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Assessing the ICC Office of the Prosecutor's new policy on complementarity and cooperation: limitations in legal rigor in integration of alternative resolution mechanisms

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This article examines the International Criminal Court (ICC) Office of the Prosecutor's new policy on cooperation and complementarity concerning Alternative Resolution Mechanisms (ARMs) within the Rome Statute framework. Although the ICC aims to address serious international crimes, its inflexible stance limits effective collaboration with ARMs like Truth and Reconciliation Commissions, which are vital for transitional justice in conflict settings. Despite the intention behind the new policy, it fails to offer a fresh perspective. The article emphasizes the necessity for inclusive cooperation that recognizes the diverse nature of justice. It argues that the test of complementarity still overlooks interactions with ARMs, often marginalizing domestic mechanisms. Ultimately, the article advocates for a constrictive legislation and institutional establishment that aligns international law with local realities to promote peace, accountability, and stability worldwide.

KEYWORDS

International Criminal Court, cooperation, complementarity, policy, alternative resolution mechanisms

1 Introduction

In September 2023, the ICC Office of the Prosecutor (OTP) released a significant document titled "Draft Policy on Complementarity and Cooperation," aimed at enhancing the Court's cooperation through a diversified approach.¹ Prosecutor Karim Khan characterized this draft as a groundbreaking effort to shift paradigms, fostering better engagement with "national authorities, civil societies, and all actors."² This initiative signals the Court's intention to move beyond its traditionally retributive perspective toward a more inclusive approach,

1 Office of the Prosecutor. (2023). Preface. In *Draft OTP Policy on Complementarity and Cooperation*. International Criminal Court. (Hereafter, Draft Policy 2023). Available online at: https://www.icc-cpi.int/sites/default/files/2023-10/DRAFT-Complementarity-and-Cooperation-Policy-Paper_September-2023%20%281%29.pdf (Accessed 2 June 2025).

2 Office of the Prosecutor. (2024). Preface. In *OTP Policy on Complementarity and Cooperation*. International Criminal Court. (Hereafter, Policy 2024). Available online at: <https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf> (Accessed 2 June 2025). [Hereafter OTP Policy on Complementarity and Cooperation (2024)].

acknowledging feedback from scholars and critics regarding the ICC's challenges in cooperation (Sarkin, 2020; Bekou, 2022; Demirdjian, 2010). Central to this document is the development of domestic jurisdictions handling international crimes using various mechanisms (Oosterveld et al., 2001), which are described as a renewed approach to complementarity.³

The ICC, as the first permanent court for international crimes, was founded with the objective of prosecuting severe offenders.⁴ However, states experiencing human rights violations often resort to non-judicial ARMs⁵ for addressing such crimes (Bassiouni, 2021). Although over 40 states have utilized Truth and Reconciliation Commissions (TRCs) to promote truth and reconciliation (Carter et al., 2016), the ICC's formal framework remains contentious in this regard (Wenqi, 2006).

The ICC relies on the state cooperation to effectively carry out its mandate, as it doesn't have international police for investigating crimes (Roach, 2005). Cooperation among states is crucial for the ICC's effectiveness, dictated by the Rome Statute, which obligates State Parties to assist in carrying out the Court's mandate.⁶ Furthermore, special arrangements with non-State Parties are also envisaged.⁷

While the Rome Statute lacks a clear legal framework for cooperation with ARMs, scholars argue for broader interpretations of Article 17 to include these mechanisms (Minow, 2019; Keller, 2007). By analyzing the characteristics of ARMs, including TRCs, they contend that these mechanisms can meet the criteria for genuine investigation and prosecution. Yet, despite ongoing debates surrounding these interpretations, the Court largely ignores ARMs in formal recognition. Moreover, it is difficult to anticipate that ARMs will function like formal justice systems. While ARMs encompass a variety of approaches, they generally emphasize principles, such as peaceful reconciliation, healing, and active victim participation. Additionally, they often maintain a more lenient stance regarding formal investigations or prosecutions.

