THE SIGNIFICANCE OF THE COMPLEMENTARITY PRINCIPLE WITHIN THE ROME STATUTE IN INTERNATIONAL CRIMINAL LAW

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Abstract

In practice, the application of the complementarity principle in the Rome Statute remains unclear, particularly with respect to the prioritization of national penal law jurisdiction. This paper will discuss the relevance of the complementarity principle to the development of a national criminal justice system and to the investigation and prosecution of the most serious crimes provided for in the Statute. It was concluded that the complementarity principle should be used to unravel the twisted development of the national criminal justice system in accordance with the provisions of international law. We need to establish our national criminal justice system as the main and foremost forum (hence, willing and able) in the process of investigating and prosecuting the most serious crimes on earth.

Keywords: *complementarity principle, international criminal law.*

Intisari

Dalam praktik, aplikasi Asas Pelengkap (*the complementarity principle*) dalam Statuta Roma masih belum jelas, khususnya terkait dengan pengutamaan (*prioritization*) yurisdiksi hukum pidana nasional. Oleh karena itu, tulisan ini akan membahas relevansi asas tersebut terhadap pembangunan sistem hukum pidana nasional dan terhadap penyelidikan dan penuntutan kejahatan paling serius yang diatur dalam Statuta. Disimpulkan bahwa Asas Pelengkap harus Mahkamah digunakan sebagai pengurai benang kusut pembangunan sistem hukum pidana nasional Indonesia sesuai dengan ketentuan hukum internasional supaya menjadi forum utama (mau dan mampu) dalam proses penyelidikan dan penuntutan kejahatan paling serius di muka bumi.

Kata Kunci: asas pelengkap, hukum pidana internasional.

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A. Introduction

The Complementarity Principle is one of the most basic principles in the Rome Statute (Statute), a basis for the establishment and after, the operational of the International Criminal Court (Court).[1] The Preamble,[2] Article 1,[3] Article 17 (1),[4] Article 18,[5] and Article 19[6] of the Statute regulates the significance of the Complementarity Principle in the conduct of the court's investigations and prosecutions for perpetrators of the most serious crimes under the scope of Court's jurisdiction. These crimes are namely: (a) war crimes; (b) crimes against humanity; (c) genocide; and (d) aggression regulated under Article 5, 6, 7, and 8 of the Statute.

The ratio behind the Complementarity Principle within the Statute is simply to maintain the balance between state sovereignty and efforts to maintain international order within the investigation and persecutions process for the perpetrators of the crimes which have led towards harm to humanity.[7] State Sovereignty is placed as the main principle within the Statute so much so that it requires States to implement three (3) main obligations,[8] namely: (a) duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;[9] (b) the obligation to strengthen the jurisdiction of national penal law for the investigation and prosecution of the crimes; and (3) the obligation to perfect the national penal system of a state until it is in accordance with the Court's substance, investigation and prosecution procedures.[10]

Even though the Complementarity Principle aims to strengthen a state's own national sovereignty, the sovereignty of a state, empirically, has become an obstacle of its own in the implementation of International Criminal Law (ICL) specifically for matters pertaining to the investigation and persecutions of perpetrators of the most serious crimes under the Court's jurisdiction.[11] The obstacles lie within the absence of an international institution which has a direct access to the protection of basic human

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1 Rome Statute, *Rome Statute of the International Criminal Court*, 17 July 1998, 37 ILM 999, entered into force from 1 Juli 2002. See a more in-depth discussion in Phillip Kirsch, "Keynote Address", *Cornell International Law*, Vol. 32, 1999, the CILJ dedicated this edition to discuss various aspects of the ICC including the basic principles applicable within the Rome Statute.

2 "Emphasizing that the International Criminal Court established under this Statute shall be Complementarity to national criminal jurisdiction", ELSAM, *Rome Statute of the International Criminal Court*, May 2000, p. 2.

3 *Ibid.*, p. 3. Article 1 stipulates that, "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be Complementarity to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."

4 Article 17 (1) regulates 4 basic scenarios in which the ICC could not admit the investigation and prosecutions of a case due to the Complementarity Principle. The Articles stipules as follows, "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court."

5 Article 18 (1) until (7) in essence regulates the obligation of the Court's Prosecutor to inform the member states and states who have jurisdiction to conduct investigation and prosecution in a month time, the concerned state can also inform the Court's Prosecutor that the State is in the process of investigating or has investigated its citizen(s)/other person(s) alleged to have breached human rights for crimes under the Court's jurisdiction.

6 Article 19 (1) until 11 regulates the challenges to the jurisdiction of the Court or the admissibility of a case, this article reflects the prioritization of national jurisdiction in investigating and prosecuting cases such as the inadmissibility to admit cases that have undergone investigation and prosecution for the concerned case.

7 Lijun Yang, "On the Principle of Complementarity in the Rome Statute of the International Criminal Court", *Chinese Journal of International Law*, Vol. 4, No. 1, 2005, p. 122.

8 Ilias Bantekas and Susan Nash, 2003, *International Criminal Law*, Ed. 3, Routledge-Cavendish, London, pp. 3-5; Steven R. Ratner and Jason S. Abrams, 2001, *Accountability for Human Rights Atrocities in International Law beyond the Nuremberg Legacy*, Ed. 2, Oxford University Press, New York, p. 10 and Timothy LH MacCormack and Gerry J Simpson (ed.), 1997, *The Law of War Crimes*: *National and International Approaches*, Kluwer, the Hague, p. 187.

