[ж] THE PRINCIPLE OF 'COMPLEMENTARITY' IN INTERNATIONAL CRIMINAL LAW

(ULUSLARARASI CEZA HUKUKUNDA TAMAMLAYICILIK (İKAME) İLKESİ)

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ÖZ

Uluslararası hukuk, devletlere ulaslararası suçları araştırmak, soruşturmak ve cezalandırmak üzere genel bir görev yüklemektedir. 2002 yılında yürürlüğe giren Roma Statüsü, uluslararası alanda işlenen özel nitelikteki bazı suçları soruşturmak üzere sürekli ve uluslarası nitelikteki bir mahkeme kurulması yönünde yaklaşık elli yıldır sürdürülen çabaları sona erdirmiştir. Bu kapsamda kurulmuş olan Uluslararası Ceza Mahkemesi uluslararası ceza adaletinin sağlanması yönünde çok olumlu bir adım olarak karşılanmıştır. Öte yandan, bu mahkemenin kurulması devletler arasında bazı anlaşmazlıklara yol açabileceği ve devletlerin ulusal egemenlik haklarının zedeleneceği yününde bazı tartışmaları da beraberinde getirmiştir. Bu bağlamda, Uluslararası Ceza Mahkemesi'ni oluşturunlar tarafından Roma Statüsü'ne konulan tamamlayıcılık (ikame, ikincil) yetkisi olarak adlandırılan ilke, devletlerin ulusal egemenlik ve yargılama yetkileri alanında ortaya çıkabilecek anlaşmazlıkları dengelemek üzere öngörülmüştür.

Roma Satatüsü'nün 10. paragrafında Uluslararası Ceza Mahkemesinin yetkisinin ulusal yargılama yetkisini tamamlayıcı nitelikte olduğu açıkça vurgulanmıştır. Statü'nün 1. maddesi de Mahkemenin uluslararası nitelikteki çok önemli suçları işleyenleri yargılama yetkisinin varlığını ve bu yetkinin ulusal yargılama yetkisini tamamlayıcı nitelikte olduğunu belirtmektedir. Bu hükümlere göre, tamamlayıcılık ilkesi iki önemli özellik taşımaktadır. Birincisi, işlenen suç uluslarası ceza yargılamasının konusunu oluştursa bile devletler kendi topraklarında vatandaşlarının işledikleri suçları ulusal yargılama yetkisine dayanarak birincil olarak soruşturma ve yargılama hakkına sahiptir. İkinci olarak, ancak bazı şartların

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gerçekleşmesi durumunda bu tür suç ve suçlular uluslararası bir ceza yargılmasının konusunu oluşturabilecektir.

Bu çalışma, uluslararası ceza hukukunda yer alan tamamlayıcılık (ikame, ikincil) ilkesini incelemeyi amaçlamaktadır. Çalışmada, bu ilkenin tanımı, tarihsel gelişimi, uygulamaları, amaçları ve etkinliği üzerinde durulmuştur.

Anahtar Kelimeler: *Tamamlayıcılık (ikame, ikincil), uluslararası hukuk, uluslararası suçlar, Uluslararası Ceza Mahkemesi, Roma Statüsü.*

ABSTRACT

International law provides for a general duty of States to investigate, prosecute and punish international crimes. The Rome Statute came into existence in 2002, marking the end of over fifty years of elaborations to create a permanent global court to prosecute particularly heinous crimes of international significance. The establishment of the International Criminal Court was accompanied by extraordinary optimism for the prospects of international criminal justice. On the other hand, an important objection the creation of the ICC is that it would create conflict between states and interfere with national sovereignty. In that context, the principle of complementarity is a formula created by the ICC founders who have sought to balance the conflicting interests of international justice and state sovereignty.

Paragraph 10 of the Rome Statute emphasizes that "…the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Article 1 of the Statute further asserts that the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern [….] and shall be complementary to national criminal jurisdiction.". According to these provisions, the principle of complementarity reconciles two competing features and jurisdictions. The first is the sovereignty of the state, which claims national jurisdiction over its citizens and crimes committed on its territory, even though these crimes are of an international character and may fall within international jurisdiction. The second feature functions only in exceptional circumstances and gives an international tribunal the ability to exercise jurisdiction over these heinous crimes.

