties, e.g. Cambodia,

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[58] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 2019, p. 40, note 216.

[59] African Union, 2009, para. 10.

El Salvador, Haiti and South Africa, have been sponsored by the UN as a mean of restoring peace and democratic regimes. Indeed, many politicians, scholars and jurists have been on the horns of a dilemma between two approaches; "no peace without justice" and "not prolonging conflicts, destructions and human sufferings". Without tracing back to the discussions on the legality or applications of amnesties[60], this article concentrates on the question if the ICC may have jurisdiction over grave international crimes which have been included into the scope of an amnesty by national authorities, in other words, if the complementary role of the Rome Statute provides the Court with a power of corrective effect over national amnesty laws.

The concept of "transitional justice" refers to societies' attempts to make reparations for victims, attain restorability, accountability, security, and stability with an aim to establish a just and sustainable peace following prolonged internal violence and atrocities. On the other hand, it is obvious that "transitional justice" does not entail the creation of the rule of law but moreover raises several dilemmas, including the most complex issues in politics, law, and the humanities. In recent decades, transitional contexts have shifted from Latin America and Eastern Europe to Africa and Asia, that a few non-exhaustive examples include to the post- authoritarian societies of Argentina and Chile as well as the post-conflict societies of Bosnia and Herzegovina, Liberia, and the Democratic Republic of the Congo. Transitional justice processes commonly include criminal justice, mechanisms for the establishment of the truth, reparation programs and guarantees of non-recurrence[61], also other measures such as memorialization efforts and amnesties may be integrated in this processes.

The Rome Statute provides no express provision of amnesties and the Court's authority. Amnesties for alleged "political crimes" such as rebellion, sedition, or treason are not subject to the jurisdiction of the ICC[62]. On the other hand, amnesties and pardons of the offenders of the crimes potentially falling within the ICC's jurisdiction would result in a waiver of their criminal prosecution, and release or not prosecution of the offenders of those grave crimes as referred above, may be considered as "the State has decided not to prosecute the person concerned". The report of the UN Secretary-General dated 2004 supports and encourages carefully tailored amnesties that might help conflicting parties reconcile and reintegrate, but it also specifically notes that such amnesties are never permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights[63]. Moreover, blanket and self-amnesties for international crimes are now considered to be crystallized under international

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[60] Gavron, 2002, pp. 91-93; Vickery and Roht-Arriaza, 1995, p. 251; Blumenson, 2006, p. 804.

[61] Stewart, 2018, para.s 42-43.

[62] *Ibid.,* para.123.

[63] UNSC, 2004, para. 32.

customary law[64]. In this respect, it is obvious that malevolent amnesties fall under the definition of "unwillingness or inability to prosecute" and grant the Court jurisdiction under article 17/1(b) of the Rome Statute In addition, the term "inability" should be used to refer not only to total or substantial collapse of national judicial system but also to political obstructions that block the judicial system and prevent prosecution of international crimes.

In the well-known *Lomé Decision*, the Special Court for Sierra Leone (SCSL) highlighted that the sovereign power of the State provides an authority to grant amnesty for the facts falling exclusively under its jurisdiction, but a State cannot deprive the universal jurisdiction. The SCSL Appeal Chamber stated that a "State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember"[65]. This is necessity of discouragement to prevent future atrocities. Thus, the *jus cogens* character of international crimes and *erga omnes* obligations of all States to prosecute properly these crimes, as well as the jurisprudence of the SCSL provides the ICC with corrective function in case of amnesties. From this point of view, punishing the offenders contributes much more to the international public order than pardoning them.

Following 50 years of a violent non-international armed war, the Colombian government and the Fuerzas Armadas signed a peace agreement in 2016. The agreement provided for the creation of a Comprehensive System to Satisfy Victims' rights to Truth, Justice, Reparation and Non-repetition, including the Special Jurisdiction for Peace which was a judicial mechanism charged with the task of determining criminal responsibility for crimes committed during the conflict[66]. It is apparent that the ICC is not responsible to determine the adequacy of the political, social and normative measures to be taken in a transition process which would be in line with social and normative expectations of a society[67]. In this respect, the ICC does not involve in the application of other components of transitional justice, such as truth commissions or reparations programs, but her mandate obviously relates to criminal prosecutions[68]. The provisions of the legal framework for peace in Colombia attracted the attention of the OTP of the ICC. The legal framework included suspended, reduced or alternative sentences and adopted a case selection criteria that would limit prosecutions to those deemed to be in the category of "those most responsible", and the granting of amnesties for so-called "political crimes"[69]. In this regards, the OTP explained that her focus is generally on cases relating to those who appear to be the most responsible

