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**The Reversed Implementation of the ICC's Principle of Complementarity:
Case Study of Argentina's Investigation for Rohingya**

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Abstract

Complementarity is one of the basic principles of the applicability of ICC jurisdiction that gives State primacy to prosecute their nationals or persons committed crimes within its territory. In the case of Rohingya, the Argentine Lower Court applied this complementarity principle "in reverse" as a ground to reject the investigation requested by the Burmese Rohingya Organization UK under universal jurisdiction. This principle applies in reverse since it is originally created as a basis of the ICC to commence investigation only when the national court is unwilling or unable to prosecute the perpetrator. Meanwhile, the Argentine Lower Court applies this principle to bar the national court investigation when a similar case is being tried before the ICC. This paper argues that the ICC's complementarity principle cannot be applied in reverse since it impedes national courts from prosecuting crimes under ICC's jurisdiction. Consequently, it is inconsistent with the objective of the principle of complementary, namely to make domestic courts effective in prosecuting crimes under ICC jurisdiction. This conclusion also strengthens the decisions of the Argentine Appeal Court to reopen the investigation of Rohingya case and overturned the Lower Court's decision.

Keywords: Complementarity, ICC, International Criminal Law, Rohingya Case, Universal Jurisdiction.

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A. INTRODUCTION

Complementarity is the basic principle that forms the jurisdiction of the International Criminal Court (ICC). It refers to the Preamble, confirms on Article 1, and further elaborates on Article 17 of the Rome Statute. It is a key principle that balances the relationship between the ICCs and National Courts. There are stated that the jurisdiction of the ICC is complementary to national criminal jurisdiction. ICC will refrain from investigating if the State has already conducted one unless it finds evidence of the State's unwillingness or inability to do so⁴.

Complementarity has attracted much attention from academics and has reappeared in the investigations of international crimes against the Rohingya. The Rohingyas, considered "*one of the world's most persecuted minorities*"⁵, have experienced the impact of military operations that displaced a large number of these ethnic. The series of Myanmar military's persecution against Rohingya Muslims have received international attention in recent decades. The culmination of the persecution in 2017 not only caused a refugee crisis but has been considered an act of ethnic cleansing and

genocide⁶. In addition, Aung San Suu Kyi's failure to prevent and remedy human rights atrocities in the Nation she represents has drawn criticism, both from international organizations like the United Nations⁷ and Amnesty International⁸ as well as from neighboring countries. The international organization's condemnation was demonstrated by withdrawing the conscience award, which was bestowed on Aung San Suu Kyi in 2009. The November 2018 withdrawal was made as Amnesty International believes that Aung San Suu Kyi is no longer a symbol of hope, owing to her apparent disregard for atrocities committed against the Rohingya and the growing intolerance of free speech. Moreover, it has also drawn criticism from neighboring countries such as Bangladesh⁹ and Malaysia¹⁰.

⁴ Diajeng Wulan Christianti, *Hukum Pidana Internasional*, Jakarta Timur: Sinar Grafika, 2021, 199–200.

⁵ This term has been used several times in both formal and informal meetings, among others by Pramila Patten, Special Representative of the Secretary-General on sexual violence in conflict of Human Rights Council in, Previously, this term was also used in online reporting. BBC, "Why is there communal violence in Myanmar?", 2014, <<https://www.bbc.com/news/world-asia-18395788>>., Historically, this term has been used since 2006 by BBC reporter Mike Thompson. See Tim McLaughlin, "Origin of 'most persecuted minority' statement unclear", 2013, <https://www.mmtimes.com/national-news/7376-origin-of-most-persecuted-minority-statement-unclear.html?__cf_chl_managed_tk__=pmd_roe0f2VW_tvhfAu2DzCQpj1zEWPOyQv9YCpNHxgKqOE-1634186343-0-gqNtZGzNAZujcnBszRH9>.

⁶ See Aulia Rosa Nasution, "The Crime of Genocide on the Rohingya Ethnic in Myanmar from the Perspective of International Law and Human Rights," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 5, no. 1, (2018): 182–206.;

⁷ United Nations General Assembly, "Resolution adopted by the General Assembly on Situation of human rights in Myanmar, 22 December 2018," 2018.

⁸ See Amnesty International UK, "Amnesty Strips Aung San Suu Kyi of "Ambassador of Conscience" Award, Press Releases, 12 November 2018", 2018, <<https://www.amnesty.org.uk/press-releases/amnesty-strips-aung-san-suu-kyi-ambassador-conscience-award>>. As reported by Simon Lewis, "Amnesty International strips Myanmar's Suu Kyi of "conscience" award", 2018, <<https://www.reuters.com/article/us-myanmar-rohingya-amnesty-idUSKCN1NH23K>>.

⁹ See Government of India Ministry of External Affairs, "Situation in Rakhine State of Myanmar, 9 September 2017", 2017, <<https://mea.gov.in/press-releases.htm?dtl/28931/Situation+in+Rakhine+State+of+Myanmar>>. As reported, among others, by Euan Mckirdy, "Bangladeshi Prime Minister Condemns Myanmar over Rohingya Treatment", 2017, <<https://edition.cnn.com/2017/09/21/asia/bangladesh-pm-sheikh-hasina-un-rohingya/index.html>>.

¹⁰ See the Statement of Foreign Minister of Malaysia, "Statement by The Honourable Dato' Sri Anifah Haji Aman, Foreign Minister of Malaysia, on The Situation in Rakhine State, Myanmar, Press Release, 5 September 2017", 2017, <https://www.kln.gov.my/web/can_vancouver/news-from-mission/-/blogs/statement-by-the-foreign-minister-of-malaysia-on-the-situation-in-rakhine-state-myanmar>. As reported, among others, by Stephen Dziedzic, "Malaysian PM condemns inaction of Aung San Suu Kyi over Rohingya "suffering"", 2018,

The problem occurs as Myanmar opposes the intervention of the international community in the Rohingya case. For Myanmar, the international community does not understand the reality on the ground, which involves violent terrorism perpetrated by ARSA. The international community's focus on the Tatmadaw in external investigations is also considered disproportionate. In line with the opinions of the domestic community and Myanmar civil society, Aung San Suu Kyi defended the Tatmadaw's controversial actions. This defense was conveyed directly before the ICJ¹¹.