The complementarity principle, or the inadmissibility test (Roach, 2005), fundamentally shapes the relationship between the ICC and national legal systems (Schabas, 2011). The Court only comes into attention when the domestic system is unwilling or unable to investigate and prosecute the international crimes.⁸ Hall (1998) observed the discussion in the Statute draft and found that the Court's intervention is warranted only when national jurisdictions are either unwilling or unable to effectively investigate and prosecute crimes. As Caesius (1999) points

out, national institutions are best positioned to deliver justice. Thus, the complementarity principle establishes a threshold that national judicial systems must meet to prosecute international crimes, which inherently excludes cooperation with ARMs.

This policy briefly assesses whether the new ICC policy represents a meaningful shift in addressing the challenges associated with ARMs within international criminal law. Using qualitative research methods, the brief encompasses the policy's context within the ICC legal framework and relevant literature, revealing the proposal of this policy on the integration of ARMs in international crimes. This brief proceeds by outlining the ICC's steadfast stance on ARMs prior to the new policy adoption, exploring the policy's contents, implications, actionable recommendations, and finally, concluding the finding.

2 The ICC'S enduring view on alternative resolution mechanisms

The ICC has consistently excluded the idea that non-criminal proceedings can effectively address international crimes. In situations from Burundi⁹, Afghanistan¹⁰, the Philippines¹¹, and Venezuela¹², national efforts to resolve alleged international crimes through ARMs were denied by the Court.

The review of the OTP reveals a consistent posture among its leaders regarding the role of ARMs in addressing international crimes. Ocampo, the ICC's inaugural prosecutor, articulated a clear stance on ARMs in response to Sudan's request for a deferral in favor of domestic solutions (Jalloh et al., 2011). He acknowledged that while alternative justice mechanisms are "an important part of the fabric of reconciliation," his office would not recognize these alternatives as "criminal proceedings" for purposes of case admissibility before the ICC (UNSC Report of the Secretary-General on Sudan, 2006).¹³ The AU proposed a declaration emphasizing a peaceful reconciliation to the Sudan's conflict, which the UN Security Council and the OTP

3 Office of the Prosecutor. (2024). Preface. In *OTP Policy on Complementarity and Cooperation*. International Criminal Court. (Hereafter, Policy 2024). Available online at: <https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf> (Accessed 2 June 2025). [Hereafter OTP Policy on Complementarity and Cooperation (2024)].

4 The ICC established by Rome Statute of the International Criminal Court (1998). 2187 UNTS 90. (Hereafter Rome Statute).

5 Alternative Resolution Mechanisms (ARMs) resolve criminal cases without formal proceedings, using methods like Truth and Reconciliation Commissions and Indigenous dispute resolution approaches such as South Africa's Ubuntu, Rwanda's Gacaca, and Uganda's Mato Oput. Research shows these mechanisms can effectively address serious crimes.

6 Rome Statute, Article 86.

7 Rome Statute, Article 87(5)(a).

8 Rome Statute, preamble para.10, Article 1 and 17.

9 International Criminal Court (2017). *Situation in the Republic of Burundi, Public Redacted Version of Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi* ICC-01/17-X-9-US-Exp. ICC-01/17-9 Red. para 152.

10 International Criminal Court (2019). *Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan* ICC-02/17-33. para 79.

11 International Criminal Court (2023). *Situation in the Republic of the Philippines, Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's Authorization pursuant to Article 18(2) of the Statute to resume the investigation* ICC-01/21-77. paras 106, 124–125, 147–155.

12 International Criminal Court (2024). *Situation in the Bolivarian Republic of Venezuela I, Judgment on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's Decision authorizing the resumption of the investigation pursuant to Article 18(2) of the Statute* ICC-02/18-89. paras 110, 245.

