

# THE PRINCIPLE OF COMPLEMENTARITY BETWEEN INTERNATIONAL AND DOMESTIC JURISDICTIONS IN THE PROSECUTION OF WAR CRIMES

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**Abstract.** The article reconstructs the legal architecture of complementarity under the Rome Statute and articulates the ICC's admissibility tests: unwillingness (shielding, unwarranted delay, lack of independence/impartiality), inability (total or substantial collapse/ unavailability of the national system), gravity, and the "same person/same conduct" standard. Drawing on Ongwen, Ruto and the Libya decisions (Saif Al-Islam Gaddafi; Al-Senussi), it distils how the Court distinguishes declaratory reforms from genuine investigative and prosecutorial action, assesses the availability of the accused, and evaluates a state's capacity to secure a fair trial. A comparative institutional section demonstrates models from Nuremberg/Tokyo (exclusive jurisdiction over "major war criminals"), through ICTY/ICTR (tribunal primacy over national courts), to hybrid tribunals (SCSL, ECCC, Kosovo SC), situating the ICC's contemporary role as complementing—rather than replacing—domestic justice. Focusing on Ukraine's wartime context, the paper identifies admissibility risks (in absentia trials, use of pre-trial statements, special evidentiary rules) and proposes safeguards that demonstrate the genuineness and capacity of domestic proceedings (comprehensive audio-video recording, effective defence and cross-examination, reasoned judgments and proportionality of sanctions). It develops a practical algorithm for delineating jurisdictions and distributing criminal proceedings among national courts, the ICC, and possible hybrid mechanisms, taking into account the preconditions and triggers of jurisdiction, the admissibility tests (Article 17 of the Rome Statute), the "same person/same conduct" standard, and the "gravity" criterion. A roadmap for positive (proactive) complementarity is offered for Ukraine—capacity-building, harmonised evidence standards, structured cooperation with the ICC Office of the Prosecutor, and duplication-minimising protocols. The contribution lies in integrating the ICC's admissibility doctrine with wartime procedural realities, clarifying terminology (primacy vs. "parallelism"), and introducing operational metrics of genuineness/capacity for oversight. The practical significance consists in developing policy tools for the prosecution of war crimes that are compatible with complementarity and fair-trial guarantees.

**Keywords:** principle of complementarity, admissibility, unwillingness, inability, gravity, same person/same conduct, International Criminal Court, ICTY/ICTR primacy, hybrid tribunals, positive complementarity, Ukraine, war crimes.

**JEL Classification:** K33, K39, K42, F51

## 1. Introduction

War crimes belong to the gravest offenses that concern the entire international community (Article 5(1) of the Rome Statute of the International Criminal Court) (Rome Statute..., 1998) and pose a threat to peace, security, and the well-being of the world. The scale and brutality of war crimes committed on the territory of Ukraine elicited a strong reaction from democratic societies and the international community, highlighting the issue of ensuring effective accountability for perpetrators (Bysaha et al., 2023). As of 27 October

2025, Ukrainian law enforcement authorities have recorded 194,924 crimes of aggression and war crimes, which indicates an unprecedented volume of potential criminal proceedings and related procedural challenges (The crimes were committed ...). The United Nations General Assembly, in its Resolution A/RES/ES-11/6 of 23 February 2023, emphasized the need to ensure accountability for the most serious crimes under international law through proper, fair, and independent investigation and prosecution at the national or international levels, as well as to secure justice for all

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victims and prevent a recurrence of crimes in the future (United Nations General Assembly Resolution ..., 2023).

In the Ukrainian context, this has evolved into a complex dual challenge for both national and international justice systems: war crimes have continued for more than a decade, hostilities remain intense, and parts of the territory are under occupation. At the same time, the state must continuously collect evidence, ensure the effectiveness of pre-trial investigations, guarantee the fairness of judicial proceedings, and secure the enforceability of sentences. As of now, over 870 individuals have been identified as suspects in war crimes proceedings; more than 620 indictments are pending before the Ukrainian courts; and over 160 individuals have been convicted, of whom no more than 15% are actually serving their sentences, while the rest were convicted in absentia (Thousands of cases...). These figures illustrate deep structural bottlenecks – ranging from problems of accessibility and procedural presence of the accused to limitations of the judicial infrastructure in the frontline and recently de-occupied regions. An additional systemic factor is the absence of the universal jurisdiction on the part of the International Criminal Court. The Court's jurisdiction is limited to the most serious crimes of concern to the international community as a whole – namely, genocide, crimes against humanity, war crimes, and the crime of aggression. The statutory preconditions for jurisdiction and the mechanisms for its activation restrict the ICC's ability to act in cases where states are not parties to the Statute or fail to cooperate adequately, while certain states may decline to prosecute individuals who are neither their nationals nor have committed crimes on their territory.

Nevertheless, the principle of inevitability of responsibility requires that war criminals must not remain unpunished. Effectiveness must be ensured simultaneously at two levels:

(a) through the strengthening of the national criminal justice system's capacity – encompassing investigation, prosecution, adjudication, and execution of the sentences; and

(b) through effective international cooperation and the engagement of international criminal justice mechanisms.

At this juncture, the principle of complementarity emerges as the cornerstone of the Rome Statute – the fundamental idea that the ICC complements rather than replaces national criminal jurisdictions (Thousands of cases..., 1998). The duty of every State to exercise criminal jurisdiction over those responsible for international crimes is combined with the supervisory role of the ICC, which intervenes in cases of unwillingness or inability of a State to conduct genuine investigations or prosecutions (Koruts, 2023).