[64] Sadat, 2006, pp. 1021-1022.
[65] *The Prosecutor v Morris Kallon and Brima Buzzy Kamara,* 2004, para. 67.
[66] Mayans-Hermida and Holà, 2020, p. 1126.
[67] *Ibid.,* pp. 1123-1124.
[68] Stewart, 2015, para. 5.
[69] *Ibid.,* para.s 10-14.

for crimes that are particularly grave or have a very significant impact, however, as a matter of prosecutorial strategy, will sometimes investigate and prosecute mid-level perpetrators, or even notorious low-level perpetrators, in an effort to reach those most responsible for the most serious crimes[70]. On the other hand, the Constitutional Court of Colombia annulled the provisions of the Amnesty Law which excluded amnesties, pardons and waivers of criminal prosecution only for "grave" war crimes, which were defined as all violations of international humanitarian law committed in a systematic manner because systematicity is not an element required for conduct to amount to war crimes under international criminal law. The OTP expressed that this finding is consistent with the duty of States to investigate and prosecute the most serious crimes, including war crimes, as an established principle of international law[71].

In the situation in Uganda, once Uganda President Museveni had referred the LRA's leaders offenses against the Ugandan people and neighbouring countries to the ICC[72] and the Pre-Trial Chamber II had issued warrants of arrest against five top members of the LRA upon request by the Prosecutor[73]. Meanwhile, Uganda established an International Crimes Division of the High Court provided with jurisdiction over the crimes within the jurisdiction of the ICC and requested deferral of the investigation conducted by the ICC[74]. However, the Prosecutor of the ICC demanded the refusal of withdrawal of warrants of arrest. The Pre-Trial Chamber II, in its decision on the admissibility, confirmed the jurisdiction of the ICC on the ground of the limitations in the Ugandan legal system due to the Amnesty Act of 2000 that the LRA leadership might benefit from the provisions[75].

As many authors and scholars argue, the silence of the Rome Statute on the amnesties creates an ambiguity allowing the Prosecutor and the Court to respect national amnesties[76]. On the other hand, this silence and absence of imperative recognition of national amnesties allows the Prosecutor and the Court to consider the admissibility of a case where a domestic amnesty is an abuse in practice[77]. Indeed, this interest of international community shall be evaluated by the Prosecutor and the Court if such an investigation or prosecution will serve the interests of justice (article 15 and 53/1(c)). A universal and independent criminal tribunal's observation of the interests of justice, including the principles of legality and equality before the law, might function as important correctives to

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[70] *Ibid.,* para. 14.
[71] *Ibid.,* para.s 126-131.
[72] ICC, 2004.
[73] *The Prosecutor v Joseph Kony,* 2005.
[74] Alhagi Marong, 2011, pp. 90-91.
[75] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, 2009, para. 50.
[76] Scharf, 1999, p.522.
[77] Freeman, 2009, p. 76.

the broader interests than a nation, thus the ICC is not established as a corrective mechanism to States, however a corrective effect *de facto* exists and is an important positive effect of the complementarity principle[78].

4.4. International Refugee Law

The roots of international criminal law and international refugee law are common. The World War II's "barbarous acts which... outraged the conscience of mankind"[79] prompted the international community to take action that victims and those who were in danger of persecution should be protected, while international community also attempted to hold those responsible for these acts accountable.

Article 1(A)(2) of the 1951 Convention relating the Status of Refugees provides that a refugee is an individual who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The Charter of the International Military Tribunal included in the definition of "crimes against humanity" "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether in violation of the domestic law of the country where perpetrated" (article 6(c)). Furthermore, persecution is considered a crime against humanity in article 3(h) of the ICTR Statute, and article 5(h) of the ICTY Statute, ICTY identified the elements of persecution as; (i) persecution did not necessarily require a physical element; (ii) victims of persecution need not be solely civilians for it to be classified as a crime against humanity; (iii) the persecutory acts must have been motivated by a discriminatory intent based on political, racial or religious grounds[80]. Further, Rome Statute article 7(1)(h) listed persecution as a crime against humanity:

> Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender …, or other grounds that are universally recognized as impermissible under international law…

The Elements of Crimes of the ICC indicates that "[t]he perpetrator targeted such person or persons by reason of the identity of a group or collectively or target the group or collectivity as such" and requires that "the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population". Although a pattern of persecution or systematic human rights breaches against a specific group would be evidence that the threshold of risk may have been met, persecution under international refugee law does not always have to be a part of a large-scale or systematic attack. In this regard, when government policies or general measures of a discriminatory nature

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[78] Stigen, 2008, pp. 358, 401; Brown, 2008, pp. 425-427.

