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PhD in International Studies – XXII Cycle

**The System of the International Criminal Court:  
Complementarity in International Criminal Justice**

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# INTRODUCTION

## Complementarity in the ICC system of justice

The International Criminal Court (ICC) was established on 17 July 1998, with the adoption of the ICC Statute at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome between 15 June and 17 July 1998.<sup>1</sup>

The Preamble and article 1 of the Statute specify that the Court shall be *complementary* to national jurisdictions. Apart from this reference, no definition of the term is contained in any other provision of the Statute. Complementarity is a new concept in the context of the allocation of concurrent jurisdiction between international and national courts and tribunals.

Given the considerable implications of the establishment of an international criminal court in terms of state sovereignty, complementarity was strongly supported by States. According to this mechanism, States retain their right (and duty) to exercise their criminal prerogatives over persons responsible for the commission of international crimes. At the same time, the newly established international criminal court ensures that, in case of failure to investigate or prosecute at the domestic level, impunity is fought at the international level.

The choice of complementarity responded also to the specific features of the ICC, a permanent international criminal court with extremely wide potential jurisdiction, but limited structural and financial resources. Complementarity was also seen as the best tool to foster states' adhesion to the ICC Statute – an international treaty – and to ensure their cooperation with the Court.

The complementary relationship between the Court and States is regulated through the procedures for the admissibility of cases before the former. It is generally said that the Court

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<sup>1</sup> Rome Statute of the International Criminal Court, A/CONF/183/9, hereinafter referred to as ICC Statute, Rome Statute or Statute.

shall intervene – as a doctor entrusted to combat the virus of impunity – when States fail to take action, or where their action is not deemed genuine. In case of disputes over which forum shall exercise jurisdiction, the international Judges are in charge of deciding, in accordance with the statutory provisions. By doing so, they are not only arbiters of the Court's jurisdiction; they are also in charge of the delicate task of evaluating the conformity of domestic proceedings with the Statutory provisions and criteria.

Since its adoption, complementarity was subject to extensive doctrinal elaboration.

Complementarity has been regarded to as both the mechanism that regulates the concurrent jurisdiction between the Court and national jurisdiction, and as an incentive for States to take action, in accordance with Statutory requirements. Much attention has been devoted to the interpretation of the statutory provisions regulating the Court's activation<sup>2</sup> and the exercise of its complementary jurisdiction,<sup>3</sup> to the analysis of the consequences of complementarity in terms

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<sup>2</sup> See, H. Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers, Leiden 2005); H. Olásolo, 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor' (2005) 5 ICLR, 121-146; C. Stahn, M. M. El Zeidy, H. Olásolo, 'The International Criminal Court's ad hoc jurisdiction revisited', (2005) 99 AJIL, 421; D. Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', (2011) 9 JICL, 355-384; C. Kress, 'Self-Referrals and 'Waivers of Complementarity. Some considerations in Law and Policy', (2004) 2 JICJ, 944-948; G. P. Fletcher, J. D. Ohlin, 'The ICC – Two Courts in One?' (2006) 4 JICJ 428-433; A. Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 JICJ, 434-441; M. C. Bassiouni, 'The ICC – *Quo Vadis?*' (2006) 4 JICJ, 421 -427.

<sup>3</sup> P. Benvenuti, 'Complementarity of the International Criminal Court to national jurisdictions', in F. Lattanzi, W. A. Schabas, (Eds.) *Essays on the Rome Statute of the International Criminal Court*, (Il Sirente, Ripa di Fagnano Alto 1999) Vol. I, 21-50; M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', (2003) 7 *Max Planck UNYB*, 591-632; M. Caianiello, 'L'esercizio dell'azione penale nella Corte penale internazionale', (2001) *LVI Rivista di diritto processuale*, 200-216; O. Solera, 'Complementary Jurisdiction and International Criminal Justice', (2002) 84 *IRRC*, 145-171; M. Bergsmo, 'The Jurisdictional Regime of the International Criminal Court', (1998) 4 *European Journal of Crime, Criminal Law and Criminal Justice*, 345-363; G. Lattanzi, V. Monetti, *La Corte penale internazionale. Organi – competenza – reati – processo*, (Giuffrè, Milan 2006); E. Greppi, 'Inability to Investigate and Prosecute under Article 17', in M. Politi, F. Gioia, (Eds.) *The International Criminal Court and National Jurisdictions*, (Ashgate, London 2008), 63-70; R. Jensen, 'Complementarity, 'genuinely' and Article 17: Assessing the boundaries of an effective ICC', in J. K. Kleffner, G. Kor, (Eds.), *Complementary Views on Complementarity. Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court. Amsterdam, 25/26 June 2004*, (T.M.C. Asser Press, The Hague 2005), S. Williams, W. A. Schabas, 'Article 17. Issues of Admissibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> edn, Nomos Baden Baden 2008), 605-625; D. Sedman, 'Should the prosecution of ordinary crimes in domestic jurisdictions satisfy the complementarity principle?', in C. Stahn, L. van den Herik I., (Eds.) *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, The Hague 2010) 259-265; F. Gioia, 'The Complementary Role of the International Criminal Court: Are there any Time-limits?', in M. Politi, F. Gioia, (Eds.) *The International Criminal Court and National Jurisdictions*, ( Ashgate, London 2008), 71-80; H. Olásolo, 'Complementarity

of States' compliance with their duty to prosecute, in particular through implementation of provisions on international crimes within their legal systems<sup>4</sup>, and to the concrete realisation of the relationship between the Court and domestic jurisdictions.<sup>5</sup>

## 1. Scope of the research

Ten years after the entry into force of the ICC Statute, the Court is fully operational. It is conducting investigations into seven situations: the Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR), Sudan, Kenya, Libya, and Ivory Coast.

Fourteen cases have so far been brought to the attention of the ICC judges, for a total of twenty-five suspects. The first judgement in the case against the Congolese Lubanga Dyilo is expected

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Analysis of National Sentencing,' in Haveman R., Olusanya O., (Eds.) *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, Oxford 2006) 37-66.

<sup>4</sup> Without ambition of exhaustivity, it is worth mentioning the research project carried out by the Max Plank Institute on national prosecution of international crimes, between 2001 and 2006, which analysed the discipline of prosecution of international crimes of 34 legal systems worldwide. The analyses were published in 7 volumes, under the supervision of Professors Eser and Kreicker, see, [http://www.mpicc.de/w/en/pub/forschung/forschungsarbeit/strafrecht/nationale\\_strafverfolgung.htm](http://www.mpicc.de/w/en/pub/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.htm) (accessed 28 December 2011). Similarly, the Konrad Adenauer Foundation finances and publishes researches on several international criminal law issues involving in particular, but not exclusively, Latin American countries. Among the annual publications, see, K. Ambos, E. Malarino (Eds.) *Persecución penal nacional de crímenes internacionales en América Latina y España*, (Konrad-Adenauer-Stiftung e. V., Montevideo 2003); K. Ambos, E. Malarino, J. Woischnik, (Eds.), *Dificultades jurídicas y políticas en la ratificación o implementación del Estatuto de Roma de la Corte Penal Internacional, Contribuciones de América Latina y Alemania*, (Konrad-Adenauer-Stiftung e. V., 2006). On African countries, M. Du Plessis, J. Ford, (Eds.) *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in selected African Countries*, ISS Monograph Series No 141, March 2008, available at <http://www.iss.co.za/pgcontent.php?UID=2113> (accessed 28 December 2011). Significant are also the studies conducted by the Société internationale de droit pénal militaire et de droit de la guerre, which published the volume *Compatibility of National Legal Systems with the Statute of the Permanent International Court*, (Bruxelles, 2003). Other eminent professors conduct research and studies on the issues. Among them, H. Fischer, C. Kress, S. Rolf Lüder, ed., *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin Verlag Arno Spitz: Berlin, 2001); C. Kress, F. Lattanzi, ed. *The Rome Statute and Domestic Legal Orders, vol. I*, (Nomos – Il Sirente: Baden Baden-Ripa di Fagnano Alto, 2000); B. Broomhall, C. Kress, F. Lattanzi, V. Santori, *The Rome Statute and Domestic Legal Orders, Vol. II, Constitutional Issues, Cooperation, Enforcement* (Nomos – Il Sirente: Baden Baden-Ripa di Fagnano Alto, 2005); A. Cassese, M. Delmas-Marty (eds.), *Juridictions nationales et crimes internationaux* (Presses Universitaires de France: Paris, 2002).

<sup>5</sup> K. Ambos, J. Large, M. Wierda, (Eds.) *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer – Verlag Berlin Heidelberg, 2009); C. Cárdenas Aravena, 'The admissibility test before the International Criminal Court under special consideration of Amnesties and truth commissions', in J. K. Kleffner, G. Kor, (Eds.) *supra* n 3; A. Bisset, 'Rethinking the Powers of Truth Commissions in Light of the ICC Statute', (2009) 7 JICJ, 963-982; J. Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?', (1999) 12 LJIL 1001-1015; D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', (2003) 3 EJIL, 481-505; D. D. N. Nseroko, 'The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court', (2008) 19 CLF, 373-393; K. A. Rodman, 'Is Peace in the Interest of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', (2009) 22 LJIL, 96-126.



to be delivered soon by Trial Chamber I. Trial proceedings are on-going in relation to the Congolese Germain Katanga and Mathieu Ngudjolo Chui in the context of the DRC situation, and Jean-Pierre Bemba Gombo for crimes committed in CAR. The trial of the two Sudanese rebels Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus is expected to commence in 2012. Six suspects in the context of the Kenya situation are awaiting Pre-Trial Chamber II's decision on the confirmation of charges. Pre-Trial proceedings are on-going in relation to former Ivory Coast President Laurent Gbagabo, transferred to the Court on 30 November 2011. On 16 December 2011, Pre-Trial Chamber I declined to confirm the charges against Callixte Mbarushimana in the context of the DRC situation. The same Chamber had previously declined to confirm the charges against Bahar Idriss Abu Garda, in the context of the situation in Darfur, Sudan.

Ten more warrants of arrest have been issued by the ICC Pre-Trial Chambers, but the suspects are still at large. These are the Sudanese President Al Bashir and the two leading figures of Ahmad Muhammad Harun (“Harun”), former Minister for Humanitarian Affairs and currently Governor of South Kordofan, and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), of the Militia Janjaweed; the leader and three leading figures of the Ugandan rebel group of the Lord's Resistance Army; the Congolese Bosco Ntaganda and the two Libyan Saif Al-Islam Gaddafi and Abdullah Al-Senussi. On 2 December 2011 the ICC Prosecutor requested Pre-Trial Chamber I to issue an arrest warrant against the current Sudanese Defense Minister Abdelrahim Mohamed Hussein for crimes against humanity and war crimes committed in Darfur from August 2003 to March 2004.

The first years of activities of the Court have shown the relevance of both the legal and the broader political dimension in which this institution is called to operate.

Although several questions remain unanswered, the practice of the Court provided opportunities to further understand the modalities and consequences of the application of the statutory

provision on complementarity. The exceptional character of judicial interventions to settle jurisdictional disputes based on complementarity has emerged. In the meanwhile, the role of the ICC Prosecutor in assessments of admissibility at earlier stages of proceedings acquired progressive relevance in the context of complementarity. Complementarity, therefore, moves between a legal and a policy or discretionary dimension.

Within this framework, the very concept of complementarity has been subject to dynamic transformations in its theorisation. Starting from the idea that the Court shall encourage the performance of proceedings at the national level, it has been progressively seen as a tool to strengthen domestic jurisdictions, under the concept of “positive” or “proactive” complementarity.

Agreement on the meaning, content and potentials of complementarity has not yet been reached. As argued by an eminent commentator, “complementarity still has different meanings to different audiences”.<sup>6</sup>

Based on this background, the general aim of this work is to identify and analyse the meaning, scope and potentials of complementarity. The objective will be reached through the individuation of answers to the following questions:

1. Who are the actors of complementarity?
2. Which are the dimensions in which complementarity comes at stake?
3. What are the potentials of complementarity? Is complementarity the key for the success of the International Criminal Court?

By shedding light on what complementarity is, how it works, and what are its potentials, this thesis aims at contributing to advancing the discourse on complementarity for both scholars and practitioners. This would permit to understand and apply complementarity as a legal test without incurring in misunderstandings or superficial elaborations; the individuation and

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<sup>6</sup> C. Stahn, Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity, in Stahn C., El Zeidy M. M., (Eds.) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP, Cambridge 2011), 233-282.

distinction between the dimensions in which it assumes relevance would contribute to downgrade expectations on complementarity and to move the focus of the discussion to the system of justice created through the establishment of the ICC, its actors, weaknesses and most urgent needs.

## **2. Structure of the Thesis**

Chapter I analyses the historical foundations that led to the establishment of the International Criminal Court. After examining the features of other mechanisms adopted to regulate the exercise of concurrent jurisdiction between international and national *fora*, the chapter presents a thorough analysis of the ICC Statute preparatory works. This provides the basis for understanding the reasons behind the adoption of complementarity as well as supplementary means of interpretation of the statutory provisions, in accordance with article 32 of the Vienna Convention on the Law of Treaties. The discourse on complementarity is then located within the framework of the “system of justice” created through the establishment of the ICC.

Chapter II examines the statutory provisions on complementarity. The content of Article 17 of the Statute is deeply analysed. Interpretative solutions are provided for the notions of unwillingness, inability and gravity, in order to contribute to clarifying the contours and scope of the Court's intervention. The chapter then analyses the whole set of provisions regulating the triggering, initiation of investigations and prosecutions before the Court, with the twofold aim of individuating the actors of complementarity and the different moments in which assessments of complementarity come at stake.

Chapter III reviews the ICC's case law on complementarity. The analysis focusses on the contours and content of judicial assessments of admissibility of cases and on the respective roles of the ICC judges and Prosecutor. Together, Chapters II and III define the content, scope and actors of the legal dimension of complementarity.

Chapter IV examines the policy or discretionary dimension of complementarity in the prosecutorial process of selection of situations and cases to be brought before the Court. The analysis is performed against the backdrop of the ICC Prosecutor's understanding, stance and application of complementarity. The recently emerged concept of positive complementarity is analysed with a view to understanding the potentials of complementarity to foster domestic capacity and ultimately ensure the success of the ICC.

### **3. Methodology**

The main components of this work are, on the one hand, the analysis of the provisions of the ICC Statute and Rules of Procedures and Evidence (RPE) and of the ICC case law in relation to complementarity and, on the other, the ICC Prosecutor's elaboration on complementarity and the practice of the Court beyond the strict legal assessments of admissibility.

The provisions of the Statute and of the RPE are analysed in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties, in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose. References to the preparatory works and to the circumstances of the inclusion of given provisions have been utilised as supplementary means of interpretation in order to confirm or clarify the meaning of the above mentioned provisions. The analysis has been integrated by references to their concrete application before the Court, and, in cases of interpretative controversies, doctrinal elaborations have been taken into consideration.

The Prosecutor's elaboration on complementarity encompasses a number of policy and strategy papers published by the Office of the Prosecutor or circulated among scholars and practitioners for comments. The principles, policies and strategies elaborated in these papers have been confronted with the practice of the Court. This latter includes the set of discretionary choices of the Prosecutor whose outcome is the investigation over specific situations and the prosecution

of specific cases as well as prosecutorial interpretations of specific statutory provisions and, more broadly, of complementarity. The analysis has been integrated with the most recent doctrinal production on both prosecutorial strategy and complementarity.

The overall analysis has been performed in light of a pragmatic, Court-based and practice-oriented approach, with the purpose of providing an interpretation of complementarity that fits to the practical realities within which it operates.

# CHAPTER I - A COMPLEMENTARY INTERNATIONAL CRIMINAL COURT

## 1. The roots that led to the establishment of the ICC

The International Criminal Court (ICC) was established on 17 July 1998, with the adoption of the ICC Statute at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome between 15 June and 17 July 1998.<sup>1</sup>

The roots that led to the creation of the ICC and to the adoption of its Statute are traced in the process of progressive internationalisation of law in the field of human rights that increased dramatically after World War II. As a reaction to the heinous crimes perpetrated by the Nazi regime, the community of states fostered the adoption of multilateral treaties and conventions aimed at promoting and protecting human rights and fundamental freedoms.<sup>2</sup> In several instances, specific organs were established to control, at the regional as well as at the international levels, the compliance of states with the provisions contained in these treaties.<sup>3</sup>

The process of codification also involved the criminalization of specific conducts that constitute the category of the so-called international crimes, such as war crimes<sup>4</sup>, genocide<sup>5</sup>, torture<sup>6</sup> and

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<sup>1</sup> Rome Statute of the International Criminal Court, A/CONF/183/9, hereinafter referred to as “ICC Statute”, “Rome Statute” or “Statute”.

<sup>2</sup> I. Brownlie, *Principles of Public International Law* (OUP, Oxford, 2003), 530.

<sup>3</sup> See, among others, the mechanism for supervision of compliance with the obligation to take all possible steps for the recognition of the rights recognised in the International Covenant on Economic, Social and Cultural Rights of 1966 and in the International Covenant on Civil and Political Rights of 1966, as well as the regional instruments for the protection of human rights such as the European Court of Human Rights and the Inter-American Court of Human Rights – which have strong judicial powers, being their decisions binding on the relevant state – and the African Commission on Human and People's Rights, which however has less stringent powers. For an in-depth analysis of these and other organs established in order to monitor the compliance of states with the human rights established in several treaties and conventions, see I. Brownlie, *supra* n. 2, 536-556.

<sup>4</sup> The category of war crimes is the most ancient category of crimes at the international level. The idea that not all conducts are allowed in war times dates back the ancient societies and was further developed by philosophers and thinkers between the eighteenth and nineteenth century. It was then the object of regulation at the domestic level, with the emergence of military codes, such as the Lieber Code of 1863 in the United States. The first regulation in terms of international law of the conduct of hostilities (the so-called *ius in bello*) dates

several others. These conducts, due to their magnitude and gravity, are conceived 'criminal *juris gentium*'<sup>7</sup>: their commission affects not only the persons directly involved as victims, but 'threaten the peace, security and well-being of the world'<sup>8</sup>, harming the international community as a whole.<sup>9</sup> The various treaties and conventions which define these crimes also set the principle that they should not go unpunished. In this context, most of them establish the duty of states to punish their perpetrators.<sup>10</sup> No sanctions were however contemplated for states' failure to comply with such obligation to prosecute.

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back the two The Hague Conventions of 1899 and 1907. The bulk of war crimes, however, is constituted by the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. Art. 8 of the Rome Statute defines war crimes as grave breaches or serious violations of the Geneva Conventions of 1949 and other serious violations of the laws and customs applicable in international armed conflicts or conflicts of non international character, "in particular when committed as part of a plan or policy or as part of large-scale commission of such crimes". For a detailed analysis of the historical development and current discipline of war crimes, see, G. Werle, *Principles of International Criminal Law* (TMC Asser Press, The Hague 2009), 267 ss.

<sup>5</sup> Convention on the Repression and Punishment of the Crime of Genocide, 9 December 1948. Art. 6 of the Rome Statute gives the same definition of the crimes as contained in Art. 2 of the Convention, i.e., the acts listed therein, hen "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group". See, G. Werle, *Principles of International Criminal Law*, *supra* n. 4, 186 ss.

<sup>6</sup> Convention against Torture and other Inhumane or Degrading Treatment or Punishment, 10 December 1984.

<sup>7</sup> P. Benvenuti, 'The repression of crimes against humanity, war crimes, genocide through national courts', (1999) *Jus - rivista di scienze giuridiche*, 1, anno XLVI, 145-155, at 145

<sup>8</sup> Preamble, ICC Statute, para. 3.

<sup>9</sup> In *Erdemovic*, the Trial Chamber, referring to crimes against humanity, affirmed that '[t]hey are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perform demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity'. *The Prosecutor v. Drazen Erdemovic* Sentencing Judgement, IT-96-22, 29 November 1996, para. 28.

<sup>10</sup> See, among others, the provisions contained in the four Geneva Conventions of 12 August 1949: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Art. 49; Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (Second Geneva Convention), Art. 50; Convention Relative to the Treatment of Prisoners of War, (Third Geneva Convention), art. 129; Convention relative to the Protection of Civilian Persons in time of War, (Fourth Geneva Convention), art. 146. The duty of states to punish the persons responsible for the commission of international crimes is also expressed in the Additional Protocol I to the Geneva Conventions, 8 June 1977, art. 85; in the Convention on the Repression and Punishment of the Crime of Genocide, 9 December 1948, arts. 4 and 6; and in the Convention against Torture and other Inhumane or Degrading Treatment or Punishment, art. 7. On the obligation for states to investigate and prosecute persons responsible for the commission of international crimes see J. K. Kleffner,

*Complementarity in the Rome Statute and National Criminal Jurisdictions*, (OUP Oxford 2008), 6 ss. Of the same author, 'The Impact of Complementarity on national implementation of substantive international criminal law', (2003)1 JICJ, 86-113 and 'Complementarity as a catalyst for compliance', in J. K. Kleffner, G. Kor, (Eds.) *Complementary Views on Complementarity. Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court. Amsterdam, 25/26 June 2004*, (T.M.C. Asser Press, The Hague 2005), 79-104. On its qualification as obligation *erga omnes*, see F. Gioia, 'State Sovereignty, Jurisdiction and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court', (2006) 19 LJIL, 1095-1123. On a critique to the "limited and disjointed obligations under conventional and customary international law", see P. Akhavan, 'Whiter National Courts? The Rome Statute's Missing Half. Towards an Express and Enforceable Obligation for the National Repression of International Crimes', (2010) 8 JICJ, 1245-1266.

The establishment of international courts and tribunals is rooted in the recognition that, failing states to act, other mechanisms, stronger than the conventional ones, should be implemented in order to respond to international crimes. The creation of International Military Tribunals of Nuremberg and Tokyo (IMTs) in the aftermaths of World War II<sup>11</sup>, and the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda in the 1990s respond to this logic.<sup>12</sup> The Preamble to the ICC Statute reflects this principle even clearer: the establishment of the Court originates from the recognition that “millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”<sup>13</sup> and that “such grave crimes threaten the peace, security and well-being of the world”<sup>14</sup>. The international community, deeply concerned by the commission of these crimes, is resolved to guarantee that they do “not go unpunished” and that their “effective prosecution” is ensured “by taking measures at the national level and by enhancing international cooperation”<sup>15</sup>, as part of the “duty of every State

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<sup>11</sup> The International Military Tribunal of Nuremberg was established through the London Agreement, signed by the four Allies (the United States, the Soviet Union, Great Britain and France) in August 1945; the International Military Tribunal for the Far East (the “Tokyo Tribunal”) was created by the unilateral initiative of General Mac Arthur in January 1946. For a detailed description of the history, activity and the critics addressed to the International Military Tribunals, see, among others, T. Taylor, *Anatomy of the Nuremberg Trials: a Personal Memoir* (NY, Knopf: 1992); G. Michelini, V. Monetti, 'L'istituzione della corte penale internazionale e i suoi precedenti. La struttura della Corte' in G. Lattanzi, V. Monetti (eds.) *La Corte penale internazionale. Organi – competenza – reati – processo*, (Giuffrè, Milan 2006), 3-10; H. Von Hebel, 'An International Criminal Court – A Historical Perspective', in H. Von Hebel, J. G. Lammers, J. Schukking (eds.) *Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos* (T.M.C. Asser Press, The Hague 1999), 18-22.

<sup>12</sup> Both Tribunals were established through United Nation Security Council Resolutions, as responses to the serious, persistent and grave crimes committed within the territories of Former Yugoslavia and Rwanda, in conformity to the powers assigned to it by Chapter VII of the UN Charter. The ICTY was established through UN Security Council Resolution 827 (1993); the ICTR through UN Security Council Resolution 955 (1994). Chapter VII of the UN Charter deals with the actions that the UN can undertake with respect to threats to peace, breaches of the peace and acts of aggression. According to Art. 39, the Security Council may determine what measures to take for the maintenance or restoration of international peace and security. Although Art. 41 does not expressly contemplate the creation of international tribunals among the measures not involving the use of force, it has been used as the basis for their establishment. For an overview on the doctrinal debate on the point, see, M. Balboni, 'Da Norimberga alla Corte penale internazionale', in G. Illuminati, L. Stortoni, M. Virgilio (eds.) *Crimini internazionali tra diritto e giustizia. Dai tribunali internazionali alle commissioni verità e riconciliazione* (Giappichelli, Milan 2000), 8-12. On the legitimacy of the Tribunal, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A. Ch., 2 October 1995, paras 9-40. Previous attempts to establish International Tribunals to judge persons responsible for the commission of war crimes date back to the medieval period and to the aftermaths of First World War. See, R. Cryer, *Prosecuting International Crimes. Selectivity and the International Law Regime*, (CUP, Cambridge 2005), 17 ss.

<sup>13</sup> Preamble, ICC Statute, para. 2.

<sup>14</sup> Preamble, ICC Statute, para. 3.

<sup>15</sup> Preamble, ICC Statute, para. 4.



to exercise its criminal jurisdiction over those responsible for international crimes”.<sup>16</sup> The failure of domestic courts to intervene, the lack of enforcement mechanisms with respect to such a duty to punish, and the will of the international community “to put an end to impunity for the perpetrators” of international crimes “and thus to contribute to the prevention of international crimes”<sup>17</sup> led to the establishment of “an independent permanent International Criminal Court (...) with jurisdiction over the most serious crimes of concern to the international community as a whole”<sup>18</sup>.

The IMTs and *ad hoc* tribunals, although different in terms of functioning and foundations, may well be considered the ancestors of the ICC, whose creation was long debated since 1948.<sup>19</sup> Their establishment consecrated the ideas that the exercise of criminal prerogatives for persons responsible for the commission of international crimes is not exclusively a prerogative of states and that the commission of international crimes directly involves the responsibility of the individual, who may be called to respond for his or her conducts before an international forum. The interest of the international community to protect human rights *vis-à-vis* “uncontrolled and arbitrary exercise of discretion by the State”<sup>20</sup> and thus to bring to justice the persons allegedly responsible for the commission of the gravest crimes prevailed over the traditional idea that criminal law and its enforcement are exclusive prerogatives of sovereign states.<sup>21</sup>

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<sup>16</sup> Preamble, ICC Statute, para. 6.

<sup>17</sup> Preamble, ICC Statute, para. 5.

<sup>18</sup> Preamble, ICC Statute, para. 9 and art. 1, ICC Statute.

<sup>19</sup> On the same day in which the Genocide Convention was adopted, the General Assembly invited the ILC to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions”. General Assembly Resolution 260 (III) B, Third session, 179<sup>th</sup> plenary meeting, 9 December 1948. Article 6 of the Genocide Convention indicated that persons charged with the offence of genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

<sup>20</sup> O. Triffterer 'Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality', in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (2<sup>nd</sup> edn, Nomos Baden Baden 2008), 26.

<sup>21</sup> B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP Oxford 2003) 19 ss.

## 2. Models for the allocation of competences between the international and the national levels

The establishment of international mechanisms such as the ICC raises the question of how to regulate the exercise of functions of the international body *vis-à-vis* domestic courts, normally in charge of the exercise of criminal prerogatives over their territories and their nationals.

The issue characterises all the instances of international or regional integration, being it for economic, political or human rights purposes, as a consequence of the ‘intrusion’ of international law and international bodies within what was previously conceived an exclusive dominion of national laws and authorities.

Different solutions have been proposed for different bodies and different subject-matters. Thus, for instance, the Law of the European Union is founded on the principle of subsidiarity;<sup>22</sup> the Organization for Economic Co-operation and Development (OECD) applies the principle of functional equivalence;<sup>23</sup> the European Court of Human Rights (ECHR) elaborated the notion of the margin of appreciation.<sup>24</sup>

In the field of international criminal law, the question of how to regulate the exercise of jurisdiction between international and national *fora* is common to the IMTs, the *ad hoc*

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<sup>22</sup> Art. 5(3) of the European Union Treaty affirms the subsidiarity of European law in the areas which do not fall within its exclusive competence.

<sup>23</sup> The concept of ‘functional equivalence’, meaning that it does not require uniform adoption and application of the provisions among State parties, as soon as they reach the results expected. See, M. Pieth ‘Taking Stock: Making the OECD Initiative Against Corruption Work’, available at <http://www.oas.org/juridico/english/pieth2000.htm> (Accessed 22 December 2011).

<sup>24</sup> This notion, which attracts the attention of the doctrine and whose contours have not yet been fully clarified, creates a system where the international level aims at harmonizing national laws around common principles and at creating a minimum common denominator of protection of human rights among the states members of the Convention, without imposing the strict uniformity of national systems with the Convention. On the debate about the nature, scope and significance of the notion of “margin of appreciation” in the ECHR jurisprudence, see, among others, M. Delmas-Marty, M. L. Mathieu-Izorche, ‘Marge nationale d’appréciation et internationalisation du droit: réflexions sur la validité formelle d’un droit commun pluraliste’, (2000) 4 *Revue Internationale de droit comparé*, 753-780; E. Fronza, “Legislazione antiterrorismo e deroghe ai diritti fondamentali: riflessioni sulla teoria del margine nazionale di apprezzamento”, (2006) 1:2 *Studi sulla questione criminale*, 31-57; F. Tulkens, L. Donnay, ‘L’usage de la marge d’appréciation par la Cour européenne des droits de l’homme. Paravent juridique superflu ou mécanisme indispensable par nature?’, (2006) 1 *Revue de Science Criminelle et Droit pénal comparé*, 3-24; P. Tanzarella, ‘Il margine di apprezzamento’, in M. Cartabia (ed.) *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti Europee*, (Il Mulino, Bologna 2007), 145-181.

Tribunals and the ICC.

The International Military Tribunal for the Far East, while not providing an express division of labour between the international and the national levels, established a sort of division of competences based on its specific jurisdiction *ratione materiae*. According to article 5 of its Statute, the Tribunal exercised jurisdiction over “Far Eastern war criminals that as individuals or as members of organizations are charged with offences which include Crimes against Peace”.<sup>25</sup> Those not suspected of crimes against peace – thus allegedly responsible for crimes that did not fall within the jurisdiction of the Tokyo Tribunal – were tried before domestic courts.<sup>26</sup>

The Nuremberg Tribunal had a more defined division of labour with domestic courts. According to its Charter, it had jurisdiction over the ‘major criminals whose offences have no particular geographical location’,<sup>27</sup> while national courts were called to judge those German officers and members of the Nazi Party whose crimes were committed within their territories.<sup>28</sup> The exercise of jurisdiction of national and international tribunals was thus concurrent, with a

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<sup>25</sup> Charter of the International Military Tribunal for the Far East, available at <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml> (accessed 5 January 2012)

<sup>26</sup> See, R. Cryer, *Prosecuting International Crimes. Selectivity and the International Law Regime*, *supra* n. 12, 48.

<sup>27</sup> London Agreement, available at [http://www.ena.lu/london\\_agreement\\_august\\_1945-020302341.html](http://www.ena.lu/london_agreement_august_1945-020302341.html) (accessed 5 January 2012) Preamble, paragraph 4. The Charter of the International Military Tribunal was annexed to the London agreement. Available at <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed 5 January 2012)

<sup>28</sup> London Agreement, Preamble, paragraph 3. The division of labour had been anticipated in the Moscow Declaration signed in October 1943 by the U.S. President Roosevelt, the British Prime Minister Churchill and the Soviet Union Premier Stalin, whereby it was established that “(...) those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions *will be sent back to the countries in which their abominable deeds were done* in order that *they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein* (...)” whereas “*German criminals whose offences have no particular geographical localization (...) will be punished by joint decision of the government of the Allies.*” October 1943 Moscow declaration, available at <http://www.ibiblio.org/pha/policy/1943/431000a.html> (accessed 5 January 2012). Emphasis added. Art 6 of the London Agreement specified that the establishment of the tribunal did not 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’. As affirmed by the international judges, “The signatory Powers created this Tribunal, defined the Law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.” Judgement of the International Military Tribunal for the trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, available at [http://avalon.law.yale.edu/subject\\_menus/imt.asp](http://avalon.law.yale.edu/subject_menus/imt.asp) (accessed 5 January 2012).

specific delineation of competences based on criteria *ratione loci* – particular geographical location *versus* non particular geographical location – and *ratione personae* – the IMT was granted jurisdiction only over those persons qualified as major war criminals of the European Axis,<sup>29</sup> as a sort of “collective exercise of national jurisdiction granted to the Parties to the Agreement but effectuated on the international level”.<sup>30</sup>

The Statutes of the *ad hoc* Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) in recognising that “in case of crimes of international concern, criminal prosecution is conceived to work comprehensively, at a double level, national and international”,<sup>31</sup> regulate the concurrent jurisdiction between the two levels by granting primacy to the international *forum*.<sup>32</sup> Primacy implies that the international forum has the faculty to request national courts to defer cases to its competence.<sup>33</sup> Whereas the concurrent jurisdiction of the UN *ad hoc* tribunals and

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<sup>29</sup> Article 1 limited the jurisdiction of the IMT to 'the just and prompt trial and punishment of major war criminals of the European Axis', thus excluding perpetrators of similarly serious crimes which however belonged to the forces of the Allies. From such an exclusion follows the reference to the Nuremberg trials as an example of victors' justice.

<sup>30</sup> J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, *supra* n 10, 62.

<sup>31</sup> P. Benvenuti, 'Complementarity of the International Criminal Court to National Criminal Jurisdictions', in F. Lattanzi, W. A. Schabas (eds.) *Essays on the Rome Statute of the ICC, Vol. I*, (Il Sirente, Fagnano Alto 1999), 21-50, 32.

<sup>32</sup> See, B. S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', (1998) 23 YJIL, 383-436.

<sup>33</sup> Article 9(2) ICTY Statute and article 8(2) ICTR Statute. Rule 9 of the Rules of Procedure and Evidence specifies that the Prosecutor may request the competent Trial Chamber to issue a request for deferral to the Tribunals in three scenarios. First, where the act being investigated or which is the subject of the national proceedings is characterized as an ordinary crime; second, where there is a lack of independence or impartiality, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; third, where the object of national prosecutions “is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal”. This provision has been applied in several cases. See, *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* n. 12, para. 52; *Prosecutor v Mrkšić, Šljivančanin and Radić*, Case No. IT-95-13-R61, Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer the Pending Investigations and Criminal Proceedings to the Tribunal, 10 December 1998. (Request based on rule 9(ii) and (iii)); *Prosecutor v Re: Republic of Macedonia*, Case No IT-02-55-MISC.6, Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, 4 October 2002. According to its Rule 9, the ICTR Prosecutor could interfere with domestic courts on even more flexible grounds, by requesting a State to defer a case to the international tribunal on the ground that he or she was investigating it; where he or she deemed that investigation shall be held at the international level, in light, *inter alia*, of the seriousness of the offence, of the status of the alleged crime at the time of the offence, and of the general importance of the legal questions involved in the case. In addition, the ICTR could interfere where a case was simply the subject of an indictment in the Tribunal. This latter scenario was the base for the ICTR's requests for deferral to national authorities in the cases against Musema, Bagosora and Radio Television Libre des Mille Collines SARL. See, *Prosecutor v Alfred Musema*, Case No ICTR-96-5-D, Decision on the Formal Request for Deferral Presented by the Prosecutor, 12 March 1996; *Prosecutor v Théoneste Bagosora*, Case No

national criminal jurisdictions reflects the view that “(...) it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts...Indeed [they] should be encouraged [to do so]”,<sup>34</sup> primacy was seen as a necessity in light of the Tribunals' special mission of “contributing to the restoration and maintenance of peace in the former Yugoslavia and Rwanda”.<sup>35</sup> Primacy was seen as “both a practical and a conceptual necessity”.<sup>36</sup> A practical necessity, as it was deemed fundamental in order to overcome the obstacles faced by national jurisdictions and ensure that perpetrators of international crimes were held accountable and punished. A conceptual necessity, as it gave a clear and strong characterization of conducts as international crimes, the gravest crimes that affect the international community as a whole.<sup>37</sup>

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ICTR 96-7-D, Decision on the Application by the Prosecutor for a Formal Request for Deferral, 17 May 1996; *Prosecutor v Radio Television Libre des Mille Collines SARL*, Case No ICTR-96-6-D, Decision on the Formal Request for Deferral Presented by the Prosecutor, 12 March 1996.

<sup>34</sup> Report of the Secretary General Pursuant to para. 2 of Security Council Resolution 808 (1993) UN Doc S/25704, 3 May 1993.

<sup>35</sup> M. M., El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, Leiden 2008), 138. Critical, on the plurality of goals pursued by the ad hoc tribunals, D. Pastor, 'Processi penali solo per conoscere la verità? L'esperienza argentina', in E. Fronza, G. Fornasari (eds.), *Il superamento del passato e il superamento del presente*, (Università degli Studi di Trento, 2009) 99-173, 103 ss.

<sup>36</sup> J. K., Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, *supra* n. 10, 66.

<sup>37</sup> See, in this regard, what held by the ICTY judges in *Tadić*,

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. (...)Indeed, when an international 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 characterised as "ordinary crimes", or proceedings being "designed to shield the accused", or cases not being diligently prosecuted. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

*The Prosecutor v. Tadić*, Decision on the Interlocutory Appeal on Jurisdiction, *supra* n. 12, paras. 58-59. See also what held by Judge Sidhwa in his separate opinion:

At the root of primacy is a demand for justice at the international level by all States which constitutes the first step towards implementation of international judicial competence(...)The rule cuts national borders to bring to justice persons guilty of serious international crimes, as they concern all States and require to be dealt with for the benefit of all civilised nations.(...) [T]he rule recognises the right of all nations to ensure the prevention of such violations by establishing international criminal tribunals appropriately empowered to deal with these matters, or else international crimes would be dealt with as ordinary crimes and the guilty would not be adequately punished.

*Prosecutor v. Tadić*, Decision on the Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A.Ch., 2

That international tribunals vested with such a wide and powerful jurisdiction – which, although limited in terms of temporal, territorial and subject matter jurisdiction, was to be exercised in contexts in which the number of crimes and perpetrators is extremely high<sup>38</sup> – needed some form of restrictions/selectivity at least with respect to the persons to be brought before it, became clear only a few years after they became operational. The practice of the *ad hoc* tribunals, accompanied by amendments of their legal instruments – in particular of the Rules of Procedure and Evidence – and fostered by the United Nations, led towards a progressive “specialization” of the international forum in focussing on those who bear the greatest responsibility for the commission of international crimes. This is stated in rule 28 RPE, as amended in April 2004, which instructs the Tribunals to determine “whether the indictment *prima facie* concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the tribunal”.<sup>39</sup> This amendment followed instructions given by the United Nations Security Council, which in several instances had directed the *ad hoc* tribunals to concentrate “on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law (...), rather than on minor actors”.<sup>40</sup> All other cases were to be left to national or internationalised criminal courts<sup>41</sup>, in accordance with the so-called “completion strategy”<sup>42</sup>,

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October 1995, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 83.

<sup>38</sup> On the unique features and challenges of prosecuting crimes at the international level, see C. Del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level. The Experience of the ICTY', (2006) 4 JICJ, 539-558, 541 ss.

<sup>39</sup> Rule 28 RPE.

<sup>40</sup> Statement by the President of the Security Council, 23 July 2002, UN Doc. S/PRST/2002/21, para 2. Also, UNSC Res. 1329 (2000) UN Doc S/RES/1329.

<sup>41</sup> In the context of the conflict in the Former Yugoslavia, it is worth mentioning the work of War Crimes Chambers in Bosnia and Herzegovina. See, among others, T. Abdulhak, 'Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina', (2009) 9 ICLR 333-358; Z. Mujkanović, 'The Orientation Criteria document in Bosnia and Herzegovina', in M. Bergsmo (Ed.) *Criteria for Prioritizing and Selecting Core International Crimes cases*, (2009) FICHL Publications Series No. 4), 61-67; Critical, N. Kandić, 'The Republic of Serbia Office of the War Crimes Prosecutor has no strategy for prosecuting war crimes', *ibid.* in M. Bergsmo (Ed.) *supra*, 113-119. In Rwanda, different categories of perpetrators were tried before domestic courts or before the community-based Gacaca courts. For a detailed overview, see, L. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Leiden, 2005), 50-53; A. Obote-Odora, 'Case selection and prioritization criteria at the

whose terms – initially set as of 2004 for the completion of investigations, 2008 for trials at first instance and 2010 for appeals – were postponed several times. At the moment of writing, the “expiration date” for the trials and appeals is set as of 2012 and 2014, respectively.<sup>43</sup>

The transfer of cases for which indictments had already been confirmed by the *ad hoc* Tribunals is regulated in Rule 11*bis* RPE, adopted in 1997 and amended several times. Transfers of cases are allowed to a State in whose territory the crime was committed, in which the accused was arrested; or to those states having jurisdiction and being willing and adequately prepared to accept such a case, provided that the competent chamber is satisfied that the accused will receive a fair trial and the death penalty will not be imposed or carried out. When such a transfer is ordered, the Prosecutors of ICTY or ICTR must provide to the authorities of the State concerned all information related to the case that he or she considers appropriate and, in particular, the material supporting the indictment. At the same time, the international prosecutor retains a monitoring role over the national proceedings and may request the trial chamber to revoke an order for transfer at any time before the accused is found guilty or acquitted by a court in the State concerned, requesting the deferral back to the competence of the *ad hoc* Tribunals in accordance with their primacy over national courts.<sup>44</sup>

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International Criminal Tribunal for Rwanda', in M. Bergsmo, (Ed.) *supra*, 41-54; Human Rights Watch, *Justice Compromised. The Legacy of Rwanda's Community-Based Gacaca Courts* (2011), available at [www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf](http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf) (Accessed 5 January 2012).

<sup>42</sup> The completion strategy was formally adopted in SC Resolutions 1503(2003), UN Doc S/RES/1503, preamble at 7, and UNSC Resolution 1534 (2004) UN Doc S/RES/1534, 5. See, among others, D. A. Mundis, 'The Judicial Effects of the Completion Strategy on the *ad hoc* International Criminal Tribunals' (2005) 99 AJIL 142-157; D. Raab, 'Evaluating the ICTY and its Completion Strategy – Efforts to achieve accountability for War Crimes and their tribunals' (2005), 3 JICJ 82-102; S. Cannata, M. Costi, 'Da consumarsi preferibilmente entro...Quando, come e perchè un Tribunale *ad hoc* chiude. Brevi considerazioni sulla dimensione temporale del TPI', in G. Calvetti, T. Scovazza (eds.), *Il Tribunale per la ex Jugoslavia: l'attività svolta e il suo prossimo scioglimento* (Giuffrè, Milan 2007) 281-295, T. Meron, 'Reflection on the prosecution of War crimes by international tribunals', (2005) 100 AJIL, 425-449.

<sup>43</sup> See, for the ICTY <http://www.icty.org/sid/10016>, with exceptions contemplated for the Karadzic and Mladic cases; for the ICTR, see <http://unictr.org/Portals/0/tabid/155/default%20.aspx?id=1244> (both accessed 21 December 2011).

<sup>44</sup> At the time of writing, 13 accused have been transferred for trial before domestic courts of the Former Yugoslavia (<http://www.icty.org/action/cases/4>) and 2 cases transferred from ICTR to France (<http://www.unictr.org/Cases/tabid/77/default.aspx?id=7&mnid=7>). In addition, outside the scope of rule 11*bis* RPE, files involving several individuals have been transferred for trial to domestic courts in Former Yugoslavia and Rwanda. See, D. Tolbert, A. Kontic, 'The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the transfer of cases and materials to national judicial authorities: lessons in complementarity', in

Throughout the years, the initial distrust of the *ad hoc* Tribunals towards domestic jurisdiction was replaced by a general acknowledgment of “the need and potential benefits of trials in national criminal jurisdictions”<sup>45</sup>, without forgetting the obstacles that the latter may face in terms of independence and impartiality.<sup>46</sup> This shift, in line with the Completion Strategy, responded also to the recognition that the *ad hoc* Tribunals could not be left alone with the burden of fighting impunity in situations involving so many perpetrators and crimes.

### **3. A complementary international criminal court. The Drafting History**

The process that led to the adoption of the ICC Statute lasted fifty years. It was characterised by complex discussions and long recesses, mainly due to political resistance towards the establishment of the Court. Following an initial phase of activities between 1948 and 1954, the negotiations were suspended from the mid-fifties until 1989. It was only in the 1990s that the drafting process was resumed and successfully – and quickly – completed.

The idea that the Court would be complementary to national jurisdictions was not immediately proposed by the ICC drafters. Although its first traces can be found in the 1953 Report of the Committee on International Criminal Jurisdiction, the term “complementary” was not openly used until the resume of the negotiations in the 1990s.

The following sessions analyse the progressive affirmation of the idea that the Court shall be complementary to national jurisdictions and the concrete modalities for the exercise of its jurisdiction.

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C. Stahn, M. M. El Zeidy, (Eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, (CUP Cambridge 2011), 888-919, 911; A. Obote-Odora, 'Case selection and prioritization criteria at the International Criminal Tribunal for Rwanda', *supra* n. 41, 50.

<sup>45</sup> J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, *supra* n. 10, 70.

<sup>46</sup> Rule 11bis RPE. According to some authors, the evolution of the system from a “pure primacy” towards a more co-operational form of division of labour approximates the *ad hoc* tribunals model to a sort of “practice of complementarity based on co-operation and the distribution of tasks”. M. M. El Zeidy, 'From Primacy to Complementarity and Backwards: (re)visiting Rule 11bis of the *ad hoc* Tribunals' (2008) 57 ICLQ, 403-415, 406. On the same vein, underlying the similarities between complementarity and rule 11bis referrals of the *ad hoc* tribunals, H. Takemura, 'A Critical Analysis of Positive Complementarity', in S. Manacorda, A. Nieto Martin A. (Eds.) *Criminal Law between War and Peace*, (Ediciones de la Universidad de Castilla La Mancha, 2009), 601-621, 605 ss.



### 3.1 Early Drafts 1950-1954. The conferral of jurisdiction

The task of drafting a Statute for an international criminal court was assigned by the UN General Assembly to the International Law Commission (ILC) for the first time in 1948. As seen above, the idea took shape in the context of the post-war climate, favourable to the repression of international crimes. In these years, trials against war criminals were undertaken before the Nuremberg and Tokyo Tribunals; the International Law Commission was given the mandate to draft a Code of Offences against the Peace and Security of Mankind<sup>47</sup> and the Convention on the Repression and Punishment of the Crime of Genocide was adopted.<sup>48</sup>

The first meetings of the ILC took place between 1949 and 1950. At this stage, the focus was mainly on the “desirability” and “possibility” of establishing an international judicial organ as requested by General Assembly Resolution 260 (III) B.<sup>49</sup> The issues of the organization and competences of the Court were briefly referred to, but they were not at the heart of the discussion. At the end of the meetings, the ILC found that the establishment of an international criminal jurisdiction was both desirable and possible.<sup>50</sup>

In 1950, on ILC recommendation, the General Assembly established the Committee on International Criminal Jurisdiction, separate from the ILC and composed of the representatives of 17 UN member states.<sup>51</sup> The Committee was entrusted with the task of preparing “one or more preliminary drafts conventions and proposals relating to the establishment and the statute of an international criminal court.”<sup>52</sup> The Committee submitted its proposals to all UN member states and received their comments and suggestions. The Report, which contained a draft

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<sup>47</sup> General Assembly Resolution 177 (II), Second Session, 123<sup>th</sup> plenary meeting, 21 November 1947.

<sup>48</sup> General Assembly Resolution 260 (III) A, Third session, 179<sup>th</sup> plenary meeting, 9 December 1948.

<sup>49</sup> M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 35, 91.

<sup>50</sup> International Law Commission, *Summary Record of the Forty-Third Meeting*, Second Session, UN Doc. A/CN.4/SR.43, p. 14, quoted by M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 35, 92.

<sup>51</sup> General Assembly Resolution 489 (V), Fifth Session, 320<sup>th</sup> plenary meeting, 12 December 1950.

<sup>52</sup> *Ibid.*

Statute for a future international criminal court, was published in 1952.<sup>53</sup>

At this stage, the focus was not on the nature of the relationship between the international criminal tribunal and domestic courts: no reference was made to the likelihood of establishing a complementary criminal court. The crucial point was represented by the modalities for the conferment of the Court's jurisdiction. Two of the 55 articles of the draft Statute were dedicated to the issue. Article 26 established that “[j]urisdiction may be conferred upon the Court by States parties to the Statute, by Convention or, with respect to a particular case, by special agreement or by unilateral declaration”. Article 27 specified that such conferment of jurisdiction should be given by both the territorial State and the State of nationality of the accused. This system, therefore, envisaged the State's necessary consent and a voluntary relinquishment of jurisdiction to the Court.

The draft, together with various opinions of representatives on the matter, was sent to States for consideration and comments. These were re-examined by the Committee, which met again, in a different composition, in pursuance of General Assembly Resolution 687 (VII),<sup>54</sup> for a total of 23 meetings between July and August 1953.<sup>55</sup> Throughout these meetings, article 26 of the 1951 draft was revised. The revised provision established that the jurisdiction of the Court shall not be presumed. A State's conferment of jurisdiction to the Court could take place by convention, special agreement or unilateral declaration; such “[c]onferral of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the State or States have specified”.<sup>56</sup> The jurisdiction of the Court was meant to be optional and subject to the voluntary submission of the relevant State; in addition, the State had the right to submit specific cases before the international court, if it did not prefer to submit the

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<sup>53</sup> Report of the Committee on International Criminal Jurisdictions on its Session held from 1 to 31 August 1951, G.A. Official Records, Seventh Session, Supplement No. 11, (A/2136), quoted by M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 35, 92.

<sup>54</sup> General Assembly Resolution 687 (VII) Seventh Session, 400<sup>th</sup> Plenary Meeting, 5 December 1952.

<sup>55</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity* (Martinus Nijhoff, Leiden-Boston 2008), 36.

<sup>56</sup> Report of the 1953 Committee on International Criminal Jurisdiction, General Assembly Official Records, Ninth Session, Supplement No. 12, A/2645 (1954), 3.

cases to its domestic courts.

The first traces of a complementary allocating mechanism can be found in this 1953 Report, although the term was not openly used until the resume of negotiations in the 1990s. Article 3 of the draft proposed that no case should be brought before the ICC when a domestic court of any of the United Nations member states “has jurisdiction and is in a position and willing to exercise such jurisdiction”.<sup>57</sup> The reference to the fact that the State concerned should be “in a position and willing” recalls the criteria of unwillingness and inability finally inserted in the Rome Statute. The draft however, did not expressly provide for a check over national proceedings, nor did it require any minimum standards for States to comply with such willingness or ability. The letter of the provision, on the contrary, suggested that “any national proceeding would pre-empt international interference, irrespective of the proceedings genuineness”.<sup>58</sup>

In concluding its Report, the Committee invited the General Assembly to decide which further steps should be undertaken to establish an international criminal court.<sup>59</sup> Having considered the Report, however, the General Assembly decided to postpone consideration of the issue until the draft Code of Offences against the Peace and Security of Mankind and a definition of the crime of aggression were adopted.<sup>60</sup>

In the same years, however, a general paralysis invested the drafting of the Code of crimes and of the crime of aggression and, as a consequence, of the ICC Statute. In 1968, the Assembly's General Committee reiterated its refusal to deal with the matter until the question of the

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<sup>57</sup> Ibid., draft article 3. Quoted in Stigen J., *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 35- 36.

<sup>58</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 35- 36.

<sup>59</sup> Report of the 1953 Committee on International Criminal Jurisdiction, *supra* n. 56, p. 15, quoted by Stigen J., *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 37-38.

<sup>60</sup> General Assembly Resolution 898 (IX) Ninth Session, 512<sup>th</sup> Plenary Meeting, 14 December 1954. The decision was reiterated in General Assembly Resolution 1187 (XII) Twelfth Session, 727<sup>th</sup> Plenary Meeting, 11 December 1957.

definition of the crime of aggression was completed.<sup>61</sup> This latter was finally adopted in 1974.<sup>62</sup> This notwithstanding, the Cold-War climate did not favour the resume of any discussions on the establishment of an international criminal court and on the draft Code of Offences against the Peace and Security of Mankind. Works on the latter were resumed only in 1981.<sup>63</sup> In 1989, the General Assembly renewed the mandate to the ILC to work on the establishment of the ICC.<sup>64</sup> With the fall of the Berlin Wall in 1989, the political climate had dramatically changed. The establishment of the *ad hoc* Tribunals in 1993 and 1994 gave an additional and significant impulse to the process that led to the establishment of the ICC.

### **3.2 From 1990 until the adoption of the Statute. Complementarity between jurisdiction and admissibility**

The new political climate after the fall of the Berlin wall gave a dramatic impulse to the drafting of the Statute of an international criminal court, which was finally established only nine years after the resume of the drafting process. With Resolution 44/39, the General Assembly re-assigned the project of the draft Statute to the International Law Commission, which presented a first report in 1990. In 1992, it presented a second, more detailed report; a first draft Statute was inserted in the 1993 report. The Draft was then expanded, modified and inserted in the 1994 Report. This draft represented the basis for subsequent revisions and discussions by Government representatives. In 1995, the General Assembly established an *ad*

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<sup>61</sup> Official Records of the General Assembly, Twenty-Third Session, (1968), Annexes, vol. I (A/7250), agenda item 8, para. 10. Quoted in J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 39.

<sup>62</sup> General Assembly Resolution 3314 (XXIX), Twenty-ninth Session, 2319<sup>th</sup> Plenary Meeting, 14 December 1974.

<sup>63</sup> General Assembly Resolution 36/106 (XXXVI) Thirty-Sixth Session, 92<sup>nd</sup> Plenary Meeting, 10 December 1981.

<sup>64</sup> General Assembly Resolution 44/39 (XLIV) Forty-Fourth Session, 72<sup>nd</sup> Plenary Meeting, 14 December 1989. The renewed attention towards the establishment of an international criminal court had been triggered by the representatives of Trinidad and Tobago, in relation to the issue of drugs trafficking and related transnational crimes. The representatives of the small caribbean state initiated a resolution in the General Assembly directing the International Law Commission to “address the question of establishing an international criminal court [...] with jurisdiction over persons alleged to have committed crimes which may be covered” under the draft code of crimes.

*hoc* Committee that presented its comments on the draft Statute. In 1996, the drafting process was assigned to the Preparatory Committee, which worked on the draft that was discussed in Rome at the United Nations Conference of Plenipotentiaries.

The idea of a “complementary” international criminal court was first promoted by the ILC and subsequently followed by the *ad hoc* Committee and the Preparatory Committee. In its Draft Statute, which however provided only general guidelines, the ILC suggested that the future International Criminal Court shall be “complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective”;<sup>65</sup> condition for the exercise of the Court’s jurisdiction would be the failure of national systems to proceed.<sup>66</sup> In the same draft, the ILC proposed to insert an admissibility regime that created a system according to which the determination of the jurisdiction of the Court was accompanied by a determination of the admissibility of the case. The admissibility regime adopted in Rome does not differ significantly from the one first proposed in 1994.

In the Report of the *Ad hoc* Committee,<sup>67</sup> agreement was expressed on the recognition of complementarity as “an essential element in the establishment of an international criminal court”.<sup>68</sup> However, delegations disagreed on the concrete modalities of the exercise of the Court’s complementary jurisdiction: some States, together with many non-governmental organizations (NGOs), supported the assignation of a great role to the Court, while others wanted to limit its jurisdiction to the cases of inability of domestic courts to prosecute international crimes.<sup>69</sup> Most of the issues related to complementarity were resolved during the

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<sup>65</sup> Report of the International Law Commission on the work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, U.N. GAOR, 49<sup>th</sup> Session, Supp. No 10, U.N. Doc. A/49/10 (1994), Preamble.

<sup>66</sup> J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (Ed.) *The ICC: The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer Law International, The Hague 1999) 41- 78, at 44. The ILC identified three grounds for inadmissibility of a case before the ICC. See art. 35 in the ILC Report.

<sup>67</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50<sup>th</sup> session, Supp. No. 22, U.N. Doc. A/50/22 (1995)

<sup>68</sup> *Ibid.*, para. 29, quoted in S. A. Williams, W. Schabas, 'Article 17. Issues of Admissibility', in O. Triffterer, (ed.) *supra* n. 20, 618.

<sup>69</sup> J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 41-2.

Preparatory Committee sessions.<sup>70</sup> This helped to solve other correlated and complicated issues, such as the exercise of the Court's jurisdiction, its triggering mechanism, and the role of the prosecutor and of the Security Council.<sup>71</sup> Discussions were held in informal consultations and focussed in particular on the opportunity for the Court to intervene not only in case of inaction of national jurisdictions, but also in cases of sham trials, and on the criteria to be used to assess the "unwillingness" and "inability" of national jurisdictions.<sup>72</sup>

Also the jurisdictional regime changed substantially throughout the negotiations. In 1953, the Committee on International Criminal Jurisdiction had established that the Court would have jurisdiction over a given case when the territorial State and the home State of the suspect had accepted the jurisdiction on an *ad hoc* basis. In the 1994 ILC draft the exercise of the Court's jurisdiction was based on "an opt-in regime" through *ad hoc* acceptance, in addition to ratification.<sup>73</sup> Only a referral by the Security Council would bypass this requirement.<sup>74</sup>

Later on, the idea that the Court should be complementary to national criminal jurisdictions gave an impulse to the adoption of a model according to which no additional acceptance than the one expressed through membership is required. The final version of the Rome Statute establishes that by ratifying the Statute, states accept the ICC jurisdiction once for all.<sup>75</sup>

Crucial to the acceptance of such a mechanism was the choice of complementarity, with primacy granted to domestic jurisdiction, and the activation of the Court subject to the finding of the unwillingness or inability of the former to perform genuine criminal proceedings.

The following sessions examine the developments, problems and challenges of

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<sup>70</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference, A/CONF.183/2, 14 April 1998.

<sup>71</sup> J. T. Holmes 'The Principle of Complementarity', *supra* n. 66, 43.

<sup>72</sup> *Ibid.*

<sup>73</sup> With the exception for the crime of genocide, for which the ILC had proposed inherent jurisdiction.

<sup>74</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 45.

<sup>75</sup> Withdrawal from the Statute is contemplated in article 127 ICC Statute. The State shall notify its decision to the Secretary General of the United Nations, with effect starting one year after the date of receipt of such notification.

complementarity throughout the last eight years of the negotiating process.<sup>76</sup> It will show that the idea of an international criminal court complementary to national jurisdictions was widely accepted by the participants to the negotiations. It will also highlight that the definition of the concrete modalities for the exercise of such complementary relationship, however, proved to be highly controversial and challenged the adoption of the ICC Statute until the very last moment. The issue proved to be complex not only from a procedural point of view, but also from a political perspective, given the implications for states' sovereignty attached to the choice of a model rather than another.<sup>77</sup>

The outcome is “a very delicately balanced text”, a “package” which was the “product of intense negotiations and judicious compromises designed to reach widespread agreement”.<sup>78</sup> The continuous necessity to satisfy opposite views in order not to undermine the successful adoption of the Statute, and the fact that during the negotiations for the adoption of the Rome Statute interrelated issues were dealt separately, so that delegations did not have the chance till the very last moment to have a look to the whole picture,<sup>79</sup> led to the inclusion of some “uneasy technical solutions” and “awkward formulations”<sup>80</sup>. Loopholes and inconsistencies between norms leave a number of issues unresolved. Similarly, some issues were either neglected or purposefully excluded by the Statute.<sup>81</sup> This renders the interpretation and application of

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<sup>76</sup> Although the drafting process throughout the formal and informal meetings that took place in more than forty years was extensively documented, there is no authorised collection of such preparatory works. In addition, such documents provide fragmented information, as they often reflect the stance of a limited number of states, whose position may also change during the course of the negotiations.

<sup>77</sup> J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 41. M. A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', (2001) 167 *Military Law Review*, 20-73, 45.

<sup>78</sup> UN Department of Public Information, International Criminal Court: Some Questions and Answers, 2 (undated), available at [www.un.org/icc](http://www.un.org/icc), quoted in P. Kirsch, J. T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', (1999) 93 *AJIL*, 2-12.

<sup>79</sup> H. Olásolo, 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor', *Guest Lecture Series of the Office of the Prosecutor*, 26 March 2004, The Hague, available at <http://www.icc-cpi.int/menus/icc/structure> of the court/office of the prosecutor/network with partners/guest lectures/dr\_%20h%C3%A9ctor%20o%C3%A1solo (accessed 22 December 2011), 1-22, 3.

<sup>80</sup> P. Kirsch, J. T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', *supra* n. 78, 11.

<sup>81</sup> On this, I. Tallgren, 'Completing the “International Criminal Order”. The Rhetoric of International Repression

complementarity by the Court of fundamental importance in order to clarify the contours of complementarity.

This analysis provides an additional interpretative tool to understand the meaning and goals that the drafters assigned to complementarity<sup>82</sup> and shows that some of the most recent issues that emerged in relation to complementarity, such as the concept of positive complementarity, were not overseen during the negotiating process. Throughout the drafting process, the focus was on complementarity as the mechanism chosen to regulate the admissibility of situations and cases before the Court, with special attention to the modalities according to which the relationship between the Court and states was shaped.<sup>83</sup>

### **3.3 1990 – 1994. The work of the International Law Commission**

One of the main obstacles to the idea of establishing an international criminal jurisdiction was the question of state sovereignty, which was explicitly addressed for the first time in the course of the 1990 meetings. The idea of a “system that preserved the right of national courts to exercise their criminal jurisdiction in the presence of the international machinery” prevailed, and was adopted not only as a “conceivable compromise” but also as the “underlying philosophy” for discussions in 1990 and onward.<sup>84</sup>

In the report submitted to the General Assembly in 1990, the ILC highlighted that the main

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and the Notion of Complementarity in the Draft Statute for an International Criminal Court', (1998) 67 Nordic Journal of International Law, 107-137, highly critical on the reasons behind such ambiguities: “(...) in the present context, any single word could be loaded with various (subjective) meanings and shaped to fit the (political) object and purpose of each negotiating party. In fact, this is precisely the role of “complementarity”: it leads the deferral strategy of the ICC negotiations by managing the tensions between sovereignty/national jurisdiction and international community. Its main task is to leave the tension unresolved, to postpone it to some (future) “application”, at 123.

