



RESEARCH ARTICLE

The Principle of Complementarity International Criminal Law and Accountability at the National Level The Role of the International Criminal Court

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ABSTRACT

The principle of complementarity is the main admissibility mechanism by which the International Criminal Court (ICC) connects its jurisdiction to national criminal jurisdictions. This article explores the operation of that principle in law and practice, with specific focus on the distinction between action and inaction, the “same person, substantially the same conduct” test, unwillingness and inability, and the procedural interaction of Articles 17–19 of the Rome Statute. The methodology is doctrinal and comparative, taking as its basis the Rome Statute, the jurisprudence and policy materials of the ICC, domestic implementing legislation in the UK, Canada and Australia and the position of India as a non-State Party. It also applies selected contemporary cases—the Philippines, Afghanistan, Venezuela, Libya, Colombia, and the Central African Republic—to test how complementarity works beyond abstract doctrine. The article proposes that complementarity should be understood as neither automatic national primacy nor ICC primacy. It is a case-specific admissibility regime which privileges genuine domestic proceedings concerning the same person and substantially the same conduct, while preserving ICC intervention in situations of inaction or where domestic proceedings are marred by unwillingness or inability. The analysis further contends that the current “positive complementarity” moves the practical relationship beyond the controversy over admissibility: the 2024 Office of the Prosecutor policy and Assembly of States Parties mechanisms increasingly characterise complementarity as cooperation, information exchange and support for domestic capacity. But the comparative evidence demonstrates that legislative incorporation alone does not generate real accountability. The article’s main contribution is an integrated framework connecting admissibility doctrine, domestic implementation, procedural timing and positive complementarity, while pointing to the limits of considering national investigations as sufficient just because they exist.

1. INTRODUCTION

The International Criminal Court (ICC) was created as a permanent court to work in parallel with national criminal justice systems. At the institutional level, complementarity is enshrined in Article 1 of the Rome Statute and operationalised through the admissibility of particular cases in Articles 17-19. The structure that emerges is different from the primacy model historically associated with the ad hoc tribunals: the ICC does not simply displace a competent national criminal process. In such a case, however, the case may be inadmissible where the State concerned is investigating or prosecuting the same person for substantially the same conduct and the State is unwilling or unable genuinely to carry out the proceedings. In this sense, the admissibility regime mediates between domestic criminal jurisdiction and international adjudication, rather than simply establishing a hierarchy between them (International Criminal Court, 1998; United Nations, n.d.).

The central research problem is that complementarity is often discussed in slogans: national sovereignty, ICC intervention, domestic primacy or the 'court of last resort' without adequately distinguishing the separate legal questions embedded in Article 17. First question: are there relevant national proceedings? The second is whether the proceedings are against the same person and involve substantially the same conduct. The third, where the proceedings are before the national courts, is whether the State is unwilling or unable genuinely to investigate or prosecute. Gravity under Article 17(1)(d) is a separate requirement of admissibility and should not be confused with the complementarity analysis. This is why the jurisprudence calls for a structured approach rather than a generic inquiry into whether a State is “doing something” about international crime (International Criminal Court, 1998; Rastan, 2017).

It makes a difference in practice. For example, in the Libya case, the ICC found that the domestic proceedings against Abdullah Al-Senussi involved the same case and that Libya was willing and able genuinely to proceed, while the case against Saif Al-Islam Gaddafi remained admissible because Libya had not shown sufficiently that its investigation involved the same case and because issues of custody and evidence remained material. This is yet another example of how a genuine national process can render an ICC case inadmissible even in an ICC situation – the subsequent Beina litigation in the Central African Republic (International Criminal Court, 2013, 2014, 2026).

The contemporary debate has also moved from “negative complementarity” where the ICC intervenes when national proceedings are absent, to “positive complementarity” where domestic capacity and cooperation are considered to be central to the Rome Statute system. This broader institutional perspective is reflected in the 2024 Policy on Complementarity and Cooperation of the ICC Office of the Prosecutor and in the ongoing complementarity mechanisms of the Assembly of States Parties. Recent scholarship also takes into account domestic accountability as a growingly widespread part of international criminal justice instead of a mere defensive instrument used by States to resist proceedings before the ICC (International Criminal Court, 2024; Labuda, 2023; van Sliedregt & Quackelbeen, 2026).

In this context, the article asks: How does the principle of complementarity affect the relationship between national criminal jurisdictions and the ICC? Three subsidiary questions arise: (1) How do Articles 17-19 determine the point at which national proceedings displace ICC admissibility; (2) How does domestic implementation affect States' practical ability to conduct genuinely complementary proceedings; and (3) What does recent practice reveal about the relationship between admissibility litigation and positive complementarity? The article suggests that the best way to understand complementarity is as an admissibility framework that is case-specific, sensitive to time and dependent on evidence, along with a cooperative institutional dimension. The formulation does not presuppose that the mere existence of a national investigation is enough.