Since 2019, the events experienced by the Rohingya are being prosecuted by three international courts, namely the International Court of Justice, the ICC, and the Argentine Court. The International Court of Justice examined this case based on an application filed by the Gambia on 14 November 2019 for alleged violations of the Genocide Convention by the Government of Myanmar. The ICC has examined this case since 4 July 2019 based on the *Proprio Motu* principle and authorized by the ICC on 14 November 2019. After the authorization, the application was presented before the Argentine court. An Argentine court heard the case at the request of the Burmese Rohingya Organization UK (BROUK) on 13 November 2019 under the principle of universal jurisdiction. This application was accepted by the Argentine Court of Appeals on 26 November 2021, overturning the Lower Court's previous decision.

On the one hand, the variety of trials demonstrates international concerns about the ongoing issue of genocide which should be appreciated. On the other hand, it raises various legal questions, particularly

regarding the investigations conducted concurrently by the ICC and the Argentine Court. This question arises because the two judicial bodies have the same purpose, to prosecute individual criminal responsibility for international crimes.

The issue that emerges is the Argentine Court's refusal to investigate the issue in accordance with the complementarity principle, which is challenged under the concept of universal jurisdiction. The ICC is aware of an application for a similar case submitted by BROUK to the Argentinian Court of the case following the ICC's decision to investigate the case. Likewise, the Lower Court of Argentina was fully aware that the ICC was investigating those cases when it decided to implement reversed complementarity.

The Argentine Court investigates this case under the Universal Jurisdiction principle. This principle, in general, is defined as a state's jurisdiction to try and punish foreigners who commit crimes abroad against foreigners¹². The application of the principle of universal jurisdiction to international crimes is also a mandate from the Rome Statute. Argentina is a member of the Rome Statute which signed the Statute on 8 January 1999, ratified it in 2001, and entered into force since 1 July 2002. Therefore Argentina has legal duties and obligations as a state party.

Currently, the principle of universal jurisdiction is applied in Argentina to conduct investigations into two cases¹³, namely the case of Rodolfo Martin Villa, the former Prime Minister of Spain, who is considered to be protecting a suspected dictator, and Aung San Suu Kyi, the leader of Myanmar, on the grounds of the genocide of Rohingya, who will be the object of this research.

In investigating the international crimes against the Rohingya, problems arise over

<<http://www.abc.net.au/news/2018-03-18/asean-malaysia-pm-confronts-aung-san-suu-kyi/9560112>>.

¹¹ Angshuman Choudhury and Felix Heiduk, "Aung San Suu Kyi at the International Court of Justice," *SWP Comment* 51, no. 51 (2019): 1–4, <https://doi.org/https://doi.org/10.18449/2019C51>.

¹² Luc Reydam, *Universal Jurisdiction, International and Municipal Legal Perspectives*, Oxford: Oxford University Press, 2003.

¹³ Trial International, *Universal Jurisdiction Annual Review 2021*, Switzerland: Trial International, 2021, 89–95.

applying complementarity. In its decision on 9 December 2019, the Argentine Lower Court refused to accept the case submitted by the Burmese Rohingya Organization UK (BROUK)¹⁴ because a similar case has been investigated by the ICC since 14 November 2019¹⁵. However, the Argentine Appeal Court takes a different stance and does not regard this issue as a barrier to the application of international jurisdiction. The Argentine Appeal Court accepted the investigation of this case by adhering to the principle that the investigation and final assessment of the crime of genocide is the primary responsibility of the national courts¹⁶.

In the case of genocide against the Rohingya, the Argentine Lower Court applied reversed complementarity by stating that

*"En relación al principio de complementariedad que rige la actuación de la Corte Penal Internacional, que se observaba de momento desplazada toda otra intervención de juzgamiento penal cuando se activó la jurisdicción de aquélla aprobando la investigación de la Fiscalía internacional y, ..."*¹⁷

That statement was freely translated by the Robert F. Kennedy Center for Justice and Human Rights in its Amicus Curiae as,

*"In relation to the principle of complementarity that governs the actions of the ICC, that at the moment all other intervention of criminal prosecution was displaced when the jurisdiction was activated approving the investigation of the International Prosecutor's Office."*¹⁸

The Argentine Lower Court argues that Argentina cannot hear a case because the ICC is investigating it. Therefore, the Argentine Lower Court interprets the complementarity in reverse by declining to investigate a case that the ICC has already investigated it¹⁹. That is one of the reasons the lawsuit filed by BROUK was rejected. The application of complementarity in this manner raises the question of whether complementarity only applies to validating the ICC's jurisdiction in investigating a case or, conversely, whether the National Court can also apply complementarity to cases the ICC has investigated.

The Lower Court Decision was appealed and Argentine Appeal Court argues that :

*"Organismos como la Corte Penal Internacional ejercen su competencia de manera complementaria a aquéllos. Este concepto, conocido como principio de complementariedad, se encuentra contemplado en el art. 17 del Estatuto de Roma, en el que se han establecido los criterios por los cuales admitirá un asunto y veda esa facultad si un Estado parte ha realizado una investigación en el ámbito de su jurisdicción..."*²⁰

¹⁴ BROUK is an organization for the Rohingya diaspora based in London, United Kingdom, which aims to support the Rohingya community, both within Myanmar and in other countries and support the Rohingya struggle on the international stage. See <https://www.brouk.org.uk/who-we-are/>.

¹⁵ Md Rizwanul Islam dan Naimul Muquim, "The Gambia V. Myanmar at the I.C.J.: Good Samaritans Testing State Responsibility for Atrocities on the Rohingya," *California Western International Law Journal* 51, no. 1, (2020): 77–131. The updates of this case can be followed on the official website of ICC, <https://www.icc-cpi.int/bangladesh-myanmar>.

¹⁶ See the Order of the Argentine Lower Court, Dte.: Burmese Rohingya Organisation s/ legajo de apelación, 26 Noviembre de 2021, CFP 8419/2, (2021).

¹⁷ Sala 1ra Cámara Federal Penal de Cap. Fed., *Nn S/Tortura, Desaparición Forzada De Persona (Art.142 Ter), Abuso Sexual - Art. 119 1° Parrafo y Homicidio Simple Denunciante: Burmese Rohingya Organisation UK* (2019)., emphasized added.

¹⁸ The Robert F. Kennedy Center for Justice and Human Rights, "Request to be Taken by Amicus Curiae," 2019, online, Internet, 2 Jul. 2021. , Available: <https://www.fortifyrights.org/downloads/AmicusCuriae-RFKHR-FR-UniversalArgentineJurisdiction-ENG.pdf>, emphasized added.

¹⁹ International Criminal Court, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November," 2019.