<sup>82</sup> As established in Art. 32 of the Vienna Convention on the Law of Treaties, “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

<sup>83</sup> C. Stahn, 'Complementarity: a Tale of Two Notions', (2008) 19 CLF , 87-113, 88.

<sup>84</sup> M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 35, 110.



problem was whether the future international criminal court was intended to “replace, compete with or complement national jurisdictions”<sup>85</sup>. The first issue to be addressed was therefore whether states agreed to establish an international court with exclusive or concurrent jurisdiction with national courts; established to function as a court of first instance or, rather, as a review court with the power to review final national judgements.<sup>86</sup> In the context of these preliminary discussions, several different views and proposals were expressed, and no final decision was taken on a specific model according to which the relationship between the international court and national jurisdictions would be regulated.

The 1992 Report contained a list of functions “that an international criminal court could have in addition to an international trial function”. These were the ability to “give advisory opinions to national jurisdictions on the understanding of international criminal law”; to “preliminarily qualify a state's conduct “as fitting a given international category [...] after which the trial of individuals for their involvement in the activity could take place at the national level «and provide “a system of international inquiry or fact finding, in some way linked to the trial of the accused in a national court” and provide “an official system of observing national trials”.<sup>87</sup>

As for the conferment of jurisdiction, the system envisaged recalled the previous models, with a process of *ad hoc* acceptance or unilateral declaration in relation to particular offences in order to enable the international criminal court to exercise jurisdiction. The underlying idea was not to establish a full-time international criminal court. The majority of the members of the working group envisaged the Court as an “established structure which could be called into operation when required”.<sup>88</sup> Despite the differences with the final model, it is in this phase that

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<sup>85</sup> Summary Records of the Meetings of the Forty-Second Session (1 May – 20 July 1990) YILC Vol. I, p. 32, quoted by M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 35, 111.

<sup>86</sup> *Ibid.*, 111-112. Also, J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 48.

<sup>87</sup> *Ibid.*, p. 70. Quoted by J. Stigen *ibid.*, 53.

<sup>88</sup> The Special Rapporteur had proposed the creation of an international criminal court with exclusive and compulsory jurisdiction over a category of crimes that included “genocide, systematic or mass violations of human rights, apartheid, illicit international trafficking in drugs and seizure of aircraft and kidnapping of diplomats or internationally protected persons. The proposal however was rejected by the other members of the

the drafters recognised that “the International Criminal Court would be complementary to the existing system of national courts”.<sup>89</sup> The idea to propose a model that did not strongly impact on state sovereignty helped convincing sceptic States about the opportunity of establishing an international criminal court.

The 11<sup>th</sup> report of the Special Rapporteur published in 1993 contained draft articles on the jurisdictional regime.<sup>90</sup> The model was identical to the one envisaged the year before, with an optional, concurrent and complementary jurisdiction. Article 5 of the draft established that “the jurisdiction of the Court shall not be presumed” and that the Court “shall have jurisdiction over every individual, provided that the State of which he is a national, and the State in whose territory the crime is presumed to have been committed, have accepted its jurisdiction,” thus calling for the necessary consent of the state.<sup>91</sup> Article 23(2) stated that any State, whether party to the Statute or not, might “instead of having an accused person tried under its own jurisdiction, refer him to the Court”.<sup>92</sup>

The draft provisions was subsequently analysed by another working group – established upon General Assembly's recommendation to continue working on the elaboration of a draft Statute<sup>93</sup> – which elaborated an additional set of provisions on jurisdiction.<sup>94</sup> Article 23 contained three alternative proposals for states' acceptance of the Court's jurisdiction. Alternatives A and C contemplated the possibility for the Court to exercise jurisdiction only if a special declaration of acceptance was lodged by the State. Alternative B, on the contrary, established that

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working group, that favoured the creation of a Court “that would be essentially a facility for States parties”. See, Report of the International Law Commission on the Work of its Forty-Fourth Session (4 May – 24 July 1992), Vol. I, pp. 3-4. Also, J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 53.

<sup>89</sup> Report of the International Law Commission on the Work of its Forty-Fourth Session (4 May – 24 July 1992), Vol. II, p. 77. Quoted by M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 35, 118.

<sup>90</sup> Eleventh Report on the Draft Code of Crimes against the Peace and Security of Mankind: Draft Statute for an International Criminal Court. UN. Doc. A/CN.4/449, 1993, YILC, Vol. II, Part One, pp. 111-124.

<sup>91</sup> *Ibid.*, p. 115.

<sup>92</sup> *Ibid.*, p. 120.

<sup>93</sup> General Assembly Resolution 47/33 (ILVII) Forty-Seventh Session, 73<sup>rd</sup> Plenary Meeting, 25 November 1992, para. 6.

<sup>94</sup> Report of the International Law Commission on the Work of its Forty-Fifth Session (3 May – 23 July 1993), UN. Doc A/48/10, 1993, YILC Vol. II, Part Two, pp. 106-111.

adherence to the Court's Statute “would automatically confer jurisdiction”. The provision, however, did not specifically address the relationship between the Court and domestic jurisdictions. Article 24(1)(a) established that “any State party that conferred jurisdiction on the International Criminal Court in relation to any of the crimes listed under article 22 had also jurisdiction under the relevant treaty criminalising the conduct to try the suspect before its own courts”.<sup>95</sup> Paragraph two of the same provision established that, in those cases in which the suspect was not in the territory of the State of nationality or the territorial State, the consent of either of those two states was required.<sup>96</sup>

The issue of admissibility was not specifically addressed, although draft article 45(2)(a) and (b) regulated the *ne bis in idem* principle. The provision, clearly inspired by the ICTY Statute which was being drafted at that time, established that “completed national trial would not bar international prosecution when “the act in question was characterised as an ordinary crime”, and when “the proceedings in the [national] court were not impartial or independent or were designed to shield the accused from international criminal responsibility”.<sup>97</sup> The proposal was criticised by some states, reluctant towards the inclusion of the faculty of the Court to review trial proceedings of national courts.<sup>98</sup>

In 1994, the ILC presented its Draft Statute, in which it was suggested that the future International Criminal Court shall be “complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective”;<sup>99</sup> condition for the exercise of the Court’s jurisdiction would be the failure of national systems to proceed.<sup>100</sup> In the same draft, the ILC also proposed the insertion of an admissibility regime that created a

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<sup>95</sup> M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 55, 121.

<sup>96</sup> *Ibid.*, 122.

<sup>97</sup> Report of the International Law Commission on the Work of its Forty-Fifth Session, *supra* n. 94, 120-121.

<sup>98</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 56.

<sup>99</sup> Report of the International Law Commission on the work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, U.N. GAOR, 49<sup>th</sup> Session, Supp. No 10, U.N. Doc. A/49/10 (1994) (hereinafter, ILC Draft Statute).

<sup>100</sup> J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 44.

system according to which the determination of the jurisdiction of the Court would be accompanied by a determination of the admissibility of the case. The admissibility regime adopted in Rome does not differ significantly from the one first proposed in 1994.

The discussions that led to the adoption of the Draft Statute reflected the different stances of those who promoted the creation of a powerful international criminal court, and those who were more in favour of a realistic approach that would lead to the establishment of a court with powers carefully shaped around the respect of state sovereignty.<sup>101</sup>

The provisions on jurisdiction were simplified around the model of an optional, concurrent and complementary jurisdiction on the basis of a specific acceptance of a State Party to the Statute after a declaration had been lodged with the Registrar.<sup>102</sup> A different system was proposed with respect to the crime of genocide, according to which the Court would have inherent jurisdiction on such crimes: states would accept the court's jurisdiction *ipso facto* by ratifying the Statute.<sup>103</sup> Thus, the Court would be entitled to exercise jurisdiction on genocide following the filing of a complaint by any state party. On the contrary, for other crimes under its jurisdiction, in order for the Court to be enabled to investigate and prosecute, an additional, *ad hoc* acceptance of the custodial and of the territorial states was required.<sup>104</sup>

An important novelty of the 1994 draft Statute is the inclusion of the term “complementarity” in the preamble. Preambular paragraph 3 of the proposal read

*Emphasising* further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective

In commenting this paragraph, the ILC noted that that it was to be intended “to assist in the interpretation and application of the statute, and in particular in the exercise of the powers

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<sup>101</sup> Report of the International Law Commission on the Work of its Forty-Fifth Session, *supra* n. 94.

<sup>102</sup> *Ibid.*, arts. 21 and 22, 70-76.

<sup>103</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 63.

<sup>104</sup> Art. 25, 1994 ILC Draft Statute, *supra* n. 99, 89-90.

conferred by article 35”.<sup>105</sup> It was explained that the Court

is intended to operate in cases when there is no prospect of [the suspect] being duly tried in national courts. The emphasis is thus on the Court as a body which will *complement* existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing agreements.<sup>106</sup>

As seen above, the novelty of the 1994 ILC Draft is also the inclusion of an admissibility regime, which will form the basis for the future drafting and adoption of article 17 of the ICC Statute. The provision read as follows:

### **Article 35**

#### **Issues of admissibility**

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.<sup>107</sup>

In the comments attached to the draft provision, it was specified that “Article 35 allows the Court to decide, having regard to certain specified factors, whether a particular complaint is admissible and in this sense it goes to the exercise, as distinct from the existence, of jurisdiction”.<sup>108</sup> Article 35 provides for the discretionary power of the Court to intervene in

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<sup>105</sup> Ibid., 44.

<sup>106</sup> 1994 ILC Draft Statute, *supra* n. 99, 43-44. Emphasis added.

<sup>107</sup> Ibid., 105.

<sup>108</sup> Ibid., 105.

cases in which the conditions listed therein are met.<sup>109</sup>

The provision “responds to suggestions made by a number of States, in order to ensure that the Court only deals with cases in the circumstances outlined in the Preamble, i.e., where it is really desirable to do so”.<sup>110</sup> According to draft article 35, thus, a case would be inadmissible before the Court if “the crime in question has been or is being duly investigated by any appropriate national authorities or is not of sufficient gravity to justify further action by the Court”. In deciding on the issue, the Court is invited to take into consideration the purposes of the Statute as set out in the Preamble.<sup>111</sup>

The Preambular reference to the ineffectiveness of national proceedings, in addition to the unavailability of trial procedure, opened towards assessments not only of the ability of the state, but also of potential attempts to shield the perpetrators, which could indeed result in ineffective proceedings. Some delegations noted that draft article 35 – with its reference to investigations, and not to prosecutions – did not contemplate the hypothesis of a State that could not, for any reason cope with the prosecution of international crimes domestically, to bring the case before the ICC.

Draft article 34 regulated the possibility for the concerned State and the accused to challenge the ICC jurisdiction on the basis that there existed an effective or available trial procedure. According to article 34(a), the interest State could challenge the Court's jurisdiction before the commencement of the trial, whereas according to article 34(b) the accused could file its challenge at the commencement of the trial or at any later stage of the trial.<sup>112</sup>

The draft Statute contained also a provision on *ne bis in idem* which recalled the one presented the year before. Thus, according to draft article 42(2)(a) and (b), a person already tried by another court could be tried before the Court if “[t]he acts in question were characterised by that

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<sup>109</sup> Draft article 24 established that the Court has the duty to satisfy itself that it has jurisdiction over a given case.

<sup>110</sup> *Ibid.*, 105.

<sup>111</sup> *Ibid.*, 105.

<sup>112</sup> *Ibid.*, 104. Also, S. Williams, W. Schabas, *supra* n. 68, 608.

court as an ordinary crime and not as a crime which is within the jurisdiction of the Court”; or “the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted”.<sup>113</sup>

Although the adoption of these provisions represented a significant step further in the definition of the admissibility regime, the debate on the role of the Court – i.e., “a facility for states that would supplement rather than supersede national jurisdiction” or “an option for prosecution when the States concerned were unwilling or unable to do so, subject to the necessary safeguards against misuse of the court for political purposes”<sup>114</sup> - was far from completed.

### **3.4 The 1995 Report of the ad-hoc Committee on the Establishment of an International Criminal Court**

After receiving the 1994 ILC Report, the General Assembly established the *Ad hoc* Committee on the Establishment of an International Criminal Court, with the task of considering, commenting and developing the major substantive issues that arose from the ILC draft.<sup>115</sup> The *ad hoc* Committee met twice and submitted its report in September 1995.<sup>116</sup> The 1995 Report contains an entire session on complementarity, which touches upon several issues related to the topic.<sup>117</sup>

The starting point of the discussion was once again the nature of the future international criminal court and its relationship with domestic courts. The majority expressed the view that the Court should be complementary to national jurisdictions. Complementarity was seen as “better suited” for the specific characteristics and goals of the Court, as opposed to the primacy exercised by the *ad hoc* tribunals for the Former Yugoslavia and Rwanda. The members of the

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<sup>113</sup> Ibid., 117.

<sup>114</sup> Ibid., 31-32.

<sup>115</sup> General Assembly Resolution 49/53, Forty-Ninth Session, 84<sup>th</sup> Plenary Meeting, 9 December 1994.

<sup>116</sup> Report of the *Ad hoc* Committee on the Establishment of an International Criminal Court, UN GAOR, 50<sup>th</sup> Session, Supp. No. 22, UN Doc A/50/22 (1995), hereinafter, 1995 *Ad hoc* Committee Report.

<sup>117</sup> Ibid., paras. 29-51.

*ad hoc* Committee agreed that the ICC should complement national judiciaries, and not replace them.<sup>118</sup> It was recognised that complementarity was “an essential element in the establishment of an international criminal court” although it required “further elaboration so that its implications for the substantive provisions of the draft Statute could be fully understood”.<sup>119</sup>

There was still considerable disagreement in relation to the precise framework of complementarity. Different views were expressed as to the too high/too low threshold for the ICC interfering *vis-à-vis* states; to the modalities for the admissibility of cases before the Court envisaged in draft article 35; and to the burden of proof contemplated therein.

While supporting the establishment of an international criminal court, many delegations “stressed that the principle of complementarity should create a strong presumption in favour of national jurisdictions”,<sup>120</sup> whose advantages in legal, semi-legal and political terms were highlighted.<sup>121</sup> On the other hand, other delegations expressed the concern that complementarity should not create the presumption in favour of national courts: “while such courts should retain concurrent jurisdiction with the court, the latter should always have primacy of jurisdiction.”<sup>122</sup>

A middle way view called for a “balanced approach” towards complementarity, that would safeguard national sovereignty but also avoid the jurisdiction of the international court becoming “merely residual” to national jurisdictions.<sup>123</sup>

As for the admissibility criteria – referred to as “exceptions to the exercise of national jurisdictions” – it was pointed out that references to the ineffectiveness and non-availability of a

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<sup>118</sup> Ibid., para. 29. See also J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 44.

<sup>119</sup> 1995 *Ad hoc* Committee Report, *supra* n. 116, para. 29.

<sup>120</sup> Ibid., para. 29.

<sup>121</sup> Ibid., para. 29. See, for instance, the facts that “applicable law would be more certain and developed”, that “both prosecution and defence were likely to be less expensive”, that “evidence and witnesses would be readily available”, “language problems would be minimised”, “penalties would be clearly defined and readily enforceable” as well as the fact that “States had a vital interest in remaining responsible and accountable for prosecuting violations of their laws – which also served the interest of the international community, inasmuch as national systems would be expected to maintain and enforce adherence to international standards of behaviour within their own jurisdiction”.

<sup>122</sup> Ibid., para. 32.

<sup>123</sup> Ibid., para. 33.



national judicial system were too vague.<sup>124</sup> In addition, the threshold for exceptions to national jurisdictions was considered too high, and it was suggested that the exercise of national jurisdictions encompassed also decisions not to prosecute, when deemed “not well-founded”. Also this reference, however, was considered to be too vague.<sup>125</sup> Some States raised concerns in relation to the exception to the *ne bis in idem* in case of domestic proceedings for ordinary crimes.<sup>126</sup> Issues of national amnesties<sup>127</sup>, voluntary relinquishment of a state's jurisdiction in favour of the International Criminal Court were also discussed.<sup>128</sup>

### 3.5 The Preparatory Committee Sessions, 1996 - 1998

In late 1995, the *Ad hoc* Committee was replaced by a Preparatory Committee, which met several times in formal and informal meetings between 1996 and 1998. The Preparatory Committee completed the draft Statute between March and April 1998.<sup>129</sup>

At the opening of discussions of the Preparatory Committee, there was “virtual consensus”<sup>130</sup> that complementarity “was to reflect the jurisdictional relationship between the international criminal court and national authorities, including national courts”.<sup>131</sup> Such a “quasi-agreement” was fundamental for the continuation of negotiations on jurisdictional issues. As to the “how, where, to what extent and with what emphasis complementarity should be reflected in the Statute”<sup>132</sup>, however, there were still widely differing opinions, as reported by the *Ad hoc* Committee the year before, and confusion still remained as to what complementarity would actually entail.

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<sup>124</sup> Ibid., para.41.

<sup>125</sup> Ibid., para. 42.

<sup>126</sup> Ibid., para. 43.

<sup>127</sup> Ibid., para. 46.

<sup>128</sup> Ibid., para. 47.

<sup>129</sup> Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II, 1998, A/CONF.183/2/Add.1 (Hereinafter 1998 Preparatory Committee Report).

<sup>130</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 69.

<sup>131</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, 1996, A/51/22, para. 153. (Hereinafter 1996 Preparatory Committee Report)

<sup>132</sup> Ibid., para. 158.

In addition to the opposed views of “sovereign-anxious” States and of those “Court-friendly”, and the interrelated issues,<sup>133</sup> the debate focused on the third paragraph of the Preamble and on article 35 of the ILC draft Statute.

Some States criticised the references in the Preamble to the “unavailability or ineffectiveness” of national judicial systems, which were considered too vague. In particular, some delegates objected that the determination of ineffective was too subjective, and that this “would place the Court in the position of passing judgement on the penal system of a state”.<sup>134</sup>

Delegations agreed that Article 35 was a central provision in the structure of complementarity. Critiques to this norm addressed the “too narrow” criteria on the basis of which the Court was called to determine the inadmissibility of cases. In particular, it was pointed out that the draft provision – which only referred to investigations – did not cover cases that had been or were being prosecuted, and that the grounds for inadmissibility contained in draft article 42 on *ne bis in idem* should be also included in article 35.<sup>135</sup> Some delegations noted the necessity to add qualifications of impartiality and diligence to such proceedings.<sup>136</sup> It was also observed that article 35(b) of the Draft Statute, while referring to a crime being under investigation as a ground for inadmissibility before the Court, did not mention “whether the investigation was ineffective, whether certain procedures were unavailable or whether it was part of a sham trial”.<sup>137</sup>

At the commencement of the August 1997 sessions, the Chairman asked the Head of the Canadian delegation, Mr. John Holmes, to coordinate informal consultations on the issue. The coordinator decided to focus on the admissibility criteria and to temporarily leave aside the *ne bis in idem* issue and the procedures for the challenges to the admissibility of cases before the

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<sup>133</sup> Ibid., paras. 154-158.

<sup>134</sup> Ibid., para. 261.

<sup>135</sup> Ibid., paras. 164.

<sup>136</sup> Ibid., para. 164. S. Williams, W. Schabas, *supra* n. 68, 609.

<sup>137</sup> Ibid. 609. 1996 Preparatory Committee Report, *supra* n. 131, para. 159.

Court.<sup>138</sup>

The coordinator produced a draft article on complementarity – accompanied by a text box to explain the origins of the provision and by several footnotes to clarify the approach – which was later approved by the Committee.<sup>139</sup> It is at this time that the terms “unwilling”, “unable” and “genuinely” were inserted in the text of article 35, together with a set of conditions for determining them.

Inability was not controversial in principle, and was added to the provision with wide agreement of the delegates. As for the factors relevant to inability, the most important was identified as the “total or partial collapse of a State's national judicial system”.<sup>140</sup> Another factor was identified as “the State being unable to secure the accused or to obtain the necessary evidence and testimony”.<sup>141</sup> These references were subsequently enriched with the phrase “or otherwise unable to carry out its proceedings”, in order not to prevent the Court from intervening in cases in which a State was able to obtain the accused and some evidence, but indeed “other aspects of the national proceedings were affected by the collapse”.<sup>142</sup>

Despite the general agreement on the opportunity to avoid that states would easily prevent the Court from intervening, by putting in place sham proceedings, the definition of the criterion of unwillingness proved to be particularly problematic, due to its sensitivity from the point of view of both states' sovereignty and the rights of the individual.<sup>143</sup> While drafting the factors relevant to the assessment of unwillingness, many delegates insisted that these would not include any subjective criteria. The criterion of “apparently well-founded” contained in the 1994 ILC draft was thus deleted. The term “genuinely” was attached to “investigations” and “prosecutions” without major discussions. Similarly, the reference to “sham trials aimed at shielding

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<sup>138</sup> J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 45.

<sup>139</sup> *Ibid.*, 46.

<sup>140</sup> *Ibid.*, 48.

<sup>141</sup> *Ibid.*, 49.

<sup>142</sup> *Ibid.*, 49.

<sup>143</sup> *Ibid.*, 48.

perpetrators” was easily included, since the main purpose of adding a provision on unwillingness was to avoid sham trials. In order to facilitate the Prosecutor in demonstrating the State's purpose to shield the person, the criterion of “undue delay” was included and indirectly linked to such purpose by inserting the words “inconsistent with intent to bring the person concerned to justice”. As for the lack of independence or impartiality of the proceedings, an argument for its inclusion was that there could have been instances in which the challenge to the genuine conduct of proceedings came from actors other than the judicial organs of the State, but from other individuals who “manipulate the conducts of the proceedings to ensure that the accused is not found guilty (for example, engineering a mistrial or deliberately violating a defendant's rights to taint evidence or testimony)”.<sup>144</sup>

Agreement was easily reached on Paragraph 1 of the new article 35, which established that the Court should determine on its own motion that a case was inadmissible. The reference to the possibility for the accused or the State with jurisdiction over the crime to challenge the admissibility of the case was kept between brackets. As to the burden of proof, States agreed that it would have been up to the ICC prosecutor to demonstrate the unwillingness or inability of a state.<sup>145</sup> Definitions of both terms were proposed and the provision was then inserted in the Draft Statute as article 15 entitled “Issues of admissibility” and forwarded to the Rome Conference.<sup>146</sup>

A draft provision on “Preliminary rulings regarding admissibility” established that, before the ICC prosecutor initiated an investigation, he or she notified those states that might have been conducting investigations or prosecutions.<sup>147</sup>

The issue of conferment of jurisdiction to the Court was not solved by the Preparatory

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<sup>144</sup> Ibid., 50-51.

<sup>145</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 78.

<sup>146</sup> 1998 Preparatory Committee Report, *supra* n. 129.

<sup>147</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 78-79.

Committee, although most states expressed their preference for the extension of inherent jurisdiction also to the other crimes under the ICC jurisdiction.<sup>148</sup>

The Preparatory Committee made fundamental progresses on the definition of the admissibility criteria, by expanding the grounds on which the Court would be allowed to exercise jurisdiction and by further clarifying and defining the references to “well founded”, “unavailability” and “ineffectiveness” contained in the 1994 ILC Draft. This contributed to States' acceptance of a complementary international criminal court, that would not replace domestic courts, but that would complement them when absolutely required. Other issues, however, such as the stance of the Court *vis-à-vis* pardons, paroles, release of the convicted person and amnesties, were not solved. Also jurisdictional issues needed further discussion and elaboration.

### **3.6 The 1998 United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court**

The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome between 15 June and 17 July 1998. On that day, the ICC Statute was adopted with 120 votes in favour, 21 abstentions and 7 negative votes.

Since the initiation of the works, most States had expressed their acceptance to the admissibility criteria. Given the delicate compromise achieved at the Preparatory Committee, the coordinator of informal consultations, Mr. John Holmes, urged delegations not to reopen discussions on the substance of the provision. Some concerns remained, and these were addressed in informal consultations, which led to the adoption of minor changes. In particular, three problematic issues had to be addressed with respect to “unwillingness” and “inability”. Some delegations held that the criteria on unwillingness granted the Court too wide discretion and that there was the need to define them in a more objective way. The solution was found by including the phrase “in accordance with norms of due process recognised by international law” in the

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<sup>148</sup> Ibid., 79.

chapeau of article 17(2) of the Statute. Another problem was that the criterion “undue delay” was considered a threshold too low for the determination of unwillingness. The reference to “undue” was therefore replaced by the reference to “unjustified”. The third problem was represented by the reference to the partial collapse of a national judicial system, which several delegations considered to be insufficient to allow the Court to exercise its jurisdiction. The term was thus replaced by “substantial”, which “raised the threshold much higher”.<sup>149</sup>

Changes were also made to the Preamble. The reference to the complementary nature of the Court was kept in paragraph 10, but those to the non-availability or ineffectiveness of domestic trial procedures were deleted, as the provision on admissibility already dealt with the issue in great detail. Reference to complementarity was added in article 1, as part of the main features of the Court.

Other related-issues, however, were far from being solved, thus challenging the adoption of the ICC Statute till the very last moment. Among them, the issue of whether to make a case admissible where the person concerned had been pardoned, paroled or released through an administrative procedure. The proposal between brackets in the draft statute established that a person who had been tried by another court for conduct also proscribed under article 5 could be tried by the Court if 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 excluded the application of any appropriate form of penalty.<sup>150</sup> The provision, however, was strongly opposed by some delegates who argued that the idea of assigning the Court the task of addressing discontinuance of prosecutions, amnesties and pardons went beyond the purview of the Court. Given the impossibility to reach an agreement on the issue, it was decided to abandon the proposal.<sup>151</sup>

As for jurisdiction, four options were considered at the Rome Conference. The first proposal envisaged an inherent jurisdiction of the Court over all the crimes contemplated in its Statute,

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<sup>149</sup> J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 53-55.

<sup>150</sup> 1998 Preparatory Committee Report, *supra* n. 129, 46.

<sup>151</sup> For a detailed overview of the issue, see Holmes, 'The Principle of Complementarity', *supra* n. 66, 76 ss.

with an additional consent requested for those states that were not parties to the Statute and were custodial of a suspect or of relevant evidence. The second proposal requested the consent or the membership to the Statute of the home state of the suspect and of the territorial state. The third one was the one proposed by the ILC in its 1994 draft Statute, according to which the Court would exercise inherent jurisdiction with respect to the crime of genocide, without requiring the consent of any state, whereas for other crimes consent was requested from the territorial state, the suspect's home state and any other state that had requested the State's extradition for the crime.<sup>152</sup> In the end, the second model prevailed, with the considerable replacement of the cumulative consent of the territorial and the national state to an alternative requirement. Also the triggering mechanism was further defined. The view of the like-minded states prevailed,<sup>153</sup> and the Prosecutor was granted the power to initiate *proprio motu* investigations, subject to a deeper control by the Pre-Trial Chambers.<sup>154</sup>

#### **4. The rationale of Complementarity**

In the aftermaths of the Rome Conference, many authors highlighted the centrality of complementarity in the ICC system. It was described as the “cornerstone”<sup>155</sup>, the “pivotal article”<sup>156</sup>, the “main”<sup>157</sup> or “key”<sup>158</sup> feature of the ICC, one of the “underlying principles” of

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<sup>152</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 84.

<sup>153</sup> U. Leanza, 'The Rome conference on the establishment of an International Criminal Court: a fundamental step in the strengthening of International Criminal Law', in F. Lattanzi, W. A. Schabas, (Eds.), *supra* n. 31, Vol. I, 7-20, 13.

<sup>154</sup> The US government strongly opposed such faculty of the ICC Prosecutor, seen by the US representatives as a risk of exposure for US citizens to criminal prosecutions manipulated for political reasons, which indeed led to the refusal of the state to ratify the Rome Statute. See, D. J. Scheffer, 'The United States and the International Criminal Court', (1999) 93 AJIL, 12-22.

<sup>155</sup> S. Williams, W. A. Schabas, *supra* n. 68, 621. Also J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 73.

<sup>156</sup> S. Williams, W. A. Schabas, '*supra* n. 68, 621.

<sup>157</sup> P. Benvenuti, 'Complementarity of the International Criminal Court to National Criminal Jurisdictions', *supra* n. 31, 21.

<sup>158</sup> M. Politi, 'Reflections on complementarity at the Rome Conference and beyond', in C. Stahn, M. M. El Zeidy (eds.), *supra* n. 44, 142-149, 142.

the Statute.<sup>159</sup> It is not surprising that the doctrine put so much light on this feature of the newly established ICC: by regulating the relationship between the ICC and national Courts, the mechanism of complementarity both founds and limits the ICC's exercise of jurisdiction, and therefore acquires a central role in the ICC system of justice.

According to the New Oxford Thesaurus of English, one thing complements the other when it adds something in a way that completes it.<sup>160</sup> The ICC is set up as an international instrument to complement, complete the action of domestic courts in the prosecution of persons responsible for the commission of international crimes. According to this model, states retain the right – and, as recalled in the Preamble to the Statute, also the duty – to prosecute the persons allegedly responsible for the commission of international crimes.<sup>161</sup> Domestic courts lose their primacy only and insofar as they fail to act in response to international crimes, or when their action is deemed inappropriate. The ICC has not been designed to replace domestic courts: it has been assigned a residual role. It is deemed to remain 'dormant'<sup>162</sup> until (and if) states fail to make their duty to prosecute effective.

The main purpose of the Rome Statute is to fight against impunity for the perpetrators of the international crimes under its jurisdiction. Impunity stems first of all from the inaction of states, but also – and this is reflected in the regulation of admissibility – by their non-genuine action. In this sense, a complementary international criminal court does not only serve the goal of filling the impunity gap left by the inaction or the inappropriate action of states. Under the threat of intrusion into sovereign states' prerogatives, it is also intended to encourage states that want to preserve their sovereign prerogatives to perform genuine criminal proceedings in response to the commission of international crimes in their territories or by their nationals. It

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<sup>159</sup> M. H. Arsanjani, 'Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court', H. Von Hebel, J. G. Lammers, J. Schukking (eds.), *supra* n. 11, 67.

<sup>160</sup> The notion of complementarity finds application, in addition to daily life, in the fields of physics, psychology, biology, and economics. For a detailed overview, see M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, *supra* n. 35, 1- 5.

<sup>161</sup> Preamble, ICC Statute, para. 6.

<sup>162</sup> H. Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers Leiden, 2005), 39.



functions both as a stimulus and as an instrument of pressure over states<sup>163</sup> to make the system of international criminal law enforcement more effective.<sup>164</sup>

The choice of complementarity responds also to a number of practical reasons. The ICC has been established through an international treaty. This is a significant departure from the ICC predecessors, which have been established through agreement (Nuremberg) or unilateral decision (Tokyo) of the victors of Second World War and through UN Security Council Resolutions (the ICTY and ICTR). The recourse of the ICC Statute drafters to the treaty instrument responds to the concern of States to ensure the Court a higher level of legitimacy than its predecessors.<sup>165</sup> This method of creation, however, implies the need for the Court to obtain adhesion and active support of states.<sup>166</sup> Consent of states becomes crucial to the ICC system: through their ratification, States recognise and grant the Court jurisdiction over all crimes within its jurisdiction<sup>167</sup> and ensure full cooperation with a Court that, otherwise, lacks enforcement mechanisms. The Court – leaving aside the hypothesis in which the UN Security Council refers a situation – does not exercise universal jurisdiction. It can exercise jurisdiction

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<sup>163</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 18. On ICC and state sovereignty from an International Relations perspective, see F. Mégret, 'Why would States want to join the ICC? A theoretical exploration based on the legal nature of complementarity', in J. K. Kleffner, G. Kor, (Eds.), *supra* n. 10, 1-52. On sovereignty and the individual, see G. Kor, 'Sovereignty in the dock', *Ibid.*, 53-72.

<sup>164</sup> M. Benzing 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity', (2003) 7 *Max Planck UNYB*, 591-632, 596. Paragraph 5 of the Preamble to the ICC Statute expressly refers to the determination of states not only to put an end to impunity for the perpetrators of the most serious crimes, but also to contribute to the prevention of such crimes. The preventive role does not find any concrete reflection among the functions of the Court. The allocation for such a purpose relies primarily on a theoretical level among the functions of criminal law, and in the case of the Court might be seen as a political message to those persons "tempted" to commit international crimes. In the form of a general prevention, the establishment and threat of activation of the Court may send a strong message to potential perpetrators of international crimes. Such a preventive role may thus be read as declaration of intent by the Court, which may play a strong role in this sense only by promoting an effective and efficient system of justice. For a vehement critique to the preventive role assigned to International Criminal Law, see I. Tallgren, 'The Sensitivity and Sense of International Criminal Law', (2002) 13 *EJIL*, 561-595.

<sup>165</sup> P. Kirsch, 'Introductory Remarks', in M. Politi, F. Gioia, (Eds.) *The International Criminal Court and National Jurisdictions*, (Ashgate, London 2008), 1-11, 1.

<sup>166</sup> *Ibid.*

<sup>167</sup> A. Sheng, 'Analysing the International Criminal Court Complementarity Principle through a Federal Courts Lens', (2007) 13 *International Law Students Association Journal of International and Comparative Law*, 415-416; B. Broomhall, 'The International Criminal Court: Overview and Cooperation with States', in (1999) 143 *Association Internationale de droit pénale, ICC Ratification and National Implementing Legislation*, 45-111, 64.

over nationals or in the territories of states parties. The number of states becoming parties to the Statute is thus of fundamental importance for the realisation of the universal aspiration to which the Court tends in order to make its fight against impunity truly global.<sup>168</sup>

Cooperation of states is equally of fundamental importance for the successful working of the Court. Whereas the ICC is a “strong judicial pillar”, the means of enforcement “have been reserved to states”.<sup>169</sup> This feature is common to all international courts and tribunals, which are therefore “entirely dependent” on the support that they receive from states, which “ultimately hold the key to their success or failure”.<sup>170</sup>

From the perspective of states, ratification of the Rome Statute implies the assumption of significant obligations. In addition to accepting the Court's potential jurisdiction over their nationals and territories, states assume the duty to cooperate with requests from the Court and to adopt domestic legislation to that purpose.<sup>171</sup> By ratifying the Rome Statute, states accept to sacrifice, under specific conditions, one of their most typical and traditional sovereign powers – the exercise of criminal prerogatives over their territory and nationals – to realize the prominent interest of ensuring that perpetrators of international crimes are brought to justice.<sup>172</sup> Given these considerable repercussions on states' sovereignty, the Statute had to carefully accommodate certain concerns, and ensure that the Court would interfere with states' domestic affairs only in limited and well-defined circumstances. A complementary ICC, with a carefully defined set of conditions for the exercise of its jurisdiction and the admissibility of cases before

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<sup>168</sup> M. Politi, 'The Rome Statute of the ICC: Rays of Light and Some Shadows', in M. Politi, G. Nesi (Eds.) *The Rome Statute of the International Criminal Court. A Challenge to impunity*, (Ashgate: Aldershot, 2001), 15. S. Fernandez de Gourmendi, 'New World Order or a World in Disorder? Testing the Limits of International Law. Late – Breaking Issues and the International Criminal Tribunals', (2005) 99 Am. Soc'y Int'l L. Proc., 272-281, 279.

<sup>169</sup> P. Kirsch, 'Introductory Remarks', *supra* n. 165, 3.

<sup>170</sup> A. Pellet, 'The Anatomy of Courts and Tribunals', (2008) 7 The Law and Practice of International Courts and Tribunals, 275-287, 286

<sup>171</sup> Articles 86 and 88 ICC Statute. As established in article 87(7) of the Statute, the Court may make a finding of non-cooperation and report the matter either to the Assembly of States Parties or the United Nations Security Council, if the Court has been triggered by the latter.

<sup>172</sup> K. Ambos, 'On the Rationale of Punishment at the Domestic and International Level', in R. Roth, M. Henzelin (Eds.) *Le droit penal à l'épreuve de l'internationalisation*, (LGDJ Paris, 2002) 305-310.

it, guarantees states the retention of their sovereign prerogatives if they don't expressly fail to exercise them, and thus facilitates their accession to its system.

An additional reason that fostered the establishment of a complementary ICC attains to the nature and main features of the latter. The ICC, being a permanent institution with universal aspiration and a considerable number of states parties, has potential jurisdiction over an unlimited number of situations and cases involving the commission of international crimes. Such a broad potential jurisdiction represents a considerable departure from the jurisdictional models of the previous international tribunals, which were established *ex post facto* and *ad hoc*, i.e., to respond to the commission of international crimes in specific situation of crisis, with, consequently, a jurisdiction limited in both space and time.<sup>173</sup> Were not the Court assigned a residual role, considering the wide degree of impunity that still follows the commission of international crimes worldwide, it would have been overwhelmed with situations and cases to investigate and prosecute. Clearly, an institution with a limited number of judges, infrastructures and financial resources<sup>174</sup> would be unable to deal with such an immense workload.<sup>175</sup>

Further, prosecutions at the domestic level are generally preferred to those performed before international courts and tribunals: the former present some specific advantages if compared to prosecutions at the international level. Proximity to crimes represents a logistical advantage, as it generally favours a better access to evidence and testimony and tends to favour the participation to the trial of victims and witnesses, whose appearance before an international court might be more problematic. It also ensures a better knowledge of both the conflict and the context by investigators, prosecutors and judges. Local institutions, if not dismantled by the situation related to the commission of international crimes, might be already equipped with all

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<sup>173</sup> U. Leanza, *supra* n. 153, 9.

<sup>174</sup> A. Cassese, *International Criminal Law* (Oxford University Press, 2008), 351.

<sup>175</sup> E. Fronza, 'Principio di complementarità, esercizio della giurisdizione e adeguamento a livello interno', in E. Amati, V. Caccamo, M. Costi, E. Fronza, A. Vallini (Eds.) *Introduzione al diritto penale internazionale* (Giuffrè, Milan 2010), 39-76, 40-41.

the necessary infrastructures to perform the various phases of criminal proceedings. Further, local proceedings may better promote internal debate and social reconciliation, as they tend to a better reconstruction of events than international trials, with the creation of an historical record that international tribunals, which, given their more selective nature, have serious difficulties in doing.<sup>176</sup>

Whether it is true that the territorial state has the best access to evidence and testimony, some shortcomings in the proceedings may indeed be provoked by such proximity to the crimes. Thus, local proceedings may be vitiated by a lack of impartiality, or characterised by attempts to intimidate victims and/or witnesses, as well as, more generally, by non-genuine performance of the proceedings. The proximity to crimes may also imply serious problems for domestic courts in terms of existing infrastructures, personnel available and all the practical means necessary to perform such proceedings. Such risks are indeed captured by complementarity as regulated in the Rome Statute, under the notions of unwillingness and inability.

## **5. The System of the International Criminal Court**

The very establishment of the Court represents a dramatic change in the international realm. States are no longer the only responsible for the prosecution and punishment of perpetrators of international crimes. Since 2002, the commission of international crimes and the related responses at the domestic level is to be at least monitored by the permanent ICC. States and the Court interact in the shared responsibility of combating impunity for the most serious crimes which affect the international community as a whole.<sup>177</sup> As acknowledged by the ICC Prosecutor, the ICC Statute creates “an interdependent, mutually reinforcing system of justice”,

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<sup>176</sup> The interaction between history/establishment of the truth and criminal proceedings is still debated and controversial in criminal law, and tends to become even more problematic when the commission of international crimes is at stake. Pastor warns against the risks of giving too much importance to the role of prosecutions in the establishment of the historical truth, given the separation between criminal proceedings and historical reconstruction of events. See, D. Pastor, *supra* n. 35, 99-173.

<sup>177</sup> C. Stahn, 'Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity', in Stahn C., El Zeidy M. M., (Eds.) *supra* n. 44, 233-282. 237.

whose aim is the prosecution of persons responsible for the commission of international crimes.<sup>178</sup> Interaction is manifest in the Preamble to the Statute, which expresses the commitment of both levels in the pursuance of the common goal to fight against impunity.

In this context, the Court and States exercise concurrent jurisdiction over international crimes. If “concurrency” is already *per se* expression of interaction, this latter is evident in the complex set of procedures provided for in the Statute for the determination of the forum that shall exercise jurisdiction. As will be seen in details in Chapter II, forms of dialogue between the Court and State commence even before the Court officially activates in relation to a given situation. States may refer situations to the Court in accordance with article 14 of the Statute, or provide information ex article 15. Before the Court initiates investigations, the procedures contemplated in article 18 of the Statute “institutionalise” such interaction.

The relationship between the Court and States goes beyond the issue of admissibility of situations and cases. The enforcement of the Rome Statute is made dependent on national support for all matters that attain to the performance of proceedings before the Court, such as the collection of evidence, the arrest and surrender of the suspects, the issuance of travel authorisation for individuals appearing before the Court, access of ICC staff to the field, etc.<sup>179</sup>

In this context, States are under the duty to cooperate with the Court, in accordance with article 86 of the Statute. Although the Court is not under an obligation of reciprocity towards states, article 93(10) of the Statute establishes that it may respond to States' requests of assistance. The ICC Prosecutor repeatedly expressed his commitment towards a cooperative relationship with states.<sup>180</sup>

Interaction extends even beyond the two main actors of the system of justice created through

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<sup>178</sup> *Office of the Prosecutor*, Paper on Prosecutorial Strategy 14 September 2006, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Report+on+Prosecutorial+Strategy.htm> (Accessed 5 January 2012), 5.

<sup>179</sup> R. Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities', (2008) 21 LJIL, 431-456, 431.

<sup>180</sup> See, Chapter IV.3.

the establishment of the ICC. Other actors of the international realm are called to play a role in the fight against impunity. Intergovernmental organizations may provide information about the alleged commission of international crimes to the ICC Prosecutor, in accordance with article 15 of the Statute and the latter may seek their cooperation in the performance of investigations, in accordance with article 54 of the Statute. Civil society, under the form of non-governmental organisations or victims of the crimes may also provide such information. Under the Rome Statute, victims are entitled to participate to the proceedings, submitting their views and concerns.<sup>181</sup>

Within this complex and multi-layered system of justice, the ICC is deemed to intervene only in exceptional scenarios, to complement the insufficient action of States. The Court, its judges and its Prosecutor have a delicate and prominent role, being them in charge of determining whether the action, if any, undertaken by domestic courts is satisfactory in light of the criteria of the Rome Statute. A thorough analysis of the meaning, scope and potentials of complementarity as regulated in the ICC Statute is therefore of crucial importance to understand the modalities of interaction among all the actors involved in the fight against impunity and the role played by the ICC.

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<sup>181</sup> Article 68 ICC Statute.



## CHAPTER II - COMPLEMENTARITY IN THE ROME STATUTE

### 1. Jurisdiction and Admissibility

The exercise of the jurisdiction of the Court is subject, on the one hand, to the existence of the preconditions for the exercise of jurisdiction, as established in Articles 5 to 8, 11 to 16 and 26 and, on the other hand, to the positive assessment of the admissibility of the case, as provided for in Articles 17 to 20 of the Statute. In accordance with articles 5, 11 and 12 of the Statute, the Court shall exercise jurisdiction over the crimes of genocide, crimes against humanity and war crimes listed in articles 6, 7 and 8<sup>182</sup> when they are committed in the territory or by a national of a state party or of a State that accepted the jurisdiction of the Court in accordance with article 12(3) of the Statute. The territorial and nationality requirements do not apply when the Security Council refers to the ICC a situation of crisis in which such crimes appear to have been committed.<sup>183</sup> The Court has jurisdiction over individuals above the age of eighteen, allegedly responsible for the commission of international crimes<sup>184</sup> after 1 July 2002 if the State became a

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<sup>182</sup> During the negotiations for the adoption of the ICC Statute, no agreement had been reached on the definition of the crime of aggression. Article 5(2) of the Statute established that the Court would exercise jurisdiction over such crime “once a provision is adopted”. The adoption of such a definition was the subject of intense negotiations which culminated in the adoption of a resolution dealing with the crime at the end of the Review Conference held in Kampala, Uganda, between 31 May and 11 June 2010 in accordance with Article 123(1) of the Statute. Resolution RC/Res.6 of 28 June 2010 introduced in the Statute Article 8 *bis* on the Crime of aggression. The crime of aggression is defined as the ‘planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. Paragraph 2 defines the act of aggression. The elements of the crime are further specified in the Elements of Crimes, with the insertion of Article 8 *bis* on the Crime of Aggression. The entry into force of the provisions relating to aggression is subject to a positive decision taken after 1 January 2017 by a two thirds majority of States Parties, and the ratification or acceptance of such amendments by at least thirty States. See, R. S. Clark, ‘Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala 31 May – 11 June 2010’, (2010) 2 *Goettingen Journal of International Law*, 689-711

<sup>183</sup> A detailed analysis of the parameters of the jurisdiction of the Court undertaken by the Appeals Chamber can be found in *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, A.Ch., 14 December 2006, paras. 20-22.

<sup>184</sup> Article 26 of the Statute excludes jurisdiction over persons that were under the age of eighteen at the time of commission of the crime. The Court may exercise jurisdiction exclusively on physical persons. The option of assigning jurisdiction to the Court also for “legal” or “juridical” persons was highly controversial, as the principle of corporate liability is not recognised in many criminal law systems. It was finally agreed that the Court would exercise jurisdiction only over physical persons allegedly responsible for the commission of international crimes. For a deeper analysis of the issue see, K. Ambos, ‘Article 25. Individual Criminal



party to the Statute at the time of its entry into force. If a State adheres to the ICC Statute at a later moment, the Court may exercise its jurisdiction only with respect to crimes committed after the entrance into force of the Statute for such State<sup>185</sup>, unless it has made a declaration accepting to backdate the Court's jurisdiction to an earlier date, in accordance with article 12(3) of the Statute.<sup>186</sup> When the Security Council refers a situation to the Court, it indicates the date from which the Court shall exercise jurisdiction.<sup>187</sup>

The fulfilment of these criteria does not automatically mean that, after the alleged commission of such crimes, the ICC may directly exercise its jurisdiction over them. On the contrary, “the States Parties have granted to the ICC a jurisdiction which is deactivated (...) and that is only activated with regard to a particular situation of crisis”, when a number of circumstances occur, and the ICC starts investigations over such situation.<sup>188</sup>

Each case to be brought before the Court shall undertake an admissibility test, in order to

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Responsibility', in O. Triffterer (ed.), *supra* n. 20, 743-770; L. van den Herik, 'Corporations as future subjects of the International Criminal Court: an exploration of the counterarguments and consequences', in C. Stahn, L. van den Herik, (Eds.) *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, The Hague 2010) 350-368; P. Saland, 'International Criminal Law Principles', in R. S. Lee (Ed.), *supra* n. 66, 199. Also, J. Kyriakakis, 'Corporations and the International Criminal Court: the Complementarity Objection Stripped Bare', (2008) 19 CLF, 115-151; A. Sereni, 'Individual Criminal Responsibility', in F. Lattanzi, W. A. Schabas, (Eds.) *supra* n. 31, Vol. II, 103-119.

<sup>185</sup> This is, for instance, the case of the jurisdiction of the Court with respect to crimes allegedly committed in Kenya: the State became party to the Statute on 15 March 2005. According to Article 126(2) of the Statute, the Statute entered into force for Kenya on 1 June 2005 (the first day of the month after the 60<sup>th</sup> day following the deposit of its instrument of ratification). See, *Situation in the Republic of 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, P.T.Ch.II., 31 March 2010, paras 172-174.

<sup>186</sup> An exception to the required acceptance of the Court's jurisdiction in accordance with article 12(1) of the Statute is the so-called “opting-out” clause of article 124 ICC Statute, according to which a State, on becoming party to this Statute, may declare that, for a period of seven years, that it does not accept the jurisdiction of the Court with respect to war crimes committed by its nationals or on its territory”. This provision represents an exception to the general prohibition of reservations contemplated in Article 120 of the Statute. Two States made use of this clause to exempt war crimes committed by their nationals or on their territory from the jurisdiction of the Court for a period of seven years: Colombia, from 2002 to 2009, and France, from 2002 to 2008. At the Review Conference, notwithstanding the common orientation of States towards deleting the provision, it was finally retained, with the commitment to further discuss its review during the fourteenth session of the Assembly of States Parties to the Rome Statute in 2015. See, Art. 124 ICC Statute, RC/Res.4 (2010); S. Tabak, 'Article 124, War Crimes and the development of the Rome Statute', (2009) 40 *Georgetown Journal of International Law*, 1069-1099; R. S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala 31 May – 11 June 2010', *supra* n. 182, 691.

<sup>187</sup> R. Rastan, 'Situations & Cases: Defining the parameters', in C. Stahn, M. M. El Zeidy (eds.), *supra* n. 44, 421-459, 424.

<sup>188</sup> H. Olásolo, 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor', *supra* n. 79, 2.

determine “to what extent the national judicial systems may be complemented by the ICC”.<sup>189</sup> The admissibility test is regulated in Article 17 of the ICC Statute, and is comprised of gravity and complementarity.

This chapter analyses the content of article 17 of the Statute, pointing to the controversial and unresolved interpretative issues, whose solution is likely to give different shapes to the action of a complementary ICC. Issues of admissibility are then located within the context of the complex set of procedures that characterises the activation and subsequent action of the Court. They come at stake in different moments and involve different actors. An in depth understanding of all these coordinates is fundamental in order to understand complementarity.

## **2. Article 17 of the ICC Statute**

Article 17 is the central norm in the architecture of complementarity. It establishes the criteria for the admissibility of cases before the Court to be evaluated by the ICC Prosecutor and Judges.

Its application and interpretation is therefore of crucial importance for the delineation of the relationship between the Court and domestic jurisdictions. As seen above, the compromise reached in Rome – although signing the successful adoption of the Rome Statute – left several questions unanswered as to the meaning, scope and extent of control to be exercised by the international judges over domestic proceedings.

The chapeau of article 17 – drafted in the negative form – establishes the conditions under which “a case is inadmissible” before the Court. This formulation is expression of the strong presumption in favour of domestic prosecutions,<sup>190</sup> unless these proceedings fail to meet any of these conditions listed in the provision.

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<sup>189</sup> C. Cárdenas Aravena, 'The admissibility test before the International Criminal Court under special consideration of Amnesties and truth commissions', in J. K. Kleffner, G. Kor, (Eds.), *supra* n. 10, 115-140.

<sup>190</sup> C. Sthan, 'Complementarity, Amnesties and Alternative forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 JICJ, 695-720, 709.

Paragraph 1 of Article 17 of the Statute suggests that there are four main situations that require close examination in order to determine the question of admissibility. First, whether the case is being investigated or prosecuted by a State having jurisdiction; second, whether a State has investigated and concluded that there is no basis on which to prosecute; third, whether the person has already been tried for this conduct; and, finally, whether the case is of sufficient gravity. Pre-Trial Chamber I, in one of the first decisions of ICC Judges dealing with admissibility issues, clarified that

[...] the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(1) (a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.<sup>191</sup>

Although the issue of gravity is not, strictly speaking, related to (existing) domestic proceedings, due attention will be paid to the issue, given its repercussions on the process of selection of situations and cases which, as will be seen in further details below, ultimately impacts on complementarity.

### **3. The admissibility assessment vis-à-vis domestic proceedings**

As a preliminary observation, it is worth noting that article 17 of the Statute establishes that the

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<sup>191</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, ICC-01/04-01/06-8-Corr, P.T.Ch.I, 10 February 2006, para. 30. This approach has been followed by the same Chamber in *The Prosecutor v. Muhammad Harun ("Ahmad Harun") and Ali Abd-Al-Rahman ("Ali Kushayb")*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1, PTC I, 1 May 2007, para. 24; by Pre-Trial Chamber III in *The Prosecutor v Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, PTC III, 10 June 2008, para. 21; also Trial Chamber II referred to the 'same person-same conduct' requirement in *The Prosecutor v. Katanga and Ngudjolo Chui*, Reasons for Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213-tENG, T.Ch. II., 16 June 2009, para. 81.

inadmissibility of cases before the Court shall be declared when proceedings are held in whatever State with jurisdiction over it, being it exercised through the classical criteria of territory or nationality, or in compliance with the principle of universal jurisdiction.<sup>192</sup>

The Court's assessment of national proceedings is not limited to those conducted before states parties, but may extend to those of states non-party, as a consequence of referrals of the UN Security Council or states' acceptance of its jurisdiction as provided for in article 12(3) of the Statute.<sup>193</sup>

Such an assessment is directed towards three different stages of national proceedings. First, article 17(1) (a) refers to on-going investigations or prosecutions.<sup>194</sup> Second, article 17(1) (b) refers to those hypotheses in which the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.<sup>195</sup>

According to this provision, “two cumulative requirements”<sup>196</sup> have to be fulfilled: first, the case has to be investigated; second, there must be a final decision not to prosecute. It has been debated whether the norm, by referring to decisions not to prosecute, encompasses a general

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<sup>192</sup> There has been a long and interesting debate on the impact of the establishment of the ICC on States' exercise of universal jurisdiction. A detailed analysis of the issue, however, falls outside the scope of the present work. Suffice it to say that some authors, such as Broomhall and Cassese, highlight the positive impact and consequences of the establishment of the Court with respect to the exercise of universal jurisdiction, while others, such as Stigen and Ambos, are of the opposite view. See, B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, *supra* n. 21, 112-118; A. Cassese, *International Criminal Law*, *supra* n. 174, 284-285; J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity*, *supra* n. 55, 26; K. Ambos, 'Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik', in W. Kaleck, M. Ratner, T. Singelstein, T. Weiss, (Eds.) *International Prosecution of Human Rights Crimes*, (Springer, Berlin 2007); P. Weiss, 'The Future of Universal Jurisdiction', *ibid.*, 29-36.

<sup>193</sup> Stigen notes that “the dynamic reference to “a State which has jurisdiction” lets the ICC decide the scope of a state's jurisdiction on a case-by-case basis, allowing the Court to adjust to a dynamic development of international law”. J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 191.

<sup>194</sup> In the words of the Appeals Chamber in Katanga, “Article 17(1) (a) of the Statute covers a scenario where, at the time of the Court's determination of the admissibility of the case, investigation or prosecution is taking place in a State having jurisdiction. This is expressed by the use of the present tense (...)” See, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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. 75.

<sup>195</sup> The Appeals Chamber held that “The purpose of article 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.” *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 83.

<sup>196</sup> J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, *supra* n. 10, 116.

tolerance of the Court for alternative forms of justice, such as truth and reconciliation commission or other non-criminal remedies.<sup>197</sup> The letter of the provision, and the reference to unwillingness and inability, however, seems to suggest that the termination of criminal proceedings shall depend on a decision taken by domestic judges, and therefore based on legal grounds, such as the insufficiency of evidence available, rather than on other non-judicial grounds.

Finally, pursuant to articles 17(1) (c) and 20(3) of the Statute, the Court has the faculty to intervene also when the person has already been tried before a national court. In this case, the Court's intervention qualifies as an exceptional derogation to the principle of *ne bis in idem*, which states that no person shall be tried twice for the same conduct, on the ground that the proceedings do not meet the threshold required by the ICC Statute.<sup>198</sup>

The positive finding of the existence and performance of domestic proceedings does not *per se* prevent the Court from intervening.<sup>199</sup> Once (and if) domestic proceedings exist, the second step to be undertaken by the ICC Prosecutor and Judges is to assess whether these proceedings meet the (un)willingness and (in)ability requirements, contemplated in article 17(1) and defined in articles 17(2) and (3).<sup>200</sup> Unwillingness and inability, thus, become relevant “only where, due

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<sup>197</sup> S. Williams, W. Schabas, *supra* n. 68, 617.

<sup>198</sup> The two exceptions to the prohibition to try a person twice for the same offence contemplated in article 20(3) of the Statute, coincide with two of the three factors of unwillingness. The Court may therefore try a person already tried by another court if the proceedings were undertaken with the intent to shield that person from criminal responsibility, or were not conducted independently or impartially and the manner in which they were conducted is considered to be inconsistent with an intent to bring the person concerned to justice. Logically, the ‘unjustified delay of the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice’ referred to in Article 17(2)(b) is not applicable to cases that already reached an end, i.e. those to which Article 20(3) applies.

<sup>199</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 75: “(...) according to the clear wording of article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability of a State having jurisdiction over the case becomes irrelevant only where, due to ongoing or past investigations or prosecutions in that State, the case appears to be inadmissible.”

<sup>200</sup> Article 17(1)(a) and (b) refer to the unwillingness or inability of the State “genuinely to carry out the investigation or prosecution”. It was long debated in the literature whether the term ‘genuinely’ had to be understood as a specification of “carry out” or whether, on the contrary it was attached to the term “unable”. See J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, *supra* n. 10, 114, in contrast to what assumed by, *inter alia*, M. Arsanjani, M. Reisman, ‘The Law-In-Action of the International Criminal Court’, (2005) 99 AJIL, 385-403, 398, W. A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’, (2008) 6 JICJ, 731-761, 758. The vast majority of authors is not convinced

to on-going or past investigations and prosecutions in that State, the case appears to be inadmissible”.<sup>201</sup> The two notions are not defined in the Statute, but paragraphs 2 and 3 of article 17 set the criteria or situations that may assist the Court in determining them.

As will be seen in further details below, a superficial reading of article 17, according to which the Court would intervene if states are unwilling or unable to investigate or prosecute, obfuscated the first part of the complementarity test.<sup>202</sup> Only recently, the ICC judges highlighted the relevance and clarified the contours and scope of the concept of states' inaction.<sup>203</sup>

### 3.1 Unwillingness

As seen above, the definition of unwillingness proved to be particularly problematic throughout the preparatory works. The notion was sensitive both from the point of view of state sovereignty and from the perspective of the rights of the individual and was per se vested with high degrees of subjectivity.<sup>204</sup>

The provision adopted in article 17(2) of the Statute establishes that, in order to determine

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that the term attains to “carry out”, and therefore “it increases the threshold of inadmissibility, in as much as it would not have to be proven that the investigation or prosecution is being carried out, but also that it is being or has been carried out 'genuinely'.”, thus increasing the threshold of admissibility. Kleffner, *Ibid.* See also, among others, M. M. El Zeidy, 'The Principle of Complementarity: a New Machinery to Implement International Criminal Law', (2002) 23 Michigan JIL, 869-975, 900, M. A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', *supra* n. 77, 54; J. T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.) *The Rome Statute of the International Criminal Court: a Commentary* (OUP, Oxford 2002) 667- 687, 674; R. Jensen, 'Complementarity, 'genuinely' and Article 17: Assessing the boundaries of an effective ICC', in Kleffner, J., K., Kor G., (Eds.), *supra* n. 10, 147-170, 159; M. Benzing, *supra* n. 164, 605. In the decision on the challenge to the admissibility of the case against Jean Pierre Bemba Gombo, Trial Chamber III seems to link genuinely only to admissibility. See, *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, T.Ch.III, 24 June 2010, para 237: Under article 17(1)(a) “the case is inadmissible if the case is being investigated or prosecuted by the relevant State, unless the latter is unwilling or *genuinely unable* to proceed.” Emphasis added.

<sup>201</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 75.

<sup>202</sup> See, D. Robinson., 'The Mysterious Mysteriousness of Complementarity', (2010) 21 CLF (2010) 67-102; of the same author 'The inaction controversy: Neglected words and new opportunities', in C. Stahn, M. M. El Zeidy, (eds.) *supra* n. 44, 460-502.

<sup>203</sup> See *infra*, chapter III.

<sup>204</sup> J. T. Holmes, 'The Principle of Complementarity', *supra* n. 66, 50-51.

unwillingness in a particular case, the Court shall consider, “having regard to the principles of due process recognised by international law”,<sup>205</sup> whether domestic proceedings are or were conducted or the national decision was made in order to shield a person from being held criminally liable,<sup>206</sup> or in a way that is inconsistent with an intent to bring the person to justice, due to an unjustified delay,<sup>207</sup> or were characterised by lack of independence or impartiality, inconsistent with an intent to bring the person concerned to justice.<sup>208</sup>

“Unwillingness” suggests that the ICC shall intervene in all instances in which it finds that domestic proceedings are used as a façade to frustrate the ends of justice.<sup>209</sup> Such a determination implies therefore an assessment of the ‘spirit’<sup>210</sup> of national proceedings.

A part from the references in article 17(2), no other provisions of the Statute or of the Rules of Procedure and Evidence provide further guidance on the content, criteria and factors of unwillingness.

The Office of the Prosecutor elaborated on the indicators or *indicia* of unwillingness in a number of papers. It suggested that the purpose of shielding the person from criminal responsibility shall be assessed by looking, at the preliminary assessment, at the scope of the investigation, in particular of whether this is directed towards “marginal perpetrators” or “minor offenders” rather than to the persons most responsible for the commission of the crimes under examination. Also the way in which investigations or prosecutions are conducted at the domestic level may be a useful indicator: insufficient investigative or prosecutorial steps,

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<sup>205</sup> Another interesting and unresolved question is whether unwillingness, in light of the reference to norms of due process, applies also to proceedings that are detrimental to the accused. See, F. Gioia, ‘State Sovereignty, Jurisdiction and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court’, *supra* n. 10, 1107; S. A. Williams, W. Schabas, *supra* n. 68, 623, suggests “an assessment of the quality of justice from the standpoint of procedural and perhaps even substantial fairness”. But Holmes explains that the phrase was introduced to ensure that the court uses “objective” criteria in its consideration of national procedures. J. T. Holmes, ‘The Principle of Complementarity’, *supra* n. 66, 53-54. In details, M. Benzing, *supra* n. 164, 606 ss.

<sup>206</sup> Article 17(2)(a), ICC Statute.

<sup>207</sup> Article 17(2)(b), ICC Statute.

<sup>208</sup> Article 17(2)(c), ICC Statute.

<sup>209</sup> M. Newton, ‘Comparative Complementarity: Domestic Jurisdictions Consistent with the Rome Statute of the ICC’, *supra* n. 77, 58.