9 Rome Statute, *Op.cit.*, Statute Preamble, paragraph 6.

10 Lijun Yang, *Op.cit.*, p. 123.

11 Kristen Hessler, "State Sovereignty as an Obstacle to International Criminal Law" in Larry May and Zachary Hoskins, 2010, *International Criminal Law And Philosophy*, Cambridge University Press, Cambridge, pp. 39-57.

rights (individuals) within a state[12] and the use of sovereignty to fabricate actions or legal measures, further opening up the opportunity for impunity for the perpetrators of crimes (composed of a majority of heads of state or state officials).[13]

Thus it is questioned: how does the implementation of the Complementarity Principle as enshrined in the Statute influence the behavior of states in determining their decision with respect to the implementation of an international regulation and whether or not this is in accordance with the content and purpose of the ICC.[14] This question of law becomes the basis of this article. The implementation of the Complementarity Principle of the Statute in this past, has arose various legal debates surrounding the existing legal gaps between regulations in ICL (specifically with regards to provisions within the Statute) and the corresponding regulations in national criminal law of a state (either member state, would-be member states, and non-member states).[15] The substance and procedural aspects of investigation and persecution will become the two main benchmarks in determining the relevance or significance with respect to the application of the Complementarity Principle.[16] This article will analyze in a critical and in-depth manner on the existence of this principle in its legal contexts, scope and purpose. In addition, this article will also discuss the relevancy of this Complementarity Principle towards the development of the Indonesian national criminal law in its investigation and prosecutions off the most serious crimes covered within the Statute and recognized under Indonesia's criminal law system.

B. Discussion

1. The Court's Complementarity Principle: A Dynamic Collaboration between the State Sovereignty Concept under the Westphalian and Hobbes Theory on Sovereignty in ICL

The existence of the Complementarity Principle in the Court still becomes a subject of debate amongst academics and practitioners.[17] Such debate mainly arose due to the uncertainty of its legal status: on whether or not it is indeed an accepted general principal of law and can be used a primary source of law in ICL[18] The question mainly arose due to the uncertainty in the application of the Complementarity Principle in the practice of states, especially in the prioritization of national criminal jurisdiction.[19] However, many circles and state belief's such as China regards this Principle as the most important guiding principle in the implementation of the Rome Statute for investigating and prosecuting the perpetrators of the most serious crimes at

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12 Hannah Arendt, 1958, *The Origins of Totalitarianism*, World Publishing Company, New York, p. 297; and Onora O'Neil, "Agents of Justice", *Methaphilosophy*, Vol. 32, 2001, p. 198.

13 *Ibid.*, p. 50; Ellen Lutz and Caitlin Reiger, 2009, *Prosecuting Heads of States*, Cambridge University Press, New York, pp. 2-4; and Kristen Hessler, "Resolving Interpretative Conflicts in International Human Rights Law", *Journal of Political Philosophy*, Vol. 13, 2005, pp. 46-47; M. C. Bassiouni (ed.), 1986, *International Criminal Law*: *Crimes*, Vol. I, Transnational Publishers, New York, pp. 147-148; and Jordan J. Paust, *et al*., 1996, *International Criminal Law Cases and Materials*, Caroline Academic Press, Durham, pp. 10-11;

14 Markus Burgstaller, 2005, *Theories of Compliance with International Law*, Martinus Nijhoff Publisher, Leiden, p. 85; and Andrew Guzman, 2008, *How International Law Works, A Rational Choice Theory*, Oxford University Press, Oxford/New York, p. 22.

15 Jann K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", *Journal of International Criminal Justice*, Vol. 1, 2003, pp. 88-89; and K.L. Doherty and Timothy L.H. McCormack, "Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *U.C Davis Journal of International Law and Policy*, Vol. 5, 1999, pp. 147-180.

16 Lyal Sunga, 2002, *The Emerging Norm of International Criminal Law*, Kluwer Law, pp. 10-21.

17 Sabthai Rossane, "Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute", *Virginia Journal of International Law*, Vol. 41, 2000, pp. 164-185 and M. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court", *Military Law Review*, Vol. 167, 2000, pp. 20-70.

18 J.T. Holmes, "Complementarity: National Court versus the ICC", in Antonio Cassesse, Paula Gaeta and J. Jones (ed.), 2002, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, pp. 667-686 and Ruth B. Phillips, "The International Criminal Court Statute: Jurisdiction and Admissibility", *Criminal Law Forum*, Vol. 10, 1999, p. 79.

19 Kleffner, *Op.cit.*, p. 90 and Article 38 ICJ Statute: "The Court whose functions is to decide cases shall use, i.e. international conventions, international customary Law, general principles of law practice by Nations [...]". See more in Bantekas and Nash, *Op.cit.*, pp. 5-6.

the time the Rome Statute was formulated.[20] In its application, Broomhall and Kleffner had also argued that the Complementarity Principle is the gap filler between the two systems law, international law and national criminal law. The "gap-filling" function could be found through the preferentiality in the national enforcement system which accords itself or complies with the standard in ICL and basic human rights.[21]

The Court's Complementarity Principle substantively meets the six legal criterias as basic principle in ICL, proven as follows: (1) The principle is a part of international law as it has been practiced in international law from 1919 until presently in the process of investigations and prosecutions of the most serious crimes through the practice of states and international community;[22] (2) Its status as an independent principle, seen through embodiment of this principle within the basic principles in *ad-hoc* and permanent courts in prosecuting the perpetrators of crimes, enshrined within the London Agreement,[23] Tokyo Charter,[24] Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY),[25] and Statute of the International Criminal Tribunal for Rwanda (ICTR);[26] (3) The Complementarity Principle assists judges in finding the original application of the particular law in the process of prosecution through Article 18 and 19 of the Rome Statute; (4) Its existence is important for the corresponding system of law, such is proven through the placement of the Principle within the Preamble of the Rome Statute;[27] (5) The philosophical aspect of the principle gives preferential treatment to the national jurisdiction of a state due to its sovereignty. This affects the effectiveness of the law enforcement. Moreover, this principle also provides incentives for the development of the national penal system to be in accordance to the ICL standard applicable in the international community so as to maintain international order from harm to humanity;[28] and (6) the Complementarity Principle has become a *reservoir* for finding provisions which relates to the prioritization of national jurisdiction for investigating and prosecuting the perpetrators of the most crimes (relates to the referral and deferrals of the UN Security Council) in accordance with Article 18 and 19 of the Statute.[29]

It can be concluded that the Court's Complementarity Principle is a general principle by the definition set out under Article 38 of the ICJ Statute,[30] where the status as a general principle of law had derived from its international

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[20] See statement from H.E. Wang Guangnya, Head of the Chinese Delegation to the Rome Conference, Vice-Minister of the Foreign Affairs of China. He said, "As the most important guiding principle of the Statute for the International Criminal Court, the principle of complementarity should be fully reflected in all substantive provisions of the statute. The ICC should also carry out its future work in strict accordance within this principle. The court can exercise it jurisdiction only with the consent of the countries concerned and should refrain from exercising such jurisdiction when a case is already being investigated, prosecuted or tried by a relevant country". In Lijun Yang, *Op.cit.*, p. 130.

