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'The Principle of Complementarity under the Rome Statute of the International Criminal Court'

A Legal Opinion Submitted to the Israeli Independent Public Commission to Examine the Maritime Incident of 31 May 2010, headed by Supreme Court Justice Jacob Turkel ('Turkel Commission')

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Legal Texts

A. Preamble (Extracts), Art. 1, and Arts. 17 - 20 of the Rome Statute of the International Criminal Court•

Preamble
The States Parties to this Statute,
[…]
Affirming that the most serious crimes 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,
[…]
Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
[…]
Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
[…].

Article 1
The Court

An International Criminal 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 complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 17
Issues of admissibility

1. 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.
2. 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/CONF.183/9, 17 July 1998, and corrected by proces-verbaux of 10.11.1998, 12.7.1999, 30.11.1999, 8.5.2000, 17.1.2001, 16.1.2001 (entry into force: 1 July 2002).

(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.

3. 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.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to article 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
   (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
   (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
   (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trail Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
   (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
   (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
   (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be

confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

B. Chapter 3 (Jurisdiction and Admissibility), Section III (Challenges and Preliminary Rulings under Articles 17, 18 and 19) of the ICC Rules of Procedure and Evidence[•]

Rule 51
Information provided under article 17

In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the state referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

Rule 52
Notification provided for in article 18, paragraph 1

1. Subject to the limitations provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2.

2. A state may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2. Such a request shall not affect the one-month time limit provided for in article 18, paragraph 2, and shall be responded to by the Prosecutor on an expedited basis.

[•] ICC-ASP/1/3, p. 10.

Rule 53
Deferral provided for in article 18, paragraph 2

When a state request a deferral pursuant to article 18, paragraph 2, that State shall make this request in writing and provide information concerning its investigation, taking into account article 18, paragraph 2. The Prosecutor may request additional information from that State.

Rule 54
Application by the Prosecutor under article 18, paragraph 2

1. An application submitted by the Prosecutor to the Pre-Trial Chamber in accordance with article 18, paragraph 2, shall be in writing and shall contain the basis for the application. The information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber.

2. The Prosecutor shall inform that State in writing when he or she makes an application to the Pre-Trial Chamber under article 18, paragraph 2, and shall include in the notice a summary of the basis of the application.

Rule 55
Proceedings concerning article 18, paragraph 2

1. The Pre-Trial Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing.

2. The Pre-Trial Chamber shall examine the Prosecutor's application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in article 17 in deciding whether to authorize an investigation.

3. The decision and the basis for the decision of the Pre-Trial Chamber shall be communicated as soon as possible to the Prosecutor and to the State that requested a deferral of an investigation.

Rule 56
Application by the Prosecutor following review under article 18, paragraph 3

1. Following a review by the Prosecutor as set forth in article 18, paragraph 3, the Prosecutor may apply to the Pre-Trial Chamber for authorization in accordance with article 18, paragraph 2. The application to the Pre-Trial Chamber shall be in writing and shall contain the basis for the application.

2. Any further information provided by the State under article 18, paragraph 5, shall be communicated by the Prosecutor to the Pre-Trial Chamber.

3. The proceedings shall be conducted in accordance with rules 54, sub-rule 2, and 55.

Rule 57
Provisional measures under article 18, paragraph 6

An application to the Pre-Trial Chamber by the Prosecutor in the circumstances provided for in article 18, paragraph 6, shall be considered ex parte and in camera. The Pre-Trial Chamber shall rule on the application on an expedited basis.

Rule 58
Proceedings under article 19

1. A request or application made under article 19 shall be in writing and contain the basis for it.

2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.

3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.

4. The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.

Rule 59
Participation in proceedings under article 19, paragraph 3

1. For the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3:

(a) Those who have referred a situation pursuant to article 13;

(b) The victims who have already communicated with the Court in relation to that case or their legal representatives.

2. The Registrar shall provide those referred to in sub-rule 1, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged.

3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

Rule 60
Competent organ to receive challenges

If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 130.

Rule 61
Provisional measures under article 19, paragraph 8

When the Prosecutor makes application to the competent Chamber in the circumstances provided for in article 19, paragraph 8, rule 57 shall apply.

Rule 62
Proceedings under article 19, paragraph 10

1. If the Prosecutor makes a request under article 19, paragraph 10, he or she shall make the request to the Chamber that made the latest ruling on admissibility. The provisions of rules 58, 59 and 61 shall be applicable.

2. The State or States whose challenge to admissibility under article 19, paragraph 2, provoked the decision of inadmissibility provided for in article 19, paragraph 10, shall be notified of the request of the Prosecutor and shall be given a time limit within which to make representations.

"The complementarity regime is one of the cornerstones on which the future International Criminal Court will be built. Throughout the negotiation process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court. Such a system would reinforce the primary obligation of States to prevent and prosecute genocide, crimes against humanity and war crimes - obligations which existed for all States under conventional and customary international law. At the same time, the system would create a mechanism, through a permanent international criminal court, to fill the gap where States could not or failed to comply with those obligations."

Statement by Mr. John T. Holmes, Coordinator of the Negotiations of the Provisions on Complementarity in the ICC Statute, in: Lee, R. S. (ed.), The International Criminal Court. The Making of the Rome Statute, 1999, p. 73/74.

'As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'

Statement by Mr. Luis Moreno-Ocampo, June 16, 2003, Chief Prosecutor of the ICC

'The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are under an existing duty to do so as explicitly stated in the Statute's preambular paragraph 6. However, it should be borne in mind that a core rationale underlying the concept of complementarity aims at "strik[ing] a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the […] Court on the one hand, and the goal to put and end to impunity on the other hand'. If States do not […] investigate […], the […] Court must be able to step in". Therefore, in the context of the Statute, the Court's legal framework, the exercise of national criminal jurisdiction by States is not without limitations. These limits are encapsulated in the provisions regulating the inadmissibility of a case, namely articles 17-20 of the Statute.'

Pre-Trial Chamber II, Situation in the Republic of Kenya, case of Muthaura and others, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11-96, 30 May 2011, para. 40.

Introduction

Crimes under international law can be investigated, prosecuted and tried before a competent international criminal court (direct enforcement model) or before competent national courts (indirect enforcement model).[1] This basic fact raises the basic question how to structure the relationship between existing international and national criminal courts with respect to the investigation, prosecution and trial of crimes under international law. This question has received different answers in the course of the evolution of the modern international criminal justice system. Theoretically, four basic models are conceivable: exclusive international or national jurisdiction or concurrent jurisdiction with either international or national priority.[2] When the Security Council established the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY; ICTR), it vested them with a far reaching primacy *vis-à-vis* the concurrent national jurisdictions.

Whatever the merits of this solution, it became clear from a very early moment in the negotiations of the Rome Statute of the International Criminal Court (ICC Statute) that this treaty would have to reserve a more important place for national criminal jurisdictions. Accordingly, under the ICC Statute States retain the primary jurisdiction over crimes under international law and, as the tenth preambular consideration of the ICC Statute emphasizes, "the International Criminal Court established under this Statute shall [only; C.K.] be complementary to national criminal jurisdictions". In a nutshell, this complementarity of the International Criminal Court (ICC or Court) means that proceedings before the Court will only be admissible in accordance with Art. 17 ICC Statute when there is complete inaction at the national level or when the State(s) concerned are unwilling or unable to genuinely carry out criminal proceedings. Importantly, the words "the Court shall determine" in Art. 17(1) ICC Statute make it plain that it is the Court which is called to determine whether proceedings before it are admissible or not.[3]

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[1] On the concepts of 'crime under international law', 'international criminal law *stricto sensu*', and 'direct/indirect enforcement model', see *Kreß, C.*, International Criminal Law, in: R. Wolfrum (ed.), Max Planck-Encyclopedia of Public International Law, Oxford forthcoming; the electronic version can be visited at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1423&recno=13&searchType=Quick&query=International+Criminal+Law, paras. 10, 17.

[2] For a further differentiation according to the compulsory/optional nature of the jurisdiction, see *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 4 *et seq.*

[3] Cf. also the language in Art. 19(1) ICC Statute; see also Appeals Chamber, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 111.

The principle of complementarity as set out in Arts. 17 to 20 ICC Statute and in Rules 51 to 62 of the Rules of Procedure and Evidence strikes a balance between the two goals to avoid any unnecessary intrusion into State sovereignty and to avoid impunity in cases of crimes under international law. The central importance to these two overarching points of reference for the interpretation of the legal regime is reflected, for example, in the following passage of the 25 September 2009 Judgment of the Appeals Chamber in the *Katanga* et al. case:

> 'The purpose of Art. 17 (1) (b) is to ensure that the Court respects genuine decisions of a State not to prosecute a given case, thereby protecting the State's sovereignty. However, the provision must also be applied and interpreted in light of the Statute's overall purpose, as reflected in the fifth paragraph of the Preamble, namely "to put an end to impunity"'.[4]

Another consideration (perhaps somewhat secondary to that of the protection of State sovereignty) underlying the priority of national criminal jurisdiction under the ICC Statute is that of "efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings"[5]. On the other hand, the principle of complementarity under the ICC Statute does not aim at ensuring that States comply with international human rights standards. In other words, the Court is not supposed, in determining the genuineness of national criminal proceedings, to assume the role of an International Human Rights Court.[6]

As such, the principle of complementarity does not contain an obligation for States to criminalize the conduct covert by the crimes listed in the ICC Statute and to investigate and prosecute such conduct.[7] Yet, those obligations of States to investigate and prosecute crimes under international law which result from other norms of international law formed an important point of reference

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[4] Appeals Chamber, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 83.

[5] Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/ para. 1; ICC-OTP, Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, para. 1.

[6] *Kleffner, J. K.*, Complementarity as a catalyst for compliance, in: Kleffner, J. K. / Kor, G. (eds.): Complementary Views on Complementarity, The Hague 2005, p. 83 (n. 12).

[7] *Rastan, R.*, Situation and Case: Defining the Parameters, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 449.

for the negotiations on the complementarity regime.[8] This is evidenced by the sixth preambular paragraph of the ICC Statute which recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Although it has soon been noted that the reference to *its* jurisdiction makes the sentence 'delightfully ambiguous'[9], the ICC Chambers have begun to refer to it in their initial practice and in the *Katanga et al*. case, it was held:

> 'The Appeals Chamber acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes.'[10]

While it remains possible that this rather sweeping statement will be qualified as the jurisprudence of the Court unfolds, the statement certainly implies the recognition of a general duty of the States of territoriality or active nationality to exercise their criminal jurisdiction over crimes under international law as listed in the ICC Statute.[11] It will be interesting to see to what extent this position will influence the future interpretation of Art. 17 ICC Statute.

While its initial practice has shed some light on the more precise legal contours of the principle of complementarity, 'the jurisprudence of the Court on the subject is limited, and the treatment of the issues related to the concept in the handful of decisions issued by the Court is relatively marginal'[12]. Besides the relative scarcity of situations and cases before the ICC, the practice of so-called self-referrals constitutes the main reason for the limited significance of the initial practice.[13] In the situations of Uganda, the Democratic Republic of Congo (DRC) and the

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[8] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 41/42.

[9] *Slade, T.N./Clark, R.S.*, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 427.

[10] Appeals Chamber, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 85.

[11] On the present state of international law on the matter, see *Kreß, C./Grover, L.*, International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character, in: Bergsmo, M./Kalmanovitz, P. (eds.), Law in Peace Negotiations, Oslo 2010, p. 47 *et seq*.

[12] *Bitti, G./El Zeidy, M. M.:* The Katanga Trial Chamber Decision: Selected Issues, 23 Leiden Journal of International Law (2010), 319.

[13] For two initial comments, see *Gaeta, P.*, Is the Practice of "Self-Referrals" a Sound Start for the ICC?, 2 Journal of International Criminal Justice (2004), p. 949; *Kreß, C.*, „Self-Referrals" and „Waivers of Complementarity", 2 Journal of Internatonal Criminal Justice (2004), p. 944; for a recent appraisal, see *Akhavan, P.*, International criminal justice in the era of failed states: the ICC and the self-referral debate, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 283.

Central African Republic, the respective territorial State referred the situation to the Court and - at least initially - declared not to conduct national proceedings pertaining to the same situation. This provided the Court with the opportunity to clarify the operation of the principle of complementarity under such 'co-operative' conditions.[14] At the time, the legally more complex situation of an 'antagonism'[15] between one or more States asserting their jurisdiction and the Court doubting the genuineness of the relevant national proceedings, remains in need of judicial elucidation.[16] At the time of writing it is an open question whether or not the situations in Sudan, in Kenya and in Libya will require the Court to proceed in that direction.

At the occasion of the first Review Conference on the ICC Statute, States Parties took stock of the practice that had emerged regarding the principle of complementarity.[17] There was no suggestion to amend the existing legal framework. There was, however, a considerable amount of debate on what is now widely referred to as '*positive* complementarity' which, in the view of the Bureau of the ICC Assembly of States Parties (ASP),

> 'refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.'[18]

Accordingly Resolution RC/Res. 1, as adopted by the Review Conference on 8 June 2010, by consensus

> '*[e]ncourages* the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways, in which to enhance the capacity of

[14] 'Partnership' is a term used in the Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/ para. 3.

[15] 'Vigilance' is a term used in the Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/ para. 3.

[16] *Van der Wilt, H./ Lyngdorf, S.*, Procedural obligations under the European Convention on Human Rights: Useful guidelines for the assessment of „unwillingness" and „inability" in the context of the complementary principle, 9 International Criminal Law Review (2009), 40.

[17] For the preparatory document, see Report of the Bureau on stocktaking: Complementarity, ICC-ASP/8/51, 18 March 2010, *passim*.

[18] Report of the Bureau on stocktaking: Complementarity, ICC-ASP/8/51, 18 March 2010, para. 16.