<sup>210</sup> S. A. Williams, W. Schabas, *supra* n. 68, 623.

deviations from practices and procedures, the failure to consider specific evidence, the intimidation of victims, witnesses and members of the judiciary, the inconsistency between the evidence tendered and the findings, as well as a clear insufficiency of resources allocated for the performance of proceedings may well unveil the hidden purpose of shielding the person from criminal responsibility.<sup>211</sup>

In relation to the unjustified delay, due relevance shall be given to whether such delay is not in line with “normal delays” in the national system for cases of similar complexity; to whether there are justifications for such a delay, and whether there is evidence in the circumstances of a lack of intent to bring the persons concerned to justice.<sup>212</sup> In order to assess independence, considerations as to the degree of independence of the judiciary as well as the prosecutors the degree of political interference and the patterns of trials reaching “preordained outcomes” shall be of assistance.<sup>213</sup> Other indicators would be the alleged involvement of the apparatus of the State in the commission of international crimes, the extent to which dismissal or appointment of judges or prosecutor is likely to impact on the conduct and outcome of the proceedings; the degree of political interference as well as the corruption or corruptibility of the actors of judicial proceedings.<sup>214</sup> Traces of lack of impartiality may be found in linkages between the alleged perpetrators and the organs responsible for the investigations and prosecutions, as emerging, *inter alia*, from public statements or awards, sanctions, promotions, replacements, dismissals etc. involving judicial personnel.<sup>215</sup> Other indicators that may assist in the determination of unwillingness involve a general look at the proceedings, with regards, *inter alia*, to the number

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<sup>211</sup> *Office of the Prosecutor*, Draft Policy Paper on Preliminary Examinations, 4 October 2010, available at <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> (accessed 21 December 2011), para. 61

<sup>212</sup> *Office of the Prosecutor*, Informal Expert Paper, the Principle of Complementarity in Practice, ICC-OTP 2003, 29, available at [www.icc-cpi.int/iccdocs/doc/doc654724.pdf](http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf) (accessed 5 January 2012); Also *Office of the Prosecutor*, Draft Policy Paper on Preliminary Examinations, *supra* n. 211, para. 63.

<sup>213</sup> *Office of the Prosecutor*, Informal Expert Paper, the Principle of Complementarity in Practice, *supra* n. 212, 29.

<sup>214</sup> *Office of the Prosecutor*, Draft Policy Paper on Preliminary Examinations, *supra* n. 211, para. 64.

<sup>215</sup> *Ibid.*, para. 65; *Office of the Prosecutor*, Informal Expert Paper, the Principle of Complementarity in Practice, *supra* n. 212, 30.



of investigations conducted, the adequacy of the charges and of the modes of liability to the evidence available, the overall investigative steps conducted, the degree of participation of victims to the proceedings, etc.<sup>216</sup>

In reality, it is extremely hard to pre-define all the factors that may assume relevance for a finding of unwillingness, whose assessment shall necessarily be tailor-made on the specific conditions of the case under examination.

Whereas the indicators may vary consistently, and the exercise of drafting a list may be only illustrative of a multi-faceted reality, it has been debated whether the three main criteria listed in article 17(2) of the Statute – the purpose of shielding, the unjustified delay in the conduct of the proceedings, and the lack of independence or impartiality – shall be considered exhaustive or illustrative. If they were considered to be only illustrative of hypotheses of unwillingness, the powers of the international judges in assessing the conformity of national proceedings to the standards of the ICC Statute would be extremely wide, with possibilities of findings of unwillingness based on other grounds. The difficulties met throughout the preparatory works in reaching a satisfying compromise as to the delineation of the criteria of unwillingness, as well as the substantial freedom left to the international judges as to the *indicia* determinative of these factors, however, seems to suggest that the list has been conceived as exhaustive.<sup>217</sup>

The ICC judges have not yet been called to assess the willingness of a State in relation to the conduct of proceedings under the umbrella of article 17 of the ICC Statute. The term “unwillingness” was however referred to in two decisions on admissibility, in which the judges talked of a “different form of unwillingness”, related to the State's choice of the forum in which prosecutions should take place. In *Katanga*, as will be extensively discussed below, the

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<sup>216</sup> A long list of possible indicators is contained in *Office of the Prosecutor*, Informal Expert Paper, the Principle of Complementarity in Practice, *supra* n. 212, 29-31.

<sup>217</sup> Scholars are divided on the issue. See, considering it illustrative, D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 EJIL, 481-505, 500; C. K. Hall 'Suggestions concerning ICC prosecutorial Policy and Strategy and external relations', 28 March 2003, on file with the author, 16. Of the opposite view C. Cárdenas Aravena, *supra* n. 189, 115-140, 121; J. T., Holmes, 'Complementarity: National Courts versus the ICC', *supra* n. 200, 675; S. Williams, W. Schabas, *supra* n. 68, 622.

defendant had challenged the admissibility of the case before the Court arguing, *inter alia*, that the DRC had been investigating on him, although not for the same charges. Trial Chamber II, in finding that the case was admissible before the Court, based its reasoning on the legitimacy of withdrawing cases held domestically in order to bring them before the Court. The Chamber's reasoning relied on an incorrect reconstruction of the admissibility test, according to which the Court may exercise jurisdiction when a state is unwilling or unable to investigate or prosecute. Without assessing whether there were proceedings in relation to the case at hand, the Chamber turned directly to assessing unwillingness and found that the DRC was unwilling to prosecute. Such unwillingness, however, was not the one contemplated in article 17(2) of the Statute, i.e., “unwillingness motivated by the desire to obstruct the course of justice”. Rather, the DRC was unwilling in the sense of a “second form of unwillingness”, not expressly provided for in article 17 of the Statute, according to which the State “aims to see the persons brought to justice, but not before national courts.”<sup>218</sup> The Appeals Chamber, subsequently asked by the defendant to rule on the correctness of the Trial Chamber's interpretation of unwillingness, declined to enter the merits of both the Chamber's interpretation and the notion of unwillingness, and simply restored the correct interpretation of article 17(1)(a) and (b).<sup>219</sup>

A few months later, Trial Chamber III in *Bemba*, distinguished between unwillingness of a State – in this case, the Central African Republic – to prosecute a person domestically and unwillingness under article 17(2) of the Statute, by stating that the former “is not unwillingness for the purposes of article 17(1) (b)” of the Statute.<sup>220</sup>

In both decisions, therefore, unwillingness is not the criterion that may lead to the admissibility

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<sup>218</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *supra* n. 191, paras. 77 ss; On the same vein, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Observations by the OPCV on the Document in support of the Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber on the Motion Challenging the admissibility of the case, ICC-01/04-01/07-1369, 13 August 2009, paras. 20-22.

<sup>219</sup> See, *infra*, Chapter III.4.4.

<sup>220</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, *supra* n. 200, para. 243.

of a case before the Court despite the existence of domestic proceedings, as provided for in article 17 of the Statute. This “second form of unwillingness” does not come at stake as a legal factor but unveils political determinations of States not to prosecute domestically because prosecution would be handed by the Court. So far, the “legal” form of unwillingness has neither been debated before the ICC judges, nor examined by the ICC Prosecutor in relation to specific situations and cases. Its content, factors and indicators, thus, remain unexplored.

### **3.2 Inability**

Article 17(3) establishes that, when determining the inability of a State to investigate or prosecute a particular case, the Court shall consider whether, due to a total or substantial collapse or the unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise to carry out its proceedings. The provision was inserted to deal with situations in which objective obstacles prevent the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court.<sup>221</sup>

Causes of the inability of the State to perform its proceedings are therefore the total or substantial collapse and the unavailability of the national judicial system. The reference to the collapse of the national judicial system, being it total or substantial, entails scenarios in which the domestic system has been seriously damaged and the situation of chaos affects also the judicial system.<sup>222</sup>

On the other hand, “unavailability” encompasses a wider range of hypotheses in which the State, for reasons other than the collapse, is not in a position to deal with the complex situations

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<sup>221</sup> *Office of the Prosecutor*, Paper on some Policy Issues before the Office of the Prosecutor, September 2003, available at <http://www.icc-cpi.int/Menus/ICC/Structure> of the Court/Office of the Prosecutor/Policies and Strategies/Paper on some policy issues before the Office of the Prosecutor.htm (accessed 21 December 2011), 4

<sup>222</sup> See, among others, M. Arsanjani, 'Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court', *supra* n. 159, 70. Also, J. Holmes, 'Complementarity: National Courts *versus* the ICC', *supra* n. 200, 677.

in which international crimes are committed. The State may not be able to gather the evidence, to arrest the accused or to perform any of all the other functions related to the prosecution of persons allegedly responsible for the commission of international crimes.<sup>223</sup> The reference to a state being “otherwise unable to carry out its proceedings” opens the door to a case-by-case assessment of the factors that may affect its ability to prosecute.

Several and different *indicia* can therefore be expressive of inability. Among them, the Office of the Prosecutor individuates factual circumstances, such as the absence of conditions of security for witnesses, victims, or actors of the legal proceedings, or the lack of adequate means for effective investigations and prosecutions, as well as legal factors, such as the existence of laws that *de facto* bar the exercise of prosecutorial powers over given individuals or for given crimes. The issue of inability of a state, while not yet fully examined before the ICC judges, has been referred to as the reason that led the governments of Uganda<sup>224</sup>, DRC<sup>225</sup> and CAR<sup>226</sup> when referring to the situations in their respective countries to the Court.

Inability has been also briefly discussed by Trial Chamber III in *Bemba*. After having found that

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<sup>223</sup> Benzing refers to a system in which ‘the authorities for the administration of justice do exist and are generally functional, but cannot deal with a specific case for legal or factual reasons such as sheer capacity overload’. See M. Benzing, *supra* n. 164, 614. Similarly, Kleffner brings the example of a system that has not collapsed but which ‘is too weak to carry out proceedings in a safe environment for members of the judiciary, victims, witnesses and/or the perpetrator’. J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, *supra* n. 10, 155.

<sup>224</sup> As reported by Pre-Trial Chamber II in the Decisions on the issuance of the warrant of arrest for 5 members of the LRA, in the “Letter of Jurisdiction” of 28 May 2004, the Government of Uganda stated that it had been “unable to arrest...persons who may bear the greatest responsibility”. *Situation in Uganda*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, ICC-02/04-53, PTC II., 27 September 2005, para. 37, also referred to in *Situation in Uganda*, Warrant of arrest for Vincent Oti, ICC-02/04-54, P.T.Ch.II, 8 July 2005, para. 37; *Situation in Uganda*, Warrant of arrest for Raska Lukwiya, ICC-02/04-55, P.T.Ch.II, 8 July 2005, para. 25; *Situation in Uganda*, Warrant of arrest for Okot Odhiambo, ICC-02/04-56, P.T.Ch.II, 8 July 2005, para. 27; and *Situation in Uganda*, Warrant of arrest for Dominic Ongwen, ICC-02/04-57, P.T.Ch.II, 8 July 2005 para. 25.

<sup>225</sup> The Government of the Democratic Republic of the Congo referred, more generally, to the fact that, given the particular situation of the country, the relevant authorities were not in a position to investigate or prosecute without the participation of the Court: “[e]n raison de la situation particuliere que connait mon pays, les autorités compétentes ne sont malheureusement pas e mesure de mener des enquetes sur les crimes mentionnés”. See, DRC letter of referral, available at ICC-01/04-01/07-11-Anx1.1.

<sup>226</sup> The Government of the Central African Republic substantiated its referral with the inability of the judicial system, confirmed by the *Cour de Cassation*, to deal with the complex proceedings necessary to investigate and prosecute the persons allegedly responsible for the commission of the alleged crimes. See, *Prosecutor opens investigation in the Central African Republic* ICC-OTP-20070522-220, available at <http://www.icc-cpi.int/menus/icc/press> and media/press releases/2007/prosecutor opens investigation in the central african republic (accessed 5 January 2012).

the case was admissible before the Court in accordance with the first sentence of article 17(1) (b) of the Statute, the Chamber decided, for the sake of completeness, to address the question of whether the CAR was to be considered unable within the meaning of article 17(3) of the Statute. The Chamber found that, due to shortage of judges and human resources, insufficient budgetary resources, and, more generally, instability of the region, the CAR had neither the investigative resources to handle the offences adequately, nor the judicial capacity to try them.<sup>227</sup> The CAR judicial system was thus deemed “unavailable”.<sup>228</sup>

The issue of “unavailability” and the necessary indeterminacy of the term leave the question of the degree of intrusion and control of the Court over national judicial systems. In particular, the question is whether the Court shall intervene, on the ground of the inability of the domestic level, in those cases in which the State is conducting proceedings for conducts that would constitute international crimes, but domestically are qualified as ordinary crimes. Some authors believe that the lack of implementation of provisions on international crimes is comprised within the reference in article 17(3) to 'otherwise unable to carry out its proceedings'.<sup>229</sup> Others, on the contrary, argue that inability envisages only exceptional scenarios, and that, therefore, the general lack of provisions on international crimes does not, *per se*, cause the inability of a State.<sup>230</sup>

The question, far from being purely theoretical, is likely to bear extremely relevant consequences on the relationship between the Court and national systems: in case of a positive finding as to a general insufficiency of prosecutions for ordinary crimes at the domestic level, this would imply a sort of obligation for States to adopt legislation on international crimes. Such an obligation is not contemplated in the Rome Statute, which instead obliges States to

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<sup>227</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, *supra* n. 200, para. 246.

<sup>228</sup> *Ibid.*, para. 245.

<sup>229</sup> See, OTP Informal Expert paper on the principle of complementarity in practice, *supra* n. 212; F. Gioia, ‘State Sovereignty, Jurisdiction and ‘Modern’ International Law’, *supra* n. 10, 1107.

<sup>230</sup> H. Olásolo, ‘Complementarity Analysis of National Sentencing,’ in R. Haveman, O. Olusanya, (Eds.) *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, Oxford 2006) 37-66, 39-40; J. T. Holmes, ‘The Principle of Complementarity’, *supra* n. 66, 49.

implement legislation to favour cooperation with the Court and to contemplate crimes against the administration of justice.<sup>231</sup>

According to Article 17(1) of the Statute, the admissibility check encompasses hypotheses in which domestic proceedings are on-going (Article 17(1) (a)); have not reached the trial stage because, upon investigation, the State decided not to prosecute (Article 17(1) (b)); or have reached an end (Article 17(1) (c)). In case of on-going proceedings or a decision not to prosecute, the Court is called to assess whether the proceedings are affected by unwillingness or inability to prosecute genuinely (Article 17(1) (a) and (b)). When the person has already been tried, the determination on the admissibility of the case is based on the exceptions to the principle of *ne bis in idem* contemplated in Article 20(3) (Article 17(1) (c)). These exceptions coincide with two of the three scenarios of unwillingness as defined in Article 17(2) of the Statute.

Causes of inability are therefore excluded from the list of factors that might imply the admissibility before the Court of cases already dealt with at the domestic level. The exclusion of any forms of inability from the exceptions to the principle of *ne bis in idem* suggests that, in a domestic system affected by inability, criminal proceedings do not reach an end. The categorization of conducts as ordinary rather than international crimes does not, in principle, impede the proper performance and conclusion of criminal proceedings. Assuming, on the contrary, that the concept of inability encompasses the failure to implement or to recur to provisions on international crimes, there would be no reason to differentiate among different phases of the proceedings. An interpretation of unavailability as implying admissibility of cases based on ordinary crimes where they are on-going, in contrast with the impossibility for the Court to step in where they reached an end, would indeed create contradictory situations, in which the Court may take over domestic courts in case of on-going proceedings, while being

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<sup>231</sup> See, Articles 70(4)(a), and 88 ICC Statute.

prevented from doing so where the proceedings already reached an end.

Such a reading is corroborated by the literal interpretation of Article 20(3). The provision establishes that, leaving aside proceedings undertaken with the purpose of shielding the person or that were not conducted independently or impartially, the Court is prevented from trying a person 'for a conduct also proscribed under article 6, 7 or 8' if he or she has already been tried by another court for the same conduct.<sup>232</sup> The reference to 'conduct' that might constitute international crimes under the Rome Statute, as opposed to 'crime', closes the door to interpretations in favour of assigning relevance to the legal qualification of conducts for the purpose of admissibility of cases before the Court. On the contrary, it is clear that a second prosecution for the same conduct is not allowed before the ICC if based on a different labelling of the same conduct.<sup>233</sup>

Also the preparatory works confirm that the concept of inability has not been designed with the objective to sanction the recourse to ordinary crimes at the domestic level. Following the rejection of the ILC proposal to include the domestic characterization of acts as ordinary crimes

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<sup>232</sup> The formulation of Article 20(3), which refers to conducts, rather than crimes, is not equivalent to the one of Article 20(2). The latter states that '[n]o 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'. This implies that national courts can still try the person for the same conduct if qualified as a crime outside the jurisdiction of the Court. According to Tallgren and Reisinger Coracini, 'The idea is that since the ICC does not have jurisdiction over crimes under national law, there is a need to ensure that a person who commits such a crime does not escape responsibility simply because in the ICC trial it is not proved beyond reasonable doubt that the acts amounted to a crime in the jurisdiction of the ICC', I. Tallgren, A. Reisinger Coracini, 'Article 20. Ne bis in idem', in O. Triffterer (ed.), *supra* n. 20, 669-700, 686-8.

<sup>233</sup> In this sense, also ICTY Trial Chamber II, which stated that '[u]nlike the prevailing practice at the Tribunal and at the ICTR, the Rome Statute of the International Criminal Court provides that, in its relations with national jurisdictions, the principle of *ne bis in idem* will block a second prosecution if an accused has already been tried in a national court for conduct also proscribed under the Statute. In so doing, the Statute of the International Criminal Court leaves the characterisation of the crimes open to national courts.' *Prosecutor v. Hadzihasanovic and Kubura*, Judgement, Case No IT-01-47-T, T.Ch. II., 15 March 2006, para. 257. It should be noted, however, that there is no uniform understanding of the meaning of 'idem', whose interpretation varies considerably at both the domestic and international levels. For an overview of the principle of *ne bis in idem* and of the definition of *idem* in regional and international instruments, and its interpretation by the related courts, see I. Tallgren and A. Reisinger Coracini, *supra* n. 232, 674-80. Also, C. Van den Wyngaert and T. Ongena, '*Ne bis in idem* Principle, Including the Issue of Amnesty', in A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *supra* n. 200, 705-725. Recently, the Grand Chamber of the European Court of Human Rights, noting the variety of interpretations of the Court on the notion of *idem*, provided 'an harmonised interpretation' of the notion of 'same offence' contemplated in Article 4 of the Seventh Additional Protocol of the European Convention of Human Rights. The Grand Chamber established that the norm 'must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same' and that there can be identity of facts independently from their juridical qualification. See, *Zolotukhin v. Russia*, Decision of 10 February 2009, ECHR, G. Ch., paras. 78-84.

among the exceptions to the principle of *ne bis in idem*, Article 20(3) has been drafted with regard to the concept of unwillingness as encompassed in Article 17. During the drafting of this latter provisions, the issue of ordinary crimes as a ground for the activation of the Court was not addressed, neither with respect to the concept of unwillingness nor to that of inability.<sup>234</sup>

In light of these considerations, it can be concluded that under the Rome Statute the ‘unavailability’ of the national judicial system which renders the state ‘otherwise unable to carry out its proceedings’ does not imply the inability of the state based on the performance of proceedings in accordance with provisions on ordinary crimes. Similarly to what was concluded with regards to the concept of unwillingness, the label of conducts as ordinary crimes is not conceived as one of the factors that shall lead the Court to exercise its jurisdiction over a case given the inability of the state concerned.

If the different labelling of conducts does not *per se* lead to the admissibility of cases before the Court, it is worth noting that some obstacles to the performance of domestic proceedings – with the consequent admissibility of the case before the Court due to the inability of the domestic judicial system – may be provoked by the absence of specific provisions on international crimes contemplated in the ICC Statute.

The Rome Statute, in addition to systematizing the definition of international crimes, crystallizes some general principles of international criminal law, which constitute a distinct body of international rules applicable to international crimes.<sup>235</sup> Some of them evolved specifically with respect to international crimes and do not necessarily find correspondence in the ones applicable to ordinary crimes under national criminal law. Contrary to the inapplicability of statutes of limitations established in Article 29 of the Rome Statute, in many

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<sup>234</sup> As seen above, the definition of the concept of inability was not controversial during the negotiations. It should also be noted that this concept was initially referred to as ‘non availability of trial procedures’, in the Preamble to the ILC Draft. See, ILC Report, Preamble, para. 3. The term was kept during the process of refinement of the concept of inability and understood as one of its causes in alternative to the total or substantial collapse of the judicial system.

<sup>235</sup> Part III of ICC Statute, General Principles of Criminal Law.



legal systems there are provisions that prevent prosecutions for various categories of crimes after a certain number of years have passed.<sup>236</sup> The applicability of prescription to conducts that would qualify as international crimes under the Rome Statute and for which investigations or prosecutions are subject to such limits may provoke the inability of a domestic system to either initiate or continue investigations or prosecutions.<sup>237</sup> Although not automatically the cause of inability, this shortcoming of a judicial system may well fit within the meaning of the non-availability of the system when its applicability prevents the state from carrying out its investigations or prosecutions.<sup>238</sup>

Also the applicability of immunities or other exemptions based on official capacity may prevent domestic courts from investigating or prosecuting persons allegedly responsible for the commission of international crimes. Whereas they are often contemplated in national and international laws, Article 27 of the Rome Statute explicitly declares their inapplicability.<sup>239</sup> In addition, the ICC Statute contemplates a specific mode of liability for commanders and superiors, who may be held responsible for the crimes committed by their subordinates as a result of their failure to fulfil the duty to prevent or repress their unlawful conduct or to submit the matter to the competent authorities, which do not necessarily exist at the domestic level.<sup>240</sup> In similar vein, the domestic system may contemplate excessive defences, which do not coincide with those – more limited – contained in the ICC Statute. The non-correspondence of provisions applicable domestically to the ones contemplated in the Rome Statute may provoke the inability of the state due to the ‘unavailability’ of appropriate provisions to ensure that the

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<sup>236</sup> See W. Schabas, ‘Article 29. Non-applicability of Statute of Limitations’, in O. Triffterer, (ed.) *supra* n. 20, 845-848.

<sup>237</sup> In some instances inability and unwillingness may overlap, if the applicability of statutes of limitations is deliberately provoked by the state *via* unjustified delays.

<sup>238</sup> In *Stanković*, the Referral Bench determined that the statute of limitations contemplated in the criminal code of the Socialist Federal Republic of Yugoslavia, and applicable to the case if referred to the authorities of Bosnia and Herzegovina under Rule 11bis of the Rules, did not constitute an obstacle to such referral, because, at that time, the twenty-five years from the commission of the crime had not passed. See *Prosecutor v. Stankovic*, Decision on the Referral of Case Under Rule 11 *bis* – Partly Confidential and Ex Parte, Case No. IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 41.

<sup>239</sup> Article 27, ICC Statute.

<sup>240</sup> Article 28 ICC Statute. See, R. Arnold, O. Triffterer, ‘Article 28’, O. Triffterer, (ed.) *supra* n. 20, 795-844.

perpetrators of the most serious crimes are brought to justice.<sup>241</sup>

The failure of a State to implement specific provisions on international crimes may become a factor of inability under the meaning of “unavailability” in those cases in which certain conducts do not constitute crimes under national law, whereas they are crimes under international criminal law. This is for instance the case of several war crimes and of the act of genocide of imposing measures intended to prevent births in the targeted group, generally not criminalised under national law.<sup>242</sup> The gap created in this respect may lead to the inaction of the state, but also to its inability to investigate and prosecute, due to the fact that the relevant conduct is not criminalized under national laws.

All these cases, however, although relating to specific principles or provisions applicable to international crimes, do not attain to the legal qualification of conducts as ordinary crimes. Rather, they refer to scenarios in which different principles apply under the Rome Statute to international crimes or in which conducts are criminalized only under international criminal law. They assume relevance inasmuch as domestic provisions bar the exercise of the state's jurisdiction over the persons allegedly responsible for the commission of international crimes, thus preventing the state from taking action with respect to a given case, or vitiating the action undertaken and impeding its continuation. These loopholes in the domestic legal system may thus lead to the inaction of the state or represent factors of inability within the meaning of 'unavailability' of the national judicial system.<sup>243</sup>

Accordingly, the domestic investigation or prosecution for multiple murder of a person that occupied a prominent position in the state apparatus, for whom immunities or other exemptions based on official capacity and statutes of limitations do not apply, in a system which recognized

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<sup>241</sup> The absence of appropriate provisions may also lead to inaction scenarios.

<sup>242</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 321.

<sup>243</sup> In the paper on the principle of complementarity in practice, the Group of Experts argue that the ‘lack of substantive or procedural penal legislation’ and the applicability of immunities are relevant in the determination of the inability of the state due to the unavailability of its system. Office of the Prosecutor, Informal Expert Paper: the Principle of Complementarity in Practice, *supra* n. 212, 15 and 31.

the specific modes of liability necessary to establish his or her responsibilities, shall be considered satisfactory by the Court in terms of the ability of the relevant state to carry out its proceedings. On the other hand, also in cases in which the conduct is labelled as an international crime, immunities or the other obstacles seen above may still lead to the finding that the state is unable to carry out its proceedings. These loopholes in the domestic legal system that may represent factors of inability within the meaning of 'unavailability' of the national judicial system are therefore not necessarily interlinked to the legal qualification of conducts. The characterization of conducts as ordinary crimes is not, under the Rome Statute, among the causes of the inability of the state to genuinely investigate and prosecute. The Rome Statute has been drafted and the ICC has been established to respond to the impunity gap left by the inaction of States in the prosecution of persons responsible for the commission of the most serious crimes of international concern. In line with that, ordinary crimes come at stake when they leave certain cases unpunished; on the contrary, as long as they ensure that perpetrators are brought to justice, the ICC is not entitled to step in.

#### **4. The gravity threshold**

In addition to the factors that attain to the existence and performance of national proceedings, the admissibility of cases before the Court is subject to a second element, the so-called “gravity threshold”.<sup>244</sup> According to article 17(1) (d) of the Statute, a case shall be declared inadmissible before the Court when it “is not of sufficient gravity to justify further action by the Court”. This element is not connected to an evaluation of domestic proceedings, but attains to specific features of the case itself.

Neither the Statute nor the Rules contain a definition of “gravity”, nor indicate how the Court's assessment shall be performed. What is clear from the letter of the provision is that the test is

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<sup>244</sup> See also, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, para. 29.

mandatory and, given the absence of express exceptions in the norm, it “is not subject to derogation”.<sup>245</sup>

The rationale for the inclusion of gravity as a factor to be considered when assessing the admissibility of cases emerges from the preparatory works.<sup>246</sup> The element was introduced in the 1994 ILC draft on the ground that the Court should have the power to stay a prosecution on specific grounds, including “the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level.”<sup>247</sup> According to the drafters, its inclusion responded to the need of avoiding that the Court would be 'swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free'.<sup>248</sup> The adoption of a gravity threshold was also seen as a realistic approach to manage the 'case-load to the resources available'<sup>249</sup> and responded to the concerns expressed by several States that 'the court might exercise jurisdiction in cases that were not of sufficient international significance'.<sup>250</sup> Considering that all crimes under the jurisdiction of the Court are *per se* serious, the additional gravity threshold under article 17(1) (d) of the Statute was 'included to serve as an additional layer that filters the type of situations or cases to be dealt with before the Court'.<sup>251</sup> In the words of Pre-Trial Chamber I, the gravity threshold

Is in addition to the drafter's careful selection of the crimes included in articles 6 to 8 of the Statute, a selection based on gravity and directed at confining the material jurisdiction of the Court to “the most serious crimes of international concern”. Hence, the fact that a case addresses one of the most serious crimes

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<sup>245</sup> C. Cárdenas Aravena, *supra* n. 189, 119.

<sup>246</sup> For a detailed overview of the drafting history on gravity, see M. deGuzman, 'Gravity and the Legitimacy of the International Criminal Court', (2009) 32 *Fordham Law Journal*, 1400-1465, 1416-1425. Also, War Crimes Research Office (WCRO), Washington College of Law, *The Gravity Threshold of the International Criminal Court* (2008), 12-18.

<sup>247</sup> Yearbook of the International Law Commission, Summary record of the 2330<sup>th</sup> meeting, 1994 YILC Vol. 1, 9.

<sup>248</sup> *Ibid.*, 9.

<sup>249</sup> Yearbook of the International Law Commission, Summary record of the 2333<sup>rd</sup> meeting, 1994 YILC Vol. 1, 33.

<sup>250</sup> Yearbook of the International Law Commission, Summary record of the 2356<sup>th</sup> meeting, 1994 YILC Vol. 1, 193.

<sup>251</sup> M. M. El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court', (2008) 19 *CLF*, 35-57, 39. On the applicability of the gravity threshold to both situations and cases, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, para. 44.

for the international community as a whole is not sufficient for it to be admissible before the Court.<sup>252</sup>

Despite its centrality in the determination of which situations and cases shall be brought before the Court, in the years that followed the adoption of the ICC Statute gravity passed almost unnoticed.<sup>253</sup>

Starting from 2005, it progressively assumed more relevance in the context of admissibility assessments. On that year, gravity was referred to by the Prosecutor as the overarching criterion for the selection of the cases against LRA rebels in the context of the Ugandan situation.<sup>254</sup>

In February 2006, gravity informed the Prosecutor's decision not to open investigations in the situation of Iraq.<sup>255</sup> According to the Prosecutor, despite the reasonable basis to believe that the war crimes of wilful killing and inhumane treatment had been committed, the overall estimated number of victims of such crimes – inferior to twenty – was too low for the situation to meet the required gravity threshold. The Prosecutor compared such number with the numbers in the other three situations under investigation at that time, Uganda, the DRC and Sudan: each of them involved “thousands of wilful killings as well as intentional and large-scale sexual violence and abductions, and, collectively, had resulted in the displacement of more than 5 million people”.<sup>256</sup>

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<sup>252</sup> Ibid., para. 41. Similarly, Pre-Trial Chamber II held that “being all the crimes that fall within the jurisdiction of the court serious, the insufficient gravity criterion represents an 'additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.” *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *supra* n. 185, para. 56.

<sup>253</sup> W. A. Schabas, 'Prosecutorial discretion and gravity', in C. Stahn, G. Sluiter, (Eds.) *The Emerging Practice of the International Criminal Court* (Koninklijke Brill, Leiden 2009) 229-246, 229-231.

<sup>254</sup> *Office of the Prosecutor*, Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 October 2005, 2-3; Statement of Mr. Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs” NY 24 October 2005, p. 7.

<sup>255</sup> *Office of the Prosecutor*, Response to communications received concerning Iraq, 9 February 2006, available at [http://www.icc-cpi.int/Menus/ICC/Structure\\_of\\_the\\_Court/Office\\_of\\_the\\_Prosecutor/Comm\\_and\\_Ref/Iraq/](http://www.icc-cpi.int/Menus/ICC/Structure_of_the_Court/Office_of_the_Prosecutor/Comm_and_Ref/Iraq/) (Accessed 5 January 2012).

<sup>256</sup> Ibid., 8. The first prosecutorial assessments of gravity seem indeed to be based on gravity understood only in a quantitative way. See, Remarks by Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Chicago, 9 April 2008 p. 2, in which the Prosecutor held that “[a]n initial evaluation showed that in terms of gravity, in particular the number of victims of crimes under the ICC jurisdiction, the Democratic Republic of

In the same days in which the Prosecutor communicated his decision concerning Iraq, Pre-Trial Chamber I declined to issue a warrant of arrest for the Congolese Bosco Ntaganda on the ground that the case did not meet the gravity threshold.<sup>257</sup> According to the Chamber, a judicial assessment of gravity is to be performed by looking at the persons and the conducts object of proceedings before the Court. The conduct shall be either systematic or large-scale,<sup>258</sup> and shall have caused social alarm in the international community.<sup>259</sup> In addition, and in furtherance of the preventive role assigned to the Court, the gravity threshold shall be assessed in relation to the persons bearing in mind that such threshold is intended “to ensure that the Court initiates cases only against the most serious leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation”.<sup>260</sup> In evaluating whether the person object of the proceedings before the Court is one of the most responsible, three elements shall be considered: the position of the persons, so that the Court focuses its attention only on “the most senior leaders”;<sup>261</sup> the role that “such persons plays, through acts or omissions, when the State entities, organizations or armed groups to which they belong commit systematic or large-scale crimes within the jurisdiction of the

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the Congo and Colombia were the most serious situations in the territory of State Parties. Northern Uganda was the next.” The decision was subject to a wide range of critiques. Schabas repeatedly criticises the purely quantitative assessment of gravity, and the consequent failure to consider the qualitative dimension of the factor. See, among others, W. A. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts', (2008) 19 CLF, 5-33; 'Complementarity in Practice: Creative Solutions or a Trap for the Court?', in M. Politi, F. Gioia, (Eds.) *supra* n. 165, 25-48. See also, I. Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*,' (2009) 9 ICLR 547-565, 548-549; M. deGuzman, *supra* n. 246, 1432, pointing to the fact that “a threshold is required, rather than a comparison”. Other authors criticise the Prosecutor's assessment of the gravity of the situation, rather than the crimes. See, K. Heller, 'Situational gravity under the Rome Statute', in C. Stahn, L. van den Herik, (Eds.) *supra* n. 184, 227-253; criticising Heller, M. Osiel, 'How should the ICC Office of the Prosecutor Choose its Cases? The multiple meanings of 'Situational Gravity', The Hague Justice Portal, available at <http://www.haguejusticeportal.net/eCache/DEF/10/344.html> (accessed 5 January 2012); P. Seils, 'Making complementarity work: Maximising the limited role of the Prosecutor', in C. Stahn, M. M. El Zeidy, (Eds.) *supra* n. 44, 989-1013, 994-997.

<sup>257</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191.

<sup>258</sup> *Ibid.*, para 46.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*, para. 50.

<sup>261</sup> *Ibid.*, para. 51.

Court”<sup>262</sup>; and the role played by such State entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation, in a sense that they shall be suspected of being the most responsible.<sup>263</sup> According to the Judges, only by concentrating on the most senior leaders suspected of being the most responsible for the commission of the crimes within the jurisdiction of the Court in the relevant situation, “can the deterrent effects of the activities of the Court be maximised”. This would foster the awareness of other senior military leaders in other similar circumstances that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.”<sup>264</sup>

The Prosecutor reacted vehemently to the Chamber's interpretation and application of the gravity threshold.<sup>265</sup> According to the organ of the accuse, the Chamber had erred in law in injecting exceptionally rigid requirements into the legal standard of sufficient gravity in accordance with article 17(1)(d) of the Statute. The legal gravity threshold has been inserted in the Statute in order to exclude minor offenders and minor crimes that “clearly do not warrant exercising of jurisdiction”; among those cases that satisfy the gravity threshold, the Prosecutor must, like any other prosecutors, apply selection criteria in order to prioritise a limited number of cases for presentation before the Court.<sup>266</sup> The interpretation proposed by the Chamber, on the contrary, entrenched “a permanent legal barrier” that would preclude the Court from prosecuting any case that does not fall within the rigid categories envisaged. This *a priori* exclusion of entire categories of perpetrators risks, contrary to what believed by the Chamber,

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<sup>262</sup> Ibid., para. 52.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid., para. 54.

<sup>265</sup> *Situation in the Democratic Republic of the Congo*, Prosecutor's Appeal against Pre-Trial Chamber I's 10 February 2006 “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58”, ICC-01/04-125, O.T.P., 14 February 2006.

<sup>266</sup> *Situation in the Democratic Republic of the Congo*, Prosecutor's Document in Support of the Appeal, ICC-01/04-120-Red, O.T.P., 28 January 2011 (redacted version of the Document filed under seal, *ex parte* on 3 March 2006), paras. 23 and 42.

to ultimately undermine the deterrent impact of the Court.<sup>267</sup> Further, in the Prosecutor's view, the Chamber conceived article 17(1) (d) not as a basic threshold, but as a means of directing the policy of case selection among grave cases; such a restrictive interpretation of gravity precludes the exercise of any discretion by the Prosecutor.

Whereas the Chamber's view was that “the relevant conduct must present particular features which render it *especially* grave”; the Prosecutor proposed that the test addressed the question of whether “the case is... of *sufficient* gravity to warrant further action by the Court”.<sup>268</sup> Article 17(1)(d) of the Statute establishes a basic standard for gravity – a requirement of “sufficient gravity” – excluding minor offenders and minor crimes that clearly do not warrant the exercise of jurisdiction by the Court and requires a basic test, whereby factors such as the gravity of the crimes and the extent of responsibility of the person shall be considered.<sup>269</sup> In his view, “the factors should be simply stated as factors to be considered, without imposing any particular legal requirements”,<sup>270</sup> and their list shall be intended as “non-exhaustive, to take unforeseen circumstances”.<sup>271</sup> With respect to the gravity of the crimes, relevant factors include the nature or severity of the crimes; their scale, including the number of victims; the degree of systematicity, where applicable; the impact of these crimes as well as any “particular aggravating aspects in the manner of commission of the crimes”.<sup>272</sup> In relation to the extent of responsibility of the alleged perpetrator, the Prosecutor suggested that relevant factors include the alleged status or hierarchical level of the accused, or implication in particularly serious or

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<sup>267</sup> *Situation in the Democratic Republic of the Congo*, Prosecutor's Appeal against Pre-Trial Chamber I's 10 February 2006 “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58”, *supra* n. 265, para. 24.

<sup>268</sup> *Ibid.*, para. 44.

<sup>269</sup> *Situation in the Democratic Republic of the Congo*, Prosecutor's Document in Support of the Appeal, 01/04-120-Red, O.T.P., 28 January 2011 (redacted version of the Document filed Under seal, *ex parte* on 3 March 2006), *supra* n. 266, para. 53.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

<sup>272</sup> These factors have been inserted in Regulation 29(2) of the Regulations of the Office of the Prosecutor. According to this provision, the Prosecutor, when deciding whether to initiate investigations or prosecutions, “[i]n order to assess the gravity of the crimes allegedly committed in the situation (...) shall consider various factors, including their scale, nature, manner of commission and impact.” Regulation 29(2) of the Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Date of entry into force: 23th April 2009.



notorious crimes; the significance of the role of the accused in the overall commission of crimes; and the degree of the involvement of the person.<sup>273</sup>

Among cases that satisfy such legal threshold, it is the Prosecutor the organ in charge of selecting those that warrant prosecution in accordance with prosecutorial policy. Forms of judicial controls on decisions of the Prosecutor not to proceed are contemplated by the Statute where such decisions are based on the interest of justice; otherwise – the Prosecutor suggests – the Court may follow the line of the *ad hoc* tribunals, to enable judicial review of case selection decisions based on discriminatory or improper motives.<sup>274</sup> Gravity as a legal threshold is therefore a simple, “basic test” that does not leave room for judicial assessments of prosecutorial discretion in the selection of cases.

The Appeal Chamber, asked by the Prosecutor to establish whether it was the intent of the drafters “to create a legal straightjacket for the Court or simply to screen out frivolous and minor cases”,<sup>275</sup> embraced the arguments presented by the organ of the accuse and found that the PTCI test was “incorrect”.<sup>276</sup> The Chamber dismantled the three factors that the PTCI had listed as part of the gravity test<sup>277</sup> and contested the PTCI's assertion that the gravity threshold directs the Court towards focussing on the most senior leaders suspected of being most responsible for the commission of international crimes. According to the higher Chamber, limiting the exercise of the Court's jurisdiction to this category of perpetrators, thus excluding a wide range of perpetrators from the Court's jurisdiction might have the opposite effect of hampering the preventative and deterrent functions of the Court and would contravene other

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<sup>273</sup> *Situation in the Democratic Republic of the Congo*, Prosecutor's Document in Support of the Appeal, 01/04-120-Red, O.T.P., 28 January 2011 (redacted version of the Document filed Under seal, *ex parte* on 3 March 2006), *supra* n. 266, para. 34.

<sup>274</sup> *Ibid.*, para. 50.

<sup>275</sup> *Ibid.*, para. 27.

<sup>276</sup> *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 a warrant of arrest, article 58”, ICC-01/04-169, A.Ch., 13 July 2006.

<sup>277</sup> *Ibid.*, paras. 70 -72.

provisions of the Statute.<sup>278</sup> The decision on the warrant of arrest for Bosco Ntaganda was then remanded to Pre-Trial Chamber I, which then issued the requested warrant.<sup>279</sup>

The Appeals Chamber rightly opposed the affirmation of a too rigid and too high gravity threshold. Restricting the initiation of cases before the Court only to the most senior leaders, with the rigid application of the three proposed criteria, might result in excessively limiting the necessary degree of flexibility in the selection of cases to be brought before the Court, which is a prerogative of prosecutorial discretion.<sup>280</sup> Similarly, establishing that the deterrent effect of the Court would be maximised by limiting its action to the most senior perpetrators might have grave repercussions on the Court's role and mandate in the fight against impunity.

The decision of Pre-Trial Chamber I, however, contained some interesting hints – such as the need to link the concrete action of the Court, in terms of cases prosecuted, to its functions and main objectives, and the need to give a special, additional qualification of gravity to the selected conduct – which would have deserved further consideration. The Chamber highlighted the importance of an accurate selection of cases, given the concrete limitations faced by the Court. Among the lines of the PTCI's decision, emerges the attempt of the latter to grant the ICC judges some forms of control over the exercise of prosecutorial discretion in the selection of cases to be brought before the Court. In such a rich debate, the Appeals Chamber missed the opportunity to clarify the meaning and scope of judicial assessments of gravity, and reset the issue “to its unclear origin”.<sup>281</sup>

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<sup>278</sup> Ibid., paras. 73-79.

<sup>279</sup> *The Prosecutor v. Bosco Ntaganda*, Warrant of Arrest, ICC-01/04-01/06-2-Anx-tENG, P.T.Ch.I, 22 August 2006 (Unsealed on 28 April 2008).

<sup>280</sup> The doctrine is unanimous in criticising the PTCI's “too high threshold”. See, M. M. El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court', *supra* n. 251, 49, R. Murphy, 'Gravity issues and the International Criminal Court', (2006) 17 CLF, 281-315, 291 (“the three elements adopted by the Chamber are useful but the threshold set is very high”). Also WCRO, *The Gravity Threshold of the International Criminal Court*, *supra* n. 246, 37 ss. I Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*', *supra* n. 256, 551, S. E., Smith, 'Inventing the Laws of Gravity: the ICC's Initial *Lubanga* Decision and its Regressive Consequences' (2008) 8 ICLR, 331-352, 338-340.

<sup>281</sup> I. Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*', *supra* n. 256, 552. Only Judge Pikis provided a timid attempt to elaborate on gravity, by raising the question of “which cases are unworthy of consideration by the Court?” and answering that these cases are those

Since the Appeals Chamber's judgement, no other Chamber attempted to present a complete, alternative test for gravity. This depended also on another finding of the Appeals Chamber in the same decision according to which, contrary to what held by Pre-Trial Chamber I, assessments of the admissibility of a case are not precondition for the issuance of a warrant of arrest against a given suspect.<sup>282</sup> This frustrated judicial assessments of admissibility at the stage in which they had normally been performed.

The issue of gravity was therefore left almost untouched<sup>283</sup> until the same Chamber addressed a specific aspect of gravity in *Abu Garda*. In the case at hand, the suspect was allegedly responsible for the death of twelve peacekeepers during an attack against the African Union Mission in Sudan (AMIS) compound in Haskanita. In the decision on the confirmation of charges, the Chamber turned its attention to the factors to take into account when assessing the gravity of a case. The judges embraced the arguments fostered by the Prosecutor in his request under article 58 of the Statute, that “the issues of the nature, manner and impact of the [alleged] attack are critical”<sup>284</sup> and agreed with the organ of the accuse that “the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case”.<sup>285</sup>

In order to clarify what shall be meant for “qualitative dimension”, the judges referred to the

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“insignificant in themselves”, “marginal”, “borderline” cases. See, *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 a warrant of arrest, article 58”, Separate and Partly Dissenting Opinion of Judge Georghios M. Pikis, ICC-01/04-169, A.Ch., 13 July 2006, paras. 38-40.

<sup>282</sup> See, *infra*, para. 8.2.

<sup>283</sup> In *The Prosecutor v Omar Hassan Ahmad Al Bashir (“Al Bashir”)*, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, P.T.Ch.I., 4 March 2009, para. 50 Pre-Trial Chamber I noted that nothing in the material presented by the Prosecutor indicated that the gravity threshold might not have been met.

<sup>284</sup> *The Prosecutor v Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, P.T.Ch.I., 8 February 2010, para. 31, referring to *The Prosecutor v Bahar idriss Abu Garda*, Prosecutor's Application under Article 58, ICC-02/05-02/09-21-Conf, 20 November 2008, para. 7.

<sup>285</sup> *Ibid.*, referring to the observations of Williams and Schabas: “[t]hat a purely quantitative test should be used to assess gravity for the purpose of determining prosecutorial priorities is questionable”, and that “[m]any other factors other than the sheer number of victims should be relevant”, S. A. Williams, W. A. Schabas, *supra* n. 68, 622.

factors listed in rule 145(1)(c) of the Rules, i.e., “the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime”, and hold that they “can serve as useful guidelines for the evaluation of the gravity threshold required by article 17(1)(d) of the Statute”.<sup>286</sup> In the case at hand, the Chamber found that the case was of sufficient gravity because, notwithstanding the relative small number of victims if compared to those of other cases, “the consequences of the attack were grave for the direct victims of the attack, that is, the AMIS personnel, and for their families. In addition, the alleged initial suspension and ultimate reduction of AMIS activities in the area as a result of the attack had a grave impact on the local population”.<sup>287</sup>

A more comprehensive attempt to substantiate gravity is contained Pre-Trial Chamber II's decision authorising the Prosecutor to initiate investigations in the Kenyan situation in accordance with article 15 of the Statute.<sup>288</sup> The findings of the Chamber somehow recall the PTCI's attempt to establish that only the most senior perpetrators should be subject to proceedings before the Court, although the gravity threshold test is not proposed in the same, rigid terms of PTCI. Also the phase of proceedings and the context in which this decision has been issued are different from those of the *Ntaganda* decision, being it applicable to the preliminary stage of initiation of investigation. The Chamber assessed admissibility at this stage by referring to the potential cases that would arise from the investigation. Parameters of these potential cases are the groups of persons that are likely to be the object of an investigation for the purpose of shaping the future case(s) and the crimes allegedly committed during the incidents that are likely to be the focus of the investigation. In is in the context of the first element, i.e., the group of persons that are likely to be the object of an investigation that the

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<sup>286</sup> Ibid, para 32. Stigen, in addition to the factors listed in Rule 145(1)(c) refers also to the aggravating circumstances in Rule 145(2)(b) and affirms that “all these factors would be covered by the “gravity of the crime” factor, although there is some overlap with this factor and the perpetrator's “role in the alleged crime”. J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 363.

<sup>287</sup> *The Prosecutor v Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 284, para. 33.

<sup>288</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *supra* n. 185.

Chamber went back to what held by PTCI in Ntaganda. In relation to the first element, i.e., the groups of persons, the Chamber considered that “it involves a generic assessment of whether such groups of persons that are likely to form the object of an investigation capture *those who may bear the greatest responsibility for the alleged crimes committed*”.<sup>289</sup>

The Chamber then looked at whether the persons or groups of persons likely to be the focus of the Prosecutor's future investigations are high-ranking positions and at their roles in the commission of the crimes, and concluded that the materials presented by the Prosecutor satisfy the first “constituent element of gravity”.<sup>290</sup> Also with respect to the second element, which concerns the crimes allegedly committed within the incidents that are likely to be the object of the prosecutor's investigations, PTCII gave a different, less rigid and clearer, interpretation of the gravity assessment than the one proposed by PTCI in Ntaganda. The Chamber held that, in relation to the gravity of the crimes committed within the incidents, “there is interplay between the crimes and the context in which they were committed. Thus, the gravity will be assessed in the context of their *modus operandi*.”<sup>291</sup>

Such an assessment has to be performed following both a quantitative and a qualitative approach, as previously found by PTCI in the Abu Garda Decision. As to the qualitative dimension, it affirmed that “it is not the number of victims that matters but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave”<sup>292</sup> and refers to Rule 145(1) (c) – already quoted by PTCI in Abu Garda – and to Rule 145(2) (b) (iv) as guidance to such examination. Thus, factors to be taken into consideration are (i) the scale of the alleged crimes, including geographical and temporal intensity; (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes, *i.e.*, the manner of their commission; and (iv) the impact of the

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<sup>289</sup> Ibid., para. 60. Emphasis added.

<sup>290</sup> Ibid., para. 198.

<sup>291</sup> Ibid., para. 61.

<sup>292</sup> Ibid., para. 62, referring to W. A. Schabas, 'Prosecutorial discretion and gravity', *supra* n. 253, 245-246.

crimes and the harm caused to victims and their families.<sup>293</sup> In its determination, the Chamber found that gravity was met also in relation to this second element.<sup>294</sup>

With this decision, Pre-Trial Chamber II reintroduced the theme of a judicial control over the exercise of prosecutorial discretion. The understanding of gravity as admissibility criterion composed of the rank or position and the role of the alleged perpetrators, on the one hand, and of quantitative and qualitative features of the crimes or of the incidents is consistent with the idea of its introduction within the provision on admissibility. Furthermore, it grants the Chamber a proper control over the exercise of prosecutorial discretion, at least at such a preliminary stage of proceedings. The fact that the Chamber found that the potential cases to be brought before it at a later stage satisfy the gravity threshold, seem to direct the Prosecutor towards a careful selection, although he is not bound to present the same potential cases before the Chamber.

The decision, however, while further clarifying the theoretical understanding of gravity, does not address the issue of whether there are – and in the affirmative, which are – the distinguishing features between the legal gravity threshold to be assessed by the judges and the relative gravity threshold, part of the discretionary powers of the Prosecutor. It is uncontroversial that the Prosecutor, after having found that the sufficient gravity threshold, the legal test, is met, applies – together with the other criteria for selection – gravity as a selection criterion to all those cases that satisfy the gravity threshold. The distinction between gravity as a legal test and gravity as expression of prosecutorial discretion is clear in the sense that, while the former requires both the Prosecutor and the Judges to balance all the factors of gravity in an overall and comprehensive assessment, the process of selection among equally grave cases entails the need for the Prosecutor – and the Prosecutor only – to prioritise certain ICC

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<sup>293</sup> Ibid., para. 62.

<sup>294</sup> Ibid., paras. 199-200.

objectives and audiences over others.<sup>295</sup>

Problems however originate from the overlap of the factors to be considered as illustrative of both dimensions of gravity, and the Prosecutor's failure to properly distinguish among them.<sup>296</sup>

A better delineation of the distinction between the two dimensions of gravity is and remains of utmost importance within the architecture of admissibility assessments, from the point of view of judicial control over prosecutorial selection and, more broadly, on the cases brought before the Court, given their necessarily limited number.

## **5. The procedures of admissibility**

The system for the admissibility of cases before the complementary ICC cannot be understood without an in-depth analysis of the whole set of provisions regulating the activation and subsequent activities of the Court and its relationship with national jurisdictions.

Within the complex system, admissibility comes at stake at the different phases of proceedings; the judicial assessment of the fulfilment of the requirements under article 17 of the Statute is only the last moment of a long set of procedures and interactions between different actors: ICC Judges and Prosecutor, on the one hand, and States, on the other.

The first steps that the Court moves in determining the appropriateness of its intervention are always in relation to a given *situation*. Within the context of each specific situation, the Prosecutor will single out specific cases, and then bring them before the ICC Judges.

The distinction between situations and cases is of fundamental importance in the structure of the Court's system: different procedures are established for the two phases; complementarity and admissibility are to be assessed in both, in different ways and with different implications,

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<sup>295</sup> M. deGuzman, *supra* n. 246, 1449.

<sup>296</sup> The issue is subject of an intense and interesting debate. See, in particular I. Stegmiller, 'Interpretative gravity under the ICC Statute: Identifying common gravity criteria', in C. Stahn, M. M. El Zeidy, *supra* n. 44, 603-641. Of the same author, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*', *supra* n. 256, 562 ss. Also, M. A. Newton, 'The quest for constructive complementarity', in C. Stahn, M. M. El Zeidy, (Eds.), *supra* n. 44, 304-340, 329-333.

although, strictly speaking, the question of admissibility and the related litigation procedures “pertain to cases”.<sup>297</sup> Cases are singled out and defined at the end of the investigative procedures, but come at stake in their “potential” feature in the pre-investigative and investigative procedures.

The notion of *case*, in particular, has become of fundamental importance in the whole structure of admissibility. As will be seen in further details below, the first challenges to admissibility before the Court and the very meaning and scope of admissibility assessments are being shaped around its definition.

Both terms are referred to in the ICC Statute. The term *situation* is used in the provisions applicable to pre-investigative and investigative phases. Articles 13(a) and (b), in regulating the triggering of the Court, refer to “a situation” in which one or more crimes within the jurisdiction of the Court appear to have been committed; article 14 establishes that a State Party may refer to the Prosecutor “a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed”. Article 15(6) grants the Prosecutor the possibility to “considering further information submitted to him or her regarding the same situation in the light of new facts or evidence”, despite his or her initial decision not to commence an investigation. Also the proceedings related to “preliminary rulings regarding admissibility” regulated in article 18 of the Statute are in relation to situations. The term “case” can be found in articles 53(1) (b) and 53(2) (b), 17 and 19 of the Statute.

The judges of the Court were soon confronted with the need to differentiate between the two phases, and to give a definition to the two terms.<sup>298</sup> In one of the Court's first decisions, Pre-Trial Chamber I clarified that situations and cases form the object of the different proceedings

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<sup>297</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, *supra* n. 55, 91.

<sup>298</sup> Although, as noted by Olásolo and Carnero Rojo, the distinction between situations and cases was first embraced by the ICC Prosecutor when announcing the opening of investigations in DRC. See, H. Olásolo, E. Carnero Rojo, 'The application of the principle of complementarity to the decision of where to open an investigation: the admissibility of 'situations'', in C. Stahn, M. M. El Zeidy (eds.) *supra* n. 44, 393-420, 396.



before the Court. The Chamber considers that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings that they entail. In the absence of statutory definitions of both terms, the Chamber established that:

[s]ituations, 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.<sup>299</sup>

Whereas,

[c]ases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.<sup>300</sup>

In the same decision, PTC I also clarified that the demarcation line between proceedings concerning the situation and proceedings concerning the case is the issuance of a warrant of arrest or a summons to appear.<sup>301</sup>

The assessment of admissibility of cases takes place in three different moments, at both situation and case stage, and involves in different ways the ICC Prosecutor and Judges, who,

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<sup>299</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 e VPRS 6, ICC-01/04-101-t-EN-Corr, P.T.Ch.I, 17 January 2006, para. 65.

<sup>300</sup> *Ibid.*, para. 65. Also, R. Rastan, 'What is a 'Case' for the Purpose of the Rome Statute?' (2008) 19 CLF, 435-448, 435: "The concept of a situation has broader parameters than that of a case and denotes the confines within which the Prosecutor is to determine whether there is a reasonable basis to initiate an investigation. As negotiations during the drafting history reveal, the term was intended to frame in objective terms the theatre of investigations, thereby rejecting the idea that a referring body could limit the focus of the Prosecutor's activities by reference to a particular conduct, suspect or party."

<sup>301</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 e VPRS 6, *supra* n. 299, para. 68: "With regard to the applications currently under consideration, the Chamber notes that, for the time being, no case has been initiated through the issuance of a warrant of arrest or a summons to appear by the Chamber under article 58 of the Statute in the light of the investigation of the situation in the territory of the DRC under way since 1 July 2002". See also H. Olásolo, 'The Lack of Attention to the Distinction between Situations and Cases in National Laws on Co-operation with the International Criminal Court with Particular Reference to the Spanish Case', (2007) 20 LJIL 193-205, 194.

depending on the specific phase, apply different standards.<sup>302</sup> The first assessment of admissibility takes place at the pre-investigative stage, in which the Prosecutor determines whether to initiate an investigation;<sup>303</sup> the second at the investigative stage, in which the Prosecutor determines whether to give rise to criminal proceedings;<sup>304</sup> the third one, the judicial one, subject to the challenging procedures envisaged in article 19 of the Statute, takes place at the case stage, following the issuance of a warrant of arrest.<sup>305</sup>

The following sessions analyse the procedures related to situations and cases, focussing in particular on the moments in which admissibility assessments take place. The procedures in relation to situations vary depending on the modalities according to which the Court has been activated. For this reason, and for the relevance of the modalities of the Court's activation for prosecutorial assessments of admissibility, to be analysed in Chapter VI, the next session examines the triggering procedures.

## **6. The pre-investigative stage: the triggering of the Court**

As seen above, the exercise of the Court's jurisdiction is not automatic: in addition to the fulfilment of the jurisdictional and admissibility requirements, the activation of the potential jurisdiction of the Court depends, first of all, on the triggering procedure, i.e., the “setting in motion of the activity of the Court by means of a request to initiate the investigation of a situation”.<sup>306</sup> Such a request, as indicated in article 13 of the Statute, may proceed from a State

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<sup>302</sup> H. Olásolo, 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor', (2005) 5 ICLR, 121-146, 135-136.

<sup>303</sup> Article 53(1), ICC Statute.

<sup>304</sup> Article 53(2), ICC Statute.

<sup>305</sup> See, in this respect, what held by Pre-Trial Chamber I in response to the *ad hoc* Counsel for the Defence in the context of the Darfur situation, who tried to challenge the jurisdiction of the Court: “(...) pursuant to article 19(2) of the Statute, the jurisdiction of the Court or the admissibility of a case may only be challenged by certain States or by an accused or a person for whom a warrant of arrest or summons to appear have been issued; and (...) the *ad hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19(2)(a) of the Statute.” *Situation in Darfur, Sudan*, Decision on the Submission Challenging Jurisdiction and Admissibility, ICC-02/05-34-tENG, P.T.Ch.I, 22 November 2006, p. 3.

<sup>306</sup> H. Olásolo, *The Triggering Procedure of the International Criminal Court*, *supra* n. 162, 38.

Party to the Statute,<sup>307</sup> from the United Nations Security Council,<sup>308</sup> or from the ICC Prosecutor, that, in this case, is required to ask authorisation to commence investigations from the relevant Pre-Trial Chamber.<sup>309</sup>

The procedures related to the triggering of the penal dimension of the Court, and to the initiation of investigations with respect to a given situation, are autonomous, precede and are necessary for the initiation of any criminal procedure, in relation to a specific case, before the Court.<sup>310</sup>

Depending on the different modalities according to which the Court is triggered, there are three different types of procedures in relation to the initiation of investigations in a given situation.

The first type of proceedings relate to the activation of the Court through a referral from a State Party. In this case, articles 13(a), 14, 18(1) (2) (4), 53(1) (3) and (4) of the ICC Statute apply.

The second type of proceedings involves the referral of the United Nations Security Council, regulated in articles 13(b) and 53(1)(3) and (4) of the ICC Statute. When the ICC Prosecutor decides to open an investigation *proprio motu*, the procedures are regulated at articles 15(1) to (4), 18(2) (4), 53(1), (3) and (4) of the Statute and Rule 48 of the Rules of Procedure and Evidence. As will be seen in further details below, the main differences among these procedures attain to the powers of States to ask the ICC Prosecutor to defer investigations, and to the degree of judicial control over prosecutorial discretion.

Before entering the merits of the triggering procedure, it is worth recalling that, when the request comes from the United Nations Security Council in relation to a given situation of crisis, the Statute does not require that the State involved is a party to the Statute. In the other instances, the Court cannot exercise jurisdiction if the State is not a Party to the Statute, or has not accepted the jurisdiction of the Court with respect to the crime in question, as provided for

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<sup>307</sup> Articles 13(a) and 14 of the ICC Statute.

<sup>308</sup> Article 13(b) of the ICC Statute.

<sup>309</sup> Articles 13(c) and 15, ICC Statute.

<sup>310</sup> H. Olásolo, *The Triggering Procedure of the International Criminal Court*, *supra* n. 162, 38.

in Article 12(3) of the Statute. The latter provision is designed to extend the Statute's scope of application by offering to States that choose not to be parties to the Statute, but that are connected to the crime in question “the possibility of accepting the Court's jurisdiction *ad hoc* and *ex post facto*.”<sup>311</sup> In this case, similarly to what happens in cases of UNSC referrals, the Court's jurisdiction extends to cases that are not connected with any of the States parties to the Statute.<sup>312</sup> Contrary to what happens with UNSC referrals, however, in this case third states autonomously decide to recur to an international judicial mechanism. By lodging a declaration with the Registry, the State accepts the exercise of jurisdiction by the Court with respect to the crime in question, and acquires the obligation to cooperate with the Court “without any delay or exception in accordance with Part 9” of the Statute.<sup>313</sup>

The *ad hoc* declaration of a State under this provision shall not, however, be confused with referrals under article 13 of the Statute. An acceptance of the jurisdiction of the Court under Art.12(3) of the Statute is an instrument according to which a State non-party to the Statute makes it possible for the Court the exercise of its potential jurisdiction, which would otherwise be unable to exercise due to the non-fulfilment of the personal and territorial parameters. Such a declaration, however, does not bear any direct consequences in terms of the activation of the Court. A formal triggering of the ICC is still required with respect to the situation concerned.

A state's acceptance of the Court jurisdiction without becoming a party to the ICC Statute raised questions as to the modalities through which the Court might activate. According to articles 13(a) and 14 of the Statute, the power to refer to the ICC Prosecutor a situation in which international crimes appear to have been committed is a prerogative reserved to states parties to the Statute. The letter of the provision therefore implies that a state which accepted the jurisdiction of the Court ex article 12(3), being not a party to the Statute, is not entitled to self-

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<sup>311</sup> G. Palmisano, 'The ICC and Third States', in F. Lattanzi, W. A. Schabas, (Eds.), *supra* n. 31, 393. Similarly, C. Stahn, M. M. El Zeidy, H. Olásolo, 'The International Criminal Court's *ad hoc* jurisdiction revisited', (2005) 99 *AJIL*, 421-431, 422.

<sup>312</sup> G. Palmisano, *supra* n. 311, 393.

<sup>313</sup> Art. 12(3), last sentence.

refer the situation of its country.

In case of UNSC referral, the state's acceptance of the Court's jurisdiction does not bear any relevance, being membership or acceptance not necessary to trigger the Court's powers.