²⁰ Camara Criminal Y Correccional Federal - Sala I, Dte.: *Burmese Rohingya Organisation s/ legajo de apelación, Nro. CFP 8419/2019/7/CA2, rta. 26 Noviembre de 2021* (2021).

The statement above demonstrates that judicial body such as the ICC exercises its competence in a complementary manner. Argentine Appeal Court believes that complementarity is the foundation for the admissibility of the Jurisdiction of the ICC. Meanwhile, Appeal Court decided that Argentina has jurisdiction to proceed with the investigation of the International Crimes against Rohingya under the principle of universal jurisdiction. Accordingly, it forms the basis for the Argentine Appeal Court to turn over the Lower Court's decision.

It is therefore critical to research this issue due to national courts' unprecedented implementation of complementarity to investigate a case concurrently with international courts. Moreover, the Argentine Court's differing interpretation of complementarity adds to the significance of this research. As a result, this paper will examine whether, under the principle of universal jurisdiction recognized by international law, the ICC's complementarity principle can be applied in reverse. However, this paper does not analyze the jurisdiction of the ICC on this case as it has been examined by the courts before the investigation was authorized.

B. COMPLEMENTARITY: THE MAIN PRINCIPLE AND THE INTERPRETATION

Most international jurists will refer to the Rome Statute when discussing complementarity. A more in-depth investigation of this principle can be found in the work of the International Law Commission. The term "complementary" was first used in the 1994 International Law Commission Report, which included the Final Draft of the Statute, whereas the Commission first discussed the complementarity mechanism in 1991 without explicitly mentioning the term "complementary." However,

complementarity is not a new concept in international criminal law.

The core idea of the principle of complementarity is based on the existence of two distinct jurisdictions²¹. Both jurisdictions have the same role in prosecuting a crime. However, in some ways, the two jurisdictional systems serve distinct, if not contradictory, purposes²². This concept evolved before finally being codified in the 1998 Rome Statute.

1. The Main Principle

Complementarity is one of the ICC's main principles, emphasizing the ICC's role as complementary to national criminal jurisdictions²³. This principle is regulated in the Preamble, confirmed in Article 1, and expanded in Article 17 of the Rome Statute.

In the Preamble, complementarity is indicated in Paragraph 10. This paragraph emphasizes the ICC, mentioned in the Rome Statute, as complementary to national criminal jurisdiction. Complementarity described in the Preamble is reaffirmed in Article 1 of the Rome Statute²⁴, which states that the ICC must be complementary to national criminal jurisdictions.

These provisions implicitly state that domestic criminal investigations and prosecutions have a higher priority over ICC criminal investigations and prosecutions²⁵. This priority occurs because member states of the Rome Statute bear

²¹ Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff Publishers, 2008) 4–5.

²² William A. Schabas, *An Introduction to the ICC, Fourth Edition* (Cambridge: Cambridge University Press, 2011) 190–191.

²³ The ICC's role as a complement to national criminal jurisdiction is explicitly described in paragraph 10 of the Rome Statute and reaffirmed explicitly in Article 1 of the *Rome Statute of the International Criminal Court*, vols., 1998.

²⁴ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Second Eds. (Oxford: Oxford University Press, 2016) 53.

²⁵ Mark Klamberg, ed., *Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher, 2017) 3.

the primary responsibility for upholding justice, which is the jurisdiction of the ICC²⁶. In addition, complementarity emphasized the different roles of ICC from the previous *ad hoc* courts, which recognize the primacy principle. Under the primacy principle, the jurisdiction of *ad hoc* courts is above the jurisdiction of national courts, while complementarity prioritizes criminal investigation and prosecution in domestic courts²⁷. In the history of statutory negotiations, this arrangement of relations between the ICC and domestic Courts has an essential role in establishing the permanent ICC²⁸.

Article 17 of the Rome Statute elaborates on this principle by involving two steps in determining its application²⁹. The first step is to examine whether there is or has been an investigation or prosecution in a national court regarding the same case. Then, If, during the examination, it is discovered that an attempt was made to investigate or prosecute the case, a second examination is required to determine whether there are indications of the State's unwillingness or inability³⁰.

Unwillingness is indicated by the absence of an intention from the State concerned to prosecute someone to court to protect that person from criminal responsibility³¹. Instead, it is motivated by a desire to obstruct justice. Article 17(2) of the Rome Statute describes indicators of unwillingness³², which include three

indicators. The first indicator of a state's unwillingness is the existence of a court process or court decision held to protect the person concerned from criminal responsibility for crimes. The second indicator is the presence of unjustified delays in the judicial process that are incompatible with the trial's objectives. The final indicator is an independent or impartial legal process incompatible with the trial's intent.

In contrast to unwillingness, indicated by the absence of intention, inability refers to the complete or partial failure or incompetence of a country's national legal system. This failure resulted in the inability of the State to carry out allegations and obtain the necessary evidence and testimony or unable to carry out the necessary legal steps. Inability is briefly described in Article 17(3) of the Rome Statute³³.

2. The Interpretation

Since the Rome Statute was established, complementarity has been recognized as an ICC principle to a country's jurisdiction. Accordingly, the practice of applying complementarity by the National Court to the jurisdiction of the ICC is known as reversed complementarity. This section will discuss whether the complementarity set out in the Rome Statute can be applied in reverse under international criminal law.

²⁶ Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court, A Commentary* (Gottingen: C.H. Beck, 2016) 13.

²⁷ Klamburg, *Commentary on the Law of the International Criminal Court* 5.

²⁸ Holmes, dalam *Ibid.*, 216.

²⁹ *Ibid.*, 217.

³⁰ Diajeng Wulan Christianti, *Hukum Pidana Internasional* (Jakarta Timur: Sinar Grafika, 2021) 199–200.

³¹ Schabas, *An Introduction to the International Criminal Court, Fourth Edition* 193–194.

³² Article 17(2)(a) of the Rome Statute stated that, "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) *The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;*

(b) *There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*

(c) *The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."*

³³ Article 17(3) Rome Statute stated that, "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

The analysis will be conducted using various legal interpretation methods³⁴, recognized by international law³⁵.

a. Understanding the History of the Complementarity

Based on historical research, the emergence of complementary cannot be separated from the idea of establishing a criminal court that has international jurisdiction³⁶. This concept is also closely related to the jurisdiction of national courts based on a country's recognition of its sovereignty.