Accordingly, both duplication of proceedings between national and international jurisdictions and "imitative" processes resulting in non-relevant or inadequate sanctions are impermissible, as both phenomena undermine the very purpose of justice and may affect the admissibility of cases before the ICC.

The scale and continuing nature of the most serious crimes have prompted the search for various jurisdictional models of accountability – ranging from special tribunals to hybrid courts. However, the application of any such model must be consistent with the principle of complementarity: national and ICC proceedings should mutually reinforce, rather than compete; while hybrid mechanisms should bridge gaps in cooperation and capacity, avoiding duplication and ensuring a level of procedural guarantees consistent with international standards. In this context, it is appropriate to assess not only the legal preconditions of jurisdiction, but also the institutional capacity – including access to crime scenes, the protection of witnesses and victims, the availability of digital evidence infrastructure, the ability to secure the presence of the accused, and the effective enforcement of judgments.

Therefore, the objective circumstances of wartime, together with the above-mentioned statistical and institutional parameters, demonstrate the relevance and practical necessity of an in-depth analysis of the roles of national judicial systems and the International Criminal Court in the mechanism of accountability for war crimes through the prism of the principle of complementarity. The purpose of this article is to demonstrate how the normative matrix of the Rome Statute and the jurisprudence of the ICC are transformed into operational criteria of admissibility and workload distribution, and to propose for Ukraine a set of complementarity-consistent approaches to the organization of investigation, prosecution, and adjudication of war crime cases (Thousands of cases..., 1998; Bysaha et al., 2023; United Nations General Assembly Resolution ..., 2023; Thousands of cases...; Koruts, 2023; Situation in Uganda..., 2021; Prosecutor v. Saif..., 2013; Judgment of the International..., 1946; Charter of the International..., 1946).

## 2. State of Previous Research

The fundamental theoretical and methodological foundations of complementarity have been established in the works of leading scholars in international criminal law. K. Ambos consistently outlines the normative framework of Article 17 of the Rome Statute, distinguishing between unwillingness (shielding, unjustified delay, lack of independence or impartiality) and inability (total or substantial collapse or unavailability of the national judicial system). He also emphasizes the autonomous gravity filter and the significance of the same person/same conduct

standard in determining admissibility (Ambos, 2015). W. Schabas conceptualizes complementarity as an institutional compromise between state sovereignty and international justice, tracing its evolution from a political notion to the legal doctrine that acquires substantive meaning through ICC practice – particularly in matters of state unwillingness or inability and the limits of non bis in idem (Schabas, 2016). K. Heller advances a “sentence-based” interpretation of genuine prosecution, focusing on the outcome of proceedings (judgment or sanction) as an indicator of the authenticity of national prosecution – a factor relevant to admissibility assessments before the ICC (Heller, 2012). W. W. Burke-White develops the concept of **positive/proactive complementarity**, shifting the focus from the ICC as a substitute for national justice to a catalyst for strengthening it through technical assistance, partnerships, and conditional compliance pressure (Burke-White, 2008). M. El Zeidy traces the historical development of the principle, analyzing the relationship between complementarity, universal jurisdiction, and state sovereignty, and substantiates the function of the ICC as a mechanism to counter impunity when the national system fails (El Zeidy, & El Zeidy, 2002).

The Ukrainian scholarly discourse has been gradually elaborating the applied dimensions of the principle of complementarity. M. Smyrnov examines the legal foundations of Ukraine’s cooperation with the ICC and the procedural instruments for implementing international obligations within the framework of the Criminal Procedure Code of Ukraine – including procedures for requests, execution of cooperation measures, and procedural safeguards (Smyrnov, 2024). O. Kaplii and Y. Smoliar outline the practical challenges of interaction between the ICC and Ukrainian institutions, highlighting gaps in domestic mechanisms that may affect the assessment of the genuineness of national proceedings (Kaplii, & Smoliar, 2024). Z. Udovenko emphasizes both the legal and organizational barriers – such as professional training, documentation standards, and communication algorithms – which are critically important for demonstrating capacity (Udovenko, 2024). O. Plakhotnik analyzes the role of the Prosecutor’s Office in cooperation with the ICC, underscoring the importance of unified communication channels, validation of evidentiary information, and adherence to fair-trial guarantees within the framework of complementarity (Plakhotnik, 2022). A. Pimenova and V. Kuzmenko systematize the legislative, institutional, and resource-related obstacles to Ukraine’s participation in international criminal justice and outline potential trajectories for overcoming them (Pimenova, & Kuzmenko, 2024).

The comparative-legal dimension is further complemented by studies illustrating various models of interaction between international and national

jurisdictions – ranging from exclusive competence over “major war criminals” (Nuremberg/Tokyo) to the **primacy** of ad hoc tribunals (ICTY/ICTR) over domestic courts, and to hybrid formats such as the SCSL, ECCC, and Kosovo Specialist Chambers. In this context, the works addressing the impact of complementarity on the implementation of substantive international criminal law at the national level (J. Kleffner) and the issues of complexity, participation, and complementarity from Nuremberg to the ICC (E. Clapham) are particularly relevant (Kleffner, 2008; Clapham, 2003). The Ukrainian-language review by V. Popko summarizes key doctrinal approaches and identifies pivotal points for legal application – unwillingness/inability, gravity, the limits of non bis in idem, and the same person/same conduct standard – all of which are instrumental for assessing admissibility in the Ukrainian context (Popko, 2019).