[21] Kleffner, *Op.cit*, pp. 112-113 and B. Broomhall, "The International Criminal Court: A Checklist for National Implementation" dalam M.C. Bassiouni and Broomhall, "ICC Ratification and National Implementing Legislation", *Nouvelles Études Pénales*, Vol. 13, 1999, pp. 67-68 and see all norms and human right mechanisms relating to the international standards for the procedural process in courts, see Human Rights Committee, General Comment 3, Article 2, para. 1, *Implementation at the national level* (Thirteenth session, 1981), *Compilation of general Comments and general Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HR1/GEN/1/Rev.1 at 4 (1994).

[22] Mohamed El Zeidy, 2008, *The Principle of Complementarity in International Criminal Law, Origins, Deleopment and Practice*, Martinus Nijhoff Publisher, Boston, pp. 5-152

[23] *The Nuremberg Charter: Charter of International Military Tribunal*, 82 UNTS 279, Vol. 82, London, 8 August 1945.

[24] *The International Military Tribunal for the Far East*, established in Tokyo, 19 January 1946, TIAS 1589 (entered in to force for USA on 26 April 1946).

[25] SC Res 827 (May 25,1993), UN Doc S/25704 (May 3, 1993), 3 ILM 1159.

[26] SC Res 955 (November 8, 1994), UN Doc S/1994/140.

[27] Timothy LH MacCormack and Sue Robertson, "Jurisdictional Aspects of the Rome Statute for the New International Criminal Court", *Melbourne University Law Review*, Vol. 23, 1999, p. 652-660; and Geoffrey Watson, "The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v Tadic", *Virginia Journal of International Law*, Vol. 36, 1997, p. 717.

[28] Lijun Yang, *Loc.cit*, and Kleffner, *Loc.cit.*

[29] Rogers S. Clark, "The Influence of the Nuremberg Trial on the Development of International Law", in G. Ginsburgs and VN Kudriavtsev (ed.), 1990, *The Nuremberg Trial and International Law,* Martinus Nijhoff, Boston, p. 260.

[30] See the general elaboration in M.C. Bassiouni's works, M.C. Bassiouni, "A Functual Approach to General Principle of International Law", *Michigan Journal of International Law*, Vol. 11, 1990, p. 768; M. C. Bassiouni, 1992, *Crimes against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, London, pp. 87-146.

practice.[31] Thus, the Complementarity Principle had become one of the main sources of international law, specifically ICL.[32] As a source of law in ICL, the Complementarity Principle can be used as a legal reference to achieve legal precision and legal recall in fulfilling the legal rights and obligations that arises. In addition, this Principle has five (5) legal functions namely: (1) to avoid the gap between *das Sollen* and *das Sein* (theory and practice); (2) reduce the possibility of legal vacuum (*legal lacunae* or *leemten in het recht*); (3) prevent the ambiguity in legal norms or bias and legal deviations (*vege normen*); (4) prevent the possibility of an overlap in the rule of laws (*legal overlap*); (5) prevent the emergence of conflict in national and international legal norms (*conflict of rules*).[33]

The significance of the Court's Complementarity Principle lies within its philosophical justification. The Principle has become the basis of international morality to prevent, prosecute, and restore a sense of justice to the international peace and security.[34] This Principle was formed as a manifestation of a collaboration of the conflict of theories between the Westphalia and Hobbes theory on sovereignty in an academic and practice context.[35] The collaboration is actually a blend of empirical evidence that the two theories on sovereignty could not apply in absolute nor stand on its own within a legal system of a state in its relations with other countries.[36]

The Westphalian theory regards sovereignty as a forerunner to the emergence of a state, such was founded upon the idea that a state is formed in a particular area or territory enabling a national authority to posses legal capacity to create, implement, and enforce the law towards persons, objects, and existing legal actions within that are or territory.[37] This theory created a number of basic principles in international law, namely the principle of non-intervention, principle of equality in state to state relations adopted in the UN Charter.[38] In contrast, the Hobbesian theory developed by Thomas Hobbes, Imanuel Kant, and Hans Kelsen regards sovereignty as a form of relative control of a sovereign state towards its citizens and to further give justification for a state to posses external powers for the creation and maintance of social order and stability to individuals or populations in the territory of a sovereign state by the international community.[39] This theory acts as a basis for the emergence of the humanitarian intervention doctrine,[40] the acceptance of grave breaches of human rights

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31 Bantekas and Nash, *Op.cit.*, p. 6 and Sunga, *Op.cit.*, p. 72 and general elaboration in Christopher L, Blakesley, "Jurisdiction, Definition of Crimes and Triggering Mechanism", *Denver Journal International Law and Policy*, Vol. 25, 1997, p. 254.

32 Bantekas and Nash, *Ibid*.

33 Ibrahim R., 2009, "Status Hukum Internasional dan Perjanjian Internasional di Dalam Hukum Nasional (Permasalahan Teori dan Praktik)", developed from a number of works from various legal experts such as the works of Leila Sadat Waxler, "Committee Report on Jurisdiction, Definition of Crimes and Complementarity", *Denver Journal International Law and Policy*, Vol. 25, 1997, p. 226; and Herman von Hebel and Darryl Robinson, "Crimes Within the Court", in Roy S. Lee (ed.), 1999, *The International Criminal Court, the Making of the Rome Statute*, Kluwer Law International, Den Haag, pp. 90-92.