This article aims to analyse the principle of complementarity in international criminal law. It addresses the definition, historical development, implementations, purposes and effectiveness of the principle.

Keywords: *complementarity, international law, international crimes, the International Criminal Court, the Rome Statute.*

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I- Introduction

Global community has sought numerous ways to address the most serious crimes. Treaties, conventions, and United Nations resolutions have given rise to monitoring mechanisms, commissions, ad hoc tribunals, and even permanent courts, such as the regional human rights courts, European Court of Human Rights (ECHR) and the International Criminal Court ('the ICC', or 'the Court') all of which contribute to the further development of this field[1].

After World War II, the newly created United Nations appointed the Special Committee of the General Assembly to draft a statute for the formation of an international criminal court. Although the committee prepared a draft statute in 1951 and revised in 1953, the conditions and Cold War made any significant progress impossible. A variety of factors led to the establishment of international criminal tribunals in the early 1990s. The establishment the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTY) provided a further spur to the establishment of an international criminal court. Finally, in 1994, a draft statute was submitted to the General Assembly; and in 1996, the Preparatory Committee on the Establishment of an International Criminal Court was founded. On 17 July 1998, the Rome Statute[2] was adopted. The ICC began functioning on 1 July 2002, the date that the Rome Statute entered into force. The idea of a permanent court and the adoption of the Rome Statute setting up the ICC has been a historical step in the fight against impunity for the most serious crimes[3]. The basic

[1]See Gianaris William N., ''The New World Order and the Need for an International Criminal Court'', Fordham International Law Journal, Vol. 16, Issue 1, 1992, p.88.; Jamison Sandra L., "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections", Denver Journal of International Law & Policy, Vol. 23, Issue 2, 1995, p. 419.; Almqvist Jessica, ''Complementarity and Human Rights: A Litmus Test for the International Criminal Court'', Loyola of Los Angeles International and Comparative Review, Vol. 33, Issue 3, 2008, pp.335-365.

[2] See http://www.unhcr.org/refworld/docid/3deb4b9c0.html, 13.05.2020.

[3] See Natarajan Mangai and Kukaj Antigona, ''The International Criminal Court'', International Crime and Justice, Ed. Mangai Natarajan, Cambridge University Press 2011, p.357.; Hall Christopher Keith, "The First Proposal for A Permanent International Criminal Court," International Review of the Red Cross, Issue 322, 1998, pp.57-74.; Mullins Christopher W., Kauzlarich David and Rothe Dawn, "The International Criminal Court and the Control of State Crime: Prospects and Problems," Critical Criminology, Vol. 12, Issue 3, 2004, p. 289

aim is to put an end to impunity for the perpetration of 'grave crimes,' or 'the most serious crimes,' and thus, contribute to the prevention of such crime, as well as guarantee lasting respect for and the enforcement of international justice[4].

According to the Rome Statute, the Court has a limited jurisdiction, which has been carefully defined under the Statute. The ICC was created, in order to have jurisdiction over only '*the most serious crimes of concern to the international community as a whole*'[5], which according to Article 5(1) of the Statute are: genocide, crimes against humanity, war crimes and the crime of aggression. On the other hand, the Statute recognizes that every State has a responsibility to exercise its own criminal jurisdiction over international crimes. The first Article of the Statute describes the Court as being '*complementary*' to national criminal jurisdictions. In that sense, the principle of complementarity is based not only on respect for the primary jurisdiction of States but also on practical considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings[6]. In addition, Article 17 of the Rome Statute empowers the Court to take over an investigation and/or prosecution from a state if the Court determines that such state is '*unable or unwilling genuinely to carry out the investigation or prosecution*'. Articles 18 and 19 provide non-parties that have jurisdiction over a case with ample procedural rights to challenge the exercise of jurisdiction by the ICC. Article 18(1) also provides that in cases where a situation has been referred to the Prosecutor and there is a reasonable basis to investigate, the Prosecutor is to notify '*all State Parties and those States which…would normally exercise jurisdiction over the crimes concerned'*. Finally, Article 20 does not permit trial by the ICC of a person who has been tried '*by another court'*.