Despite the existing doctrinal developments, several areas require further elaboration:

(1) the operationalization of **positive/proactive complementarity** through capacity-building roadmaps for Ukraine’s investigative authorities and courts (Burke-White, 2008; Policy Paper..., 2013; Making Justice Count..., 2021);

(2) the impact of martial law on genuineness and capacity (including in absentia proceedings, reliance on pre-trial testimonies, and special admissibility regimes) in light of ICC standards;

(3) the criteria for the practical allocation of cases among the ICC, national jurisdictions, and potential hybrid mechanisms; and

(4) the safeguards against “imitative” proceedings that may cast doubt on genuine prosecution and create risks concerning non bis in idem (Stigen, 2008; Office of the Prosecutor..., 2023; Prosecutor v. Germain..., 2014; Ambos, & Wirth, 2020).

It is precisely at these junctions between doctrine and practice that the present article seeks to make its further contribution.

### 3. The Main Research Material

The basic provision is enshrined in Article 1 of the Rome Statute, which establishes that the International Criminal Court (ICC) complements national systems of criminal justice rather than replaces them (Thousands of cases..., 2002). The jurisdiction of the ICC rests upon two groups of preconditions: temporal, territorial, and personal (Articles 11–12), and the triggers for the initiation of proceedings (Article 13) – namely, a referral by a State Party, a United Nations Security Council resolution, or the Prosecutor’s proprio motu action (under the procedure of Article 15, subject to authorization by the Pre-Trial Chamber) (Thousands of cases..., 2002).. On this basis, the Statute establishes a mechanism for preliminary notifications and

interaction with “ordinary jurisdictions” of States (Article 18), as well as a procedural framework for challenging the Court’s jurisdiction and the admissibility of a case (Article 19) (Thousands of cases..., 2002)..

At the core of the complementarity principle lies the admissibility test set out in Article 17 of the Rome Statute. A case is inadmissible:

(a) if it is being investigated or prosecuted by a State, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) unwillingness is determined on the basis of specific indicators:

i) shielding – proceedings conducted for the purpose of protecting the person concerned from criminal responsibility;

ii) unjustified delay inconsistent with the intent to bring the person to justice;

iii) lack of independence or impartiality of national proceedings that contradicts genuine prosecution;

(c) inability arises in the event of a total or substantial collapse or unavailability of the national judicial system, when the State is unable to secure the appearance of the accused, obtain evidence, or otherwise carry out the proceedings;

(d) the gravity requirement functions as a separate admissibility filter, extending beyond the mere scale of harm to encompass the nature of the acts, the manner of their commission, and the position of the suspect within the hierarchical structure (Thousands of cases..., 2002; Heller, 2012; Burke-White, 2008; Prosecutor v. Germain..., 2014; Ambos, & Wirth, 2020).

A practical instrument for applying Article 17 is the “same person/same conduct” standard developed in ICC jurisprudence. Under this standard, a State must demonstrate not merely general activity, but concrete investigative or procedural actions specifically concerning the same person and the same conduct that fall within the scope of the ICC proceedings. Reforms or declarations of intent, without corresponding procedural steps, do not neutralize the Court’s admissibility; conversely, proven and documented national actions – such as interrogations, procedural decisions, motions submitted to the court, and measures to secure the appearance of the accused – will serve as evidence of genuine prosecution (Situation in Uganda..., 2021; Prosecutor v. Saif..., 2013; Policy Paper..., 2013; Prosecutor v. Germain..., 2014; Thousands of cases..., 1998; Prosecutor v. Bosco..., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014).

An important component of the statutory framework is the principle of non bis in idem (Article 20). A final determination of a case by a State precludes renewed prosecution before the ICC only if the domestic proceedings were genuinely directed at bringing the person to justice for the same conduct. Imitative or sham proceedings resulting in lenient or purely

formal convictions, conducted for the purpose of evading justice, do not bar ICC proceedings, as they correspond to the element of unwillingness under Article 17 (Thousands of cases..., 1998; Office of the Prosecutor..., 2023; Prosecutor v. Germain..., 2014). At the same time, the Prosecutor’s discretion under Article 53 – concerning the interests of justice – does not override the admissibility tests of Article 17, but rather operates subsequent to the assessment of jurisdiction and admissibility.

Thus, complementarity under the Rome Statute is not a matter of political courtesy but a legally precise construct: the State retains the primary responsibility for investigation and prosecution, yet must demonstrate both genuineness and capacity. In the Ukrainian context, this implies the practical necessity of showing the State’s documented “presence” in each case – including the availability of the accused, proper documentation of evidence, effective defense representation, and reasoned judicial decisions. Such demonstrable engagement minimizes the risk of a case being deemed admissible before the ICC on grounds of unwillingness or inability, while ensuring consistency with the requirements of non bis in idem (Thousands of cases..., 1998; Stigen, 2008; Office of the Prosecutor..., 2023; Prosecutor v. Germain..., 2014).