13 UN Security Council. (2006). Report of the Secretary-General on the Sudan' UN Doc S/PV.5459 (June 2006). Available online at: https://digitallibrary.un.org/record/577059/files/S_PV.5459-EN.pdf (Accessed 12 June 2025).

ultimately rejected.¹⁴ This incident illustrates Ocampo's refusal to endorse ARMs in favor of traditional prosecutorial responsibilities.

Fatou Bensouda, the second ICC prosecutor, also focused on the necessity of cooperation among states and other international justice stakeholders. While she did not make explicit declarations regarding the application of ARMs, she emphasized the need to bolster national jurisdictions, particularly in the Democratic Republic of the Congo (DRC).¹⁵ The DRC had established a Truth and Reconciliation Commission aimed at resolving conflict domestically; however, Bensouda (2012) reports did not address the commission's role or its legal standing.

The current Prosecutor Karim has introduced initiatives aimed at harnessing "transitional mechanisms."¹⁶ His signing of a Memorandum with Colombia to support the development of the Special Jurisdiction for Peace marks a significant shift toward recognizing ARMs as valuable tools in post-conflict scenarios.¹⁷ The next section presents the policy outlook in detail regarding ARMs as follows.

3 The policy options on the status of alternative resolution mechanisms

Described as "the first of its kind," the new policy aims to foster effective cooperation with national authorities and civil society. It adopts a principle of partnership and vigilance, highlighting that cooperation with national actors should not lead to conflict.¹⁸ This policy aspires to enhance complementarity, bridging various accountability mechanisms to provide redress for victims of atrocities. It seeks to localize justice by embedding the Office of the Prosecutor's work within communities and exploring "innovative partnerships."¹⁹

3.1 Breakthrough of the policy on ARMs

The policy explicitly incorporates ARMs under the umbrella of "Transitional Justice Processes and Mechanisms," suggesting an avenue for future collaboration. Such acknowledgment of ARMs within the policy may signify a departure from the Court's previous approaches. The document articulates a need for integration with transitional justice mechanisms at the national level.²⁰

While affirming the role of ARMs, the policy paradoxically maintains, "non-criminal proceedings fall outside the Court's legal assessment of complementarity." This clause restricts ARMs from interacting with the judicial processes of the ICC, undermining their potential impact on justice and peace initiatives. The policy reaffirms the long-standing of the Court by revoking the legal recognition of ARMs.

3.2 Policy's proposal on cooperation with ARMs

The policy suggests that the revocation of legal recognition for ARMs does not preclude their cooperation with the ICC.²¹ It posits that ARMs can engage without claiming the Courts' jurisdiction under the Rome Statute by the complementarity test. Nevertheless, the applicability of these mechanisms without formal legal recognition from the Court remains ambiguous.

However, there is a terminological difference between the draft policy (2023 para.102) and the adopted policy (2024). The draft incorporates "this [denial of legal recognition] does not prevent the Office...to seek cooperation," while the adopted final version of policy (2024) uses "this does not prevent the Office (and the Court as a whole) as a matter of policy ... to seek cooperation."²² The draft has no specific integration, while the latter adds the phrase "as a matter of policy," which implies that the ICC's recognition is limited to policy-oriented cooperation toward ARMs. This is technically inserted to avoid a contradiction with the Rome Statute.

4 The policy implications on status of alternative resolution mechanisms

While non-binding on State Parties, the new policy significantly impacts the ICC's operations.

4.1 Positive implications

On the positive side, the policy offers renewed optimism for ARMs in international crimes, encouraging the ICC to adopt a less conservative and more collaborative stance with states. Such a move inspires states to use non-judicial mechanisms that involve peaceful reconciliation to harness the advantage of those methods. Such a change could invite positive cooperation between the ARMs and the ICC through transitional mechanisms. The policy seeks to foster cooperation by leveraging practical lessons gained over time (OTP Policy, 2024, para.118). For this purpose, the policy uses Colombia as the test ground. ICC's cooperation engagement set out action plans, including technical support, training, exchange of good practice, and establishment of OTP's country office in Bogota (OTP Policy, 2024, para.128).