The principle of complementarity is the cornerstone of the relationship between the ICC and national jurisdictions designed to implement states' obligations to investigate and prosecute those responsible for crimes, which have been defined under the Statute. This relationship is built around complementary or substitutive responsibilities in the exercise of jurisdiction over these crimes. Thus, the ICC is constituted as an *ultima ratio* jurisdiction with competency only as the result of total inactivity or

[4] See Almqvist, p.335.
[5] See the Statute, Preamble, para 4.
[6] Cryer Robert, Friman Hakan, Robinson Darryl, Wilmshurst Elizabeth, An Introduction to International Criminal Law and Procedure, Cambridge University Press, 2010, p.153.

inefficiency by national jurisdictions- whether because of unwillingness or inability-in carrying out the proceedings against those responsible for crimes included in the Rome Statute.

II- The Term of 'Complementarity'

In the English language, the term '*complementarity*' means 'a complementary relationship or situation', or 'a state or system that involves complementary components'[7]. Despite its apparent simplicity, the term is extremely complex in international criminal law. The term refers to the relationship between the ICC and national judicial systems, and has evolved significantly since it was first introduced and ultimately included in the Rome Statute[8].

More specifically, the complementarity concerns the allocation of effective jurisdiction between domestic courts and the ICC in relation to the crimes envisaged in the Statute, determining that for such crimes (genocide, crimes against humanity, and war crimes) the ICC is to be a 'complement' to national jurisdictions[9]. From this perspective, the principle implies on the one hand that the Court's intervention will be barred if national jurisdictions have the capacity and the will to prosecute crimes within the dormant jurisdiction of the Court. On the other hand, the principle recognizes that there may be situations where such capacity or will are absent and where the Court may exercise its jurisdiction to complement state action[10].

The experience of the International Criminal Tribunal for the former Yugoslavia and its counterpart for Rwanda led to further developments of the notion of jurisdiction[11]. Proposed as an option by the International Law

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[7] El Zeidy Mohamed M., The Principle of Complementarity in International Criminal Law, 2008, p.1.

[8] See Marshall Katharine A. ''Prevention and Complementarity in the International Criminal Court: A Positive Approach'', Human Rights Brief, Vol. 17, No.2, 2010, pp.21-26.

[9] Krings Britta Lisa, ''The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?'', Goettingen Journal of International Law, Vol.4, Number 3, 2012, p.745.

[10] See Carnero-Rojo Enrique, ''The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?'', Leiden Journal of International Law, Vol.18, 2005, pp.829-869.

[11] See Brown Bartram S., ''Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals'', The Yale Journal of International Law, Vol.23, 1998, pp.383-486.

Commission (ILC)[12], the complementary jurisdiction survived all stages of the negotiation process[13] and was finally accepted and incorporated in the Rome Statute in 1998. Whereas the Statutes of the *ad hoc tribunals* for the former Yugoslavia and Rwanda and the Statute of the Special Court for Sierra Leone dictate that the Tribunal's jurisdiction prevails over national courts, the Rome Statute, reversely, determines that the ICC shall be complementary to national criminal jurisdictions.

The principle of complementarity is a formula created by the ICC founders who have sought to balance the conflicting interests of international justice and state sovereignty[14]. The principle is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction, in other words on acceptance by the former that those who have committed international crimes may be punished through the creation and recognition of international criminal bodies[15]. In that sense, complementary jurisdiction dictates that the ICC would be competent to investigate and try a case, unless there is a state that claims jurisdiction. States continue to play the central role, but if they fail or find it impossible to assume that role, or show disinterest or bad faith, the ICC will step in to ensure that justice is done[16]. According to the Rome Statute, the "*International Criminal Court established under this Statute shall be complementary to national criminal*

[12] The International Law Commission was established by the United Nations General Assembly in 1948 for the promotion of the progressive development of international law and its codification. See available at: http://www.un.org/law/ilc/, 13.05.2020.