Following World War I, the prosecution and conviction of those responsible for war crimes by the Allied Tribunal, as outlined in the Treaties of Versailles. The supremacy of the Allied Courts over the national courts of Germany, Austria, Bulgaria, Hungary, and Turkey was challenged by these countries through their refusal to hand over suspected war criminals, which Hungary deemed "so humiliating that they could not be imposed, even on a conquered state, except by force."³⁷ In order to protect its sovereignty, Germany offered to exercise its criminal jurisdiction by prosecuting war criminals before the *Reichsgericht* (Supreme Court) in Leipzig. Other countries demanded the same treatment as a result of this practice³⁸. The Allies accepted this idea by asserting their right, according to the agreements reached, to override the decisions of national courts if the results were unsatisfactory. The concept of trying and punishing perpetrators if national courts fail is the foundation for the existence of complementarity ideas³⁹. Thus,

the shift in the principle of the Allied Court from primacy to complementary was motivated by an interest in reserve state sovereignty.

The same issue arose during the League of Nations Convention in 1937. This convention was the first official attempt after World War I to establish an international criminal tribunal. This convention proposed a complementarity system based on the principle of *aut dedere aut judicare*, emphasizing the importance of national courts. When prosecuting someone who commits an international crime, a country has three options. The first option is to have him tried in his country's courts. The second option is to extradite him to another country that is a party to the relevant convention. The final option is to submit it before an international criminal tribunal. Regardless of the decision obtained, the convention, signed by 13 countries,⁴⁰ was only ratified by one country, India. Nevertheless, this convention became a turning point in the history of the establishment of an international criminal tribunal.

During World War II, there was an increasing emphasis on establishing an international judiciary body to prosecute war criminals. The debate over establishing an exclusive judicial body evolved in tandem with the recognition of the importance of national courts. As a result, the burden-sharing between national courts and the proposed international criminal tribunal was emphasized⁴¹. Given the enormous number of cases encountered during World War II, this burden-sharing is critical, according to the London International Assembly established by the League of Nations in 1941. Furthermore, granting primary jurisdiction

³⁴ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, vols. (Leiden: Martinus Nijhoff Publishers, 2009).

³⁵ Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) 50.

³⁶ Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* 6.

³⁷ Ibid., 20.

³⁸ Mariam Jikia, "The Influence of Leipzig Trials on the Concept of Individual Criminal Responsibility," *Medeniyet Law Review* 4, no. 6 (2019): 1–18.

³⁹ Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin,*

Development and Practice (Leiden: Martinus Nijhoff Publishers, 2008), 20.

⁴⁰ Werle Gerhard and Jeßberger Florian, *Principles of International Criminal Law*, 4th Editio. (Oxford: OSAIL, 2020) 18.

⁴¹ Michael J Lyons and David J Ulbrich, *World War II: A Global History* (New York: Routledge, 2021).

to national courts fulfills a country's sovereign rights⁴².

A similar topic emerged in the International Commission for Penal Reconstruction and Development discussion, which believes that almost no country will relinquish its jurisdiction over crimes committed by its citizens. Furthermore, bringing thousands of war criminals before an international criminal tribunal is regarded as an impractical solution. However, there has been discussion about establishing an international tribunal that does not interfere with national jurisdiction and will hear cases that cannot be brought before national courts on a territorial basis⁴³.

United Nations War Crimes Commission adopted the above-mentioned discourse in 1943. This body proposed the establishment of war crimes tribunals or inter-allied tribunals to try war criminals in accordance with the Moscow Declaration of 1943, which preserved national jurisdiction by handling cases where national courts lack jurisdiction under international law or due to gaps in domestic law. This jurisdiction was granted because national courts have primary jurisdiction to try crimes committed by their citizens. However, these efforts were not successful. Following that, efforts were made to establish the Nuremberg International Military Tribunal, which would try major war criminals in accordance with the Moscow Declaration⁴⁴.

The idea of the United Nations War Crimes Commission was adopted by the International Military Tribunal, which was established at the end of World War II. However, the International Military Tribunal was set up to try only major war criminals, while most of the prosecution

task was left to national criminal jurisdictions by implementing Law No. 10 concerning "Punishment of Persons Guilty of War Crimes, Crimes against Peace, Crimes against Humanity." It reflects the principle of the primacy, or supremacy of international law over national law, with respect to prosecuting major war criminals for core crimes. As a result, the International Military Tribunal tried only 22 defendants, 19 of whom were found guilty and three were acquitted.

Following World war II, complementarity was discussed not only in the discourse on the establishment of an international criminal tribunal but also became the subject of discussion in the Genocide Convention, particularly in the discussion of Article 4, which states that,

"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

The drafters of the genocide convention have seen the possibility of an international court with jurisdiction over genocide offenses recognized by the State parties. The 1948 Genocide Convention prompted the United Nations General Assembly to pass resolution 260 (III) B regarding establishing an international judiciary to try certain crimes under international law. The International Law Commission debated this issue from 1950 to 1994. In addition, the International Law Commission sparked the idea of international courts having exclusive jurisdiction in 1951 when national courts were not allowed to deal with certain international crimes after an international tribunal was established. This concept is based on the assumption that if all crimes were naturally political, no State would be willing to have its officials tried by its courts. This idea refers to the

⁴² Koskimies, *Norm Contestation, Sovereignty and (Ir)Responsibility at the International Criminal Court*, 47–77.

⁴³ Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*.

⁴⁴ Norman K. Swazo et al., *The Rohingya Crisis* (London and New York: Routledge, 2017), 21–22, <https://doi.org/10.1111/1467-8322.12389>.

unsatisfactory experience of the courts in Leipzig and other post-Leipzig national courts. Therefore, international crimes “in any case” must be tried by international courts. This idea was controversial in discussing the 1954 Draft Code of Offences against the Peace & Security of Mankind. This conflict is based on customary international law, including the custom of war, which obliges states to punish perpetrators of crimes. The jurisdiction of the national courts cannot be revoked in any case. Therefore, it is feared that the establishment of an ICC will affect the sovereign power of the State. The proposal of the Committee on International Criminal Jurisdiction reflects this concern. The UN General Assembly-appointed committee proposed the establishment of an international criminal tribunal with very limited powers, based on a system that respects state sovereignty.

Thus, based on historical research, it is clear that the complementarity of the ICC emerged as a mechanism that reconciles the concept of national and international courts’ jurisdiction. This principle recognizes the sovereignty of the State as well as seeks to prevent impunity, based on the experience of world wars.

b. Binding ICC Only

The Rome Statute is a treaty that serves as the foundation for the ICC. Therefore, the use of treaty interpretation methods in the 1969 Vienna Convention is under Article 5 of the 1969 Vienna Convention, which states that the 1969 Vienna Convention also applies to international treaties that form the basis of an international organization. Furthermore, Article 34 of the 1969 Vienna Convention states that international treaties do not create rights and obligations for third countries without their consent. Therefore, this section will examine the Rome Statute parties’ rights and obligations, particularly concerning complementarity.