34 Andrew Altman and Christopher Heath Wellman, 2009, *A Liberal Theory of International Justice*, Oxford University Press, Oxford, pp. 69, 71 and 75.

35 Allen Buchanann, "Rawl's Law of People: Rules for a Vanished Westphalian World", *Ethics*, Vol. 115, 2004, pp. 35-66; Stehpen Krasner, 1999, *Sovereignty*: *Organized Hypocrisy*, Princeton University Press, p. 20; and John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept", *American Journal of International Law*, Vol. 97, 2003, pp. 786-787.

36 Michael Reismann, "Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law*, Vol. 84, 1990, pp. 876 and 879 and developed from the opinions of Louis Henkin in Louis Henkin, 1995, *International Law*: *Politics and Values*, Martinus Nijhoff Publishers, Dordrecht, pp. 9-11.

37 The Wetphalian theory emerged in the 1648 when the Westphalian Peace Treaty between the Holy Roman Emperor and the the King of the French Kingdom which contained 128 articles which in essence recognized that the Emporer had absolute sovereignity over its territory as a concept on state sovereignity under *cujus regio ejus religio* (the religion of the rule is the religion of the territory of that ruler). See Jackson, *Op.cit.*, pp. 786-789.

38 Article 2 (1) United Nations Charter.

39 Larry May, 2005, *Crimes Against Humanity*: *A Normative Account*, Cambridge University Press, Cambridge, p. 9; Hans Kelsen, 1966, *Principles of International Law*, Ed. 2, Holt, Rinehart and Winston, New York, p. 180; Lyal Sunga, 1992, *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff Publisher, Dordrecht, pp. 140-141; See also P. Reuter, 1983, *Droit International Public*, PUF, Paris, p. 235.

40 J.L. Holzgrefe and Robert O. Keohane, 2003, *Humanitarian Intervention, Ethical, Legal and Political Dillemas*, Cambridge University Press, Cambridge.

as a form of threat to international peace and security,[41] the development of the responsibility to protect (R2P) principle,[42] and the acceptance of sovereignty as responsibility for states.[43]

Thus, the adoption and existence of the Complementarity Principal is the first empirical evidence and acts as a leeway on the notion of state sovereignty, a thought formed generally from the Westphalian and Hobbesian theory and specifically from International Criminal Law. This theory emphasizes the importance of the jurisdiction of a sovereign state as a primary forum in investigating and prosecuting the most serious crimes, and only if this primary forum is unwilling or unable to curb impunity, then international jurisdiction applies for that process (the last resort forum).[44]

2. Area, Scope, Purpose and Nature of the Court's Complementarity Principle in International Criminal Law

The Complementarity Principles covers 2 (two) legal scopes, namely: (1) its scope of substance (its material or contents); and (2) its procedural scope (the mechanism for its legal enforcement).[45] The two scopes also include three (3) major issues relating to the prioritization of national legal system in investigating and prosecuting the most serious crimes as a form of application of the Court's Complementarity Principle, namely: (1) Jurisdiction, regulated under Article 5-8, 11, 12, 13, 16, and 26 of the Statute; (2) The mechanisms in admitting the jurisdiction of a case to begin the investigation and prosecution (with regards to the admissibility of the case), regulated under Article 17-20 of the Statute; and (3). The implementation of the Court's Prosecutor discretion, regulated under Article 53 (1) (c) dan (2) (c) of the Statute.[46] These three scope are accumulative and does not apply facultative in its implementation, however many experts and practitioners usually cover the jurisdictional and admissibility aspect only without the third aspect in place.[47]

The first test is the fulfillment of the Court's jurisdiction requirements where it must abide by and be in accordance with the five (5) basic rules, namely: (1) the rule stipulated under Article 5 of the Statute;[48] (2) the crimes were committed after 1 July 2002 when the Statute has legal standing as an international law;[49] (3) the perpetrator must be above 18 years old;[50] (4) the *locus delicti* is within the territory of a member state or a state accepting the Court's jurisdiction to apply;[51] and (5) the UN Security Council had postponed the submission for the investigation and prosecution process (deferral).[52]

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41 SC Res, *Op.cit.*, and SC Res, *Op.cit.*, on the formation of ICTY and ICTR.

42 The Asia Pacific Center for R2P, *The Responsibility to Protect in Southeast Asia*, January 2009, p. 6 elaborated from the opinions of B. Cheng, "Custom: the Future of General State Practice in Divided World" dalam R. Macdonald and D. Johnston (ed.), 1983, *The Structure and Process of Internatmional Law: Essay in Legal Philosophy, Doctrine and Theory*, Martinus Nijhoff Publisher, Dordrecht, p. 513

43 Holgrefe and Keohane, *Op.cit.*, pp. 45-67.

44 Kleffner, *Op.cit.*, pp. 107-110.

45 Kleffner, *Ibid.*; and Jo Stingen, 2008, *The Relationship Between The International Criminal Court and National Jurisdiction: The Principle of Complementarity*, Martinus Nijhoff Publisher, Leiden/Boston, p. 3.

46 Stingen, *Ibid.*, pp. 3-5 and Jimmy Gurrule, "The International Criminal Court the Complementarity with National Jurisdiction", *Amicus Curiae – Journal of the Society for Advanced Legal Studies*, Vol. 33, January-February 2001, pp. 21-24.

47 Stingen, *Ibid.*, p. 5.

48 Article 5 regulates that the Court has limited jurisdiction on the most serious crimes in affecting the international community as a whole.

49 Article 11 of the Statute regulates that (a) the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute; and (b) if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.

50 Article 26 of the Statute regulates that the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

51 Article 12 of the Statute regulates the Court's jurisdiction applies in the territory of a member State for crimes under Article 5; states who accepts the jurisdiction of the Court and states who have made a declaration that they have accepted the Court's jurisdiction.

52 Article 16 Statute regulates no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Security Council under the same conditions.