[13] The ICC negotiations produced a considerable amount of "preparatory work", including the reports and the Draft Statute of the International Law Commission; the papers, reports and drafts of the Ad Hoc Committee and the Preparatory Committee; as well as the documentation from the Rome Conference.

[14] The English word 'sovereignty' is derived from the French term 'souverain', and this term is the fundamental concept around which international law is presently organized. See McKeon Patricia A., ''An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice'', Journal of Civil Rights and Economic Development, Vol. 12, Issue 2, Spring 1997, p.539.; Grossman Claudio and Bradlow Daniel D., ''Are We Being Propelled Towards a People-Centered Transnational Legal Order?'', American University International Law Review, Vol.9, No.1, 1993, pp.1-25.

[15] See Xavier Philippe, ''The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?'', International Review of the Red Cross, Vol.88, Number 862, June 2006, p.381.

[16] See Solera Oscar, ''Complementary Jurisdiction and International Criminal Justice'', International Review of the Red Cross, Vol. 84, No: 845, 2002, pp.145-177.

jurisdictions.". Because of this requirement, the ICC can only investigate or prosecute where national governments fail to act or where they undertake investigations or prosecutions that are not genuine. Unlike prior ad hoc tribunals, the Court does not have the power to remove cases from national courts or to prosecute where national governments are already investigating a case[17]. Thus, the Rome Statute's complementarity principle responds to a mixed logic. On the one hand, it gives precedence to national justice systems to combat impunity and to assume responsibility for trying (or extraditing) those responsible for the crimes listed in the Statute. On the other hand, in the event a state is unwilling or unable to try these types of crimes, it guarantees that there will be an international and permanent international jurisdiction that operates effectively and with legitimacy[18].

III- Historical Development of Complementarity

The idea of justice and punishment as a deterrent to crime has been debated and discussed throughout legal history. Complementarity, a concept that has evolved significantly since it was first introduced and ultimately included in the Rome Statute, presents a way by which the ICC can increase its potential positive impact on both domestic and international criminal justice. The basic idea of complementarity existed in the context of the treaty of Versailles in 1919, in which the Allies authorized the Germans to try some of the war criminals themselves in Leipzig, Germany[19]. Encouraging national governments to undertake their own prosecutions of international crimes found in a wide range of international treaties, including the Geneva Conventions of 1949 and the Genocide Convention, and such obligations are reaffirmed in the preamble to the Rome Statute itself[20].

First of all, the penalty provisions found in the Peace Treaties concluded after World War I reflected the real origins of the notion of complementarity in the modern era. During World War II, the problem of dealing with

[17] Burke-White William W., ''Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice'', Harvard International Law Journal, Vol. 49, 2008, p.65.

[18] One of the main objectives of complementarity is to encourage states to investigate these heinous crimes at the national level. In that sense, 'proactive complementarity principle' (in contrast to passive complementarity) recognizes that the ICC can and should encourage, and perhaps even assist, national governments to prosecute international crimes. See Burke-White, p.56.

[19] Krings, p.746.

[20] Burke-White, p.57.

atrocities committed during the course of war was more compelling. The idea of establishing an international judicial organ to try war criminals was the focus of activities of several bodies.

Early traces of a complementary allocation mechanism can be found in the 1943 Draft Convention for the Creation of an International Criminal Court. The International Military Tribunal, established at the end of World War II, reflected another form of the complementarity principle and the significance of cooperation with national criminal jurisdictions[21]. This reflected the principle of primacy, or the supremacy of international law over national law, with regard to trying major war criminals for core crimes[22]. In 1948, prompted by the brutalities of the Second World War, the United Nations General Assembly adopted a resolution that there would be 'an increasing need of an international judicial organ for the trial of certain crimes under international law'[23]. The discussion of the 1948 Genocide Convention also generated the idea of considering a plan to study the question of international criminal jurisdiction. The 1951 Draft Code of Offences against the Peace and Security of Mankind (Draft Code) lacks any reference to the type of tribunal being considered for the punishment of the crimes set out in the draft. Although the 1951 Draft Code made no reference to the type of tribunal that was supposed to deal with the crimes defined in the Code, the question of inserting a provision to that effect re-emerged in the course of the discussion of the changes proposed to that draft, which later led to the adoption of the 1954 Draft Code. The final text of the 1954 Draft Code, like the 1951 draft, lacked any reference to the tribunals responsible for punishment, it was clear during the discussions surrounding the two drafts that there was a trend towards organizing the relationship between national courts and the proposed international court in such a manner that would provide national courts with a role only during a transitional period, pending the establishment of an international tribunal that would later exercise exclusive jurisdiction over the crimes defined in