However, this practical lesson of the policy falls short in effectively addressing critical issues surrounding cooperation. For instance, it fails to

14 AU Sirte Resolution (2009). Assembly/AU/Dec. 243–267 (XIII) Rev.1 Assembly/AU/Decl.1–5(XIII) p.1–3. Available online at: <https://www.legal-tools.org/doc/5f9085/pdf> (Accessed 21 June 2025); United Nations Security Council Resolution 1,593. Available online at: <https://digitallibrary.un.org/record/544817?ln=en> (Accessed 21 June 2025).

15 International Criminal Court OTP (2018). Statement by the ICC Prosecutor, Fatou Bensouda, at the Conclusion of Her Visit to the DRC. Available online at: <https://perma.cc/T7R7-P2MW> (Accessed August 2025).

16 OTP Policy on Complementarity and Cooperation (2024), para. 117.

17 Cooperation agreement between the OTP of the international criminal court and the government of Colombia (2021). Available online at: <https://www.icc-cpi.int/sites/default/files/itemsdocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf> (Accessed 2 June 2025).

18 OTP Policy on Complementarity and Cooperation (2024). Preface.

19 OTP Policy on Complementarity and Cooperation (2024). Preface.

20 OTP Policy on Complementarity and Cooperation (2024), para.117.

21 OTP Policy on Complementarity and Cooperation (2024), para.117.

22 See Draft OTP Policy on Complementarity and Cooperation (2023). Para.102 with adopted OTP Policy on Complementarity and Cooperation (2024). para.117.

specify whether the evidence gathered by the TRCs should be shared with the ICC. It also lacks guidance on who should take the lead in determining the sequencing of interventions, whether the ARMs should commence investigations first, or if the ICC should initiate them, or if both could operate concurrently. Furthermore, it does not clarify whether the procedural and evidentiary laws of the ICC extend to transitional justice mechanisms. Due to these significant legal and practical gaps, the policy does not adequately confront these pressing concerns.

4.2 Negative implications

Conversely, the policy's adherence to the rigid standards set by the Rome Statute perpetuates the challenges faced by ARMs in practice. Despite its promising outlook, the policy lacks concrete rules and procedures. The Office of the Prosecutor empowers itself to integrate with ARMs on a policy-based recognition. While the policy approval authorizes the prosecutor's discretion, and the prosecutor is allowed to make agreements of cooperation unless they contravene the principles of the Statute.²³ Arguably, the application of ARMs contravenes the principle of legality for two key reasons. First, the statute lacks explicit legal authorization for the implementation of ARMs. Second, the statute explicitly rejects any cooperation agreements that conflict with its provisions, rendering them void [Article 54(3)(d)]. Since the establishment of ARMs through such cooperation agreements is inconsistent with the statute, this approach can be deemed a violation of the principle of legality and may be perceived as an attempt to expand the discretionary powers of the Prosecutor.

Particularly, the absence of clear binding guidelines raises concerns about potentially subjective application. For instance, the MOU signed with Colombia to establish a transitional justice mechanism contrasts with the repeated rejection of proposals from African nations, provoking accusations of selective justice and politicization of the ICC's mandate.²⁴

²³ Rome Statute, Article 54(3)(d).