The article is grounded on doctrinal and comparative legal research. Primary sources include the Rome Statute, decisions and judgements of the ICC, policy materials of the ICC Office of the Prosecutor, documents of the Assembly of States Parties and domestic legislation. The jurisdictions of comparison are the UK, Canada and Australia as these are States Parties with domestic legislation implementing core international crimes, whereas India is a non-State Party whose stance illustrates the boundaries of viewing complementarity as a universal Article 17 mechanism. The broader case studies are purposefully chosen to provide insight into different procedural contexts: withdrawal and continuing jurisdiction in the Philippines; institutional collapse and gender-persecution allegations in Afghanistan; Article 18 practice in the Philippines and Venezuela; domestic accountability in Libya; the closure of the Colombia preliminary examination; and the Beina admissibility ruling in the Central African Republic.

The article is developed in six analytical steps. It then describes the architecture of Articles 17-20. Then it considers unwillingness, inability and the evidentiary assessment of genuineness. The third stage considers domestic implementation and the relationship between legislative incorporation and real accountability. The fourth compares the United Kingdom, Canada, Australia and India. The fifth explores present day global case studies. The final section synthesises the findings and presents an integrated account of complementarity both as an admissibility rule and a framework for domestic accountability and cooperation.

2. LITERATURE REVIEW AND RESEARCH GAP

There is a large body of literature on complementarity, which has developed from early doctrinal accounts of the relationship between the ICC and national jurisdictions, to wider debates about domestic accountability, institutional design and power. Stahn's scholarship, as well as early ICC practice, contributed to the shaping of complementarity as a mechanism to apportion responsibility between national and international institutions. Rastan extensively analyses the requirement of 'substantially the same conduct' and shows that the sameness inquiry is central to the functioning of Article 17 and cannot be substituted by a general presumption that any domestic activity should prevent the ICC from working (Rastan, 2017).

A second strand relates to the nature and effects of domestic proceedings. Mayans-Hermida and Holá (2021) discuss the difficult position of sentences and sanctions when considering complementarity, especially in transitional contexts. Their analysis is significant because ICC sentences are not used as a benchmark for domestic proceedings under Article 17, but proceedings aimed at protecting the accused might invite questions of authenticity. The question is therefore not whether domestic punishment is equivalent to an ICC sentence but whether the national process is genuine and has a legal nexus to the relevant conduct.

A third strand looks at the institutional consequences of positive complementarity. Complementarity can create potential negative incentives (Shereshevsky, 2020). The "complementarity turn" is part of a wider shift to domestic enforcement and state-building (Labuda, 2023). His analysis warns that international aid could activate domestic processes that conform to institutional expectations but do not necessarily address the structural roots of impunity. This concern is particularly relevant to the current article, since the mere existence of an investigation cannot logically be equated with effective accountability.

Contemporary research also questions notions of power and information. Shereshevsky (2025) argues that powerful States may benefit from informational gaps and procedural deference in domestic investigations. The Iraq/UK case is a principal example. This literature complicates a purely formal reading of Article 17: while the legal test may be uniform, the evidence available to the ICC and the institutional capacity of States to document domestic proceedings may vary considerably.

Finally, the 2024 ICC Policy on Complementarity and Cooperation and the 2025-2026 scholarship on distributed domestic prosecution indicate that complementarity is increasingly being understood as a networked accountability architecture. For example, Van Sliedregt and Quackelbeen (2026) describe a shift toward a more distributed system where domestic authorities cooperate and share practices across jurisdictions. This literature expands the field's scope beyond the traditional admissibility debate.

The research gap identified here is therefore not a claim that complementarity per se is under-theorised. Rather, the gap is in integrating four dimensions often considered in isolation: the doctrinal Article 17 test; the domestic legislative capacity to prosecute core crimes; the procedural and temporal operation of Articles 18 and 19; and the cooperative dimension of positive complementarity. The contribution of the article is a structured framework that links these dimensions and then tests the framework across three implementing common law jurisdictions and one non-party jurisdiction.

The article does not claim statistical representativeness of the comparative selection. The jurisdictions are chosen purposively for doctrinal contrast. The comparison therefore sustains analytical generalisations about legal structures and institutional choices, rather than empirical claims about all States Parties.

3. ANALYTICAL FRAMEWORK AND METHODOLOGY

It is a doctrinal and comparative legal study. The doctrinal component studies the interpretation of the Rome Statute, relevant decisions of the ICC and the Assembly of States Parties and official ICC and Assembly materials. The comparative component identifies how core international crimes are translated into national criminal law by domestic legislation, and asks whether those legislative arrangements facilitate the same-person/substantially-same-conduct inquiry and genuine domestic prosecution. The study does not try to measure prosecutorial effectiveness empirically.