[21] See Stahn Carsten, ''Complementarity and Cooperative Justice Ahead of Their Time? The United Nations War Crimes Comission, Fact Finding and Evidence'', Springer Science Business Media Dordrecht, Criminal Law Forum, 2014, 25, pp.223-260.

[22] The crimes dealt with were characterised as 'crimes under international law, for which the responsible individuals shall be punishable'. See Stigen Jo, The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity, Leiden and Boston, 2008, p.39.; El Zeidy p.75.

[23] Stigen, p.36.

the code[24]. The drafting history reveals that it was the intention to establish an international criminal court with very limited powers, based on a system that respected states' sovereignty[25].

The International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Statutes were the first international instruments to expressly regulate the relationship between international and national criminal jurisdiction. These two *ad hoc tribunals* clearly had an important impact on the process toward the establishment of a permanent court. States gradually became accustomed to the idea that criminal law could be exercised at the international level, and it was demonstrated that international jurisdictions could play a meaningful role[26]. Both the ICTY and the ICTR are based on a principle of 'primacy'. Those tribunals can preempt a prosecution in a national jurisdiction if the tribunal decides to proceed. The Special Court for Sierra Leone (SCSL), a tribunal established by agreement between the government of Sierra Leone and the United Nations, similarly operates under a primacy principle[27].

The determination of the appropriate relationship between national and international jurisdictions and its organization remained one of the puzzling issues the ILC had to face even during the first phase (1983-1989) and second phase of its work (1990-1994). At this stage, the term 'complementary' had been introduced for the first time by the 1992 Working Group[28]. The nature of an appropriate mechanism for allocating cases between the ICC and states was an essential issue in the discussions. With this issue pending, states were not able to fully foresee how the ICC would affect their sovereignty[29].

[24] At that time, most national judiciaries were probably viewed as incompetent to adjudicate international crimes. The 1953 Committee met shortly after the Nuremberg and Tokyo Tribunals and was probably impressed by their achievements. See Stigen, p.38.

[25] See Stigen, p.31.; El Zeidy p.102.; Solera, p.170.; One of the main obstacles in the face of accepting the involvement of an international jurisdiction in the process of prosecuting international crimes was the question of sovereignty. See El Zeidy pp.102-126.

[26] See Stigen, p.44.

[27] See Carter Linda E., ''The Future of the International Criminal Court: Complementarity As Strength or a Weakness? Washington University Global Studies Law Review, Vol.12, 2013, p.452.

[28] Stigen, pp.31-39.; El Zeidy p.124.; Some argue that the 1992 discussions reflect optimism in two ways: First, there was a positive general attitude toward the establishment of an international criminal court, although it was not envisaged as strong as some would have desired. Second, there appears to have been a feeling that if the court lived up to the expectations, sceptic states would be convinced. See Stigen, p.55.

[29] Stigen, p.32.

The concept of complementarity as it exists today finally crystallized with the adoption of an Ad hoc Committee on the Establishment of an International Criminal Court (Ad hoc Committee) to study and develop the 1994 International Law Commissions' Draft Statute. In late 1995, the Ad hoc Committee was replaced by a Preparatory Committee[30]. The Preparatory Committee adopted an identical approach when it discussed the issue of complementarity for the first time in March 1996. The question of complementarity was discussed in general terms during the plenary meetings in Rome. Many delegations supported in principle the scheme of 'unwillingness' and 'inability' reflected in Article 15 of draft submitted by the Preparatory Committee to the Rome Conference[31]. On the other hand, several states held that the complementarity 'should create a strong presumption in favour of national jurisdiction'. Other states stressed that the ILC had not intended to 'establish a hierarchy between the international criminal court and national courts', or to allow the international court to 'pass judgement on the operation of national courts in general'[32].