The most likely outcome of a declaration under article 12(3) seems to be the *proprio motu* activation of the Prosecutor, contemplated in article 13(c) and 15 of the ICC Statute. Also the formulation of article 13(c) of the Statute, however, raises interpretative problems. According to this provision, the Court may exercise its jurisdiction if the Prosecutor “has initiated an investigation in respect of such a crime in accordance with article 15”: this seems to imply that, before a state not party to the Statute lodges a declaration accepting the Court's jurisdiction, the prosecutor shall already have initiated an investigation with regard to the situation.<sup>314</sup> Article 15(1) and (2) of the Statute, on the contrary, establish that the Prosecutor may initiate investigations on the basis of information received. This, combined with what provided for in Rule 44(1) of the Rules of Procedure and Evidence, i.e., that the Prosecutor may request the Registrar to enquire whether a State has the intention to accept the jurisdiction of the Court, seems to imply that, having received a *notitia criminis*, the Prosecutor may carry out preliminary examination of a situation, and explore the possibility of securing its jurisdiction through an acceptance ex Art. 12(3), thus ruling out the hypothesis that the Prosecutor shall initiate investigations before a third state's ad hoc acceptance of jurisdiction.<sup>315</sup>

The practice of the Court seems to confirm this interpretation. The first declaration accepting the jurisdiction of the Court was filed by the Ivory Coast's Government on April 2003.<sup>316</sup> As stated by the Prosecutor, “the situation in the Republic of Côte d'Ivoire had been under preliminary examination since the receipt on 1 October 2003 of a declaration from the

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<sup>314</sup> C. Stahn, M. M. El Zeidy, H. Olásolo, *supra* n. 311, 425.

<sup>315</sup> *Ibid.*, 425-426.

<sup>316</sup> République of Côte D'Ivoire, Declaration under article 12(3) of the Rome Statute, 18 April 2003, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> (accessed 22 December 2011)

Government” accepting the jurisdiction of the Court.<sup>317</sup> Thus, the Prosecutor seems to endorse the view that such a declaration, in addition to granting the Court the opportunity to have jurisdiction over a situation that would otherwise fall outside its scope of intervention, amounts to a sort of information on the commission of international crimes, and thus triggers the pre-judicial phase of preliminary investigations. In the situation at hand, the Côte d’Ivoire government declaration – which was re-transmitted by the new government in December 2010<sup>318</sup> – constituted the basis for the subsequent determination of the ICC Prosecutor to formally start an investigation under article 15 of the Statute.<sup>319</sup>

The letter of article 12(3) of the Statute raises also questions in relation to the scope and object of a state's acceptance of jurisdiction. The provision allows third States to accept the jurisdiction of the Court “with respect to the crime in question”. This formulation seems to suggest that, when accepting the jurisdiction of the Court, states may limit it to a specific set of incidents and a specific qualification of the conducts. The ambiguity is solved by rule 44(2) RPE, which expressly states that “[t]he Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation”, thus extending the Court's intervention to all crimes falling within its jurisdiction. The reading according to which States shall not be entitled to direct an hypothetical action of the Court towards specific incidents and sets of crimes is indeed corroborated by the general intent of the drafters of the Statute to avoid the possibility of manipulation of the action of the Court through political influence, as well as

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<sup>317</sup> See, Office of the Prosecutor, Communications, Referrals and Preliminary Examinations, Côte D'Ivoire, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/C%C3%B4te+dIvoire/> (accessed 22 December 2011)

<sup>318</sup> République of Côte D'Ivoire, Letter reconfirming the acceptance of the jurisdiction of the Court, 14 December 2011, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> (accessed 22 December 2011).

<sup>319</sup> *Situation in the Republic of Côte d'Ivoire*, Request for authorisation of an investigation pursuant to article 15, ICC-02/11-3, OTP, 23 June 2011.

by the drafting history of the provision itself.<sup>320</sup>

In the context of the situation in Côte d'Ivoire, the two declarations of acceptance – transmitted by the two rivals whose confrontation originated the commission of international crimes in the territory – present two different time frames. In the first, signed by the then President Laurent Gbagabo – currently indicted before the Court – the Ivorian government accepts the jurisdiction of the Court starting from 19 September 2002; the second – signed by Gbagabo's opponent, Alassane Ouattara, winner of the Presidential elections in 2010, sets the starting date as of March 2004. In its request to the Chamber, the Prosecutor did not directly address the discrepancy between the two declarations. He referred to the potential jurisdiction of the Court on the situation since 19 September 2002, without mentioning the different time-frame contained in the second declaration, and decided to focus on crimes committed since November 2010, thus putting aside any consideration on the value of the second declaration.<sup>321</sup>

As for the alleged possibility to limit the jurisdiction of the Court to specific crimes and/or incidents, no problems arise from the declarations, as they are both extremely general, by simply referring to “acts committed on Ivorian territory since the events of 19 September 2002”<sup>322</sup> the first one, and “tous les crimes and exactions commis depuis mars 2004” the second.<sup>323</sup>

On 22 January 2009, the Court received a second declaration accepting jurisdiction under article 12(3) of the Statute from the Palestinian National Authority (PNA). In its letter, the PNA recognized the jurisdiction of the Court for the purpose of “identifying, prosecuting and judging the authors and accomplices of crimes committed on the territory of Palestine since 1 July 2002” and asked the ICC Prosecutor to investigate on the crimes allegedly committed during

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<sup>320</sup> Ibid., 427. Also, K. Gallant 'The International Criminal Court in the System of States and International Organizations', in F. Lattanzi, W. A. Schabas, (Eds.), *supra* n. 31, Vol. II, 3-39, 28.

<sup>321</sup> Ibid., paras. 41 and 42. Of the view that the State accepting ad hoc the jurisdiction of the Court shall be entitled to set the starting and end date of the situation, R. Rastan, 'Situations & Cases: Defining the parameters', in C. Stahn, M. M. El Zeidy (eds.) *supra* n. 44, 421-459.

<sup>322</sup> République of Côte D'Ivoire, Declaration under article 12(3) of the Rome Statute, 18 April 2003, *supra* n. 317.

<sup>323</sup> République of Côte D'Ivoire, Letter reconfirming the acceptance of the jurisdiction of the Court, 14 December 2011, *supra* n. 319.

the conflict in Gaza between December 2008 and January 2009.<sup>324</sup> While accepting the Court's jurisdiction since the entry into force of its Statute, the PNA directs the Prosecutor towards a specific time-frame, which indeed involves the most serious incidents in the situation of Palestine since the establishment of the ICC.<sup>325</sup> At the moment of writing, the Prosecutor has not formally opened any investigations in the situation at hand.

The PNA's acceptance of the Court's jurisdiction raises the preliminary question of whether it shall be considered a State under international law – and thus whether its representatives had the capacity to lodge the declaration under article 12(3) of the Statute.

On 3 May 2010, the OTP published a “Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements”<sup>326</sup> which lists and grants access to a number of submissions on the issue. As the issue goes beyond the scope of the present work, suffice it to say that three main views dominate the debate. Some scholars and practitioners consider that the Palestinian National Authority cannot be regarded as a 'State' under international law, and that, as a consequence, it has not the capacity to accept the jurisdiction of the Court ex article 12(3) of the Statute.<sup>327</sup> Others promote the opposite view, namely that the Palestinian National Authority is recognised as a State by many States and institutions and, thus, has the contested capacity.<sup>328</sup> Others argue that Palestinian statehood is irrelevant to the issue, as criminal jurisdiction rests with the PNA, which can therefore also

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<sup>324</sup> Office of the Prosecutor, Letter to the UN High Commissioner on Human Rights, 12 January 2010, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine/> (accessed 22 December 2011)

<sup>325</sup> See, Human Rights Council, 'Human Rights in Palestine and other Occupied Arab Territories. Report of the United Nations Fact Finding Mission on the Gaza Conflict', A/HRC/12/48, 15 September 2009.

<sup>326</sup> All the papers referred to above are available at this link [http://www.icc-cpi.int/menus/icc/structure\\_of\\_the\\_court/office\\_of\\_the\\_prosecutor/comm\\_and\\_ref/palestine/summary\\_of\\_submissions\\_on\\_whether\\_the\\_declaration\\_lodged\\_by\\_the\\_palestinian\\_national\\_authority\\_meets](http://www.icc-cpi.int/menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/palestine/summary_of_submissions_on_whether_the_declaration_lodged_by_the_palestinian_national_authority_meets) (Accessed 22 December 2011)

<sup>327</sup> European Centre for Law and Justice, 'Legal Memorandum opposing accession to ICC jurisdiction by Non-State entities', 9 September 2009; D. Davenport, K. Anderson, S. Estreicher, E. Kontorovich, J. G. Ku, and A. D. Sofaer, 'The Palestinian declaration and ICC jurisdiction' 19 November 2009.

<sup>328</sup> J. Quigley, 'The Palestine Declaration to the International Criminal Court: the Statehood Issue', Memo to the Prosecutor, 23 March 2009; Al-Haq Position paper on Issues Arising from the Palestinian Authority Submission of a Declaration to the International Criminal Court under Article 12(3) of the Statute, 14 December 2009.



transfer it to the Court.<sup>329</sup> In this regard, some argue that the PNA cannot transfer jurisdiction it does not possess fully, as it has entered into a bilateral agreement, the Oslo Accords, through which it has accepted not to exercise jurisdiction over Israeli nationals. Therefore, the PNA would have no authority to exercise jurisdiction over the criminal conduct of Israeli nationals on Palestinian territory and transfer it to the Court.<sup>330</sup> Some others argue that this limitation confirms that the PNA has inherent jurisdiction. They consider that the Oslo Accords are analogous to other bilateral agreements related to state, diplomatic or SOFA immunities. It would be the existence of the PNA's inherent jurisdiction over Palestinian territory that allows them to delegate jurisdiction, similar to the agreements recognised by Article 98 of the Statute.<sup>331</sup>

A decision on the issue is thus expected not only to dissipate doubts about any political pressure or constraint on the Office of the Prosecutor, but also given its relevance from a pure international law perspective.

### **6.1 State Party referral and the practice of self-referrals**

According to article 13(a) of the Statute, the Court may activate through referral from a State Party to the Statute. By way of such referral, the State requests the ICC Prosecutor to investigate the situation “for the purpose of determining whether one or more specific persons should be charged with the commission of such crime”.<sup>332</sup>

The first years of activity of the Court have been characterised by the practice of the so-called self-referrals: three out of the seven investigations on situations currently before the Court – Uganda, Democratic Republic of the Congo and Central African Republic – have been triggered

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<sup>329</sup> The International Association of Jewish Lawyers and Jurists, 'Opinion in the matter of the jurisdiction of the ICC with regard to the Declaration of the Palestinian authority', 9 September 2009.

<sup>330</sup> D. Gold, Jerusalem Center for Public Affairs, 'Discussion on Whether the Declaration Lodged by the Palestinian Authority Meets Statutory Requirements: Historical and Diplomatic Considerations', 10 October 2010.

<sup>331</sup> D. Benoliel, R. Perry, 'Israel, Palestine and the ICC', 5 November 2009; A. Pellet, 'Les effets de la reconnaissance par la Palestine de la compétence de la CPI', 18 February 2010.

<sup>332</sup> Article 14(1) ICC Statute.

by referrals of the governments of the same States in whose territories international crimes were being or had been committed. These self-referrals responded to a specific strategy of the ICC Prosecutor Luis Moreno Ocampo at the beginning of his activities. The letter of 19 April 2004<sup>333</sup> in which President Kabila asked the ICC to open investigations in relation to the situation involving the DRC, “was not spontaneous”<sup>334</sup>: it was preceded by a series of declarations by the ICC Prosecutor in which he affirmed his intention to start investigation *proprio motu*, but called for a better cooperation with the concerned State and expressly envisaged the possibility to receive a self-referral.<sup>335</sup> A few months earlier, Ugandan President Museveni had asked the Court to intervene within the situation involving its country.<sup>336</sup> On 22 December 2004, the government of the Central African Republic referred to the ICC Prosecutor the situation of crimes committed within its territory since 1 July 2002.<sup>337</sup>

The favour of the ICC Prosecutor towards this practice responds to the opportunity of building a cooperative relationship with the State, rather than “imposing” the presence of the Court through an activation *proprio motu*<sup>338</sup>; at the same time, as noted by some commentators, it spared him from the control of the Pre-Trial Chamber and easily satisfied the need to attract

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<sup>333</sup> See, Press Release, Prosecutor receives referral of the Situation in the Democratic Republic of the Congo, ICC-OTP-20040419-50, 19 April 2004 [http://www.icc-cpi.int/menus/icc/press\\_and\\_media/press\\_releases/2004/prosecutor\\_receives\\_referral\\_of\\_the\\_situation\\_in\\_the\\_democratic\\_republic\\_of\\_congo](http://www.icc-cpi.int/menus/icc/press_and_media/press_releases/2004/prosecutor_receives_referral_of_the_situation_in_the_democratic_republic_of_congo) (accessed 22 December 2011)

<sup>334</sup> P. Gaeta, 'Is the Practice of 'Self-Referrals' a Sound Start for the ICC?' (2004) 2 JICJ, 949-952, 949.

<sup>335</sup> In September 2003, the Prosecutor informed the Assembly of States Parties that he would be prepared to seek authorisation from a Pre-Trial Chamber to start an investigation under his *proprio motu* powers, but that a referral and active support from the DRC would facilitate the work of the Office of the Prosecutor. Office of the Prosecutor, Report on the activities performed during the first three years (June 2003 – June 2006), 12 September 2006, 10. On the link between the practice of self-referrals and the prosecutorial policy of positive complementarity, see *infra*, Chapter IV.5.

<sup>336</sup> See, Press Release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44, available at [http://www.icc-cpi.int/menus/icc/press\\_and\\_media/press\\_releases/2004/president\\_of\\_uganda\\_refers\\_situation\\_concerning\\_the\\_lord\\_s\\_resistance\\_army\\_lra\\_to\\_the\\_icc](http://www.icc-cpi.int/menus/icc/press_and_media/press_releases/2004/president_of_uganda_refers_situation_concerning_the_lord_s_resistance_army_lra_to_the_icc) (accessed 22 December 2011)

<sup>337</sup> See, Press Release, Prosecutor receives referral concerning Central African Republic, ICC-OTP-20050107-86, 7 January 2005, available at [http://www.icc-cpi.int/menus/icc/press\\_and\\_media/press\\_releases/2005/otp\\_prosecutor\\_receives\\_referral\\_concerning\\_central\\_african\\_republic](http://www.icc-cpi.int/menus/icc/press_and_media/press_releases/2005/otp_prosecutor_receives_referral_concerning_central_african_republic) (accessed 22 December 2011).

<sup>338</sup> This has also been seen as a “reassuring message” to the opponents of the *proprio motu* powers of the ICC Prosecutor, who, on the contrary, showed his willingness to assist States, rather than interfering with their sovereign powers. P. Gaeta, *supra* n. 334, 950.

cases in the initial phase of the Court's activities.<sup>339</sup> Counter arguments and critiques point to the risk of manipulation of the Court's intervention by the political organs of the State concerned.<sup>340</sup>

The issue has been deeply examined by scholars, who pointed to the risks and advantages<sup>341</sup> of the recourse to such self-referrals. Most of the authors, in opposing the Prosecutor's practice, noted that self-referrals had not been envisaged by the drafters of the Statute.<sup>342</sup> The Prosecutor, on the contrary, argued that the issue was discussed during the preparatory works, and that nothing indicates that it shall not be used.<sup>343</sup>

The practice of self-referrals raises interesting questions also in relation to the complementary nature of the Court, and in particular, to the primacy granted to States in the prosecution of persons allegedly responsible for the commission of international crimes. In this sense, it has been debated in the doctrine whether the recourse to self-referrals implies for States a waiver of complementarity or whether it does not have any implications in terms of the complementary

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<sup>339</sup> W. A. Schabas, 'The rise and fall of complementarity', in C. Stahn, M. M. El Zeidy, *supra* n. 44, 150-164, 158.

<sup>340</sup> S. Fernandez de Gurmendi, 'New World Order or a World in Disorder? Testing the Limits of International Law. Late – Breaking Issues and the International Criminal Tribunals', (2005) 99 *Am. Soc'y Int'l L. Proc.*, 272-281, 278; G. Gaja, 'Issues of Admissibility in case of Self-Referrals' in M. Politi, F. Gioia, (Eds.) *supra* n. 165, 49-52.

<sup>341</sup> M. C. Bassiouni, 'The ICC – *Quo Vadis?*' (2006) 4 *JICJ*, 421-427; A. Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 *JICJ*, 434-441; P. Gaeta, *supra* n. 334, 950; N. N. Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does it Really Contribute to Ending Impunity on the National Level?', (2010) 10 *ICLR* 73-96, 80 ss.

<sup>342</sup> M. Arsanjani, M. Reisman, '*supra* n. 200, 386 "There is no indication that the drafters ever contemplated that the Statute would include *voluntary* state referrals to the Court of difficult cases arising in their own territory"; A. Th. Müller, I. Stegmüller, 'Self-Referrals on Trial. From Panacea to Patient', (2010) 8 *JICJ* 1267-1294, 1269. Also C. Kress, 'Self-Referrals and 'Waivers of Complementarity'. Some considerations in Law and Policy', (2004) 2 *JICJ*, 944-948, 944.

<sup>343</sup> *Office of the Prosecutor*, Draft Policy Paper on Preliminary Examinations, 4 October 2010, *supra* n. 211, para. 77 and footnote 48. The Prosecutor reports that in the Official Report of the debates at the Ad Hoc committee, "[S]ome delegations expressed the view that any State party to the Statute should be entitled to lodge a complaint with respect to the [core crimes]...However, the view was also expressed that only the States concerned that had a direct interest in the case, such as the territorial State, the custodial State or the State of nationality of the victim or suspect...should be entitled to lodge complaints". Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, *supra*, para. 112. Also, Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, para. 163: "Some delegations felt that only those States Parties to the Statute with an interest in the case should be able to lodge a complaint. Interested States were identified as the custodial State, the State where the crime was committed, the State of nationality of the suspect, the State whose nationals were victims and the State which was the target of the crime. Some other delegations opined that the crimes under the Statute were, by their nature, of concern to the international community as a whole".

relationship between the Court and States.<sup>344</sup>

The Appeals Chamber implicitly affirmed the legality of self-referrals and their consistency with the ICC's prominent goal to fight against impunity in *Katanga*, at least from the perspective of admissibility assessments. According to the higher Chamber, the decision of a State to relinquish jurisdiction in favour of the ICC cannot be considered as a decision not to prosecute and, thus, lead to the inadmissibility of the case before the Court, as this would open the impunity gap, which instead the ICC is mandated to close.<sup>345</sup>

The initial, extensive recourse to self-referrals experienced a halt in the subsequent years of the Court's activities. Since 2004, no investigations have been initiated upon referral of the State in whose situations international crimes are or have been committed. In 2009, the Prosecutor tried to foster a self-referral by the Government of Kenya; the attempt however failed and the investigations were initiated upon *proprio motu* activation. The “experiment” that the Prosecutor tried to pursue in Kenya might reveal a possible, future, “responsible” recourse to self-referrals based on an agreed division of labour between the Court and the State, also with the involvement of alternative mechanisms of justice, such as Truth and Reconciliation Commission.<sup>346</sup>

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<sup>344</sup> C. Kress, *supra* n. 342; A. Th. Müller, I. Stegmüller, '*supra* n. 342; M. M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: an Assessment of the First State's Party Referral to the ICC', (2005) 5 ICLR, 83-119; M. M. El Zeidy, 'The Legitimacy of Withdrawing State Party Referrals & *Ad hoc* Declarations under the Statute of the International Criminal Court', in C. Stahn, G. Sluiter, (Eds.), *supra* n. 253, 55-78; J. K. Kleffner, 'Auto-Referrals and the complementary nature of the ICC', in C. Stahn, G. Sluiter G., (Eds.), *supra* n. 253, 41-53; D. Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', (2011) 9 JICL, 355-384, J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity*, *supra* n. 55, 67 ss. W. Burke-White, S. Kaplan, 'Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation', (2009) 7 JICJ, 257-279; W. Burke-White, S. Kaplan, 'Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation', in C. Stahn, G. Sluiter G., (Eds.), *supra* n. 253, 79-114.

<sup>345</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 83. As argued by Batros, “fundamental to reconciling its approach with the principle of complementarity and the object and purpose of the Statute was the reality that although the Court could encourage a State to take action domestically, it could not force the State to investigate or prosecute”. B. Batros, 'The evolution of the ICC jurisprudence on admissibility' in C. Stahn, M. M. El Zeidy (Eds.), *supra* n. 44, 558-602, 599.

<sup>346</sup> Press Release, *ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya*, ICC-OTP-20090930-PR456, 30 September 2009, available at [http://www.icc-cpi.int/menus/icc/situations\\_and](http://www.icc-cpi.int/menus/icc/situations_and)

## 6.2 United Nations Security Council referral

Article 13(b) of the Statute establishes that the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, may refer the Court a situation in which one or more crime within the jurisdiction of the Court appear to have been committed.<sup>347</sup> Article 12(2) of the Statute, by excluding the case of UN referral from those for which the alternative criteria of territory or nationality of States that are party or have accepted the jurisdiction of the Court are required in order to enable the Court to exercise its jurisdiction, makes clear that a UN referral may relate to a situation which has no jurisdictional links with the Court. Similarly, article 18(1) excludes the hypothesis of UNSC referral from the cases in which the Prosecutor is bound to notify all States Parties and those that would normally exercise jurisdiction over the crimes concerned, of his or her intention to commence investigations.<sup>348</sup> In this case, the Court acts as a sort of separate tribunal, with jurisdiction different from the one of the Court.<sup>349</sup> In the commentary to draft article 23(1) of the ILC 1994 Statute, it was explicitly stated that the provision served to enable “the Security Council to use the Court as an alternative instrument to the setting up of *ad hoc* tribunals.”<sup>350</sup>

This does not mean that the jurisdiction of the Court is immediately activated as a consequence of a Security Council referral. The Prosecutor is still required to perform its checks in

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[cases/situations/situation\\_icc\\_200109/press\\_releases/pr456](#) (Accessed 22 December 2011). See, *infra*, Chapter IV.5.1.

<sup>347</sup> The Statute grants the UNSC also the exceptional power of deferring investigations and prosecutions before the Court. According to article 16 of the Statute, the Security Council, acting under Chapter VII of the UN Charter, may block investigations and prosecutions before the Court. See, P. Gargiulo, 'The controversial relationship between the International Criminal Court and the Security Council', in F. Lattanzi, W. A. Schabas, (Eds.), *supra* n. 31, Vol. I, 67-103; J. Yanez-Barnuevo, C. Escobar Hernandez, 'The International Criminal Court and the United Nations: a complex and vital relationship', in F. Lattanzi, W. A. Schabas, (Eds.), *supra* n. 31, Vol. II, 41-68; M. M. El Zeidy, 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422', (2002) 35 *Vanderbilt Journal of Transnational Law*, 1503-1544; S. Zappalà, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and article 98 Agreements', (2003) 1 *JICJ*, 114-134.

<sup>348</sup> States would however be entitled to challenge the admissibility of a given case before the Court in accordance with Article 19 of the Statute. See, J. Stigen, 'The admissibility procedures', in Stahn C., El Zeidy M. M., (Eds.) *supra* n. 44, 503-537, 512-516.

<sup>349</sup> G. P. Fletcher, J. D. Ohlin, 'The ICC – Two Courts in One?' (2006) 4 *JICJ*, 428-433, 433.

<sup>350</sup> Report of the International Law Commission on the Work of its Forty-Sixth Session (2 May – 22 July 1994), with Annex Draft Statute for an International Criminal Court, UN doc. A/49/10, 1994 *YILC* Vol. I, p. 85. On the drafting history and the different points of view of negotiators, see, P. Gargiulo., *supra* n. 347, 71 ss.

accordance with article 53(1) of the Statute. So far, the UNSC has referred two situations to the ICC Prosecutor, who has subsequently commenced investigating in situations, Darfur, Sudan,<sup>351</sup> and Libya<sup>352</sup>. In the context of the Sudan situation, the *ad hoc* Counsel for the Defence attempted to challenge the jurisdiction and admissibility of the situation, alleging the lack of juridical foundations for referrals of situations involving States non-parties to the Statute, even if referred by the UNSC.<sup>353</sup> The Chamber did not enter the merits of the alleged illegality of UNSC referrals, but rejected the challenge on the ground that the *ad hoc* counsel for the defence lacked the power to present challenges before individual cases are brought before the Court.<sup>354</sup>

### **6.3 *Proprio motu* initiation of investigation**

The third way by which the Court may activate is, according to articles 13(c) and 15 of the Statute, through initiative of its Prosecutor, on the basis of information that he receives from several sources, such as the United Nations, inter-governmental or non-governmental organizations, civil society, victims, etc.<sup>355</sup> The Prosecutor's *proprio motu* activation was the most criticised, debated and resisted during the negotiations for the adoption of the ICC Statute<sup>356</sup> and represented, at least formally, the reason behind the decision of some of the main

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<sup>351</sup> UNSC Resolution 1593, 31 March 2005.

<sup>352</sup> UNSC Resolution 1970, 26 February 2011. The decision of the Prosecutor to open investigations arrived only a few days after the UNSC referral, on 2 March 2011. See, Press Release, ICC Prosecutor to open an investigation in Libya, 2 March 2011, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/statement%20020311> (accessed 22 December 2011)

<sup>353</sup> *Situation in Darfur, Sudan*, Conclusions aux fins d'exception d'incompétence et d'irrecevabilité, ICC-02/05-20-Corr, *ad hoc* Counsel for the Defence, 9 October 2006.

<sup>354</sup> *Situation in Darfur, Sudan*, Decision on the submission challenging jurisdiction and admissibility, ICC-02/05-34-tENG, P.T.Ch. I, 22 November 2006.

<sup>355</sup> The OTP receives large numbers of communications in relation to the alleged commission of international crimes; however, most of them fail to meet the jurisdictional requirements, see, Report on the activities performed during the first three years (June 2003 – June 2006), 12 September 2006 available at [http://www.icc-cpi.int/menus/icc/structure\\_of\\_the\\_court/office\\_of\\_the\\_prosecutor/reports\\_and\\_statements/statement/report\\_on\\_the\\_activities\\_performed\\_during\\_the\\_first\\_three\\_years\\_june\\_2006](http://www.icc-cpi.int/menus/icc/structure_of_the_court/office_of_the_prosecutor/reports_and_statements/statement/report_on_the_activities_performed_during_the_first_three_years_june_2006) (accessed 5 January 2012), 9-10: “out of the 1918 communications received until the end of June 2006, only 20% warranted further analysis, the others being outside the jurisdiction of the Court”.

<sup>356</sup> R. J. Goldstone, N. Fritz, 'In the Interests of Justice and Independent Referrals: The ICC Prosecutor

protagonists of the international realm, such as the United States, not to adhere to the Rome Statute.<sup>357</sup>

The 1994 ILC Draft did not contain references to this power of the Prosecutor. At the time, concerns prevailed that the Prosecutor's independence would lead to politically motivated or frivolous proceedings;<sup>358</sup> the power of the Prosecutor to start investigations on its own initiative was deemed “not advisable” at the time.<sup>359</sup> In the subsequent years, the idea that the Prosecutor should be granted more leeway, and that other actors could call the attention of the Court over situations in which international crimes were being or had been committed, started slowly to gain relevance. At the Preparatory Committee, some delegates suggested that the Prosecutor should have the ability to initiate investigations on the basis of information received by non-state actors and NGOs.<sup>360</sup>

The question, however, continued to raise concerns among the drafters. Interestingly, both those in favour and those contrary to the inclusion of such powers in the Statute based their arguments on fears of politicization of the Court.<sup>361</sup> At the Rome Conference, Argentina and Germany proposed a model according to which the ICC Prosecutor would enjoy the independence and discretion to commence investigations on its own initiative, but subject to the control and approval of a pre-trial chamber.<sup>362</sup>

In order to compensate the powers of the Prosecutor, and ensure that he would not act for

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Unprecedented Powers', (2000) 13 LJIL, 655-667, 657-658.

<sup>357</sup> D. J. Scheffer, 'The United States and the International Criminal Court', (1999) 93 American Journal of International Law, 12-22; U. Leanza, *supra* n. 153.

<sup>358</sup> S. Fernandez de Gurmendi, 'The role of the Prosecutor', in M. Politi, G. Nesi, (Eds.) *supra* n. 168, 55.

<sup>359</sup> Report of the International Law Commission on the work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, U.N. GAOR, 49<sup>th</sup> Session, Supp. No 10, U.N. Doc. A/49/10, 1994, 46 (commentary to art. 27): “The Commission believes that affording the prosecutor the power to initiate investigations on his own was not advisable at the “present stage of development of the international legal system”.

<sup>360</sup> S. Fernandez de Gurmendi, 'The Role of the International Prosecutor', in R. S. Lee, (Ed.) *supra* n. 66, 175-188, 177.

<sup>361</sup> A. M. Danner, Prosecutorial Discretion and Legitimacy, Guest Lecture Series of the Office of the Prosecutor, 13 June 2005, 510-552, available at [www.icc-cpi.int](http://www.icc-cpi.int), 513. For a detailed overview of the different positions, see also, F. Guariglia, 'Investigation and prosecution', in R. S. Lee, (Ed.), *supra* n. 66, 227-238, 227-8; also, S. Fernandez de Gurmendi, 'The Role of the International Prosecutor', *supra* n. 360, 175-188, 178-181.

<sup>362</sup> S. Fernandez de Gurmendi, *ibid.*, 182.

political motives,<sup>363</sup> the drafters established that, contrary to the other ways of activation, when the Prosecutor activates on its own initiative, the initiation of investigations on the situation is subject to authorisation of the Pre-Trial Chamber.<sup>364</sup>

At the beginning of the Court's activities, the Prosecutor Luis Moreno Ocampo opted for a cautious approach towards *proprio motu* investigations, favouring the practice of self-referrals rather than initiating himself investigations.<sup>365</sup> In the most recent years, article 15 of the Statute has been utilised to initiate investigations in the situations in Kenya<sup>366</sup> and Côte d'Ivoire.<sup>367</sup> In both cases, the Pre-Trial Chamber granted the Prosecutor's request.<sup>368</sup>

## 7. Initiation of investigations

The commencement of investigations, which follows the Court's activation, is regulated by two different procedures, depending on whether the Prosecutor has been requested to activate through a referral, or whether he activates *proprio motu*. In the latter instance, as provided for in Article 15(3) of the Statute, the Prosecutor is required to seek authorisation by the Chamber; in the former, regulated in article 53(1), the decision is not subject to judicial controls. In both cases, as expressly provided for in rule 48 of the Rules of Procedure and Evidence, the Prosecutor's determination is based on the assessment of the criteria listed in article 53(1) of the

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<sup>363</sup> J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity*, *supra* n. 55, 98.

<sup>364</sup> Article 15(3) ICC Statute.

<sup>365</sup> The concept is very well expressed in the *Office of the Prosecutor*, Annex to the "Paper on some Policy Issues before the Office of the Prosecutor": Referrals and Communications, April 2004 available at <http://www.icc-cpi.int/Menus/ICC/Structure> of the Court/Office of the Prosecutor/Policies and Strategies/Annex to the Paper on some policy issues before the Office of the Prosecutor\_ Referrals and C.htm (accessed 5 January 2012), para. I.C. in which the Prosecutor notes that the Office will "generally seek to alert the relevant state of the possibility of taking action itself very early in the process" and generally "consult and seek additional information from the States that would normally exercise jurisdiction", unless there is reason to believe that such consultations could prejudice subsequent analysis or investigation.

<sup>366</sup> *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, OTP, 26 November 2009.

<sup>367</sup> *Situation in the Republic of Côte d'Ivoire*, Request for authorisation of an investigation pursuant to article 15, ICC-02/11-3, OTP, 23 June 2011.

<sup>368</sup> *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, *supra* n. 185; *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, P.T.Ch. III, 3 October 2011.



Statute.<sup>369</sup>

The Rome Statute does not contemplate any time limit for prosecutorial decisions on whether to initiate investigations in a given situation, in line with the flexibility needed by this organ in the assessment of the specific circumstances of each situation or case.

At the time of writing, a number of situations are under scrutiny of the Office of the Prosecutor; some of them have been under preliminary examination since a considerable amount of time. The scrutiny of the situation in Afghanistan has been made public in 2007; the one of the situation in Georgia in 2008; the Palestinian one in 2009; the situation of Colombia is under preliminary investigation since 2006. In June 2011 the Prosecutor decided to request Pre-Trial Chamber III authorization to commence investigations on the situation in Cote d'Ivoire, when the acceptance of jurisdiction of the Court ex article 12(3) of the Statute dates back April 2003. Whereas, in some instances, such as the situation in Colombia, the delayed decisions may depend on a careful monitoring of the mechanisms implemented at the national level to respond to the commission of international crimes, in other instances, such as those of Afghanistan or Palestine – particularly delicate from a political point of view – prosecutorial inaction may leave room to critiques as to unveiled “decisions not to decide”, rather than complex and therefore long assessments of the situations at hand in light of complementarity.

### **7.1 The criteria under article 53(1) of the Statute**

Article 53(1) establishes that the Prosecutor may open an investigation only where there is a reasonable basis to proceed. For the purpose of determining whether such basis exists, the Prosecutor shall consider (a) whether there is “a reasonable basis to believe that a crime within

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<sup>369</sup> Rule 48 of the Rules explicitly remands to the criteria set out in article 53(1). However, the different formulation between article 15(1) and 53(1) shall be noted: according to article 15(1), the Prosecutor “may” initiate investigations *proprio motu* on the basis of information received, and thus the authority to commence an investigation is, in this instance, discretionary. On the contrary, article 53(1), which applies to the hypotheses of referral, states that when the Prosecutor receives a referral, he or she “shall” investigate, unless there isn't a reasonable basis to proceed. See, J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity*, *supra* n. 55, 98-99.

the jurisdiction of the Court has been or is being committed” (b) whether the case is or would be admissible under article 17; (c) whether “taking into consideration the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.

In assessing the first element, the Prosecutor is called to assess whether all jurisdictional requirements, i.e., *ratione materiae, temporis, loci or personae*, are met.<sup>370</sup>

The second criterion, i.e., the assessment of whether the case is or would be admissible under article 17 of the Statute, represents the first of the three admissibility assessments that take place in three different phases.<sup>371</sup> The nature of this assessment is preliminary, as this phase relates to the admissibility of a situation, i.e., the decision of whether to commence an investigation in relation to a given situations of crisis. At this stage, admissibility is not an issue for litigation and judicial determination; rather, it is a matter for the Prosecutor to consider and assess in reaching a decision.<sup>372</sup> Pre-Trial Chamber II, in the decision authorising the Prosecutor to initiate investigations in the context of the situation in Kenya, confirmed that, at the stage of determining whether to initiate an investigation, the Prosecutor must conduct an initial examination of admissibility in the course of determining whether there is a “reasonable basis to proceed” for the sake of initiating an investigation.<sup>373</sup> This assessment is on the

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<sup>370</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *supra* n. 185, paras. 36-39: the Chamber notes that the reference to crimes within the jurisdiction of the Court shall not be assessed only against the backdrop of article 5(1). This would absurdly leave outside considerations on other jurisdictional requirements. Thus, it interprets such a reference as encompassing all the jurisdictional requirements (*ratione materiae, personae, loci, temporis*) to which the Court's jurisdiction is subjected. On the same vein, the Prosecutor, OTP Draft Paper, Criteria for the selection of situations and cases, June 2006 (on file with the author), 3.

<sup>371</sup> In the words of Pre-Trial Chamber II, “the Statute is drafted in a manner which tends to solve questions related to admissibility at different stages of the proceedings up until trial. These stages begin with a “situation” and end with a concrete “case”, where one or more suspects have been identified for the purpose of prosecution.” *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *supra* n. 185, para 41.

<sup>372</sup> *Office of the Prosecutor*, Informal Expert Paper, the Principle of Complementarity in Practice, *supra* n. 212, paras. 24-26, footnote 10.

<sup>373</sup> *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, *supra* n. 185, para. 42. Concurring with the Chamber's finding, War Crimes Research Office, Washington College of Law, *The Relevance of “a Situation” to the Admissibility and Selection of Cases Before the International Criminal Court* (2009), available at

“admissibility of the situation”.<sup>374</sup>

The Chamber explained that the reference to “case” at such a preliminary phase shall be understood in accordance with the context to which it applies. At this stage, where investigations are still to be performed, there are no specific cases involving identified suspects for the purpose of prosecution. Admissibility assessments therefore relate to “one or more potential cases within the context of the situation”.<sup>375</sup> When analysing a situation and the admissibility of the potential cases that would stem from investigation, the Prosecutor already knows, in a general manner, the type of groups of persons and/or incidents that would deserve investigation. Logically, “[i]n the absence of such information, a comparison could never be made between what the Court intends to do with respect to investigations, and what domestic courts are actually doing or have done, thus making a finding of *inadmissibility* impossible”.<sup>376</sup> Thus, while not being binding on the Prosecutor in terms of the cases selected for prosecution at a later stage, depending on the development of the investigation, the Prosecutor's assessment of admissibility at the preliminary stage will be directed towards the groups of persons and 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 cases.<sup>377</sup> At this stage, the admissibility assessment requires an examination of whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court's investigations.<sup>378</sup> In addition, and despite state action or inaction, the Prosecutor shall assess whether the sufficient gravity threshold required under article

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[http://www.wcl.american.edu/warcrimes/icc/icc\\_reports.cfm](http://www.wcl.american.edu/warcrimes/icc/icc_reports.cfm) (accessed 5 January 2012); H. Olásolo, E. Carnero Rojo E., *supra* n. 298, 396; F. Guariglia, 'The selection of cases by the Office of the Prosecutor of the International Criminal Court', in C. Stahn, G. Sluiter, (Eds.) *supra* n. 253, 209-217, 217.

<sup>374</sup> *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, *supra* n. 185, para. 45.

<sup>375</sup> *Ibid.*, para. 48.

<sup>376</sup> *Ibid.*, para. 49.

<sup>377</sup> *Ibid.*, para. 50.

<sup>378</sup> *Ibid.*, para. 52.

17(1)(d) is met.

Also this assessment shall be performed against the backdrop of the potential cases, i.e., a generic assessment of whether the groups of persons that are likely to form the object of investigation capture those who bear the greatest responsibility, and, of the crimes committed within the incidents that will be likely to be the focus of the investigation.<sup>379</sup> Throughout the investigation, these potential cases will acquire the dimension of “cases” and will therefore meet the most stringent admissibility assessment as provided for in article 53(2) of the Statute.

The third criterion listed in article 53(1)(c) of the Statute is, in the words of Pre-Trial Chamber II, a “non-criterion”, as it does not require the Prosecutor to establish, first, and demonstrate, then, that an investigation is actually in the interests of justice.<sup>380</sup> On the contrary, he or she shall inform the Chamber when decided not to commence an investigation based solely on this criterion<sup>381</sup>, after having balanced it with the interests of victims and the gravity of the crimes.<sup>382</sup>

The meaning of “interests of justice” although extensively examined in the literature, remains largely undefined.<sup>383</sup> The Prosecutor has repeatedly stated that “[i]n light of the mandate of the Office and the objects and purposes of the Statute, there is a very strong presumption that investigation and prosecution is in the interest of justice and a decision not to proceed on the grounds of the interests of justice would be highly exceptional”<sup>384</sup>.

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<sup>379</sup> Ibid., paras. 57-61.

<sup>380</sup> Ibid., para. 63.

<sup>381</sup> Article 53(1) ICC Statute.

<sup>382</sup> H. Friman, 'Procedural law of the Criminal Court. An introduction' in F. Lattanzi, W. A. Schabas, (Eds.) *supra* n. 31, Vol II, 201-239, 212.

<sup>383</sup> See, among the most recent contributions, D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', *supra* n. 217; K. A. Rodman, 'Is Peace in the Interest of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', (2009) 22 LJIL, 96-126; M. Valiñas, 'Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice', in C. Stahn, L. van den Herik, (Eds.) *supra* n. 184, 267-287.

<sup>384</sup> *Office of the Prosecutor*, Policy Paper on the Interests of Justice, September 2007, available at [www.icc-cpi.int/ICCOTPIInterestsOfJustice.pdf](http://www.icc-cpi.int/ICCOTPIInterestsOfJustice.pdf) (accessed 5 January 2012), 3; OTP Draft Paper, Criteria for the selection of situations and cases, *supra* n. 370, 8.

## 7.2 Decisions under article 53(1) of the Statute

Upon preliminary examination of the situation, the Prosecutor may decide not to commence an investigation. In this case, the Statute differentiates between proceedings based on article 15 of the Statute and proceedings based on article 53 of the Statute. The main difference attains to the power of the judges to review the Prosecutor's decision. Judicial control over the Prosecutor's determination not to commence an investigation is contemplated only for those instances in which the Prosecutor has been activated through State or UNSC referral. Rule 105(1) of the Rules establishes that the Prosecutor, having decided not to initiate investigations upon referral, shall promptly inform the referring States or Security Council. They may then trigger the Pre-Trial Chamber, in accordance with article 53(3) (a) of the Statute. Upon examination of the Prosecutor's conclusions and reasons<sup>385</sup>, the Pre-Trial Chamber may request the Prosecutor to reconsider that decision. The powers of review of the Chamber, however, are extremely limited, as the Prosecutor, upon review, may decide not to change his or her determination, and no further remedies are available.

Article 53(3) (b) of the Statute establishes that the Chamber may activate *proprio motu* where the decision of the Prosecutor is based solely on considerations of the interests of justice, given the sensitivity and the highly discretionary nature of such a determination. In this case, the Prosecutor is duty bound to inform the Pre-Trial Chamber of his or her decision.<sup>386</sup> If the Chamber determines that such a decision shall be reviewed, the latter becomes effective only if confirmed by the judges.<sup>387</sup>

So far, the ICC Prosecutor has not undertaken decisions not to investigate under article 53(1) of the Statute, and therefore also the procedures under article 53(3) and (4) of the Statute have not yet been applied. The provision of article 53(3) was however referred to in an application of the government of the Central African Republic. Two years after having referred the situation of its

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<sup>385</sup> Rule 105(3) RPE.

<sup>386</sup> Article 53(1)(c) ICC Statute.

<sup>387</sup> Article 53(3)(b) ICC Statute.

country to the Prosecutor, in the absence of Prosecutor's decisions, the CAR authorities requested Pre-Trial Chamber III to seek information from the Prosecutor as to the “alleged failure to decide within a reasonable time whether or not to initiate an investigation pursuant to rules 105(1) and 105(4) of the rules of procedure and evidence”.<sup>388</sup> The Chamber, while noting that the preliminary examination of a situation “must be completed within a reasonable time from the reception of a referral”<sup>389</sup>, refrained from embarking in any substantive review ex article 53 of the Statute and simply invited the Prosecutor to inform the referring State of the status of the preliminary examinations.<sup>390</sup>

In its response, the Prosecutor contested the power of the Pre-Trial Chamber to request information during the preliminary examination stage, on the ground that the Chamber's supervisory role under article 53(3) of the Statute applies only to reviews of decisions not to investigate or not to prosecute. Since no decision had yet been taken in relation to the situation under examination, “there is no exercise of prosecutorial discretion susceptible to judicial review”.<sup>391</sup>

Contrary to what established for decisions not to investigate upon referral of a situation to the Prosecutor, decisions not to commence an investigation in accordance with article 15 are not subject to judicial controls. In this case, the Prosecutor is only required to inform those who provided the information of his or her finding that there was not a reasonable basis to proceed with an investigation.<sup>392</sup> No legal means to trigger a judicial control of such a decision are contemplated for those who submitted the information to the Prosecutor, a part from the submission of further information in order to foster the Prosecutor's re-consideration of the situation, as provided for in article 15(6) of the Statute and rule 49(2) RPE.

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<sup>388</sup> *Situation in Central African Republic*, Decision Requesting Information on the Status of Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, P.T.Ch.III, 30 November 2006, 3.

<sup>389</sup> *Ibid.*, 4.

<sup>390</sup> *Ibid.*

<sup>391</sup> *Situation in Central African Republic*, Prosecution Response Pursuant to Pre-Trial Chamber's III 30 November 2006 Decision Requesting Information on the Status of Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-7, O.T.P., 15 December 2006.

<sup>392</sup> Article 15(6) ICC Statute.

The failure to provide some forms of control over decisions of the Prosecutor not to commence investigations on the basis of information received reflects the concern of the drafters to provide forms of control of prosecutorial discretion only in those cases in which his or her decision has an impact over State's sovereignty: a decision not to prosecute does not bear such an impact. The provision of some forms of control over these latter kinds of decisions, at least for decisions taken on the basis of the interests of justice, would have however been desirable in order to ensure that, similarly to what established for decisions under article 53(1) of the Statute, no decision is taken for motives that go beyond the statutory requirements.

The Prosecutor decided not to initiate investigations in relation to the situations in Iraq and Venezuela. The former, as seen above, based on the insufficient gravity threshold, raised several concerns about its legal and political appropriateness.<sup>393</sup> The latter was based on the ground that the information available did not provide a reasonable basis to believe that the alleged crimes fell within the jurisdiction of the Court.<sup>394</sup>

When the Prosecutor decides to open investigations in a given situation, the forms of judicial control over such decisions apply in the opposite way: the Prosecutor shall apply to the Chamber for authorisation to open investigations *proprio motu*, while no controls are established for decisions under article 53(1) of the Statute.<sup>395</sup>

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<sup>393</sup> See, *supra*, para 4.

<sup>394</sup> OTP Response to communications concerning Venezuela, available at <http://www.icc-cpi.int/Menus/ICC/Structure> of the Court/Office of the Prosecutor/Comm and Ref/Venezuela/ (accessed 22 December 2011)

<sup>395</sup> A different procedure is established for the initiation of investigation with respect to the crime of aggression, as regulated in draft articles 15 *bis* and *ter*, adopted at the Kampala Review Conference in 2010, not yet into force. Article 15*bis*, which regulates the hypotheses of state referral and initiation of investigation *proprio motu* by the Prosecutor, establishes that where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State. He or she shall notify the Secretary General of the United Nations of the situation before the Court, including any relevant information or document. When the SC has made such a determination, the Prosecutor may proceed with the investigation; if no determination is made within six months after the date of notification, the Prosecutor may proceed with investigation if authorised by the Pre-Trial Division, and the SC has not decided otherwise in accordance with Article 16 of the Statute. Article 15*ter* deals with the hypothesis of exercise of jurisdiction over the crime of aggression following the Security Council referral. Also in this case the Court may exercise jurisdiction one year after the ratification or acceptance of the amendments by thirty states parties, and subject to a decision taken after 1 January 2017 by two thirds majority of States Parties, as provided for in Article 121(3) of the Statute. See, Annex III to the

As seen above, this solution reflects concerns related to State sovereignty: judicial control is contemplated in those instances that may severely affect states' sovereignty. On the contrary, the Prosecutor's decision to initiate investigation upon referral of a state or of the Security Council is considered of less impact.

An interesting question, with repercussions on the Court's action, currently debated before and among the ICC judges, attains to the temporal scope of the investigations over a given situation. Article 11 of the Statute limits the exercise of the Court's jurisdiction to crimes committed after the entry into force of the Statute for the relevant State; no other reference is contained in the Rome Statute as to whether and to what extent investigations and prosecutions of the Court can involve crimes committed after the activation of the Court in relation to a given situation. Far from being a purely theoretical issue, the question is of extreme relevance, also in light of the fact that, being the Court often called to intervene in situations of on-going conflicts, several further crimes can continue being committed after the opening of investigations. On the other hand, however, the Court's intervention shall not be considered as lasting indeterminately in relation to a given situation. The fact that the Court intervenes in relation to a "situation" and not to a "State" already excludes the idea of a constant monitoring over a given country, which would be under perennial control of the ICC once it intervenes. The Statute, however, does not clarify whether the ICC's intervention has an expiring date, and, if any, how it shall be determined.

In *Mbarushimana*, the last case singled out in the context of the DRC situation, the question was exactly whether the ICC still had jurisdiction on crimes allegedly committed in 2009, five years after the commencement of investigations in the DRC situation. In the decision granting the Prosecutor's request to issue a warrant of arrest against the suspect, Pre-Trial Chamber I found that the case fell within the jurisdiction of the Court, arguing that:

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Resolution RC/Res. 6. In case of UN SC referral, the ICC may exercise jurisdiction irrespective of whether the State has accepted the Court's jurisdiction.



[...] it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated. Such a situation can include not only crimes that had already or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as on-going at the time of the referral.<sup>396</sup>

The Chamber, without further elaborating on the issue, requires a “sufficient link” with the situation under investigation, to be assessed on a case by-case-basis. In the case at hand, the ICC judges agreed with the Prosecutor that the incidents object of his request were “an integral part of the situation referred to by the DRC authorities”, although committed between five and six years after the DRC referral and the subsequent opening of ICC investigations.<sup>397</sup>

Of a different view was Pre-Trial Chamber II, at least with respect to investigations initiated upon *proprio motu* initiative of the Prosecutor. In authorising the Prosecutor to commence investigations in the Kenyan situation, it established that the scope of authorised investigation shall not exceed the date of the filing of the Prosecution's application. This, according to the judges, depended not only on the requirement that the Chamber authorises the Prosecutor's request, but by the letter of article 53(1) of the Statute:

Since article 15(4) of the Statute subjects the Chamber's authorisation of an investigation to an examination of the Prosecutor's request and supporting material, it would be erroneous to leave open the temporal scope of the investigation to include events subsequent to the date of the Prosecutor's request. Article 53(1)(a) of the Statute, by referring to “a crime [which] has been or is being committed”, makes clear that the authorisation to investigate may only cover those crimes that have occurred up until the time of the filing

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<sup>396</sup> *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1, P.T.Ch.I, 28 September 2010, para. 6. See also, *The Prosecutor v. Callixte Mbarushimana*, Prosecution's Submission on jurisdiction, ICC-01/04-577, OTP, 10 September 2010, para. 18, in which the Prosecutor, after recalling the distinction between the triggering procedure and the conduct of investigations, affirm that the threshold under article 53(1) “does not circumscribe the future scope of prosecutor's investigations”.

<sup>397</sup> *The Prosecutor v. Callixte Mbarushimana*, Prosecution's Submission on jurisdiction, *supra* n. 396, paras. 2 and 22.

of the Prosecutor's Request.<sup>398</sup>

Pre-Trial Chamber III, also asked to decide on a Prosecutor's request under article 15 of the Statute, extended the end date of investigation beyond the date of the Prosecutor's application. This, however, was not indeterminately, but only for “continuing crimes”, (...), whose commission extends past the date of the application”.<sup>399</sup> Thus,

[...] crimes that may be committed after the date of the Prosecutor's application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes).<sup>400</sup>

The Chamber extended the same reasoning to any crimes that may have been committed before the commencement date requested by the Prosecutor, 28 November 2010, upon submission of further information to the Chamber.<sup>401</sup>

### **7.3 The Procedures under article 18: dialogue between the Court and States**

The preliminary selection of “potential cases” is the object of the procedures provided for in

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<sup>398</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *supra* n. 185, para. 206

<sup>399</sup> *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *supra* n. 368, para. 179.

<sup>400</sup> *Ibid.* Critical towards the Majority's Decision, Judge Fernandez de Gourmendi, according to whom the Majority shall have adopted the same approach of Pre-Trial Chamber I in Mbarushimana, with the only limitation for Prosecutor's investigations being the link with the situation of crisis. See, *Situation in the Republic of Côte d'Ivoire*, Corrigendum to “Judge Fernàndez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire”, ICC-02/11-15-Corr, 5 October 2011, paras. 62-73.

<sup>401</sup> *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *supra* n. 368, paras. 184-185. Also on this point Judge Fernandez de Gourmendi disagreed with the Majority, holding that the Chamber's role under article 15 of the Statute is “solely a review of the request and material presented by the Prosecutor”, i.e., that “the statement of fact is accurate” and “that the legal reasoning applied to establish that there is a reasonable basis to believe that the facts may constitute crimes within the jurisdiction of the Court, and that cases would be admissible, is correct under the ICC legal texts and the jurisprudence of the Court.” *Situation in the Republic of Côte d'Ivoire*, Corrigendum to “Judge Fernàndez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire”, *supra* n. 400, paras. 17-28 and 53-61.

article 18, which represent the first dialogue between the Court and States in light of the complementary nature of the former and an additional guarantee for States.

According to article 18, once the Prosecutor has determined that there is a reasonable basis to commence an investigation, he or she is required to notify all States Parties, together with those that would normally exercise jurisdiction over the crimes, although not parties.<sup>402</sup> Within one month, the State that is investigating or prosecuting the crimes, or has done so, may request the Prosecutor to defer his or her investigations.<sup>403</sup> If a State with jurisdiction asks the Prosecutor to defer his or her investigation on the situation, the Prosecutor normally has to do so, unless he or she determines that the investigation should stay with the Court, and applies to the Pre-Trial Chamber.

In case of deferral, the Prosecutor may review his or her decision in order to assess whether “there has been a significant change in circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.”<sup>404</sup>

As to the factors to be taken into consideration by the Prosecutor when evaluating whether to defer or not, rule 55 of the Rules of Procedure and Evidence establishes that the Chamber, in examining the Prosecutor's application and the observations submitted by the State in relation to a request of deferral “shall consider the factors in article 17”.<sup>405</sup>

According to Article 18(4) of the Statute, the decision of the Pre-Trial Chamber may be appealed by both the Prosecutor and the concerned State. The reference of rule 55 RPE to the factors of article 17 of the Statute means that the decisions of both Chambers shall be based on considerations as to the action or inaction of domestic courts, gravity and, in presence of domestic action, of unwillingness or inability of the State. The Prosecutor and the State will thus have to demonstrate whether there is action, and whether this action satisfies the criteria

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<sup>402</sup> Article 18(1), ICC Statute.

<sup>403</sup> Article 18(2), ICC Statute.

<sup>404</sup> Article 18(3), ICC Statute.

<sup>405</sup> Rule 55(2) RPE.

under article 17 of the Statute. The mechanism of article 18 of the Statute therefore represents the first formal form of dialogue between the Court and States in relation to the exercise of concurrent jurisdiction over international crimes. The proceedings involve primarily the Prosecutor and States; the ICC judges are not assigned the power to rule on the decision of the Prosecutor of whether or not to defer the situation to the requesting State. Rather, they are triggered only on initiative of the Prosecutor: the decision of the Prosecutor to defer to the State is not subject to any judicial control.

These procedures, however, do not apply to investigations that stem from Security Council referrals. When the informant is the Security Council, an investigation will be automatically opened if the Prosecutor determines that there is a reasonable basis to proceed.<sup>406</sup> In line with the assumption that in this case the Courts acts as an *ad hoc* tribunal, no dialogue is established between the Court and States, although the Prosecutor is still obliged to evaluate the admissibility of potential cases in accordance with article 53(1) of the Statute, and the possibility for the defendant or the State to subsequently challenge the admissibility of the case as provided for in article 19 of the Statute.

## **8. Proceedings in relation to the admissibility of cases**

Once the Prosecutor has determined, or has been authorised, to commence investigations in a given situation of crisis, his or her work will be directed towards the assessment of whether and which cases shall be brought before the Court for prosecution. In doing so, the Prosecutor is required to follow the criteria established in article 53(2) of the Statute. The criteria largely recall those of article 53(1) of the Statute, although they require a higher threshold – a

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<sup>406</sup> This raises concerns as to the potential abuse of political discretion by the Prosecutor, as well as an excessive cooperative relationship between the Security Council and the Prosecutor. See, M. Bergsmo, 'Occasional remarks on certain state concerns about the jurisdictional reach of the ICC and their possible implications for the relationship between the court and the Security Council' (2000) 69 *Nordic Journal of International Law*, 87-101. Stigen notes that article 18 is meant first of all to provide a safeguard for States in case of *proprio motu* activation of the prosecutor and, to a lesser extent, of other states' referrals. J. Stigen, 'The admissibility procedures', *supra* n. 348, 512.

sufficient basis for prosecution, *versus* the reasonable basis required for commencement of investigations – and a higher degree of specificity, connected to the more advanced status of investigations and the assessment on a more concretely defined case hypothesis, or potential case. Thus, in order to take the decision to prosecute, the Prosecutor has to be satisfied that there is a sufficient legal or factual basis to seek a warrant of arrest or a summons to appear under article 58 of the Statute;<sup>407</sup> that the case is admissible under article 17;<sup>408</sup> and that there are no reasons to believe that a prosecution would not be in the interests of justice.<sup>409</sup> It is in this phase that the Prosecutor determines which persons shall be the target of prosecution and which crimes and incidents shall be selected and brought before the Pre-Trial Chamber assigned to the situation.

### **8.1 The decision not to prosecute**

Upon investigation, having examined the factors under article 53(2) of the Statute, the Prosecutor may decide not to exercise the Court's criminal prerogatives. In this case, he or she is required to notify the Pre-Trial Chamber and the referring State or the United Nations Security Council of his or her decision, regardless of whether it is based on letter (a), (b) or (c) of article 53(2) of the Statute. Upon request of the referring State or of the Security Council, the Pre-Trial Chamber shall review the Prosecutor's decision and may request him or her to reconsider the decision, as established in relation to decisions not to investigate.<sup>410</sup> The Chamber has the faculty to review *proprio motu* a decision of the Prosecutor not to prosecute based on the interests of justice; the confirmation of the judges is necessary for the decision to become effective.

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<sup>407</sup> Article 53(2)(a) ICC Statute.

<sup>408</sup> Article 53(2)(b) ICC Statute.

<sup>409</sup> Article 53(2)(c) ICC Statute. In line with the higher degree of specificity of the assessment in this phase, article 53(2)(c) refers also to the particular conditions of the alleged perpetrators, such as age or infirmity. In this sense, the Prosecutor argues that the interests of justice may suggest that no prosecution is launched with respect to a person, when the latter is terminally ill or has been the subject of abuse amounting to serious human rights violations. OTP Policy Paper on the Interests of Justice, September 2007, p. 7.

<sup>410</sup> Article 53(3)(a), ICC Statute. See *supra*.

Whereas the object and the content of decisions not to investigate are uncontroversial, the reference to “decisions not to prosecute” may be interpreted differently, and each interpretation bears different consequences. Stahn individuates four possible interpretations of prosecutorial inaction in relation to prosecution.<sup>411</sup> First, prosecutorial inaction could relate to a decision not to prosecute a specific individual; second, to a decision not to prosecute a certain group of persons in a given situation; third, to a decision not to prosecute certain crimes; fourth, a decision not to prosecute at all, i.e., the conclusion that upon investigation no case is worth being prosecuted, and, thus, the absence of any cases before the Court in relation to the situation.<sup>412</sup>

The meaning to be assigned to a “decision not to prosecute” has considerable implications for the exercise of judicial review. If the first interpretation were to prevail, this would imply that the Prosecutor's action is subject to extensive judicial scrutiny, even exceeding the scope of review of prosecutorial discretion contemplated in many domestic systems.<sup>413</sup> On the other hand, the judicial scrutiny would be “reduced to a bare minimum” if a decision not to prosecute were understood as covering only scenarios of complete absence of prosecution. Stahn argues that, given the limited resources of the Court and the careful selection of situations and cases by the OTP, it is very unlikely that the Prosecutor would first select a situation for investigation and then decide not to prosecute a single case in the entire situation. Article 53 review would remain a very rare exception.<sup>414</sup>

On the contrary, if the decision not to prosecute subject to review of the Pre-Trial Chamber was in relation to a certain group of persons or crimes, the judges would have the power to scrutinise the prosecutorial selection of cases within a given situation. Thus, judges would be

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<sup>411</sup> C. Stahn, 'Judicial review of prosecutorial discretion: Five years on', in C. Stahn, G. Sluiter, (Eds.) *supra* n. 253, 247-279, 270 ss.

<sup>412</sup> *Ibid.*, 270.

<sup>413</sup> *Ibid.*, 270.

<sup>414</sup> *Ibid.*, 271.

enabled to go to the heart of prosecutorial discretion.<sup>415</sup>

Whereas the observation of Stahn seems to capture the most logical interpretation of the provision, there are no *indicia* in the legal framework to suggest that such interpretation should prevail. Rule 106 of the Rules of Procedures and Evidence establishes that the Prosecutor, after having decided not to prosecute, shall promptly inform the Pre-Trial Chamber, together with the State or States or the Security Council that referred the situation. The notifications shall contain, together with the Prosecutor's conclusions, the reasons that led him or her to such a determination. No clarification comes to the question of what is the focus of a decision not to prosecute. However, if it were to be applicable to decisions not to prosecute certain crimes or groups of persons, as suggested by Stahn, this would imply that the Prosecutor takes an express decision in this respect and informs the referring states or the Security Council, as well as the relevant chamber, of the reasons that led him or her to such a conclusion. In contexts in which international crimes are committed, with multitudes of incidents and perpetrators, and the constraints faced by the ICC Prosecutor, the hypotheses in which the latter might decide not to prosecute certain crimes or groups of persons would likely be in a huge number. The Prosecutor necessarily adopts a selective approach to cases to be brought before the Court, based on his or her strategies as well as on the evidence available.<sup>416</sup> It does seem neither plausible nor feasible that the Prosecutor justifies himself or herself any time he or she decides not to bring a given case before the Court. Although the idea that, upon conducting investigations, the Prosecutor decides not to prosecute would imply a considerable waste of resources, it seems to be the most plausible interpretation of “decisions not to prosecute”. Such decisions, as clearly established in article 53(2) of the Statute, shall be based on the two objective assessments as to the jurisdiction and admissibility of the potential cases; otherwise, on the more subjective assessment that a prosecution would not satisfy the interests of justice. It seems to be more likely that the

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<sup>415</sup> Ibid., 271.

<sup>416</sup> See, *infra*, Chapter IV.2.

Prosecutor is required to explain the reasons why he or she, upon investigation, decides not to prosecute any case in relation to the situation under consideration, rather than being required to notify States or the Security Council and inform the Pre-Trial Chamber about specific decisions not to prosecute certain crimes or certain persons or groups of persons, especially where no statutory provisions specifically direct the action of the Prosecutor towards certain individuals or crimes. If, on the contrary, the Prosecutor had to inform of any decisions not to prosecute a given person or given crimes, the effect would be of paralysing his or her office. The process of case-selection is largely based on the Prosecutor's exercise of his or her discretionary powers. Within equally admissible cases, he or she decides to focus his or her attention on specific categories of crimes. In relation to the case against Thomas Lubanga Dyilo, the Prosecutor expressly decided to focus on the crimes of conscription, enlistment and active use in hostilities of children under the age of fifteen.<sup>417</sup> A reading of decision not to prosecute as encompassing decisions not to prosecute certain crimes, would imply that the Prosecutor shall explain why he did not indict Lubanga for murders, sexual crimes or many other crimes for which a military commander is likely to be held responsible. The same can be said for any other accused before the Court, or for any other incident, considering that more than one person may have responsibility in relation to a given incident. If decisions ex article 53(2) of the Statute encompassed all possible responsible for the commission of the selected crimes, the Prosecutor would be asked to explain for any single crime why he decided to leave out a likely big number of persons, among lower level perpetrators and accomplices to the commission of the said crimes. This would force the ICC Prosecutor to use many resources of its Office to deal with these required information and notifications, with the detrimental effect of distracting resources from other more useful activities.