The analytical framework is structured in five steps. First, identify the ICC case or possible case, and the State with jurisdiction. Second, determine if the State is investigating or prosecuting the same individual for substantially the same conduct. Thirdly, if there are national proceedings, take into account unwillingness under Article 17(2), including shielding, unjustified delay and lack of independence or impartiality. Fourth, assess inability under Article 17 (3), including the requisite link between the collapse or unavailability of the national judicial system and the State's inability to obtain the accused, necessary evidence or otherwise conduct proceedings. Fifth, the other admissibility filters, especially gravity and *ne bis in idem*, must be conceptually separated from the complementarity inquiry (International Criminal Court, 1998; United Nations, n.d.).

Another temporal principle is important. The assessment of complementarity is made on the basis of the national proceedings at the relevant stage and later factual developments can affect the assessment. This is particularly evident in the practice under article 18, where a State may request deferral of an investigation and the Prosecutor may request authorisation to resume it when the national process does not meet the relevant standard. An example of this dynamic is the litigation in the Philippines. The Prosecutor's investigation was temporarily deferred at the request of the State, and subsequently authorised to resume after the Pre-Trial Chamber found that the materials supplied did not establish sufficiently relevant national investigations (International Criminal Court, 2023).

The comparison therefore separates legal capacity from demonstrated accountability. A State may have domestic offences corresponding to Rome Statute crimes but it may not show a genuine investigation against a specific person and conduct. In contrast, differences in procedure between domestic and ICC systems do not automatically indicate unwillingness. The question is whether

the domestic process meaningfully deals with the conduct that is the subject matter of the ICC case.

4. ARTICLE 17 AND THE FRAMEWORK OF ADMISSIBILITY

Article 17 sets forth a number of separate admissibility rules. Article 17(1)(a) provides that a case is inadmissible if it is being investigated or prosecuted by a State with jurisdiction over it, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution. 17(1)(b) addresses a scenario where the investigation has been completed and the State has refused to prosecute, but there is the same unwillingness or inability qualification. Article 17(1)(c) read with Article 20(3) deals with a person already tried for the conduct and exceptions to *ne bis in idem*. Article 17(1)(d) also separately requires sufficient gravity. This is important because if a country is found to have taken no action, there will be no need to litigate the first limb of complementarity, whereas a genuine national investigation will activate the second-stage inquiry into unwillingness or inability (International Criminal Court, 1998; United Nations, n.d.).

The case, not the situation in its entirety, is considered the critical unit of complementarity in the jurisprudence. The Appeals Chamber adopted the Kenya jurisprudence, which embraced the “same person/same conduct” approach and subsequent practice has characterised the conduct in question as substantially the same. This is one of the most debated aspects of the Court’s complementarity jurisprudence, according to academic commentary (Rastan, 2017). The rule prevents a State from relying on unrelated proceedings against different persons or different incidents simply because they arise out of the same general situation.

The Libya litigation is a very clear illustration of the point. In the Gaddafi case, the Appeals Chamber confirmed that Libya had not sufficiently demonstrated that its investigation concerned the same case as that before the ICC. However, in Al-Senussi the Pre-Trial Chamber found that the domestic proceedings related to the same case and that Libya was willing and able genuinely to proceed. The Appeals Chamber confirmed the finding in 2014. The contrast shows why a statement of situation as “Libya is investigating” is legally insufficient without a case-specific evidentiary match (International Criminal Court, 2013, 2014).

The same reasoning explains why the national prosecution of a lower-level perpetrator does not automatically render the case against another suspect in the ICC inadmissible. The legal test is not whether the State is prosecuting someone else in some other part of the same hierarchy or conflict. It asks whether the State is prosecuting the same person for substantially the same conduct. This is not to say that prosecutorial selection does not matter, but that selection and admissibility are related, but distinct questions. The jurisprudence on complementarity should not be confused with the case-selection policies of the Office of the Prosecutor.

Articles 18 and 19 provide procedural mechanisms for admissibility but are not to be conflated with Article 17. Article 18 operates mainly at the stage of investigation: once the Prosecutor starts an investigation under Article 15, he notifies the States and a State may inform the Court that it is investigating. The Prosecutor shall normally defer at the request of the State unless the Pre-Trial Chamber authorises the investigation to proceed. Article 19 provides for a judicial mechanism for challenges to jurisdiction or admissibility and lists the persons and States entitled to lodge such challenges (International Criminal Court, 1998, 2020).