> national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations'.[19]

The debate about '*positive* complementarity' is largely (except perhaps for 'inverted co-operation' pursuant to Art. 90(10) ICC Statute[20]) one of legal *policy*[21] and the following text will refrain from delving any further into it.[22] Instead, all emphasis will be placed on the analysis of the existing legal framework in light of the initial jurisprudence. This would appear to respond the mandate entrusted upon us which was circumscribed as follows:

> 'The Commission is looking for a scholarly assessment of the principle of "complementarity" generally and as established in the Rome Statute; an outline of the principle and the standards required to be met; its history; an overview of academic comment; and a summary/assessment of any application of the principle in practice (i.e. Kenya, Congo, Uganda).'[23]

It must be stressed that it was not possible within the allocated working time to provide an exhaustive analysis of each and every legal detail pertaining to the principle of complementarity. The focus will therefore be on explaining the key features of the legal regime in full consideration of the initial jurisprudence and with reference to the more important scholarly contributions. The number of the latter is growing rapidly and the following recent monographs deserve to be singled out because of their thoroughness and significance: *El Zeidy, M. M.*, The Principle of Complementarity in International Criminal Law, 2008; *Kleffner, J. K.*, Complementarity in the Rome Statute and National Criminal Jurisdictions, 2008; *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, 2008; and most recently *Lafleur, L.*, Der Grundsatz der Komplementarität, 2011. The two volumes 'The International Criminal Court and Complementarity. From Theory to Practice', edited by *Stahn, C.* and *El Zeidy, M. M.*, which are due to appear later this year, provide an impressively comprehensive picture of the 'state of the art'. Fortunately, in preparing this opinion it was possible to consult the proofs of this *opus magnum* thanks to the kind permission of the editors.

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[19] Paragraph 8 of Resolution RC/Res. 1 Complementarity, Adopted at the 9th plenary meeting of the Review Conference, on 8 June, by consensus, RC/11, p. 8.

[20] *C. Kreß/K. Prost*, Art. 93, in: Triffterer, O. (ed.), Commentary on the Rome Statute of the International Criminal Court, Baden-Baden, 2nd ed., 2008, marginal notes 61-69.

[21] For the legal aspects of 'positive' complementarity, see *Stahn, C.*, Taking complementarity seriously, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 233.

[22] See instead the contributions by *Burke-White, W.:* Implementing a policy of positive Complementarity in the Rome system of justice, 19 Criminal Law Forum (2008), pp. 59-85, and *id*., Proactive Complementarity: The International Criminal Court and national courts in the Rome system of international justice, 49 Harvard International Law Review (2008), pp. 53-108.

[23] Letter from Mr. Hoshea Gottlieb of 23 March 2011, para. 5.

A. Historical Survey[24]

I. Versailles – Nuremberg/Tokyo – The Hague/Arusha

The 1919 Treaty of Versailles constitutes the prologue to modern international criminal law. Art. 229(2) of the Treaty provided for the establishment of military tribunals composed of members of the military tribunals of the Allied and Associated Powers and vested them with absolute primacy with respect to persons guilty of criminal acts against the nationals of more than one of the Powers concerned.[25] This model of an exclusive jurisdiction of a multinational military tribunal was not, however, put into practice because of firm German opposition, and was subsequently changed to a legal regime of primary jurisdiction of the State of active nationality under multinational supervision which resulted in the so-called *Leipzig Trials* against German war criminals in the 1920ies.[26]

The Nuremberg Trial of Germany's *major war criminals* may count - at least in practice - as the key example for the exclusive jurisdiction of a multinational court. Whereas Art. 6 of the London Agreement[27] alludes to the possibility of national proceedings, this was never really an option with respect to the major war criminal selected for trial before the International Military Tribunal and, accordingly, there was no provision how to deal with a concurrency of proceedings.[28] The legal picture was similar in the case of the International Military Tribunal for the Far East.[29]

The 1993 ICTY-Statute, by which the first genuine international criminal tribunal was established, provides for a concurrency-model with primacy of the international jurisdiction. Art. 9 ICTY Statute (entitled 'Concurrent Jurisdiction') provides as follows:

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[24] For a particularly detailed analysis of the historical evolution, see *El Zeidy, M. M.:* The Principle of Complementarity in International Criminal Law, Leiden 2008. pp. 11-154.

[25] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 26 *et seq*.; for a different interpretation, see *El Zeidy, M. M.:* The Principle of Complementarity in International Criminal Law, Leiden 2008. p. 11 *et seq*.

[26] *Kress, C.*, Versailles – Nuremberg – The Hague. Germany and International Criminal Law, 40 The International Lawyer (2006), 16 *et seq*.; for the failed attempt to come up with a similar model as that contained in the Treaty of Versailles by virtue of Art. 226 in conjunction with 230 of the Treaty of Sèvres between the Allied Powers and Turkey, see *El Zeidy, M. M.:* The Principle of Complementarity in International Criminal Law, Leiden 2008. p. 22 *et seq*. (Art. 230 even foresaw the option of a court created by the League of Nations).

[27] It reads: ‚Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.'; 82 U.N.T.S., p. 280.

[28] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 37/38; *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 5.

> '(1) The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
>
> (2) The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.'[30]

Art. 9 ICTY Statute was subsequently elaborated upon and somewhat qualified in Rule 9 of the Rules of Procedure and Evidence (entitled 'Prosecutor's Request for Deferral') which reads as follows:

> 'Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:
>
> (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
>
> (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
>
> (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal, the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.'

In practice, only the third hypothesis has been relied upon and it would appear that the Prosecutor is vested with a wide margin of appreciation in applying this provision which leaves the international primacy largely unimpeded. The landmark *Tadic* case, for example, was referred by Germany to the ICTY as a result of the following proposition made by the Prosecutor:

> 'The Prosecutor feels that the International Tribunal is the appropriate forum to deal with the Tadic case, taking into account the seriousness and nature of the crimes committed, and the legal points which will be raised in connection therewith (questions of international interpretation of the concept of armed conflict and the nature and manner of their proof.'[31]

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[29] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 40/41.
[30] S/RES 827 (1993), 25 May 1993.
[31] ICTY, Prosecutor v. Tadic, Decision of the Trial Chamber on the Application of the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia, 8 November 1994, IT-94-1-D, para. 17.

Art. 9 ICTY Statute is complemented by Art. 10 (entitled 'Non-bis-in-idem'), paragraph 2 of which reads as follows:

> 'A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
>
> (a) the act for which he or she was tried was characterized as an ordinary crime; or
>
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.'

Art. 10(2)(a) and (b) ICTY Statute mirror the scenarios referred to in Rule 9(i) and (ii) of the Rules of Procedure and Evidence. An exception from the principle of *ne bis in idem* may not be based, however, on the reasons listed in Rule 9(iii). Art. 10(2) ICTY Statute has remained a dead letter.

The primacy of the ICTY over national jurisdictions was put to a judicial test in the *Tadic* case. The ICTY Appeals Chamber affirmed the international legality of Arts. 9 and 10(2) ICTY Statute and, in doing so, it did not only rely on the Security Council powers under Chapter VII of the United Nations Charter. Instead it confirmed the following statement made by the Trial Chamber:

> 'Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.'[32]

Remarkably, the Appeals Chamber went one step further and opined that an international criminal tribunal should be vested with primacy:

[32] ICTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 59.

> 'Indeed, when an international criminal tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as "ordinary crimes" […], or proceedings being "designed to shield the accused", or cases not being diligently prosecuted […].'[33]

Over time the ICTY developed the policy to confine the exercise of its jurisdiction to those persons allegedly being most responsible for crimes within the jurisdiction of the Tribunal which later became the key element of the completion strategy for the Tribunal. This implied the need to refer back cases not meeting this threshold to the national level. The following Rule 11*bis* (entitled 'Referral of the Indictment to Another Court') was adopted to implement the new policy:

> '(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:
>
> (i) in whose territory the crime was committed; or
>
> (ii) in which the accused was arrested; or
>
> (iii) having jurisdiction and being willing and adequately prepared to accept such a case,
>
> […]
>
> (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.'

The legal framework under the ICTR Statute and the latter Tribunal's Rules of Procedure and Evidence closely mirror that of the ICTY. In practice, however, the ICTR right from the beginning pursued a policy to exercise its jurisdiction only over those allegedly being most responsible. While this 'burden sharing' between the international and the national level appears to be sound in principle, the case of Rwanda also revealed its problems. While lower level perpetrators had to cope with appalling prison conditions and were (initially) facing the death penalty, the most responsible offenders enjoyed the respect of fairly high international procedural standards and often had their sentences enforced under much better conditions.[34]

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[33] ICTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 58.

[34] *Lafleur, L.,* Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 68/69, with a persuasive appeal for ‚positive complementarity' to improve the conditions at the national level.

II. From the 1941 London International Assembly to the ILC Draft Statute 1994

> 'The London International Assembly was the first to propose a clear complementary relationship between domestic courts and a future international criminal court.'[35]

The Assembly submitted a Draft Convention for the Creation of an International Criminal Court which encapsulated a forerunner of the ICC Statute's principle of complementarity in Art. 3(1):

> 'As a rule, no case shall be brought before the Court when a domestic Court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction.'[36]

After 1989 the International Law Commission (ILC) renewed its efforts to submit a proposal for the establishment of a permanent international criminal court. In its 1992 report on a possible 'general approach' forward, the ILC discussed three possible models to structure the relationship between the national and international level: the exclusive international jurisdiction for certain crimes, the concurrent jurisdiction and the mere 'appeals-function' of the international criminal court.[37] While at the time the ILC avoided a clear expression of preference for either model, a majority of its members appeared to favour the concurrency model.[38] It was at this juncture that the term 'complementarity' was perhaps mentioned for the first time in our context. The relevant passage of the 1992 ILC report reads as follows:

> 'According to the approach taken in this report, an international criminal court would be complementary to the existing systems of national courts.'[39]

Both the term and the principle of complementarity finally gained prominence with the adoption of the 1994 ILC Draft Statute. According to the third preambular paragraph the new court was 'intended to be complementary to national criminal justice systems in cases where such trial

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[35] *El Zeidy, M. M.*, The Principle of Complementarity in International Criminal Law, Leiden 2008. p. 59; on the Assembly, which was an unofficial body which made suggestions to the Allies during World War II, see U.N. Doc., A/CN.4/7/Rev.1, p. 11.
[36] Cit. after *El Zeidy, M. M.*, The Principle of Complementarity in International Criminal Law, Leiden 2008. p. 63.
[37] U.N. Doc. A/47/10 (1992), para. 35.
[38] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 83.
[39] U.N. Doc. A/47/10 (1992), para. 161.

procedures may not be available or may be ineffective'.[40] Art. 35 (entitled 'Issues of admissibility') reads as follows:

> 'The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:
>
> (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
>
> (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> (c) is not of such gravity to justify further action by the Court.'[41]

This provision is complemented by Art. 42 (entitled 'Non bis in idem'), the second paragraph of which mirrors Art. 10(2) ICTY Statute and is as follows:

> '(2) A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:
>
> (a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or
>
> (b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international responsibility or the case was not diligently prosecuted.'[42]

B. Some Essential Features of the Negotiations on the Principle of Complementarity under the ICC Statute

Remarkably, the above mentioned position taken by the ICTY in the *Tadic* case, that an international criminal court must be endowed with primacy, was not echoed by States when the negotiations on the ICC began in 1995. Instead, as the coordinator of the negotiations on the principle of complementarity under the ICC Statute, *John T. Holmes*, records, delegations took the solution suggested by the ILC as their starting point:

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[40] *Bassiouni, M.C.*, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, volume 2, Ardsley 2005, p. 12.
[41] *Bassiouni, M.C.*, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, volume 2, Ardsley 2005, p. 153.
[42] *Bassiouni, M.C.*, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, volume 2, Ardsley 2005, p. 171.

> 'The approach suggested by the International Law Commission contributed to the eventual resolution of the complementarity question. It established clearly that the Statute should provide criteria permitting the Court to intervene in cases even where the national authorities had acted or were acting. The fact that a pre-eminent international legal body such as the ILC would accept this important principle gave added weight during the negotiations on this point. However, the specific approach taken by the Commission with respect to the criteria available to the Court proved deficient and occupied much of the negotiations.'[43]

On the basis of the fact that there was a general view right from the beginning of the negotiations that the ICC should only complement national jurisdictions, the coordinator was successful in his attempt to largely resolve most of the issues already in the Preparatory Committee whose work extended over the years 1996 to 1998. As in many other areas the main bone of contention was how much emphasis was to be placed on the protection of State sovereignty:

> 'Some States, while supporting the establishment of an international criminal court, were reluctant to create a body that could impinge on national sovereignty. Under existing international law, States had obligations to prosecute many of the crimes contemplated for inclusion in the Court's Statute. In their view, these obligations were paramount and should not be pre-empted or challenged by the Court, acting, for example, as an international court of appeal. Rather, the Court should only assume jurisdiction where the national judicial system was unable to investigate or prosecute transgressors. A different view, shared by some States and many non governmental organizations, held that the Court should have the potential for a greater role. Fearing the possibility of sham investigations or trials aimed at protecting perpetrators, these States argued that the Court should intervene where the proceedings under a national jurisdiction were ineffective and where a national judicial system was unavailable.'[44]

I. The Substantive Standards (Arts. 17 and 20 ICC Statute)

The fundamental divergence of opinion about the extent to which State sovereignty should be protected resulted mainly in controversies over the concept of 'unwillingness'. Both the inclusion of the concept as such and its formulation caused difficulties. With respect to the latter aspect the coordinator later described the challenge as follows:

> 'Many delegations were sensitive to the potential for the Court to function as a kind of court of appeal, passing judgments on the decisions and proceedings of national judicial systems. While this potential could not be completely avoided, these States argued very strongly for the deletion of any perceived subjective criteria. Thus, the criteria of "apparently well-founded" used by the International Law Commission was unacceptable, as were terms such as "effectively",

[43] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 44.
[44] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 41/42.