Further, article 53(2) of the Statute establishes that such a decision shall take place “upon

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<sup>417</sup> F. Guariglia, 'The selection of cases by the Office of the Prosecutor of the International Criminal Court', *supra* n. 373, 211.



investigation”.<sup>418</sup> Thus, it seems to be associated with a decision to conclude the investigations in a given situation, rather than in relation to a particular person or crimes. Whereas it is true that no temporal limits are established for the conduct of investigations, both in relation to situations and cases, it is likely that, given the need of the prosecutor to select among thousands of crimes and perpetrators, he or she will deem sufficient the case presented against one perpetrator or involving specific crimes, rather than considering opening new cases in relation to the same person or the same crimes. Although this shall not be seen as absolute, an interpretation of the term as encompassing the more general reference to investigations in a situation helps the expedite performance of proceedings before the Court and seems to be more in line with the wide degree of discretion assigned to the Prosecutor.

The question of what shall be the subject-matter of decisions under article 53(2) of the Statute has not been yet addressed by the ICC judges. The issue was solely touched upon a few times, but never directly addressed. From the circumstances of these references, it can be inferred that the two Pre-Trial Chambers involved embraced a middle-ground interpretation of decisions under article 53(2) of the Statute, i.e., as directed to decisions not to prosecute certain individuals or certain crimes.

The first Chamber to attempt to apply article 53(2) and (3) was Pre-Trial Chamber II in relation to the situation in Uganda. In December 2005, the judges convened a *status* conference to be attended by the Prosecutor “in order to consider the status of the investigation under article 53”.<sup>419</sup> The Chamber decided to request information to the Prosecutor, in particular in relation to the requirement that the Prosecutor informs the Chamber about decisions “not to prosecute” in accordance with article 53(2) of the Statute. This decision originated from various statements

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<sup>418</sup> The issue of the conclusion of investigations in a given situation has been addressed at the Kampala review conference. See, Mr. Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, in *Review Conference of the Rome Statute*, Stocktaking of international criminal justice. Taking stock of the principle of complementarity: bridging the impunity gap. [Draft] Informal summary by the focal points, International Criminal Court RC/ST/CM/1, 22 June 2010, 108-109.

<sup>419</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision to convene a status conference on the investigation in the situation in Uganda in relation to the application of Article 53, ICC-02/04-01/05-68, P.T.Ch.II, 2 December 2005.

of the Prosecutor which the Chamber considered contradictory. In relation to the situation of Uganda, the ICC Prosecutor Ocampo had affirmed in a number of circumstances his intention to investigate crimes of both the Lords' Resistance Army (LRA) – the rebels' group – and the Uganda People Defence Forces (UPDF) – the Ugandan Army. The argument was often used to make it clear that the Ugandan referral, which explicitly requested the Prosecutor to investigate on LRA crimes, was not binding nor even influencing to the Office of the Prosecutor.<sup>420</sup> On the other hand, the Prosecutor had, in other occasions, affirmed that, after the issuance of warrants of arrest against the five LRA leaders, he would not continue looking at past crimes falling within the Court jurisdiction, but would investigate future crimes of LRA. He had also affirmed that investigations and assessments of allegations made against the military forces of the Government of Uganda were on-going,<sup>421</sup> that the investigation in the situation in Uganda was “nearing completion” and that “the interpretation of article 53 (...) involves the OTP and ultimately the judges”.<sup>422</sup> The judges, arguing that regulation 48 of the Regulations of the Court granted them the power to seek information from the Prosecutor, tried to investigate whether he had taken any decisions not to prosecute certain crimes within the Ugandan situation. The Chamber considered that the status conference and the gathering of information was a step prior to the exercise of review under article 53(3) (b) of the Statute. The stance of the judges seems to lead to the same interpretation of “decisions not to prosecute” proposed by Stahn, i.e., as a decision involving certain crimes or perpetrators. It is not clear, however, how the Chamber could have inferred that the alleged Prosecutor's decision not to prosecute, if any, was based on the interests of justice. In addition, the Rules of Procedure and Evidence clearly require the Prosecutor to notify the referring actors and the Chamber of the decision not to prosecute. No such information had been given by the organ of the accuse in the case at hand.

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<sup>420</sup> See, Report on the activities performed during the first three years (June 2003 – June 2006), *supra* n. 355, p. 14: “The Office informed the Government of Uganda that, in compliance with its obligations of impartiality, the Office would interpret the referral to include all crimes committed in Northern Uganda.”

<sup>421</sup> *Ibid.*, para. 7.

<sup>422</sup> *Ibid.*, para. 8.

The Prosecutor replied to the Chamber's decision by challenging the judges' reasoning. He refrained from delving into the interpretation of article 53(2) of the Statute, and limited his reply to the observation that a decision under article 53(2) had yet to be taken. In relation to the statements referred to by the Pre-Trial Chamber, the Prosecutor observed that “none of these statements constitute any decision reached by the Prosecutor because of a lack of “sufficient basis for prosecution” under article 53(2)”.<sup>423</sup> He explained that the investigation was not fully completed and that the process of gathering evidence was still on-going.<sup>424</sup> Article 53(2) of the Statute was therefore not applicable to the situation at hand.<sup>425</sup> The Chamber did not enter the merits of the content or focus of a decision not to prosecute, and, in the case at hand, decided not to further address the question of “prosecutorial inaction”.<sup>426</sup>

The same “cautious” approach towards possible interpretations of the reference to decisions not to prosecute under article 53(2) of the Statute was reiterated by Pre-Trial Chamber I in the DRC situation. Both requests to the Chamber originated from a statement of the Prosecutor Ocampo, in which he informed the Chamber that he had temporarily suspended the investigation in relation to other potential charges against Lubanga.<sup>427</sup> In the first instance, the Chamber had been triggered by a motion from a non-governmental organisation, the Women's Initiatives for Gender, which requested authorisation to submit observations as *amicus curiae* in relation to the role of the Pre-Trial Chamber in supervising prosecutorial discretion as well as on the criteria for determining the status of victims.<sup>428</sup> The Women's Initiatives for Gender wanted to submit observations in relations to the charges presented by the Prosecutor against Lubanga. It

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<sup>423</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, OTP submission providing information on the Status of the investigation in Anticipation of the Status Conference to be held on 13 January 2006, ICC-02/04-01/05-76, 11 January 2006, para. 2

<sup>424</sup> *Ibid.*, paras 6-7.

<sup>425</sup> *Ibid.*

<sup>426</sup> C. Sthan, 'Judicial review of prosecutorial discretion: Five years on', *supra* n. 411, 275.

<sup>427</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Prosecutor's information on further investigation, ICC-01/04-01/06-170, 28 June 2006, informing the Chamber that had temporarily suspended the investigations in relation to other potential charges against Lubanga.

<sup>428</sup> *Situation in the Democratic Republic of the Congo*, Request submitted pursuant to rule 103(1) of the Rules for leave to participate as *amicus curiae* with confidential annex 2, ICC-01/04-313, 10 November 2006, para. 13.

argued for a wide interpretation of article 53 of the Statute, based on the practice of domestic jurisdictions: the Pre-Trial Chamber has an inherent duty to satisfy itself that the Prosecutor is exercising his or her discretion correctly, even when deciding not to prosecute a particular person, or not to prosecute a person for particular crimes.<sup>429</sup> The Chamber rejected the application on the ground that the issue was not appropriate at that stage of proceedings, as investigations in DRC were on-going and the Prosecutor had not taken any decisions not to investigate or prosecute.<sup>430</sup>

The same Chamber reiterated its cautious approach towards judicial review of Prosecutorial decisions under article 53(2) of the Statute in response to a request of the Legal Representatives of Victims to interpret the Prosecutor's decisions to prosecute certain persons for certain crimes as tacit decisions not to investigate or prosecute other persons and other crimes, with an interpretation that recalls the second and the third options envisaged by Stahn. The Chamber noted that no negative decision under Article 53(2) (c) of the Statute had been made in the context of the situation in the Democratic Republic of the Congo. On the contrary, the Prosecutor was already prosecuting an individual, and investigations in the situation were still on-going, so that the request of the Legal Representative of Victims – which had originated from the Prosecutor's information to the Chamber that he had temporarily suspended the investigation in relation to other potential charges against Lubanga – had not legal basis.<sup>431</sup>

The caution adopted by the Judges in relation to article 53(2) of the Statute seems to be directed more towards attempts to clarify the content of the provision, rather than to a cautious interpretation of the latter. Pre-Trial Chamber II initially acted aggressively in the attempt to affirm its powers of control over the exercise of prosecutorial discretion, and was probably

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<sup>429</sup> Ibid., para. 8.

<sup>430</sup> *Situation in the Democratic Republic of the Congo*, Decision on the request submitted pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/04-373, P.T.Ch.I, 17 August 2007, para. 5.

<sup>431</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Requests of the Legal Representative for Victims VPRS1 to VPRS 6 regarding “Prosecutor's information on further investigation”, ICC-01/04-399, P.T.Ch.I, 26 September 2007.

stopped by the right observations of the Prosecutor. Pre-Trial Chamber I, on the contrary, was careful in underlining that prosecutorial statements shall not be understood as decisions not to prosecute. Although both Chambers, as well as the Prosecutor, refrained from delving into possible interpretations of the provision under examination, it can be inferred from the limited case-law examined that they understand the provision as encompassing decisions not to prosecute specific persons or crimes. Otherwise, the requests might have been dismissed on other grounds, such as the non-applicability of the provision on the basis that it related to the whole framework of investigations, and not the specific case. Far from being a purely theoretical question, the issue is of extreme relevance from the point of view of judicial control over prosecutorial discretion. Only a future deeper elaboration of the issue will clarify the contours of the intrusion of judicial control over the exercise of prosecutorial discretion, as well as the duties of the Prosecutor to inform about and explain his or her choices, with the consequences underlined above.

## **8.2 The decision to prosecute**

Upon investigation on a given situation, the most likely scenario is that the Prosecutor individuates and selects cases that are worth to be prosecuted before the Court, in accordance with article 53(2) of the Statute. The criminal proceedings before the Court initiate with his or her request to the relevant Chamber to issue a warrant of arrest or summons to appear for the individuated suspect(s). The Chamber's decision on whether to grant the Prosecutor's request is based on the finding that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, as established in Article 58 of the Statute.<sup>432</sup>

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<sup>432</sup> As established in article 58 of the Statute, the decision to issue a warrant of arrest or summons to appear depends on whether the arrest appears necessary to ensure the person's appearance at trial, to ensure that he or she does not obstruct or endanger the investigations or court's proceedings, or to prevent him or her from continuing committing crimes. On the contrary, the Chamber will issue a summons to appear if satisfied that such summons is sufficient to ensure the person's appearance before the Court. Summonses to appear have been issued for Abu Garda, Banda and Jerbo in the situation of Sudan and for the six defendants in the two

In the initial practice of the Court, the ICC judges tended to include assessments of the admissibility of the case as a part of their determination on the existence of reasonable grounds to believe that the person had committed the crimes. In the case of *Kony et al*, Pre-Trial Chamber II, analysed the existence of jurisdictional and admissibility requirements of the case before turning to finding whether there were reasonable grounds to believe that the suspects had committed the crimes referred to in the Prosecutor's application.<sup>433</sup> The Chamber therefore implicitly treated assessments of admissibility as part of a decision under article 58 of the Statute. The explicit confirmation that the Judges intended assessments of admissibility to be integral part of decision to issue warrants of arrest or summonses to appear came a few months later. In the decision on the issuance of a warrant of arrest against Lubanga and Ntaganda, Pre-Trial Chamber I affirmed that a determination of whether the cases fell within the jurisdiction of the Court and were admissible was “a prerequisite to the issuance of a warrant of arrest”.<sup>434</sup> Although admissibility assessments are not explicitly contemplated as factors to be assessed under article 58 of the Statute, and since the Prosecutor had not raised any issue on jurisdiction and admissibility in his application, the Chamber reviewed *proprio motu* the admissibility of the case, as provided for in article 19(1) of the Statute.<sup>435</sup>

The Chamber's assessment of admissibility led to the finding that the case against Ntaganda did not meet the sufficient gravity threshold, as seen above.<sup>436</sup> In its judgment, the Appeals Chamber, in addition to finding the incorrectness of PTCI's elaboration on gravity, held that assessments of admissibility under article 19(1) of the Statute are not prerequisites for the

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cases selected from the situation in Kenya.

<sup>433</sup> *Situation in Uganda*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, para. 38; also referred to in *Situation in Uganda*, Warrants of arrests for Vincent Otti, para 38; *Situation in Uganda*, Warrants of arrests for Raska Lukwiya, para. 26; *Situation in Uganda*, Warrants of arrests for Okot Odhiambo, para. 28; *Situation in Uganda*, Warrants of arrests for Dominic Ongwen, para. 26, *supra* n. 224.

<sup>434</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, para. 18. Pre-Trial Chamber II followed the same method in the decision on the issuance of arrest for Jean-Pierre Bemba Gombo, *The Prosecutor v Jean-Pierre Bemba*, Decision on the Prosecutor's application for a warrant of arrest against Jean-Pierre Bemba, *supra* n. 191, paras. 11-22.

<sup>435</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, paras. 19-20.

<sup>436</sup> See, *supra*, Chapter II.4.

issuance of a warrant of arrest, but entail a separate procedural step.<sup>437</sup> Pre-Trial Chambers retain their discretion to trigger proceedings under article 19(1) of the Statute; in the case at hand, however, with proceedings conducted *ex parte*, the exercise of the Chamber's discretion was considered erroneous, because it had not given sufficient weight to the interests of one of the suspects.<sup>438</sup>

In its reasoning, the Appeals Chamber correctly noted that the assessment of whether a case falls within the jurisdiction of the Court and is admissible is not expressly contemplated in article 58 of the Statute, and therefore entail different and separate proceedings. It however gave a restricted interpretation of article 19(1) of the Statute, whose letter states, generally, that the “[t]he Court may, on its own motion, determine the admissibility of a case in accordance with article 17”.<sup>439</sup> According to the Higher Chamber, the Pre-Trial Chamber should exercise its discretionary powers only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspects. Such circumstances “may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review”.<sup>440</sup> In the case at hand, such a *proprio motu* review was not appropriate, considering that the Prosecutor had not raised any issues on admissibility, that proceedings were conducted *ex parte* without participation of the suspects, victims or other entities, and that no ostensible cause or self-evident factor were manifestly impelling such assessment.<sup>441</sup>

Contrary to what held by the Appeals Chamber, however, the opportunity for the Chamber to

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<sup>437</sup> *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 a warrant of arrest, article 58”, *supra* n. 169, paras. 42-46.

<sup>438</sup> *Ibid.*, paras 46-53.

<sup>439</sup> G. Bitti, M. M. El Zeidy, 'The Katanga Trial Chamber decision: Selected Issues', (2010) 23 LJIL, 319-329, 323. Similarly, M. M. El Zeidy, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court', 19 (2006) LJIL, 741-751, 748-749

<sup>440</sup> *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 a warrant of arrest, article 58”, *supra* n. 169, para. 52.

<sup>441</sup> *Ibid.*, para. 53.

revise the prosecutorial choice of cases at the time in which they are formally brought before the Court seems to represent an additional guarantee to the suspect. A Chamber's finding that the jurisdictional or admissibility criteria are not fulfilled at such an early phase of proceedings would indeed exonerate the person from being subject of a warrant of arrest or summons to appear. In addition, warrants of arrest are often issued under seal. This prevents the accused from exercising his or her right to challenge the admissibility of the case at the earliest opportunity.<sup>442</sup> A preliminary assessment of the admissibility of a case would also help the Court to save resources and time by blocking an inadmissible case before it goes through. Finally, this would ensure a judicial control over prosecutorial discretion at the moment a case is brought before the Court. As seen above, the only form of judicial control over Prosecutor's determination to initiate investigations in a given situation is the one contemplated under article 15 of the Statute; in all other instances, the limited judicial powers of review are contemplated for prosecutorial decisions not to investigate or prosecute, or in accordance with proceedings under article 18 of the Statute.

As a consequence of the Appeals Chamber's clarification that there is no direct link between decisions under article 58 of the Statute and assessments of admissibility of the case under article 19 of the Statute, subsequent pre-trial chambers' issuances of warrant of arrests or summonses to appears tended not to include *proprio motu* admissibility assessments.<sup>443</sup>

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<sup>442</sup> G. Bitti, M. M. El Zeidy, 'The Katanga Trial Chamber decision: Selected Issues', *supra* n. 439, 323.

<sup>443</sup> In *Bashir, Abu Garda, and Banda and Jerbo*, Pre-Trial Chamber I expressly declined to use discretionary powers to rule on admissibility. While declining to use these powers, however, PTCI somehow analyses the issue, as it tends to justify its refusal to proceed to an analysis of admissibility by arguing that "no ostensible cause or self evident factor" manifestly requires it to proceed to such analysis. See, *The Prosecutor v Omar Hassan Ahmad Al Bashir* ("Al Bashir"), Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *supra* n. 283, paras. 46-48; *The Prosecutor v Bahar Idriss Abu Garda*, Decision on the Prosecution's Application under article 58, ICC-02/05-02/09-2, P.T.Ch.I., 7 May 2009, para. 4; *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Second Decision on the Prosecutor's Application under Article 58, ICC-02/05-03/09-1, P.T.Ch.I, 15 June 2010, para. 4; *The Prosecutor v Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, *supra* n. 396, para. 5. On the Contrary, Pre-Trial Chamber II simply, and more clearly, refused to use its powers. See, *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-01, P.T.Ch.II, 8 March 2011, para. 12; *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the



The issuance of a warrant of arrest or summons to appear determines the formal commencement of criminal proceedings before the Court. Before the trial opens, the ICC Statute establishes that the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial.<sup>444</sup> The hearing shall be held in the presence of the person and, only in exceptional scenarios *in absentia*.<sup>445</sup> As repeatedly explained by the Chambers, the confirmation hearing “is not a mini trial”; it is a “procedural step to ensure that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person or the persons committed the crimes with which they have been charged”.<sup>446</sup> The purpose of confirmation of charges hearings thus is to “to distinguish those cases that should go to trial from those that should not”.<sup>447</sup>

On the basis of the hearing, the Pre-Trial Chamber determines whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. The Chamber may confirm or decline to confirm the charges against the suspect; it may also decide to adjourn the hearing, requesting the Prosecutor to consider providing further evidence or conducting further investigation with respect to a particular charge or amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.<sup>448</sup>

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Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01, P.T.Ch.II, 8 March 2011, para. 12: “Regarding admissibility, the second sentence of article 19(1) of the Statute dictates that an admissibility determination of the case is only discretionary at this stage of the proceedings, in particular when triggered by the *proprio motu* powers of the Chamber. Accordingly, the Chamber shall not examine the admissibility of the case at this phase of proceedings.”

<sup>444</sup> Article 61, ICC Statute.

<sup>445</sup> Article 61(2), ICC Statute.

<sup>446</sup> *The Prosecutor v Bahar Idriss Abu Garda*, Second decision on issues relating to disclosure, ICC-02/05-02/09-35, P.T.Ch.I, 15 July 2009, para. 10. Also, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tENG, P.T.Ch.I, 29 January 2007.

<sup>447</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, P.T.Ch.I, 25 April 2008, para 6.

<sup>448</sup> Article 61(7) ICC Statute. In the decision for the confirmation of the charges against *Lubanga*, Pre-Trial Chamber I found that, in addition to the charges presented by the Prosecutor as to the commission of the crime of enlisting, conscripting and actively using children in hostilities in the context of a conflict not of an international character, the evidence submitted showed that the same conducts had been committed in the

When the charges are confirmed against an accused, they can be modified by the Prosecutor upon authorisation of the Chamber, but before the trial commences; during the trial, the Prosecutor can only withdraw charges.<sup>449</sup> At the end of the confirmation hearing, the case is therefore defined and ready for trial.<sup>450</sup>

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context of a conflict of an international character. The Chamber decided to amend the charges without adjourning the hearing, as normally required in article 61(7)(c)(ii) of the Statute, on the ground that the scope of protection of the Statute against the crime of enlisting, conscripting and using children for participation in hostilities “is similar, regardless of whether the conflict is characterised as of international or not international character”. See, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, *supra* n. 446, paras. 202-204. For a critique of the Chamber's decision not to adjourn, based on the distinction between conduct and crime, see, O. Bekou, 'Prosecutor v Thomas Lubanga Dyilo – Decision on the Confirmation of Charges', (2008) 8 HRLR, 343-355. On the opposite view, that the Prosecutor does not retain exclusive authority to amend the charges upon confirmation, J. A. Goldston, 'More Candour About Criteria. The Exercise of Discretion by the Prosecutor of the International Criminal Court', (2010) 8 JICJ, 383-406, 393. On the contrary, in *Bemba*, Pre-Trial Chamber III established the adjournment of the hearing on the ground that “the legal characterisation of the facts of the case may amount to a different mode of liability under article 28 of the Statute”, not envisaged by the Prosecutor. *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388, P.T.Ch. III, 3 March 2009, paras 46 ss. The Chamber subsequently confirmed the charges against the accused in accordance with the suggested mode of liability. See, *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P.T.Ch.II, 15 June 2009.

<sup>449</sup> Article 61(9) ICC Statute.

<sup>450</sup> Although the issue does not fall within the scope of the present work, it is worth noting the attempt of the Majority of Trial Chamber I in *Lubanga* to interfere with the charges selected by the Prosecutor. The Chamber had been triggered by a requests of the participating victims to the Chamber to trigger the procedure for a modification of the legal characterisation of the facts under regulation 55 of the Regulations of the Court, in order to include the crimes of sexual slavery and inhuman or cruel treatment among the charges against *Lubanga*. In its decision, the Majority of the Chamber held that paragraph 2 and 3 of regulation 55 of the regulations of the Court empower the judges to change the legal characterisation of facts also beyond the facts and circumstances described in the charges, thus allowing the incorporation of of additional facts and circumstances insofar as they come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges. The decision of the Trial Chamber was appealed by both the Defendant and the Prosecutor and finally reversed by the Appeals Chamber, on the ground that the last two paragraphs of regulation 55 cannot be used to exceed the facts and circumstances described in the charges or any amendment thereto. In addition to the finding that such a reading of regulation 55 of the Regulations of the Court would be incompatible with articles 74 (2) and 61(9) of the Statute, the higher Chamber recalled that it is the Prosecutor who, pursuant to article 54(1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61(1) and (3) of the Statute, proffers charges against suspects. To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute. See, from the case file of *The Prosecutor v Thomas Lubanga Dyilo*, *inter alia*, Joint Application of the Legal Representatives of Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891-tENG, 22 May 2009; Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, T.Ch.I, 14 July 2009; Clarification and further guidance to parties and participants in relation to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', ICC-01/04-01/06-2093, T.Ch.I, 27 August 2009; For an opposite view, *The Prosecutor v Thomas Lubanga Dyilo*, Second Corrigendum to 'Minority Opinion on the “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2069-Annx1, 31 July 2009; *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal

### 8.3 Challenges to the jurisdiction of the Court or the admissibility of a case

Article 19 of the Statute regulates litigations on the jurisdiction of the Court or the admissibility of a case before it. Judicial assessments of the admissibility of a case may be triggered, in accordance with article 19(2) of the Statute, by the accused or the person for whom a warrant of arrest has been issued under article 58 of the Statute, by the State with jurisdiction over the case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted it, and by the State for which acceptance of jurisdiction is required under article 12 of the Statute. Also the Prosecutor may seek a ruling of the Court on admissibility or jurisdiction.<sup>451</sup>

According to paragraph 4 of the provision, the State or the person may challenge the admissibility of a case only once. Such a challenge shall take place “prior to or at the commencement of the trial”. Only in exceptional circumstances, the Court may authorise that a challenge is brought more than once, or after the trial has commenced. In this latter case, however, challenges shall be only based only on article 17(1)(c) of the Statute, thus encompass cases already tried before a national court.

Whereas the letter of the provision makes it clear that a challenge may be presented immediately after the issuance of a summons to appear or a warrant of arrest, i.e., upon proceedings related to a given case commence, and at the hearing for the confirmation of charges, the interpretation of the reference to “commencement of the trial” has been debated before the ICC Judges.

In *Katanga*, before entering the merits of the challenge filed by the defendant, Trial Chamber II analysed whether the challenge had been presented at the right moment, i.e., prior to or at the

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characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, ICC-01/04-01/06-2205, A.Ch., 8 December 2009.

<sup>451</sup> Article 19(3) ICC Statute. In these proceedings, those who have referred the situation under article 13, as well as victims, may submit observations to the Court.

commencement of the trial, in accordance with article 19(4) of the Statute. Considering that the Statute establishes that challenges presented at the commencement of the trial or, exceptionally, at a later moment, must be based only on article 17(1) (c), the question of when does the trial commence was treated as a crucial starting point for the admissibility of the challenge, which had been presented in the period between the issuance of the Pre-Trial Chamber decision on the confirmation of charges and the commencement of the trial hearings.

Trial Chamber II adopted a restricted interpretation of “commencement of the trial”, establishing that the trial commences with the constitution of the Trial Chamber, immediately after the decision on the confirmation of the charges before the Pre-Trial Chamber. As a consequence, the Chamber found that the Statute establishes three different moments in which admissibility challenges may be raised, with different contents. First, before the decision on the confirmation of charges is filed, challenges may be raised on all grounds contemplated in article 17 of the Statute. Second, in a phase that is “fairly short”, as it goes from the filing of the decision on the confirmation of charges until the constitution of the trial chamber, challenges may be based only those on *ne bis in idem*. Third, after the establishment of the trial chamber, only challenges based on exceptional circumstances and with the granting of the Trial Chamber are admissible, and only on article 17(1)(c) grounds.<sup>452</sup> The Chamber, despite the finding that the challenge presented by Katanga fit under the third case, decided to admit the defendant's application, on the ground that the exceptional circumstances were met. Further, noting the impossibility for Katanga to obtain the relevant information and documents at a prior moment, the Chamber accepted to rule on the challenge raised by the Defence, despite the fact that it was based on articles 17(1) (a) and (b), and not on article 17(1)(c) as its interpretation of article

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<sup>452</sup> D. Jacobs, 'The Importance of Being Earnest: The Timeliness of the Challenge to Admissibility in Katanga', (2010) 23 LJIL, 331-342, 333-334, argues that the TC erred in limiting the grounds on which challenges to the jurisdiction of the Court may be presented after the confirmation of charges to the *ne bis in idem*. Also, it erred in saying that the commencement of the trial under 19(4) is the moment of the constitution of the trial chamber, rather than the making of opening statements. This unduly limits the possibility of the defendant challenge the admissibility of the case after the confirmation of the charges.

19(4) of the Statute would have required.<sup>453</sup>

A few months later, Trial Chamber III, triggered by a challenge to admissibility presented by Bemba, embraced a wider interpretation of “commencement of trial”, similar to the one already given by Pre-Trial Chamber I in a previous decision.<sup>454</sup> According to both Chambers, the trial commences when the opening statements are made, immediately before the beginning of the presentation of the evidence.<sup>455</sup> Trial Chamber III commented on Trial Chamber II’s interpretation, arguing that, in finding that the trial commences when the trial chamber is constituted, it had “unnecessarily” strained the language of article 19(4) of the Statute. According to Trial Chamber III, the exceptional circumstances and the limitation to challenges based on article 17(1)(c) apply only to challenges presented after the presentation of the evidence has commenced.

In relation to the moment against which admissibility shall be assessed, in *Katanga*, the defendant tried to foster the argument that, notwithstanding the moment in which the challenge is presented, it shall always be assessed against the facts and circumstances as they existed at the moment of the issuance of the warrant of arrest.<sup>456</sup> This interpretation was indeed an attempt of the Defence to give a factual basis to its challenge: the proceedings against the defendants initiated in DRC had been dismissed upon the issuance of an arrest warrant before the Court

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<sup>453</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *supra* n. 191, paras. 29-50.

<sup>454</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Status Before the Trial Chamber of the Evidence heard by the Pre-Trial Chamber and the Decision of the Pre-Trial Chamber in Trial Proceedings, and the Manner in which Evidence shall be Submitted, 01/04-01/06-1084, T.Ch.I, 13 December 2007, para. 39: “Although no definition is provided as to when the trial is considered to have begun, the Bench is persuaded that this expression means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses. This conclusion is based on the plain, unambiguous language of Article 61 (11) which states that: Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to Article 64 (4), shall be responsible for the conduct of subsequent proceedings and may exercise any function of the pre-Trial Chamber that is relevant and capable of application in those proceedings.”

<sup>455</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, *supra* n. 200, para. 210.

<sup>456</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, ICC-01/04-01/07-949, 11 March 2009, para. 58-65. At the time of the issuance of the arrest warrant against its defendant, proceedings were ongoing in DRC. Following the issuance of the warrant of arrest before the Court, these domestic proceedings were dismissed. Thus, according to the Defence, the case was inadmissible at the time of the issuance of the warrant of arrest.

and the transfer of Katanga to The Hague. Trial Chamber II did not touch upon the issue. The doubts, if any, were dissipated by the Appeals Chamber, which affirmed that

“[g]enerally speaking the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge.”<sup>457</sup>

The Chamber further explained that the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction, and these activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa. This is confirmed by the right granted to the Prosecutor under Article 19 (10) of the Statute to submit a request for a review of a previous decision on the inadmissibility of a case if satisfied “that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17”.<sup>458</sup> This right of the Prosecutor would be meaningless if the admissibility of a case would always have to be determined on the basis of the factual situation at the time the warrant of arrest is issued. The provision is expression of the assumption that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory. Furthermore, the chapeau of article 17(1) of the Statute indicates that the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the admissibility challenge. The chapeau requires the Court to determine whether or not the case “is” inadmissible, and not whether it “was” inadmissible.<sup>459</sup> The Appeals Chamber further notes that, if the Defence's interpretation were accepted, this would mean that it would be called to assess the correctness of the Pre-Trial

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<sup>457</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 56.

<sup>458</sup> Article 19(10) ICC Statute.

<sup>459</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 56.

Chamber's decision on the issuance of a warrant of arrest, and not the one of the Trial Chamber.<sup>460</sup>

As seen above, the first paragraph of Article 19 of the Statute, in addition to establishing that the Court shall satisfy itself that it has jurisdiction over a case, grants the opportunity to the Judges to determine *proprio motu* the admissibility of a case. In addition to the *proprio motu* assessments at the time of ruling on requests under article 58 of the Statute, already analysed, the provision has been applied by Pre-Trial Chamber II in the case of *Kony et al.* The Chamber decided to recur to its revisionary powers in order to re-state the Court's jurisdiction over the case.<sup>461</sup> In the decision, Pre-Trial Chamber II extensively discussed the discretionary powers of a Chamber to assess admissibility on its own motion. The Chamber affirmed that “the authority to decide whether the determination of admissibility should be made, and, in the affirmative, at what specific stage of proceedings such determination should occur, resides exclusively with the relevant Chamber”. The only limit for a Chamber is that “the proceedings must have reached the phase of a case”, as opposed to the preceding stage of the situation, which follows the commencement of investigations.<sup>462</sup> The Chamber also found that “the Statute does not rule out the possibility that multiple determinations on admissibility may be made in a given case”.<sup>463</sup> Nowhere it is said in the Statute that a challenge brought by either of the parties forecloses the bringing of a challenge by another equally legitimate party, nor that the right of either of the parties to bring a challenge is curtailed or otherwise affected by the Chamber's exercise of its *proprio motu* powers.<sup>464</sup> The Court may indeed need to address the issue several times, either as a consequence of multiple challenges of the parties or participants, or due to the possibility for a State or accused to bring a challenge more than once, on exceptional

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<sup>460</sup> Ibid., para. 57.

<sup>461</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009. See, *infra*, Chapter III.3.

<sup>462</sup> Ibid., para. 14.

<sup>463</sup> Ibid., para. 25.

<sup>464</sup> Ibid.

circumstances.<sup>465</sup> This interpretation is – the Chamber found – in line with the on-going nature of admissibility assessment, which depends on the circumstances of the case that may vary. Thus, the idea that a change in circumstances allows the Court to determine admissibility “anew” is consistent with the Statute.<sup>466</sup>

The Appeals Chamber, called by the Counsel for the defence to rule, *inter alia*, on the alleged Pre-Trial Chamber's improper use of its discretionary powers under article 19(1) of the Statute, clarified that its function is to “determine whether the determination on the admissibility is in accordance with the law”. In the case of *proprio motu* determinations of admissibility under article 19(1) of the Statute, the Appeals Chamber's functions extend to reviewing the exercise of discretion of the Chamber, in order to ensure that it has been exercised correctly. However, in order for the Appeals Chamber to interfere with such discretionary powers, the decision of a lower chamber to exercise its discretion has to be vitiated by an error of law, an error of fact or a procedural error, and “only if the error materially affected the determination”. As a consequence, the Appeals Chamber is to intervene only “under limited conditions”.<sup>467</sup> In the case at hand, having found that the lower Chamber had made no error that materially affected the determination on admissibility – mainly because the decision at hand was limited to “dispelling uncertainty”, as to who has the ultimate authority to determine the admissibility of the case, without entering the merits of an admissibility assessment – an interference with the exercise of discretion by the Pre-Trial Chamber “would be to usurp the powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.”<sup>468</sup>

Article 19 of the Statute further establishes that when a challenge is made by a State, the Prosecutor shall suspend the investigation until the Court decides on the issue of

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<sup>465</sup> Ibid., para. 26.

<sup>466</sup> Ibid., para. 28.

<sup>467</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Judgment on the Appeal against “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009, ICC-02/04-01/05-408, A.Ch., 16 September 2009, para. 80.

<sup>468</sup> Ibid., para. 79.



admissibility.<sup>469</sup> Pending a ruling of the Court, the Prosecutor may seek authorisation from the Chamber to pursue necessary investigative steps for the purpose of preserving evidence when there is a unique opportunity to obtain it, in accordance with article 18(6) of the Statute; to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun before the challenge was filed; or to prevent the absconding of persons subject to requests under article 58 of the Statute.<sup>470</sup> The making of a challenge does not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the filing of such challenge.<sup>471</sup>

The extensive recourse to proceedings under article 19 of the Statute in the first years of the activities of the Court, with two challenges to admissibility filed by two defendants, one by a State, and one *proprio motu* assessment by Pre-Trial Chamber II, examined in the next chapter, provided ample opportunities to further understand the scope and applicability of admissibility challenges and, consequently, the role of the ICC Judges and Prosecutor in admissibility assessments.

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<sup>469</sup> Article 19(7) ICC Statute.

<sup>470</sup> Article 19(8) ICC Statute.

<sup>471</sup> Article 19(9) ICC Statute.

## CHAPTER III - JUDICIAL ASSESSMENTS OF ADMISSIBILITY

### 1. Judicial assessments of admissibility

As emerged from the analysis of the provisions of the Rome Statute regulating admissibility, not all proceedings have yet found application before the Court. In particular, the proceedings contemplated in article 18 of the Statute, which create the first formal interaction between the Court and States in the assessment of admissibility of a situation, have not been utilised by any states. The situation in Kenya would indeed have provided the good framework for the applicability of the provision. As seen above, the ICC Prosecutor, upon failure of the informal negotiations held with the government to put in place a three-layered system of intervention in the country,<sup>472</sup> with the ICC and the Kenyan government sharing the responsibility of prosecuting the persons responsible for the commission of international crimes in the 2008 post-election disorders, and considering the failure of the Kenyan government to undertake any prosecutions, decided to initiate investigations *proprio motu*, in accordance with article 15 of the Statute.<sup>473</sup> The Prosecutor then was authorised by the Chamber;<sup>474</sup> one year later he requested the Chamber to issue summonses to appear for six suspects, distributed in two cases.<sup>475</sup>

Soon after the issuance of these summonses,<sup>476</sup> the Government of Kenya challenged the

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<sup>472</sup> Press Release, *ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya*, *supra* n. 346.

<sup>473</sup> *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, *supra* n. 366.

<sup>474</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *supra* n. 185.

<sup>475</sup> *Situation in Kenya*, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-30-RED2, O.T.P. 15 December 2010; *Situation in Kenya*, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-31-RED2, O.T.P. 15 December 2010.

<sup>476</sup> *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, and *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, *supra* n. 443.

admissibility of the two cases before the Court.<sup>477</sup> The issue will be analysed in further details below; suffice it to say that the Government's challenge was basically based on the allegation that the State was undertaking reforms that would have permitted the State to properly investigate and prosecute and that investigations were already on-going, although not exactly towards the same persons. The challenge was easily dismissed by Pre-Trial Chamber II;<sup>478</sup> the appeal presented by the Kenyan Government represented an opportunity for the higher Chamber to further clarify the contours of judicial assessments of admissibility in accordance with articles 17 and 19 of the ICC Statute.<sup>479</sup>

Although the situation of general inaction at the time of the ICC intervention and the very limited time frame within which a state shall present a request for referral – one month upon notification of the Prosecutor's intention to initiate investigation – would have probably made a Kenyan request to the Court to defer the investigation in accordance with article 18 unacceptable, the arguments presented by the Kenyan Government seem to better fit within these procedures rather than those under article 19 of the Statute.

The non-application of procedures of articles 18 of the Statute also depends on the fact that three out of the seven situations currently before the Court were self-referred to the Prosecutor; a fourth one – the one in Ivory Coast – was initiated *proprio motu* by the Prosecutor upon the

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<sup>477</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Application on behalf of the Republic of Kenya pursuant to article 19 of the ICC Statute, ICC-01/09-01/11-11, 31 March 2011; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Application on behalf of the Republic of Kenya pursuant to article 19 of the ICC Statute, ICC-01/09-02/11-11, 31 March 2011.

<sup>478</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 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-01/09-01/11-101, P.T.Ch.II, 30 May 2011 and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 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, P.T.Ch.II, 30 May 2011.

<sup>479</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307 and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “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-01/09-02/11-274, 30 August 2011.

receipt of a declaration of acceptance of the Court's jurisdiction in accordance with article 12(3) of the Statute. The situations in Darfur, Sudan and Libya were referred by the United Nations Security Council: procedures under article 18 of the Statute do not apply. The situation in Kenya would indeed be the only one which could have fostered such procedures.

Also the procedures under article 53 of the Statute, in the absence of any prosecutorial determination not to investigate or prosecute, have not yet been applied.

The ICC judges have, instead, been quite active in the context of procedures under article 19 of the Statute. In addition to the challenge of the Government of Kenya, the defendants Katanga and Bemba requested the Court to declare the inadmissibility of the cases against them. Before that, Pre-Trial Chamber II had activated *proprio motu* proceedings under article 19 of the Statute in relation to the case against Kony et al.

This chapter analyses in details the relevant submission in the context of these four set of proceedings. All these proceedings contribute to clarify that judicial assessments of admissibility in accordance with articles 17 and 19 of the Rome Statute are to be performed against the backdrop of the same case. It took almost five years to the Courts to clarify it and provide a reconstruction of the content and applicability of the admissibility procedures. At the end of the analysis of the judicial assessments of admissibility, the contours of admissibility, the scope and applicability of assessments of complementarity and the main actors of these phases, are clear.

It is worth noting, however, that none of the proceedings under article 19 of the Statute, culminated in a judicial decision on which forum should exercise jurisdiction in relation to the case under examination. They were, rather, non-decisions: in all these instances, the judges found that, given the absence of domestic proceedings, the cases were admissible before the Court due to lack of conflicts of jurisdiction.

## **2. The notion of case and the concept of inaction in Lubanga**

The first case selected in the context of the situation in the Democratic Republic of the Congo, and the very first one to be heard before the Court, is the one against Thomas Lubanga Dyilo.

Thomas Lubanga Dyilo is the alleged founder of the Union des Patriotes Congolais (UPC) and the Forces patriotiques pour la libération du Congo (FPLC) and the alleged former Commander-in-Chief of the FPLC and the alleged President of the UPC. He has been charged before the Court for the war crimes of enlisting, conscripting and using to participate actively in hostility children under the age of fifteen, punishable ex article 8 (2)(b)(xxvi) or 8(2) (e) (vii) of the Statute.

The parties presented their closing statements on 25 and 26 August 2011. At the moment of writing, the judgement of Trial Chamber I is expected.

Throughout the proceedings, the judges of Pre-Trial Chamber I and Trial Chamber I were often confronted with interpreting for the first time the provisions of the Rome Statute. One of the merits of Pre-Trial Chamber I have been its bravery in dealing with complex issues and providing its own interpretation of most of them.

The decision on the issuance of a warrant of arrest for Thomas Lubanga Dyilo became the milestone in the judicial interpretation of article 17 of the Statute and of the issue of admissibility of cases. As reported above, this decision, which also ruled on the Prosecutor's request to issue a warrant of arrest for Bosco Ntaganda, was overruled by the Appeals Chamber as to the gravity test proposed by the Chamber, as well as to its finding that the assessment of the admissibility of a case is a precondition for the issuance of a warrant of arrest.<sup>480</sup>

The decision contributed to shed light on the concrete scope, range and limits of the judicial assessment over the admissibility of a case. The general discourses on complementarity are clarified or corrected in light of the definition of situations and cases, adopted a few weeks

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<sup>480</sup> See *supra*, Chapter II.4 and 8.2.

earlier by the same Chamber,<sup>481</sup> and, most of all, of the strict test to be applied by the Chambers. The Chamber did not create anything: it correctly interpreted the statutory provisions.

The Chamber starts its analysis by dividing the admissibility test of a case arising from the investigation in two parts. The first part relates to national investigations, prosecutions and trials concerning the case at hand. The Chamber gives the correct reading of article 17 of the Statute, and states that the “case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(1)(a)to(c), 2 and 3 of the Statute”.<sup>482</sup> The second part of the test relates to the gravity threshold in accordance with article 17(1)(d),<sup>483</sup> which has been analysed above and will not be part of the present analysis.

A superficial reading of article 17 of the Statute, according to which the Court intervenes if States are unwilling or unable to do so, led many authors to misunderstand the content of the admissibility test related to the complementary nature of the Court *vis-à-vis* domestic courts.<sup>484</sup>

The Chamber clarified that first requirement for a case to be declared admissible before the Court is not the finding of the unwillingness or inability to genuinely carry out its proceedings. Rather, it is the finding that no State with jurisdiction over it is investigating, prosecuting, or trying that case, or has done so.<sup>485</sup> If the relevant State is investigating, prosecuting or trying the case, or has done so, then, in order to declare the case inadmissible, it is necessary to find that

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<sup>481</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 e VPRS 6, *supra* n. 301, para. 65.

<sup>482</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, para. 29.

<sup>483</sup> *Ibid.*

<sup>484</sup> Many authors refer to the admissibility test in such a way. See, among others, W. A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', *supra* n. 200, 731; J. Bacio Terracino, 'National Implementation of ICC Crimes. Impact on National Jurisdictions and the ICC', (2007) 5 JICJ, 421-440, 431; F. Lattanzi, 'Concurrent Jurisdictions between Primacy and Complementarity', in R. Bellelli. (Ed.) *International Criminal Justice. Law and Practice from the Rome Statute to its Review*, (Ashgate, London 2010), 181-210, 190; D. Y. Hewet, 'Sudan's Courts and Complementarity in the face of Darfur', (2006) 31YJIL, 276, 279; N. N. Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does it Really Contribute to Ending Impunity on the National Level?', *supra* n. 341, 95.

<sup>485</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, para. 30.

the State is not unwilling or unable to genuinely conduct these proceedings.<sup>486</sup>

The admissibility assessment is, at the time of ruling on a request for the issuance of a warrant of arrest, conducted in relation to the specific case that the Prosecutor is bringing before the Chamber. As a consequence, and in light of the definition of case as including “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”<sup>487</sup>, the Chamber found that

it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that the national proceedings encompass both the person and the conduct which is the subject of the case before the Court.<sup>488</sup>

The very first question to be answered when determining the admissibility of a case is, therefore, whether there are or there were domestic proceedings in relation to the very same case, i.e., directed towards the same person and addressing the same conduct which is the subject of the case before the Court. At the time of the Prosecutor's request for the issuance of a warrant of arrest against him, Thomas Lubanga Dyilo was detained by the DRC authorities. His arrest and detention were based, among others, on charges of genocide and crimes against humanity. In its application, the Prosecutor had presented two main arguments to the Chamber to demonstrate that the case against him was admissible. First, he had referred to the inability to undertake investigations and prosecutions of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002 alleged by the DRC government in its letter of referral. In the case at hand, the prosecutor alleged the likelihood of a release of the suspect before any trial commenced in DRC.<sup>489</sup> Second, the Prosecutor had submitted that, leaving aside the purported inability of the DRC to conduct the proceedings

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<sup>486</sup> Ibid., para 32.

<sup>487</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 e VPRS 6, *supra* n. 301, para. 65.

<sup>488</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, para. 31.

<sup>489</sup> Ibid., paras. 33-34.

against the suspect, these did not encompass the conduct that constituted the basis of the application before the Court.<sup>490</sup>

In its reasoning, the Chamber did not refrain from touching upon some of the arguments raised by the Prosecutor. The judges expressed doubts in relation to the Prosecutor's allegation that the DRC was unable to conduct proceedings, noting that some changes and developments had been undertaken in the domestic system.<sup>491</sup> The Chamber, however, did not enter the full details of the alleged inability of the system, as the very first step to be undertaken in an admissibility assessment is whether domestic proceedings, if any, are in relation to the specific case under examination.<sup>492</sup> The case against Thomas Lubanga Dyilo was admissible before the Court because the warrant of arrest issued by the competent DRC authorities contained no references to his alleged criminal responsibility for the alleged practice/policy of enlisting, conscripting and using to participate actively in hostilities children under the age of 15 for which the suspect had been brought before the Court, and no other state with jurisdiction over the case was acting or had acted in that respect.<sup>493</sup> In the presence of an inaction scenario, the admissibility of the case was not questionable.

With this decision, the concepts of inaction and notion of case are brought for the first time at the forefront of admissibility issues. This application of admissibility assessment was then used for all other cases brought before the Court, and became the standard explanation for the Prosecutor when determining and justifying the admissibility of a given case.<sup>494</sup> The approach has been followed by the Pre-Trial Chambers in their decisions on the issuance of warrants of

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<sup>490</sup> Ibid., para. 37, referring to paras. 18-19 of the Prosecutor's application. See also, Transcript of the hearing of 2 February 2006, ICC-01/04-01/06-T-1-RED, p 6, lines 11-14 and p. 8 lines 15-18.

<sup>491</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, *supra* n. 191, para. 36.

<sup>492</sup> Ibid., para. 37. Contrary to what held by S. Sàcouto and K. Clearly, 'The Katanga Complementarity Decisions: Sound Law but Flawed Policy', (2010) 23 LJIL, 363-374, 365, the Prosecutor did not base its application entirely on a purported inability of the DRC to investigate or prosecute Lubanga. The "same-conduct test" was already present in his submissions to the Chamber.

<sup>493</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, *supra* n. 191, paras. 39-40.

<sup>494</sup> *Situation in Darfur, Sudan*, Prosecutor's Application under Article 58(7), ICC-02/05-56, O.T.P., 27 February 2007.



arrests<sup>495</sup>, until the Appeals Chamber ruled that they should recur carefully to the exercise of their discretionary powers ex article 19(1) of the Statute. Since then, the Chambers tended to decline to use such powers.<sup>496</sup> The “same-person – same-conduct” test was also applied in the decisions on the Katanga and Bemba challenges to the admissibility of cases before the Court, as well as in the *proprio motu* assessment of Pre-Trial Chamber II in *Kony et al.*

### **3. The Pre-Trial Chamber II's *proprio motu* assessment of admissibility of the case against Kony et. al. The principle of “la compétence de la compétence”**

The situation in Uganda has been the first one to be referred to the Court, with Ugandan President Museveni's letter to the ICC Prosecutor at the end of 2003. Following the investigations, opened at the beginning of 2004,<sup>497</sup> the Prosecutor decided to request the Chamber to issue five warrants of arrest against the leader and other prominent figures of the LRA, the rebel group which fights against the government since the late 1980s, and which is responsible for the commission of several international crimes both in the territory of Uganda and in the neighbouring states.<sup>498</sup>

Despite the sound start of proceedings before the Court, since the issuance of the warrants of arrest in July 2005<sup>499</sup> no significant developments took place. The suspects are still at large, and

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<sup>495</sup> *Prosecutor v. Muhammad Harun (“Ahmad Harun”) and Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Prosecution Application under Article 58(7) of the Statute, *supra* n. 191, para. 24; on the investigations in Sudan in relation to crimes allegedly committed by Kushayb, and the relationship with the Court's “same-conduct test”, see, J. Pichon, 'The Principle of Complementarity in the Cases of the Sudanese Nationals *Ahmad Harun* and *Ali Kushayb* before the International Criminal Court', (2008) 8 ICLR 185-228, 225-226; by Pre-Trial Chamber III in *Prosecutor v Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo, *supra* n. 191, para. 21; also Trial Chamber II referred to the 'same person-same conduct' requirement in *Prosecutor v. Katanga and Ngudjolo Chui*, Reasons for Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *supra* n. 191, para. 81.

<sup>496</sup> See, *supra*, Chapter II.8.2.

<sup>497</sup> [Press Release, President of Uganda refers situation concerning the Lord's Resistance Army \(LRA\) to the ICC, \*supra\* n. 336.](#)

<sup>498</sup> K. P. Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', (2006) 4 JICJ, 179-187, 181.

<sup>499</sup> *Situation in Uganda*, Warrants of arrests for Vincent Otti; Warrants of arrests for Raska Lukwiya; Warrants of

no other cases have been brought to the attention of the Chamber. This notwithstanding, the Ugandan situation has provided interesting inputs for reflections and elaborations on the relationship between the Court's intervention in situations of on-going conflict, and peace processes attempts in the field.

In 2006, peace negotiations were resumed in Juba, South Sudan, between the Government and the LRA, under the auspices of the United Nations and the European Union, with the aim of signing a peace agreement and obtaining the cessation of the hostilities.<sup>500</sup> The agreement to be signed between the Ugandan Government and LRA representatives comprised a five points agenda, which encompassed the cessation of hostilities, a comprehensive solution with respect to the return, resettlement and rehabilitation of internally displaced persons, an accountability and reconciliation agreement, directed to person responsible for the commission of international crimes of both sides of the conflict, a permanent ceasefire agreement and a project on the disarmament, demobilisation and reintegration of LRA combatants. One of the main obstacles to the successful outcome of the negotiations was represented by the warrants of arrest pending before the Court for the leader of the LRA and some of his fellows, issued in 2005. The Government of Uganda found itself in a very delicate position, with, on the one hand, the prospect of finally reaching an agreement with the rebels, and, on the other, the problem of the ICC's activation over the situation.<sup>501</sup> The most controversial issue was represented by the Agreement on Accountability and Reconciliation and its Annex<sup>502</sup>, which did not mention the

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arrests for Okot Odhiambo; Warrants of arrests for Dominic Ongwen, *supra* n. 224.

<sup>500</sup> K. P. Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', *supra* n. 498, 183-185.

<sup>501</sup> M. Ssenyonjo, 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?', (2007) 7 ICLR, 361-389, 388-389. At the time, it was also debated whether the Government should apply to the UNSC to ask to use their powers of deferral in accordance with article 16 of the ICC Statute. See, K. P. Apuuli, 'The ICC's Possible Deferral of the LRA Case to Uganda', (2008) 6 JICJ, 801-813. On the possibility for the Government of Uganda to challenge the admissibility of the case before the Court, see, W. Burke-White, S. Kaplan, 'Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation', *supra* n. 344, 268-274.

<sup>502</sup> Annexure to the Agreement on Accountability and Reconciliation Between the Lord's Resistance Army and/Movement and the Government of Uganda, 19 February 2008 (hereinafter, Annexure), available at [http://www.iccnw.org/documents/Annexure\\_to\\_agreement\\_on\\_Accountability\\_signed\\_today.pdf](http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf) (Accessed 23 December 2011)

ICC involvement in the Uganda situation, and established that the Government would put in place a “unit” to carry out investigations and prosecutions especially against individuals who are alleged to have planned or committed widespread, systematic or serious attacks directed against civilians, or who have allegedly committed grave breaches of the Geneva Conventions. In addition, the Annexure foresaw the establishment of a special division of the High Court to try individuals who are alleged to have committed serious crimes during the conflict, and that, it established that the Government of Uganda shall ensure that serious crimes committed during the conflict are addressed by the Special Division of the High Court<sup>503</sup>, traditional justice mechanisms and any other alternative justice mechanism established under the principal agreement.<sup>504</sup>

The ICC judges reacted to the ambiguous signal sent by the Ugandan government. In February 2008, Pre-Trial Chamber II requested information to the Government on the status of the execution of the warrants of arrest that were pending before the Court, asking in particular to provide information on the steps undertaken or future steps in the implementation of the Agreement and the Annexure; the exact competence, in particular *ratione materiae* and *personae*, of the Special Division of the High Court, the categories of offences and alleged perpetrators to be subject of traditional or alternative justice mechanisms, and the impact of all these instruments on the execution of the warrants of arrest pending before the Court.<sup>505</sup> The Chamber set the deadline for the provision of such information on 28 March 2008, the same day in which the signature of the final peace agreement was supposed to take place. In its reply, the Government did not dissipate the ambiguities that had triggered the Chamber's request of information. While affirming that “[t]he Special Division of the High Court is not meant to

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<sup>503</sup> Ibid., Clause 7.

<sup>504</sup> Ibid., Clause 23. It is interesting to note what held by Allen in relation to traditional justice mechanisms in Uganda, T. Allen, 'Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda', in Waddell N., Clark P., (Eds.) *Courting Conflict? Justice, Peace and the ICC in Africa*, (Paperback, London 2008) 47-54.

<sup>505</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Request for information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, ICC-02/04-01/05-274, P.T.Ch. II, 29 February 2008.

supplant the work of the International Criminal Court” it held that “accordingly, those individuals who were indicted by the International Criminal Court will have to be brought before the special division of the High Court for trial.<sup>506</sup>

The Chamber did not further react to the government's assertions. In the meanwhile, the LRA representatives, upon several postponements, refused to sign the Final Peace Agreement.

In June 2008, the Chamber it issues another request to the Government to provide information on the status of the execution of the warrants of arrest. In the decision, the Court referred to both the Government's reply to the previous request and its ambiguous reference to the mandate of the High Court and its relationship with the ICC, and to the failure to sign the peace agreement, which had at that time become official.<sup>507</sup> The Government's reply reiterated its commitment to cooperate with the Court, without however clarifying the doubts as to the jurisdiction and mandate of the High Court Special Division.<sup>508</sup> Three months later, the Judges of Pre-Trial Chamber II decided to initiate proceedings under article 19(1) of the Statute.<sup>509</sup> In the Decision, they referred again to the ambiguity of the Ugandan Government responses and explained the “appropriateness” of a *proprio motu* determination of admissibility.<sup>510</sup>

The Prosecutor, the Defence, the Ugandan government and Victims submitted their observations on 18 November 2008. The Prosecutor highlighted that, despite his constant monitoring the situation, he had not identified any national proceedings in relation to the case against Kony et al. The case was therefore still admissible before the Court, and admissibility

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<sup>506</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Report by the Registrar on the Execution of the "Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest", ICC-02/04-01/05-286-Anx2, 28 March 2008, p.3.

<sup>507</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, ICC-02/04-01/05-299, P.T.Ch.II, 18 June 2008.

<sup>508</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Report by the Registrar on the Execution of the "Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest", ICC-02/04-01/05-305-Anx2, 10 July 2008.

<sup>509</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, ICC-02/04-01/05-320, P.T.Ch.II, 21 October 2008.

<sup>510</sup> *Ibid.*, p. 6.

was not affected by the negotiations between the Ugandan Government and the LRA nor by the Agreement on Accountability and Reconciliation.<sup>511</sup>

The Defence, instead of submitting observations on the admissibility of the case, raised a number of arguments touching upon the very legitimacy of the initiative undertaken by the Chamber, such as the opportunity of appointing one counsel for the four suspects at a stage of proceedings in which it was impossible for him to have contacts with them and the initiation of *proprio motu* proceedings in absentia, which gave rise to parallel proceedings before the Pre-Trial Chamber, the Presidency and the Appeals Chamber.<sup>512</sup>

The Government of Uganda observed that the case was still admissible before the Court. With the usual ambiguity, it alleged that the framework and processes envisaged in the Agreement on Accountability and Reconciliation and in the Annexure had been agreed upon “in anticipation of a comprehensive peace agreement whose legal significance, importance and credibility was to be confirmed by its execution by Mr Joseph Kony and the Government of Uganda”. In light of the failure of the LRA to sign the agreement, this and all the annexed protocols did not reach legal force, and, thus, the case is still admissible before the Court.<sup>513</sup>

The OPCV noted that, notwithstanding the legitimacy of the Chamber's exercise of its discretionary powers, the failure of the Ugandan government and of the LRA to sign the comprehensive peace agreement made the assessment on the admissibility of the case before the Court “moot”.<sup>514</sup>

Upon receipt of all observations, Pre-Trial Chamber II issued a decision on the admissibility of

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<sup>511</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Prosecution's Observations regarding the Admissibility of the Case against Joseph KONY, Vincent OTTI, Okot ODHIAMBO and Dominic ONGWEN, ICC-02/04-01/05-352, OTP, 18 November 2008.

<sup>512</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Submission of observations on the admissibility of the Case under article 19 (1) of the Statute, ICC-02/04-01/05-353, Defence, 18 November 2008.

<sup>513</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Report of the Registrar on the execution of the request to the Republic of Uganda for observations on the initiation of proceedings pursuant to Article 19 of the Rome Statute, ICC-02/04-01/05-354-Anx2, 18 November 2008.

<sup>514</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Observations on behalf of victims pursuant to article 19 1 of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes, ICC-02/04-01/05-349, 18 November 2008.

the case under article 19(1) of the Statute.<sup>515</sup> The decision, however, does not fully qualify as a “decision on admissibility”. Rather, the judges used their powers under article 19(1) of the Statute to “dispel the ambiguity” contained in the Ugandan Government statements, and to warn it that it did not have the faculty to decide on which forum should try the LRA leaders.<sup>516</sup> The Chamber clarified that, once the Court has been triggered and a case is pending before it, it is for the international body to decide about the competent forum to proceed.<sup>517</sup> According to the principle of “Kompetenz Kompetenz” or “la compétence de la compétence”, any judicial body, including any international tribunal, “retains the power and the duty to determine the boundaries of its own jurisdiction and competence.”<sup>518</sup> Such a power and duty is enshrined in the first sentence of article 19(1) of the Statute, which provides that “the Court shall satisfy itself that it has jurisdiction in any case brought before it”.<sup>519</sup> One of the major consequences entailed by this principle is that it is “for the judicial body whose jurisdiction is being debated to have the last say as to the way in which its statutory instruments should be construed”.<sup>520</sup> Since admissibility is the criterion allowing the Court to identify which cases, among those in respect of which it has jurisdiction concurrently with one or more national judicial systems, it is appropriate for it to investigate and prosecute under the complementarity regime, it is for the Chamber to construe and apply the rules on admissibility as well.<sup>521</sup> The Chamber then turned to the analysis of the specific circumstances of the case. After referring to the organizational and institutional developments in Uganda in relation to mechanisms to prosecute international crimes,<sup>522</sup> it found that all these implementations and

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<sup>515</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, *supra* n. 461.

<sup>516</sup> On the faculty of the Chamber to recur to the use of discretionary powers under article 19(1) of the Statute, see, *supra*, Chapter II.8.2. and 8.3.

<sup>517</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, *supra* n. 461, para. 45.

<sup>518</sup> *Ibid.*

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*, para. 46.

<sup>522</sup> *Ibid.*, para. 47.

changes in the system were at a very preliminary stage. Similarly, the Agreement and its annexes had not been signed.<sup>523</sup> As a consequence, the Chamber noted that only when – and if – such reforms became effective in Uganda, a determination on admissibility in accordance with Article 17 of the Statute can be made.<sup>524</sup> Further, the Chamber noted the need of commencing investigations or prosecutions on the case currently before the Court, in order to trigger proceedings on admissibility, in line with what the “same-conduct test” described by Pre-Trial Chamber I in Lubanga.<sup>525</sup>

The Chamber acknowledged that “it would be premature and therefore inappropriate to assess the features envisaged for the Special Division and its legal framework” and that, as a consequence, “the purpose of the proceedings remains limited to dispelling uncertainty as to who has ultimate authority to determine the admissibility of the case: it is for the Court, and not for Uganda, to make such determination.”<sup>526</sup> Pending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the case has to be determined remained therefore identical to the one at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.<sup>527</sup>

On 16 March 2008, the Defence filed its appeal against Pre-Trial Chamber's decision,<sup>528</sup> which was then rejected by the Appeals Chamber.<sup>529</sup> The issues objects of the appeals proceedings were mainly related to the Pre-Trial Chamber II's alleged improper use of discretionary powers

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<sup>523</sup> Ibid., para. 49.

<sup>524</sup> Ibid.

<sup>525</sup> Ibid., para. 50.

<sup>526</sup> Ibid., para. 51.

<sup>527</sup> Ibid., para. 52.

<sup>528</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Defence Appeal against 'Decision on the admissibility of the case under article 19 (1) of the Statute' dated 10 March 2009, ICC-02/04-01/05-379, 16 March 2009.