After the issue of jurisdiction is completed, then the next test is with regards to the mechanisms in admitting a case to the Court, specifically in relation to national criminal law. This test differs with other issues of jurisdiction which mainly questions whether or not there is existence of jurisdiction of the Court Admissibility questions the use of jurisdiction on the Court's procedural process (exercise of jurisdiction).[53] According to Article 17 and 20 of the Statute, the issue of admissibility of the Court relates to the ability and willingness of a state to conduct investigation and prosecution towards the perpetrators of the crimes under the Court's jurisdiction in the concerned states. If the concerned state had conducted the process genuinely, then the Court could not admit the case. If the contrary occurs, then the Court automatically must admit the legal remedy submitted.[54]

The third test is the discretion of the Court's Prosecutor under Article 53 (1) (c) and Article 52 (2) (c) The Discretion of the Prosecutor relates to the legal interpretation on whether or not the process of investigating and prosecuting the crime had been in accordance with the interests of justice.[55] This discretion ensues debate as the basis for prerogative right of the Prosecutor and the consideration for such is the interest of justice alone which determines whether or not a case should be investigated and prosecuted in the Court (besides the subjective consideration for stability and reconciliation efforts–the basis of social order in a transitional society, as seen in Yugoslavia, Timor Leste and South Africa).[56]

The second scope of the Court's Complementarity Principle is the applicability of this principle to states. This Principles applies to member states and states who intend to become member of the Statute directly.[57] The basis for its enforceability is the acceptance of states (consent to be bound) as the states had received its rights and obligations from the Statute through the application of the principle in international treaty law: *pacta tertiis nec nocent nec prosunt* in accordance with Article 34 of the 1969 Vienna Convention 1969 on the Law of Treaties. According to this Article, only member states are bound to the follow the contents and purpose of the international treaty, where that treaty applies as a binding source of law to them. Non-member states is indirectly bound by the Principal as this Principal acts as an incentive towards the renewal and improvements of substantial and procedural provisions within national penal law where such is in accordance with the contents, purpose and spirit of the Rome Statute.[58] In short, the Court's Complementarity Principle applies for non-member states to create accountability in the process of investigating and prosecuting the perpetrators to crimes covered under the Statute.[59] Additionally, a non-member state can be bound by this principle through the principle's recognition as customary international law and the application of the Court's jurisdiction coverage through referrals from the UN Security Council under Article 13 of the Statute.[60]

The area of law in the Court's Complementarity Principal covers its orientation, i.e. orientation in the strengthening of its process and

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53 Stingen, *Op.cit.*, pp. 4-5.
54 *Ibid.*, p. 6; Lijun Yang, *Op.cit.*, p. 125 and Kleffner, *Op.cit.*, p. 109.
55 Stingen, *Ibid.*, p. 4.
56 Up until now, the debate on "serving the interests of justice" still becomes a frequent legal debate with relation to the ICTY *ad-hoc* court in Plavsic; ICTY Prosecutor vs. Plavsic, Sentencing Judgment, 27 February 2003, para. 79-81; see Anja Siebert-Fohr, "The Relevance of the Rome Statute of the International Criminal Court for Amnesty and Truth Commission", *Max Planck Yearbook of the United Nations Law,* Vol. 7, 2003, pp. 533-542.
57 Kleffner, *Op.cit*., p. 112.
58 Lijun Yang, *Op.cit.*, p. 126.
59 Vladimir-Djuro Degan, "On the Sources of International Criminal Law", *Chinese Journal of International Law,* Vol. 4, No.1, 2005, pp. 45-48
60 David Scheffer and Ashley Cox, "The Constitutionality of the Rome Statute of the International Criminal Court", *The Journal of Criminology and Law,* Vol. 98, No. 3, 2008, pp. 985-987.

orientation in achieving its outputs by combining the prioritization of the national penal system towards international criminal law through coordinative and concurrent measures. According to Lijun Yang, the Court's Complementarity Principal is an "encouragement and punishment" approach or a "courtesy-first, punishment second" approach.[61] Strengthening and courtesy lies in the prioritization of the national jurisdiction in conducting the investigation and prosecution first, where the sentencing is then allocated to the Court through international criminal law if the national legal system of a state is truly unwilling or unable to carry it out.[62]

What first was a scientific approach brought up to a normative level, the Court's Complementarity Principle has become a highly practical political approach, namely the "Proactive Complementarity Principle". This approach has been supported by the Court themselves, academics and practitioners.[63] The legal reasoning behind the use of this approach is mainly due to the international community's unfulfilled legal expectation for the Court after it has operated for as along as 10 years. The international community's adopts such views as the Court's obligation to investigate, prosecute perpetrators of international crimes had been hindered at times due to political barriers, lack of resources and the Court's lack of ability to bring the alleged perpetrator to the Court.[64] The "Proactive Complementarity Principle" approach bases itself on an understanding that by strengthening the legal capacity of a national legal system of a state (that accords itself with the contents, intent and purpose of the Statute) and shifts the burden of investigation and prosecution to the state's national legal system, will be the primary means for the Court to achieve its intent and purpose for its establishment and at the same time, end impunity for all crimes which has tore the sense of justice and humanity in the world.[65]

This is the approach currently campaigned by the Court to states who have not ratified the Statute or has planned to ratified to strengthen its national law and achieve universal justice.[66] This fact is well recognized by the Court's Prosecutor, Luis-Moreno Ocampo has stated that, "As a consequence of complementarity, the number of cases that reach the Court should not be a measure to its effienciency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institution, would be a major success."[67] These areas of law become the focus in strengthening legal culture, legal content, and structure of national penal law of a state to be in accordance with the content, intent, purpose and procedural process of the Rome State, both simultaneously developed side-by-side, considering also its legal and political aspects.[68] The approach of the Proactive Complementarity Principle used currently differs from the Complementarity Principle when the Rome Statute was being established, because at that time, according to the Court's *intra vires* interpretation, it was passive. Based on the interpretation from the purpose of Court's establishment in the Statute, the Principle is now active.[69]

The Court's Complementarity Principle refers to two legal views, namely: (1) complementarity Principle as a right and (2) complementarity