> "ineffective", "good faith" and "diligently". Indeed, even the phrase "sufficient grounds" was found to be unacceptable.'[45]

The coordinator's summary of how the draft definition of unwillingness could be achieved again deserves to be quoted in full:

> 'Since the main purpose of adding a provision on "unwillingness" was to preclude the possibility of sham trials aimed at shielding perpetrators, this criterion was easily included. The criterion requires the Court to establish that the proceedings were "for the purpose of shielding the person". Proving such a purpose may be difficult at times for the Court. To offset this onus, a second criterion was added relating to a delay which would result in the perpetrator not being held to account. The question arose as to whether the Court should be left to determine the nature and effect of the delay or whether the Statute should provide guidance. It was agreed that some qualification was necessary and the phrase "undue delay" emerged. This phrase was then linked to the intent of the State. The delay must, in the circumstances, be inconsistent with an intent to bring the person concerned to justice".
>
> The final criterion to determine unwillingness was the question of the independence and impartiality of the proceedings. The original idea was to include this proposal in the criteria relating to inability. Where a State was unable to provide for independent and impartial proceedings (including guaranteeing due process for defendants), the Court should then intervene. The whole question of the rights of defendants was addressed in other parts of the Statute and many delegations believed that procedural fairness should not be a ground for the purpose of defining complementarity. Nevertheless, in the discussions, it emerged that there could be procedural problems in a State, which, while not meeting the test of shielding, could be inconsistent with an intent to bring an accused to justice. For example, while the State may genuinely be endeavouring to prosecute someone (and therefore shielding is not an issue), there may be individuals who manipulate the conduct of the proceedings to ensure that the accused are not found guilty (for example, engineering a mistrial or deliberately violating a defendant's rights to taint evidence or testimony). The added criterion was thus believed to be necessary, even though it may appear to duplicate the two other criteria of shielding or undue delay.'[46]

The draft proposal that resulted from the debate within the Preparatory Committee reads as follows:

> '**Article 15**
>
> **Issues of admissibility**
>
> (1) Having regard to paragraph 3 of the preamble, 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;

[45] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 49.

[46] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 50/51.

(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 paragraph 2 of article 18;

(d) The case is not of sufficient gravity to justify further action by the Court.

(2) In order to determine unwillingness in a particular case, the Court shall consider 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 as set out ion article 5;

(b) There has been an undue 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.

(3) In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial 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.'[47]

The minority position rejecting the concept of 'unwillingness' altogether was recorded as follows:

'The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.'[48]

With respect to the interrelated provision on *ne bis in idem* (the future Art. 20(3)) delegations could build on the language provisionally agreed in the form of draft Art. 15(2)(a) and (c). At the same time, an important debate took place whether the principle *ne bis in idem* should or should not apply where national proceedings were conducted on the basis of the definition of an 'ordinary crime' instead of that of a crime under international law in correspondence with that contained in the ICC Statute. While both Art. 10(2)(a) ICTY Statute and Art. 42(2)(a) 1994 ILC Draft Statute had opted for an exception from *ne bis in idem*, such a solution was rejected in the course of the negotiations leading to the adoption of Art. 20(3) ICC Statute:

[47] *Bassiouni, M.C.*, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, volume 2, Ardsley 2005, p. 141/142.
[48] *Bassiouni, M.C.*, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, volume 2, Ardsley 2005, p. 142.

> ‘During the negotiations, the discussion surrounding the concept of “ordinary crime” revealed the difficulties inherent in trying to include this notion. Delegations diverged greatly on how to define this concept and, as a result, on whether it should be included at all. An attempt at a different approach provided for the Court to take into account the “international character and grave nature of the crime”. The problem with these approaches for many delegations was that they ran counter to the underlying basis of the principle *ne bis in idem*. If an accused committed some reprehensible conduct, what did it matter if that person was tried, convicted and punished pursuant to a national crime as opposed to the crimes listed in the Statute? Arguments were made to the deterrent and retributive effects of adjudicating crimes as international but these points did not sway the majority. As a result, the concept of “ordinary crime” was not included.’[49]

This resulted in the following draft

> ‘**Article 18**
>
> ***Ne bis in idem***
>
> […]
>
> (3) No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court unless the proceedings in the other court:
>
> (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) otherwise were not conducted independently or impartially and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.’[50]

The following draft Art. 19 provided for another exception from the *ne bis in idem* principle in the case of a ‘manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence’. This draft provision remained controversial, though, and thus appeared in bracketed form.[51]

The negotiations at the Rome Conference led to three changes of draft Art. 15.[52] The words ‘having regard to the principles of due process recognized by international law’ were included into the chapeau of the second paragraph to provide the Court with another objective criterion when assessing ‘unwillingness’. The term ‘undue delay’ was changed to ‘unjustified delay’ to set a more stringent standard for a determination of unwillingness. Finally, the word ‘partial’ in the third paragraph was replaced by the word ‘substantial’ to avoid the need to make a determination

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[49] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 57/58.

[50] *Bassiouni, M.C.*, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, volume 2, Ardsley 2005, p. 166/167.

[51] *Bassiouni, M.C.*, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, volume 2, Ardsley 2005, p. 167.

of inability in a case where part of a State's judicial apparatus is incapacitated, but significant and relevant portions remained intact. This resulted in what became Art. 17 ICC Statute. Draft article 18(3)(b) was adjusted and the whole provision finally became Art. 20 ICC Statute.

The Rome negotiations on *ne bis in idem* focused on the bracketed draft Art. 19 and the outcome was negative:

> 'Concerns were expressed by a number of delegations from the "like-minded" States, normally supporters of the inclusion of stronger provisions in the Statute. Some delegations continued to argue that the Statute should not permit the Court to intercede in the administrative (parole) or political decision-making process (pardons, amnesties) of a State. A second, more practical argument was that, given the resistance to the proposal, it would be difficult to secure a solution and protracted negotiations could lead to a reopening of the entire package on the subject of complementarity. Finally, there were some who argued that the proposal was not absolutely necessary, as the provisions on admissibility could give the Court sufficient breadth to examine cases of pardons or amnesties made in bad faith. The coordinator undertook extensive consultations on this issue and realized that open-ended negotiations were unlikely to produce a compromise solution. After consulting with the sponsors of this proposal, the coordinator recommended that it be dropped and it was not included in the final package.'[53]

II. Challenges (Art. 19 ICC Statute)

The focus on the negotiations on admissibility challenges rested on who should have legal standing.[54] It was finally agreed that both an accused and a suspect for whom a warrant of arrest or a summons to appear has been issued should be so entitled. Regarding the position of States it was finally decided not to exclude non-party States from the system. The two criteria finally agreed upon were that of past or present criminal proceedings in the State concerned and that of territoriality and active nationality as referred to under Art. 12(2) ICC Statute.

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[52] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 53 *et seq.*

[53] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 60.

III. Preliminary Rulings (Art. 18 ICC Statute)

Art. 18 ICC Statute is the result of intensive negotiations triggered by a proposal submitted at a late stage of the Preparatory Committee's work by the delegation of the USA:

> 'The objectives behind the proposal were to (i) ensure that relevant States were aware of any investigation being conducted by the Prosecutor; (ii) oblige the Prosecutor to defer investigations where the same matter was being investigated by a State, unless the case would be admissible under the complementarity provisions of the Statute; and (iii) allow the prosecutor to review developments with respect to a State's investigation and seek a ruling to resume an investigation, should exceptions to the complementarity provisions apply.'[55]

The proposal did not meet with unanimous approval. It was asked whether such preliminary proceedings were really necessary in addition to the system of admissibility challenges and whether there was a risk that such additional procedural mechanism would be abused in order to delay or obstruct the international proceedings. In the end, the wish to have the additional mechanism included prevailed and the intense debate about the appropriate checks and balances resulted in Art. 18 ICC Statute.[56]

C. Some Basic Concepts and Clarifications

Before entering into a more detailed legal analysis it appears useful to situate the principle of complementarity in a somewhat broader procedural context and, in doing so, to clarify a couple of basic legal concepts.

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[54] For the details, see *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 60 *et seq*.

[55] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 69.

[56] For the details, see *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court - The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 68 *et seq*.

I. Jurisdiction, Admissibility and Complementarity

The ICC Statute distinguishes between the *jurisdiction* of the Court (ratione *materiae*, *temporis* and *personae et loci*)[57] and the *admissibility* of the (international) proceedings. The importance of this distinction becomes clear, for example, from Art. 19(1) ICC Statute according to which the Court *shall* satisfy itself that it has *jurisdiction* while it *may*, on its motion, determine the *admissibility* of the proceedings.

The principle of complementarity is part of the requirements of admissibility, but does not exhaust them. Irrespective of the primacy of genuine national criminal proceedings, proceedings before the ICC will also be inadmissible where, in accordance with Art. 17(1)(d) ICC Statute 'the case is not of sufficient gravity to justify further action by the Court'. The requirement of sufficient gravity, which has soon given rise to a number of not altogether harmonious judicial statements[58], is thus independent of the principle of complementarity[59] which is also evidenced by the fact that State challenges under Art. 19(2)(b) ICC Statute cannot be based on the argument of insufficient gravity. The gravity issue does therefore not go to the heart of the present opinion[60], although it will be touched upon later (infra C. IV.).

II. The Principle of Complementarity and Security Council Referrals

Pursuant to Art. 13 ICC Statute, the jurisdiction of the Court may be triggered by a State Party, by the Security Council and by the Prosecutor acting *proprio motu*. While the principle of complementarity certainly applies in the first and in the last alternative doubts may be raised as

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[57] Appeals Chamber, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr Thoms Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, paras. 21/22.

[58] The first attempt to clarify the concept was made in Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 10 February 2006 (this decision is to be found in the record of the case Bosco Ntaganda, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Annex 2), paras. 42 *et seq.*; the very stringent gravity-threshold developed in this decision was overturned by the Appeals Chamber in Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169, 13 July 2006, paras. 68 *et seq*.

[59] The conceptual distinction between the principle of complementarity and the gravity test has been made in the ICC jurisprudence as early as in Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 10 February 2006 (this decision is to be found in the record of the case Bosco Ntaganda, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Annex 2), para. 29.

[60] See, however, *Stegmiller, I.*, Interpretative gravity under the Rome Statute, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 603.

to whether the situation could be different in the case of a Security Council referral. If the Security Council may establish international criminal tribunals and endow them with primary jurisdiction, so the argument could run, then the situation should be no different if the Security Council uses the ICC to initiate international criminal proceedings. The situation *may well* be different, though, because the ICC is an independent legal person and can only act according to its legal framework. Art. 17 ICC Statute does not provide for an exception from the application of the principle of complementarity in the case of a Security Council referral. Art. 18(1) ICC Statute is the only provision on complementarity which treats proceedings triggered by the Security Council in a special manner and this confirms the rule that the complementarity applies to all three trigger mechanisms. This result is confirmed by the fact that Art. 53(3)(a) ICC Statute empowers the Pre-Trial Chamber to review the Prosecutor's decision on *admissibility* also in the case of a Security Council referral. It follows that the principle of complementarity, except for the special procedural mechanism under Art. 18 ICC Statute, also applies in the case of a Security Council referral.[61] The ICC practice in the situation of Sudan (Darfur) is in conformity with this conclusion.[62] It is quite a different question not to be explored any further in this legal opinion whether the Security Council could use its powers under Chapter VII of the UN Charter to order States to refrain from exercising their primary jurisdiction.[63]

III. The Principle of Complementarity and the Exercise of Universal Jurisdiction by a State

In light of the fact that the protection of State sovereignty and the procedural efficiency and economy are two main ideas underlying the principle of complementarity, it may be doubted whether the primacy of national criminal proceedings should also apply where the State concerned exercises - exclusively - *universal* jurisdiction. In such a case the State does not pursue a national interest, but purports to act as a fiduciary of the international community. The latter, however, is much more directly presented by the ICC. Also, the universal jurisdiction

[61] For an early scholarly view in that sense *Benvenuti, P.,* Complementarity of the International Criminal Court to National Criminal Jurisdictions, Lattanzi, Flavia / Schabas William A. (eds.)*:* Essays on the Rome Statute of the International Criminal Court Vol. I, Ripa Fagnano Alto, 1999, pp. 21, 41.

[62] See, for example, Pre-Trial Chamber I, Situation in Darfur, Sudan, Case of Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, Public Redacted Version, ICC-02/05-02/09-243-Red, 8 February 2010, paras. 27 *et seq*; for the practice of the ICC OTP, see *Stigen, J.*, The admissibility procedures, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 510.

[63] For an inconclusive treatment of this question, see Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-

State will typically be faced by similar procedural challenges, such as a lack of proximity to the place of the crime and the evidence, which are typical for international criminal proceedings. Against this background the suggestion was made to confine the application of the principle of complementarity to the relationship between the Court and States 'directly connected with the criminal conduct or to the accused'.[64] Sound as this proposition may be de *lege ferenda*, it is difficult to defend this solution as a matter of the *lex lata* because it must be recognized that Art. 17(1)(a) and (b) ICC Statute refer to the State jurisdiction over the case without providing for an exception in the case of universal jurisdiction. There is also no indication in the *travaux préparatoires* that there was a tacit understanding that the principle of complementarity should be applied the other way round where a State exercises - exclusively - universal jurisdiction. It would appear a courageous assertion to say the least to assume an unwritten 'universality exception' based on the above mentioned purposive considerations because that would presuppose the assumption that those negotiating the ICC Statute simply overlooked the specific question of universal jurisdiction in the context of the principle of complementarity. Such an assumption is all the more doubtful as Art. 18(1) ICC Statute explicitly excludes universal jurisdiction States when it refers to 'those States which […] would normally exercise jurisdiction'.

IV. The Principle of Complementarity and the Procedural Distinction between Situations and Cases

The ICC Statute distinguishes between the procedural concepts of 'situation' (as referred to, for example, in Arts. 13, 14, 15(5), and 18) and 'case' (as referred to, for example, in Art. 19 and 53). Pre-Trial Chamber I has referred to the concept of situation in the following terms:

> 'Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.'[65]

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cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/, paras. 69/70.

[64] *Benvenuti, P.*, Complementarity of the International Criminal Court to National Criminal Jurisdictions, Lattanzi, Flavia / Schabas William A. (eds.)*:* Essays on the Rome Statute of the International Criminal Court Vol. I, Ripa Fagnano Alto, 1999, p. 48.