The rights and obligations of the parties in the Rome Statute will be

analyzed using the method of textual interpretation. The method of textual interpretation, or the grammatical method, is a method of legal interpretation that recognizes the text of the agreement as an authentic expression of the parties’ intentions⁴⁵. Concerning this research, Argentina and Bangladesh are parties to the Rome Statute. Myanmar is one of the 42 countries that have not signed the Rome Statute. In addition to binding the parties under Article 34 of the 1969 Vienna Convention, the Rome Statute also binds the ICC. It is in accordance with Article 1 of the Rome Statute, which states that “... The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”

Paragraph 10 of the Preamble to the Rome Statute states, “Emphasizing that the ICC established under this Statute shall be complementary to national criminal jurisdictions.” The legality of complementarity is founded on this paragraph. Textually, this paragraph states that the ICC complements national criminal jurisdiction. The ICC is the party referred to in this paragraph and the subject of this provision. Thus, the textual interpretation of the paragraph’s provisions indicates that the complementarity cannot be reversed for application by national criminal jurisdictions.

Article 1 of the Rome Statute confirms the provisions of Paragraph 10 of the Preamble. Regarding complementarity provisions, this article states, “An ICC (“the Court”) is hereby established. It ... shall be complementary to national criminal jurisdictions.” Textually, this article is a perfect repetition of Paragraph 10 of the Preamble. The repetition of this article further confirms the textual interpretation of Paragraph 10 of the Preamble, which states that the article’s subject is clear, namely the ICC so that it cannot be

⁴⁵ Waldock in Maarten Bos, “Theory and Practice of Treaty Interpretation” *Netherlands International Law Review*. 27.2 (1980): 135–170.

reversed to be applied by national criminal jurisdictions.

The provision of article 1, however, is not solely intended to address the issue of jurisdiction between international and national courts. Moreover, it is not meant to answer the issue of concurrent trials before two courts. It can be seen from the intent of this principle, which, among others, is to ensure that there is no safe haven for perpetrators of human rights violations by encouraging national courts to try cases of international crimes.

Complementarity in Article 17 of the Rome Statute, which regulates the issue of admissibility, is emphasized in the opening of the first paragraph, which states, "Having regard to paragraph 10 of the Preamble and article 1, ..." Although Article 1 of the Rome Statute does not only mention the principle of complementarity, the provisions of paragraph 10 of the Rome Statute fully state the complementarity. Thus, the opening phrase of the first paragraph of the Rome Statute explicitly shows the relationship between Article 17(1) and Complementarity.

Article 17(1) continues, "... the Court shall determine that a case is inadmissible where..." The subject of the provisions of this article is the Court. According to Article 1, the Court's terminology in the Rome Statute specifically refers to the ICC. This specific use of terminology indicates that the provisions of Article 17 of the Rome Statute are not universally applicable and cannot be applied automatically to other courts, both under national and international jurisdiction. By considering the four provisions of Article 17(1), the ICC becomes the specific subject that determines whether a case is admissible.

c. Exercising the Criminal Jurisdiction is the Duty of the State

Apart from the textual setting of the Rome Statute on complementarity, the contextual/systematic interpretation shows that exercising criminal jurisdiction is the duty of every State. The

contextual/systematic interpretation method is an interpretation method that interprets the text of an agreement in the closest context with a broader meaning⁴⁶. This interpretation is used to strengthen the interpretation obtained from the results of textual interpretation. In order to answer the question that the complementarity regulated in the Rome Statute can be applied in reverse, contextual interpretation will be carried out by considering the context in general, especially by considering the Preamble to the Rome Statute under the provisions of Article 31 paragraph (3) of the 1969 Vienna Convention.

Complementarity governs the relationship between the jurisdiction of the ICC and other courts. Paragraph 10 of the opening section contains the core of complementarity, which states that the ICC was established to complement national criminal jurisdictions. In this regard, Paragraph 6 of the opening section states, "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." on the State. Accordingly, states must prosecute perpetrators of international crimes. It is also emphasized in Paragraph 4 of the opening section, which states that "...their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation to ensure effective prosecution of the most serious offenders.

The State plays a central role in taking effective steps to carry out prosecutions to enforce its criminal jurisdiction under international law. This central role of the State is granted not only as a form of recognition of state jurisdiction but also because the State has the best access to evidence, witnesses, and the resources to carry out prosecutions. Moreover, this prosecution is not only voluntary but also compulsory. As a result, the State takes the

⁴⁶ Viilliger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 422.

lead in prosecuting perpetrators of international crimes. On the other hand, the ICC serves a complementary role by prosecuting perpetrators of international crimes under certain conditions. These conditions are elaborated on in Article 17.

d. Serving the Object and Purposes of the Rome Statute

The making of the Rome Statute cannot be separated from particular objects and purposes. Therefore, an in-depth study of the object and purpose of the agreement is carried out using the teleological interpretation method. The opening section is an integral part of the Rome Statute and needs to be considered in the interpretation of the articles and provisions of the Rome Statute. Therefore, paragraphs 4, 5, and 6 will be interpreted to supplement the textual interpretation of the object and purposes of the complementarity.

National measures and international cooperation support achieving the objectives stated in the fourth paragraph: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished...". This purpose is reaffirmed in paragraph 5 by stating that "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." Thus, the ICC was established with two goals in mind: first, to end impunity for perpetrators of international crimes, and second, to prevent international crimes. These two goals include two legal functions: the enforcement function and the related prevention function. Effective prosecution also serves a preventive function by raising awareness and demonstrating to potential perpetrators that perpetrators of international crimes do not enjoy impunity.

Both the enforcement and prevention function of international crimes, as referred to in paragraph 5 of the Preamble of the Rome Statute, is not solely the responsibility of the ICC. This responsibility

is even the responsibility of the State, according to the provisions of Paragraph 6 of the Statute's Preamble. The ICC was not intended to take over the role of the State or to compete with state jurisdiction. On the contrary, ICC was established as a complementary which will directly intervene to prosecute a perpetrator of crimes under the jurisdiction of the ICC only if national jurisdiction has failed to ensure that the most serious international crimes are not left unpunished. In this way, international criminal law puts an end to impunity.