<sup>529</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, *supra* n. 467.

under article 19(1) of the Statute, and the related scope of the Appeals Chamber's powers to review a lower Chamber's exercise of discretion.<sup>530</sup> The Appeals Chamber clarified that, for it to interfere with the lower Chamber's exercise of discretionary powers under article 19(1) of the Statute, such exercise shall be vitiated by an error of law, an error of fact or a procedural error, which materially affect the determination. In light of the content of the contested decision, which was limited to dispelling uncertainty as to who, between the Government of Uganda and the Court, had the ultimate authority to determine the admissibility of the case, and the related absence of prejudice for the right of the suspects, the Chamber found unnecessary to enter the merits of Pre-Trial Chamber II's exercise of discretion.<sup>531</sup>

#### **4. The Katanga's challenge to the admissibility of the case before the Court. The correct interpretation and application of article 17 of the ICC Statute**

The same person – same conducts test that was applied since Lubanga was deeply discussed for the first time in *Katanga*, when the defendant filed a motion challenging the admissibility of the case against him in March 2009.<sup>532</sup>

Germain Katanga, alleged former commander of the Force de Résistance Patriotique en Ituri (FRPI) is accused, jointly with Mathieu Ngudjolo Chui, of war crimes and crimes against humanity, such as sexual slavery, rape, murder and use of children under the age of fifteen to take active part in the hostilities, allegedly committed during an attack to the Village of Bogoro on 24 February 2003.<sup>533</sup> At the moment of writing, the trial is on-going before Trial Chamber II.

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<sup>530</sup> See, *supra*, Chapter II.8.3.

<sup>531</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, *supra* n. 467, paras. 79-80.

<sup>532</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, *supra* n. 456.

<sup>533</sup> *The Prosecutor v. Germain Katanga*, Warrant of arrest for Germain Katanga, ICC-01/04-01/07-1, P.T.Ch.I, 2 July 2007; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Joinder of the



Before being transferred to the Court on 17 October 2007, Katanga was detained in DRC for charges of 'atteinte a la suretè de l'Etat' and several counts of genocide and crimes against humanity allegedly committed in Ituri between May 2003 and December 2005.

On 11 March 2009, the Defence for Germain Katanga filed the first article 19 challenge to the admissibility of the case before the Court.<sup>534</sup> The Defence based its challenge on a vehement critique of the “same person – same conduct” test. It argued that such test is contrary to the purposes of the Statute and the spirit of complementarity.

In its submission, the Defence raised several arguments that underline the confused interpretation of article 17 of the Statute and of the procedures related to admissibility that were common among practitioners and scholars<sup>535</sup> in the first years of activity of the Court. In particular, in confuting the interpretation of the scope for the admissibility of a case before the Court, it confuses the legal and the policy or discretionary dimensions of complementarity. Also the decision of Trial Chamber II revealed some uncertainties in the interpretation and application of Article 17 of the Statute. In this context, the Prosecutor's elaboration on the notion of case, and the Appeals Chamber's reconstruction of the correct reading of article 17 of the Statute, contribute to a better understanding of the issue. Given the relevance of the arguments raised by all participants, the next sessions will provide a throughout analysis of each relevant submission, as well as of the Trial and Appeals Chambers' decisions.

#### **4.1 The Defence Challenge to the “same person-same conduct test”**

The Defence motion was based on a critique of the Court's interpretation and application of

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Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, ICC-01/04-01/07-257, P.T.Ch.I, 10 March 2008.

<sup>534</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, *supra* n. 456.

<sup>535</sup> See *supra*, n 484. Also Nouwen, quoted by the Defence, by criticising the “same person same conduct test” and hoping that in the future other Chambers deviate from this understanding of the admissibility test, confuses the judicial with the discretionary function. See, S. Nouwen, 'Finetuning Complementarity', in B. Brown (Ed.), *Research Handbook on International Criminal Law* (Edward Elgar, Cheltenham 2011) 206-230, 212. Critical, D. Robinson, 'The inaction controversy: Neglected words and new opportunities', and 'The Mysterious Mysteriousness of Complementarity', *supra* n. 202.

complementarity. In the Defence's view, complementarity as interpreted and applied by the Court was *de iure* of complementarity, but *de facto* nothing less than primacy of the ICC over national courts.<sup>536</sup> The Defence asked the Chamber to declare the inadmissibility of the case against Germain Katanga on the basis of two main arguments.

The first set of arguments addressed the admissibility test developed by Pre-Trial Chamber I in Lubanga, and in particular the requirement that for a case to be declared inadmissible before the Court – safe considerations of willingness and ability – it should entail the same person and involve the same conducts of a case held before domestic courts.

The Defence did not object the findings that article 17(1)(a) refers to on-going investigations and prosecutions, and that inaction at the domestic level leads to the admissibility of a case before the Court.<sup>537</sup> Rather, it contested the 'same conduct test' as developed by the Pre-Trial Chamber I in Lubanga, and the judges' consequent refusal to examine the alleged DRC inability to genuinely carry out proceedings in relation to that case. The Defence brought the example of an individual accused of participating in unlawful attacks on ten villages, each of them amounting to the commission of crimes against humanity. Under the 'same conduct test', if the person was investigated or prosecuted for attacks on nine villages over the ten involved, a case on the crimes committed in the tenth village would be admissible before the Court. According to the Defence, such a reading of article 17 of the Statute would be inconsistent with the intentions of the drafters to establish a complementary ICC, as this would turn to primacy, with the Prosecutor “in a position to put an end to serious investigations and prosecutions at the national level”.<sup>538</sup> The notion of “case” shall be interpreted in light of the objects and purposes

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<sup>536</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, *supra* n. 456.

<sup>537</sup> *Ibid.*, para. 28.

<sup>538</sup> *Ibid.*, para. 39. See also what held in the reply to the Prosecutor's submission on the relationship between the complementary nature of the Court and the fight against impunity from the perspective of admissibility and case selection. According to the Defence, the Prosecutor, with his decision to intervene in the present case, breaches the essential basis for complementarity, which is to let national systems get on with investigations and trials when they can and thereby, as a consequence, preserve the ICC's limited sources for alternative, worthy causes. The fight against impunity is not best assisted by the kind of intervention displayed in the case under

of article 17 of the Statute, and not equated, according to the “narrow” interpretation applied, to article 20 standards.<sup>539</sup>

In alternative to the “same person-same conduct test”, the Defence proposed two tests to be applied in combination by the Chambers and the Prosecutor when determining the admissibility of a case with respect to complementarity. The first is a 'comparative-gravity test' that “would amount to comparing the gravity of the (intended) scope of investigations at the national level and the (intended) scope of investigations by the ICC Prosecutor”. According to this test, “only when the scope of investigations by the ICC Prosecutor would significantly exceed in gravity the scope of national investigations, would the admissibility threshold be met.” A typical case would be the discrepancy between domestic prosecutions based on war crimes and the ICC prosecutor's focus on genocide.<sup>540</sup>

The second test, the 'comprehensive conduct-test', is based on the idea that “one has to compare the factual scope of investigations”.<sup>541</sup> Only when the scope of Prosecutor's investigations is significantly more comprehensive than the scope of national investigations, there would be a basis for admissibility. According to the Defence, the Prosecutor has a duty to assist states; such a duty is not directly required by the Statute, but is within the very meaning of complementarity. As a consequence, the first step that the Prosecutor has to undertake upon finding that domestic cases would not pass the 'comprehensive conduct test' is to inform

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consideration. International criminal law is about the “intelligent use of scarce resources”; the Prosecutor exercises discretion as to the selection of the conducts to be brought before the Court and, as a natural consequence, certain conducts will remain unpunished”. An approach to complementarity allowing the Prosecutor to put an end to legitimate national efforts – especially when States out of convenience or for other reasons do not challenge the OTP – on the sole basis that a tiny part of the case would not be investigated by national authorities shall be deemed inconsistent with the object and purpose underlying article 17 of the Statute and with an effective fight against global impunity. *The Prosecutor v. Katanga and Ngudjolo Chui*, Public Redacted Version of Defence Reply to “Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)”, ICC-01/04-01/07-1015, 1 April 2009, para. 23.

<sup>539</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, *supra* n. 456, para. 43.

<sup>540</sup> *Ibid.*, para. 46.

<sup>541</sup> *Ibid.*, para. 47.

national authorities and cooperate with them.<sup>542</sup>

The second argument brought by the Defence was based on the alleged wrongfulness of the 'same conduct test'. According to the Defence, the application of the alternative tests proposed would have led to a finding of action of DRC courts. As a consequence, the Chamber should have then had evaluated the willingness and ability of the State.

In order to substantiate this argument and overcome the problem represented by the discontinuance of domestic proceedings against Katanga upon issuance of the warrant of arrest against him before the Court, the Defence argued that the admissibility of a case should be evaluated with respect to the circumstances existing at the time of the decision on the issuance of a warrant of arrest. It was only at a later moment, i.e. after the issuance of the warrant of arrest by PTCI, that the DRC government dropped the allegations against Katanga. The proceedings before domestic courts did not reveal any unwillingness or inability of the DRC to genuinely investigate or prosecute the accused. The fact that the DRC government had self-referred the situation to the Court shall not constitute a basis for the admissibility of the case. The referral was “of a general nature”, and the sole reference to the DRC inability to try persons responsible for the commission of international crimes “can, in and of itself, not be a basis for admissibility”.<sup>543</sup>

#### **4.2 The Prosecution's elaboration on the notion of case**

In its reply, the Prosecutor argued that the 'same conduct test' is the correct test to be applied to the determination of the admissibility of a case before the Court in light of its complementary. As a consequence, as the defendant was not investigated in DRC for the crimes for which he was charged before the Court, the case was admissible in accordance with article 17 of the Statute.

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<sup>542</sup> Ibid, para. 48.

<sup>543</sup> Ibid., paras. 60-64.

According to the Prosecutor, the “same-person same-conduct test” is consistent with the language, the drafting history and the purposes of the Rome Statute. The test proposed by the Defence – and its understanding of the notion of case – on the contrary, reflected “alternative policy judgements that should be made by the Assembly of States Parties, not by the Chambers”.<sup>544</sup>

The Prosecutor reconstructed the meaning of the notion of “case” in light of articles 31 and 32 of the Vienna Convention on the Law of Treaties and of a contextual reading of the notion in light of articles 17, 20(3) and 89 of the Statute and of the drafting history of article 17 of the Statute.<sup>545</sup> In its ordinary meaning, the term “case” shall be understood “as being constituted by the underlying event, incidents and circumstances – i.e. in the criminal context, the conduct of the suspect in relation to a given incident.”<sup>546</sup> A case “must thus be based on particular facts, incidents and conducts related to a crime within the jurisdiction of the Court”; the ordinary meaning of the term given in Article 17 of the Statute “requires the Court to determine whether that specific subject-matter is being investigated or prosecuted by national authorities”.<sup>547</sup>

Not only Pre-Trial Chambers consistently applied the “same conduct test”; also the Appeals Chamber found that “[o]nce the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged”.<sup>548</sup> Further, regulation 52(b) of the Regulations of the Court clarifies that the charges in turn encompass “the facts, including the time and place of the

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<sup>544</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Public Redacted Version of the 19<sup>th</sup> March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07-1007, 30 March 2009, para. 4.

<sup>545</sup> The arguments presented by the OTP are in large part based on a paper published a few months before the filing of the defence challenge in Katanga, and authored by a member of the OTP: R. Rastan, 'What is a 'Case' for the Purpose of the Rome Statute?', *supra* n. 300.

<sup>546</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Public Redacted Version of the 19<sup>th</sup> March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), *supra* n. 544, paras. 58-59.

<sup>547</sup> *Ibid.*, para. 60.

<sup>548</sup> *Ibid.*, para 62, referring to *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, A.Ch., 11 July 2008, para 62.

alleged crimes, which provide a sufficient basis to bring the person or persons to trial”.<sup>549</sup>

The ordinary meaning given to “case” is also consistent with the Statute as a whole. Particular consideration was given to the way in which articles 17 and 20(3) of the Statute “operate together to implement the system of complementarity”. According to the Prosecutor, the principle of *ne bis in idem*, contained in article 20(3) is an integral part of article 17 of the Statute, as demonstrated by its inclusion in paragraph (1)(c) of the latter. The three situations described in article 17(1)(a) to (c) “cover a State's complete range of activities with regard to criminal procedure from the opening of an investigation until the final judgement, leaving no loopholes”.<sup>550</sup> The principle of *ne bis in idem* relates to a very specific notion “based on the same cause, same acts or same offence”. In the context of the Court, this would be represented by the charges, which include the conduct that forms the basis of the crime for which the person is brought to trial: both articles 17(1)(c) and 20(3) of the Statute expressly refer to “the same conduct”. Different subparagraphs of article 17(1) of the Statute cannot be assigned different meanings, and, thus, the notion of case and the assessment of its admissibility are to be associated to the same conduct.<sup>551</sup>

The Prosecutor corroborated his assumptions through a contextual reading of the relevant provisions of the Statute. Part IX of the Statute contains provisions that deal with scenarios in which a different case is being run at the national level. Articles 89(4) and 94 of the Statute, which deal respectively with the surrender of a person to the Court and the postponement of execution of a request in respect of on-going investigation or prosecution, expressly contemplate the potential for conflicts between the prosecution of a case before the Court and the prosecution of other cases at the national level.<sup>552</sup> The issue is therefore not regulated by the provisions governing complementarity and admissibility, but by those contained in part IX of

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<sup>549</sup> Ibid., para. 63.

<sup>550</sup> Ibid., para. 71. Quoting I. Tallgren, A. Resinger Coracini, *supra* n. 232.

<sup>551</sup> Ibid., para. 73.

<sup>552</sup> Ibid., para. 77. Article 90, on the contrary, regulates instances of competing requests for extradition among a third state and the court with respect to the same case.

the Statute. When, on the contrary, the case is the same, as also reflected in article 89(2) which refers to conflicts raised by *ne bis in idem*, provisions on admissibility apply.<sup>553</sup>

The Prosecutor then concluded that

The 'same conduct' test ensures comprehensive accountability for all relevant criminal conducts in a manner which is consistent with the object and purpose of the Statute. The fact that a specific mechanism is established in part 9 for dealing with situations relating to different cases demonstrates that the Statute's admissibility provisions must relate to instances involving the same "case", in the precise meaning of the term, i.e., the same conduct.<sup>554</sup>

The Prosecutor further noted that the understanding of the term "case" was also "uncontroversial" throughout the drafting of the Statute, since the 1994 ILC draft.<sup>555</sup> Further, its narrow definition and the "same conduct test" are not in contrast with the purpose and proper interpretation of complementarity. The Statute and the complementarity regime aim at achieving a number of goals, including the ending of impunity and the reaffirmation of the pre-existing obligations of States under international law. The respect for State's sovereignty shall not be seen as the unique and overriding object; similarly, a State may well favour a sharing of responsibilities between the ICC and national authorities in response to situation of mass atrocities.<sup>556</sup>

As to the alternative tests proposed by the Defence, the Prosecutor noted that they have no basis in the Statute; are vague; have no link with the notion of case under article 17 of the Statute, and, if applied, would lead to absurd or inconsistent results, by requiring the Chamber "to engage in speculative assessments that fall beyond the range of criteria spelt out in the letter of the Statute". Certain cases would remain unpunished, as they will be neither prosecuted at the domestic level nor before the ICC, thus countering the key objective of the Statute, and of the

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<sup>553</sup> Ibid., para. 80.

<sup>554</sup> Ibid., para. 82.

<sup>555</sup> Ibid., paras. 84-85.

<sup>556</sup> Ibid., para. 86.

principle of complementarity, to contribute to ending impunity.<sup>557</sup>

The Prosecutor also discussed the Defence's allegation that the organ of accuse bears a duty to assist States in their investigation. According to the Prosecutor, such a duty is not contemplated in the ICC Statute: the OTP does not bear any burden to convince the PTC that it has taken all steps that could be reasonably expected to assist the State in its national investigations or prosecutions, as alleged by the Defence. Rather, the decision of a pre-trial Chamber on the application for a warrant of arrest is limited to consideration of the factors expressly prescribed in article 58.<sup>558</sup> The Court “was not created to be an international investigative bureau with resources to support national authorities.” Rather, it is “a judicial body” with jurisdiction over the most serious crimes of international concern and established to be complementary to national criminal jurisdictions,<sup>559</sup> as also demonstrated by the fact that article 93(10) of the Statute, which deals with requests for cooperation from States to the Court, does not impose an obligation to the ICC to render assistance to States.<sup>560</sup>

Given the validity of the same conduct test, and the relative finding of the inaction of domestic Courts in relation to that case, the purported willingness and ability of the DRC to prosecute Katanga was not to be analysed by the Chamber. This notwithstanding, the Prosecutor recalled the inability alleged by the DRC President in his letter of referral was reaffirmed in other subsequent statements, and the DRC authorities did not undertake any steps to investigate or prosecute the Bogoro incident, or to challenge the admissibility of the case.<sup>561</sup>

#### **4.3 Trial Chamber II Decision: a second form of unwillingness**

Three months after the filing of the Defence's challenge, Trial Chamber II, found that the case against Germain Katanga was admissible in accordance with article 17 of the Statute. The

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<sup>557</sup> Ibid., para. 92.

<sup>558</sup> Ibid., paras. 98-99.

<sup>559</sup> Ibid., para. 100.

<sup>560</sup> Ibid., para. 101.

<sup>561</sup> Ibid., paras. 46-50.



Chamber's decision will not be remembered as an exemplary ruling on admissibility and complementarity. Quite the contrary: the Chamber showed to be confused with respect to issues related to admissibility and complementarity, and avoided to directly deal with the most complex and intriguing ones, i.e., the correctness of the same conduct test and the notion of case, which had been raised by the Defence and object of the detailed and substantiated Prosecutor's response.

The Chamber founded its reasoning on the (incorrect) assumption that “according to the Statute, the Court may only exercise its jurisdiction when a State which has jurisdiction over an international crime is either unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators.”<sup>562</sup> Without analysing in detail the other elements of article 17(1)(a) or (b) of the Statute, i.e., the existence of investigations or prosecutions in relation to the case at hand, the Chamber directly turned to the question of the unwillingness of the DRC to prosecute the Appellant. It noted that the term “unwillingness” defined in article 17(2) of the Statute referred to “unwillingness motivated by the desire to obstruct the course of justice”, the typical example being the case of a State “which has no intention of bringing a person to justice, because it wants to shield that person from criminal responsibility.”<sup>563</sup>

According to the Chamber, that “unwillingness” is not the only one contemplated within the meaning of the Rome Statute. A second form of unwillingness, not expressly provided for in article 17 of the Statute, relates to the case of a State that does not want specifically to protect a person, but for different reasons prefers not to exercise its jurisdiction over him or her. This “second form of unwillingness” corresponds to the will of a State to bring the person concerned to justice, although before a jurisdiction other than the national one, and is fully in line with the object and purposes of the Statute. It fully respects the drafter's intention to “put an end to impunity” and, at the same time, adheres to the principle of complementarity, which was

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<sup>562</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), supra n. 191, para. 74.

<sup>563</sup> *Ibid.*, para. 76.

“designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so”.<sup>564</sup> As holder of this right, “the State may waive it, just as it may choose not to challenge the admissibility of a case, even if there are objective grounds for it to make a challenge.”<sup>565</sup> Noting the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes contained in the sixth paragraph of the Preamble to the Statute, the Trial Chamber considered that a State was still complying with its duties under the complementarity principle “if it surrenders a suspect to the Court in good time”.<sup>566</sup> Thus, a State may refer a situation to the Court “if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case”.<sup>567</sup>

As to the Defence's observation that “the accused cannot become the victim of a sort of burden sharing between the DRC and the Prosecutor” and that the acceptance of a “waiver of complementarity” would render the right of the accused to challenge the admissibility of a case “theoretical and illusory,”<sup>568</sup> the Chamber noted that the conditions under which trials are conducted before the Court do not attain to issues of admissibility and that all States parties have accepted that their nationals may be transferred to the Court if it issues a warrant for their arrest.<sup>569</sup> Any form of “waiver” on the part of a State, based on article 17(1)(a) or (b) of the Statute, does not in any way deprive the Defence of its right to challenge the admissibility of a case on the basis of the *ne bis in idem* principle or on the level of gravity of the case”.<sup>570</sup> In the case at hand, the DRC government had expressed its willingness not to bring the perpetrator to justice before domestic courts. A Defence challenge can only be done within the scope of the expression of the sovereignty of the State:

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<sup>564</sup> Ibid., para. 78.

<sup>565</sup> Ibid.

<sup>566</sup> Ibid., para. 79.

<sup>567</sup> Ibid., para. 80.

<sup>568</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, *supra* n. 456, para. 26.

<sup>569</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *supra* n. 191, para. 84.

<sup>570</sup> Ibid., para. 87.

[e]ven assuming that investigations had been underway in a State against an accused person for crimes wholly identical to those which are the subject of a warrant issued for his or her arrest by the Court, the expression of the unwillingness of the State to bring the accused to justice before its own courts can be such that it can only result in a Chamber declaring the case admissible. Consequently, in the face of such a clearly expressed determination, there would be no need for the Chamber to undertake a comparative assessment of the cases brought before national and international courts and, thereby, apply any given admissibility test.<sup>571</sup>

Turning to the facts of the case, the Trial Chamber explained that in assessing the willingness of the DRC, it took into consideration the intention of the State that the person concerned be brought to justice, together with its unwillingness to prosecute him domestically. The DRC has therefore left it to the Court to try Germain Katanga for the acts committed on 24 February 2003 in Bogoro.<sup>572</sup>

#### **4.4 The Appeals Chamber judgement and the interpretation of article 17(1)(a)to(c)**

The Defence appealed the Trial Chamber's decision, in accordance with article 82(1)(a) of the Statute, on five grounds.<sup>573</sup> Among them, the Appeals Chamber was asked to rule on whether the Trial Chamber had erred in defining unwillingness in light of article 17(2) of the Statute and of complementarity. The Appeals Chamber dismissed the appeal and confirmed TCII's decision. In doing so, it gave a detailed interpretation of article 17(1) of the Statute: this decision became a milestone for future decisions on admissibility.

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<sup>571</sup> Ibid., para. 88.

<sup>572</sup> Ibid., paras. 90-95.

<sup>573</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber 'motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire', ICC-01/04-01/07-1234, Defence, 22 June 2009, and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Document in Support of the Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber 'motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire', ICC-01/04-01/07-1279, Defence, 8 July 2009. The issue of whether the challenge to admissibility was filed out of time, as found by the Trial Chamber, the one of whether the Prosecutor is obliged to bring to the attention of the Pre-Trial Chamber the documents in relation to the admissibility of a case, rejected by the Chamber, are of no relevance for the present analysis.

In his submissions, the appellant pointed to TCII's erroneous enlargement of the definition of unwillingness, not intended by the drafters of the Statute, not in compliance with the objective and purpose of the latter, and contrary to the fundamental values underlying complementarity. According to the Defence, article 17(2) of the Statute contains an exhaustive list of criteria to determine unwillingness, which therefore does not leave room for discretion to rely on other forms of unwillingness. Further, the Trial Chamber's interpretation of complementarity violates paragraph 6 of the Preamble to the Statute, which recalls the duty of states to prosecute, as well as the fundamental values underlying complementarity.<sup>574</sup> If states were granted an “unconditional right not to prosecute”, this would “seriously jeopardize any encouragement of States to prosecute domestically and thereby endanger the correct application of the principle of complementarity” and “negate this persisting and primary responsibility for States to prosecute international crimes”. It is clear from the intention of the drafters of the Statute that the Court “may only exercise its jurisdiction over a case if a State is unwilling or unable genuinely to bring a person to justice, not if it simply prefers the ICC to take over the case”.<sup>575</sup>

The Prosecutor reiterated its interpretation of article 17 of the Statute, and the fact that the question of unwillingness arises only if and when there are investigations or prosecutions in a State having jurisdiction over the case. In this context, the question of the correctness of TCII's interpretation of unwillingness is irrelevant. Further, the Prosecutor held that Trial Chamber II, despite the characterisation of its findings as a second form of “unwillingness”, had in substance addressed the question of whether the DRC was conducting investigations or prosecutions into the case under examination and had correctly found, in substance, that the situation was characterised by inactivity, not by unwillingness. The Chamber had also implicitly

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<sup>574</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Document in Support of the Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber 'motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire', *supra* n. 573, para. 71.

<sup>575</sup> *Ibid.*

applied the “same-conduct test”.<sup>576</sup> The Trial Chamber made no error in the way it treated the submissions of the DRC and in giving them substantial weight. The Court cannot force a State to open investigations or to prosecute a case; further, the admissibility provisions “do not empower the Court to refuse to take up jurisdiction because it believes a State could or should have”. Although the preference “is for States to deal with cases domestically”, the Statute imposes the Court the duty to act when there are no national proceedings in relation to a particular case. In this context, the principle of complementarity “can neither be applied to force national proceedings, nor can it be applied to effectively perpetuate impunity”.<sup>577</sup>

In its judgment, the Appeals Chamber gave an in-depth interpretation of the admissibility requirements under article 17 of the Statute, kindly pointing to and correcting the mistakes of the Trial Chamber. It noted the failure of the lower chamber to address in detail the other elements of which article 17(1)(a) and (b) of the Statute is composed, before and in addition to unwillingness and inability. The Appeals Chamber agreed with the Prosecutor that the question of unwillingness or inability of a State having jurisdiction over the case becomes relevant only where, due to on-going or past investigations or prosecutions in that State, the case appears to be inadmissible. The Appellate Judges explained that Article 17(1)(a) of the Statute covers a scenario where, at the time of the Court's determination of the admissibility of the case, investigations or prosecutions are taking place in a State having jurisdiction, as expressed by the use of the present tense, “[t]he case is being investigated or prosecuted by a State.” Article 17(1)(b) of the Statute covers a similar scenario, in which a State having jurisdiction has investigated a case, but “decided not to prosecute the person concerned”.<sup>578</sup> In both articles 17(1)(a) and (b) of the Statute, the questions of unwillingness or inability are linked to the

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<sup>576</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the Prosecution's Response to the Document in Support of the Appeal, ICC-01/04-01/07-1349, O.T.P., 31 July 2009, paras. 58-59.

<sup>577</sup> *Ibid.*, para. 82.

<sup>578</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194.

activities of the State having jurisdiction. In Article 17(1)(a) such activities are the performance of on-going investigations or prosecutions: they entail the inadmissibility of the case, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. The use of the definite article “the” instead of the indefinite “a” emphasises that reference is made to an investigation or prosecution that is on-going at the moment of the assessment. Similarly, in article 17(1)(b), unwillingness and inability refer to the decision of a State, after investigation, not to prosecute the person concerned “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”.<sup>579</sup>

This interpretation of article 17(1)(a) and (b) of the Statute is in line with article 17(2)(a) of the Statute, which refers to “proceedings [that] were or are being undertaken at the national level”. The same holds true with respect to sub-paragraph (b), which uses the verb “has been” in conjunction with the phrase “unjustified delay in the proceedings” to indicate that the test of unwillingness applies to proceedings that have already started. Also sub-paragraph(c) speaks of “proceedings [that] were not or are not being conducted independently.”<sup>580</sup> Therefore, in 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 on-going 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 questions of unwillingness or inability do not arise; the failure of a State to investigate or prosecute, i.e., State's inaction, renders a case admissible

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<sup>579</sup> Ibid., para. 76.

<sup>580</sup> Ibid., para. 77.

before the Court, subject to the gravity assessment under article 17(1)(d) of the Statute.<sup>581</sup>

As a consequence, according to the Appeals Chamber, the interpretation of article 17(1) of the Statute proposed by the Appellant, that unwillingness and inability should be considered in case of inaction is not sustainable. It is irreconcilable with the wording of the provision of the Statute and conflicts with a purposive interpretation of the latter. The aim of the Rome Statute is “to put an end to impunity” and to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished. If the interpretation of the Appellant was applied, then there would be a situation in which, “despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations”.<sup>582</sup> The Court thus would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and prosecute the case, even though that State has no intention of doing so. A potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court: impunity would persist unchecked and thousands of victims would be denied justice.<sup>583</sup>

The case against Katanga cannot be seen as inadmissible in light of article 17(1)(a) of the Statute. The Chamber, in response to the opposite view of the Defence, clarified that “the admissibility of a case has to be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge”. At that time, no proceedings were on-going in the DRC in relation to any crime allegedly committed by neither the Appellant, at Bogoro nor anywhere else in DRC. Any investigation that may have been on-going regarding Katanga was closed when he was surrendered to the Court in October 2007, as confirmed by

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<sup>581</sup> Ibid., para. 78.

<sup>582</sup> Ibid.

<sup>583</sup> Ibid., para. 79. Stahn notes, however, that the reference contained in a footnote appended to this sentence, i.e., that “not every inaction of States will automatically lead to proceedings before the Court”, demonstrates a certain uneasiness on the part of the Chamber to provide unconditional support for “consensual admissibility”, through the practice of self-referrals. See, C. Stahn, 'Perspectives on *Katanga*: An Introduction', (2010) 23 LJIL, 311-318, 317, referring to footnote 169 of the decision.

the DRC government in its Observations to the Defence challenge.<sup>584</sup> It is because of this inaction scenario, irrespective of the willingness of the DRC to investigate or to prosecute the Appellant, that the case is admissible before the Court.<sup>585</sup>

In light of this finding, the Appeals Chamber refused to go into the merits of the correctness of the “same-conduct test” used by the Pre-Trial Chambers to determine whether the same “case” is the object of domestic proceedings, on the ground that the determination of the correctness of the same conduct test was not determinative for the appeal.<sup>586</sup>

According to the Chamber, the case against Katanga would have been admissible also under article 17(1)(b) of the Statute. This provision comprises two cumulative elements that have to be fulfilled for a case to be inadmissible. First, the case must have been investigated; second, the State having jurisdiction must have decided not to prosecute. Even assuming that the same case was at some point investigated, the DRC did not make any decision not to prosecute the Appellant, as required by the provision. To the contrary, throughout the proceedings before the Trial Chamber, the representatives of the DRC emphasised that they wished that the Appellant be brought to justice. The DRC decision to close domestic proceedings against the Appellant was not a decision not to prosecute in terms of article 17(1)(b) of the Statute. It was, rather, a decision to surrender the Appellant to the Court and to close domestic investigations against him as a result of that surrender: “[t]he thrust of this decision was not that the Appellant should not be prosecuted, but that he should be prosecuted, albeit before the International Criminal Court”.<sup>587</sup> The purpose of article 17(1)(b) of the Statute 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, “to put an end to

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<sup>584</sup> Ibid., para. 79.

<sup>585</sup> Ibid., para. 80.

<sup>586</sup> Ibid., para. 81.

<sup>587</sup> Ibid., para. 82.



impunity". Thus,

[i]f 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.<sup>588</sup>

A "decision not to prosecute" in terms of article 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.<sup>589</sup>

The Appeals Chamber concluded its analysis by reading article 17 of the Statute in light of complementarity. The Chamber stressed that complementarity "strikes a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the International Criminal Court on the one hand, and the goal of the Rome Statute to "put an end to impunity" on the other hand".<sup>590</sup>

Complementarity means that if States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.<sup>591</sup> Moreover, "there may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the "duty to exercise [its] criminal jurisdiction", as envisaged in the sixth paragraph of the Preamble." Thus,

the general prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction. This is so because under the Rome Statute, the Court does not have the power to order States to open investigations or prosecutions domestically. It is purely speculative to assume that a State that has refrained from opening an investigation into a particular case or from

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<sup>588</sup> Ibid.

<sup>589</sup> Ibid., para. 83.

<sup>590</sup> Ibid., para. 85.

<sup>591</sup> Ibid., para. 84.

prosecuting a suspect would do so, just because the International Criminal Court has ruled that the case is inadmissible.<sup>592</sup>

Contrary to the arguments of the Appellant, his interpretation of the complementarity regime would not necessarily lead to an increase in domestic investigations or prosecutions. It would, instead, intensify the risk of serious crimes going unpunished.<sup>593</sup>

In light of the clear analysis of article 17 of the Statute, and on the finding that the scenario in the Katanga case at the domestic level was of inaction, the Appeals Chamber did not enter the merits of the fourth ground of appeal raised by the Defence.<sup>594</sup>

In the fifth ground of appeal, the Defence had argued that Trial Chamber II's erroneous definition of unwillingness had deprived the accused of a real and effective right to challenge admissibility. According to the Defence, the fact that a State is allowed to transfer cases to the Court results in a deprivation of the rights of the accused to effectively challenge the admissibility of his or her case. The Chamber drew a distinction between the right for the appellant, under article 19(2) of the Statute, to challenge the admissibility of a case, and the (inexistent) right of the accused to “insist that States or organs of the Court behave in a manner that would render a case inadmissible”.<sup>595</sup> The Appellant has the right to challenge the admissibility of his or her case, but shall also “accept that the Court will determine the admissibility on the basis of facts as they present themselves”.<sup>596</sup> Further, the Chamber confuted the Appellant's attempt to raise a purported breach of the DRC obligation under international law of the duty to prosecute international crimes by arguing that this is not a faculty of the defendant, and falls even beyond the scope of the Court. As to the alleged violation of his rights

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<sup>592</sup> Ibid., para. 86.

<sup>593</sup> Ibid.

<sup>594</sup> The fourth ground of appeal related to the alleged confusion of the Trial Chamber in the interpretation of unwillingness and inability, and the Defence's allegation that the unwillingness alleged by the Chamber should have been seen as inability. If the Chamber had applied the correct criterion, it would have concluded that the DRC was not unable to prosecute the appellant.

<sup>595</sup> Ibid., para. 110.

<sup>596</sup> Ibid., para. 111.

derived from the finding that the case against him is admissible before the Court, the Chamber made it clear that article 19 of the Statute “is not the mechanism under which to raise alleged violations of the rights of the accused in the course of the prosecutorial process.” Rather, it is a “limited procedure that triggers the relevant Chamber's powers to determine the admissibility of the case under article 17 of the Statute.” Unless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render a case inadmissible.<sup>597</sup>

### **5. The Bemba challenge to the admissibility of the case before the Court: complementarity and self-referrals**

Jean-Pierre Bemba Gombo, former Vice-President of the Democratic Republic of the Congo, is allegedly criminally responsible, as a person effectively acting as military commander within the meaning of article 28(a) of the Rome Statute, for crimes against humanity and war crimes, such as murder and rape, allegedly committed by his troops in the territory of the Central African Republic during the period from approximately 26 October 2002 to 15 March 2003. After his arrest by the Belgian authorities, in accordance with the warrant of arrest issued by the Pre-Trial Chamber of the ICC on 23 May 2008, he was transferred to the Court in July of the same year.

Upon adjournment of the hearing for the confirmation of the charges, these were confirmed by Pre-Trial Chamber II on 15 June 2009;<sup>598</sup> the trial hearings started on 22 November 2010.

In February 2010, the Bemba's Defence team filed a motion challenging the admissibility of the case against him on the ground that the case had been investigated by CAR authorities, which had then decided not to prosecute, in accordance with article 17(1)(b) of the Statute. Contrary to the Katanga challenge, which objected the content of admissibility test under article 19 of the Statute, this challenge was based on a more technical issue, i.e., on the alleged decision of CAR

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<sup>597</sup> Ibid., para. 112.

<sup>598</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *supra* n. 448.

authorities not to prosecute within the meaning of article 17(1)(b) of the Statute. According to the Defence, this decision of CAR authorities, not affected by any unwillingness or inability, should have led to the Court's declaration of the inadmissibility of the case against the defendant. Trial Chamber III found that there was no decision of CAR authorities not to prosecute under article 17(1)(b) of the Statute; rather, the decision to discontinue proceedings in the CAR was dictated by the simultaneous taking over of the Court, and the will of CAR authorities to have the case tried at the international level. The link between admissibility and self-referrals had already emerged in Katanga; the Bemba case shows that the impact of the latter on the former is far from marginal. The decision is also relevant for other aspects, already analysed above, such as the moment in which the trial commences under article 19(4) of the Statute and the Chamber's analysis of inability. Of less significance, especially if compared to the one in Katanga, is the Appeals Chamber judgement, which mainly addresses technical issues, and which will therefore only briefly mentioned.

### **5.1 The Defence challenge: alternative arguments for a finding of inadmissibility**

In its motion, the Defence raised a number of arguments, alternative one to the other, to substantiate its request to declare the case inadmissible before the Court.

First, the Defence argued that the case was inadmissible *ex art* 17(1)(b), on the ground that effective national investigations had been conducted in the CAR on the very same case subsequently brought before the Court, and that the decision not to prosecute was not vitiated by unwillingness nor inability.<sup>599</sup> In particular, the Defence held that the CAR judicial system had not collapsed, but functioned effectively and efficiently: the CAR authorities were wholly

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<sup>599</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2) of the Rome Statute, ICC-01/05-01/08-704-Red3-tENG, 25 February 2010, paras. 69-74; also, *The Prosecutor v Jean-Pierre Bemba Gombo*, Corrigendum to Defence Reply to the Observations of the Prosecutor and of the Legal Representatives of Victims on the Application Challenging the Admissibility of the Case, ICC-01/05-01/08-752-Corr-tENG, 7 June 2010, paras. 24-26.

capable of gathering evidence and concluding the criminal proceedings which were commenced there prior to the referral to the Court.<sup>600</sup>

The Defence criticised Pre-Trial Chamber III's decision on the issuance of a warrant of arrest for the defendant, in which it had found that the case was admissible, as there was nothing to indicate that Bemba had been prosecuted at the national level. According to the Chamber, on the contrary, it appeared that CAR judicial authorities had abandoned any attempt to prosecute the accused on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC.<sup>601</sup>

According to the Defence, diplomatic immunity or residence outside the territory shall not be considered factors of inability ex article 17(3) of the Statute. Further, at the time of the issuance of the arrest warrant, the reasons previously given by the judicial authorities in the CAR as to their inability to prosecute the accused did not apply, since from April 2007 Bemba was no longer DRC vice-president and was living in exile in Portugal. Diplomatic immunity simply represented a temporary procedural obstacle, not the reason for the discontinuance of proceedings in the CAR.<sup>602</sup> Investigations were conducted and the decision not to proceed – a decision on the merits, not appealed by the Prosecutor – falls within the scope of article 17(1)(b) of the Statute.

The Defence held that the case would have been inadmissible also on the basis of article 17(1)(c) and 20(3) of the Statute, since the decision of the senior investigative judge order of discontinuance had terminated the criminal proceedings against the accused in relation to the acts for which he was then being prosecuted at the Court.<sup>603</sup>

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<sup>600</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2) of the Rome Statute, *supra* n. 599, para. 91.

<sup>601</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo, *supra* n. 191, para. 21.

<sup>602</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2) of the Rome Statute, *supra* n. 599, paras. 94-95.

<sup>603</sup> *Ibid.*, paras. 115-131. In the reply to the Prosecutor's observations, the Defence argues that the principle of *ne bis in idem* does not require an acquittal or conviction, but can be applicable also to final and definitive orders for dismissal of charges. Contrary to article 20(1) and (2), article 20(3) of the Statute does not refer to

In the alternative, the Defence argued that no court order had removed jurisdiction from the CAR's courts. The latter, thus, remained seized with the case. The decision of the CAR government to refer the case to the ICC violated the principle of the separation of executive and judicial powers, and the Court shall not therefore have deemed lawfully seized following a political decision which violated this fundamental principle of rule of law.<sup>604</sup>

Third, the Defence alleged that the case did not meet the sufficient gravity threshold contemplated in article 17(1)(d) of the Statute. Although the Appeals Chamber had rejected the criteria proposed by the PTCI in Lubanga, “there have been no positive directions on the matter in the case law of the ICC”.<sup>605</sup> In this vacuum, and in light of the criteria referred to by the Prosecutor in the 2007 Policy Paper on the Interests of Justice and in the communication of his decision not to open investigations in the Iraq situation, the Defence argued that the level of alleged responsibility of military commander does not meet the gravity threshold to justify prosecution by the Court.<sup>606</sup>

Finally, with respect to complementarity, the Defence criticised the recourse to and the very legitimacy of self-referrals. According to the Defence, the Prosecutor should activate only through article 15 *proprio motu* initiatives; by inviting a State to utilise Article 14(1) of the Statute, the Prosecution avoids the forms of judicial scrutiny contemplated under article 15 of the Statute. The encouragement of “self-referrals” increases the risk of manipulation by transient governments which may attempt to exploit the Court in order to eliminate their enemies.<sup>607</sup>

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convictions or acquittals, and this was deliberate, in order to include other examples of “terminating” proceedings. *The Prosecutor v Jean-Pierre Bemba Gombo*, Corrigendum to Defence Reply to the Observations of the Prosecutor and of the Legal Representatives of Victims on the Application Challenging the Admissibility of the Case, *supra* n. 599, paras. 55-69.

<sup>604</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2) of the Rome Statute, *supra* n. 599, para. 129.

<sup>605</sup> *Ibid.*

<sup>606</sup> *Ibid.*, paras. 138-139.

<sup>607</sup> *Ibid.*, paras. 60-68.

## 5.2 The Prosecutor's Response: self-referrals and decisions not to prosecute

The Prosecution replied to the Defence's challenge arguing that the case was admissible due to the inactivity of the national authorities, since the investigations initiated in the CAR were not terminated on the basis of an evaluation of the merits of the case.

The Prosecutor further noted the inconsistency of the Defence's arguments, which argued that the case was inadmissible under four different and alternative circumstances: under Article 17(1)(b) of the Statute because the CAR judicial authorities investigated and then decided not to prosecute him; under Article 17(1)(c) of the Statute because the CAR judicial authorities' dismissal of the case constituted, in effect, a completion of the prosecution against him; because, notwithstanding the absence of an investigation or prosecution, the CAR authorities were not unable or unwilling genuinely to prosecute; and, finally, under Article 17(1)(d) of the Statute because the case is not of sufficient gravity to justify the Court's involvement.<sup>608</sup>

In relation to the alleged illegitimacy of self-referrals, the Prosecutor referred to the Appeals Chamber's decision in Katanga, according to which the Statute does not prevent a State from relinquishing its jurisdiction in favour of the Court.<sup>609</sup> A general prohibition against "self-referrals" is not a suitable tool for fostering compliance by States with their duty to exercise criminal jurisdiction; the Court in any case retains the discretion to decline the exercise of jurisdiction on the basis of a State referral.<sup>610</sup>

The Prosecutor then presented its main argument to demonstrate that the case against Jean-Pierre Bemba is admissible before the Court. According to him, in relation to the case at hand

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<sup>608</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Prosecution's response to motion challenging the admissibility of the case by the Defence of Jean-Pierre Bemba Gombo pursuant to article 17 and 19(2)(a) of the Rome Statute, 29 March 2010, OTP, ICC-01/05-01/08-739, para. 46.

<sup>609</sup> *Ibid.*, para. 47, referring to *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 85.

<sup>610</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Prosecution's response to motion challenging the admissibility of the case by the Defence of Jean-Pierre Bemba Gombo pursuant to article 17 and 19(2)(a) of the Rome Statute, para. 47. The Prosecutor confuted the suggestion that it influenced the CAR authorities in their decision to refer the situation; it summarises its own investigative activities; and it refutes the suggestion that it sought to avoid judicial review by the Pre-Trial Chamber. See, *ibid.*, paras. 48-50.

there was a situation of inaction at the domestic level: the accused was not tried, nor the CAR proceedings were terminated on the ground that prosecution was unwarranted.<sup>611</sup> As a consequence, and in light of article 17 of the Statute, no assessment of willingness or ability shall be performed.<sup>612</sup> In abandoning all potential domestic proceedings against the accused, the CAR authorities did not make a decision on the merits “not to prosecute” within the meaning of Article 17(1)(b) of the Statute, because the investigations were discontinued before they were completed.<sup>613</sup>

Even if the Chamber considered that the decision taken by the CAR authorities fell within the meaning of Article 17(1)(b) of the Statute, the CAR authorities would be found genuinely unable to prosecute the case. Article 17(3) of the Statute enjoins the Court to consider whether the national judicial system has totally or substantially collapsed, or is unavailable. In the case at hand, problems that included the accused's personal immunity, security concerns and the difficulty in collecting the necessary evidence resulted in the overall “unavailability” of the CAR national judicial system.<sup>614</sup>

As to the Defence's allegation that the case should be inadmissible in accordance with articles 17(1)(c) and 20(3) of the Statute, the Prosecutor held that these provisions would require a final decision of conviction or acquittal, whereas the accused was never tried before the CAR authorities.<sup>615</sup>

Finally, in relation to the alleged insufficient gravity of the case, the Prosecutor highlighted that, although the Statute does not define the term "gravity" for the purposes of admissibility, the Appeals Chamber had resisted an overly restrictive interpretation of the concept of gravity on

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<sup>611</sup> Ibid., paras. 51-55.

<sup>612</sup> Ibid., paras. 51-56.

<sup>613</sup> Ibid., paras. 57-60.

<sup>614</sup> Ibid., paras. 61-64.

<sup>615</sup> Ibid., para. 68. The Prosecutor further noted the inconsistency of the Defence's arguments in asserting, on the one hand, that CAR authorities should have recommenced proceedings against the accused once he lost vice-presidential immunity, and, on the other hand, in relying on the *res judicata* principle, suggesting that the order of the investigating judge dismissing the charges finally concluded the case against the accused. Ibid., paras. 69-72.



the ground that it would have hampered the preventative or deterrent role of the Court. The pending charges against the accused meet the gravity test and have sufficient specificity; this latter issue, which attains to the evidence presented by the Prosecutor rather than to gravity, should be separated from the admissibility challenge.<sup>616</sup>

### **5.3 The Trial Chamber III Decision: admissibility between self-referrals and inaction**

In its decision, Trial Chamber III analysed all subparagraphs of 17(1) of the Statute, although the Defence had founded its arguments on sub-letters (b), (c) and (d) of the provision. Starting with article 17(1)(a), the Chamber found that there were neither on-going investigations nor prosecutions in the CAR in relation to the case at hand.<sup>617</sup>

As to article 17(1)(b) of the Statute, the Chamber agreed with the Defence that investigations had been performed in the CAR. However, once the dismissal decision had been set aside, decisions were taken by the appellate courts which brought the national proceedings to a halt. In line with what held by the Appeals Chamber in *Katanga*, that a decision not to prosecute in terms of article 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 Court,<sup>618</sup> the Chamber noted that the discontinuance in the CAR of the proceedings against the defendant was not the result of a final decision not to prosecute; rather, it depended on decisions to close the proceedings in the CAR, in order to have the case prosecuted before the Court.<sup>619</sup>

For the sake of completeness, the Chamber addressed also the unwillingness and inability elements. In the analysis of willingness, the Chamber found that, although, for the purposes of article 17(1)(b), the State is “willing” because it positively seeks the accused's trial before the ICC, it is no longer prepared to prosecute the accused in the national courts. Through the

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<sup>616</sup> Ibid., paras. 73-79.

<sup>617</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, *supra* n. 200.

<sup>618</sup> Ibid., para. 241.

<sup>619</sup> Ibid., para. 242.

referral, the CAR authorities indicated their “unwillingness” to prosecute the accused domestically. This “unwillingness”, as described during the oral submissions before the Chamber, is not unwillingness for the purposes of Article 17(1)(b) of the Statute.<sup>620</sup>

As to inability, the Chamber noted that CAR's representatives submissions in relation to the State's lack of capacity to conduct a trial such as the one against Bemba, given the human resources required, the high number of cases already pending before the national courts in relation to the shortage of judges, the “ridiculously insignificant” budget and several other practical problems, were determinative of the State's inability to conduct proceedings in terms of both investigative resources and judicial capacity.<sup>621</sup> Accordingly, the CAR judicial system shall be regarded as “unavailable” within the meaning of article 17(3) of the Statute.<sup>622</sup>

Looking at the issue from article 17(1)(c) of the Statute, the Chamber noted that the accused had not been tried for the conduct which is the subject of the complaints. The decision in the CAR was not a decision on the merits of the case - instead it involved, *inter alia*, a consideration of the sufficiency of the evidence before the investigating judge who was not empowered to try the case - and it did not result in a final decision or acquittal of the accused. The Chamber further stated that, in any event, a “trial” for the purposes of Article 17(1)(c) of the Statute could only have occurred before the criminal chambers, and not before the Senior Investigating Judge. The provision on *ne bis in idem* did not apply to the case at hand.<sup>623</sup>

In relation to gravity, the Chamber noted that Pre-Trial Chamber II, in the decision on the confirmation of charges, had evaluated whether there was sufficient evidence to establish substantial grounds to believe that the accused committed each of the crimes charged, had determined that the case fell within the jurisdiction of the Court and that it was admissible. The decision had not been appealed at the time, and therefore the issue – determined by the Pre-

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<sup>620</sup> Ibid., para. 243.

<sup>621</sup> Ibid., para. 245.

<sup>622</sup> Ibid., para. 246.

<sup>623</sup> Ibid., para. 248.

Trial Chamber – should not have been brought before the Trial Chamber.<sup>624</sup>

Finally, the Chamber, in addressing the issue of self-referrals, recalled the Appeals Chamber decision in *Katanga*, according to which a general prohibition for a State to relinquish its jurisdiction to the Court would not foster compliance by States to the duty to prosecute international crimes, and thus dismissed the allegations of the Defence.<sup>625</sup>

#### **5.4 The Appeals Chamber judgement: States' relinquishment of jurisdiction**

The Defence for Jean-Pierre Bemba Gombo appealed the decision of Trial Chamber III on four grounds.<sup>626</sup> The Chamber rejected all of them by referring to its previous decisions, in particular the one in *Katanga*, as to the correct interpretation of article 17. The Chamber dismissed the Defence's first ground of appeal, that the Trial Chamber had erred in finding that the decision of the Senior investigative judge in CAR was not a final decision not to prosecute, by stating, firstly, that when a trial Chamber must determine the status of domestic judicial proceedings, it should accept *prima facie* the validity and effect of the decision of domestic courts, unless presented with compelling evidence stating otherwise.<sup>627</sup> Secondly, it referred to its finding in *Katanga*, that, 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. A decision not to prosecute, in terms of art 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.<sup>628</sup>

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<sup>624</sup> Ibid.

<sup>625</sup> Ibid., 260.

<sup>626</sup> Given the irrelevance for the present analysis of the second and fourth grounds of appeals, they will not be examined.

<sup>627</sup> *The Prosecutor v Jean-Pierre Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-962, AC, 19 October 2010, para. 66.

<sup>628</sup> Ibid., para. 74.

The Appeals Chamber declined to rule on the third ground of appeal, in which the Defence alleged an error in law of the Chamber with respect to the factors of inability, when holding that the CAR did not have the capacity to conduct a trial such as the one against Bemba, given the human resources required, the number of cases pending before the national courts and the shortage of judges.<sup>629</sup> The higher Chamber reiterated that it is only once it has been established that there was a decision not to prosecute within the meaning of article 17 (1) (b) of the Statute that the question arises whether the decision resulted from the unwillingness or inability of the State genuinely to prosecute, as already explained in Katanga.<sup>630</sup>

## **6. The admissibility challenge presented by the Government of the Republic of Kenya. Finally, the “final” assessment of the “same conduct test”**

As seen above in chapter II, the investigations on the situation in Kenya were initiated *proprio motu* by the Prosecutor, upon failure to reach an agreement with the Government as to a division of labour for prosecution between the national and international levels. The decision of the Chamber authorising the commencement of investigations has been analysed for its relevance from the perspective of the notion of potential cases and of the assessment of the “admissibility of situations” in accordance with article 53(1) of the Statute.<sup>631</sup>

The proceedings in Kenya are also of relevance for the challenge to the admissibility of the two cases that arose from the investigations in the situation filed by the Government of Kenya.<sup>632</sup>

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<sup>629</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, *supra* n. 200, para 245.

<sup>630</sup> *The Prosecutor v Jean-Pierre Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, *supra* n. 627, paras. 107-109.

<sup>631</sup> See, *supra*, Chapter II.7.1.

<sup>632</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Application on behalf of the Republic of Kenya pursuant to article 19 of the ICC Statute, ICC-01/09-01/11-11, and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Application on behalf of the Republic of Kenya pursuant to article 19 of the ICC Statute, *supra* n. 477.

The cases selected by the Prosecutor go to the heart of the Kenyan Government and leading economic powers, being the suspects representatives of both political parties and powerful economic lobbies. The challenge was filed by the representatives of the Government in accordance with article 19(2)(b) of the Statute, before the commencement of the confirmation of charges hearings against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, on 1 September 2011, and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, on 21 September 2011. The issue was therefore to be decided by Pre-Trial Chamber II.

The Government of Kenya relied on two main arguments to substantiate the alleged inadmissibility of the two cases before the Court. First, it alleged that the Court should refer the cases back to its domestic courts. Reforms of the judicial system were undergoing and this would have made the State able to prosecute the persons responsible for the commission of international crimes during the post-election violence in 2008. Second, the Government criticised the same-person component of the "same person – same conduct test", although with very weak arguments.

The challenge was easily dismissed by Pre-Trial Chamber II, and the decision was confirmed by the Appeals Chamber.

The Kenya's submission is weak and badly substantiated. However, an analysis of its arguments, together with the decisions of the Pre-Trial and Appeals Chamber, is interesting from many perspectives. The challenge, and in particular the (confused) attempt of the government of Kenya to criticise the "same person" component of the admissibility test, completes the picture of a judicial review of the test. The Appeals Chamber's analysis of the notion of "case" closes the doors to future challenges based on the "same person – same conduct" test, applied since the Lubanga case. The Kenyan Government's attempt also shows the difficulties faced by a State whose situation is under investigation by the Court – upon

failure to recur to the procedures for referral under article 18 of the Statute – to regain the full exercise of its sovereign powers in relation to specific cases, where the judicial system is not equipped with the necessary legislation. Once the Court is activated, the successful outcome of a challenge, or the possibilities for a State to deal with the crimes and perpetrators subject to proceedings before the Court, are extremely rare.

### **6.1 The government of Kenya's submission: the “same conduct” but not the “same person” test**

In its submission, the Kenyan Government highlighted to the judicial reforms undertaken in the country as a consequence of the commencement of the ICC Prosecutor's investigations in its territory.<sup>633</sup> The Government referred to the judicial reforms already adopted and to those under discussion, and based its arguments on the future ability of domestic courts to conduct investigations and prosecutions for those responsible of the commission of international crimes within the situation in its territory.<sup>634</sup> The Government argued that the reforms were undertaken to comply with the duty to prosecute contained in the Statute and that the process of reform was in line with the encouragement to Kenya to establish credible and effective proceedings that came from the President of the Assembly of States Parties.<sup>635</sup> On the basis of complementarity, the Court should declare the two cases inadmissible, since “the ICC does not enjoy primacy over Kenya's domestic jurisdictions.”<sup>636</sup>

In its submission, the Kenyan Government also asked the Chamber to postpone the date of the confirmation of charges hearings, thus granting it more time to implement the reforms and foster investigative steps, both of them *in fieri*.<sup>637</sup> The Government acknowledged that the reforms were not complete, but argued that a reform process such as the one undertaken could

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<sup>633</sup> Ibid., para. 3 of both submissions.

<sup>634</sup> Ibid., para. 5.

<sup>635</sup> Ibid., para. 5.

<sup>636</sup> Ibid., paras. 5 and 24.

<sup>637</sup> Ibid., para. 16; for a description of the reforms, see paras. 47-59; for the investigative steps, see paras. 67-78.

not be expected to be realised "overnight".<sup>638</sup> It polemically noted that in several other instances, such as Colombia, Georgia, Russia and Afghanistan, the Prosecutor, after the public announcement of the initiation of preliminary investigations in the related situations, granted considerable time to the related governments to start addressing the situations domestically.<sup>639</sup>

The Government recalled that, as established in *Katanga*, the admissibility of a case has to be assessed at the time of the application. It noted that, in the case at hand, investigations and prosecutions were underway, and Kenya was not unwilling under the meaning of article 17(2) of the Statute. Thus, there should be a presumption that the case is inadmissible before the Court.<sup>640</sup>

Having said that, the Kenyan Government tried to foster a different definition of "case", that will be the subject of the Appeals Chamber's judgement. It referred to Pre-Trial Chamber II's definition of "potential cases" in the decision authorising the commencement of investigation in the situation. Considering that the judges held that the admissibility of potential cases was to be assessed by looking at the groups of persons likely to be the object of an investigation, and the crimes likely to be the focus of such investigation, the Kenyan Government argued that "national investigations must (...) cover the same conduct in respect of *persons at the same level in the hierarchy* being investigated by the ICC".<sup>641</sup> This was indeed happening in Kenya, where the investigative approach was to start from lower perpetrators for the most serious incidents and conducts.<sup>642</sup>

## **6.2 The Prosecutor's Observations and other filings of the participants: alternative readings of the admissibility test**

The Prosecutor observed that the Kenyan government had failed to show that it had conducted

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<sup>638</sup> Ibid.

<sup>639</sup> Ibid., para. 25 and footnote 8.

<sup>640</sup> Ibid., paras. 28-29.

<sup>641</sup> Ibid., para. 32. Emphasis added.

<sup>642</sup> Ibid.

or was conducting investigations or prosecutions in relation to the cases currently before the Court. If, as alleged in the application, it was investigating in relation to different persons or different conducts, the cases subject to proceedings at the national level and before the Court were not the same cases.<sup>643</sup> Further, a promise to conduct investigations or prosecutions does not suffice for a declaration of inadmissibility.<sup>644</sup> Should Kenya later start proceedings against the same persons for the same conducts, then it would be able to present a second challenge of admissibility.<sup>645</sup>

Not all the defendants submitted observations. Ruto and Sang jointly argued that the case against them should be declared inadmissible,<sup>646</sup> on the ground that they were under investigation domestically for the same conducts and incidents before the Court,<sup>647</sup> and that Kenya was neither unwilling nor unable to carry out the proceedings.<sup>648</sup> They also discussed the notion of “case”, arguing that its definition for the purposes of admissibility under article 17(1)(a) of the Statute is broader than the “same person – same conduct” test, which shall apply only to *ne bis in idem* proceedings.<sup>649</sup> This would be in line with the fact that, following the investigative phase, the charges may be confirmed in a manner different from that initially presented by the Prosecutor.<sup>650</sup>

In its reply, the Kenyan Government reiterated its capacity to address the cases before the Court, and that there were investigations in relation to three of the suspects were on-going.<sup>651</sup> At

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<sup>643</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Prosecution Response to 'Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute', ICC-01/09-01/11-69, OTP, 28 April 2011 and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Prosecution Response to “Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute”, OTP, ICC-01/09-02/11-71, 28 April 2011, paras. 12-18

<sup>644</sup> *Ibid.*, para. 21.

<sup>645</sup> *Ibid.*, para. 22.

<sup>646</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Response on behalf of Mr William Samoei Ruto and Mr Joshua Arap Sang to the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", ICC-01/09-01/11-68, 28 April 2011.

<sup>647</sup> *Ibid.*, paras. 5-14.

<sup>648</sup> *Ibid.*, paras 15-25 on unwillingness and 26-30 on inability.

<sup>649</sup> *Ibid.*, para. 7.

<sup>650</sup> *Ibid.*, paras 9-11.

<sup>651</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Reply on behalf of the



the same time, it expressed its disagreement with the “same person – same conduct” test, noting that the State “may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence”.<sup>652</sup> Even if the State possessed the same evidence as the Prosecutor, “there can be no requirements that in order to exclude ICC admissibility the State must conduct an investigation that leads to charging of those very individuals.”<sup>653</sup>

### **6.3 Pre-Trial Chamber II's Decision: the notion of case and the different phases of admissibility determinations**

In its decision, not surprisingly, Pre-Trial Chamber II found that the cases were admissible under article 17(1)(a) of the Statute, due to the inaction of domestic courts.<sup>654</sup>

The Chamber firstly observed that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. As held by the Appeals Chamber, 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 of the Rome Statute to 'put art end to impunity' on the other hand”.<sup>655</sup> 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, but are also under an existing duty to do so, as explicitly stated in paragraph 6 of the Preamble to the Statute. The Court shall intervene when States fail to do so; the ICC Statute provisions regulating the inadmissibility of case limit the exercise of national

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Government of Kenya to the Responses of the Prosecutor, Defence and OPCV to the Government's Application pursuant to article 19 of the Rome Statute, ICC-01/09-01/11-89, 13 May 2011, paras. 2, 29-32, and 57-58.

<sup>652</sup> Ibid., para. 27.

<sup>653</sup> Ibid., para. 28.

<sup>654</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 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-01/09-01/11-101, P.T.Ch.II, 30 May 2011; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 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, P.T.Ch.II, 30 May 2011.

<sup>655</sup> Ibid. paras. 44 and 40 respectively, referring to *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment 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, *supra* n. 194, para. 85.

criminal jurisdiction by States.<sup>656</sup>

While welcoming the will of Kenya to investigate the cases before the Court, and the reforms projects undertaken in the country, the Chamber noted that it was required to decide on the challenge against the backdrop of the facts presented and the applicable legal parameters.<sup>657</sup>

The Kenya's challenge relied mainly on actions or promises of judicial reform for future investigative activities; the evidence presented did not show that investigation or prosecutions were on-going with respect to the suspects. As a consequence, the Chamber found that the cases were admissible before the Court in accordance with article 17(1)(a) of the Statute.<sup>658</sup>

The Chamber also discussed the interpretation of the notion of “case” proposed by the Kenyan government, according to which “national investigations must [...] cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC”, and not necessarily the same person.<sup>659</sup> According to the Chamber, the reference of the Kenyan government to the criteria used in the decision authorising the Prosecutor to commence investigations in the situation was misleading. These criteria were not conclusive, but simply indicative of the sort of elements that the Court should consider in making an admissibility determination within the context of a situation, when the examination focusses on one or more “potential” case(s). At such a preliminary stage, the reference to the groups of persons is to leave enough room to further proceed to the identification of the suspects to be brought before the Court. The test becomes more specific when it comes to an admissibility determination at the “case” stage, i.e., following a Prosecutor's application for the issuance of a warrant of arrest or summons to appear in accordance with article 58 of the Statute. At this stage, the case(s) before the Court are already shaped; as a consequence, admissibility determinations must perforce be assessed against national proceedings related to those particular persons subjected

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<sup>656</sup> Ibid.

<sup>657</sup> Ibid., paras. 45 and 41 respectively.

<sup>658</sup> Ibid., paras. 70 and 66 respectively.