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61 *Ibid.*, p. 127.
62 Yang, *Loc.cit*.
63 William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Court in the Rome System of International Justice", *Harvard International Law Journal*, Vol. 49, No. 1, 2008, pp. 54-55.
64 *Ibid.*, p. 57.
65 *Ibid.*, p. 59.
66 Heribertus Jaka Triyana, "The Geopolitical Analysis Concerning Universal Acceptance and Fairness of the International Criminal Court", *Jurnal global Strategis*, Vol. 3, No. 1, January-June 2008, pp. 45-56.
67 Luis Moreno-Ocampo, Prosecutor of the ICC, "Statement Made for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court", *http://www.icc-cpi.int/library/organs/otp/030616moreno_ocampo_english_final.pdf* , retrieved on 2012.
68 Triyana, *Op.cit.*, pp. 46-47.
69 Burke-White, *Loc.cit.*

Principle as a legal obligation.[70] Both of these views leads to a debate on whether or not the Court's Complementarity Principle as a general principle of law has a *ius* cogens statuss. The concept on *ius cogens* is one of the principles applicable in the implementation of source of international law that is binding to the all individuals in the international society. The *ius cogens* norm is binding in all circumstances, both in international practice and the formulation of legal norms.[71] This principle situates itself at the top in the source of international law hierarchy thus its existence could not be reduced, removed or replaced.[72] The *ius cogens* doctrine first obtained its formal recognition within Article 53 of the 1969 Vienna Convention[73] and further strengthened in the 1986 Vienna Convention on the Law of Treaties.[74] These two Conventions defines that a *ius cogens* or peremptory norm recognized in the international community, could not be reduced and could only be altered by a basic norm possessing equally the same character or nature.[75]

At first, the concept of *ius cogens* arose in situations where multilateral or bilateral relations in international treaties and conventions had conflicted with the basic norms recognized in the international community. However, the international community then imposed the *ius cogens* norm in a much broader context.[76] The International Law Commission, international statutes and conventions has used the *ius cogens* norm as a basic norm when formulating matters pertaining to international crimes such as genocide, crimes against humanity and war crimes as regulated within the Rome Statute.[77] Thus, the Complementarity Principle is a *ius cogens* or peremptory norm applicable in ICL.

Crimes that are *ius cogens* in nature, such as the crimes under the Court's jurisdiction, raises the duty of a state to prevent and punish those perpetrators of crimes under the Court's Complementarity Principle. This obligation is binding towards subjects of international law (most especially states) enabling the application of the *obligatio erga omnes* principle.[78] In other words, if there are crimes that are *ius cogens* in nature, comes also a legal obligation for states to undertake *obligatio erga omnes*.[79] The obligation is for states to investigate, prosecute, punish or extradite the perpetrators of crime,[80] the application of no restrictions in interpreting those crimes, pemberlakuan ketidakadaan pembatasan interprestasi terhadap kejahatan-kejahatan tersebut,[81] and the applicability of universal jurisdiction in prosecuting those crimes regardless of the place and time the crime was conducted.[82] In conclusion, the *ius cogens* nature can be said to be inherent in the Court's Complementarity

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70 Kleffner, *Op.cit*., p. 115.

71 There is a wide array of works of legal experts on the discussion of *ius cogens*, among which is J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of the Treaties* (1974); CL Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976); L. Hannikainnen, *Peremptory Norms* (*Jus Cogens*) *in International Law* (1988).

72 MC. Bassiouni, "A Factual Approach to "General Principles of International Law", *Michigan Journal of International Law*, Vol. 11, 1990, p. 768, 801-809.

73 Open for signature on 23 May 1969, 1155 UNTS 331, 8 ILM 679, in force since 27 January 1980, 1969 Vienna Convention on the Law of Treaties.

74 *The 1986 Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations*, U.N. Doc. A/Conf.129/15, 1986.

75 G.M. Danilenko, 1993, *Law Making in the International Community*, Martinus Nijhoff Publisher, Dordrecht, p. 212.

76 See Draft Article on State Responsibility, Article 19, *Yearbook of International Law Commission 75*, 1976, Vol. II; JHH Weiler, Antonio Cassese, M. Spinedi (ed.), 1988, *Internastional Crimes of States A Critical Analysis of the ILC's Draft Article 19 on State Responsibility.*

77 M. C. Bassiouni, *Op.cit.*, p. 68.

78 *Ibid*.

79 Claudia Annacker, "The Legal Regime of *Erga Omnes* Obligation in International Law", *Austrian Journal of Public and International Law*, Vol. 46, 1994, p. 131.

80 See, as a whole, M.C. Bassiouni and Edward M. Wise, 1995, *Aut Dedere Aut Judicare*: *The Duty to Extradite or Prosecute in International Law,* Martinus Nijhoff, Dordrecht.

81 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, open for signatures on 26 November 1968, General Assembly Resoultion No. 2391, UNGAOR, 23 sess, Supp. Number 18, UN Doc. A/Res/2391 (1968), 754 UNTS 73, 8 ILM 68, entered in force on November 1970.

82 Kenneth Randall, "Universal Jurisdiction under International Law", *Texas Law Review*, Vol. 66, 1988, pp. 785-834.

Principle as *obligatio erga omnes* apply for international crimes to end the chain of impunity for perpetrators of those crimes in each states.[83]

However, the *ius cogens* doctrine and *erga omnes* obligation inherent within the Court's Complementarity Principle still raises different legal interpretation in its implementation, especially with regards to the rights and obligations of state in its relation to the Court. These legal questions has up until now becomes subject to a prolonged debate. These questions include, among which, is whether or the legal obligation within *obligatio erga omnes* is strictly for the recognition of certain rights and obligations or would it also include the implementation of those rights and obligations to a state.[84] For example, if an international crime which has possessed *ius cogens* status had been conducted, the question that arises is whether or not a state has the right to investigate, prosecute or extradite the perpetrators of those crimes (the passive nature of states in process of prosecution) or is that state obliged by law to prosecute or extradite the perpetrators of those crimes (the active nature of states in prosecuting the perpetrators of the alleged crimes).[85]