The practice of the International Criminal Court refines the substance of complementarity, transforming the provision of Article 17 of the Rome Statute into a set of verifiable admissibility tests – unwillingness, inability, and gravity – applied in conjunction with the “same person/same conduct” standard (Thousands of cases..., 199). Key decisions in the Ongwen (Uganda), Ruto et al. (Kenya), and the Libyan proceedings concerning Saif al-Islam Gaddafi and Abdullah al-Senussi demonstrate that, for a case to be deemed inadmissible, it is insufficient for a State to rely on general reform intentions or abstract assertions of activity. The State must instead present concrete and properly documented procedural actions concerning the same person and the same conduct covered by the Court’s mandate, as well as demonstrate its institutional capacity to bring the case to a fair and genuine judgment (Situation in Uganda..., 2021; Prosecutor v. Saif..., 2013; Prosecutor v. Germain..., 2014; Prosecutor v. Bosco..., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014; The Prosecutor v. Saif..., 2022; The Case of the Prosecutor..., 2012).

Ongwen (Uganda). In the situation concerning Uganda, the Court proceeded from the finding that, despite the State’s self-referral and its formal willingness to prosecute the leaders of the LRA, the national authorities were in fact unable to secure the arrest and appearance of the suspects before domestic courts, given the ongoing armed conflict and the fugitives’ presence in remote and inaccessible areas. Under such

circumstances, the Court determined the existence of inability within the meaning of Article 17(3) of the Rome Statute: systemic and objective obstacles rendered the proceedings impossible to conduct properly, thereby making the case admissible before the ICC (Situation in Uganda..., 2021). At the same time, the Court emphasized that inability is not a value judgement of the quality of a State's policy, but a legal conclusion as to whether the domestic system is capable of ensuring the key procedural prerequisites – control over the accused, access to evidence, and the functioning of judicial infrastructure – in the specific case at hand.

Ruto et al. (Kenya). Kenya argued for inadmissibility, citing the creation of new institutions and its political will to prosecute those responsible for the 2007–2008 post-election violence. However, the Court emphasized that legislative plans, organizational measures, and general investigations “in the sphere of events” do not amount to genuine prosecution with respect to the same person and the same conduct. The absence of concrete procedural steps directed specifically at the individuals under ICC proceedings, as well as the lack of evidence of real progress in domestic cases, led the Court to conclude that the case was admissible before the ICC. Thus, the same person/same conduct standard functions as a procedural lens: it filters out declarative or symbolic activity and requires proof that the State is genuinely prosecuting that particular suspect for the very acts forming the focus of the ICC proceedings (The Case of the Prosecutor..., 2012).

Libya: Saif Al-Islam Gaddafi / Al-Senussi. In the Libyan proceedings, the Court demonstrated a flexible yet consistent application of the unwillingness and inability tests. In the case of Abdullah Al-Senussi, the Court found evidence of a genuine domestic proceeding marked by procedural progress and the State's capacity to conduct the trial; accordingly, the case was held inadmissible before the ICC. Conversely, with respect to Saif Al-Islam Gaddafi, the Court established the absence of effective State control over the proceedings: the limited ability of national authorities to secure access to the accused and to guarantee a fair trial led to the conclusion that the case was admissible before the ICC (Prosecutor v. Saif..., 2013; Prosecutor v. Ahmad..., 2016). This contrast illustrates that the Court assesses not the formal designation of a jurisdiction or political declarations, but the factual ability of the State to organize a fair process in the specific case, avoiding both excessive formalism and any substitution of the national role by the Court itself.

Concluding Guidelines for the Ukrainian Context. The above precedents yield several practical conclusions:

(1) Inability must be demonstrated through factual barriers – such as the unavailability of the accused, the collapse or substantial inaccessibility of institutions – rather than by mere general references to martial law;

(2) Unwillingness and imitative proceedings can be revealed through subtle indicators such as unjustified delays, lack of independence or impartiality, and sanctions that are clearly disproportionate to the gravity of the crimes;

(3) The same person/same conduct standard requires documenting concrete actions – summonses, interrogations, motions to court, and hearings – that prove genuine progress regarding a specific suspect and the exact episodes that must “mirror” those under ICC proceedings;

(4) The gravity criterion should be interpreted not only in terms of the scale of harm but also in terms of the qualitative characteristics of the acts and the position of the perpetrator;

(5) The principle of non bis in idem does not bar ICC proceedings when the national process has been of a shielding or token nature.

Taken together, these elements form a procedural model for demonstrating the “genuineness” and “capacity” of national criminal justice authorities – aimed at minimizing the risk of cases being deemed admissible before the ICC while simultaneously ensuring compliance with the standard of a fair trial (Thousands of cases..., 1998; Stigen, 2008; Office of the Prosecutor..., 2023; Prosecutor v. Germain..., 2014; Ambos, & Wirth, 2020).

After the Second World War, the Charter of the International Military Tribunal of 8 August 1945 and the Tokyo Charter for the first time codified individual criminal responsibility for international crimes and established a model in which an international tribunal possessed jurisdiction over “major war criminals”, while other categories of offenders were to be prosecuted by national courts (Judgment of the International..., 1946; Charter of the International..., 1946). This “two-tier” architecture did not yet constitute complementarity in the modern sense (the term itself had not yet been formulated), but it effectively ensured a division of jurisdictional subject matter: the international tribunal dealt with the leadership echelon, while national courts handled the remaining perpetrators. In such a model, the contemporary “same person/same conduct” test was not applied; instead, the criterion was defined by the status of the individual (level of responsibility) and the nature of the alleged acts (Smyrnov, 2024; Kaplii, & Smoliar, 2024; Udovenko, 2024; Plakhotnik, 2022; Popko, 2019).