Complementarity, therefore, serves as a mechanism to encourage and facilitate States in carrying out their obligation to investigate and prosecute international crimes. If states fail, the ICC will step in to deliver justice, demonstrating the international community's determination to end impunity. It is hoped that the ICC's actions will encourage countries to pursue prosecutions in the future.

According to the ICC's Prosecutor, Luis Moreno Ocampo, the success of the ICC cannot be measured by the number of cases investigated. If states have been proven capable and willing to carry out their functions in prosecuting international crimes, then this shows success even though there is no trial before the ICC.

C. THE REVERSED IMPLEMENTATION OF THE ICC PRINCIPLE OF COMPLEMENTARITY IN ARGENTINA FOR ROHINGYA

Accepting the situation in Bangladesh/Myanmar before the ICC, according to the Argentine Lower Court, means activating the ICC's jurisdiction. The Argentine Lower Court considers that based on complementarity, the jurisdiction of the ICC replaces other criminal prosecution interventions. This assumption led the Argentine Lower Court to decide that the case could not be continued.

Argentine Appeal Court has a different view about complementarity. The Argentine Appeal Court regards complementarity as the principle used by

the ICC to exercise its jurisdiction. Moreover, this principle serves as the foundation for the ICC's admissibility. As a result, Argentina's Appeal Court believes that Argentina has the right to proceed with the investigation under the principle of universal jurisdiction.

This section examines the reversed implementation of ICC's complementarity by the Argentine Court in the international crime against Rohingya under international law. The term reversed complementarity describes the view of the Argentine Lower Court, which argues that the ICC's jurisdiction replaces other criminal prosecution interventions under complementarity.

1. Universal Jurisdiction of The Argentine Court

Argentine Court prosecutes cases of international crimes against the Rohingya under universal jurisdiction. The principle of universal jurisdiction is a principle that grants a country jurisdiction over certain crimes without requiring a territorial, national, or national security connection, as is usually required. This jurisdiction allows a state to prosecute someone regardless of where the crime occurred or the nationality of both the victim and the perpetrator.⁴⁷

Based on the 2021 Trial Universal Report, universal jurisdiction is implemented in at least 17 countries to prosecute serious crimes. Torture, genocide, crimes against humanity, and war crimes were all tried in the seventeen courts. At least 11 genocide cases are being tried under this principle, including the case of the Rohingya in Myanmar⁴⁸.

The application of universal jurisdiction in Argentina is regulated under Article 118

of Argentina's Constitution⁴⁹. Furthermore, in order to fulfill international obligations under human rights treaties, Argentina has conducted several investigations based on the principle of universal jurisdiction. This section will further describe the basis of Argentina's national law regarding the implementation of universal jurisdiction and the implementation of universal jurisdiction in Argentine courts.

Furthermore, it is stated in Article 5 of Law 26200 of 13 December 2006 on the implementation of the Rome Statute that "*La competencia por la comisión de los delitos previstos en el Estatuto de Roma y en la presente ley corresponden a los Tribunales Federales con competencia en lo penal*" ("The jurisdiction for the commission of the crimes specified in the Rome Statute and this law corresponds to the Federal Courts with criminal jurisdiction"). Thus, the Argentine Federal courts have jurisdiction to try crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.

Generally, Argentine Constitution recognizes the exercise of universal jurisdiction to fulfill international obligations under human rights treaties. In particular, Article 118 of the Argentine Constitution and the Argentine Law 26200/2006 not only state that the Argentine legal system recognizes the principle of universal jurisdiction for the prosecution of international crimes but also certifies its competence to prosecute cases committed by foreigners, against foreigners, and/or occurs in foreign territory⁵⁰.

Several precedents have demonstrated Argentina's competency in applying universal jurisdiction. Some

⁴⁷ Britta Lisa Krings, "Principles of Complementarity and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match" *GOettingen Journal of International Law*. 4.3 (2012): 737–763.

⁴⁸ See Trial International, *Universal Jurisdiction Annual Review 2021* (Switzerland: Trial International, 2021) 89–95.

⁴⁹ See *Constitution of the Argentine Nation*, 1994, bag. 118. Lihat juga "The Scope and Application of the Principle of Universal Jurisdiction in Argentina", <https://www.un.org/en/ga/sixth/73/universal_jurisdiction/argentina_e.pdf> (accessed 28 January 2022).

⁵⁰ Aitor Martínez Jiménez and Manuel Miguel Vergara Céspedes, *La Jurisdicción Universal Como Instrumento Para La Protección* (Copenhagen: IWGIA & FIBGAR, 2015) 56–57.

well-known cases to be mentioned are the case of genocide and crimes against humanity against the Falun Gong in China⁵¹ and the civil war crimes of the Franco regime⁵².

2. The Implementation of Complementarity in the Argentine Court

a. Reversed Complementarity

Legal remedy in the Argentine Court for the case of Rohingya began on 13 November 2019. Bearing in mind Argentina's ability and willingness to exercise Universal jurisdiction, Burma Rohingya Organization UK (BROUK) filled out the application there. Before the registered application, an investigation into a similar case had been ongoing at the ICC since 4 July 2019⁵³ and had been accepted on 14 November 2019.⁵⁴

There had been no domestic prosecution when the ICC began its investigation. In considering admissibility in this case, the ICC considered the complementarity according to the provisions of Article 17 paragraph (1)(a)-(b) of the Rome Statute. There is no indication of a violation of complementarity in this case based on the information available prior to the issuance of the Authorization Decision. It is indicated by the absence of objections received by the ICC. Reverse complementarity, which happens when the

national Court consciously investigates a case after receiving authorization from the ICC, is the complementarity issue that became the basis for rejecting the lower court's case. It could happen because The Argentine Court is aware of the circumstance and its responsibilities as a signatory to the Rome Statute.

b. The Precondition of Complementarity

There are two preconditions for applying complementarity in accordance with article 17 of the Rome Statute. The first requirement is that there is no national investigation or prosecution conducted. The second requirement is the inadmissibility requirement which consists of unwilling and unable.

The first precondition is stated in the first part of Article 17(1)(a) of the Rome Statute, namely, "The case is being investigated or prosecuted by a State which has jurisdiction over it,..." The Argentine Court, both lower and appeal, are the representation of a country's national courts recognized by the Rome statute. Argentina is also a party to the Rome Statute, which is bound by the provisions of the Rome Statute. In the Rohingya Case, the Argentine Court recognized the principle of universal jurisdiction in its Constitution, legislation, and practice. Thus, it is clear that Argentina is "... a State which has jurisdiction over it ..." as referred to by the provisions of Article 17(1)(a) of the Rome Statute.