The Philippines litigation demonstrates the interplay. The Philippines invoked Article 18 deferment, the Prosecutor subsequently sought resumption, and the Pre-Trial Chamber granted the request after reviewing the material submitted by the State. The Appeals Chamber subsequently affirmed the resumption framework. So Article 18 is not a forever national veto. It is

a procedural tool to investigate domestic activity within the admissibility framework of the Statute (International Criminal Court, 2023).

The temporal dimension also means that complementarity is not a permanent shield. A once-unable State may later recover institutional capacity; a once-genuine process may later reveal stagnation or shielding. The legal assessment to be made must therefore remain sensitive to the proceedings actually being conducted at the time relevant to the assessment.

5. INABILITY, UNWILLINGNESS AND GENUINENESS

Article 17(2) identifies three types of unwillingness. The proceedings may show an intent to shield the individual from criminal liability, or there may be an unwarranted delay that is inconsistent with the intent to bring the individual to justice, or the proceedings may not be conducted independently or impartially and may be conducted in a manner inconsistent with the intent to bring the individual to justice. These are statutory criteria, not broad political labels.” “Evidence as to the proceedings themselves cannot be substituted by a State’s political system or institutional reputation.”

Article 17(3) covers inability. The Court must determine whether the State is unable to obtain the accused, the necessary evidence and testimony, or otherwise to carry out its proceedings, due to a total or substantial collapse or unavailability of the national judicial system. The ICC jurisprudence has interpreted the criteria cumulatively, meaning it is not enough to show that evidence is difficult to obtain but the inability must be related to the collapse or non-existence of the judicial system (International Criminal Court, 2010).

This difference is important for comparison. The legal differences of national systems do not in themselves create inability. It is true that a common law system might have different rules of disclosure, modes of trial, evidentiary practices or sentencing structures from the ICC. The question under Art. 17 is whether the national system is really capable of carrying out the relevant proceedings, not whether it duplicates the ICC procedure. In contrast, a formal legislative power cannot remedy a practical impossibility of obtaining the accused or essential evidence.

Reluctance is likewise a matter of fact. A lengthy inquiry is not in itself an unreasonable delay. Not prosecuting is not a protective decision necessarily. A national sentiment does not become a sham simply because observers consider the sentence lenient. Scholarship on sanctions confirms that the relationship between punishment and complementarity is legally complex; the core inquiry remains the genuineness of the national proceedings and the statutory exceptions (Mayans-Hermida & Holá, 2021).

The problem of information deserves more weight than it normally gets in doctrinal discussion. The ICC must evaluate the evidence submitted by the national authorities, and the States hold most of the basic investigative material. Shereshevsky’s analysis of powerful States contends that informational asymmetry can affect the practical operation of complementarity. This does not imply that domestic proceedings in powerful states are not real; it implies that evidentiary transparency and reasoned documentation are important for the application of a formally uniform test (Shereshevsky, 2025).

The practical implication is that States wishing to avail themselves of complementarity should be able to document the identity of suspects, incidents investigated, investigative steps, evidentiary decisions, prosecutorial decisions, and procedural progress. The ICC in turn must distinguish real procedural differences from signs of shielding or incapacity. This reciprocal evidentiary discipline is more precise than to characterise complementarity as national sovereignty or international supervision.

6. DOMESTIC IMPLEMENTATION AND STATES' ACCOUNTABILITY CAPACITY

The complementarity is better when States have domestic offences that can cover the conduct prohibited by the Rome Statute. Domestic implementation is not a condition of ICC admissibility per se but it matters in terms of whether a State has the legal tools it needs to pursue a national investigation or prosecution. The United Kingdom, Canada and Australia offer examples of different legislative paths to domestic implementation.

The International Criminal Court Act 2001 incorporated genocide, crimes against humanity and war crimes into domestic law for the jurisdictions to which its provisions apply in the United Kingdom. Sections 50 and 51 define the relevant offences with reference to Articles 6–8 of the Rome Statute and provide for domestic criminal jurisdiction in certain specified circumstances. The Act also provides for command responsibility and cooperation. It thus provides domestic authorities with a statutory basis for prosecuting conduct corresponding to core international crimes (International Criminal Court Act 2001).

Canada enacted the Crimes Against Humanity and War Crimes Act 2000. The Act creates offences in Canada and provides for offences committed outside Canada, as well as procedural provisions and implementation of the Rome Statute. The Act is currently described in federal text as legislation respecting genocide, crimes against humanity and war crimes, and implementing the Rome Statute. This sets up a domestic legal framework that could provide legal grounds for prosecutions, but the capacity to legislate should not be confused with the presence of a particular actual prosecution (Crimes Against Humanity and War Crimes Act, 2000).