Further development occurred through the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda. Unlike the earlier, more intuitive form of “parallelism,” their defining feature was the primacy over national courts: under their statutes, the tribunals were empowered to take over cases from domestic jurisdictions, require States to relinquish prosecutions, and conduct their own proceedings with priority authority. Such a design does not represent

complementarity in the sense of the Rome Statute, but rather establishes a competitive jurisdiction in which the international body holds the right of precedence (Plakhotnik, 2022; Pimenova, & Kuzmenko, 2024; Kleffner, 2008; Clapham, 2003; Popko, 2019). For contemporary practice, this distinction is important for two reasons:

(1) primacy functions as a crisis-management tool in situations where the national system is disorganized or incapacitated; and

(2) it demonstrates that an institutional “super-structure” can rapidly absorb complex and sensitive cases, thereby alleviating the burden on domestic judicial mechanisms.

The third vector of development is represented by hybrid mechanisms – mixed in both composition and legal foundation – which combine an international component with the domestic procedural framework. Unlike the ad hoc tribunals, their purpose is to strengthen local capacities, creating procedural “bridges” (through the composition of the court and prosecution, evidentiary rules, and witness protection systems) and thereby reducing barriers to cooperation. In this regard, particular attention should be given to the Agreement between Ukraine and the Council of Europe on the establishment of the Special Tribunal for the Crime of Aggression against Ukraine (25 June 2025): its jurisdiction is limited to the crime of aggression, whereas war crimes remain within the purview of national justice and/or the ICC (Establishment of a Special..., 2023). Accordingly, with respect to war crimes, a hybrid format may serve as an additional channel for cases involving the highest levels of responsibility, but only under conditions of strict coordination to avoid duplication with national proceedings and the mandate of the ICC.

Thus, the historical evolution – from Nuremberg/Tokyo (jurisdiction divided by level of responsibility) through the primacy of the ICTY/ICTR to hybrid mechanisms – defines an institutional spectrum within which the complementarity principle of the Rome Statute serves as a normative meta-principle. National authorities retain primary responsibility, the ICC intervenes based on the criteria of Article 17, and special or hybrid mechanisms must be designed so as not to dilute that primacy or create jurisdictional conflicts, but rather to fill gaps in capacity and cooperation (Thousands of cases..., 1998; Judgment of the International..., 1946; Charter of the International..., 1946; Pimenova, & Kuzmenko, 2024; Kleffner, 2008; Clapham, 2003; Popko, 2019).

Within the framework of the Rome Statute, the demonstration of “genuineness” and “capacity” of the national system implies not declaratory intent but a replicable chain of procedural actions in specific cases: timely initiation of proceedings; genuine investigative steps concerning the same person and the same

conduct; securing the presence of the accused; effective participation of the defense; a reasoned judgment; and a proportionate sentence (Thousands of cases..., 1998; Clapham, 2003.; Popko, 2019; Office of the Prosecutor..., 2023). Under conditions of martial law, this standard is complicated by objective factors – ongoing hostilities, territorial occupation, limited availability of suspects, risks to witnesses and victims, and pressure on the investigative and judicial infrastructure. For this reason, the ICC’s assessment focuses on the actual capacity to organize a fair process in a concrete case, rather than on the general characteristics of the system as a whole (Situation in Uganda..., 2021; Prosecutor v. Saif..., 2013; Stigen, 2008; Prosecutor v. Germain..., 2023; Prosecutor v. Germain..., 2014; Ambos, & Wirth, 2020; Prosecutor v. Bosco..., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014; Establishment of a Special..., 2023; The Prosecutor v. Saif..., 2022; The Case of the Prosecutor..., 2012).

Potential “risk zones” of admissibility before the ICC in domestic war crime cases arise across several dimensions. First, excessive reliance on in absentia proceedings – without an adequate procedural framework for notification, representation, and the possibility of review – may be perceived as a deviation from genuine prosecution, particularly where there is no evidence of systematic efforts to secure the accused’s appearance. Second, the use of pre-trial testimonies or simplified admissibility regimes – without full video recording, genuine opportunities for cross-examination, and thorough judicial reasoning – raises doubts as to the independence and impartiality of the proceedings, thus corresponding to the criteria of “unwillingness” under Article 17(2) of the Rome Statute (Thousands of cases..., 1998; Clapham, 2003). Third, unjustified delays in investigation, as well as sanctions that are manifestly disproportionate to the gravity of the alleged crimes, may be qualified as “shielding” or “unjustified delay”, thereby opening the way for the case to be deemed admissible before the ICC (Thousands of cases..., 1998; Popko, 2019; Prosecutor v. Germain..., 2023).

At the same time, national practice can minimize these risks through instruments that visibly demonstrate “genuineness” and “capacity.” Such instruments include: meticulous documentation of efforts to secure the accused’s appearance, including international search warrants, MLA requests, and records of refusals of extradition; comprehensive audio and video recording of all key procedural actions; ensuring the participation of defense counsel with genuine opportunities for cross-examination; reasoned judicial decisions providing transparent evaluation of evidence; standardized protocols for working with witnesses and victims, covering risk assessment, security measures, and remote participation formats

where necessary; integrity and traceability of the digital evidence chain; sanctions proportionate to the gravity of the offense and the individual's role. All these elements must function not as isolated practices but as a reproducible procedural pattern, demonstrable as evidence of "genuine prosecution" in the sense articulated by the ICC in the Kenya and Libya cases (Prosecutor v. Saif..., 2013; Prosecutor v. Ahmad..., 2016; The Case of the Prosecutor..., 2012).