The answer to these two questions could be categorized in to two groups which has a jurisdictional argument of its own. **Firstly**, by possessing a *ius cogens* status and the obligation to apply *obligation erga omnes*, then a state is required by law to actively conduct investigation, prosecution or extradition for the perpetrators of those crimes. This opinion is supported by a number of legal experts, such as Bassiouni,[86] Orenlichter,[87] Scharf,[88] dan Weiner.[89] They argue that because of existence of the *ius cogens* status within the Court's Complementarity Principle, the primary consequence of this is the universal jurisdiction of those crimes, thus states must and is required to conduct investigation, prosecution or extradition of the perpetrators. This opinion is in line with the legal opinion from the International Court of Justice (ICJ) in the Barcelona Traction case,[90] where they ICJ had stated that: [91]

> An essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising vis a vis another State in the field of diplomatic protection. By their nature the former concern all State in the field of diplomatic protection; they are obligation erga omnes. Such obligations derive, for example, in contemporary international law, from outlawig of acts of aggression and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

This opinion was also considered in the formulation of the Rome Statute where the Preamble of the Statute affirmed that the most serious crimens of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[92] The

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83 See Preamble of the Statute, "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measure at the national level and by enhancing international cooperation.

84 Andrew D Mitchell, "Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v Thompson", *Melbourne University Law Review*, Vol. 24, 2000, p. 20.

85 Edoardo Greppi, "The Evolution of Individual Criminal Responsibility under International Law", *International Review of the Red Cross*, Vol. 81, No. 835, September 1999, p. 531 and see MC. Bassiouni and P. Nanda, 1973, *A Treatise on International Criminal Law*, Charles C. Thomas, Springfield.

86 M. C. Bassiouni, *Op.cit.*, pp. 19-22.

87 Diane Orenlichter, 1991, "Settlling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal*, Vol. 100, pp. 2537-2542.

88 Michael Scharf, "Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?", *Texas International Law Journal*, Vol. 31, 1996, pp. 1-4.

89 R Weiner, "Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties", *St Marry Law Journal*, 1995, pp. 857-867.

90 *Barcelona Traction, Light and Power Co. Ltd. Case* (*Spanyol v. Belgia*), 1970 ICJ Report 3, pp. 33-34, 5 February 1970.

91 *Ibid*. Cited also by Sunga, *Op.cit.*, pp. 235-236 and M.C. Bassiouni, *Op.cit.*, p. 19.

92 See Preamble of the Rome Statute.

prosecution of those crimes is the duty of all states to apply criminal jurisdiction to perpetrators of the most serious crimes.[93] Thus, every state has the obligation to actively conduct prosecution and sentencing for breaches of the three crimes under the Court's jurisdiction in accordance with "the Court's Proactive Complementarity Principle."[94]

Secondly, states have the obligation to investigate, prosecution or to conduct extradition to perpetrators of international crimes. This opinion is supported by a jurisprudence from the International Criminal Court and the practice of states. In essence, this second opinion is based on an argument that the effectiveness of the prosecution of international crime relies upon the national law of a state. Or in other words, the legal substance or material of national law, procedural enforcement of a crime and political support under the sovereignty of this second opinion. Within this context, the prosecution of crimes possessing the *ius cogens* status and *obligation erga omnes* based on the application of the Court's Complementarity Principle, individual responsibility and issue of impunity cannot be separated from the jurisdiction of the Pinochet case which strengthened the prioritization of a state's right to conduct investigation, prosecution, and/or extradition towards perpetrators of crimes.[95]

This case is a jurisprudence from the practice of states towards investigation, prosecution and/or the process of extradition of perpetrators of international crimes, namely crimes against humanity.[96] Even though this case was regarded as practice of law enforcement in England, a number of precedences could be taken in the enforcement of law towards international crimes possessing *ius cogens* status and the applicability of the *erga omnes* obligation, namely: (1) a person does not have legal immunity (impunity) toward actions or crimes against humanity that he/she has undertaken when they were acting as a agent of a state (heads of state or state officials) in their own territory in situations of peace. As a consequence of such, they must be individually responsible for their actions[97]; (2) from the House of Lords judgment, it was explicitly seen that England was willing to prosecute Pinochet. This prosecution was undergone due to the crimes that he had commited, which was *ius cogens* in nature, by applying the universal jurisdiction principle for crimes committed outside the England territory.[98] The prosecution of this crime is regarded as England's duty under the *obligation erga omnes* principle. That decision has changed the non-intervention and sovereignty dogma which has been the primary pillar of international relations. In other words, the issue of protection of individuals formed within the normative legal framework, either from conventions or international customary law, has changed that dogma.[99] The basis of this change takes into account the interests of the international community as a whole; (3) the emergence of the will of states to broaden the scope of application for the Pinochet precedence through the prosecution of perpetrators of crimes conducted in a situation of an armed conflict. The requirement of armed conflict is the primary element for provisions governing war crimes to apply. This precedence has shown that prosecution is aimed at heads of states or governments (state officials) living in

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93 *Ibid*.

94 Stingen, *Op.cit.*, p. 6

95 The term Pinochet refers to Pinochet as a General, President and Senator in Chili; see *http://www.derechos.rg/nizkor/chile/juicio/eng.html*.

96 Colin Warbrick, Elena Martin Salgado and Nicholas Goodwin, "The Pinochet Cases in the United Kingdom", *Yearbook of International Humanitarian Law*, Vol. II, 1999, p. 93; *Regina v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte* (*No. 1*), 1998, 4 All England Law Reports 897 (Lords Nicholls, Lord Steyn and Lord Hoffmann towards Lord Sylnn and Lord Lloyd).

97 Warbrick, *Ibid.*, pp. 113-115; the principle of individual responsibility in the Pinochet case is the embodiment of a precedence set in the Nuremberg Trials that has been accepted as customary international law and has been supported by General Assembly Resolutions as discussed in Chapter II, Sub-Chapter 1 of this book.