²⁴ African states have made efforts to address international crimes and foster reconciliation through ARMs. For instance, in the case of Kenyan officials, William Ruto and Uhuru Kenyatta, the Kenyan government established the Truth, Justice, and Reconciliation Commission (TJRC) in 2008 to promote reconciliation in the aftermath of electoral violence. Similarly, in Sudan, although the country is not a member of the ICC, it cooperated during the initial stages of the ICC's investigation into the situation and announced the establishment of a Special Court for Darfur in 2008. In Uganda, the government collaborated with international organizations to create the International Crimes Division (ICD) of the High Court, tasked with adjudicating serious crimes committed during the protracted conflict, as affirmed by the Juba Peace Agreement in 2008. Despite these initiatives, the ICC's response to these efforts has often been criticized as lacking cooperation. In contrast, Colombia's experience illustrates a more collaborative approach, where the OTP partnered with domestic actors to develop a cooperative framework, culminating in agreements that outline action plans and ensure ongoing oversight. Historically, the ICC's engagement with ARMs was not characterized by positive cooperation; however, recent shifts in the OTP's strategy suggest a desire to integrate ARMs more effectively moving forward. To enhance the effective implementation of these mechanisms, it is crucial for the ICC to maintain consistency and coherence with legal affirmations.

The other negative implication is that on the fate of the Court itself, if the Office of Prosecutor lets integration without binding the Court's legal framework to establish jurisdiction by the name of Special Court, it would lead to devastating consequences to lose its legitimacy. As there is a growing trend to sign MOUs with various countries to foster cooperation, there is a need for a binding legal framework to regulate these agreements beyond mere policy.

5 Actionable recommendations

To address the challenges outlined above, the following three schemes of recommendations are proposed:

5.1 Legal and policy framework

First, the Office of the Prosecutor should propose amendments to the Rome Statute and its Rule of Procedure and Evidence to formally recognize non-judicial mechanisms and establish binding criteria for their application, thereby enhancing the role of ARMs in alignment with the Statute's principles. Second, it is essential to revise the existing policy to incorporate a robust framework that affirms the legal recognition of ARMs and provides a clear integration perspective. Third, the ICC should develop comprehensive guidelines defining the conditions and responsibilities associated with ARMs, thereby establishing transparency and clarity in their application.

5.2 Institutional framework

It is recommended that an internationally responsible organ be established under the Office of the Prosecutor to coordinate and manage alternative resolution mechanisms (ARMs), staffed with trained experts in the field, as the ICC currently lacks such a regulatory body.

5.3 Suggestions on practical challenges

The Office of the Prosecutor needs to take serious caution to avoid practical inconsistencies. Despite the lack of specific binding rules, this shall not lead to unpredictability in the approach to mitigate perceptions of favoritism among nations seeking ARMs.

6 Conclusion

The ICC's new policy on cooperation and complementarity is a significant development in its engagement with ARMs. While the policy expresses a willingness to collaborate with diverse actors, its limitations underscore the ongoing tension between the Court's foundational principles and the realities of alternative mechanisms. The insistence on maintaining strict adherence to the principle of complementarity

continues to marginalize ARMs, dismissing their potential to address the diverse needs of states recovering from conflict and atrocities.

The brief review finding shows that the new policy has the potential to harness the advantages of ARMs. Still, it annuls alternatives to be recognized as part of the domestic judicial system. This underscores that effective cooperation requires more than nominal policy interest; it necessitates a robust legal framework that recognizes and integrates ARMs into the ICC's operations meaningfully. Without such reform, the Court risks perpetuating its detachment from local realities, undermining its legitimacy and failing to leverage the transformative power of restorative justice approaches that ARMs can offer.

Going forward, the ICC must embrace a dual commitment to international accountability and local justice mechanisms. This commitment should be manifested not only in policy statements but also in practical, actionable guidelines that foster collaboration with ARMs. By reconsidering its approach to complementarity, the ICC can forge a path that reconciles the need for accountability for grave international crimes with the equally vital pursuit of peace and reconciliation within affected communities. Ultimately, embracing a more inclusive and pragmatic stance toward ARMs will not only enhance the credibility of the Court but also serve the broader goals of justice, healing, and collective progress. The time has come for the ICC to consider a pluralistic approach and recognize the diverse spectrum of justice that exists in the global landscape.

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AB: Writing – original draft, Writing – review & editing.

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