[65] Situation in the Democratic Republic of the Congo, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65; for much more detail on the concept and the difficulties in refining it, see *Rastan, R.*, Situation and Case: Defining

In the same decision, the concept of case was defined as follows:

> **'**[S]pecific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects'.[66]

It is not yet clearly settled when precisely a *case* comes into being. This has certainly happened once the Prosecutor seeks for an arrest warrant with respect to the person concerned. There are good reasons, however, to recognize the existence once the Prosecutor has developed an investigative hypothesis with respect to the person concerned.[67]

These two procedural concepts refer to different stages in the proceedings before the Court. Situations are the object of preliminary examinations by the Prosecutor which may result from the referral of the situation concerned by a State Party or by the Security Council or which may form the object of a preliminary examination carried out *proprio motu*. Such a preliminary examination may, in the cases of a State or Security Council referral, result into the initiation of an investigation into a situation in accordance with Art. 53(1) ICC Statute and, in the case of a *proprio motu* examination by the Prosecutor, into the initiation of an investigation into a situation upon authorization by the Pre-Trial Chamber in accordance with Art. 15(4) ICC Statute in conjunction with Art. 53(1) as referred to by Rule 48 of the Rules of Procedure and Evidence. In all cases the investigation into a situation will have evolved into a case once a warrant of arrest or a summons to appear has been issued with respect to a person in pursuance to Art. 58 ICC Statute.

While it is clear from the wording of Arts. 17 and 19 that the principle of complementarity applies at the case stage, it is less evident that the same holds true with respect to a situation because Art. 17 ICC Statute only speaks of the determination of the admissibility of *cases*. Yet, Art. 18 ICC Statute provides for a strong argument that there must also be a complementarity test at the situation stage because at the time of 'preliminary rulings regarding admissibility' under

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the Parameters, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 422 *et seq*.

[66] Situation in the Democratic Republic of the Congo, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65.

[67] *Burke-White, W. W./Kaplan S.*, Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation, Stahn, C./Sluiter, G. (eds.), The Emerging Practice of the International Criminal Court, Leiden/Boston, 2009, p. 88.

this provision there will only be a *situation* and not yet *cases*. The same is true for the moment in time when the Prosecutor has to decide about the initiation of an investigation and when, in the case of Art. 15(4), the Pre-Trial must rule on a Prosecutor's request for the commencement of an investigation. It also reflects the spirit of the complementarity principle to defer to genuine national proceedings already at the situation stage and it can be argued that such an approach avoids the duplication of investigative efforts by the ICC and national authorities.[68] These reasons warrant the view that, contrary to what its wording suggests, Art. 17 ICC Statute should already be applied at the situation stage.[69] This view has also been embraced by Pre-Trial Chamber II in its decision of 31 March 2010 to authorize the commencement of an investigation into the Situation of Kenya. The Chamber held that

> 'article 53(1)(b) of the Statute must be construed in its context, and accordingly, an assessment of admissibility during the article 53(1) stage should in principle be related to a "situation" (admissibility of a situation).'[70]

This led to the question how the admissibility of the international investigation into a situation can be ascertained in the absence of any actual case. Pre-Trial Chamber II has suggested to proceed as follows:

> '[A]dmissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage on the development of the investigation.'[71]

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[68] *Olásolo, H./Carnero-Rojo, E.*, The application of the principle of complementarity to the decision of where to open an investigation. The admissibility of 'situations', in: in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 410.

[69] Therefore I do no longer maintain the view set out in *Kreß, C./Grover, L.*, International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character, in: Bergsmo, M./Kalmanovitz, P. (eds.), Law in Peace Negotiations, Oslo 2010, p.69/70.

[70] Pre-Trial Chamber II, Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para. 45.

[71] Pre-Trial Chamber II, Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para. 50.

In his Draft Policy Paper of 4 October 2010 on Preliminary Examinations, the ICC Office of the Prosecutor echoes this suggestion and states:

> 'At the stage of the opening of a situation, article 53(1)(b) requires the Office to consider whether "the case is or would be admissible under article 17". Prior to the initiation of an investigation at the preliminary examination stage there is not yet a "case" strictly speaking, as understood to comprise an identified set of incidents, individuals and charges. Therefore the Office will consider admissibility taking into account the potential cases that would likely arise from the investigation into the situation based on the information available.'[72]

In carrying out its preliminary examination, the ICC OTP should also take into account the fact that some kind of preliminary examination into the situation as a whole may also be necessary at the national level. Where the decision is made at the national level to conduct a special preliminary investigation into the situation as a whole and where the decision to take this preliminary step does not reflect the unwillingness of the State concerned to genuinely investigate, the ICC OTP is well advised to accept this way to proceed and not (yet) to open an investigation into the situation itself.

The main challenge for the future practice of the ICC is to come up with a convincing set of criteria how to define the category of 'potential cases' before the Court. In its decision of 10 February 2006, Pre-Trial Chamber I had developed the following most stringent standard to satisfy the second limb of admissibility under the ICC Statute, namely 'sufficient gravity' as referred to in Art. 17(1)(d) ICC Statute:

> '[T]he Chamber considers that any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17 (1) (d) of the Statute if the following three questions can be answered affirmatively:
>
> i) Is the conduct which is the object of a case systematic or large-scale (due consideration should be given to the social alarm caused to the international community by the relevant type of conduct)?
>
> ii) Considering the position of the relevant person in the State entity, organisation or armed group to which it belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
>
> iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts and omissions when the State entities, organisations or armed group to which he belongs commit

[72] OTP Draft Policy Paper of 4 October 2010 on Preliminary Examinations; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm, para. 52.

> systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?'[73]

This 'gravity-test' was, however, considered to be too restrictive by the Appeals Chamber.[74] As the Appeals Chamber has not yet substitute a different text for the one proposed by Pre-Trial Chamber I it remains to be seen to what extent the criterion of 'sufficient gravity' may provide guidance in defining the concept of 'potential cases' when examining whether a States satisfies the standards of complementarity at the situation stage.

Irrespective of what selection criteria can be derived from the test of 'sufficient gravity', the ICC OTP, as early as in 2003, suggested the following guideline for the selection of cases:

> 'The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or Organisation allegedly responsible for those crimes* [emphasis in the original].'[75]

If this standard, which closely mirrors the one Pre-Trial Chamber I had derived from the 'sufficient gravity' test will be the one applied to the definition of the category of 'potential cases' in our context the ICC will concern itself, *ratione personae*, only with a very small part of the universe of criminality in a typical situation before it. This may be a sensible approach[76], but it remains to be seen whether it will be implemented as such. The 2010 Draft Policy Paper on Preliminary Examinations does not, in the context of 'situation complementarity', explicitly refer to the above cited paragraph in the 2003 policy paper.[77]

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[73] Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 10 February 2006 (this decision is to be found in the record of the case Bosco Ntaganda, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Annex 2), para. 64.

[74] Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169, 13 July 2006, paras. 68 *et seq*.

[75] ICC-OTP, Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, p. 7.

[76] For a more detailed discussion with references to diverging views, see *Olásolo, H./Carnero-Rojo, E.*, The application of the principle of complementarity to the decision of where to open an investigation. The admissibility of 'situations', in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 415 *et seq*.

D. The Substantive Standards (Arts. 17 and 20 ICC Statute)

I. The Same Conduct/Same Person - Test

In the *Lubanga* case, the Pre-Trial Chamber made the following statement with respect to the admissibility test at the *case* stage:

> '[I]t is a condition *sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.'[78]

This 'same conduct/same person test' has been followed in the subsequent jurisprudence of the Pre-Trial Chambers and in the subsequent practice of the Office of the Prosecutor.[79] Yet, it must be noted that this test has not been fully explained by the jurisprudence so far and that the Appeals Chamber, as of yet, has not explicitly endorsed the 'same conduct-limb' of the test.[80]

The 'same conduct/same person-test' is significant in two respects. First, it does refer to the *conduct* and not to the *crime*. This implies that the fact that the national authorities charge the person concerned with an 'ordinary crime' and not with a crime under international law does not *per se* render the international proceedings admissible as far as the principle of complementarity is concerned. Second, the requirement of national proceedings for the *same* conduct defines the *primacy* of national proceedings rather strictly. The *Lubanga* case provides for an initial example of this aspect of the test. The authorities of the DRC had charged *Lubanga* with several crimes,

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[77] OTP Draft Policy Paper of 4 October 2010 on Preliminary Examinations; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm, paras. 52/53.

[78] Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 10 February 2006 (this decision is to be found in the record of the case Bosco Ntaganda, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Annex 2), para. 31.

[79] For references, see *Rastan, R.*, Situation and Case: Defining the Parameters, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 438/439; for a full exposition of the Prosecutor's view in favour of the test, see Prosecution's Response to the "Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Situation in the Republic of Kenya, In the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11 OA01, 12 July 2011, paras. 79 *et seq*.

[80] Appeals Chamber, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 81.

including crimes against humanity, in connection with military attacks from May 2003 onwards. The Pre-Trial Chamber held that these proceedings did not render the proceedings before it inadmissible:

> 'The Chamber observes that the warrants of arrest issued by the competent DRC authorities against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda contain no reference to their alleged responsibility for the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003. As a result, in the Chamber's view, the DRC cannot be considered to be acting in relation to the two specific cases before the Court (which are limited to Mr Thomas Lubanga Dyilo's and Mr Bosco Ntaganda's alleged responsibility for the UPC/FPLC's alleged policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003).[81]

It is useful to deal with these two different aspects of the 'same conduct/same person-test' separately. With its insistence on the identity of *conduct* instead of that of *crime*, the same conduct-test amounts to the implicit rejection of the so called 'hard mirror-thesis' that the national prosecution of a crime under international as an ordinary crime cannot satisfy the principle of complementarity.[82] In fact, the hard-mirror thesis is incorrect.[83] Nothing in the text of Art. 17 and Art. 20(3) ICC Statute suggests that the national proceedings must be based on the definition of a crime under international law to satisfy the principle of complementarity. In fact, Art. 20 ICC Statute carefully distinguishes in its use of the words 'conduct' and 'crime' and the former term is used in the third paragraph which is of central importance in our context. The hard mirror thesis also directly contradicts the record of the negotiations. As has been shown (*supra* B I.) the hard mirror-model had been discussed on the basis of its inclusion in the Statutes of both the ICTY the ICTR and of its support by the ILC, but it did not find sufficient support and was ultimately rejected. The implication of the same conduct-text that national proceedings for an alleged ordinary crime may satisfy the complementarity standard is therefore correct.

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[81] Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 10 February 2006 (this decision is to be found in the record of the case Bosco Ntaganda, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Annex 2), paras. 39/40.

[82] This position is held, for example, by *Sedman, D.*, Should the Prosecution of ordinary crimes in domestic jurisdictions satisfy the complementarity principle, in: *Stahn, C./ van den Herik, L. (eds.):* Future Perspectives on International Criminal Justice, The Hague 2010, p. 266; *Philippe, X.:* The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh? (2006) 88 International Review of the Red Cross, p. 390/391.

[83] For a more detailed exposition of the flaws of this position, see *Heller, K. J.,* A Sentence-Based Theory of Complementarity, 53 Harvard International Law Journal (2012), forthcoming.

The requirement of the *identity* of the conduct which forms the object of the proceedings at both levels of jurisdiction has been criticized as a significant limitation of the primacy of national jurisdictions because States are required, so the argument runs, to choose the same incident(s) from 'the universe of criminality' that typically characterizes situations of mass atrocity. In the same vein, the *Lubanga* case has given rise to the question whether it was sensible to pre-empt national proceedings for serious charges, including murder, on the basis of international criminal case for war crimes relating to the enlistment and use of child soldiers.[84] Following this critique, one commentator has suggested to replace the requirement of the *identity* of conduct by a pragmatic 'sentenced-based approach' which would only ask whether the person is expecting a sentence at the national level which is no less severe than that he or she would receive as a result of the international proceedings.[85]

While the thrust behind the critique and the alternative proposal is readily understood, it is more difficult to support them as a matter of law. While it is true that the ICC Chambers have, as of yet, failed to set out legal reasons in support of the same conduct/same person test, such reasons can be provided.[86] Art. 17(1)(c) ICC Statute is directly connected with Art. 20(3) ICC Statute on *ne bis in idem* and the chapeau of the latter provision explicitly uses the term 'same conduct'. The same conduct-test is therefore clearly stipulated as far as the alternative of a past national decision on the merits is concerned. Whereas the language used in Art. 17(1)(a) and (b) ICC Statute is not equally clear, it would be odd to apply a different test at the investigation stage than at the decision stage. Such a different test could even discourage States from completing trials of persons domestically as they would stand a better chance of successfully challenging admissibility if domestic processes are ongoing (Art. 17(1)(a) ICC Statute) or if a decision is made not to prosecute (Art. 17(1)(b) ICC Statute) than in the case of the completion of the case by a decision on the merits.

Instead of an outright rejection and replacement of the 'same conduct' test, it should therefore rather be asked whether the test cannot be developed further in order not to unduly limit the

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[84] *Williams, S. A./ Schabas, W. A.*, Art. 17, *Triffterer, O. (ed.)*, Commentary on the Rome Statute of the International Criminal Court, Baden-Baden 2nd ed. 2008, marginal note 23.

[85] *Heller, K. J.*, A Sentence-Based Theory of Complementarity, 53 Harvard International Law Journal (2012), forthcoming.

[86] For a concise treatment of the matter, see *Rastan, R.*, Situation and Case: Defining the Parameters, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 439 *et seq.*

effect of a case selection at the national level. This raises the question how the principle of *ne bis in idem* is to be properly applied in the context of crimes against humanity and genocide. Much more thought must be given to the question whether the concept of 'conduct' (of the same person!) cannot perhaps be conceived in a more generic sense to the extent that it is situated within the same criminal context, be it a widespread or systematic attach or a genocidal campaign. The question is all the more relevant with respect to cases against those persons who (allegedly) bear the greatest responsibility. Concededly, also such broader construction of the term 'conduct' faces its limits. But even with these limits the approach might be acceptable at the *case* stage in recognition of the fact that the test 'potential cases - test' to be applied at the *situation* stage provides States will almost by necessity be less rigid.

II. The *In*action Scenario

In *Katanga et al*., the ICC Appeals Chamber held:

> '[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction of the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.'[87]

This statement, which had been foreshadowed by the 2003 Informal Expert Paper on Complementarity[88], has cleared the way for the emerging practice of self-referrals to the Court. Under this jurisprudence, the principle of complementarity does not prevent a State from making the deliberate choice not to itself conduct certain proceedings for crimes under international law within the ICC jurisdiction, but have them conducted before the Court.

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[87] Appeals Chamber, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 78.

[88] Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/. paras. 18/19.