98 Judgement on Pinochet. See the legal opinions of the presiding judges, *Ibid.*

99 William Aceves, "Liberalism and International Legal Scholarship: The Pinochet Case and the Move toward a Universal System of Transnational Law Litigation", *Harvard International Law Journal*, Vol. 41, No. 1, 2000, p. 183.

exile in other states.;[100] (4) the Pinochet case also recognized that there are legal limitations in the prosecution of international crimes that are *ius cogens* in nature. **Firstly**, is the lack of positive law within a state for that international crime. **Secondly**, the weak political support from states to conduct prosecution towards those crimes.[101] For example, the limited jurisdiction over crime undertaken by Pinochet before the ear 1988 could not be prosecuted by the England courts as there was no positive law which had regulated as such. Of course, the interpretation of this conflicts with the Court's Complementarity Principle which prioritizes a state's national jurisdiction.

The Court's Complementarity Principle is a *ius cogens* norm which arises an *erga omnes* obligation towards investigation and prosecution of war crimes, crimes against humanity and genocide; because of this, states are obliged to undertake such legal measures. The sentencing for those crimes is a form of individual accountability in the criminal process aimed at the victims, national and international community, justice, legal certainty and expediency.[102] The procedural process and sentencing of those crimes relies on many influencing aspects. Aspects which slows down the legal process, such as jurisdiction issues and the chain of immunity, could be minimized through *ius cogens* and *obligation erga omnes* inherent within the Court's Complementarity Principle. The presence of the Rome Statute which had introduced the Complementarity Principles is a legal fact that needs more attention in a broader context in prosecuting and sentencing the perpetrators of the most serious crimes.[103]

The two indicator refers to the fulfillment of the accountability aspect of criminal law and also the prosecution towards the three types of crimes as aforementioned that must be undertaken by states.[104] The accountability aspect for this matter encompasses a broad scope of applicability in the area of politics, social, economics, and other areas.[105] Accountability could also be seen from its legal.[106] Accountability, from a legal perspective, towards the implementation of the Court's Complementarity Principle is the availability of a form of responsibility of a party (the perpetrator) for their actions towards the other party (the victim) within the national penal system of a state. Thus. legal accountability has to fulfill three components, namely: (1) an action that binds a number of parties; (2) the availability of norms which regulates those actions within the national penal law system, and (3) the availability of a mechanism for responsibility to monitor the execution of an act that is regulated under a normative rule in relation to the contents and procedural process in investigating and prosecuting crimes under the Court's scope of jurisdiction within the national law of a state.[107]

Thus, the principle of accountability towards the implementation of the Court's Complementarity Principle becomes a peremptory rule and also become a pre-requisite to achieve justice, legal certainty and expediency for the international community.[108] This aim could be

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100 Mary Braid, "Exiled Dictators to Face Criminal Charges for Murder and Torture", *The Independent*, 23 Juni 1999, p. 16.

101 See Axel Marschick, "The Politic of Prosecution: European National Approaches to War Crimes", in Timothy L.H. MacCormack and Gerry J Simpson (ed.), 1997, *The Law of War Crimes*: *National and International Approaches*, Kluwer, p. 73.

102 Lyal Sunga, 1992, *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff, Dordrecht, pp. 140-141.

103 Stingen, *Op.cit*., p. 6.

104 Lijun Yang, *Op.cit.*, p. 128.

105 Koenraad Van Brabant, *Accountable Humanitarian Action*: *An Overview of Recent Trends*, in ICRC, FORUM (War and Accountability), April 2002, pp. 16-17.

106 Paragraph 6 of the Statute's Preamble stipulates that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes under the scope of the Court's jurisdiction This duty must be interpreted as countries must make and create laws which regulates that it posses national jurisdiction over crimes under the scope of the Court's jurisdiction. *Op.cit.*, p. 92.

107 Pierre Perin, 2002, *Accountability*: *A Framework*, FORUM: War and Accountability, ICRC, pp. 22-23.

108 M.C. Bassiouni, 1999, "The Need for International Accountability", in M.C. Bassiouni, *International Criminal Law, Enforcement*, Ed. 2, Martinus Nijhoff Publishers, Leiden, p. 21.

achieved by eliminating legal immunities towards perpetrators of those crimes,[109] the acceptance of individual responsibility in the national and international level, and the need for re-examination of the state sovereignty doctrine towards the implementation of the Court's Complementarity Principle progressively and actively (progressive and active engagement).[110]

C. Conclusion

The Court's Complementarity Principle had evolved dynamically from a passive legal norm to an active diplomacy tool which has developed and been accepted as an obligation for a state to strengthen its national criminal law system, most especially in the implementation of ICL for the process of investigating and prosecutingthe most serious crimes on earth, namely: war crimes, crimes against humanity, genocide, and aggression. This principle has become a goal to strengthen the capacity, accountability and legitimacy of a state's national criminal law where all state are required to do so due to its peremptory nature

The breach or ignorance towards this Principle is a form of international law breach, thus states must be aware and abide by this rule to effectively implement it within the national legal system that is in line and compatible with international criminal law. In the future, the existence of this Principle will be very important in international relations. Thus states will rely on the seriousness and good faith of other states upon this matter. The Court's Complementarity Principle in ICL simply strengthens the state sovereignty and not the contrary, most especially for a state's national criminal law.

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[109] Legal immunity here means the lack of actions, either *de facto* or *de jure*, to bring the perpetrators of the most serious crimes against human rights to be held liable, both in a criminal or private law sense, in the form of administrative or disciplinary sanctions, due to the failure of perpetrators of those crimes to be investigated, prosecuted, and sentenced, "*The Administration of Justice and Human Rights Detainees: Question of the Impunity of Perpetrators of Human Rights Violations* (*Civil and Political*)", Final Report by Mr. Joinet based on Sub Commission Decision 1996/119, UN Doc.E/CN.4/Sub.2/1997/20, 26 June 1997, Annex II, para. 13-14.

[110] Stingen, *Op.cit.*, pp. 7-8.

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