<sup>659</sup> Ibid., paras. 52-53, and 48-49 respectively.

to the Court's proceedings.<sup>660</sup>

#### **6.4 The Appeals Chamber's Decision: the “same person” component of the test**

On 6 June 2011, the Government of Kenya appealed PTCII's decision, in accordance with article 82(1)(a) of the ICC Statute.<sup>661</sup> In its application, the Government of Kenya alleged that there was a legal error of PTCII in the interpretation of the words: “[t]he case is being investigated [...] by a State which has jurisdiction over it” of article 17(1)(a) of the Statute. The alleged error attained to PTCII finding that, for a case to be inadmissible before the Court, a national jurisdiction must be investigating the same person for the same conduct object of the case already before the Court.<sup>662</sup> According to the Government of Kenya, the test developed in the decision under article 15 of the Statute in relation to potential cases should apply to all stages of the proceedings, not only to the situation stage. The admissibility test cannot be interpreted as requiring that the same persons are being investigated by national jurisdiction. Considering that the presumption is in favour of national jurisdictions, “[t]here simply must be a leeway [sic] in the exercise of discretion in the application of the principle of complementarity”.<sup>663</sup>

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<sup>660</sup> Ibid., paras. 54 and 50 respectively.

<sup>661</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 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”, ICC-01/09-01/11-109 and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 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’, ICC-01/09-02/11-104, 6 June 2011, and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Document in Support of 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”’, ICC-01/09-02/11-130, 20 June 2011; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Document in Support of 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’”, ICC-01/09-01/11-135-Corr, 20 June 2011.

<sup>662</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 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”, and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 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’, *supra* n. 661, both paras. 12 and 79-92.

<sup>663</sup> Ibid.

In its response, the Prosecutor submitted that Pre-Trial Chamber II explicitly and correctly addressed the issue of which test shall be applied for the purposes of admissibility determinations, and found that the test developed in the decision under article 15 of the Statute “was made for the specific and limited purpose of admissibility determinations at the situation stage”. Article 17 of the Statute regulates how the Court should determine which forum should proceed where there is a concurrent exercise of jurisdiction by the ICC and a State with respect to a particular case. In this context, the “same person – same conduct” test is supported by the text and the drafting history of the Statute. The Kenyan Government had failed to establish any reversible error in the Pre-Trial Chamber's decision.<sup>664</sup>

The defendants Ruto and Sang,<sup>665</sup> and Ali<sup>666</sup> filed responses, in which they concurred with Kenyan allegations. Also the OPCV submitted observations, in which they basically agreed with the Prosecutor's submissions.<sup>667</sup>

In its judgment, the Appeals Chamber confirmed PTCII decision, definitively ruling on the correctness of the “same person” component of the admissibility test and the different moments in which admissibility assessments take place.

The Higher Chamber explained that, once the Court has issued a warrant of arrest or a

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<sup>664</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Prosecution's Response to the appeal of the Government of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “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-01/09-01/11-183, 12 July 2011; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Prosecution's Response to the appeal of the Government of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “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-01/09-02/11-168, 12 July 2011.

<sup>665</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Ruto and Sang Defence Response to the Government of Kenya's "Document in Support of 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", ICC-01/09-01/11-185, 12 July 2011.

<sup>666</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Defence response to the Government of Kenya's "Document in Support of the Appeal 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", ICC-01/09-02/11-166, 12 July 2011.

<sup>667</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings, ICC-01/09-01/11-205, 19 July 2011; and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings ICC-01/09-02/11-177, 19 July 2011.

summons to appear, for a case to be inadmissible under article 17(1)(a) of the Statute, the question is not merely a question of “investigation” in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction. Article 17 applies not only to the determination of the admissibility of a concrete case, as provided for in article 19 of the Statute, but also to preliminary admissibility rulings under article 18 of the Statute. Under rule 55 (2) of the Rules of Procedure and Evidence, the Pre-Trial Chamber, when making a preliminary admissibility ruling, “shall consider the factors in article 17 in deciding whether to authorize an investigation”. The factors listed in article 17 of the Statute are also relevant for the Prosecutor's decision to initiate an investigation under article 53(1) of the Statute or to seek authorisation for a *proprio motu* investigation under article 15, and for the decision to proceed with a prosecution under article 53 (2) of the Statute.

The meaning of the words “case is being investigated” in article 17(1)(a) of the Statute shall therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation, regulated in articles 15 and 53(1) of the Statute, the contours of the likely cases will often be relatively vague because the investigations of the prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. At this stage, individual suspects, as well as exact conducts and their legal classification, might not have been identified yet. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of “information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2” that the Prosecutor's notification to States should contain.<sup>668</sup> In contrast, article 19

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<sup>668</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307, paras. 37-39; and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the

of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. Article 58 requires, for a warrant of arrest or a summons to appear to be issued, reasonable grounds to believe that the person named therein has committed a crime within the jurisdiction of the Court. Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17 (1) (c) and 20 (3) of the Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20 (3) (a) or (b) of the Statute are met. Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.<sup>669</sup>

The admissibility challenge that gave rise to the appeal was brought under article 19(2)(b) of the Statute in relation to a case in which a summons to appear had been issued against specific suspects for specific conduct. Accordingly, the “case” in terms of article 17(1)(a) of the Statute is the case as defined in the summons. This case would be inadmissible before the Court only if the same suspects are being investigated by Kenya for substantially the same conduct. The words “is being investigated”, in this context, signify the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The mere preparedness to take such steps or the investigation of other suspects is not sufficient. Unless investigative steps are undertaken in relation to the suspects who are the subject of the proceedings before the Court, it cannot be said that the same case is under investigation by the

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Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-02/11-274, 30 August 2011, paras. 36-38.

<sup>669</sup> Ibid., paras. 40 and 39 respectively.

Court and by a national jurisdiction. If this is not the case, there is no conflict of jurisdictions. The Chamber also underlined that determinations of the existence of an investigation shall be distinguished from an assessment of whether the State is “unwilling or unable genuinely to carry out the investigation or prosecution”. In assessing whether the State is investigating, the genuineness of the investigation is not at issue: such an assessment requires verifying whether there are investigative steps.<sup>670</sup>

According to the Appeals Chamber, the Kenya Government's submission that “it cannot be right that in all circumstances in every situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State if the State is to retain jurisdiction”<sup>671</sup> cannot be accepted. It disregards the fact that the proceedings have progressed and that specific suspects have been identified. At this stage of the proceedings, where summonses to appear have been issued, and the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for substantially the same conduct.<sup>672</sup> The Kenyan Government sought to counter this conclusion by suggesting that a national jurisdiction may not always have the same evidence at the disposal of the Prosecutor and therefore may not be investigating the same suspects as the Court.<sup>673</sup> According

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<sup>670</sup> Ibid., paras 41 and 40 respectively.

<sup>671</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Document in Support of 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”’; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Document in Support of 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", *supra* n. 661, para. 43.

<sup>672</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute” and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *supra* n. 668, paras. 42 and 41 respectively.

<sup>673</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Document in Support of the 'Appeal of the Government of Kenya against the “Decision on the Application by the

to the Appeals Chamber, the argument was not persuasive for two reasons. First, if a State does not investigate a given suspect because of lack of evidence, then there simply is no conflict of jurisdictions, and no reason why the case should be inadmissible before the Court. Second, what is relevant for the admissibility of a concrete case under articles 17(1)(a) and 19 of the Statute is not whether the same evidence in the Prosecutor's possession is available to a State, but whether the State is carrying out steps directed at ascertaining whether these suspects are responsible for substantially the same conduct as is the subject of the proceedings before the Court.

The Chamber also discussed the Government's allegation that there should be a "leaway [sic] in the exercise of discretion in the application of the principle of complementarity" to allow domestic proceedings to progress. The judges reiterated that the argument had no merit because the purpose of admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible due to a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favour of domestic jurisdictions does not contradict this conclusion. Article 17(1)(a) to (c) of the Statute does indeed favour national jurisdictions; however, it does so only to the extent that there are, or there have been, investigations and/or prosecutions at the national level. If the suspects or the conducts have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible. Furthermore, proceedings to determine the admissibility of a concrete case under article 19 of the Statute are but one aspect of the complementarity principle. The concerns raised by Kenya regarding its exercise of criminal jurisdiction and protection of its sovereignty are taken into consideration in the proceedings under articles 15, 53, 18 and 19 of the Statute. Nevertheless, under article 19, the focus is on a concrete case that is the subject of proceedings before the Court. For that reason, the Chamber

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Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Document in Support of 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", *supra* n. 661, para. 83.



found the Kenya's reference to the careful preliminary examination by the Prosecutor in relation to other situations “unpersuasive”: the proceedings in relation to the situations mentioned are simply at a different stage than the proceedings in the case at hand.

Similarly, the argument that once the summons to appear was issued, Kenya was constrained, under article 19(5) of the Statute, to bring the admissibility challenge “at the earliest opportunity” and therefore it could not be “expected to have prepared every aspect of its Admissibility Application in detail in advance of this date” was also found “misconceived”. The Chamber explained that article 19(5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions. The provision does not require a State to challenge admissibility just because the Court has issued a summons to appear.<sup>674</sup>

In light of the above, the Appeals Chamber found that, given the specific stage that the proceedings had reached, the 'same person/same conduct' test applied by the Pre-Trial Chamber was the correct test: it had made no error of law.

## **7. Admissibility of Cases and the Inaction scenario**

The decisions issued so far on admissibility shed light on the proper interpretation of the discipline of admissibility contained in the Rome Statute. Starting from the “same conduct test” elaborated by Pre-Trial Chamber I, and the definition of the notion of “case” that emerged throughout the proceedings in the various situations, the ICC judges made it clear that conflicts of jurisdiction ex article 19 of the Statute apply to hypotheses in which the same person is

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<sup>674</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute” and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, supra n. 668, paras. 43-47 and 42-46 respectively.

charged with substantially the same conducts at both the international and the national level.

The Office of the Prosecutor, in its submissions in the various proceedings, gave a significant contribution to the development and affirmation of the correct application of articles 17 and 19 of the Statute. In *Katanga*, in particular, the reasons brought by the Prosecutor in relation to the correctness of the “same-person same conduct test” in order to assess admissibility *vis-à-vis* a given case, cannot be neither refuted nor confuted. These are in line with what held by the Chambers since the test developed in Lubanga, with the exception of Trial Chamber II, whose interpretation and explication of admissibility, as seen above, were not fully satisfactory.

Having analysed the relevant decision and submissions, there are no doubts about the correct characterisation of a case as encompassing a given suspect and specific conducts and incidents.

The main argument in support of a “strict definition of case” stems from the analysis of the discipline of *ne bis in idem*, and its “interoperability” with the notion of case.<sup>675</sup> Article 17(1)(c) of the Statute establishes that a case is inadmissible where “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”. Article 20(3) of the Statute recites that no person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 of the Statute shall be tried by the Court with respect to the same conduct, unless the proceedings were vitiated by the two causes of unwillingness, i.e., were for the purpose of shielding the person from criminal responsibility or were not conducted independently or impartially in accordance with the norms of due process, and conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. Thus, given that the Statute requires articles 17(1)(c) and 20(3) to be read together, whenever a complementary challenge is brought in relation to a claim that national authorities have already tried the person under article 17(1)(c), “the challenge must perforce relate to conduct”.<sup>676</sup> The fact that a case shall be

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<sup>675</sup> R. Rastan, 'What is a 'Case' for the Purpose of the Rome Statute?' supra n. 300, 437.

<sup>676</sup> Ibid.

“incident specific” stems not only from the classical understanding of *ne bis in idem*, but also from the meaning of “case” known in domestic criminal systems. Once it is found that the notion of case applicable to instances of *ne bis in idem*, it becomes difficult to deny its applicability to the other hypotheses contemplated in Article 17 of the Statute. As noted by the Prosecutor in *Katanga*, this interpretation is further corroborated by the references to articles 89(4) and 94 of the Statute, which regulate conflicts between the Court and a state with respect to prosecution or investigation of the same person for different cases.<sup>677</sup> Article 89(4) establishes that when the person sought by the Court “is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender is sought before the Court, the requested State, after making its decision to grant the request, shall consult with the Court”. Article 94 establishes that a State may postpone the execution of a request when it is investigating or prosecuting a case different from the one held before the Court, when the immediate execution would interfere with its investigations or prosecution. These provisions, contained in the part of the Statute which deals with issues of cooperation, make it clear that the litigations on admissibility do not apply when it is not the same case to be the object of proceedings at the national and international levels.

The Appeals Chamber, triggered in all the instances analysed above, took some time before finally confirming the correctness of the definition of case applied by all the other Chambers and the Prosecutor, and contrasted by defendants (*Bemba, Katanga, Ruto and Sang*) and States (the Government of Kenya). In the decision concerning the appeal of the Kenyan Government to Pre-Trial Chamber II decision on the challenge of admissibility presented by the former, the Higher Chamber made it clear that article 19 of the Statute relates to the admissibility of concrete cases, and that these are defined by the warrants of arrests or summonses to appear and further refined throughout the confirmation of charges hearing: cases are made of “the persons

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<sup>677</sup> *The Prosecutor v. Katanga and Ngudjolo Chui*, Public Redacted Version of the 19<sup>th</sup> March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), *supra* n. 544, para. 77.

and the charges”.<sup>678</sup>

As a consequence, for a case to be inadmissible under article 17 of the Statute, the question is not merely a question of investigation or prosecution in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction. The purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible.

The idea that, under the regime of the ICC Statute, there is a presumption in favour of domestic jurisdictions is not contradicted by this conclusion. The mechanism for the admissibility of cases established in article 17(1)(a) to (c) of the Statute, however, favours national jurisdictions to the extent that there are, or there have been, investigations and/or prosecutions at the national level. If the suspects or the conducts have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.<sup>679</sup>

The understanding of the notion of “case” as encompassing the same person and the same conduct reveals the correctness of the Prosecutor's and Judges' references to “inaction” in all instances in which there is no correspondence between cases dealt with at the domestic and international levels.

As vehemently explained by Robinson, there shall be no doubts that the three subparagraphs of article 17(1) of the ICC Statute require first of all the existence of national proceedings, either on-going or terminated, in relation to the same case brought before the Court.<sup>680</sup> The attempt of the Kenyan Government to block the proceedings before the Court due to its “intentions to

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<sup>678</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *supra* n. 668.

<sup>679</sup> *Ibid.*, paras. 40 and 39, respectively.

<sup>680</sup> D. Robinson, 'The inaction controversy: Neglected words and new opportunities', and 'The Mysterious Mysteriousness of Complementarity', *supra* n. 202.

investigate or prosecute”, has therefore not been considered acceptable by the ICC Judges, in line with the correct interpretation of article 17 of the Statute.

The ICC judges also clearly state that assessments of unwillingness and inability come at stake only at a subsequent moment, when the existence of domestic proceedings, and their conflict with those before the Court, has been found. The general assumption that the Court intervenes unless States are unwilling or unable to do so, referred to by many authors in relation to the admissibility test,<sup>681</sup> is not correct insofar as it does not contain reference to the preceding and mandatory assessments of the existence of domestic proceedings.

## **8. The Actors of Admissibility**

Having found that both the Prosecutor and the Chambers applied the admissibility test correctly, in light of a proper definition of “case” and of the finding that the inaction scenario does not leave the floor to litigation based on admissibility proceedings, some considerations shall be presented in relation to the role of the two above-mentioned organs of the Court and to the different phases of proceedings in which admissibility comes at stake.

Under the Rome Statute, the ICC Judges are arbiters of the Court's jurisdiction as well as of national proceedings, being them asked to verify the existence of the conditions established in article 17 of the Statute for the admissibility of cases before the Court.<sup>682</sup> In *Kony at al.*, Pre-Trial Chamber II made it clear that, according to the principle of “la compétence de la compétence” it is up to the Court to determine the admissibility of a case; under the complementarity regime of the ICC Statute, it is for the Chamber “to construe and apply the rules on admissibility”.<sup>683</sup>

The analysis of judicial interventions in relation to admissibility, however, leaves the

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<sup>681</sup> See, *supra* n. 484 and 535.

<sup>682</sup> See, *supra*, Chapter II.2.

<sup>683</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, *supra* n. 461, para. 46.

impression that the role of the judges is more limited than what expected. In the first part of the admissibility test relating to complementarity, judges shall verify the existence of a conflict on jurisdiction, i.e., the performance of proceedings for the same case before the national and the international *fora*. This test is therefore rather “mechanic”: the judges, on the basis of the evidence brought by the conflicting parties, shall verify the existence of proceedings for the same person and the same conducts at the national and international levels. Their role acquires more relevance in relation to the second part of the test, which entails assessments of the willingness and ability of the state genuinely to prosecute. It is in this context that judges are called to evaluate domestic proceedings, to consider the number of factors expressive of unwillingness and inability and likely face the challenge represented by the controversial and unresolved issues inherent to these two concepts, underlined above.<sup>684</sup> It is in this context that the ICC judges application and interpretation of the provisions on admissibility are likely to bear considerable impacts not only for the State whose performance is under examination, but also for the Court itself, in terms of its legitimacy, credibility and international support.

The first practice of the Court, however, showed that the applicability of the provisions on unwillingness and inability is confined to a limited number of instances in which the same case is dealt with before both a domestic court and the ICC.

In the absence of a “same-case” scenario, the judges of the ICC cannot but find that the first part of the admissibility test related to complementarity is not met, and therefore the case is admissible before the Court. This is what happened in relation to all assessments of admissibility performed so far. All the cases brought before the ICC judges were not being nor had been dealt with domestically: there were therefore no conflicts of jurisdiction. The decisions analysed above, were not strictly speaking decisions on admissibility: the judges simply verified the absence of jurisdictional conflicts. In doing that, they were *de facto* asked to

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<sup>684</sup> See, *supra*, Chapter II.3.1. and 3.2.

“stamp” the Prosecutor's decision of which cases to bring before them. Judicial assessments of admissibility are subject to the Prosecutor's decision of which cases shall be selected for prosecution before the Court. Unless the Prosecutor decides to push the applicability of the second part of the admissibility test based on complementarity – thus presenting a case that has been or is being dealt with domestically – the ICC judges intervention will be confined to a sort of confirmation of the selection operated by the organ of the accuse.<sup>685</sup>

The finding of the “passivity” of the ICC judges seems to be applicable also to the second component of the admissibility test that attains to the “sufficient gravity threshold” of article 17(1)(d) of the Statute. Whereas, as seen above, there were merits in the Appeals Chamber finding that the rigid test proposed by Pre-Trial Chamber I in *Ntaganda* incorporated elements usually considered to be part of prosecutorial discretion,<sup>686</sup> this latter expressed the Chamber's attempt to exercise a more active role *vis-à-vis* the admissibility of cases. Only the future practice of the Court will reveal whether also judicial assessments of gravity are confined to “mechanic” assessments of whether the evidence and arguments presented by the Prosecutor

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<sup>685</sup> The case against the Libyan Saif Al-Islam Gaddafi and Abdullah Al-Senuffi might lead to a real conflict of jurisdiction between the Court and the State. A warrant of arrest for the two suspect was issued by the Court in June 2011. See, *Situation in Libya*, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-13, 27 June 2011, and *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL SENUSSI", ICC-01/11-01/11-1, 27 June 2011. In November 2011, the son of Gaddafi son was arrested by Libyan authorities, which expressed their willingness to try him domestically. At the time of writing, the warrant of arrest is still pending before the Court; the ICC Prosecutor, however, during a visit to Libya, expressed his favour for domestic prosecution of the suspect. See, among others, BBC News, Saif Al-Islam Gaddafi can face trial in Libya – ICC, available at <http://www.bbc.co.uk/news/world-africa-15831241>, (accessed 28 December 2011). The Chamber, reacted to this statement by clarifying that, unless a successful challenge to admissibility is brought, the case rests with the Court and asked the Libyan government to submit observations regarding the arrest of the suspect. See, ICC Press Release, Course of action before the ICC following the arrest of the suspect Saif Al Islam Gaddafi in Libya, ICC-CPI-20111123-PR746, 23 November 2011, available at <http://www.icc-cpi.int/NR/exeres/48F6B130-EC14-4A51-BC79-1CCF8633E270.htm> (Accessed 28 December 2011) and *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, CC-01/11-01/11-39-Red, P.T.Ch.I., 6 December 2011. If the Libyan authorities want to exercise their primacy over the case, their domestic courts shall first of all and quickly present a case that is substantially the same held before the Court, and then challenge its admissibility before the Court, demonstrating their willingness and ability to genuinely investigate and prosecute. Ruling on admissibility may also be triggered by the ICC Prosecutor, or be performed *proprio motu* by the Chamber. Libyan authorities might also recur to the provision of article 94 of the Statute, according to which they may seek the postponement of the execution of the Court's request to surrender the suspect, on the ground that such request interferes with ongoing investigation or prosecution in relation to the same person.

<sup>686</sup> C. Sthan, 'Judicial review of prosecutorial discretion: Five years on', *supra* n. 411, 274-275.

are convincing, or whether, on the contrary, judicial assessments of gravity will entail a deeper control of the judges over the selection of cases brought before them.

Leaving aside possible future enlargements of the judges' room for manoeuvre within the context of the applicable legal provisions, the initial surprise for the limited role of the judiciary in admissibility assessments under article 19 of the ICC Statute shall be attenuated when considering the scope of applicability of the provision at hand. Proceedings under article 19 of the Statute may be triggered “prior to or at the commencement of the trial”, i.e., at the conclusion of the long set of phases and proceedings in which issues of admissibility come at stake. They perforce entail exceptional scenarios, in which the Court and the State – despite all the previous checks and forms of dialogue, find themselves exercising concurrent jurisdiction over a given case. It is in this context that the ICC judges are arbiters of the Court jurisdiction, as well as of national proceedings, is applicable.<sup>687</sup>

Before this final, exceptional phase is reached, the Rome Statute establishes that it is the ICC Prosecutor the organ tasked with assessing admissibility, and thus, with the exercise of the “ICC's watchdog functions over national courts”<sup>688</sup> in light of the complementary nature of the Court. Since the phase of preliminary examination of situations, until the decision to prosecute which culminates with the request to the relevant chamber to issue a warrant of arrest or a summons to appear, the ICC Prosecutor is in charge of gathering information and assessing the conformity of domestic proceedings to the statutory provisions. The key role of this organ is confirmed by the corresponding limited powers of the ICC judges to interfere with his or her assessments on admissibility until this becomes an issue for litigation, as amply seen above.<sup>689</sup>

In addition to the proceedings under article 19 of the Statute, article 18 of the Statute introduces

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<sup>687</sup> In the words of the ICC Prosecutor, Luis Moreno Ocampo, judicial assessments of admissibility relate to “the adjudication of disputes over forum allocation with respect to specific cases”. L. M. Ocampo, 'A positive approach to complementarity: The impact of the Office of the Prosecutor', in C. Stahn, M. M. El Zeidy (Eds.), *supra* n. 44, 21-32, 23.

<sup>688</sup> H. Olásolo, *The Triggering Procedure of the International Criminal Court*, *supra* n. 162, 96.

<sup>689</sup> See, *supra*, Chapter II.



the first, formal, form of dialogue between the Court and States. After receiving communication of the Prosecutor's intention to initiate investigations, the latter may request the former to defer the investigations, on the ground that criminal proceedings are being or had been performed domestically. In this context, the ICC judges intervene in case of disagreement between the Prosecutor and the State in relation to such deferral: upon Prosecutor's application, the Pre-Trial Chamber may decide to authorise the former to commence investigations, despite a State's request for referral; the Prosecutor and the State concerned may appeal the Pre-Trial Chamber's decision.<sup>690</sup> The decision of both Chambers, as established in rule 55 of the Rules of Procedure and Evidence, shall be based on considerations to the factors of article 17 of the Statute. The ICC judges are not, however, assigned an autonomous, *proprio motu*, power to rule on the decision of the Prosecutor of whether or not to defer the situation to the requesting State. Rather, they are triggered only on initiative of the organ of the accuse, and the opposite decision of the Prosecutor to defer to the requesting State is not subject to any form judicial review. The provisions under article 18 of the Statute do not apply to initiation of investigations triggered by UN Security Council referral. In this case, an investigation will be automatically opened if the Prosecutor determines that there is a reasonable basis to proceed, thus leaving admissibility determination at the full disposal of the ICC Prosecutor. Also in proceedings ex article 18 of the Statute the ICC judges intervene to solve conflicts of jurisdiction; they have not, however, powers to control the Prosecutor's assessments of admissibility before this latter becomes a matter for litigation.

The same applies to all other instances in which the Rome Statute calls the judges to assess admissibility throughout the proceedings. The limited forms of control that the Chambers can exercise in this context are based on the evidence and the arguments presented by the Prosecutor. As seen in the decisions authorising the initiation of investigations in Kenya and

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<sup>690</sup> Article 18(4) ICC Statute.

Cote D'Ivoire in accordance with article 15 of the Statute, the judges assess whether the evidence and arguments presented by the Prosecutor provide reasonable grounds to believe that the (potential) cases would be admissible. That such control derives from the need to balance the wide powers assigned to the Prosecutor to commence investigations on its own initiative with the concern of States, is confirmed by the absence of similar procedures for the opposite decision – thus favourable to states – not to initiate investigations, and for the instances in which the organ of the accuse is triggered by a State or by the Security Council. In these latter cases, the Rome Statute contemplates some forms of control where the Prosecutor determines not to investigate, as established in article 53(1) and (3) of the Statute. These may trigger the Pre-Trial Chamber, which, upon examination of the Prosecutor's conclusions and reasons<sup>691</sup>, may request the Prosecutor to reconsider that decision. As seen above, the Chamber's request to the Prosecutor to reconsider the decision is not binding, and the latter may decide to stick to his or her previous determination.<sup>692</sup> The powers of the Chamber become binding – with the duty of the Prosecutor to review the decision, becomes effective only if confirmed by the judges<sup>693</sup> – only in the hypothesis in which the Prosecutor's determination is based on considerations of the interests of justice, thus excluding any evaluation as to complementarity.

Similarly to what established for decisions not to investigate, decisions not to prosecute are subject to judicial control in those instances in which the Pre-Trial Chamber is triggered by the referring State or Security Council, with the Chamber being entitled to request the Prosecutor to review his or her decision, and where the decision is based on the interests of justice, with the Chamber being entitled to activate *proprio motu*, and the condition, for the Prosecutor's decision to become effective, that it is confirmed by the Chamber. As extensively seen above, the contours and applicability of decisions not to prosecute has not yet been clarified: doubts remain as to whether decisions not to prosecute entail general decision not to prosecute any

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<sup>691</sup> Rule 105(3) RPE.

<sup>692</sup> See *supra*, Chapter II.7.2.

<sup>693</sup> Article 53(3)(b) ICC Statute.

case within a given situation, or whether it relates more specifically to a given set of potential cases.<sup>694</sup>

At the case stage, the Pre-Trial Chamber is required, under article 58 of the Statute, to establish whether there are reasonable grounds to believe that the person committed the alleged crimes. The Chamber, in doing so, has to examine the prosecutor's application and the evidence or other information submitted, not the specific features of the case.<sup>695</sup> As seen above, the Appeals Chamber clarified that assessments of admissibility under article 17 and 19(1) of the Statute are not preconditions for the issuance of warrants of arrest.<sup>696</sup> Thus, no control over the specific contours of the case is provided for, if the evidence submitted by the Prosecutor meets the reasonable grounds threshold of article 58 of the Statute.

The power of shaping the cases, of selecting the persons, incidents and charges to be brought before the Judges for prosecution are assigned, like in every criminal system, to the Prosecutor. It is therefore the ICC Prosecutor the organ that dominates the admissibility of cases before the Court. The specific features of the ICC, a Court with an extremely wide potential jurisdiction over the multitude of crimes and perpetrators that normally characterise situations in which international crimes are committed, vest the Prosecutor with an extremely wide discretion. Given the close link between assessments of admissibility and exercise of prosecutorial discretion, the exercise of his or her powers is likely to have repercussions on the whole architecture of the ICC system. In order to understand complementarity, is it therefore necessary to carefully examine the role, functions, stance and policies of the Office of the Prosecutor, the leading actor of admissibility

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<sup>694</sup> See, *supra*, Chapter II.8.1.

<sup>695</sup> Article 58(1) ICC Statute.

<sup>696</sup> *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 a warrant of arrest, article 58", *supra* n. 276, paras 42-45. See, *supra*, Chapter II.8.2.

## **CHAPTER IV - COMPLEMENTARITY BEYOND ADMISSIBILITY**

### **1. The ICC Prosecutor and a complementary International Criminal Court**

The analysis of the legal provisions regulating the admissibility of cases before the Court and of the practice of judicial assessments of admissibility highlighted the central role of the ICC Prosecutor.

Within the architecture of the Rome Statute, the ICC judges intervene where there are controversies between the Court and States in relation to the forum that shall exercise jurisdiction. These conflicts may arise before the ICC Prosecutor formally initiates investigations on a given situation, as regulated in article 18 of the Statute, or at the case stage, to which article 19 of the Statute applies. In addition, the ICC judges have some limited forms of control over prosecutorial decisions in relation to admissibility before cases are selected for prosecution. Under article 15 of the Statute, they are called to authorise the Prosecutor to initiate investigations in a given situation; under article 53(3) of the Statute they may review decisions not to investigate or prosecute on specific and limited circumstances, upon request of the referring State or Security Council or acting *proprio motu* when the decision of the Prosecutor is based on the highly discretionary assessment of the interests of justice.

A part from these limited forms of judicial control, and considering the exceptional character of jurisdictional conflicts between the Court and states on a given case, it has been found that it is the ICC Prosecutor – the organ in charge of deciding whether to initiate investigations on a given situation and of selecting the cases to be brought before the Court – the leading actor of admissibility.

Although the organ of the prosecution retains discretion in the exercise of its functions in any

judicial system, national or international,<sup>697</sup> within the architecture of the Rome Statute the freedom enjoyed by the ICC Prosecutor is wider than in other systems. This depends not only on the express determination of the drafters to ensure independence to the activities of this organ, as an additional guarantee against the risk of political influence, pressure or manipulation,<sup>698</sup> but also on the specific features of the Court. In particular, the ICC has an extremely wide potential jurisdiction, and its Prosecutor is in charge of determining whether and when shall the Court intervene. The possibility for the Court to activate not only upon referral but also upon *proprio motu* initiative of the Prosecutor, on the basis of the information received, together with the non-membership requirement for States whose situation is referred to the Court by the UNSC, considerably enlarge the scope of prosecutorial intervention. The ICC Prosecutor would most likely be involved in assessing the likelihood of potential ICC investigations in a considerable number of instances in which international crimes are committed. Before the ICC, selectivity is to be performed first of all in relation to the situations within which investigations shall be performed. Within the context of a situation, the Prosecutor shall then determine which cases are worth prosecution before the Court. The commission of international crimes is normally characterised by a considerable number of perpetrators, incidents and crimes and, thus, the potential jurisdiction of the Court extends over an immense number of cases.

A careful and thorough selection is also fundamental in light of the limited economic and human resources at the disposal of the ICC Prosecutor and of the Court as a whole.<sup>699</sup> This

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<sup>697</sup> H. B. Jallow, 'Prosecutorial Discretion and International Criminal Justice', (2005) 3 JICJ, 145-161, 145 ss.; D. D. N. Nsereko, 'The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court', (2008) 19 CLF, 373-393, 374.

<sup>698</sup> M. R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', (2004) 2 JICJ, 71-95, 71; H. B. Jallow, *supra* n. 697, 145 ss.; C. Sthan, 'Judicial review of prosecutorial discretion: Five years on', *supra* n. 411, 253; Danner A, M., *supra* n. 361, 514-516, available at [iccdocs.asp?docs\\_library\\_organs\\_optp\\_050613\\_Danner\\_presentation.pdf](#) (Accessed 5 January 2012)

<sup>699</sup> The ICTY Appeals Chamber in *Delalic et al.* held that "[i]n the present context, indeed in many criminal justice systems, the entity responsible for prosecution has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question

operation is further complicated, from a practical point of view, by the fact the ICC Prosecutor intervenes in situations in which he or she does not have the monopoly of force, and in which, most likely, violence is on-going. This means that, in determining whether to initiate investigations in a given situation, he or she shall have careful regard to issues of security of his staff, of witnesses and of victims.<sup>700</sup> The collection of evidence, strongly dependent on assistance and cooperation of states, may be, in some cases, particularly challenging.

More broadly, through selection, the ICC Prosecutor bears the responsibility of shaping the contours of the intervention of the complementary institution which he or she represents. It is the ICC Prosecutor in charge of determining how the complementary ICC shall exercise its complementary mandate. Within the process of selection, complementarity assessments take place before specific cases are singled out for prosecution. At the pre-investigative stage, assessments of whether national courts are active, and, in the affirmative, of whether their action is not vitiated by unwillingness and inability genuinely to prosecute, are of a more general nature than those performed in the context of judicial litigation. The Prosecutor is asked to assess the overall response to international crimes put in place by the State or States concerned, with a special consideration of the potentials of the intervention of the complementary ICC. As pointed out by an eminent commentator, due to the primary role conferred by the Rome Statute to the ICC Prosecutor at the early stage of proceedings, this latter becomes “the *gatekeeper* of the ICC”.<sup>701</sup>

Complementarity assessments acquire a broader dimension which impacts on any subsequent action of the Court, and selection becomes an extremely challenging and complex operation, whose repercussions go beyond the strict performance of legal proceedings before the Court.

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that the prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.” *Prosecutor v. Delalic, Mucic, Delic and Landzo, (Celebici case)*, Appeals Chamber Judgement, Case No.: IT-96-21-A, 20 February 2001 para. 602.

<sup>700</sup> *Office of the Prosecutor*, Paper on some Policy Issues before the Office of the Prosecutor, *supra* n. 221, 2. (Hereinafter, Policy Paper)

<sup>701</sup> H. Olásolo, ‘The Prosecutor of the ICC before the initiation of investigations: a quasi-judicial or a political body?’ (2003) 3 ICLR, 87-150, 89.

Discretionary choices of selection have the potential of bearing an impact on a number of issues, such as the Court's ability to respond in the most efficient way to the commission of international crimes; its relationship with states, its credibility and perceived legitimacy; the realization of its goals to fight against impunity and to contribute to the prevention of the commission of future international crimes.

Before turning to an analysis of the Prosecutor's understanding and treatment of complementarity, it is therefore worth briefly examining, in general terms, the issue of selection and the relevance of complementarity assessments at these phases. A broader assessment of prosecutorial selection in both theoretical and practical terms is not, however, subject of this work.

## **2. The ICC Prosecutor and the selection of situations and cases to be brought before the Court**

As extensively seen above in Chapter II, article 53 of the ICC Statute establishes the legal criteria against which decisions to investigate and prosecute shall be undertaken. Thus, article 53(1) of the Statute, applicable to Prosecutor's decisions to initiate investigations in a given situation, requires him or her to be satisfied that there is a reasonable basis to proceed. In his or her determination, the Prosecutor shall evaluate whether the information available provides a reasonable basis to believe that the alleged crimes fall within the jurisdiction of the Court and that the case is or would be admissible under article 17 of the Statute. Exceptional considerations of the "interests of justice" may lead him or her to decide not to investigate, despite the fulfilment of jurisdictional and admissibility requirements. Article 53(2) of the Statute requires a higher threshold and a higher degree of specificity, being it applicable to a decision to prosecute. Accordingly, the Prosecutor shall be satisfied that there is a sufficient factual or legal basis to seek the issuance of a warrant of arrest or a summons to appear in

accordance with article 58 of the Statute and that the selected case is admissible under article 17 of the ICC Statute. Again, under exceptional circumstances related to considerations that a prosecution would not be in the interests of justice and notwithstanding the subsistence of the two above-mentioned requirements, the Prosecutor may decide not to prosecute.

These assessments intersect with other principles, policies and factors to be considered throughout the selection process, as expression of the wide degree of discretion enjoyed by the ICC Prosecutor and of the need to be highly selective due to the extremely wide ICC potential jurisdiction, on the one hand, and its practical limitations, on the other.

The ICC Prosecutor Luis Moreno Ocampo has devoted considerable attention to the publicity of the methods, criteria and principles guiding the process of selection of situations and cases to be brought before the Court.<sup>702</sup>

As recalled in a number of papers, the process of selection is informed, first of all, by the “overarching” principles of independence, impartiality, objectivity and non-discrimination.<sup>703</sup>

Independence means that selection “is not influenced by the presumed wishes of any external source or the importance of the cooperation of any particular party, nor the quality of cooperation provided”.<sup>704</sup> This, however, does not mean lack of interaction: the specificity of the context in which the ICC and its Prosecutor operate makes “contacts with all potential sources of cooperation (...) not only a practical necessity but indeed a duty, in order to ensure

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<sup>702</sup> See, *Office of the Prosecutor*, Draft Paper, Criteria for the Selection of Situations and Cases, *supra* n. 370 (hereinafter, Paper on Selection Criteria); *Office of the Prosecutor*, Policy Paper, *supra* n. 221, *Office of the Prosecutor*, Paper on Prosecutorial Strategy 14 September 2006, *supra* n. 178 (hereinafter, 2006 Prosecutorial Strategy); *Office of the Prosecutor*, Paper on Prosecutorial Strategy 2009-2012, 1 February 2010, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Report+on+Prosecutorial+Strategy.htm> (accessed 5 January 2012), hereinafter, 'Second Paper on Prosecutorial Strategy'. See also the contributions of current or former OTP members: F. Guariglia, 'The selection of cases by the Office of the Prosecutor of the International Criminal Court', *supra* n. 373, and P. Seils, 'The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court', in Bergsmo M., (Ed.) *supra* n. 41, 55-60.

<sup>703</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 1-2; *Office of the Prosecutor*, Draft Policy Paper on preliminary examinations, *supra* n. 211, 6-7.

<sup>704</sup> *Ibid.*



the effective investigation or prosecution of international crimes”.<sup>705</sup>

The principle of impartiality informs a “non-partisan approach to selection”, with the same methodology and standards applied to all groups.<sup>706</sup> The Prosecutor applies “consistent methods and criteria irrespective of the States or parties involved or the persons or groups concerned.”<sup>707</sup>

As a consequence of impartiality, there may be different outcomes for different groups: the ideas of “equivalence of blame” or “geographical balance” are not part of the principles inspiring the prosecutor's selection process.<sup>708</sup>

The principle of objectivity, crystallised in article 54(1)(b) of the Statute, establishes that the Prosecutor shall conduct investigations by considering incriminating and exonerating circumstances equally, in order to establish the truth.<sup>709</sup>

According to the principle of non-discrimination, the selection process does not draw any distinction based on grounds such as gender, race, age, colour, religion, belief or language, political or other opinion, national, ethnic or social origin, wealth, birth or other status.<sup>710</sup> In its analyses, the Office of the Prosecutor applies the same standards formats for analytical reports, the same standard methods to evaluate the sources of information, and examines information from various different sources, in order to avoid the risk of bias information.<sup>711</sup>

The process of selection is necessarily dependent upon the evidence available, issues of security of both staff and the providers of information – in particular when intervening in situations in which violence is still on-going – and possible cooperation constraints.<sup>712</sup>

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<sup>705</sup> Ibid.

<sup>706</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 2.

<sup>707</sup> *Office of the Prosecutor*, Draft Policy Paper on preliminary examinations, *supra* n. 211, 7. Also, *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 2.

<sup>708</sup> Ibid., 8 and 2 respectively.

<sup>709</sup> Ibid.

<sup>710</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 3.

<sup>711</sup> Ibid.

<sup>712</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 4. *Office of the Prosecutor*, Informal Expert Paper, Fact-finding and investigative functions on the office of the Prosecutor, including international co-operation, 11, available at *Office of the Prosecutor*, Informal Expert Paper, Fact-finding and investigative functions on the office of the Prosecutor, including international co-operation, available at [http://212.159.242.181/iccdocs/asp\\_docs/library/organs/otp/](http://212.159.242.181/iccdocs/asp_docs/library/organs/otp/) (Accessed 5 January 2012)

At the moment of determining whether to initiate an investigation, and, thus, before the conferment of investigative powers, the Prosecutor's assessment will be undertaken on the basis of the information available, in a “comprehensive and throughout manner”.<sup>713</sup> Considering the likely peculiar features of each situation, the Prosecutor refrains from elaborating fixed criteria to be applied to this phase. Whereas regional balance is not a criterion for selection,<sup>714</sup> the general and overall gravity of the crimes committed in the context of the situation and the performance of domestic proceedings, if any, will be evaluated with particular attention, in line with the statutory requirements.<sup>715</sup>

When selecting the cases that are worth prosecution before the Court, in addition to the factors listed in article 53(2) of the Statute, the Prosecutor's strategy is inspired by the intrinsic limitations of the ICC, which require him or her to maximise the impact of the Court's intervention, by producing “a limited number of particularly serious cases for presentation before the Court”.<sup>716</sup> Thus, selection will be performed in accordance with the need to prioritise certain regions, incidents, groups or persons, and charges.<sup>717</sup> The selected cases shall be “representative of the overall scope of the crime, against those bearing the greatest responsibility for the most serious crimes”.<sup>718</sup>

According to the Prosecutor, the policy of focussing on those bearing the greatest responsibility for the commission of international crimes is not only consistent with the fact that the Court shall deal with a limited number of cases, and that these shall be the most representative. It is

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<sup>713</sup> *Office of the Prosecutor*, Draft Policy Paper on Preliminary Examinations, *supra* n. 211, 17. See, also, *Situation in Central African Republic*, Prosecution Response Pursuant to Pre-Trial Chamber's III 30 November 2006 Decision Requesting Information on the Status of Preliminary Examination of the Situation in the Central African Republic, *supra* n. 391, para 7.

<sup>714</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 8.

<sup>715</sup> F. Guariglia, 'The selection of cases by the Office of the Prosecutor of the International Criminal Court' *supra* n. 373, 214.

<sup>716</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 9.

<sup>717</sup> *Ibid.*, 12-13. On selection and prioritisation, see P. Seils, 'The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court', *supra* n. 702, 55-60. More generally, M. Bergsmo, 'The theme of selection and prioritization criteria and why it is relevant,' *ibid.*, 15-19

<sup>718</sup> *Ibid.*, 10. *Office of the Prosecutor*, Policy Paper, *supra* n. 221, 3; *Office of the Prosecutor*, Second Paper on Prosecutorial Strategy, *supra* n. 702, paras. 18-21; *Office of the Prosecutor*, 2006 Prosecutorial Strategy, *supra* n. 178, 5.

also in line with the idea that prosecution of the persons at the highest echelon of responsibility may have positive consequences in relation to future deterrence of the commission of crimes, in general, and, specifically, in the context of the situation concerned.<sup>719</sup>

In the selection phase, assessments of admissibility, and, therefore, of complementarity, come at stake. At both the pre-investigative and investigative stages, admissibility is to be considered against the backdrop of the potential cases that would likely arise from the investigation. Complementarity assessment at this phase require examinations as to whether the relevant State is or has acted in relation to the groups of persons and the crimes allegedly committed during the incidents that would likely form the object of the Court's investigation. Similarly, assessments of gravity are generic assessments of whether these potential cases would be worth being investigated and eventually prosecuted before the Court. Once, and if investigations are opened, the potential cases would be progressively defined, according to a process in which other factors, such as the available evidence and specific prosecutorial policies, are relevant, and admissibility constantly assessed against a more defined background.

As amply seen above in Chapter III, the strict definition of case and the related strict admissibility assessments performed at the case-stage, combined with the wide discretion of the Prosecutor in the selection process, as a consequence of its freedom but also of the wide number of incidents and perpetrators, make it for the Prosecutor relatively easy to select cases that would meet the admissibility test. As argued by the Prosecutor, “[n]ot every case meeting the admissibility threshold of the Statute will be subject to prosecution”.<sup>720</sup> Otherwise said, the Court shall not intervene for each and every potentially admissible case. The challenge is, therefore, the determination of when and how a Court's intervention would be appropriate. Complementarity acquires a wider dimension that goes beyond the strict admissibility test of

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<sup>719</sup> The Prosecutor, however, underlines the necessary flexibility of this policy, and the fact that sometimes, on the contrary, the focus of an investigation by the Office of the Prosecutor may go wider than high ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case. *Office of the Prosecutor*, Policy Paper, *supra* n. 221, 3.

<sup>720</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 12.

whether a given case has been investigated or prosecuted, and that both affects and is affected by the process of selection, under the question of when and what shall the Court complement. The following sessions of this chapter examine the Prosecutor's approach towards complementarity in this broader, policy or discretionary dimension, fundamental to understand the Court's approach to national proceedings and that is likely to shape the Court's relationship with States. The question is, in synthesis, what is the prosecutor's approach to complementarity, beyond the strict admissibility test?

### **3. The Prosecutor's approach to complementarity**

Since he took Office in 2003, Luis Moreno Ocampo was aware of the practical limitations and challenges faced by the Court. He paid special consideration to the broader framework within which the new instrument of justice at the international level operates, acknowledging that the Rome Statute, by establishing a complementary International Criminal Court, creates an “interdependent, mutually reinforcing system of justice”<sup>721</sup> whereby the Court is deemed to intervene in exceptional scenarios to complement the failure of states to comply with their duty to prosecute. The Court is not intended to replace national courts, but to operate “when national structures and courts are unwilling or unable to conduct investigations or prosecution”.<sup>722</sup>

At the ceremony for his solemn undertaking, he affirmed that

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.<sup>723</sup>

Within this context, the prosecutorial policy towards complementarity is conceptualised as a

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<sup>721</sup> *Office of the Prosecutor*, 2006 Prosecutorial Strategy, *supra* n. 178, 5.

<sup>722</sup> *Office of the Prosecutor*, Policy Paper, *supra* n. 221, 4.

<sup>723</sup> *Ceremony for the Solemn Undertaking of the Chief Prosecutor*, Statement by Luis Moreno Ocampo, 16 June 2003, available at <http://www.icc-cpi.int/Menus/ICC/Structure> of the Court/Office of the Prosecutor/Ceremony for the solemn undertaking of the Prosecutor/Ceremony for the solemn undertaking of the Prosecutor.htm (Accessed 5 January 2012)

positive attitude, according to which domestic efforts shall be welcomed and encouraged. The theoretical elaboration on complementarity uniformly expresses the favour of the Prosecutor for national proceedings, under the general reference to the Prosecutor's commitment to encourage them, to the extent possible and to take action "only where there is a clear failure to take national action".<sup>724</sup>

The Prosecutor also acknowledged that a fruitful fight against impunity goes much beyond the intervention of the Court, whose possibilities of prosecution remain confined to a small number of cases. A successful fight against impunity cannot be performed without a direct involvement of domestic courts. The Court, therefore, shall not be left alone. The Prosecutor repeatedly called for "urgent and high level discussions" among the Court, States and civil society on methods to deal with the issue and invited to deploy formal and informal networks to that purpose, not only to encourage the concerned State to act, but also to develop a broader sense of "taking ownership" of the Court.<sup>725</sup> Such an approach is, in his view, necessary both to prevent the Court from intervening in those situations in which domestic courts can successfully fight impunity, and to ensure that, in those instances in which the Court activates, it complements steps undertaken at the national level. Domestic action is indispensable for a successful fight against impunity in the system of justice created in Rome.

Within this context, the Prosecutor individuated a role for its Office in concretely assisting States in their efforts to investigate and prosecute. In the 2003 Policy Paper, the Prosecutor expressly envisaged the possibility of taking initiatives in order to foster domestic capacity, such as the development of formal and informal networks of contacts to encourage States to undertake action, and the implementation of specific forms of assistance to those States genuinely willing to investigate and prosecute.<sup>726</sup> According to the Prosecutor, forms of encouragement of domestic proceedings encompass the provision to States of information

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<sup>724</sup> *Office of the Prosecutor, Policy Paper, supra* n. 221, 5.

<sup>725</sup> *Ibid.*, 2-3.

<sup>726</sup> *Ibid.*, 5.

available to its Office, and may even extend to assistance in rebuilding the national justice systems and in the process of implementation of the necessary legislation.<sup>727</sup>

The ICC Prosecutor devoted considerable attention to the issue of complementarity, not only as an admissibility factor, but in its broader dimension as a factor to be considered at the moment of assessing whether to initiate investigations or prosecutions in a given situation, as part of his discretionary powers.

#### **4. The emergence and affirmation of positive complementarity**

The first, and most significant elaboration on complementarity is represented by the informal expert paper “The principle of complementarity in practice” produced between May and October 2003 by a group composed of eminent jurists and practitioners, upon initiative of the Office of the Prosecutor.<sup>728</sup> The group of experts delved into the concept of complementarity and its practical implications for the Office of the Prosecutor's work. The paper provides a detailed analysis and explanation of the mechanism of complementarity, which “governs the exercise of the Court's jurisdiction”<sup>729</sup> and a systematisation of the suggested prosecutorial approach to it. Through reference to the intertwined guiding principles of partnership and vigilance, the Experts substantiate the twofold dimension in which complementarity operates. Vigilance attains to the strict complementarity test, part of the admissibility assessment; partnership applies broadly to the stance and approach of a complementary international criminal court towards domestic efforts. The Experts also reiterate the importance of coordinating efforts among the organs of the ICC and other actors of the international realm in order to encourage the performance of proceedings at the national level. Within this context, they suggest that, under the umbrella of a positive approach to complementarity, the Office of

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<sup>727</sup> Ibid., 3.

<sup>728</sup> *Office of the Prosecutor*, Informal Expert Paper, the Principle of Complementarity in Practice, supra n. 212, 2. (Hereinafter, Paper on Complementarity in Practice)

<sup>729</sup> Ibid., 3.

the Prosecutor – within the scope of its role and functions – might provide specific forms of assistance and initiatives to contribute to encouraging domestic action.

The concepts expressed by the Group of Experts represent the basis of the subsequent prosecutorial elaboration on complementarity. Throughout the years, however, the recognition that complementarity operates on two dimensions, the legal and the policy or discretionary ones, is replaced by the conceptualisation of two separate dimensions of complementarity. The first dimension of complementarity is the admissibility test; the second is “positive complementarity” whose meaning and content are also objects of progressive transformation.

The following sessions analyse the elaboration of the Group of Experts on complementarity in the aftermaths of the entry into force of the ICC Statute and the subsequent prosecutorial conceptualisation and transformation of “a positive approach to complementarity” into “positive complementarity”.

#### **4.1 The Group of Experts' Paper on Complementarity in Practice: a positive approach to complementarity**

The Experts start their analysis by underlining the philosophical foundations of complementarity. They recall that complementarity rests on the philosophy that “the establishment of an international order wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC, would indeed be a major success for the Court and the international community as a whole.”<sup>730</sup> As a consequence, the Prosecutor's objective when applying complementarity is not to compete with domestic courts, but, rather, to help ensure that the most serious international crimes do not go unpunished, in order to contribute to putting an end to impunity.<sup>731</sup> By doing so, complementarity may serve “as a mechanism to encourage and facilitate the compliance of

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<sup>730</sup> Ibid., 3.

<sup>731</sup> Ibid.

states with their primary responsibility to investigate and prosecute core crimes”.<sup>732</sup>

The Group of Experts thus individuates two guiding principles that shall inform the Office of the Prosecutor's approach to complementarity: partnership and vigilance.<sup>733</sup> They are “twin aspects of complementarity”, in tension but inseparably related.<sup>734</sup> On the one hand, partnership – the ancestor of positive complementarity – implies that “the relationship with States that are genuinely investigating or prosecuting can and should be a *positive*, constructive one”.<sup>735</sup> On the other, the Court is called to exercise a controlling function over the functioning of domestic courts, in accordance with the statutory requirements as to the admissibility of cases, which thus implies careful vigilance.<sup>736</sup>

A bench of activities shall characterise the policy of creating partnership and dialogue with States, with a view to motivate genuine national proceedings on the basis of effective legislation.<sup>737</sup>

The Office of the Prosecutor shall, as a high priority, encourage national action and prompt anti-impunity measures. Such encouragement shall be general or specific, and involve reminds to States of their responsibility to adopt and implement effective legislation and encouragements to carry out effective investigations and prosecutions. In this context, the motivation or encouragement to domestic proceedings shall be a priority for all parties to the ICC system, not a responsibility of the Office of the Prosecutor alone. They therefore recommend that the organs of the Court and the Secretariat of the Assembly of States Parties “consider developing an action plan on implementing legislation as an essential foundation for an effective complementarity regime”.<sup>738</sup>

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<sup>732</sup> Ibid.

<sup>733</sup> Ibid.

<sup>734</sup> Ibid., p. 4.

<sup>735</sup> Ibid., p. 4. Emphasis added.

<sup>736</sup> Ibid.

<sup>737</sup> Ibid., 5. The Group of Experts notes that, being it “a comparatively new and developing area”, the Office of the Prosecutor will then have to establish “objective benchmarks, objectives and management parameters” in order to measure the effectiveness of the measures and activities suggested”, see, footnote 2.

<sup>738</sup> Ibid., 5, footnote 3.



The efforts of the Court are thus to be located in a broader system, in which international institutions, in particular the United Nations, and various actors promote “consistent and decisive action” in preventing and punishing crimes, on the ground that “advancing an anti-impunity “vision” and strategy in other *fora* will reduce the need for the ICC to exercise its jurisdiction”.<sup>739</sup> In this respect, the contribution of the Office of the Prosecutor may consist of making available its expertise and experience to bodies negotiating resolutions on relevant topics, developing intergovernmental policies or administering a region.<sup>740</sup>

In line with what held by the Prosecutor in its Policy Paper, the Experts envisage the possibility that the Office of the Prosecutor provides direct assistance and advice to specific States, in particular through the exchange of information and evidence in order to facilitate national investigations and prosecutions. This is expressly contemplated in article 93(10) of the Statute, according to which the Court may, upon request, cooperate with and provide assistance to a State – irrespective of whether it is a party to the Statute – which is conducting an investigation into or a trial in respect of a conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.<sup>741</sup> The Office may also share technical expertise on a number of legal and practical issues, that may assist States in the performance of the complex proceedings related to the prosecution of international crimes, as well as the complex legal questions that may arise.<sup>742</sup> Thanks to its monitoring role before and throughout investigations, the OTP may individuate the need for trainings and indicate benchmarks. This task, however, shall not imply the diversion of OTP

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<sup>739</sup> Ibid., 5.

<sup>740</sup> Ibid., 5.

<sup>741</sup> This form of cooperation has been referred to as “reverse cooperation” by Gioia, and it is increasingly being associated to the activities that can be performed under the heading of “positive complementarity”. See, F. Gioia, “Reverse cooperation” and the architecture of the Rome Statute: a vital part of the relationship between States and the ICC?, in M. C. Malaguti, (Ed.) *ICC and international cooperation in light of the Rome Statute. Proceedings of the workshop held in Lecce on October 21-22, 2005*, (Argo, Lecce 2007), 75-102; for a closer link between “reverse cooperation” and positive complementarity, F. Gioia., 'Complementarity and 'reverse cooperation', in C. Stahn, M. M. El Zeidy (Eds), *supra* n. 44, 807-829.

<sup>742</sup> *Office of the Prosecutor, Paper on Complementarity in Practice*, *supra* n. 212, 5-6.

financial or personnel resources. Other actors shall be encouraged to address the matter.<sup>743</sup>

Finally, the Experts suggest that the Office of the Prosecutor, in light of its privileged position, may act as an intermediary, facilitating assistance between States in carrying out national proceedings, without however undertaking initiatives that may jeopardise or compromise any future role of the Court.<sup>744</sup>

Having said that, the Experts warn the Office of the Prosecutor on the potential risks of getting too closely involved in partnership and dialogue with States, considering that its role is first and foremost to assess the genuineness of domestic proceedings. The two aspects of complementarity, partnership and vigilance, while intertwined, may indeed lead to tensions. They therefore recommend the Prosecutor to proceed with a *positive*, cooperative approach to assisting national efforts, but a caution one, in order to avoid being exploited by the relevant States.<sup>745</sup>

In analysing the second aspect of complementarity – the vigilance function to be exercised by the Office of the Prosecutor – the Experts note that this implies an assessment of national proceedings, conducted in accordance with the criteria on admissibility of article 17 of the Statute, already examined in details above.<sup>746</sup>

The Experts acknowledge the possibility that assessments of domestic proceedings may lead to the finding that there are no proceedings in relation to the situation under examination. Situations of domestic inaction, while bearing the effect that admissibility would be “uncontested”, bear detrimental effects for the Court's operation, which presumes that States will carry out the main burden of investigating and prosecuting international crimes. Measures shall thus be undertaken to deter inactivity. Among them, the Experts suggest the possibilities of holding bilateral discussions with domestic authorities, or of exercising public pressure to urge

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<sup>743</sup> Ibid., 6.

<sup>744</sup> Ibid., 6.

<sup>745</sup> Ibid., 7. Emphasis added.

<sup>746</sup> See, *supra*, Chapter II.2 and 3.

states to act, and of fostering and strengthening of the prosecutorial policy of focusing on persons most responsible, leaving the prosecution of other perpetrators to national authorities.<sup>747</sup> In some cases, it may be found that a consensual division of labour between the Court and the State concerned may have positive effects on the overall fight against impunity, although it shall be exercised with caution.<sup>748</sup>

#### **4.2 From a “positive approach to complementarity” to “positive complementarity”**

The positive, constructive approach to complementarity, and the parallel need to encourage domestic action envisaged by the Group of Experts in 2003 gained increasing attention by the OTP a few years later, once the Court had become fully operational and the main challenges and difficulties faced by the Office of the Prosecutor were transposed from a theoretical to a practical level.

The 2006 Paper on Prosecutorial Strategy, which sets out the strategic objectives and the principles inspiring prosecutorial action, contains the first official reference to a “positive approach to complementarity”. According to this approach, the Office of the Prosecutor explains its commitment to encourage genuine national proceedings where possible, to rely on national and international networks and to participate in a system of international cooperation.<sup>749</sup> Such a prosecutorial policy is in line with the fact that the primary responsibility for the prosecution of persons allegedly responsible for the commission of international crimes rests with States, and the Court's intervention shall be exceptional.<sup>750</sup>

In the Report on activities performed during the first three years, issued in the same period, the Office of the Prosecutor refers to “positive complementarity” as a “concept”, and links it to issues of cooperation. In light of the “positive complementarity concept”, the Prosecutor affirms

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<sup>747</sup> Ibid., 17-18.

<sup>748</sup> Ibid., 19.

<sup>749</sup> *Office of the Prosecutor*, 2006 Prosecutorial Strategy, *supra* n. 178, 5.

<sup>750</sup> Ibid. The same is held in *Office of the Prosecutor*, Report on the activities performed during the first three years, *supra* n. 355, para. 58. (hereinafter, First Three Years Report)

its commitment to make cooperation work in two directions: States towards the Court, but also the Court towards States.<sup>751</sup> In order to “facilitate deep and sustained cooperation and empower domestic criminal jurisdictions”, the Office reported the implementation of some of the initiatives envisaged in the 2003 Expert Paper, such as the creation of electronic Legal Tools, a collection of legal documents on international and national legislation and case law on international crimes, and of ICC documents and preparatory works materials, freely accessible by the public.<sup>752</sup>

In the subsequent years, a conceptual transformation invested the Prosecutor's stance towards complementarity. Under the umbrella of “positive complementarity”, the set of initiatives initially conceived as part of the policy of encouraging domestic initiatives acquires a sort of conceptual autonomy. The initial “positive approach to complementarity” is often referred to as “positive complementarity”; rather than a guiding principle for the Office of the Prosecutor, which shall inspire its performance of investigations and prosecutions, it becomes a second, separate dimension of complementarity, as opposed to the admissibility test.

This division is traced in the second paper on Prosecutorial Strategies, published in 2010.<sup>753</sup> The Prosecutor distinguishes between two dimensions of complementarity, i.e., the admissibility test, which is a judicial issue and is conducted in order to assess the existence of national proceedings and their genuineness, and “the positive complementarity concept”, i.e., “a proactive policy of cooperation aimed at promoting national proceedings”.<sup>754</sup> The Prosecutor explains that the positive approach to complementarity implies an encouragement of national proceedings where possible, including in countries where the Office is conducting preliminary examinations or investigations, without however implying any direct involvement of the Office

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<sup>751</sup> Ibid., para. 95.

<sup>752</sup> Ibid., para. 96.

<sup>753</sup> *Office of the Prosecutor, Second Paper on Prosecutorial Strategy, supra* n. 702.

<sup>754</sup> Ibid., para. 16.

in capacity building or financial or technical assistance.<sup>755</sup> Positive complementarity is described as a “policy of cooperation” whose aim is to promote national proceedings.

In the paper on Preliminary Examinations, having reiterating the same conceptual understanding of complementarity, the Prosecutor adds the idea of “burden sharing” with States, when the circumstances make it possible and feasible, in order to comprehensively address impunity.

The idea of a burden sharing had been already envisaged by the Experts who, however, had called for caution, given the risks inherent in excessive cooperation with states for prosecutorial independence. The issue was extensively elaborated upon in a 2006 OTP draft paper entitled “Positive Complementarity”, which was distributed among scholars and practitioners for discussion, but never published.<sup>756</sup> The paper contemplated three different forms of interaction with States in order to foster their duty to prosecute, depending on the different problems affecting them. General forms of dialogue and pressure would contribute to foster State's willingness to investigate and prosecute; more concrete forms of assistance would assist in overcoming inability, and division of labour would contribute to closing the impunity gap where States are able and willing to prosecute international crimes generally, but is unable or unwilling to prosecute a particular case.<sup>757</sup>

#### **4.3 Legal and Theoretical foundations of positive complementarity**

The rapid affirmation of the concept of positive complementarity culminated in its progressive understanding as a separate, independent manifestation or “dimension” of complementarity. As seen above, the most recent Prosecutor's elaboration on complementarity talks of “two dimensions” of complementarity: on the one hand, complementarity as admissibility, i.e., the

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<sup>755</sup> Ibid., para. 17.

<sup>756</sup> *Office of the Prosecutor*, Draft Policy Paper on Positive Complementarity, 4 August 2006 (On file with the author).

<sup>757</sup> Ibid., 10-18.

assessment of the existence of domestic proceedings and, if any, of their compatibility with the statutory requirements; on the other, positive complementarity.