Contrary to one scholarly view[89], this treatment of State inaction is in line with the words of Art. 17 ICC Statute and with the spirit behind it.[90] Art. 17(1) ICC Statute makes the existence of an ongoing national investigation (*littera* a), of a national decision not to prosecute upon investigation (*littera* b), or of a national decision on the merits a prerequisite for a determination of inadmissibility. This implies *e contrario* that international proceedings *are* admissible whether neither of these conditions is met. The practical result of this interpretation does not contradict the teleology of the principle of complementarity which is primarily to protect State sovereignty. Where the State concerned chooses not to exercise its criminal jurisdiction, its sovereign interests cannot be adversely affected if the Court conducts proceedings at the international level.

The ICC Appeals Chamber has also rightly held that its interpretation is not in violation of the rights of the suspect(s) or accused person(s):

> '[A]n accused person does not have a "right" under the Statute to insist that States or organs of the Court behave in a manner that would render a case inadmissible.'[91]

This statement is in line with the above (*supra* A I.) cited statement of the ICTY Appeals Chamber in the *Tadic* decision on jurisdiction that those who commit a crime under international law will not have their rights violated when the relevant international criminal law is *directly* enforced by an international criminal court.

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[89] *Schabas, W. A.*, Prosecutorial Discretion v. Judicial Activism, 6 Journal of International Criminal Justice (2008), 757.

[90] For a meticulous analysis, see *Robinson, D.*, The inaction controversy, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 460.

[91] Appeals Chamber, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 111.

III. The Three Scenarios of Action at the National Level

Art. 17(1) ICC Statute distinguishes between three types of national activity.

1. Investigation or Prosecution (Art. 17(1)(a) ICC Statute)

Art. 17(1)(a) ICC Statute deals with 'investigations and prosecutions by a State which has jurisdiction over the case'.

The use of the term 'State' here and generally in Art. 17 ICC Statute should not be read so as to exclude the primacy of proceedings before the ICTY or any internationalized tribunal.[92]

The term 'jurisdiction' here as elsewhere in Art. 17 ICC Statute refers to any jurisdiction provided by the national law concerned, including universal jurisdiction (on universal jurisdiction, see *supra* C III.).[93]

The precise moment in time when an 'investigation' within the meaning of Art. 17 ICC Statute into a case begins remains to be clarified. The investigation has certainly begun once the national investigative authority (police, prosecutor or investigative judge) has sought an arrest warrant, but it is likely that the Court will identify an earlier stage in the proceedings. The 30 May 2011 decision by Pre Trial Chamber II in *Muthaura et al.* may be read to suggest that the opening of an investigative file with respect to a concrete suspect may suffice if followed by concrete investigative steps.[94] This leads to the question what kind of investigative steps are required to determine that a national investigation has begun. According to the view held by the ICC OTP

> '[a]n investigation for the purposes of Articles 17(1) and 19(2) means the existence at the national level of concrete, meaningful and effective investigative steps in relation to a specific case. The empty assurance that there is an investigation in the works, without any demonstration of the steps effectively undertaken, their importance and their consistency with the goal of bringing the responsible persons to justice, must necessarily fall short of satisfying this burden.'[95]

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[92] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 154 *et seq*.
[93] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 163.
[94] Pre-Trial Chamber II, Situation in the Republic of Kenya, case of Muthaura and others, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11-96, 30 May 2011, paras. 55 *et seq*.
[95] Prosecution's Response to the "Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Situation in the Republic of Kenya, In the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11 OA01, 12 July 2011, para. 28; this position is further developed in *Rastan*,

The issue is of considerable practical importance because it defines the border line between national inaction (rendering international proceedings admissible without further conditions) and national activity which must be put to the test of genuineness. The obvious counter argument against the concept of 'investigation' as supported by the ICC OTP is that it overly broadens the scope of the inaction scenario and hereby shifts the burden too much to the detriment of the State concerned. It is to be expected that the decision by the Appeals Chamber in the *Kenyan* admissibility dispute will shed further light on the issue.

The prosecution stage begins when the charges against the accused have been laid and the case is ready to go before the Court and it ends with a decision on the merits within the meaning of Art. 17(1)(c) ICC Statute.

2. Decision not to Prosecute (Art. 17(1)(b) ICC Statute)

A decision 'not to prosecute the person concerned' can be based on a variety of reasons. There may be a legal impediment (for more detail, see infra D. V. 2.) or the national investigative authority may have concluded that there is insufficient evidence to warrant a prosecution. The decision need not be final in the sense that it is not open to reconsideration under certain conditions by the same authority.[96] A decision not to prosecute can also be modified or squashed as the result of an (interlocutory) appeal which may result in the continuation of the investigation or prosecution stage.

In the *Katanga et al*. case the ICC Appeals Chamber has held that a national decision not to prosecute in order to surrender the suspect to the ICC does not come under Art. 17(1)(b) ICC Statute:

> 'If the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a 'decision not to prosecute', the peculiar, if not absurd, result would be that *because* of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute. Thus, a "decision not to prosecute" in terms of article

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R., Situation and Case: Defining the Parameters, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 447/448.

[96] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 176.

> 17(1)(b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC.'[97]

This interpretation of Art. 17(1)(b) ICC Statute[98] ensures the possibility of an effective self-referral also after the initiation of a national investigation and for the reasons explained above (*supra* D II.) such an effective self-referral is in line with the spirit of the principle of complementarity. This does not mean that the interpretation of Art. 17(1)(b) ICC Statute as suggested in the *Katanga* judgment is a compelling one. An alternative explanation of the admissibility of the proceedings before the ICC could have been to either accept that the State can waive its right under the principle of complementarity or to hold that a State may make its judicial system unavailable in the sense of Art. 17(3) ICC Statute by surrendering the suspect to the ICC.[99] Whichever explanation is to be preferred, the Appeals Chamber has reached the correct decision.

3. Decision on the Merits (Art. 17(1)(c) in conjunction with Art. 20(3) ICC Statute)

Art. 17(1)(c) ICC Statute covers the situation where the person concerned 'has already been tried' at the national level. The preferable interpretation of the latter words is to confine them to decisions of the trial judge on the merits which have become final.[100] Other decisions to conclude the proceedings should be subsumed under Art. 17(1)(b) ICC Statute. Art. 17(1)(c) ICC Statute should thus be construed so as to cover only those persons who, in the words of the ICTY[101], have been 'tried in the full sense', i.e., who have been convicted or acquitted.

IV. Unwillingness

Art. 17(2) ICC Statute lists the three scenarios in which the national activity within the meaning of Art. 17(1) ICC Statute is coupled with the unwillingness of the State to genuinely investigate

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[97] Appeals Chamber, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 83.
[98] It had previously been suggested by *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 311/312.
[99] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 266/267.
[100] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 176 *et seq*.
[101] ICTY, Prosecutor v. Tadic, Decision of the Trial Chamber on the Defence Motion on the principle of ne bis in idem, 14 November 1995, IT-94-1-T, p. 4.

or prosecute. The list in paragraph 2 is exhaustive ('*shall* consider […] whether one or more of the following exist […]').[102] The 2003 Informal Expert Paper on Complementarity suggests that a determination of unwillingness under paragraph 2 cannot be based on the outcome of the proceedings, but must be grounded on procedural and institutional factors.[103] This statement lends itself to a misunderstanding. While it is true that the ICC is not supposed to act as a supranational Court of Appeals, it is perfectly possible that the unwillingness of the State will become apparent only through the final decision.[104] Here again, though, this decision will not be put to an examination akin to an appeal, but the question of (un)willingness will be assessed in light of a comprehensive consideration of all relevant factors.

The chapeau of Art. 17(2) ICC Statute instructs the organs of the ICC to have regard 'to the principles of due process recognized by international law' in applying the criteria listed in *litterae* (a) to (c). This reference should not be misconstrued as empowering the ICC to make a finding of unwillingness based of a serious violation of the procedural rights of the suspect or accused recognized under international law.[105] As has been shown above (*supra* B I) the reference to due process was included not to accord to the ICC the additional function to act as an international court of human rights, but to preclude as much subjectivity as possible in the application of the criteria for unwillingness. Violations of due process principles to the detriment of the accused could therefore only become relevant if they reach such an outrageous level that it is no longer possible to speak of legally governed procedure at all.[106] This opens up the possibility to include traditional forms of criminal justice - such as the Rwandan *gacaca* trials - into the concept of criminal proceedings within the meaning of the ICC Statute's principle of complementarity although they may fall afoul of internationally recognized human rights standards to a greater or lesser extent.[107]

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[102] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 206; *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 258.

[103] Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/. paras. 46.

[104] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 210.

[105] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 244/245; for a different view, see *Gioia, F.*, in: Kleffner, J. K. /Kor, G. (eds.): Complementary Views on Complementarity, The Hague 2005, p. 112.

[106] For a perhaps slightly less restrictive position, see *Van der Wilt, H./ Lyngdorf, S.*, Procedural obligations under the European Convention on Human Rights: Useful guidelines for the assessment of „unwillingness" and „inability" in the context of the complementary principle, 9 International Criminal Law Review (2009), 68/69; the legal situation is different in the context of the ICTY's referral practice under Rule 9bis (supra A I); for more information on that practice, see *Van der Wilt, H./ Lyngdorf, S., id*., 67/68.

The reference to due process principles does, however, support the view that international human rights standards, as embodied in the relevant international and regional instruments and customary international law, should be taken into consideration in construing and applying concepts such as 'unjustified delay' (Art. 17(2)(b) ICC Statute) or 'independently or impartially' (Art. 17(2)(c) ICC Statute).[108] This is all the more true in light of the international human rights jurisprudence and control organ practice according to which there is, in principle, a State duty to conduct genuine criminal investigations in cases of murder, torture and enforced disappearances.[109] It is noteworthy that the reference to due process principles in Art. 17(2) ICC Statute is unqualified and therefore pertains also to the assessment of national criminal investigations and prosecutions of alleged war crimes. This is in line with the view espoused by the September 2010 Report of the Committee of independent experts on proceedings undertaken by Israel and the Palestinian side according to which the international human rights standards are relevant also with respect to the duty to investigate and prosecute war crimes.[110] The Committee has - rightly - qualified this relevance with a view to the constraints which do impede investigations during armed conflicts[111] and it is to be expected that the ICC will take the same position.

As of yet, the concept of unwillingness has not been the object of judicial refinement. What follows are therefore a couple of suggestions as to the proper application of Art. 17(2) ICC Statute.

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[107] See *Valinas, V.*, Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice, in: Stahn, C./von den Herik, L. (eds.), Future Perspectives on International Criminal Justice, The Hague 2010, p. 281/282.

[108] Cf. also the reference to internationally recognized norms and standards in Rule 51 of the Procedure and Evidence.

[109] For a more detailed treatment of the relevance of this jurisprudence and control organ practice in our context with an emphasis on the European Convention of Human Rights, see *Van der Wilt, H./ Lyngdorf, S.*, Procedural obligations under the European Convention on Human Rights: Useful guidelines for the assessment of „unwillingness" and „inability" in the context of the complementary principle, 9 International Criminal Law Review (2009), 39 *et seq*.; see also *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 219 *et seq*.

[110] Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in light of General Assembly resolution 64/254, including independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50, 23 September 2010, para. 29.

[111] Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in light of General Assembly resolution 64/254, including independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50, 23 September 2010, para. 32.

1. The Purpose of Shielding the Person (Art. 17(2)(a) ICC Statute and Art. 20(3)(a) ICC Statute)

The first case of unwillingness is where 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' (Art. 17(2)(a) ICC Statute), a formulation which is echoed in Art. 20(3)(a) ICC Statute.

The first alternative of unwillingness poses the most stringent standard. It does not require, though, that all State organs concerned with the conduct of the proceedings act or have acted with the purpose of shielding. Instead, it will suffice that certain State organs, wherever located within the State apparatus, act with such purpose, if these organs are in a position to exercise control.[112]

It follows from what has been stated above (*supra* D I.) that a purpose of shielding cannot be inferred from the mere fact that the State concerned charges the person with an ordinary crime instead of an international crime. This does not preclude the question of inability within the meaning of Art. 17(3) ICC Statute in cases of severe *lacunae* in the national legislation.

There is widespread agreement that, for most practical purposes, the purpose of shielding will have to be inferred from factual indicia.[113] The 2010 ICC OTP Draft Policy Paper on Preliminary Examinations list the following indicators by way of illustration:

> 'manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; lack of resources allocated to proceedings at hand as compared with overall capacities; and refusal to provide information or cooperate with the ICC.'[114]

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[112] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 213/214.

[113] See, for example, Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/. para. 47; *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 259.

[114] OTP Draft Policy Paper of 4 October 2010 on Preliminary Examinations; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm,, para. 61.

In the literature the following additional factors are mentioned[115]: the lateness of the initiation of the investigation (especially where the initiation is prompted by the notification of the ICC under Art. 18(1) ICC Statute) despite much earlier knowledge; the destruction of pieces of evidence; the selection of a biased jury; a lack of procedural transparency, especially at the trial stage, without a plausible explanation[116]; and a manifestly disproportionate sentence to the benefit of the convicted person.

More often than not a finding of unwillingness will probably be based on a combination of several indicia. In reaching their finding, the ICC judges will have to bear in mind that States did not wish the Court to assume the role of a supranational court of appeals. The mere fact that the ICC judges find that the national authorities should have made a better job in collecting and/or evaluating the evidence will not do for a finding of a purpose of shielding.[117] Obviously, the line to be drawn may prove to be a fine one with respect to criteria such as 'giving [a piece of evidence] insufficient weight' 'irreconcilability of findings with evidence tendered' as listed by the ICC OTP.

According to one view, the decision not to prosecute in the national public interest should not be seen as a means to shield the suspect within the meaning of Art. 17(2)(a) ICC Statute if the decision accords with legitimate national guidelines for the exercise of prosecutorial discretion.[118] This proposition is doubtful at least to the extent that the crimes under international law in question are subject to an *international* legal duty to prosecute.[119]

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[115] The following list draws on *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 262 *et seq.*; and *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 218 *et seq.*; cf. the conspicuous overlap between the list in the text and that in Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in light of General Assembly resolution 64/254, including independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50, 23 September 2010, paras. 21 – 25.