Division 268 of Australia's Criminal Code covers genocide, crimes against humanity, war crimes and related offences. Section 268.1 states clearly that ICC jurisdiction is complementary to Australia's jurisdiction over offences within the Division which are also within ICC jurisdiction. The provision thus provides unusually direct statutory evidence of the domestic legislature's understanding of complementarity. The Australian framework also contains extraterritorial jurisdictional provisions and an offence structure that seeks to domesticate the core crimes (Criminal Code Act 1995 (Cth), 2026).

These three jurisdictions show an important point: implementation legislation can operationalise complementarity but cannot make all domestic processes genuine. A statute can give the offence, the jurisdiction and the procedure, but the practical question is whether the investigators and prosecutors are in fact dealing with the same person and substantially the same conduct. Comparative studies should therefore make explicit the difference between normative capacity and performance on a specific case.

India has a different institutional profile. India is not a State Party to the Rome Statute. India still describes the Rome Statute as a treaty it has not signed in its official material and it does not appear on the ICC's current list of States Parties. Thus, Article 17 does not create a procedural admissibility motion available to India as a State Party against an ICC case. But India can engage in international criminal-law discussions and seek domestic accountability through its own legal system. The legal point is that such domestic action does not amount to an Article 17 relationship with the ICC unless some other basis of ICC jurisdiction applies (Ministry of External Affairs, Government of India, 2012, 2016; International Criminal Court, 2026).

Also the comparison provides a methodological warning. The draft original provides qualitative expressions such as "low" ICC exposure and "donor and technical partner" roles in Table 1. Those statements are kept in the table as requested but should not be construed as quantitative findings. The underlying comparative analysis is doctrinal, comparing legislation, institutional position and publicly documented practice rather than measuring a numerical probability of ICC intervention.

7. OTHER LEGAL SYSTEMS

The comparative evidence is in favour of three propositions. First, incorporation of international crime into domestic law creates the legal capacity for complementary prosecution, but does not fulfill Article 17. The second factor is the degree of consistency between the statutory framework and the Rome Statute, which affects the ease of comparing national proceedings with ICC allegations. Third, non-party status changes the legal relationship: a non-party may seek domestic accountability, but does not have the same procedural position as a State Party under Article 17.

The model of the United Kingdom is of particular importance in that the International Criminal Court Act 2001 not only provides for cooperation mechanisms but creates domestic offences corresponding to the core crimes. This makes the domestic system a possible forum for the conduct that would otherwise be subject to the jurisdiction of the ICC. But the existence of such a statute cannot be described without qualification as a “service-personnel safeguard.” The better legal theory is that domestic criminal jurisdiction can provide a forum in which allegations against persons subject to UK jurisdiction can be investigated and prosecuted.

Canada, for instance, has a dedicated legislative framework and a decades-old war-crimes program that exemplifies the same principle. The point of the comparative lesson is not whether Canada necessarily has more or less ICC exposure than another State. Rather, the point is that a State can develop a domestic legal architecture that provides prosecutors with tools for international-crime accountability, while still being subject to the factual requirements of Article 17 in any given case.

By comparison, Australia perhaps provides the clearest statutory articulation of complementarity. Section 268.1 of the Criminal Code makes it clear that the ICC jurisdiction is complementary to the Australian jurisdiction in relation to overlapping offences. This section should be read with division 268 of the substantive offences. The result is a domestic architecture that preserves Australian jurisdiction while importing the substantive content of international criminal law.

India shows the opposite. India, not being a State Party, cannot invoke Article 17 in the same manner as a State Party would. Its domestic criminal-law choices may continue to matter for international criminal accountability, but the relationship is not one of Article 17 admissibility. Hence the formulation of India as a “political claim of domestic primacy” in the original draft is too evaluative. A more precise description would be that India is a non-party but remains engaged with international criminal law through diplomacy and its domestic legal order.

The comparison also emphasises a broader point: legislation alone does not create complementarity. The first institutional condition is the statutory offence. The second is the investigation. The third is the case-specific correspondence. The fourth is genuineness. A domestic system can meet the first requirement and fail in the latter stages. The four-stage distinction is one of the article's main analytical contributions.

8. INTERNATIONAL EXAMPLES IN A BROADER CONTEXT

A more contemporary example of complementarity after withdrawal is the Philippines. The Philippines ratified the Convention on 1 November 2011 and its withdrawal took effect on 17 March 2019. The ICC retains jurisdiction over alleged crimes committed during the period of membership. In 2023, the Pre-Trial Chamber authorised the Prosecutor to resume the investigation following a request for deferral by the Philippines; in 2025 the Court issued an arrest warrant for Rodrigo Duterte and in April 2026 the Pre-Trial Chamber confirmed the charges and committed him to trial, with the trial scheduled to open on 30 November 2026 as of September 2026. These events show that withdrawal does not retroactively nullify the Court's jurisdiction

over conduct committed while the Statute was in force (International Criminal Court, 2023, 2025, 2026).