The second precondition is willingness and ability. The unwillingness requirement is spelled out in Article 17(2) of the Rome Statute, appearing in 3 ways. The first is the existence of legal measures taken to protect a person from criminal responsibility for crimes within the ICC's jurisdiction under Article 5 of the Rome Statute. Second, there is an unjustifiable delay in the legal steps taken, which shows inconsistency with the original intention. Third, the existing legal process is not carried out independently and impartially

⁵¹ See Davis Ownby, "The Falun Gong: A New Religious Movement in Post-Mao China" in *Controversial New Religions*. Ed. James R Lewis and Jesper Aagaard Petersen, vols. (New York: Oxford University Press, 2005), 195–214.

⁵² The in-depth analysis on this case can be read on Máximo Langer dan Mackenzie Eason, "The quiet expansion of universal jurisdiction," *European Journal of International Law* 30, no. 3, (2019): 779–817.

⁵³ Lihat International Criminal Court, *Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 4 July 2019, vols., 2019.

⁵⁴ Md Rizwanul Islam dan Naimul Muquim, "The Gambia V. Myanmar at the I.C.J.: Good Samaritans Testing State Responsibility for Atrocities on the Rohingya," *California Western International Law Journal* 51, no. 1, (2020): 77–131. The update on this case can be followed on ICC's official website, <https://www.icc-cpi.int/bangladesh-myanmar>.

and is carried out inconsistently with the main intention.

All of the unwillingness preconditions specified in Article 17(2) of the Rome Statute are not present in the Argentine Court, especially during the investigation of the Rohingya Case. The Argentine Court's case investigation was not conducted to absolve a person of criminal responsibility. There were no unjustified delays in the legal steps taken by the Argentine Court. Previous practices demonstrate the independence of Argentine courts in adjudicating cases based on universal jurisdiction.

Article 17(3) of the Rome Statute sets out the provision for inability caused by "... a total or substantial collapse or unavailability of its national judicial system ...". This condition results in the inability of the State to prosecute, obtain evidence, and witnesses and to take the necessary legal measures. However, the failure, in whole or in part, or even the absence of a national legal system, was not found in the Argentine Court's application of universal jurisdiction.

Despite the question of the ICC's jurisdiction and competing jurisdiction, the justification above demonstrates that the Courts of Argentina demonstrated sufficient capacity and willingness to investigate international crime cases against the Rohingya. The Argentine Appeal Court decision, which overturned the previous Court's decision, is clear evidence of their willingness. Furthermore, Argentina's experience with implementing universal jurisdiction, including cases involving Falun Gong and the Franco Regime, demonstrates the competence of Argentine courts in dealing with international crimes cases out of their jurisdiction.

c. Complementarity under Universal Jurisdiction

The complementarity recognized in the Rome Statute aims to regulate the relationship between two jurisdictions at

different levels⁵⁵, namely the jurisdiction of national courts and the jurisdiction of ICCs.

Universal jurisdiction, despite the debate on its potential violation of state sovereignty, has been recognized and practiced by countries long before the ICC existed. This jurisdiction does not recognize conflicts between national and international courts, which only arose as a result of the plan to establish an ICC. As a result, the complementarity as applied by the ICC is not recognized by universal jurisdiction. Universal jurisdiction, on the other hand, cannot be separated from jurisdictional conflicts⁵⁶, that is, conflicts between more than one national court jurisdiction at the same level. The complementarity recognized in universal jurisdiction is the horizontal complementarity known as the subsidiary principle, which governs relationships between national courts which are equal.

Horizontal complementarity is a recognized principle in international law that serves as one of the criteria for applying universal jurisdiction. Horizontal complementary roles are crucial because universal jurisdiction, as a means of combating impunity in a country's national laws and maintaining order, does not instantly applicable⁵⁷. A horizontal complementary mechanism plays a role on two sides simultaneously. On the one hand, this principle protects a country's sovereignty by limiting other countries' interference. On the other hand, this principle prevents impunity by providing opportunities for other countries to prosecute crimes that are considered serious⁵⁸.

⁵⁵ Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* 4–5.

⁵⁶ Morten Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 133.

⁵⁷ Diajeng Wulan Christianti, *Hukum Pidana Internasional* 125.

⁵⁸ Laura Burens, "Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International

In contrast to the complementarity in the Rome Statute, which governs the vertical relationship between the jurisdiction of its member states and the ICC, horizontal complementarity refers to a situation when several states claim jurisdiction to prosecute international crimes. In such cases, stronger links to crime and the ability and willingness to investigate and prosecute will be considered in the application of jurisdiction. The subsidiary principle, like the complementarity under the Rome Statute, is recognized as a mechanism that complements – not replaces – the jurisdiction of the states with the closest relationship to the crime under consideration.⁵⁹ This principle, however, has not been universally recognized or defined yet⁶⁰.

d. The Implementation of Complementarity in the Argentine Court

The application of reversed complementarity by the Argentine Lower Court in the international crimes against Rohingya Case is an intriguing matter⁶¹. The reason is that the Argentine Lower Court bases its argument on the investigations authorized by the ICC, which refers to the ICC's complementarity. The decision was overturned by an Appeal Court⁶², stating that Argentina had the right to continue the investigation under the principle of universal jurisdiction.

No provision in the Rome Statute states that the Rome Statute's State Party cannot accept a case that has been investigated, either by the International Court of Justice in general or by the ICC in particular. John T. Holmes firmly concludes this provision by stating that

*"... if States fulfil their obligations under international law by exercising effective jurisdiction over the crimes set out in the Rome Statute, then the Court, recognizing the primacy of national jurisdictions explicitly provided for in the Statute, will not be seized of any cases"*⁶³

Thus, a State's jurisdiction in investigating or prosecuting a case will not be hampered by the ICC's investigation or trial process unless there is evidence of unwillingness and inability, as stated in Article 17 of the Rome Statute.

The above-mentioned conclusion is supported by the purposes and objectives of adopting complementarity in the Rome Statute, which is to end impunity for perpetrators of international crimes and to prevent international crimes. The ICC cannot end impunity on its own. The Rome Statute reminds states of their obligation to enforce their criminal jurisdiction in this regard. Criminal jurisdiction, as defined by international law, is related to extraterritoriality as well as territorial jurisdiction.