[116] ICC judges will certainly observe the following *caveat* contained in the Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in light of General Assembly resolution 64/254, including independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50, 23 September 2010, para. 32: '[T]he level of transparency expected of human rights investigations is not always achievable in situations of armed conflict, particularly as questions of national security often arise.'

[117] *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 277/278.

[118] *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 310.

[119] For an argument against prosecutorial discretion according to the usual national standards in the case of a grave breach of the Geneva Conventions, see *Kreß, C.*, Reflections on the Iudicare Limb of the Grave Breaches Regime, 7 Journal of International Criminal Justice (2009), p. 802/803.

The question of shielding finally arises where a sentenced person has been granted parole or early release or where a whole category of sentenced persons have been amnestied after the conviction. A suggestion has been made to stretch the concept of 'proceedings' in Art. 20(3) ICC Statute so far that the decisions of parole etc. form part of these proceedings.[120] It could then be said that the latter had been conducted for the purpose of shielding and the fact that the person concerned had already been tried would not render fresh international proceedings inadmissible pursuant to Art. 17(2)(c) ICC Statute in conjunction with Art. 20(3)(a) ICC Statute. This, however, surpasses the limits of interpretation because the proceedings referred to in Art. 20(3)(a) ICC Statute are clearly those *preceding* the national conviction and sentence. In light of the intensive debate at Rome it can also not be argued that the issue had escaped the drafters attention so that the resulting *lacuna* could be filled by way of analogy.[121] The unsatisfactory result that follows is that a national decision of parole etc. will not render proceedings before the Court admissible unless the national authorities had planned right from the start to first convict to grant parole etc. soon thereafter.

2. Unjustified Delay (Art. 17(2)(b) ICC Statute)

This criterion may be amongst those considered in the application of Art. 17(2)(a) ICC Statute. It was singled out by the drafters in order to somewhat ease the burden to reach a finding of unwillingness.[122] On somewhat closer inspection the difference proves to be a very subtle one[123] because the unjustified delay must be 'inconsistent with an intent to bring the person concerned to justice'. According to one view, however, a finding of unjustified delay should almost invariably be seen as inconsistent with an intent to bring the person to justice.[124] According to another opinion more weight should be given to the 'inconsistency-limb' in order not to loose sight of the fact that what is in issue is a finding of unwillingness. Where a State generally allocates insufficient funding to the judiciary, the resulting delays may be contrary to internationally recognized human rights standards, but may not be seen as inconsistent with an intent to bring the person concerned to justice. Such an inconsistency is, according to this second

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[120] *Van den Wyngaert, C./Ongena, T.*, Ne bis in idem Principle, Including the Issue of Amnesty, in: Cassese, A./Gaeta, P./Jones,J. R.W.D. (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford 2002, p. 727.
[121] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 262 f.
[122] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 50/51.
[123] *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 290.
[124] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 241.

view, also doubtful, where the delay primarily results from the incompetence rather than from the bad faith of the State organs involved in the proceedings.[125]

In applying Art. 17(2)(b) ICC Statute, it must be kept in mind that the term 'unjustified' was eventually chosen instead of that of 'undue' in order to prevent the judges from unduly lowering the threshold for a finding of unwillingness under Art. 17(2)(a) ICC Statute. The ICC judges will therefore carefully consider the legal and factual complexity of the proceedings which is typically very considerable in a case of macro-criminality. The judges will also have to give due regard to the impediments which result from the fact that an armed conflict is ongoing and which may, in particular, exclude certain investigative steps from being taken immediately.[126] Certainly, ICC judges will construe the terms 'unjustified delay' in light of the experience of the quite considerable length of many international criminal proceedings.

3. Lack of Independence or Impartiality (Art. 17(2)(c) ICC Statute and Art. 20(3)(b) ICC Statute)

The terms 'independence' and 'impartiality' are not defined in the ICC Statute which makes reliance on international human rights law almost a necessity.[127] According to the ICC OTP

> '[i]ndependence in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators; political interference in the investigation; and the corruption of investigators, prosecutors and judges.'[128]

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[125] *Id.*

[126] Cf. once more Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in light of General Assembly resolution 64/254, including independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50, 23 September 2010, para. 32.

[127] For a concise summary, see Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in light of General Assembly resolution 64/254, including independence, effectiveness, genuineness of these investigations and their conformity with international standards, A/HRC/15/50, 23 September 2010, paras. 22, 23.

[128] OTP Draft Policy Paper of 4 October 2010 on Preliminary Examinations; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm,, para. 64.

Again according to the ICC OTP

> '[i]mpartiality in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes; public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.'[129]

It is hard to see the independent scope of application of this provision alongside Art. 17(2)(a) ICC Statute because a finding of independence or impartiality to the benefit of the suspect or accused will weigh heavily in the assessment as to whether national authorities acted with the purpose of shielding. As we have seen (*supra* B I) the drafters thought of a case where the State is genuinely endeavouring to prosecute someone (and therefore shielding is not an issue), while certain individuals manipulate the conduct of the proceedings to ensure that the accused are not found guilty (for example, engineering a mistrial or deliberately violating a defendant's rights to taint evidence or testimony).[130] This, however, does not convincingly explain the necessity of having *littera* (c) as a separate sub-provision because there will not be a question of State unwillingness under Art. 17(2)(c) ICC Statute, but of State inability under Art. 17(3) ICC Statute where individuals from outside the State apparatus are in a position to obstruct the proceedings.

V. Inability (Art. 17(3) ICC Statute)

As in the case of unwillingness, inability is defined by an exhaustive set of criteria. It must result from either a total or substantial collapse of the national system or from the unavailability of the national judicial system. In the *Bemba* case Trial Chamber III was prepared to attribute great weight to the statement of the representative of the Central African Republic that its judiciary was unable to genuinely carry out criminal proceedings against the accused.[131]

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[129] *Id.*, para. 65.
[130] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 50/51.
[131] Trial Chamber III, Situation in the Central African Republic, Case of Jean-Pierre Bemba Gombo, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 July 2010, paras. 245 *et seq*.

1. Total or Substantial Collapse of National Judicial System

The usual result of a (total or substantial) collapse of the national judicial system will be State inaction in the sense discussed above (*supra* D II). It is not therefore to be expected that this alternatives will gain considerable practical importance. Unsurprisingly, Trial Chamber III preferred the 'unavailability' alternative in the case of the Central African Republic.[132]

As mentioned above (supra B I.) the drafters preferred the term 'substantial' over that of 'partial' in light of the fact that a State might experience a collapse in one region while still being able to undertake genuine proceedings in others. The argument fails to recognize that the collapse of the system must always result in inability:

> 'A state which actually manages to proceed genuinely with a case in one region cannot be deemed unable under article 17(1) to deal with a case because of collapse in another region.'[133]

2. Unavailability of National Judicial System

The interpretation given to the concept of 'unavailability of a national judicial system' will be crucial for the practical significance of the inability limb. It is possible to give a very narrow meaning to the term in the sense of non-existence. This, however, would deprive the alternative of an independent scope of application alongside the collapse alternative and would, by the same token, deprive the inability limb of almost all practical significance. It is therefore clearly preferable to interpret the unavailability scenario so as to

> 'cover situations where a legal system has not collapsed (*i.e.* still exists) but is inadequate (not accessible or useful) for the purpose of dealing genuinely with a given case.'[134]

This interpretation appears to be shared by the ICC OTP, because its non-exhaustive list of factors indicating inability do not contain only 'the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection system', but also

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[132] *Id.*, para. 246.
[133] *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 316.
[134] *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 317 (see also 324); see also *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 249.

> 'the existence of laws that serve as a bar to domestic proceedings in the case at hand, such as amnesties, immunities or statutes of limitation'.[135]

It follows from the above (supra D I.) considerations that the concept of 'unavailability' is not to be interpreted as suggested by the 'hard mirror' thesis. Therefore, the absence of definitions of crimes under international law does not make the State concerned *per se* unable to genuinely carry out criminal proceedings. Even in a case of genocide it cannot be said that a State is unable within the meaning of Art. 17 ICC Statute when it can prosecute the person concerned 'only' for the 'ordinary' crime of murder. The fact that a crime under international law as contained in the ICC Statute is prosecuted as an ordinary crime by a State will therefore only warrant a finding of 'inability through unavailability' where the (possible) sentence will be manifestly inadequate.[136] The situation is different, of course, where, due to the absence of special legislation, for example on superior responsibility, there is no criminal responsibility at all at the national level.

National immunities and statutes of limitation are examples for legal obstacles for national criminal proceedings. At least in theory, there are border-line cases, though. Say, the ICC interpreted the concept of mistake of law in the second sentence of Art. 32(2) ICC Statute narrowly or the concept of 'manifest illegality' in Art. 33(1)(c) ICC Statute broadly or did not accept a necessity (more precisely: duress) defence under Art. 31(1)(d) ICC Statute in the case of killing. In such cases, it might well be that the national court or the national law concerned would take a more lenient line by allowing mistakes of law to exonerate more broadly or by allowing duress to exclude the criminal responsibility for killing under certain circumstances. If this were so, the national court concerned would arrive at an acquittal in a case where the ICC would convict. It could be argued that, in such cases, the national judicial system was unavailable to reach the result which, from the perspective of the ICC jurisprudence, would have been the preferable one. It is doubtful, however, whether the ICC should impose his position even in such border line cases through the principle of complementarity. The ICC should rather accept national acquittals (irrespective of the considerations infra D V. 3.) in such border line

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[135] OTP Draft Policy Paper of 4 October 2010 on Preliminary Examinations; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm,, para. 59; in the same vein Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/, para. 50, last bullet point.

[136] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 254.

cases on the condition that the national decision concerned is based on a generally applicable national legal standard which does not violate international law. The result should be no different where, in such a border line case, the national proceedings - due to a defence or excuse which is unavailable under the ICC Statute - end at an earlier stage. It might well even happen that the competent body at the national level makes a formal decision not to open an investigation because of the availability of the defence or excuse. Such a case should not be treated as one of national *in*action (supra D. II.) but, based on a teleological construction of the terms, as a decision not to prosecute within the meaning of Art. 17(1)(b) ICC Statute. While one might wish to see the Court developing a jurisprudence to clarify this border line question, this is not very likely to happen because the ICC OTP will select such border line cases only rarely for prosecution before the ICC in light of the gravity requirement.

3. Completed Trials despite Inability to Genuinely Proceed

Problems arise where, exceptionally, a trial has been completed despite the inability of the State to genuinely carry out the proceedings. The two scenarios that come to mind are, first, the case mentioned above where the person was prosecuted for an ordinary crime under a law with a manifestly inadequate penalty threat and has, as a result hereof, received a manifestly too lenient sentence and, second, the case of an acquittal because of insufficient evidence in a situation where the local judiciary was simply not in a position to secure the existing pieces of evidence. In both instances the investigation and prosecution leading to the respective judgment would not satisfy the complementarity standard due to an unavailability of the national judicial system within the meaning of Art. 17(3) ICC Statute. The respective case could thus be brought before the ICC as long as the investigation or prosecution was ongoing. Once the (defective) judgment would be given, however, Art. 20(3) ICC Statute would appear to render the international proceedings inadmissible because this provision does not refer to Art. 17(3) ICC Statute. The only possibility to avoid such an awkward result would be to hold that, under such circumstances, the national proceedings were for the purpose of shielding the person concerned from criminal responsibility within the meaning of Art. 20(3)(a) ICC Statute.[137] Whether such an inference will invariably be justified, is, however, open to doubt.[138]

[137] In that sense *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 260.

VI. The Special Issue of Amnesties[139]

In its early years, the ICC has already been confronted with the tension between its mandate to prosecute crimes under international law and local demands for alternatives to a criminal law response. These intriguing policy problems were alluded to, for example, in a 2006 'Briefing by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator' on developments in Uganda in the following terms:

> 'It is important for the Council to know that the International Criminal Court indictments were the number one subject of discussion with the internally displaced persons in Uganda and civil society in Juba. All expressed strong concern that if the indictments were not lifted, they could threaten the process in these most promising talks ever for northern Uganda. I said I believed that the indictments had been a factor in pushing the LRA [Lord Resistance Army; C.K.]' into negotiations, and that there could be no impunity for mass murder and crimes against humanity.'[140]

Despite the obvious practical relevance of the issue, the ICC Statute contains no specific rule dealing with national amnesties or equivalent national decisions of non prosecution. Therefore the general rules, including those encapsulating the principle of complementarity must be applied. In that respect *Mahnoush H. Arsanjani* has stated:

> 'But the Statute does not appear to provide the ICC a right to review the acts of national legislatures. Amnesty laws are usually adopted by national legislation; thus it is unclear whether the ICC has even been given the competence to review the lawfulness of national amnesty laws.'[141]

While it is true that the ICC has no power to rule on the international legality of any national amnesty law, this does not mean that criminal proceedings before the ICC are inadmissible because of such an amnesty decision. To the contrary, as a national amnesty law does not bind

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[138] *Stigen, J.*, The Relationship between the International Criminal Court and National Jurisdiction, Leiden, Boston 2008, p. 332.

[139] The following chapter updates and partly revises the analysis provided in: *Kreß, C./Grover, L.*, International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character, in: Bergsmo, M./Kalmanovitz, P. (eds.), Law in Peace Negotiations, Oslo 2010, p. 69 *et seq*.

[140] U.N. Doc. S/PV.5525, 15 September 2006; for a detailed analysis of the subsequent developments in Uganda, see *Burke-White, W. W./Kaplan S.*, Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation, Stahn, C./Sluiter, G. (eds.), The Emerging Practice of the International Criminal Court, Leiden/Boston, 2009, p. 79.

[141] *Arsanjani, M. H.*, The International Criminal Court and National Amnesty Laws, 93 ASIL Proceedings (1999), 67.

the ICC *per se*, the Court can determine the inadmissibility of any proceedings before it only in light of the conditions set out in Art. 17 of the ICC Statute.

A blanket amnesty is not one of the grounds listed in Art. 17(1)(a)-(c) ICC Statute for determining that a case before the ICC is inadmissible. Accordingly, the prevailing and correct scholarly view is that the grant of a blanket amnesty 'could never satisfy the complementarity test'[142].