The Philippines also illustrates the distinction between Article 18 and Article 17. The State's request for deferral in and of itself did not determine the ultimate admissibility of each potential case. The Court examined the pertinence and the substance of the national investigations and permitted their resumption where the legal conditions for deferral were no longer met. Complementarity thus functioned as an evidence-based process rather than as an automatic rule of deference (International Criminal Court, 2023).

Afghanistan provides an example of the inability dimension in a dramatically different institutional context. On 8 July 2025, the ICC Pre-Trial Chamber II issued arrest warrants against Haibatullah Akhundzada and Abdul Hakim Haqqani for the alleged crimes against humanity of persecution on gender and political grounds. The warrants are about alleged actions in Afghanistan after the Taliban took de facto control. The mere existence of these warrants does not, on its own, constitute a judicial determination that Afghanistan is "unable" within the meaning of Article 17; the more prudent doctrinal position is that the current ICC proceedings raise a question of complementarity in the light of the alleged perpetrators exercising de facto authority over the relevant domestic institutions. The distinction between an allegation of institutional capture and a formal Article 17 determination should be maintained. (International Criminal Court, 2025)

Venezuela is an example of a different kind of Article 18 practice. 2018 was the year States Parties referred the situation to the ICC and 2021 was the year the Prosecutor announced the conclusion of the preliminary examination, with a decision to proceed to investigation. The situation in Venezuela is therefore a useful example of how complementarity is considered at the stage of investigation, although this article does not take the existence of an ICC investigation as proof of a final Article 17 admissibility finding in any particular case (International Criminal Court, 2026).

Libya is still a crucial doctrinal case, because the Gaddafi and Al-Senussi cases demonstrate that in the same situation, complementarity may lead to different admissibility outcomes. In the Al-Senussi litigation the ICC considered the domestic proceedings as covering the same case and found Libya willing and able genuinely to proceed. The ICC case was still admissible, although the national process in the Gaddafi litigation did not sufficiently cover the same case. The pair thus shows the inadequacy of situation-level statements on State willingness (International Criminal Court, 2013, 2014).

Colombia also illustrates another type of complementarity: a preliminary examination may be closed without an ICC investigation where the Office determines that national authorities cannot be characterised as unwilling or unable genuinely to investigate and prosecute relevant Rome Statute crimes. On 28 October 2021, the Office closed the Colombia preliminary examination on this basis. What is significant about the example is that it demonstrates that complementarity operates not only through contested admissibility decisions after a case has been opened, but also through prosecutorial decisions before a full investigation begins (International Criminal Court, 2021).

A recent and particularly clear example is the Beina litigation from the Central African Republic. In September 2025, Pre-Trial Chamber II ruled that the case against Edmond Beina was inadmissible under Article 17(1)(a) after considering the ongoing case before the Cour pénale spéciale and determining that the Central African Republic was willing and able to genuinely investigate and prosecute. The decision was confirmed by the Appeals Chamber on 11 March 2026. This example corrects a common misunderstanding in the original draft: the 2026 development is not a simple "Beina ruling of 2025," but a determination of admissibility in 2025 with an appeal in 2026 (International Criminal Court, 2026).

Collectively, these examples illustrate the operation of complementarity in various factual scenarios: withdrawal does not terminate jurisdiction over prior conduct; Article 18 can lead to deferral and subsequent resumption; national proceedings can lead to inadmissibility; and the absence of genuine national action can maintain ICC admissibility. The cases are not to be read as interchangeable examples of "national primacy." The procedural postures of the cases differ, and the legal propositions derived from each must remain case-specific.

9. POSITIVE COMPLEMENTARITY AND THE ICC–DOMESTIC RELATIONSHIP IN TRANSITION

The classic debate of complementarity was whether the ICC should intervene. Contemporary institutional practice adds a second question: how can domestic jurisdictions be strengthened to ensure that international crimes are investigated and prosecuted at the national level? The Assembly of States Parties has used the term "positive complementarity" to refer to activities that strengthen national jurisdictions, and the 2024 Office of the Prosecutor Policy on Complementarity and Cooperation places complementarity and cooperation in a broader institutional context (Assembly of States Parties, 2010, 2026; International Criminal Court, 2024).

"Positive complementarity should not be used as an additional admissibility test. Article 17 determines the admissibility of a particular case; capacity building, exchange of information and legislative assistance function at a different institutional level. Mixing the two could turn policy support into a legal statement of authenticity. This distinction is explicitly reflected in Assembly documents which describe complementarity activities as measures to build the capacity of national jurisdictions to undertake real national investigations and prosecutions (Assembly of States Parties, 2009).