[79] Universal Declaration of Human Rights, 1948, Preamble.

[80] *Prosecutor v. Kupreškic*, 1999, para. 305.

are imposed on certain groups, or where these groups are directly targeted in an internal armed conflict or by communal violence, members of that group may be regarded as having a well-founded fear of being persecuted on account of one or more of the 1951 Convention grounds[81]. Although the status of refugee is an individual status, as UN High Commissariat of Refugees (UNHCR) has highlighted "[i]n armed conflict or violent situations, whole communities may be exposed to persecution for 1951 Convention reasons, and there is no requirement that an individual suffers a form or degree of harm which is different [or higher] to others with the same profile"[82]. For the determination of a "well-founded fear of persecution" on the part of the asylum seeker, international criminal jurisprudence has been expressly recognized that past persecution may be so egregious that time and changes in political or other circumstances may not be sufficient to justify repatriation to the country of origin[83].

A crucial relationship between ICL and refugee law is the exclusion clauses and jurisprudence. Article 1(F) of the 1951 Convention sets an exception to this rule by excluding a person if:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The interaction between exclusion laws and ICL shows that national exclusion decision makers and jurisprudence have followed ICL quite closely for war crimes and crimes against humanity. ICL has become a basis for the forms of liability to ensure accountability in accordance with international law as exhibited by judgments at the highest level in the UK, New Zealand and Canada as well as other States[84].

5. Conclusion

The complementary role of the ICC does not correspond to a simple subsidiarity purpose, but to perform a dissuasive monitoring and control function on the fulfilment of international community's ideal to put an end to impunity for the perpetrators. In this regard, the ICC becomes involved when the national legislation or applicable law of the State exercising its jurisdiction over such an

[81] Goodwin-Gill and McAdam, 2007, p. 129; Grahl-Madsen, 1966, p. 213.
[82] Türk, 2011, p. 6.
[83] UNHCR, 2019, para. 51.
[84] Rikhof, 2013, pp. 7-10.

international crime fails or does not comply with the international law, that is the complementarity role of the ICC includes a corrective function.

Almost all the important international instruments on international humanitarian law, including Geneva Conventions and additional Protocols, Genocide Convention, Convention against Slavery, Convention against Racial Discrimination, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and others, require Contracting States to criminalize these acts in their domestic law and seek to prosecute those who are responsible for such crimes. In addition, the *jus cogens* nature of the prohibition and prevention of such crimes encourages and compels the members of international community to combat these atrocities together and in solidarity.

The ICC's jurisdiction arises in terms of complementarity when national courts and judicial authorities are unable or unwilling to prosecute the perpetrators, also when the national legal system and criminal laws are inadequate to prosecute and punish offenders in the international community's and justice's interests. The ICC, on the other hand, does not function as an appeal tribunal for the national courts and the procedure does not apply automatically for each national jurisdiction. A case may be referred to the ICC by a State or the Prosecutor, or by a UNSC resolution, if national judicial system is unable or unwilling to act, or if impunity and unaccountability result from inconsistencies in the relevant law. Even if national courts and authorities refuse to recognize the ICC's jurisdiction, the latter can rule a case still pending before a national court admissible if the national judicial system and legislation are deemed inadequate. The complementary function of the ICC is also applicable for the internationalised criminal courts and expected stay up for the internationalised courts which may be established in the future to exercise jurisdiction. In such a circumstance, the ICC observes the interests of justice and intervenes on behalf of the international community "to guarantee lasting respect for and the enforcement of international justice" and to avoid a risk of impunity and lack of accountability for those who perpetrated international crimes as a result of inconsistencies in national legislation and implementations that "threaten the peace, security, and well-being of the world", the ICC applies the internationally recognized and accepted rules and principles of ICL.

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