The more difficult and controversial question is whether a national decision to grant amnesty on the condition of full disclosure of the truth before a judicial or quasi-judicial body (and other conditions such as the laying down of arms) renders international proceedings inadmissible under Art. 17(1)(b) ICC Statute. The better view is that it does not. Where the national authority concerned is not competent to conduct investigations as part of *criminal* proceedings, it is already highly doubtful whether the case 'has been *investigated*' within the meaning of Art. 17(1)(b) ICC Statute. The more natural meaning to be given to the term 'investigation' is to read it as the first stage of *criminal* proceedings.[143] After all, the tenth preambular paragraph emphasizes the complementarity of the ICC to national *criminal* jurisdictions.[144] Irrespective of the content to be given to the word 'investigation', it is not possible to convincingly argue that the decision not to prosecute, but to amnesty the person, is not for the purpose of shielding the person concerned from criminal justice. The best attempt to that end is to say that

> '[i]f criminal prosecution is waived by a truth commission in the interest of re-establishing peace, the purpose is not to shield individual persons but to serve a greater objective at the expense of criminal justice. The non-prosecution is merely a means to this end. This suggests that a state in such cases is not unwilling genuinely to carry out the prosecutions as required by article 17.'[145]

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[142] See, for example, *Robinson, D.*, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, 14 European Journal of International Law 14 (2003), 501.

[143] *Holmes, J. T.*, The Principle of Complementarity, in: Lee, R. S. (ed.), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London, Boston 1999, p. 77: 'It is clear that the Statute's provisions on complementarity are intended to refer to criminal investigations'; see, however, *Valinas, V.*, Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice, in: Stahn, C./von den Herik, L. (eds.), Future Perspectives on International Criminal Justice, The Hague 2010, p. 273/274.

[144] For a meticulous argument in that sense, see *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 166 *et seq.*; for the contrary view, see *Cárdenas, C.:* Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof, Berlin 2005, p. 58 *et seq.*

[145] *Seibert-Fohr, A.*, The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions, 7 Max Planck Yearbook of United Nations Law (2003), 570.

It is unpersuasive, however, to distinguish between 'means to an end' and 'purpose'. To confine the word 'purpose' to the *ultimate* goal would also open the floodgate for all kind of abusive arguments in order to render the criminal proceedings before the ICC inadmissible. It is also not possible to say that in case of a conditional amnesty the State concerned 'is not unwilling to genuinely carry out the prosecutions as required by article 17'. To the contrary, *not* to prosecute this is the very essence of the type of amnesty under consideration, or in other words: the willingness to amnesty by necessity implies the unwillingness of the State genuinely to prosecute within the meaning of Art. 17(1)(b) ICC Statute.[146]

A national amnesty decision does not therefore render criminal proceedings before the ICC inadmissible as a result of a 'black letter'-analysis of Art. 17 ICC Statute. To the extent that national amnesty decisions cover mid- or lower level perpetrators of crimes under international law this result will not provoke tension in practice as long as the ICC OTP sticks to its declared policy to focus its activity on those who bear the greatest responsibility. With respect to those persons it remains to be seen whether the organs of the ICC will discard the 'black letter' by way of a 'disguised decision of judicial policy' where an amnesty is granted in a situation of utmost necessity. Alternatively, the ICC Prosecutor may attain the same result through a policy guided exercise of prosecutorial discretion pursuant to Art. 53(1)(c) ICC Statute. The related policy debate, though of great importance, is not to be pursued any further in this opinion.

If placed on a 'continuum of justice'[147] transitional justice models such as those adapted in Rwanda and in Columbia fall in between an ordinary criminal investigation and an amnesty decision in that they empower the criminal law judge to very substantially reduce the sentence in exchange of fully disclosing the truth (and laying down any weapons).[148] From the angle of the principle of complementarity, the main question that arises in such cases is whether the reduction of the sentence reaches a point where the State must be said to shield the person concerned from criminal responsibility within the meaning of Art. 17(2)(a) ICC Statute. Again, the question is likely to remain theoretical with respect to mid- and low-level perpetrators. Should it ever arise in practice the Court should exercise utmost restraint in 'overruling' a good faith decision made

[146] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 231 *et seq*.
[147] *Greenawalt, K.A.*, Complementarity in Crisis: Uganda, Alternative Justice and the International Criminal Court, 50 Virginia Journal of International Law (2009-2010), 130.
[148] For a short summary of both models, see *Valinas, V.*, Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice, in: Stahn, C./von den Herik, L. (ds.), Future Perspectives on International Criminal Justice, The Hague 2010, p. 278/279.

at the national level. It is possible that the future decisions regarding the Columbian situation[149] will shed further light on the issue as this situation forms the object of a preliminary examination by the ICC OTP.

E. Litigating Complementarity

At the situation stage, the ICC Prosecutor is the primary guardian of the principle of complementarity. In deciding whether to initiate an investigation upon a State or Security Council referral, the Prosecutor *shall* consider whether the case is or would be admissible (Art. 53(1)(b) ICC Statute). The same holds true by virtue of Art. 15(3) ICC Statute in conjunction with Rule 48 of the Rules of Procedure and Evidence. The ICC OTP discharges this duty by applying the 'potential cases' test set out above (supra C IV.). As we have seen (supra C IV), the Pre-Trial Chamber applies the same test when it decides, in accordance with Art. 15(4) ICC Statute, over a prosecutorial request for authorization of an investigation.

Other than the Prosecutor, the Chambers are not required to determine the admissibility *proprio motu* even at the *case* stage because the second sentence of Art. 19 (1) ICC Statute stipulates that the Court *may* determine the admissibility of a case.[150] Whether or not the Pre-Trial Chamber shall exercise its discretion to that effect already in deciding over a request for an arrest warrant (Art. 58 ICC Statute) has given rise to controversy in the early jurisprudence of the Court. In the *Ntaganda* case the Appeals Chamber held that the Pre-Trial Chamber should not have made a determination of admissibility because of an inevitable degree of predetermination to the detriment of the suspect or accused with respect to a possible subsequent admissibility challenge brought by the latter:

> 'The Appeals Chamber accepts that the Pre-Trial Chamber may on its own motion address admissibility. However, in the Appeals Chamber's view, when deciding on an application for a warrant of arrest in ex parte Prosecutor only proceedings the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect. Such circumstances may include instances where a case is based on the

[149] For a detailed study of this situation, see *Ambos, K.,* The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court, Berlin/Heidelberg, 2010, passim.

[150] An exception must be made with respect to the principle of *ne bis in idem*; *Stigen, J.,* The admissibility procedures, in: *Stahn, C./El Zeidy, M.M.,* The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 534.

> established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of prorio motu review.'[151]

The principle of complementarity also forms the object of 'sophisticated interaction' between the Court and States. It may also give rise to disputes between those parties and between the Court and the suspect or accused. The relevant procedures set out in Arts. 18 and 19 ICC Statute shall now be briefly outlined.[152] Those procedures, as much as the substantive standards analyzed above, reflect the drafters' attempt to strike an appropriate balance between, in particular, the protection of State sovereignty, on the one hand, and the goal to avoid impunity for crimes under international law, on the other hand. Due to the limited amount of 'complementarity antagonism' so far (supra Introduction), the jurisprudence has hardly begun to bring this law from the books into practice.

I. Preliminary Rulings (Art. 18 ICC Statute)

The ICC OTP has declared its policy to 'generally seek to alert the relevant State of the possibility of taking action itself very early in the process' and to 'consult and seek additional information from the States that would normally exercise jurisdiction', unless there is reason to believe that such consultation could prejudice subsequent analysis or investigation.[153]

Art. 18 ICC Statute on 'Preliminary Rulings Regarding Admissibility' formalizes this communication by requiring the Prosecutor to notify[154] all States Parties and those non-State Parties with a special link to the alleged crimes of the fact that it has initiated an investigation after a State referral or that the Pre-Trial Chamber has authorized the commencement of a *proprio motu* investigation. The 'Art. 18 - procedure' does not apply in case of a Security Council referral.[155]

Within one month of the prosecutorial notification, a State may request the Prosecutor to defer to its investigation into the situation (Art. 18(2), first sentence, ICC Statute). In its request, the State

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[151] Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169, 13 July 2006, para. 52.

[152] For a meticulous study, see *Stigen, J.*, The admissibility procedures, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 503.

[153] Annex entitled Referrals and Communications to ICC-OTP, Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, para. I. C.

[154] This may happen on a confidential basis; Art. 18(1), second sentence, ICC Statute.

[155] On the details, see Rule 52 of the Rules of Procedure and Evidence.

must provide the Prosecutor with information concerning its investigation[156] so that the Prosecutor can decide - on the basis of the 'potential cases-test' (supra C IV.) - whether to defer or to seek the authorization of the investigation from the Pre-Trial Chamber in accordance with Art. 18(2), second sentence, ICC Statute[157].[158] The authorization of the international investigation by the Pre-Trial Chamber is subject to an interlocutory appeal (Art. 18(4) ICC Statute) by the State concerned.

In case of a deferral, the Prosecutor may request the State concerned for periodical information of the progress of its investigations (Art. 18(5), first sentence, ICC Statute). States Parties are under a duty to comply with such a request (Art. 18(5), second sentence, ICC Statute). There is no such duty for non-State parties, but their failure to inform may be taken into consideration in the assessing the complementarity standards under Art. 17 ICC Statute. The deferral shall be open to review six months after the date of the deferral or at any time in case of a significant change of circumstances (Art. 18(3) ICC Statute).[159] Even in case of a deferral (or pending a ruling by the Pre-Trial Chamber) the ICC Prosecutor may seek authority from the Pre-Trial Chamber to pursue certain investigative steps under the conditions set out in Art. 18(6) ICC Statute.[160]

II. Challenges (Art. 19 ICC Statute)

The right of certain individuals and States to challenge the complementary nature of the proceedings before the Court is limited to the *case* stage.

Art. 19(2)(a) provides the accused[161] or a person for whom an arrest warrant or a summons to appear has been issued with a right to challenge the complementary nature of the proceedings before the Court. This is remarkable, if one considers the principle of complementarity as not protecting a substantive right of this person, but only that of the State(s) concerned. Art. 19(2)(a) ICC Statute therefore follows the famous statement made by the ICTY Appeals Chamber in the

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[156] Cf. Rule 53 of the Rules of Procedure and Evidence.
[157] For the details, see Rule 54 of the Rules of Procedure and Evidence.
[158] For the details of the proceedings before the Pre-Trial Chamber, see Rule 55 of the Rules of Procedure and Evidence.
[159] For the requirements of the prosecutorial application, see Rule 56 of the Rules of Procedure and Evidence.
[160] The proceedings will be conducted ex parte and in camera; cf. Rule 57 of the Rules of Procedure and Evidence.
[161] The term of accused is not clearly defined in the procedural law of the ICC; according to *Stigen, J.*, The admissibility procedures, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity.

Tadic case on the inapplicability of precedents (in the cases of *Eichmann* and *Noriega*) on *male captus bene detentus* in the realm of international criminal proceedings:

> 'Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which may bring upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of more liberal forces at work in the democratic societies, particularly in the field of human rights.'[162]

In the opinion of the ICTY Appeals Chamber, the accused could not

> 'be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stage, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which the Chamber feels it is its duty to refute and lay to rest.'[163]

Until now, the jurisprudence of the Chambers have analysed the principle of complementarity as a device to protect State sovereignty which is certainly in line with the drafting history. It remains to be seen whether the judges shall explore the argument advanced in the literature that the principle of complementarity, as evidenced by Art. 19(2)(a) ICC Statute, in particular, also reflects the right of the accused to be judged by the court which has the best ties to him or her and to be removed from this judge only as a last resort.[164]

Art. 19(2)(b) ICC Statute provides those States, including non-party States, with a right to challenge the complementary nature of the proceedings before the Court which have exercised their jurisdiction over the case. Art. 19(2)(c) ICC Statute extends this right - irrespective of an exercise of jurisdiction - to the territorial State and the State of active nationality. In case the

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From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 537, the accused within the meaning of Art. 19(2)(a) ICC Statute is a person in respect of whom charges have been confirmed by the Pre-Trial Chamber.

[162] ICTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 55.

[163] *Id*.

[164] *Burke-White, W. W./Kaplan S.*, Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation, Stahn, C./Sluiter, G. (eds.), The Emerging Practice of the International Criminal Court, Leiden/Boston, 2009, p. 92/93; see also *Stahn, C.*, Taking complementarity seriously, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 280, who argues that the accused should be entitled to make 'abuse of process' arguments.

State concerned had already brought an interlocutory appeal under Art. 18(4) ICC Statute, it must, by virtue of Art. 18(7) ICC Statute, demonstrate additional significant facts or significant change of circumstances to make use of the right under Art. 19(2) ICC Statute. One aspect of the practice of self-referrals that has yet to be clarified is whether the referring State is estopped from subsequently bringing a challenge under Art. 19(2) ICC Statute. The issue is being debated in the context of the Ugandan situation and plausible arguments have been advanced that the recognition of an estoppel is not an inevitable conclusion if a Ugandan challenge was to be based on a significant change of circumstances.[165]

An admissibility challenge under Art. 19(2) ICC Statute[166], which does not affect prior procedural acts (Art. 19(9) ICC Statute), may, as a rule, brought only once (Art. 19(4), first sentence, ICC Statute) and shall take place prior to or at the commencement of the trial (Art. 19(4), second sentence, ICC Statute)[167]. States shall make a challenge at the earliest opportunity.[168]

In case the competent Chamber[169] determines the case inadmissible, the Prosecutor may seek for a review on the basis of significant new facts (Art. 19(10) ICC Statute).[170]

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[165] *Burke-White, W. W./Kaplan S.*, Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation, Stahn, C./Sluiter, G. (eds.), The Emerging Practice of the International Criminal Court, Leiden/Boston, 2009, p. 109/110.

[166] For more procedural details, see Rule 58 of the Rules of Procedure and Evidence.

[167] 'Commencement of the trial' may mean the moment in time of the constitution of the Trial Chamber or the beginning of the trial hearing with opening statements; for the first alternative, see Trial Chamber II, Situation in the Democratic Republic of the Congo, case of Germain Katanga and Mathieu Ngudjolo Chui, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, ICC-01/04-01/07-1213-tENG, 16 June 2009, para. 49; for the second alternative, see Trial Chamber III, Situation in the Central African Republic, Case of Jean-Pierre Bemba Gombo, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, par. 210.