In the Second Paper on Prosecutorial Strategy, positive complementarity is defined as “a proactive policy of cooperation aimed at promoting national proceedings”<sup>758</sup>; in the paper on preliminary examinations the “positive complementarity policy” is described as “based on the goals of the preamble and article 93(10) of the Statute” and “distinct from the legal admissibility threshold of complementarity”.<sup>759</sup> In the Report of the Court on Complementarity, presented to the tenth session of the Assembly of States Parties in December 2011, positive complementarity is described as “a key principle underlying the prosecutorial strategy of the Office”, which “includes the full range of activities conducted during the preliminary examination stage, as well as cooperation with national jurisdictions conducting investigations on serious crimes”.<sup>760</sup> In a recent publication, Luis Moreno Ocampo reiterates that complementarity has two dimensions, the second one being “positive complementarity”. Positive complementarity finds its legal basis, “*inter alia*”, article 93(10) of the ICC Statute; it is one of the four prosecutorial policies and “implies a more horizontal relationship with states. It does not seek to introduce to the Court or the OTP a function of assessing or reforming domestic judiciaries. (...) Rather, it is a proactive use of OTP information to help states to fulfil their obligations for the achievement of a common responsibility: the prosecution of massive crimes”.<sup>761</sup>

The Prosecutor, however, never adopted a definition of positive complementarity nor provided a systematic analysis of its legal foundations. The scarce elaboration of the Prosecutor on the legal basis and foundation of positive complementarity has been compensated by the attention

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<sup>758</sup> *Office of the Prosecutor*, Second Paper on Prosecutorial Strategy, *supra* n. 702, para. 16

<sup>759</sup> *Office of the Prosecutor*, Paper on Preliminary Examinations, *supra* n. 211, para. 93.

<sup>760</sup> *Assembly of States Parties*, Report of the Court on Complementarity to the Tenth Session of the Assembly of States Parties, ICC/ASP/10/23, 11 November 2011 (Hereinafter, Report of the Court on Complementarity), paras. 28 and 30 respectively.

<sup>761</sup> L. M. Ocampo, 'A positive approach to complementarity: The impact of the Office of the Prosecutor', *supra* n. 687, 24.

devoted by a group of scholars, and in particular by Burke-White. The author elaborated on the concept of a “positive”<sup>762</sup> or “proactive”<sup>763</sup> complementarity, individuated of its legal basis and the concrete means through which it shall be realised,<sup>764</sup> which somehow backed – or even inspired - the Prosecutor's elaborations.<sup>765</sup> The author starts from the assumption that the ICC Statute creates a system of judicial enforcement for the prosecution of the most serious crimes at both the national and international level, with duties and rights of both national governments and the ICC to prosecute these crimes,<sup>766</sup> in which the Court and states interact in the pursuance of the common goal to end impunity.<sup>767</sup> Within this system, the ICC and its Prosecutor have a broader, active role to play in ending impunity, consisting in encouraging national governments to undertake their investigations and prosecutions, where there are reasons to believe that they may be able or willing to do so, and where the active encouragement of domestic proceedings offers a “resource-effective” means of ending impunity.<sup>768</sup>

According to Burke-White, the legal basis for the implementation of a policy of positive complementarity is to be found in three separate elements. First, the Statute does not explicitly prohibit it: the regulation of admissibility, with primacy granted to States and controlling functions assigned to the Court, does not bar the Prosecutor from encouraging inactive national jurisdictions to take actions.<sup>769</sup>

Second, complementarity is to be understood not only as “a formal legal requirement for admissibility”, but also as “a broader principle that allocates authority among concurrently

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<sup>762</sup> W. Burke-White, 'Implementing a Policy of Positive complementarity in the Rome System of Justice,' (2008) 19 CLF, 59-85,60.

<sup>763</sup> W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', (2008) 49 Harvard International Law Journal, 53-108, 62.

<sup>764</sup> W. Burke-White, 'Reframing positive complementarity: Reflections on the first decade and insights from the U.S. Federal criminal justice system', in C. Stahn, M. M. El Zeidy (Eds.) *supra* n. 44, 341-360

<sup>765</sup> The unpublished OTP paper on Positive Complementarity, *supra* n. 756, does indeed closely resemble Burke White's production.

<sup>766</sup> W. Burke-White, 'Implementing a Policy of Positive complementarity in the Rome System of Justice, *supra* n. 762, 60.

<sup>767</sup> W. Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Governance in the Democratic Republic of the Congo', (2005) 18 LJIL, 557-590.

<sup>768</sup> W. Burke-White, 'Implementing a Policy of Positive complementarity in the Rome System of Justice, *supra* n. 762, 62.

<sup>769</sup> *Ibid.*, 64-65.

empowered institutions at different levels of governance within an international justice system.”<sup>770</sup> According to such a broader reading, the Rome Statute is not only the foundational instrument for the ICC, but also the basis for the whole system of justice. The overall purpose of this system is to put an end to impunity. Whereas the primary responsibility rests on states and the Court has the function to fill the gap left by their inaction or inappropriate action, the specific series of interactions between the Office of the Prosecutor and States, contemplated in the ICC Statute, represent a legal basis for positive complementarity.<sup>771</sup> The opportunities for dialogue and communication between the Court and national governments on issues of complementarity may be utilised as mechanisms to encourage national proceedings. These are the possibility for the Prosecutor to seek information from States in relation to communications he received, as contemplated in article 15 of the Statute; the notification under article 18 of the Statute of the Prosecutor's intention to initiate investigations; the possibility, under the same provision, that the Prosecutor after having decided to defer the investigation to the requesting State, to ask the latter to periodically provide information on the status of such proceedings. Further, article 53 of the Statute makes the evaluation of admissibility a dynamic process throughout the pre-investigative and investigative phases. Finally, article 54 of the Statute explicitly empowers the Prosecutor to seek cooperation of States, intergovernmental organisations and to enter into arrangements as it may be necessary.<sup>772</sup>

In addition to these means directly available to the Prosecutor, the Rome Statute establishes a number of obligations for States parties, such as the duties to cooperate with the Court's investigations and to implement appropriate legislation to that purpose, as established in articles 86 and 88 of the Statute, the duty to surrender persons to the Court if legal requirements are met, as provided for in articles 59 and 89 of the Statute, together with various other forms of judicial cooperation. The interaction created by all these provisions, if used strategically, may

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<sup>770</sup> Ibid., 65.

<sup>771</sup> Ibid., 66.

<sup>772</sup> Ibid., 67.



encourage the prosecution of international crimes by domestic court.<sup>773</sup>

Third, according to Burke-White, it cannot be excluded that the Rome Statute grants the Prosecutor “implied powers” that stem from the “inherent authority” of his office to undertake actions consistent with the Statute, although not expressly contemplated.<sup>774</sup>

Positive complementarity is therefore conceived and theorised as an important mechanism for catalysing and coordinating national efforts in the pursuance of the core mission of ending impunity.

## **5. Positive Complementarity in practice**

Positive complementarity is therefore theorised as both a policy aimed at fostering domestic initiatives in response to the commission of international crimes, and as a series of initiatives to be implemented by the Office of the Prosecutor with the aim of fostering domestic ability or willingness to investigate and prosecute. This twofold dimension in which positive complementarity operates is reflected in the distinction between measures adopted and policies implemented by the OTP.

On the one hand, the Office of the Prosecutor implemented a wide range of activities under the heading of “positive complementarity”. These activities were refined and increased throughout the years, so that, at the moment of writing, they encompass a series of initiatives that go from forms of cooperation, until the OTP engagement with international and national networks. Common condition for their adoption and implementation is that they don't imply any direct involvement of the Office in capacity building nor financial or technical assistance.<sup>775</sup> On the other hand, through the promotion of information on the Court and through expression of the Court's interest towards specific situations, the Prosecutor encourages States to take action and welcomes national efforts.

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<sup>773</sup> Ibid., 68.

<sup>774</sup> Ibid., 68-69.

<sup>775</sup> *Office of the Prosecutor*, Second Paper on Prosecutorial Strategy, *supra* n. 702, para. 17.

The following sessions analyse, first, the policies pursued in light of a positive approach to complementarity and, then, the set of concrete initiatives aimed at strengthening domestic capacity implemented by the Office of the Prosecutor.

### **5.1 Policies implemented in light of a positive approach to complementarity**

As seen above, the “positive approach to complementarity” has been envisaged as an express policy of the Office of the Prosecutor which informs its relationship with States throughout the whole process of deciding whether the Court shall activate in relation to a given situation.

The policy was initially concretised through the Prosecutor's direct involvement in inviting States to refer their situation to the Court, according to the so-called practice of “self-referrals”.<sup>776</sup> According to this practice, the Prosecutor, upon determining that there was a reasonable basis to commence investigation on a given situation, and before asking authorisation to the Pre-Trial Chamber in accordance with article 15 of the Statute, informed the relevant State of his intention to investigate, and offered the State's authorities the option of referring the situation to the Court. Both the investigations on Uganda and DRC were initiated upon States' receipt of the Prosecutor's invitation.<sup>777</sup> According to the Prosecutor, this increased the prospects for State's cooperation, showing the commitment of the State to the goal of ending impunity<sup>778</sup> and bringing considerable practical advantages in terms of assistance to OTP

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<sup>776</sup> See, *supra*, Chapter II.6.1.

<sup>777</sup> *Office of the Prosecutor*, First Three Years Report, *supra* n. 355, paras. 12 and 25 respectively. In particular, in relation to the DRC situation, the ICC Prosecutor announced publicly his intention to initiate investigations *proprio motu* before the Assembly of States Parties. See, Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court, 8 September 2003, available at [http://www.amicc.org/docs/Ocampo9\\_03.pdf](http://www.amicc.org/docs/Ocampo9_03.pdf) (Accessed 5 January 2012). The referral of the Government of Central African Republic followed immediately after. In this case, however, the referral was not even promoted by the Prosecutor, who then took almost three years to decide to commence investigations. The three years delay of the Prosecutor's decision has been interpreted by several NGOs as an attempt to “pursue a political rival of President Kabila”. See, among others, J. A. Goldston, 'More Candour About Criteria. The Exercise of Discretion by the Prosecutor of the International Criminal Court', *supra* n. 448, 384; Human Rights Watch, ICC hearing against former vice-President of DR Congo Jean-Pierre Bemba, 7 January 2009, available at <http://www.hrw.org/news/2009/01/07/icc-hearing-against-former-vice-president-dr-congo-jean-pierre-bemba> (accessed 5 January 2012)

<sup>778</sup> *Office of the Prosecutor*, Draft Policy Paper on preliminary examinations, *supra* n. 211, paras. 76-77.

investigation.<sup>779</sup>

A thorough analysis of the different views on self-referral, of the legal questions that they raise and their implications in the practice goes beyond the scope of the present work. It is however worth noting the close link between the practice of self-referrals and Ocampo's idea of a positive approach to complementarity in the first years of his mandate, as underlined by some authors.<sup>780</sup>

The expected results of better assistance to the Court's work, however, did not emerge. The only warrant of arrest issued in the context of the DRC situation for a suspect currently supported by the government, Bosco Ntaganda, is still pending.<sup>781</sup> In the case against Lubanga, the Prosecutor faced considerable difficulties in gathering evidence in the field, despite the Government's favour in having him tried before the Court.<sup>782</sup>

Also the prosecutorial choices in terms of cases to prosecute were highly criticised. The cases against Lubanga, Katanga and Bemba, who had been indicted before domestic courts for either the same or even graver counts, showed the “diabolic” side of the relationship between the strict admissibility test and discretionary assessments of the Prosecutor at the moment of selecting

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<sup>779</sup> *Office of the Prosecutor*, Annex to the “Paper on some Policy Issues before the Office of the Prosecutor”: Referrals and Communications, *supra* n. 365, 2.

<sup>780</sup> Schabas refers to positive complementarity as “a vision of the Rome Statute embraced by the Office of the Prosecutor in the early years of the Court as a means of generating cases” in the first years of the Court's activities. W. A. Schabas, 'The rise and fall of complementarity', *supra* n. 339, 150 and 155. Also, H. Takemura, 'A Critical Analysis of Positive Complementarity', *supra* n. 46.

<sup>781</sup> On the failure of DRC to cooperate with the Court for the arrest of Bosco Ntaganda, see, among others, Coalition for the International Criminal Court, State Cooperation: the weak link of the ICC, available at [http://www.coalitionfortheicc.org/blog/?p=588&langswitch\\_lang=en](http://www.coalitionfortheicc.org/blog/?p=588&langswitch_lang=en); (accessed 22 December) Human Rights Watch, Letter from Parents in Eastern Democratic Republic of the Congo to the UN Security Council, available at <http://www.hrw.org/en/news/2009/04/22/letter-parents-eastern-democratic-republic-congo-un-security-council> (accessed 22 December 2011)

<sup>782</sup> The *Lubanga* trial was stayed due to problems related to the use of information gathered by the Prosecutor as evidence during the trial. Although the problem arose as a consequence of the Prosecutor's excessive and misleading recourse to information gathered in accordance with article 54(3)(e), i.e. under conditions of confidentiality and for the sole purpose of generating new evidence, it is also expressive of the difficulties of the ICC Prosecutor in obtaining information and evidence for investigations and prosecutions. On the suspension – and resume – of the Lubanga trial, see, *inter alia*, Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June, ICC-01/04-01/06-1401, T.Ch.I, 13 June 2008; Decision on Release of Thomas Lubanga Dyilo, ICC-01/04-01/06-1418, T.Ch.I, 2 July 2008; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Release of Thomas Lubanga Dyilo', ICC-01/04-01/06-1487, A.Ch., 21 October 2008.

cases. They also revealed the risk that the Court's intervention, rather than fostering and encouraging states' action, may lead to the discontinuance of proceedings initiated before domestic courts, in order to have the suspects tried before the Court.

The alleged positive, cooperative relationship between the Court and States, rather than fostering activity at the national level, led to an inaction scenario and forced the judges to elaborate on the "second form of unwillingness" according to which a State may be willing to have a suspect prosecuted, but not before its courts. The reasoning of the Appeals Chamber, although legally correct, led to a construction of the ICC's role in the fight against impunity that does not match with the corresponding policies of a positive approach to complementarity<sup>783</sup>, as well as those of maximising the impact of the Court's activities and, as envisaged by many, of focussing on those bearing the highest degree of responsibility,<sup>784</sup> with a view to make the Court's intervention confined to exceptional circumstances.<sup>785</sup>

In the context of the Court's intervention in Uganda, perplexities arose in relation to the one-side focus of the Prosecutor. The Prosecutor's failure to address other cases in addition to the one against the LRA leadership raised concerns about the transparency and independence of the investigations,<sup>786</sup> the risk of political bias of the ICC action<sup>787</sup>, and the Prosecutor's application of gravity as a selection criterion.<sup>788</sup>

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<sup>783</sup> M. E. Cross, S. Williams, 'Recent Developments at the ICC: Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui – A Boost for 'Co-operative Complementarity'?', (2010) HRLR 336-345, 344.

<sup>784</sup> H. Takemura, 'Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion', (2007) 7 ICLR, 677-685; P. Clark, 'Law, Politics and Pragmatism: the ICC and Case Selection in Uganda and the Democratic Republic of the Congo,' in Waddell N., Clark P., (Eds.), *supra* n. 504, 37-45; of the same author, 'Chasing cases: The ICC and the politics of state referral in the Democratic Republic of the Congo and Uganda', in C. Stahn, M. M. El Zeidy (Eds.), *supra* n. 44, 1180-1203.

<sup>785</sup> S. Sàcoutho, K. Clearly, *supra* n. 492, 369-371.

<sup>786</sup> H. Takemura, 'A Critical Analysis of Positive Complementarity', *supra* n. 46, 619.

<sup>787</sup> P. Clark, 'Law, Politics and Pragmatism: the ICC and Case Selection in Uganda and the Democratic Republic of the Congo', *supra* n. 784, 42

<sup>788</sup> W. A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', *supra* n. 200, 747-748; the same author in 'Prosecutorial discretion and gravity', *supra* n. 253, 245, in criticising the Prosecutorial strategy not to investigate crimes allegedly committed by members of the Government's Army, asks the following question: "(...) in a domestic justice setting involving ordinary crimes, would we countenance a national prosecutor who ignored clandestine police death squads on the ground that gangsters were killing more people than the rogue officials?"; M. Arsanjani, M. Reisman, *supra* n. 200, 394; K. J. Heller, *supra* n. 256, 14 ss.

After the initial pick of recourses to self-referrals, the Prosecutor adopted a more cautious approach towards what he initially conceived as a viable solution to the problems of obtaining cooperation from states if the Court's intervention was not favoured by the latter.

The idea of self-referral came back in relation to the situation in Kenya. The Prosecutor informed States' authorities about his intention to open an investigation and engaged in dialogue with them with the aim of implementing a complex, three-pronged response to the commission of international crimes. The idea was that, upon Kenya's Government referral, the Court would deal with the prosecution of the persons most responsible, while a special tribunal would have been established domestically to prosecute other perpetrators. A Justice, Truth and Reconciliation Commission would have completed the overall response to international crimes in the country, by shedding light on the full history of events and suggesting mechanisms to prevent the future commission of crimes.<sup>789</sup> Upon failure of the plan, the Prosecutor acknowledged the failure of the policy of encouraging domestic prosecutions, and requested the Chamber to initiate *proprio motu* investigations,<sup>790</sup> thus sending a solid message about the Court's commitment and role in the fight against impunity.<sup>791</sup> The recent challenges of the Kenyan Government to the admissibility of the two cases presented by the ICC Prosecutor reveal the pressure faced by the Kenyan Government as a consequence of the Court's investigations and prosecution. At least on paper, this marks the commitment of State's authorities to implement legislation on international crimes and to initiate investigations and prosecutions.<sup>792</sup>

In the recent Report presented to the Assembly of States Parties, the Prosecutor stressed the importance of the publicity of the Court's pre-investigative activities as a tool to encourage

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<sup>789</sup> *Office of the Prosecutor*, Draft Policy Paper on Preliminary Examinations, *supra* n. 211., para. 96. See also, *Press Release*, ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya, ICC-OTP-20090930-PR456, 30 September 2009.

<sup>790</sup> *Situation in Kenya*, Request for authorisation of an investigation pursuant to Article 15, *supra* n. 366.

<sup>791</sup> P. Seils, 'Making complementarity work: Maximising the limited role of the Prosecutor', *supra* n. 256, 1110.

<sup>792</sup> See, *supra*, Chapter III.6.

states to put in place domestic proceedings. He brought the example of the responses to international crimes implemented in Guinea, Georgia and Colombia upon the Prosecutor's expression of interest over the situations in these countries, and the meetings held with States' representatives and the performance of the Office's monitoring activities.<sup>793</sup>

## **5.2 Concrete Measures to assist and strengthen domestic capacity**

In these years, the Office of the Prosecutor has worked on the implementation of initiatives aimed at fostering domestic capacity, as envisaged by the Chief Prosecutor since the early years of his mandate.<sup>794</sup>

In the recent Report of the Court on Complementarity, which will be analysed in further details below, the Office of the Prosecutor provided a detailed account of all the activities and measures implemented throughout the years.<sup>795</sup>

Forms of assistance to States consist, first of all, of the provision of information at the Prosecutor's disposal that could be of assistance to their proceedings, in accordance with Article 93(10) of the Statute. The Prosecutor also envisages the possibility of sharing with national authorities expertise in relation to its best practices in the conduct of investigations and prosecutions, including witness protection and evidence handling.<sup>796</sup>

As already envisaged by the Group of Experts in the 2003 Paper on Complementarity in Practice, the Office of the Prosecutor, through the exercise of its monitoring functions over domestic proceedings, is in the privileged position of individuating the specific shortcomings and the most urgent needs of States in order to be able to genuinely investigate or prosecute.

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<sup>793</sup> Report of the Court on complementarity, *supra* n. 760, para. 33. For conflicting views in relation to the Prosecutor's approach to the situation in Colombia, and the potential admissibility of the situation in accordance with the statutory provisions, see, K. Ambos, 'The Colombian Peace Process (Law 975 of 2005) and the ICC's principle of complementarity', in C. Stahn, M. M. El Zeidy (Eds.) *supra* n. 44, 1071-1096, and P. Seils, 'Making complementarity work: Maximising the limited role of the Prosecutor', *supra* n. 256, 1003-1011.

<sup>794</sup> See, *supra*, para. 3 of this Chapter.

<sup>795</sup> Report of the Court on Complementarity, *supra* n. 760, para. 35. The Prosecutor brings the example of the provision of assistance to Ugandan authorities with regards to witness-related issues, by sharing lessons learned and best practices.

<sup>796</sup> *Ibid.*, para. 30.

Within this context, the Prosecutor instructed OTP investigators to report to States on the specific situations and areas that would require assistance. These reports, which do not imply the allocation of additional resources by the Court, assist states and other organisation operating in the field to “better diagnose the needs” of each specific situation.<sup>797</sup>

Other forms of cooperation undertaken and fostered by the Office of the Prosecutor entail the engagement with a variety of national and international networks. Thus, the Office of the Prosecutor has been actively involved in the creation of and participation to the Law Enforcement Network (LEN) Project. The LEN is a network of specialised organisations, such as INTERPOL, and national law enforcement agencies that deal with international crimes or serious crimes under national law. All these actors work together to define investigations and projects that can be undertaken domestically to support efforts against massive crimes, with the aim of pooling resources, sharing relevant information and identifying areas for potential judicial cooperation.<sup>798</sup> The Office also sought to contribute to national efforts to build expertise and capacity, by inviting national officials, experts and lawyers to participate in the OTP investigative activities, and developed and strengthened contacts with several specialised agencies of the United Nations as well as with donors in order to encourage the international community to adopt a policy of promoting justice efforts which effectively complement the work of the Court.<sup>799</sup>

Since the early years after the adoption of the Rome Statute, upon initiative of the Office of the Prosecutor, the Court is working on the implementation of the Legal Tools Project, an electronic

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<sup>797</sup> Ibid., paras. 49-50.

<sup>798</sup> Ibid., para. 45. Also, *Office of the Prosecutor*, Second Paper on Prosecutorial Strategy, *supra* n. 702, para. 17. Gallmetzer explains that the LEN “is a platform through which its members define concrete investigations and mutually support their investigative and prosecutorial activities by: (i) exchanging information, including relevant evidence; (ii) providing each other with legal, technical and operational assistance in support of investigative and prosecutorial activities; and (iii) sharing expertise through training and other initiatives.” The author underlines the need for cooperation in efforts to investigate crimes falling under the Court's jurisdiction or other related national crimes. R. Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas' (2010) 8 JICJ, 947-956, 952 and 956.

<sup>799</sup> Report of the Court on Complementarity, *supra* n. 760, paras. 46-47; *Office of the Prosecutor*, Second Paper on Prosecutorial Strategy, *supra* n. 702, para. 17.

library on international criminal law and justice, to which the general public has free access.<sup>800</sup> Further, the OTP promotes educational activities as means of preventing the commission of crimes, based on disseminating knowledge about, *inter alia*, international institutions and their functioning, and on historical events involving massive crimes;<sup>801</sup> and contributes to State's initiatives to compile rosters of experts to be made available, upon request, to States facing massive crimes, such as the recently established Justice Rapid Response Project (JRP).<sup>802</sup>

## 6. The 2010 Review Conference

The first Review Conference of the ICC Statute, in pursuance of its article 123, was held in Kampala, Uganda, between 31 May and 11 June 2011. In addition to introducing some amendments to the Statute<sup>803</sup> and adopting the definition of the crime of aggression<sup>804</sup>, the Review Conference “provided a timely opportunity to reflect on some key aspects of the Court's regime”.<sup>805</sup> An integral part of the Conference was devoted to “stocktaking on international criminal justice”, in which all participants at the Conference were invited to reflect on “successes and failings of the ICC following the first few years of its operation” and to consider measures that could be enhanced in order to strengthen and foster the Court's functions.<sup>806</sup> Stocktaking exercises were undertaken in relation to the most relevant issues within the context of the ICC system: the impact of the Rome Statute on victims and affected

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<sup>800</sup> At present, the Legal Tools comprise over 44,000 documents in several databases, together with four legal research and reference tools, i.e. the Case Matrix, the Elements Digest, the Proceedings Digest and the Means of Proof Digest. Report of the Court on Complementarity, *supra* n. 760, para. 51. For a detailed description of the Legal Tools Project, see M. Bergsmo, O. Bekou, A. Jones, 'Complementarity After Kampala: Capacity Building and the ICC Legal Tools', (2010)2 Goettingen Journal of International Law, 791-811, 806 ss.; of the same authors, 'Complementarity and the construction of national ability', in C. Sthan, M. M. El Zeidy (Eds.), *supra* n. 44, 1052-1070.

<sup>801</sup> Report of the Court on Complementarity, *supra* n. 760, paras. 52-54.

<sup>802</sup> *Ibid.*, para. 55.

<sup>803</sup> Review Conference of the Rome Statute, Amendments to article 8 of the Rome Statute, RC/Res.5, 10 June 2010.

<sup>804</sup> See, *supra*, n. 181.

<sup>805</sup> Bergsmo M., Bekou O., Jones A., 'Complementarity After Kampala: Capacity Building and the ICC Legal Tools', *supra* n. 800, 793.

<sup>806</sup> *Ibid.*



communities; peace and justice; cooperation;<sup>807</sup> and complementarity.<sup>808</sup>

### 6.1 The Report of the Bureau on Complementarity

The works on complementarity were preceded by the Report presented at the Resumed Eight Session of the Assembly of States Parties, by the Bureau in March 2010.<sup>809</sup>

The paper, while emphasising the “integral nature of the principle of complementarity to the functioning of the ICC's system of justice and the long term efficacy of the Court”,<sup>810</sup> focussed primarily on positive complementarity. The Bureau identified three different categories of support<sup>811</sup>, discussed the different scenarios in which such assistance could be provided – before, during and after situations arise – and the actors involved in positive complementarity.

In line with the approach of the Prosecutor, the Bureau drew a clear distinction between complementarity as a judicial, admissibility issue, and complementarity as a matter of policy. In relation to the latter, however, the Bureau highlighted that activities aimed at strengthening national jurisdictions should be carried forward by States themselves, together with international and regional organisations and civil society, exploring interfaces and synergies

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<sup>807</sup> See, <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Stocktaking/> (accessed 5 January 2012).

<sup>808</sup> The foundations for discussion on complementarity at the Review Conference can be found in the eight Session of the Assembly of States Parties, which took place in November 2009. *Assembly of States Parties, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/8/Res.3, Eight Plenary Meeting, 26 November 2009*. See, in particular, paragraph 6: The Assembly of States Parties “*Encourages States Parties to further discuss issues related to the principle of complementarity and to explore proposals by States Parties introduced as ‘positive complementarity’*”. In 2006, the Assembly of States Parties had already introduced the issue of positive complementarity among those to be discussed “as a matter of priority” with the representatives of the Court in its Report on the ICC Strategic Planning Process. See, *Assembly of State Parties, Report of the Bureau on the Strategic Planning Process of the International Criminal Court, 5th Session, the Hague, ICC-ASP/5/30, 20 November 2006, paras. 21 and 24*. The issue, however, had not been subject of any substantial discussion.

<sup>809</sup> *Assembly of States Parties, Report of the Bureau on stocktaking: Complementarity. Taking stock of the Principle of Complementarity: Bridging the Impunity Gap, ICC-ASP/8/51, Resumed Eight Session, 18 March 2010*. (Hereinafter, Report on the Bureau on Complementarity)

<sup>810</sup> Bergsmo M., Bekou O., Jones A., ‘Complementarity After Kampala: Capacity Building and the ICC Legal Tools’, *supra* n. 800, 798.

<sup>811</sup> According to the Bureau, assistance is required in the legislative field, i.e., in the drafting of an appropriate legislative framework and in overcoming domestic hurdles for passing such legislation; in technical and capacity building initiatives, such as the training of police, investigators, judges, defence counsels, etc.; and in the construction of physical infrastructures such as courthouses, prison facilities, etc. Report of the Bureau on Complementarity, *supra* n. 809.

with the Rome Statute system.<sup>812</sup> Considering that the main obstacles to domestic action are either national inability or unwillingness, and that, in order to realise the “end-goal of no impunity” domestic action shall be fostered also in those cases in which the Court intervenes, it affirmed that stakeholders, in particular States and international and regional organisations, as well as civil society, shall play a role in proactively strengthening national jurisdictions and advance domestic investigations and prosecutions.<sup>813</sup> Within this context, the Bureau emphasised that the Court as a judicial institution, not a development agency. As a consequence, the Court and its organs might engage in activities which enhance the effectiveness of national jurisdiction capacity to prosecute serious crimes, under the condition that these initiatives do not provide additional costs nor expose it to risks of having its independence undermined.<sup>814</sup> In particular, it acknowledges that the Office of the Prosecutor and the Registry, without compromising their judicial mandate, may provide assistance to in strengthening domestic judicial systems.<sup>815</sup>

The Bureau gave a definition of positive complementarity, according to which it encompasses

all the 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.<sup>816</sup>

It stressed that the possibilities for enhancing the fight against impunity through positive

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<sup>812</sup> Ibid., para. 4.

<sup>813</sup> Ibid.

<sup>814</sup> Ibid., para. 43.

<sup>815</sup> Ibid., para. 44. In the Report of the Court on Complementarity, the Registrar acknowledged the significant contributions that her Office can play in assisting efforts to strengthen national capacity to conduct fair trials, given its expertise on the matter, in particular in the areas of translation and interpretation, counsel representation, legal aid, detention conditions, witness protection, victim participation and court management. The Registry can contribute to advancing complementarity work either through participation in multilateral *fora* and debates, thus engaging with wider international and donor community initiatives related to complementarity, or by fostering effective initiatives in the situation countries in close dialogue with local actors and rule of law programmes, closely coordinating with the other organs of the Court. See, Report of the Court on complementarity, *supra* n. 760, paras. 58 ss, and S. Arbia, G. Bassy, 'Proactive complementarity – A Registrar's perspective and plans', in C. Stahn, M. M. El Zeidy (Eds.), *supra* n. 44, 52-67.

<sup>816</sup> Ibid., para. 16.

complementarity are many and diverse, and that sharpening this tool could help bridge the impunity gap and dissuade and deter the commission of future crimes.<sup>817</sup> In concluding its report, the Bureau invited all actors of the international community to work on the identification of ways “in which States Parties, in a dialogue with the Court, may even better, more targeted and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions”.<sup>818</sup>

The acknowledgement that neither the Prosecutor nor the Court alone shall contribute to strengthen national jurisdiction in order to fill the impunity gap represents a significant shift in the understanding of complementarity. The Report highlights that it is not up to the Court, being it through its Office of the Prosecutor or other organs, to significantly contribute to the development of domestic capacity and willingness in relation to prosecution of persons responsible for the commission of international crimes. Rather, this shall be carried out by States, international or regional organisation, and civil society.

## 6.2 The Review Conference

The formal stocktaking exercise on complementarity took place on the fourth day of the Review Conference<sup>819</sup> and was accompanied by several “informal side events” organised to allow States Parties, civil society and other delegates to further discuss the issue.<sup>820</sup> In addition to these side events, the discussion at the Review Conference was preceded by the paper presented by Denmark and South Africa, the two States identified as focal points for the issue of

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<sup>817</sup> Ibid., para. 50.

<sup>818</sup> Ibid., para. 51.

<sup>819</sup> *Review Conference of the Rome Statute*, Stocktaking of international criminal justice. Taking stock of the principle of complementarity: bridging the impunity gap. [Draft] Informal summary by the focal points, International Criminal Court RC/ST/CM/1, 22 June 2010.

<sup>820</sup> M. Bergsmo, O. Bekou, A. Jones, 'Complementarity After Kampala: Capacity Building and the ICC Legal Tools', *supra* n. 800, 799 report the event on complementarity organised by the Coalition for the International Criminal Court, a panel discussion hosted by Denmark and South Africa, and a side event hosted by the Democratic Republic of the Congo, the United States and Norway.

complementarity.<sup>821</sup> The paper contained examples of actions that the organs of the Court could undertake to strengthen capacity to prosecute ICC crimes domestically, such as trainings, visiting professional and internship programmes and sharing of expertise on the issues of witnesses protection.<sup>822</sup> It also illustrated projects already implemented by States, international and non-governmental organizations aimed at reconstructing the legal systems, at promoting the rule of law, at enhancing programmes of witnesses protection and at supporting domestic mechanisms of States affected by the commission of international crimes, in order to enhance and strengthen the capacity and willingness of States in undertaking their duty to prosecute.<sup>823</sup>

In line with the new focus of the preparatory works for the Review Conference, during the plenary, the centrality of complementarity and of States' fulfilment of their duty to investigate and prosecute were highlighted, together with the advantages of trials held domestically for victims and the affected communities. With regard to the practical application of complementarity, three main problems emerged: the lack or the inadequacy of national implementing legislation; the lack of operational capacity and the lack of training.<sup>824</sup>

Also the meaning of the term “positive complementarity” was discussed. Interestingly, and despite the wide reference to the term throughout the whole session, some States questioned it. The Spanish delegation held that the set of initiatives encompassed under the heading of positive complementarity might have been better referred to as to “technical assistance”. Similarly, German delegates highlighted that the term had no legal basis in the Statute, and that it “served to confuse judicial capacity building with the principle of complementarity as laid

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<sup>821</sup> *Review Conference of the Rome Statute*, Focal Points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes, RC/ST/CM/INF.2, 30 May 2010.

<sup>822</sup> *Ibid.*, Example A, 2-3.

<sup>823</sup> See, *inter alia*, the project implemented by the UNODC (United Nations Office on Drugs and Crime) to Support Kenya in order to Operationalise a witness Protection Programme, Example C, 6-7; the project implemented by Avocats Sans Frontiers in DRC, aimed at reconstructing the legal system in the country, Example D, 8-11, and the Justice Project implemented by the European Union in Colombia, Example H, 21-23.

<sup>824</sup> M. Bergsmo, O. Bekou, A. Jones, 'Complementarity After Kampala: Capacity Building and the ICC Legal Tools', *supra* n. 800, 802.

down in Article 17 of the Rome Statute”.<sup>825</sup>

This notwithstanding, no concerns were raised in substantive terms as to the desirability of an active involvement of States and civil society in capacity building initiatives and to corresponding limited role of the Court, in light of its judicial functions.<sup>826</sup>

The outcome of the discussions on complementarity was a resolution by which the Review Conference, *inter alia*, recognises “the need for additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community”;<sup>827</sup> and expresses the “desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level”.<sup>828</sup> The Review Conference, taking note of the Report of the Bureau on complementarity, and welcoming the fruitful discussions on the issue held at the Review Conference, encouraged the Court, States Parties and other stakeholders, including international organizations and civil society “to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern”.<sup>829</sup>

The Resolution, of a declaratory nature, recognised and emphasised the importance of engaging in initiatives to foster national capacity. It also represented a starting point for further discussion on the basis of the new focus of the discussions. The works of the Review Conference on complementarity are therefore of extreme relevance, as they contribute to shed light on the real, urgent necessities in order to have the ICC system of justice work, and represent the basis for a future, fruitful involvement of all the actors that compose the ICC system.

The Review Conference sets the shift of the focus of the discussion on complementarity to

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<sup>825</sup> Ibid.

<sup>826</sup> Ibid.

<sup>827</sup> *Review Conference of the Rome Statute*, Draft Resolution on Complementarity, ICC-ASP/8/Res.9, Annex VII, 8 June 2010, para. 3.

<sup>828</sup> Ibid., para. 5.

<sup>829</sup> Ibid., para. 8.

States and civil society, and “the way in which they could encourage and assist national institutions to fulfil their role under the Rome Statute”.<sup>830</sup> Contrary to an almost exclusive association of positive complementarity to the Office of the Prosecutor's policies and activities aimed at encouraging domestic prosecutions, where possible, and to forms of cooperation and contributions to capacity building envisaged by the latter, after the Review Conference positive complementarity acquires a wider dimension, which overcome the ICC, and passes to the other components of the system of justice created with the establishment of the Court.

## **7. The institutionalisation of positive complementarity**

The outcome of the extensive discussion at the Review Conference, i.e., the recognition of the need to strengthen domestic jurisdictions in order to enable them to comply with their duty to investigate and prosecute the persons responsible for the commission of international crimes under the heading of “positive complementarity”, is the last shift in the theorisation and elaboration that such a new concept experienced in less than ten years.

The Paper on Complementarity in Practice drafted by the Group of Experts in 2003 highlighted the opportunity for the Office of the Prosecutor to adopt, while performing the statutory functions of assessment of domestic proceedings, a “positive approach” to complementarity. This entailed a general, positive, stance towards domestic initiatives, with the aim of encouraging and promoting prosecutions at the national level. This approach would assist the performance of the ICC Prosecutor's role, circumscribing the Court's intervention to limited, exceptional instances of failure at the domestic level, and ensure that impunity is fought at both levels.

As a consequence of this “positive approach”, the Experts envisaged the possibility for the Office of the Prosecutor to actively contribute to national efforts by putting at the disposal of

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<sup>830</sup> M. Bergsmo, O. Bekou, A. Jones, 'Complementarity After Kampala: Capacity Building and the ICC Legal Tools', *supra* n. 800, 798.

domestic authorities a set of capabilities, expertise and materials that, while not affecting the Prosecutor's primary role within the architecture of the Rome Statute, would represent an additional tool for domestic courts to do their job properly.

A positive approach to complementarity was nothing more than a positive stance towards assessments of complementarity, based on the recognition that complementarity, before becoming a matter for judicial litigation, is played on a policy or discretionary dimension, within which the ICC Prosecutor, the leading actor of complementarity, is called to operate when performing the complex, delicate and challenging task of deciding which situations and cases shall be brought before the Court.

As seen above, the Prosecutor rapidly included such an approach within the set of policies that inspire and guide the performance of its functions. The policy of a positive approach to complementarity, however, soon acquired the status of a second, separate dimension of complementarity, described as a “proactive policy of cooperation aimed at promoting national proceedings” and empowering domestic jurisdictions,<sup>831</sup> whose content was progressively enriched. On the one hand, it retains the positive approach towards domestic efforts, as originally described by the Group of Experts under the guiding principle of partnership. On the other, it entails the implementation of a set of concrete measures of cooperation, empowerment of domestic jurisdictions and capacity building.

The set of concrete initiatives and measures individuated as forms of assistance or tools to maximise the impact of the positive stance towards states' efforts, progressively acquired theoretical independence from the guiding principle of “partnership”. The shift is evident in the Prosecutor's elaboration on the concept: positive complementarity becomes a policy of cooperation, in light of the goals established in the Preamble of the ICC Statute and in accordance with article 93(10) of the Statute, according to which the Court itself may cooperate

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<sup>831</sup> *Office of the Prosecutor*, Second Paper on Prosecutorial Strategy, *supra* n. 702, para. 16.

with States by providing some forms of assistance. The encouraging side of positive complementarity is obfuscated by the growing relevance of the “enabling side” of the concept. The transformation is complete at the end of the Review Conference. Positive complementarity is “institutionalised” as the set of initiatives aimed at enabling domestic courts to investigate and prosecute international crimes, in which all actors of the international realm are asked to give their contribution.<sup>832</sup>

The Court continues to play a role within this context. It is recognised that not only the Office of the Prosecutor, but also the Registry, may fruitfully put their capabilities, expertise and best practices at the disposal of States, under the condition that they do not impose to the Court any additional function or financial burden. Other actors, however, acquire a prominent role in the discourse on positive complementarity. All subjects that play any role in the issue of strengthening domestic capacity – the European Union, United Nations and its specialised agencies, civil society, the most important non-governmental, inter-governmental and governmental organisations active in the field of international justice – become actors of this new form of complementarity.

The active involvement of the members of the Assembly of States Parties in the issue of capacity building and empowerment of domestic jurisdiction marks a significant moment in the implementation and realization of international criminal justice. Upon the repeated requests of the ICC Prosecutor to States to focus on the urgent need of encouraging and motivating domestic proceedings, they finally acknowledge that the empowerment of domestic capacity is the key to effectively realise the goal of “zero impunity” that lies at the core of the establishment of the ICC.

All the initiatives already put in place, their future improvements and implementation are extremely promising for the future. They are likely to touch upon the two main causes of

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<sup>832</sup> Report of the Bureau on Complementarity, *supra* n. 809, para. 16.



impunity at the domestic level: states' unwillingness and inability to investigate and prosecute. As expression of this renewed attention towards the problem of impunity, positive complementarity is currently at the heart of the debate on complementarity. It is associated to states' adoption of implementing legislation<sup>833</sup> and to a wide range of other activities that go from trainings to encouragement to ratification of the Rome Statute, passing by agreed division of labour between the Court and States.<sup>834</sup> The discourse on positive complementarity goes even beyond the ICC: traces of it are recognisable also in the practice of the *ad hoc* Tribunals to refer cases to domestic courts in compliance with the Completion Strategy and the mechanisms under rule 11 bis of the Rules of Procedure and Evidence, and in the relationship of the ICTY with the judicial institutions created to overcome impunity in Former Yugoslavia, such as the Bosnian War Crimes Chamber.<sup>835</sup>

The new concept of positive complementarity is increasingly attracting the attention of scholars, who elaborate on its theoretical foundations and potentials. According to some authors, positive complementarity is not a policy, but an “inherent concept of the Rome Statute”, whose potentials extend from the empowering of domestic jurisdictions until the promotion of states' willingness to bring perpetrators of international crimes to justice.<sup>836</sup> It is seen as a “managerial principle” which organises the common responsibility of the Court and States to fight against impunity, by promoting burden sharing and division of labour.<sup>837</sup> It is held that positive complementarity offsets prospects for the Court to play a greater role in conflict resolution, and to “serve as a forum of alerts and early warning”.<sup>838</sup> This

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<sup>833</sup> O. Bekou, 'In the hands of the State: implementing legislation and complementarity', in Stahn C., El Zeidy M. M., *supra* n. 800, 830-852.

<sup>834</sup> C. Hall, 'Positive complementarity in action', in Stahn C., El Zeidy M. M., (Eds.) *supra* n. 44, 1114-1051.

<sup>835</sup> D. Tolbert, A. Kontic, *supra* n. 44; in the same volume, F. Donlon, 'Positive complementarity in practice: ICTY rule 11bis and the use of the tribunal's evidence in the Srebrenica trials before the Bosnian War Crimes Chamber', 920-954.

<sup>836</sup> C. Stahn, 'Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity', *supra* n. 177; see the production of Burke White, *supra* notes 762,763,764 and 767.

<sup>837</sup> C. Stahn, 'Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity', *supra* n. 177, and 'Complementarity a Tale of Two Notions', *supra* n. 83, 88.

<sup>838</sup> C. Stahn, 'Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative'

conceptualisation of positive complementarity is based on an understanding of complementarity as the foundation of the system of justice, whereby “the Court and domestic jurisdictions are meant to complement and reinforce each other in their mutual efforts to institutionalise accountability for mass crimes”.<sup>839</sup>

## **8. A new understanding and conceptualisation of complementarity?**

While fully embracing the potentials of the initiatives falling under the concept of positive complementarity for the future success of the fight against impunity at both the international and national levels, perplexities arise in relation to its conceptualisation as a separate and autonomous form of complementarity.

Originally, the “positive approach to complementarity” entailed policy considerations *vis-à-vis* domestic efforts. It called for respect of diversity and encompassed a general stance aimed at encouraging and promoting domestic initiatives. Such an approach, it was envisaged, could be accompanied by some concrete measures that, while being cost-free for the Court, would provide the advantage of contributing to states’ initiatives.

It soon emerged, however, that the second component of the complementary relationship – domestic efforts – was missing. In the context of the fight against impunity for perpetrators of international crimes, domestic inaction is still widespread. Inaction, and therefore impunity, not only affects the victims of the crimes and the international community as a whole. It also affects the Court's performance of its functions: general inaction makes the work of the ICC – established to intervene when States fail to act, or do not act genuinely – and of its Prosecutor – in charge of determining where and how to intervene – much harder. If the Court finds itself to operate in a vacuum, the performance of its role and the task of the Prosecutor become not only extremely difficult, but even impossible. Domestic inaction makes the burden of filling the

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complementarity', *supra* n. 177, 281

<sup>839</sup> C. Stahn, *Complementarity a Tale of Two Notions*, *supra* n. 83, 91.

impunity gap fall exclusively on the Court, with its fragile means of enforcement and practical limitations. It makes the work of the ICC Prosecutor even more complicated than the one already challenging of complementarity assessments of domestic efforts envisaged in the ICC Statute.

As seen above, under its most recent definition and conceptualization, positive complementarity becomes expression of the renewed attention to the old problem of states' failure to investigate and prosecute persons responsible for the commission of international crimes. The call for coordinated efforts aimed at strengthening domestic capacity under the label of positive complementarity responds to the need of having the "missing half"<sup>840</sup>, i.e. domestic jurisdictions, work. Their empowerment would, first of all, contribute to making the fight against impunity effective. This would also bring specific advantages to the Court itself and to its Prosecutor in assessing whether the Court's intervention is recommended.

The set of activities and actions to be undertaken in order to enable domestic courts to genuinely investigate and prosecute seem to be linked to complementarity through the reasoning that, if the Court is called to complement the action of domestic courts, there must be some action to be complemented. It is in this context of general inaction that the idea of a positive approach to complementarity was progressively transformed into "positive complementarity", and that, within this concept, the "enabling" side prevailed so vehemently over the "encouraging" one, to become almost exclusively associated to discourses inherent to capacity building.

However, if the exercise of the Court's jurisdiction had been regulated differently, for instance by granting it primacy over domestic courts, wouldn't the measures falling within the concept of positive complementarity be still necessary to maximise both its work and the overall goal of ending impunity for the perpetrators of international crimes? If an international tribunal vested

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<sup>840</sup> P. Akhavan, *supra* n. 10.

with primacy over domestic courts found itself to operate in a context of general inaction, wouldn't it face the same challenges of the complementary ICC?

As seen above in chapter I, primacy is another mechanism to regulate the concurrent jurisdiction international tribunals and domestic courts that was applied to the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda. Although based on a different rationale, that stressed the “inherent supremacy”<sup>841</sup> of the *ad hoc* tribunals, also primacy entails interaction between the international and the national levels. Upon their establishment, the United Nations Secretary General emphasised that “it was not intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to the acts committed”.<sup>842</sup> Domestic jurisdictions retained their ability to prosecute perpetrators; the difference with complementarity lies in the more extensive powers granted to the ICTR and ICTY judges in determining that a case shall be brought before their tribunals and in the more “gentle” stance towards domestic jurisdiction that complementarity entails. Like complementarity, primacy is a mechanism according to which, in case of disputes over the forum that shall exercise jurisdiction, the international judges are called to assess whether the case would be better dealt with at the international level, in accordance with the criteria established in Rule 9 RPE.<sup>843</sup> Also primacy, in addition to being applied in the legal dimension, entails broader considerations in terms of selection, i.e., in respect to which cases primacy shall be exercised.

In the practice of the *ad hoc* Tribunals, the relevance of empowering domestic capacity to investigate and prosecute, however, emerged more in relation to the overall advantage that this would bring in relation to the objective of fighting against impunity within the context of the situational countries, rather than to its impact on prosecutorial selection. This was due to the fact that the initially broad mandate of the *ad hoc* Tribunals to investigate and prosecute persons

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<sup>841</sup> M. A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', *supra* n. 77, 41.

<sup>842</sup> Report of the Secretary General Pursuant to paragraph 2 of Security Council Resolution 803 (1993) UN SCOR 48<sup>th</sup> Session UN Doc S/25704 (1003), paras 64-65.

<sup>843</sup> See, *supra*, n. 33.

responsible for the commission of international crimes within the context of the situations of Former Yugoslavia and Rwanda was refined, in accordance with the Completion Strategy, as encompassing the most senior leaders accused of the commission of the most serious crimes. Prosecution was then distributed between the international and the national levels, with the latter in charge of dealing with persons not targeted by the *ad hoc* tribunals. As a consequence of this division of labour, primacy, initially exercised by the *ad hoc* tribunals, was no longer applied.<sup>844</sup>

This notwithstanding, measures aimed at enabling domestic courts, that recall those recommended under the concept of positive complementarity, have been applied by the tribunals, in particular the Office of the Prosecutor, and other actors of the international community. The ICTY Office of the Prosecutor, for instance, undertook and continues to implement a series of activities aimed at contributing to the performance of proceedings before domestic courts. Initiatives such as the transfer of evidence and other supporting material, even beyond the scope of transfers of cases under rule 11bis<sup>845</sup>, the provision of judicial assistance upon request, and the creation of networks of communication and interaction between national prosecutors and the ICTY, do not differ from set of initiatives undertaken or envisaged by the ICC Prosecutor.<sup>846</sup>

Forms of cooperation of the international tribunal with domestic courts were and are indeed possible because other actors of the international community extensively contributed to the empowerment of domestic courts in the territories of the Former Yugoslavia. For instance, in Bosnia and Herzegovina, domestic prosecution was ensured through the creation of the War Crimes Chambers of Bosnia and Herzegovina, hybrid institutions established under Bosnian

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<sup>844</sup> See *supra*, Chapter I. 2.

<sup>845</sup> The so-called 'Category 2 cases', i.e., those cases for which the ICTY Prosecutor had not formulated indictments, but that could have been tried before domestic courts. See, D. Tolbert, A. Kontic, *supra* n. 44, 911.

<sup>846</sup> *Ibid.*, 916.

law and composed of both national and international judges, prosecutors and staff members.<sup>847</sup>

Reforms of the police and of other sectors of the national justice system were put in place, and the Organisation for Security and Cooperation in Europe provided a system of monitoring of domestic proceedings.<sup>848</sup>

These measures were implemented in order to make the fight against impunity for the perpetrators of international crimes in the two situational countries effective. For the ICC, in the absence of any express division of labour between the two levels, and in light of the broader jurisdiction with which it is vested, the advantages of empowering domestic actions are more evident in relation to the strict performance of its mandate.

These considerations suggest that the need to strengthen domestic capacity to prosecute international crimes, and the concrete measures to be implemented to that purpose, do not stem from the specific mechanism chosen to regulate the exercise of jurisdiction of international tribunals, being it primacy or complementarity. Rather, it is inherent to the fact that international tribunals such as the ICC and the *ad hoc* Tribunals exercise concurrent jurisdiction with domestic courts. When it is established that prosecution of persons responsible for the commission of international crimes shall be exercised at two levels, the international and the national, both components of the system shall work. Otherwise, in the absence of action of one of the two components of the system, neither primacy nor complementarity can be exercised. Further, and more broadly, in order to achieve the goal of “zero impunity” that both the systems created with the establishment of the *ad hoc* Tribunals and the ICC pursued, domestic action is necessary in light of the structural limitations of the international tribunals, which cannot deal with all possible crimes and perpetrators.

The extension of the actors, purposes, dimensions and mandate that positive complementarity experienced in the past years seems therefore to be based on a conventional, symbolic

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<sup>847</sup> See, <http://www.sudbih.gov.ba/?jezik=e>; also, *supra*, n. 41.

<sup>848</sup> For a detailed overview, D. Tolbert, A. Kontic, *supra* n. 44, 904-911.

attachment to “complementarity”, rather than to a real affiliation between it and measures to foster domestic action. The commitment to strengthen domestic capacity is expressive of the recognition that the Court is called to operate in a system, whereby the international and national levels pursue the common goal of fighting against impunity. The first, essential condition for this goal to be achieved is that both components of the system work.

## CONCLUDING REMARKS

### Reunifying Complementarity

The establishment of the Court represents a dramatic change in the context of international criminal justice. Since 2002, States are no longer the only responsible for the prosecution and punishment of perpetrators of international crimes. The permanent ICC and States interact in the shared responsibility of combating impunity for the most serious crimes, whose commission affects the international community as a whole. As acknowledged by the ICC Prosecutor, the ICC Statute creates “an interdependent, mutually reinforcing system of justice”, whose aim is the prosecution of persons responsible for the commission of international crimes.<sup>855</sup>

Under the system of justice created with the establishment of the ICC, States retain their primacy to investigate or prosecute; the ICC is deemed to be complementary to national jurisdictions. Complementarity was conceived and designed as the mechanism to regulate the concurrent jurisdiction between the Court and domestic jurisdictions in the pursuance of the common goal to fight against impunity for the most serious crimes of international concern.<sup>856</sup>

The choice of complementarity responded to a number of reasons. It accommodated the concern of States not to be deprived of their sovereign right to exercise criminal prerogatives over their territories and their nationals with the commitment of the international community to ensure that perpetrators of international crimes are brought to justice. The idea that the Court would intervene only in exceptional scenarios also represented the best tool to achieve widespread adhesion of States to the ICC Statute. Further, complementarity was tailor-made to the specific features of a permanent international criminal court with potential jurisdiction over a wide number of situations and cases but limited financial and infrastructural resources.<sup>857</sup>

The concrete modalities for the exercise of the Court's complementary functions are regulated

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<sup>855</sup> *Office of the Prosecutor*, Paper on Prosecutorial Strategy 14 September 2006, *supra* n. 178, 5.

<sup>856</sup> See, *supra*, Chapter I.3.

<sup>857</sup> See, *supra*, Chapter I.4.



through the complex set of procedures that lead to the admissibility of cases before the Court. According to article 17 of the Statute, the Court shall intervene when States fail to act, or where their action is vitiated by unwillingness or inability genuinely to prosecute.

The analysis of the legal provisions and of their application in Chapters II and III of this work showed that complementarity assessments come at stake in different moments and before different actors. Within the architecture of the Rome Statute, the ICC judges are arbiters not only of the Court's jurisdiction, but also of national proceedings, being them in charge of verifying the existence of the conditions established in article 17 for the admissibility of cases before the Court. As the reference to "arbiters" suggests, they intervene in cases of controversies as to which forum, the national or the international, shall exercise jurisdiction. These conflicts may arise before the ICC Prosecutor formally initiates investigations on a given situation, as regulated in article 18 of the Statute, or at the case stage, to which article 19 of the Statute applies. In addition, the ICC judges have some limited forms of control over prosecutorial decisions in relation to admissibility before cases are selected for prosecution. Under article 15 of the Statute, they are called to authorise the Prosecutor to initiate *proprio motu* investigations in a given situation; under article 53(3) of the Statute they may review decisions not to investigate or prosecute on specific and limited circumstances, upon request of the referring State or Security Council or acting *proprio motu* when the decision of the Prosecutor is based on the highly discretionary assessment of the interests of justice.<sup>858</sup>

A part from these limited forms of judicial control, and considering the exceptional character of jurisdictional conflicts between the Court and States, it emerged that it is the ICC Prosecutor – the organ in charge of deciding whether to initiate investigations on a given situation and of selecting the cases to be brought before the Court – the leading actor of admissibility.

Assessments of admissibility, and therefore of complementarity, come at stake throughout the process of selection of situations and cases. At both the pre-investigative and investigative stages,

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<sup>858</sup> See, in particular, Chapter III.7.

complementarity entails for the ICC Prosecutor broader considerations of the overall actions undertaken by one or more States in response to international crimes. Complementarity assessment require evaluation and monitoring of domestic action, with considerations and evaluation of the mechanisms implemented as well as of the willingness and ability of the concerned States in relation to the potential cases that would likely arise from the investigations. Once, and if investigations are opened, the potential cases would be progressively defined, according to a process in which other factors, such as the available evidence and specific prosecutorial policies, are relevant.<sup>859</sup>

As amply seen above in Chapter III, the strict definition of case and the related strict admissibility assessments performed at the case-stage, combined with the wide discretion of the Prosecutor in the selection process, as a consequence of its freedom but also of the wide number of incidents and perpetrators that normally characterise situations in which international crimes are committed, make it relatively easy for the Prosecutor to select cases that would meet the admissibility test. As argued by the Prosecutor, “[n]ot every case meeting the admissibility threshold of the Statute will be subject to prosecution”.<sup>860</sup> Otherwise said, the Court shall not intervene for each and every potentially admissible case. The challenge is, therefore, the determination of when and how the Court's intervention would be appropriate. Complementarity acquires a wider dimension that goes beyond the strict admissibility test of whether a given case has been investigated or prosecuted, that both affects and is affected by the process of selection, under the question of when and what shall the Court complement.<sup>861</sup>

The analysis performed in Chapter IV of the Prosecutor's approach to complementarity showed the commitment of Luis Moreno Ocampo to adopt a positive approach to complementarity, aimed at encouraging and promoting prosecutions at the national level, based on the assumption that the absence of trials before the Court as a consequence of the regular functioning of national

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<sup>859</sup> See, *supra*, Chapter II.7 and Chapter IV.2.

<sup>860</sup> *Office of the Prosecutor*, Paper on Selection Criteria, *supra* n. 370, 12.

<sup>861</sup> See, *supra*, Chapter IV.2.

institutions, “would be a major success”.<sup>862</sup>

In the first ten years of activity, however, the discourses on complementarity were dominated by the problem of inaction. Inaction showed its relevance not only in relation to the application of complementarity in its strict legal terms in the context of challenges to the admissibility of specific cases before the Court, but also in the form of the old, constant problem of the failure of States to adequately respond to the commission of international crimes.

Findings of inaction of domestic courts characterised the proceedings related to challenges to the admissibility of cases before the Court. As emerged from the analysis in Chapter III, the ICC judges, in their rulings, did not enter the merits of the unwillingness or inability of the concerned State to investigate or prosecute a person also tried before the Court. They simply found that the cases were admissible due to the inaction of domestic courts in relation to the case under examination.<sup>863</sup> These findings of inaction, however, were not due to an inappropriate use of the Prosecutor of his discretionary powers in the selection of cases to be brought before the Court. The Prosecutor did not decide to prosecute certain persons and certain crimes despite the domestic investigations or prosecutions of similar cases, thus contravening the positive approach to complementarity that shall have inspired his action. Rather, he found himself, and therefore the Court, to operate in contexts of general inaction.<sup>864</sup>

Inaction, and therefore impunity, not only affects the victims of the crimes and the international community as a whole. It also affects the Court's performance of its functions: general inaction makes the work of the ICC, established to intervene when States fail to act, or do not act genuinely, and of its Prosecutor, in charge of determining where and how to intervene, much harder. If the Court finds itself to operate in a vacuum, the performance of its role and the task of the Prosecutor

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<sup>862</sup> *Ceremony for the Solemn Undertaking of the Chief Prosecutor*, *supra* n. 723. See, *supra*, Chapter III.3.

<sup>863</sup> See, *supra*, Chapter III.4, 5, and 6.

<sup>864</sup> K. Ambos, F. Huber, "The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now? Extended version of the statement in the “Thematic session: Colombia”, ICC-OTP-NGO roundtable, 19/20 October 2010, The Hague”, available at <http://www.icc-cpi.int/menus/icc/structure> of the court/office of the prosecutor/comm and ref/colombia/the colombian peace process and the principle of complementarity of the international criminal court (Accessed 5 January 2012), 4.

become not only extremely difficult, but even impossible. Domestic inaction makes the burden of filling the impunity gap fall exclusively on the Court, with its fragile means of enforcement and practical limitations. It makes the work of the ICC Prosecutor even more complicated than the one, already challenging, consisting of complementarity assessments of domestic efforts envisaged in the ICC Statute.

It is in this context of general inaction that the idea of a positive approach to complementarity was progressively transformed into “positive complementarity”, and that, within this concept, the enabling side prevailed so vehemently over the encouraging one to become almost exclusively associated to discourses inherent to capacity building.<sup>865</sup>

While welcoming the renewed attention towards the need to foster action at the domestic level expressed at the ICC Review Conference, and fully embracing the potentials of the initiatives falling under the concept of positive complementarity for the future success of the fight against impunity at both the international and national levels, it was questioned whether positive complementarity represent a new, different form of complementarity, with different actors, meaning and potentials than the “classical” complementarity, conceived as a mechanism to regulate the concurrent jurisdiction between the Court and States.

It was noted that the set of initiatives to be implemented to strengthen domestic capacity proposed or implemented by both organs of the Court and other actors of the international realm are not new in the context of prosecutions of international crimes held at both national and international levels. The “enabling” actions envisaged and recommended to all actors of the system of justice created through the establishment of the ICC closely resemble those put in place in the context of the activities and operations of other international tribunals. Also the organs of the *ad hoc* tribunals and in particular their prosecutors implemented measures of cooperation with domestic courts, aimed at fostering their capacity to investigate and prosecute. These initiatives were possible because several actors of the international community intervened in the countries of Former Yugoslavia and Rwanda

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<sup>865</sup> See, *supra*, Chapter IV.4 to 7.

with specific and targeted programmes aimed at reconstructing and empowering domestic courts.

It was therefore suggested that the need to strengthen domestic capacity to prosecute international crimes, and the concrete measures to be implemented to that purpose, do not stem from the specific mechanism chosen to regulate the exercise of jurisdiction of international tribunals, being it primacy or complementarity. Rather, it seems to be inherent to the fact that international tribunals such as the ICC and the *ad hoc* Tribunals exercise concurrent jurisdiction with domestic courts. When it is established that prosecution of persons responsible for the commission of international crimes shall be exercised at two levels, the international and the national, both components of the system shall work. The failure of one of the two components of the relationship to perform its functions negatively impacts also on the performance of the functions of the other. Further, and more broadly, international tribunals, with their structural and financial limitations, are not in the position to deal with all perpetrators and crimes in the context of specific situations. Irrespective of their involvement, which is conceived to be exceptional, impunity shall be fought primarily at the domestic level.

Within this context, the new concept of positive complementarity seems to be based on a conventional, symbolic attachment to “complementarity”, rather than to a real affiliation between it and measures to foster domestic action. As rightly affirmed by some delegates during the plenary on complementarity, these set of initiatives could well be referred to as forms of “technical assistance”, rather than complementarity.<sup>866</sup> They are expressive of the recognition that the Court is called to operate in a system, whereby the international and national levels pursue the common goal of fighting against impunity. The first and necessary condition for this goal to be achieved is that both components of the system work.

Having excluded the existence of a direct connection between complementarity and capacity building, complementarity remains the mechanism according to which the drafters of the ICC Statute decided to regulate the concurrent jurisdiction between the Court and States.

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<sup>866</sup> See, *supra*, Chapter IV.6.2.

Complementarity is played in two dimension, the strictly, legal one, and the policy or discretionary one, which entails prosecutorial considerations on whether and how shall the complementary ICC intervene. In relation to the legal dimension, this work has shown that much remains to be explored. Also complementarity as a policy has not yet found full application, due to the absence of the second component of the relationship.

If the coordinated efforts of the members of the system of justice established with the creation of the Court succeed in making domestic systems take action with respect to international crimes, this would undoubtedly contribute to the successful application of complementarity.

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