To manage caseloads and enhance predictability, it is advisable to introduce a set of capacity indicators subject to regular monitoring at the levels of the prosecution service and the courts. These may include: the percentage of cases with either the physical or procedurally equivalent presence of the accused; the percentage of proceedings in which cross-examination was effectively conducted; the average duration of procedural stages; the percentage of judgments in which the court provided a detailed response to the key arguments of the defense; the percentage of appellate or cassation decisions identifying violations of the right to a fair trial; the percentage of cases with full video recording of critical procedural actions; the scope and quality of international legal assistance, measured by the number and responsiveness of requests. Public reporting on these parameters not only disciplines domestic practice but also creates an evidentiary foundation for demonstrating "genuineness" and "capacity" in communications with the Office of the Prosecutor of the ICC (Thousands of cases..., 1998; Stigen, 2008; Prosecutor v. Germain..., 2023).

In conclusion, the Ukrainian dimension of complementarity emerges as a synthesis of a properly structured normative framework and operational practices that verify the State's actual engagement in criminal prosecution of the same persons for the same conduct, as well as its capacity to bring proceedings to a fair and reasoned judgment. Such institutionally and evidentially "visible" genuineness, combined with the system's demonstrated capacity, constitutes the decisive safeguard against cases being deemed admissible before the ICC on grounds of unwillingness or inability. At the same time, it preserves the space for coordinated interaction with international and hybrid jurisdictions in cases involving the highest levels of responsibility (Thousands of cases..., 1998; Prosecutor v. Germain..., 2023; Prosecutor v. Germain..., 2014; Prosecutor v. Bosco..., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014; The Prosecutor v. Saif..., 2022; The Case of the Prosecutor..., 2012).

By "positive" or "proactive complementarity," we understand not a passive expectation of national system failure, but rather a policy of **strengthening** that system so that the primacy of domestic proceedings becomes real and verifiable according to the criteria of Article 17 of the Rome Statute (Thousands of cases..., 1998). In the paradigm originally proposed by

W. Burke-White, the ICC does not replace the State but instead stimulates its capacity through technical assistance, shared evidentiary methodologies, coordinated investigations, standards for the treatment of victims and witnesses, and a form of "compliance pressure" toward proper practices (Burke-White, 2008). For Ukraine, this translates into an institutional "roadmap" that includes: unification of protocols for recording and preserving evidence; full audio-video documentation of key procedural actions; ensuring the procedural presence of the accused (or functionally equivalent mechanisms with a right of review); stable communication channels with the Office of the Prosecutor of the ICC; regular quality audits of proceedings using genuineness/capacity indicators; and harmonized approaches to sanctions proportionate to the gravity of the offense (Thousands of cases..., 1998; Prosecutor v. Germain..., 2023). At the same time, this policy requires safeguards to prevent the "dark side of complementarity" – forum shopping, imitative proceedings under the guise of local initiative, or the use of criminal prosecution as a political instrument – cautioned against by K. J. Heller (Heller, 2012). Accordingly, positive complementarity should operate as **managed cooperation**: national justice conducts proceedings concerning the same person/same conduct; the ICC supports domestic capacities and assumes jurisdiction over pivotal cases where unwillingness or inability is proven; and hybrid mechanisms selectively fill capacity and cooperation gaps without duplicating jurisdictions (Heller, 2012; Burke-White, 2008).

The allocation of proceedings among national justice, the ICC, and potential hybrid mechanisms should be grounded in the legal filters of the Rome Statute – namely, the jurisdictional preconditions (Articles 11–12), triggers for initiation (Article 13), admissibility criteria (Article 17), procedural mechanisms (Articles 18–19), and the principle of non bis in idem (Article 20) – in combination with the "same person/same conduct" standard and the "gravity" filter (Thousands of cases..., 1998; Heller, 2012; Burke-White, 2008; Kleffner, 2008; Clapham, 2003). The purpose of this approach is to prevent duplication of proceedings, to ensure genuine criminal prosecution at the national level, and to concentrate international resources on pivotal cases involving command responsibility and cross-border episodes (Heller, 2012; Burke-White, 2008; Kleffner, 2008; Clapham, 2003).

The sequence of decisions should be structured as a step-by-step admissibility test. First, determine the type of crime and its procedural gravity – the nature of the acts, manner of their commission, and status of the perpetrator – all of which directly correlate with the gravity criterion (Thousands of cases..., 1998; Heller, 2012; Burke-White, 2008; Kleffner, 2008; Clapham, 2003). Second, verify the jurisdictional

preconditions and triggers under the Rome Statute (Articles 11–13), including the possibility of proprio motu action and the requirement of preliminary notifications under Article 18 (Thousands of cases..., 1998). Third, apply the “same person/same conduct” standard: assess whether the State is conducting genuine investigative and judicial actions with respect to the same suspect and the same incidents that fall within the ICC’s mandate. General reforms or abstract investigations are insufficient for this purpose (The Case of the Prosecutor..., 2012). Fourth, evaluate the State’s genuineness and capacity within the meaning of Articles 17(2)–(3) – identifying any objective barriers (availability of the accused, functionality of institutions, access to evidence) or indicators of shielding, unjustified delay, or lack of independence (Thousands of cases..., 1998; Prosecutor v. Germain..., 2014; Prosecutor v. Ahmad..., 2016). Only thereafter may a decision be taken – whether to leave the case at the national level (provided that genuine prosecution is ensured), to refer or “reinforce” it under the model of positive complementarity, or to initiate proceedings before the ICC if unwillingness or inability is established.