The Constitution and Law of Argentina, for the sake of the international case against Rohingya, recognize universal jurisdiction. This acknowledgment is a declaration of Argentina's competence to hear cases committed by foreigners, against foreigners, and/or occurring in foreign territories⁶⁴. Argentina's recognition of Universal Jurisdiction can also be seen in its judicial practice, which includes cases of genocide and crimes against humanity

Criminal Court" *Criminal Law Forum*. 27.1 (2016): 75–97.

⁵⁹ Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* 179.

⁶⁰ Burens, "Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International Criminal Court."

⁶¹ Cámara Federal Penal de Cap. Fed., *Nn S/Tortura, Desaparición Forzada De Persona (Art.142 Ter), Abuso Sexual - Art. 119 1° Parrafo y Homicidio Simple Denunciante: Burmese Rohingya Organisation UK*.

⁶² Cámara Criminal Y Correccional Federal - Sala I, *Dte.: Burmese Rohingya Organisation s/ legajo de apelación*, Nro. CFP 8419/2019/7/CA2, rta. 26 Noviembre de 2021.

⁶³ Holmes, "Complementarity: National Courts versus the ICC."

⁶⁴ Jiménez and Céspedes, *La Jurisdicción Universal Como Instrumento Para La Protección* 56–57.

committed against the Falun Gong in China, as well as crimes committed against the Franco regime. These practices are not without difficulties. Following objections from the Chinese Embassy in Argentina⁶⁵, the Falun Gong investigation was temporarily closed before being reopened after two appeals processes⁶⁶. Meanwhile, another case, namely the case of the Franco Regime, succeeded in prompting the investigation of a similar case in Spain, despite the strong opposition from the Spanish authorities⁶⁷.

As a result, it can be concluded that the ICC's complementarity is not the appropriate standard for national courts in accepting or rejecting a case, particularly for the case of international crimes against Rohingya. Moreover, apart from the lack of provisions to apply complementarity to national courts in their relation to international courts, the implementation of complementarity by national courts also injures the national jurisdiction of a country in enforcing its criminal jurisdiction, which will have an impact on the country's efforts to fight against impunity. In particular, in the international crime against Rohingya case, the principle of universal jurisdiction can be applied by the Argentine Court as this principle has been recognized and practiced in Argentina to combat impunity. Moreover, there was no indication of unwillingness or unable to be found in the Argentine Court.

E. CONCLUSION

The argument of Argentina's Lower Court that basing their decline on the international crimes against the Rohingya Case on the complementarity is the

implementation of reversed complementarity. This application was overturned by the Argentine Appeal Court in the next two years, stating that Argentina had the right to continue investigations based on the acceptance of the universal jurisdiction principle. According to the analysis, the application of reversed complementarity is contrary to international law. In particular, in the case of international crimes against Rohingya prosecuted before the Argentine Court, the principle of complementarity cannot impede the Argentine Court from investigating international crimes in Myanmar.

The interpretation of the Rome Statutes regarding complementarity confirms that complementarity is the basic principle of the jurisdiction of the ICC. This principle is binding on the ICC and, in accordance with Paragraph 10 of the Preamble and Article 1 of the Rome Statute, this principle does not apply in reverse. The application of complementarity in relation to the issue of admissibility demonstrates that the ICC is a party that is obliged to conduct an admissions test and cannot continue the investigation of a case that the National Court has investigated unless the country indicates unwillingness or inability to try the case. No provision in the Rome Statute confirms that this applies otherwise, so it can be concluded that the complementarity is not binding on the State's parties to the Rome Statute.

The ICC's role as a complement to national jurisdiction is derived from the object and purpose of the Rome Statute, as stated in paragraph 5 of the Preamble, which is to end impunity for perpetrators of international crimes and to prevent international crimes. Moreover, the contextual interpretation of paragraph 6 of the Rome Statute's Preamble reveals that states must enforce criminal jurisdiction. As a result, pursuant to paragraph 4 of the Rome Statute's Preamble, international crimes must be prosecuted at the national

⁶⁵ Arduino, "Espiritualidad Y Bienestar Psicofísico. El Movimiento Falun Dafa En La Argentina."

⁶⁶ "Argentina's Criminal High Court Rules to Reopen Trial Against Jiang Zemin and Luo Gan," n.d., online, Internet, 2 Jun. 2022. , Available: <https://en.minghui.org/html/articles/2013/6/3/140287.html>.

⁶⁷ Garcia, "Overview of the Argentine Lawsuit against the Crimes of the Franco Regime: Outcomes and Challenges."

level while also enhancing international cooperation. The principle of complementarity, therefore, serves as a mechanism that encourages and facilitates States in undertaking their obligations to investigate and prosecute international crimes. Based on this function, it is reasonable to conclude that the principle of complementarity is not intended to limit the enforcement of a country's jurisdiction.

The enforcement of criminal jurisdiction at the national level constructs the ICC's complementarity. Complementarity is one of the keys to successfully accepting the Rome Statute, thus significant to establishing the ICC. According to historical research, the issue of state jurisdiction arose during the process of establishing an ICC. This issue is linked to countries' concerns about impunity for perpetrators of international crimes, particularly war crimes committed during the First and Second World Wars. Complementarity is an important principle that bridges international interests to end impunity while protecting state interests in upholding internationally recognized jurisdictions.

International law recognized both State's nexus-based and non-nexus-based jurisdiction. Universal jurisdiction is an extraterritorial and non-nexus-based jurisdiction ensured by international law. It is acknowledged as a mechanism of putting an end to impunity by recognizing that there is no safe haven for those who commit crimes that pose a serious threat to the international community as a whole. This jurisdiction does not affirm the ICC's complementarity. Therefore, applying the ICC's complementarity by the National Court under universal jurisdiction is contrary to international law.

Argentina is one country that honors universal jurisdiction in its Constitution and has implemented it on numerous precedents. This country's application of universal jurisdiction is inextricably linked to various challenges and rejections, especially from countries with close links to

crime. Argentina's intention to apply the principle of universal jurisdiction can be seen in its experience dealing with challenges and objections in previous trials, such as those involving Falun Gong and the Franco Regime. In the case of international crimes against the Rohingya, Argentina expressed no indication of unwillingness or inability to apply universal jurisdiction. Therefore, in line with the decision of the Argentine Appeal Court, it can be concluded that Argentina has the right to continue the investigation based on the principle of universal jurisdiction.

This paper is not intended to examine the jurisdiction of the ICC that has been examined before the authorization under the proper admission test. Further studies should be conducted extensively into competing jurisdiction problems that will surface following the Argentine Court's investigation of the case.

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