The 2024 OTP Policy is important because it presents complementarity and cooperation as interdependent principles and seeks to move beyond an exclusively defensive conception of the ICC. However, the policy ought to be read within the confines of the mandate of the Court. For instance, the Assembly's Complementarity Platform connects requesting States with technical-assistance providers; it is not a substitute for domestic prosecutors, investigators or courts (International Criminal Court, 2024; Assembly of States Parties, 2026).

Recent scholarship describes this development as part of a larger "distributed" accountability system. Van Sliedregt and Quackelbeen (2026) speak about the rise of domestic coordination and networks of prosecutors and investigators, while Labuda (2023) warns that the complementarity turn can have unintended effects when domestic proceedings become an institutional objective in their own right. These perspectives suggest that positive complementarity should be assessed on the basis of substantive domestic capacity and accountability outcomes rather than the number of workshops, memoranda or training events.

The present article therefore seeks to distinguish between positive capacity, procedural genuineness and substantive accountability. Positive capacity means the legal and institutional capacity to investigate and prosecute. Procedural genuineness is about whether the State is actually using that capacity in the given case. Substantive accountability is whether the process yields a legally meaningful response to the conduct. The first and third shed light on the broader policy environment but should not be silently substituted for the statutory test. The second category is directly governed by Article 17.

10. DISCUSSION

Complementarity is therefore a composite account that emerges from a doctrinal and comparative analysis. The principle operates in a sequence, not in a single presumption of national priority. The first question is whether there is any relevant national activity. The second question is whether that activity relates to the same person and substantially the same conduct. The third, if the State is active, is whether it is willing and able to proceed in good faith. The other requirements of admissibility are separate. It is more legally accurate than the binary claim that the ICC is either inferior or superior to national courts.

One implication is that national jurisdiction has legal consequences but is not self-authenticating. A criminal code, a commission of inquiry, an administrative review or a press statement are not a genuine Article 17 investigation. The Court in its case-law has repeatedly focused on the concrete proceedings, the identity of the suspect and the conduct investigated. For this reason the Libya cases remain central and the Philippines Article 18 litigation is important.

Second, domestic implementation is a prerequisite for practical capacity, but not a performance indicator. The United Kingdom, Canada and Australia have domestic legal systems that are able to deal with core crimes. Their statutes allow for domestic prosecution, in theory. But complementarity is case-specific. A national statute itself cannot render an ICC case inadmissible; the national proceedings must be connected to the case and meet the statutory requirements of genuineness.

A third implication is that information is embedded in the practical operation of complementarity. Where the State controls the investigative file, the ICC's ability to test the national process depends on the quality of the material disclosed. This does not warrant an assumption that powerful States are unwilling or unable. It justifies a research and policy focus on transparent documentation, reasoned prosecutorial decisions and identifiable investigative steps. This information problem is especially important for the current scholarship on power and complementarity (Shereshevsky, 2025).

The fourth implication is that positive complementarity should be institutionally separated from admissibility. Capacity-building can strengthen domestic justice and reduce the need for ICC intervention, but it cannot retroactively determine the veracity of a particular investigation. The same distinction also protects domestic judicial autonomy: national courts do not have to reproduce ICC procedure so that they can remain complementary. What counts is whether the national system actually tackles the relevant criminal conduct.

The fifth implication is time related. Complementarity is no fixed point in time. Early stage deferral allowed under Article 18 Judicial challenges allowed under Article 19 Reassessment as facts change allowed under Article 17 The Philippines experience demonstrates that national claims of investigative activity can be reopened. In the Beina litigation the opposite is illustrated: where a national process is sufficiently advanced and genuinely deals with the same case, the ICC may be obliged to find the case inadmissible.

The sixth implication relates to non-party States. India demonstrates why "domestic primacy" is not a synonym for Article 17 complementarity. A non-party may invoke the value of national criminal jurisdiction and may articulate domestic law, but in doing so it has not accepted the admissibility regime of Article 17 of the Rome Statute. This distinction is doctrinally important, and prevents comparative research from attributing treaty rights to non-parties.

A final implication is that of transitional justice. Amnesties, truth commissions and alternative sanctions raise difficult questions, since Article 17 is framed in terms of investigation and prosecution, whereas transitional processes may have broader goals. The article does not give a

new categorical rule. Rather, it proposes any analysis be divided between the statutory text, ICC jurisprudence, the specific language of the domestic process, and the academic debate on whether forms of transitional justice could satisfy the framework of the Rome Statute. Political agreement alone cannot be assumed to be either sham or genuine in a national process.