For Ukraine, the practical distribution of proceedings can be outlined as follows: cases involving the highest level of responsibility for the **crime of aggression** fall under the jurisdiction of the Special Tribunal established pursuant to the Agreement with the Council of Europe, noting its distinct separation from war crimes jurisdiction [33]; complex war crimes cases with a cross-border dimension, systemic obstacles to national prosecution, or clear indicators of unwillingness or inability, constitute potential candidates for ICC jurisdiction (Thousands of cases..., 1998; Situation in Uganda..., 2021; Prosecutor v. Saif..., 2013; Prosecutor v. Germain..., 2014; Prosecutor v. Bosco..., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014; The Prosecutor v. Saif..., 2022; The Case of the Prosecutor..., 2012); the remaining war crimes cases should be handled within national proceedings that demonstrably reflect genuineness and capacity – including the physical or procedurally equivalent presence of the accused, comprehensive evidentiary documentation, effective defense participation, and reasoned, proportionate sentencing. Hybrid formats may serve to bridge specific gaps in high-level cases, provided that strict coordination mechanisms are in place to avoid jurisdictional conflicts and duplication (Kleffner, 2008; Clapham, 2003; Prosecutor v. Germain..., 2023).

Organizationally, this allocation of proceedings requires a continuous “de-confliction” procedure between the Office of the Prosecutor General of Ukraine and the Office of the Prosecutor of the ICC. This should include: preliminary notifications under Article 18 of the Rome Statute; exchange of case

statuses following the logic of the same person/same conduct standard; protocols of cooperation concerning evidence management and witness protection; documented reasoning for each jurisdictional decision (national / ICC / hybrid), explicitly referencing the Article 17 admissibility tests and the gravity criterion (Thousands of cases..., 1998; Prosecutor v. Germain..., 2023). Such a transparent forum-selection trajectory, supported by regular capacity metrics, minimizes the risk of imitative proceedings and prevents violations of non bis in idem, thereby ensuring a coordinated and genuinely complementary prosecution of war crimes.

The core systemic problem lies in the gap between States’ **universal jurisdiction and the statutory limits of the ICC’s jurisdiction**. States may establish universal jurisdiction over international crimes within their domestic law, while the ICC operates strictly within the preconditions and triggers set out in the Rome Statute – namely, State Party participation, referral of a situation, UN Security Council resolution, or the Prosecutor’s proprio motu action (subject to Pre-Trial Chamber authorization). The ICC therefore does not possess universal jurisdiction per se (Thousands of cases..., 1998). This discrepancy results in fragmentation of prosecutions, dependence on political will and cooperation, risks of suspect inaccessibility, and extradition gaps. The safeguard against these challenges lies in establishing **forum coordination procedures** among national, hybrid, and ICC jurisdictions: early notifications, harmonization of the scope and boundaries of proceedings, and exchange of case statuses according to the same person/same conduct standard – all of which serve to minimize competition and duplication (Thousands of cases..., 1998; Prosecutor v. Germain..., 2023).

The second category of risks involves “**sham proceedings**”, designed to shield suspects from ICC scrutiny. Under Article 17 of the Rome Statute, such cases manifest either as unwillingness – characterized by shielding, **unjustified delays**, or a lack of independence or impartiality – or as inability, understood as a total or substantial collapse or unavailability of the national system, reflected in the absence of control over the accused, evidence, or institutions (Thousands of cases..., 1998). The Kenya jurisprudence demonstrated that declaratory reforms and general investigations “within the sphere of events” do not amount to genuine prosecution concerning the same person and the same conduct. Conversely, the Libya cases illustrated an asymmetry of findings: inadmissibility in relation to Abdullah Al-Senussi due to genuine procedural progress, and admissibility in relation to Saif Al-Islam Gaddafi due to the lack of effective State control over the proceedings (Prosecutor v. Saif..., 2013; The Prosecutor v. Saif..., 2022). Thus, the **substantive** test of genuineness remains the presence of real, documented procedural actions directed at that specific

person and those specific acts, rather than institutional declarations or abstract intentions.

The third dimension concerns the **limits of non bis in idem**. Article 20 of the Rome Statute bars renewed prosecution only if the national proceedings genuinely served the ends of justice regarding the same conduct, and were not used as a means to avoid responsibility. Lenient or formally reasoned convictions rendered merely to “close the case” do not constitute a bar to ICC jurisdiction and correspond to the criteria of unwillingness (Thousands of cases..., 1998; Kleffner, 2008; Clapham, 2003). Accordingly, the quality of judicial reasoning, the proportionality of sanctions to the gravity of the offence, and the assurance of equality of arms and procedural presence (or its functional equivalents with a right of review) **are not only** domestic standards of fair trial but also preconditions for preserving the primacy of the national forum.