[168] On the question whether a failure to do so precludes the right to bring the challenge, see *Stigen, J.*, The admissibility procedures, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 546; on the right of the Prosecutor under Art. 19(3) ICC Statute to seek an admissibility ruling to prevent subsequent challenges, see *Stigen, J., id*., p. 543; on how to apply the criterion 'in the earliest opportunity' in the situation of Uganda, see [168] *Burke-White, W. W./Kaplan S.*, Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation, Stahn, C./Sluiter, G. (eds.), The Emerging Practice of the International Criminal Court, Leiden/Boston, 2009, p. 110/111.

[169] On the different possibilities, see Art. 19(6) ICC Statute and Rule 60 of the Rules of Procedure and Evidence.

[170] For the procedural details, see Rule 62 of the Rules of Procedure and Evidence.

In case of a State challenge, the Prosecutor shall suspend its investigation (Art. 19(7) ICC Statute), but he or she may seek authority from the Pre-Trial Chamber to take the exceptional investigative steps listed in Art. 19(8) ICC Statute[171].

F. Standard and Burden of Proof

Despite their potential practical significance for the operation of the principle of complementarity, neither of these issues is explicitly addressed in the ICC Statute or in the Rules of Procedure and Evidence and, as of yet, the jurisprudence on those matters is marginal.[172] It is impossible to try to give a conclusive and comprehensive answer to the questions raised within the framework of this legal opinion. What follows are no more than a couple of tentative considerations with due regard to the most important scholarly views expressed so far[173] on how the Court might 'create workable solutions in the wake of constructive ambiguity'.[174]

What makes the analysis difficult in addition to the lack of specific guidance in the ICC Statute and in the Rules of Procedure and Evidence is the peculiar nature of the principle of complementarity. While it is clear that the guilt or innocence of the accused is not at stake so that, for example, Art. 66(3) ICC Statute, which encapsulates the standard 'beyond reasonable doubt', is not (directly) applicable, it is an open question how best to characterize complementarity disputes:

> 'For all of the comparisons that may be drawn, complementarity proves frustrating with regard to analogical reasoning. It welcomes and yet defies comparison.'[175]

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[171] For the procedural details, see Rule 61 in conjunction with Rule 57 of the Rules of Procedure and Evidence.
[172] For the only explicit statements on the matters, see Trial Chamber III, Situation in the Central African Republic, Case of Jean-Pierre Bemba Gombo, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, paras. 201 et seq.
[173] For the most detailed scholarly treatment of the issues so far, see *Fairlie, M. A./Powerdy, J.*, Complementarity and burden allocation, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 642.
[174] *Fairlie, M. A./Powerdy, J.*, Complementarity and burden allocation, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 682.
[175] *Fairlie, M. A./Powerdy, J.*, Complementarity and burden allocation, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 681/682.

With regard to the *standard* of proof the clearly prevailing view appears to be that the appropriate test is the simple balance of probabilities or preponderance of the evidence instead of that of beyond reasonable doubt.[176] This seems, indeed, to be a reasonable starting point. Whether or not the Court will see the need to lower the standard further with respect to the earliest stages of the proceedings.[177]

It is doubtful whether a question of burden of proof properly so called arises when the Chamber determines the matter *proprio muto*. In such case the Chamber will probably simply make use of the information available to it and weigh it. With respect to challenges under Art. 19(2) ICC Statute, the first statement of an ICC Chamber on the matter suggests that the burden of proof lies with the party that raises the issue. This would mean that the burden of proving the requirements of inadmissibility falls on the accused or the State that have brought the challenge[178] or on the Prosecutor where the latter requests the authorization to commence an investigation under Art. 15(3) ICC Statute or Art. 18(2) ICC Statute. Such approaches find a measure of support in the literature.[179]

Interestingly, however, Trial Chamber III has immediately qualified its approach to the matter as follows:

> 'As to the Court's overarching approach, although the defence must establish, to the civil standard, the relevant facts and other necessary matters that underpin the application, in other aspects it is not of assistance to describe this exercise as depending on the defence satisfying the burden of proof on the accused's argument. Instead, the result of these applications is simply

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[176] Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/ para. 52; *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 231 *et seq*.; in the same direction *Fairlie, M. A./Powerdy, J.*, Complementarity and burden allocation, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 680; Trial Chamber III, Situation in the Central African Republic, Case of Jean-Pierre Bemba Gombo, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, para. 203, in case the burden of proof lies with the accused.

[177] For such a differentiated approach, see *Kleffner, J. K.*, Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford 2008, p. 208.

[178] Trial Chamber III, Situation in the Central African Republic, Case of Jean-Pierre Bemba Gombo, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, para. 201: '[T]he compelling logic of the situation is that should an accused challenge the admissibility of the case under Article 19(2)(a) of the Statute […], it falls to him to establish the facts or other relevant matters that are said to support the argument.

[179] *Kleffner, J. K.*, Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford 2008, p. 203/204.

> dependent on the judicial assessment by the Court as to whether the case is admissible […]. Therefore, although the defence bears an evidential burden, the Court will otherwise simply weigh the merits of competing submissions in arriving at its judgment, and the latter task is not dependent on, or improvised by, imposing a burden on the accused to "prove" the argument.'[180]

It is perhaps not altogether easy to conceptualize this statement in procedural terms, but it certainly reveals the willingness to apply some measure of flexibility to arrive at a workable solution.

In fact, it would seem possible to develop a more nuanced, though still structured approach to the matter. Such an approach would take it as the starting point that what the Court has to determine under Art. 17(1) ICC Statute is the *in*admissibility of the proceedings so that a kind of presumption to the contrary applies in the first place. It would then be for the State or the accused to set aside this presumption by showing one form of State action in the forms listed in Art. 17(1) ICC Statute. Then, however, the burden of proof would, as a general rule, shift to the Prosecutor to prove the lack of genuineness of the proceedings because the alternative of unwillingness and inability is addressed in the negative in Art. 17(1)(a)-(c) ICC Statute. In other words, once the fact of (past or present) criminal proceedings at the national level is proven the presumption would be that they are genuine.[181] This possible two steps-analysis demonstrates the potential practical importance of the question raised above (supra D III. 1.) as to whether a national 'investigation' for the purposes of Art. 17(1)(a) ICC Statute presupposes a substantive measure of investigative activity.

Irrespective of the general rule(s) regarding the burden of proof, there is a widespread tendency in the literature to recognize the possibility of alleviating or even shifting the prosecutorial burden to prove the unwillingness or inability of the State. Opinions differ, however, as to the precise conditions for such alleviation or shift to happen. While it is doubtful that it is justified to shift the burden simply because and to the extent that the State has the exclusive or superior

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[180] Trial Chamber III, Situation in the Central African Republic, Case of Jean-Pierre Bemba Gombo, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, para. 204.

[181] In that sense Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/ para. 55; *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 335; *Stigen, J.*, The admissibility procedures, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 540.

access to necessary information[182], it is warranted to accept such a shift when the State has taken an obstructive attitude towards the efforts to establish the relevant facts.[183]

A further refinement of the burden allocation is possible, for example, in the application of Art. 17(2)(b) and (c) ICC Statute. As the drafting history (supra B I.) reveals that the main function of those two additional hypotheses should be to ease the onus to demonstrate unwillingness, a strong argument can be made that the burden shifts back to the party which has brought the challenge to demonstrate the State intent to genuinely carry out the proceedings once unjustified delay or dependence or partiality have been proven.

All in all these tentative considerations support the optimistic view that the ambiguity of the texts will prove 'constructive' enough for the ICC to develop a workable regime on the matters discussed.

[182] In that sense Informal expert paper: The principle of complementarity in practice (with 8 annexes) - ICC-OTP 2003; http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Informal+Expert+Consultations/ para. 56; *Kleffner, J. K.*, Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford 2008, p. 204; *contra*: *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 337/338.
[183] *Lafleur, L.*, Der Grundsatz der Komplementarität, Baden-Baden 2011, p. 337.

Conclusion

> 'Indeed, when an international criminal tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as "ordinary crimes" […], or proceedings being "designed to shield the accused", or cases not being diligently prosecuted […].'[184]

The principle of complementarity under the ICC Statute defies the first sentence of this famous statement of the ICTY Appeals Chamber, but it reflects the wisdom contained in the statement's second sentence. It endows States with the 'primacy over the ICC', but in recognition of the 'perennial danger of proceedings being designed to shield the accused or cases not being diligently prosecuted' it makes this primacy dependent on the fulfilment of certain legal criteria and, crucially, reserves the ultimate competence to decide on the correct application of these criteria to the ICC[185]. In theory, it is hard if not impossible to decide whether the primacy-model enshrined in the Statutes of the ICTY and the ICTR or the principle of complementary under the ICC Statute is the 'better' or the 'more consistent' one.[186] In practice, the rejection of the idea of a primary permanent international criminal jurisdiction was a *conditio sine qua non* for the establishment of the first such jurisdiction in legal history. The principle of complementarity as enshrined in the ICC Statute constitutes, it may be said, a realistic compromise between the vertical aspiration inherent in the idea of an international criminal law *stricto sensu* and the persistent pivotal importance of State sovereignty in the contemporaneous international system. It also corresponds with the interplay between the primary national and the subsidiary international 'Responsibility to protect' in the 2005 World Summit document.[187]

Inevitably, in terms of legal drafting, the principle of complementarity is more demanding than the ICTY's and the ICTR's primacy-models. It requires the formulation of a rather detailed legal framework to carefully strike the balance between safeguarding the primacy of domestic

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[184] ICTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 58.

[185] On the 'Kompetenz-Kompetenz of the ICC in the early ICC jurisprudence, see, in particular, Pre-Trial Chamber II, Situation in Uganda, case of Kony and others, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para. 45.

[186] For a classical argument in favour of the ‚primacy model', see Cassese, A., Reflections on International Criminal Justice, 61 Modern Law Review (1998), 6.

[187] 2005 World Summit Outcome Document, U.N.G.A. Res. 60/1, para. 138; see also *Stahn, C.*, Taking complementarity seriously, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 238/239.

proceedings *vis-à-vis* the Court on the one hand, and the goal to put and end to impunity on the other hand. It is too early to reach a definitive judgment as to whether the drafters of the ICC Statute have been successful in meeting the challenge. What can safely be said, though, is that Arts. 17 to 20 ICC Statute constitute a remarkably consistent attempt to that effect. In surveying the legal regime, this opinion has identified only three noteworthy flaws: the extension of primacy to a State exercising exclusively universal jurisdiction (supra C III.); the lack of legal provision to deal with a decision of pardon or parole which evidences the unwillingness of the State concerned to genuinely carry the criminal proceedings to its necessary end (D IV. 1.); and the gap regarding a State which is unable to genuinely carry out the proceedings, but nevertheless completes a trial which results in an acquittal (D V. 3.). In addition to these flaws one may, depending on ones policy preferences, consider it as a shortcoming that the complementary regime under the ICC Statute does not (explicitly) incorporate certain national amnesty decisions as part of a comprehensive transitional justice approach (supra D V.).

The principle of complementarity is not designed to (directly) enforce the duties of States Parties under international law to investigate and prosecute crimes under international law. Yet, the legal regime has been drafted with those duties in mind and can be seen as a ‘carrot and stick’-mechanism to catalyze enhanced compliance with those duties. In due course, the situations of Columbia and Uganda may reveal to what extent this catalyst potential could be activated. How far down the echelon within the structures of a State or organization the catalyst potential in question will reach cannot yet be safely ascertained. The reach will remain limited should the ICC rigorously stick to a policy to confine the exercise of its jurisdiction to those who bear the greatest responsibility (supra C IV. in fine).

With the prominence of the practice of self-referrals (in the Democratic Republic of the Congo, in Uganda and in the Central African Republic) the principle of complementarity has to a significant extent been applied ‘in partnership’ in the initial phase of the ICC’s existence. The integration of this practice into the legal framework has essentially been successful with only few, though not unimportant, legal questions left to be answered (supra E II. on the issue of a possible estoppel with respect to an admissibility challenge subsequent to a self-referral). This demonstrates a welcome flexibility of the principle of complementarity under the ICC Statute which allows certain forms of co-operative burden-sharing as part of a joint national and international attempt to avoid impunity in a case of macro-criminality under international law. In

light of these possible positive effects of a practice of self-referrals, the early statement of the ICC Prosecutor stressing that the absence of proceedings before the Court would constitute a major success should be slightly qualified.

As a consequence of the early emphasis on a co-operative approach between the Court and 'self-referral States', the 'antagonistic' side of the principle of complementarity has not yet been put to a practice test so that the legal regime's core ingredients of State unwillingness and inability, as of yet, remain exclusively in the books. According to one commentator, that should not have come as a surprise:

> 'If anything, typical ICC cases are those in which there will be no investigation whatsoever (regardless of the adequacy of legislation) and where a state evidences no intention of complying with either the Rome Statute or general international law obligations to try certain crimes (e.g. Sudan). In fact, it was always unlikely politically that states would conduct 'mock' proceedings for the purposes of holding off ICC jurisdiction. If a state is unwilling, it will generally be unwilling all the way. […] As a result, it is unlikely that the ICC will become involved in sophisticated qualitative analysis of domestic trials to see if they constitute "genuine" proceedings or not, and thus deal, among other things, with the finer details of implementation.'[188]

If seen from the broader perspective of the international legal system in general, there would be reason to regret if this prediction were to prove accurate and if the Court would therefore not be involved in 'sophisticated qualitative analysis of domestic trials', because the refinement of these standards by criminal law judges would certainly very usefully complement the corresponding practice of international human rights courts and control bodies. Such a spill-over effect of the application of the legal regime of complementarity beyond the realm of the ICC Statute and its State Parties could only be welcomed.

(Prof. Dr. Claus Kreß) Cologne, 16 August 2011

[188] *Mégret, F.*, Too much of a good thing? Implementation and the uses of complementarity, in: *Stahn, C./El Zeidy, M.M.*, The International Criminal Court and Complementarity. From Theory to Practice, vol. 1, Cambridge 2011, forthcoming, p. 377/378.