11. RESULTS

Finding 1 — Complementarity is case dependent. Article 17 does not render an entire situation inadmissible simply because a state is investigating international crimes. The national process must involve the same individual and substantially the same conduct.

Finding 2. Inaction differs analytically from unwillingness and inability. In the absence of a relevant national investigation or prosecution, the Court need not establish unwillingness or inability in the same manner as it would in the case of an active national process. The Article 17 framework thus begins with a question of action/inaction.

Finding 3 — Legislative incorporation promotes but cannot guarantee complementarity. The value of domestic implementation is clear in the United Kingdom, Canada and Australia but the presence of offences is only the legal capacity stage of the analysis.

Finding 4 — Positive complementarity is not limited to Article 17. The modern ICC and Assembly practice increasingly sees complementarity as cooperation, capacity building and domestic accountability support. These activities should not be confused with the test of admissibility in law.

Finding 5 — Distinguishing party and non-party status in comparative analysis. India may be a case study of domestic accountability outside the Rome Statute, but it does not have the same Article 17 procedural relationship as a State Party.

Finding 6 — Contemporary cases demonstrate variation in time and procedure. The Philippines, Libya, Colombia, Afghanistan and the Central African Republic are different expressions of complementarity, and should not be treated as interchangeable evidence.

Finding 7. The record of evidence counts. Transparency and concrete documentation are important for the practical assessment of genuineness as national authorities usually have the underlying investigative material. This is particularly pertinent to debates over powerful states and information asymmetry.

Finding 8 — The best analytical model is a sequence. The relationship between the ICC and domestic jurisdictions can be best analysed as national activity → case correspondence → genuineness/capacity → other admissibility requirements → cooperation and, where appropriate, positive complementarity. This sequence is the main conceptual contribution made by the article.

12. CONCLUSION

The principle of complementarity structures the relationship between national criminal jurisdictions and the ICC by transforming a broad institutional question—whether to prosecute in a State or in an international court—into a structured admissibility inquiry. Article 17 aims at determining whether there are relevant national proceedings and whether these involve the same person and substantially the same conduct and, as appropriate, whether the State is unwilling or unable genuinely to investigate or prosecute. Articles 18 and 19 provide related procedural mechanisms, but gravity and ne bis in idem are separate admissibility considerations.

The comparative analysis points to the importance of domestic implementation as a State cannot realistically prosecute Rome Statute crimes if its legal system does not satisfactorily define or reach

them. The United Kingdom, Canada and Australia demonstrate different types of domestic implementation. Their legislation supports a proposition that complementarity can foster national legal capacities. It does not support the more robust proposition that legislation alone creates real accountability. India, a non-State Party, exemplifies the converse: domestic accountability outside the Rome Statute may be possible but Article 17 cannot be characterised as a procedural right of a non-party.

The modern examples also demonstrate the case-specific and temporal nature of the principle. Libya shows how different cases in the same situation can have different admissibility outcomes. Colombia demonstrates that complementarity can function at the stage of preliminary examination. The Philippines shows both Article 18 deferral practice and continuing jurisdictional consequences of withdrawal. Afghanistan is an example of a case where putative institutional control by the putative wrongdoers raises fundamental issues of domestic capacity; Beina litigation is an example of where a true functioning national process can trump ICC admissibility and such a finding can be upheld on appeal.

The broader institutional development is also important. Positive complementarity is increasingly linking the ICC system to domestic capacity-building, information exchange and inter-State cooperation. The 2024 OTP Policy and Assembly mechanisms demonstrate that complementarity is no longer only talked about as a defensive admissibility doctrine. But positive complementarity should not be a substitute for Article 17. Training, legislative assistance and cooperation can improve the conditions for accountability, but only case-specific proceedings can determine whether a particular ICC case is inadmissible.

The single analytical sequence identified in the article's main contribution is therefore to identify the national activity; match the person and conduct; assess its genuineness and ability; separate the other admissibility requirements; and then examine the broader cooperative and capacity-building dimension. It does not resolve all the disagreements about complementarity, but it prevents some common errors: treating any domestic activity as worthy; conflating gravity and complementarity; treating domestic primacy by non-party states as Article 17 complementarity; and treating activities of positive-complementarity as evidence of genuineness in the specific case.

Complementarity therefore is neither a national veto nor an ICC primacy rule. It provides a legal mechanism to determine when a national process should displace ICC admissibility, and when the Court may proceed because the domestic process is absent or legally insufficient under the Statute. Its success ultimately depends on the quality of domestic institutions, the transparency of national proceedings, the ICC's ability to assess evidence, and the willingness of States and international institutions to support meaningful domestic accountability.

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◆ Ethical Statement

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