Practical **safeguards** for national authorities – which simultaneously serve as evidence of genuine prosecution – include: (1) documentation of efforts to secure the accused’s appearance, including the use of MLA and extradition channels; (2) comprehensive audio and video recording of all key procedural actions and controlled preservation of the digital evidence chain; (3) genuine cross-examination and effective defense access to case materials; (4) judgments containing detailed evidentiary analysis and sanctions proportionate to the gravity of the offence; (5) witness and victim protection standards and procedural alternatives ensuring their participation or presence; (6) regular metrics of genuineness and capacity, such as stage duration, the proportion of in-person proceedings, and appellate review indicators; (7) a coordination protocol with the Office of the Prosecutor of the ICC applying the same person/same conduct standard; (8) Internal and external oversight mechanisms to prevent the political instrumentalization of criminal proceedings (Thousands of cases..., 1998; Prosecutor v. Saif Heller..., 2013, 2012; Burke-White, 2008; Kleffner, 2008; Clapham, 2003). Collectively, these instruments reduce the risk of cases being deemed **admissible** before the ICC, preserve the primacy of national jurisdiction, and maintain room for the targeted engagement of hybrid and international mechanisms in cases involving the highest levels of responsibility.

#### 4. Conclusions and Recommendations

The growing scale and brutality of war crimes has naturally intensified the public demand for genuine accountability. Within the proposed model, the principle of complementarity functions as a practical instrument for coordinating jurisdictions, rather than as a declaratory norm: the ICC complements, but does not replace the national justice systems. It applies

the admissibility tests – unwillingness, inability, and gravity – in conjunction with the “same person/same conduct” standard and the limits of non bis in idem (Thousands of cases..., 1998; Kleffner, 2008; Clapham, 2003). The jurisprudence in the Ongwen, Ruto et al., and Saif Al-Islam Gaddafi / Al-Senussi cases clarifies that declaratory reforms, general sectoral investigations, or proceedings resulting in unduly lenient sentences do not amount to genuine prosecution. The Court evaluates concrete procedural actions directed at specific individuals and incidents, as well as the State’s actual capacity to ensure a fair trial (Prosecutor v. Saif..., 2013; Prosecutor v. Bosco..., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014; The Prosecutor v. Saif..., 2022; The Case of the Prosecutor..., 2012).

Historical models illustrate the evolution of institutional configurations: Nuremberg/Tokyo – a division of jurisdictional subject matter based on the level of responsibility; ad hoc tribunals (ICTY/ICTR) – **the primacy** of international tribunals over national courts; and hybrid formats – the integration of international standards within the domestic procedural fabric. In the modern institutional architecture, this constitutes a spectrum of mechanisms within which complementarity operates as a meta-principle of coordination rather than competition among jurisdictions (Kleffner, 2008; Clapham, 2003; Popko, 2019). For Ukraine, it is particularly important to differentiate between the crime of aggression (falling within the potential jurisdiction of the Special Tribunal established under the Agreement with the Council of Europe) and war crimes (falling within the domain of national proceedings coordinated with the ICC). There is no substantive or legal overlap between these two categories, yet technical coordination is required, especially concerning evidence handling and witness protection (Plakhotnik, 2022).

The recommendation-oriented and practical dimension can be summarized as follows: first, rather than pursuing a defensive strategy, Ukraine should implement a **policy of positive (proactive) complementarity**: standardizing protocols for evidence recording and preservation (full audio-video documentation and controlled evidence chains), ensuring effective defense participation and cross-examination, and improving the reasoning quality of judgments and the proportionality of sanctions to the gravity of the offence (Burke-White, 2008). Second, operationalize the “same person/same conduct” standard: in each case, document specific procedural actions that mirror those within the ICC’s mandate (summonses, interrogations, motions, and measures securing the appearance of the accused), thereby minimizing the risk of findings of unwillingness or inability (Prosecutor v. Bosco..., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014; The Prosecutor v. Saif..., 2022; The Case of the Prosecutor...,

2012). Third, establish a transparent case-allocation mechanism to manage caseloads: national courts should handle the majority of war crimes cases; the ICC should focus on pivotal cases involving systemic barriers to prosecution or command responsibility; and hybrid mechanisms should address targeted capacity gaps without duplicating the mandates of either the ICC or national jurisdictions (Thousands of cases..., 1998; Heller, 2012; Kleffner, 2008; Clapham, 2003). Fourth, institutionalize coordination with the ICC Office of the Prosecutor through early notifications under Article 18, exchange of case statuses according to the same person/same conduct logic, and harmonized protocols for witness protection and evidence access (Thousands of cases..., 1998). Fifth, in in absentia proceedings, embed procedural safeguards – proper notification, effective representation, and the right to review – while documenting objective efforts to secure the accused's appearance; these are key indicators of genuineness (Heller, 2012; Burke-White, 2008; Kleffner, 2008; Clapham, 2003). Finally, given

the absence of universal jurisdiction for the ICC, Ukraine should expand international legal assistance channels and, where necessary, develop targeted hybrid mechanisms for cases of the highest level of responsibility, without compromising the primacy of the national forum (Heller, 2012; Burke-White, 2008; Kleffner, 2008; Clapham, 2003; Murphy, 2021).

Thus, complementarity serves as a tool of attainable justice for war crimes – provided that national proceedings remain visibly genuine and capable, the ICC focuses on cases that genuinely require its involvement, and hybrid mechanisms function as bridges of capacity rather than duplications of jurisdiction. Such a configuration ensures a coordinated distribution of caseloads, minimizes non bis in idem conflicts, and strengthens confidence in the outcomes of justice (Thousands of cases..., 1998; Heller, 2012; Burke-White, 2008; Kleffner, 2008; Clapham, 2003; Prosecutor v. Bosco., 2021; Prosecutor v. Ahmad..., 2016; Prosecutor v. Thomas..., 2014; The Prosecutor v. Saif..., 2022; The Case of the Prosecutor..., 2012).

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