As the Preparatory Committee opened its discussions in 1996, there was virtual consensus that 'complementarity […] was to reflect the jurisdictional relationship between the International Criminal Court and national authorities, including national courts'. As for the more detailed formulation of the complementarity principle, there were, however, still widely differing opinions as to 'how, where, to what extent and with what emphasis complementarity should be reflected in the statute'[33]. Not all states were

[30] See Brown, p.424.

[31] See Brown, p.425.; El Zeidy says that there are four model in that sense. The first major complementarity model is mainly the outcome of the 1937 Convention, and the 1951 and 1953 Draft Statutes for the creation of an international criminal court; According to this model, which was based on the principle of autdedereautjudicare, a State Party to the convention was 'entitled' to refer a case to the international criminal court if it was unwilling or unable for whatever reason to prosecute the case before its own domestic courts or to extradite to another State. The second model resulted from the Nuremberg experience; it was merely based on the division of responsibilities between national and international jurisdictions. The third major model was a modified scheme of complementarity adopted by the 1994 Working Group of the International Law Commission; this model was based on a combination of the consensual system introduced in the first major model coupled with an admissibility mechanism that acted as a safety valve to frame a new version of complementarity. The fourth major model is the traditional complementarity reflected in the 1998 Rome Statute, and this model lies between the categories of optional and mandatory complementarity. See El Zeidy, pp.131-137.

[32] See Stigen, pp.63-65.

[33] Stigen, p.70.

completely satisfied with the formulations of the principle, but most states recognised that better compromises would be difficult to find. The debate also revealed continued reservations over a bracketed proposal in the Draft Statute.

After these meetings, the Rome Statute entered into force in 2002. Paragraph 10 of the Statute emphasizes that "…*the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*.". Article 1 of the Statute further asserts that the Court "*shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern….and shall be complementary to national criminal jurisdiction*". This means that national jurisdiction over the crimes comes first and in the absence of effective prosecution (as it is defined by the Rome Statute) the Court jurisdiction comes later.

IV- The Purposes of Complementarity

The Rome Statute builds on two main assumptions: the first is that international crimes must not go unpunished; the second is that these crimes should preferably be prosecuted at the national level. The two assumptions reflect the respective purposes of the Statute and the complementarity principle. The Statute shall ensure that the crimes are prosecuted, while the complementarity shall ensure that this primarily is done at the national level. The two purposes can also be seen as parts of superior purposes, including the preservation of international peace and security and the safeguarding of state sovereignty[34].

As mentioned above, the principle of complementarity is implemented in paragraph 10 of the Preamble and in Article 1 of the Rome Statute. One of the most important roles of the principle is to encourage the State Party to implement the provisions of the Statute, strengthening the national jurisdiction over those serious crimes listed in the Statute. So long as the legal system of a state can efficiently investigate and prosecute the serious crimes prohibited in the Statute, the sovereignty of the state will remain unaffected, free of any interference by the ICC[35]. But if a state is unwilling

[34] Stigen, p.11.

[35] See Benzing Markus, ''The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity'', Max Planck Yearbook of United Nations Law, Vol. 7, 2003, pp.591-632.; Krings, p.750.; Jurdi Nidal Nabil, ''The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?'', International Criminal Law Review, Vol.10, 2010, p.74.

or unable to investigate or prosecute a case, the Court will invoke the principle to admit any case concerned and exercise jurisdiction over it[36]. Therefore, the principle has impact on a state's implementation of international substantive criminal law, as well as on its exercise of jurisdiction in many aspects[37].

The most apparent underlying interest that the complementarity regime is designed to protect and serve is the sovereignty both of state parties and third states[38]. Under general international law, states have the right to exercise criminal jurisdiction over acts within their jurisdiction[39]. Sovereignty has long been viewed as the most fundamental right of a nation and many nations continue to believe that any infringement on sovereignty is impermissible. Indeed, the concept of sovereignty still has a great impact on international law and international relations. Although sovereignty has long been considered the most fundamental right a nation can possess, there should be a balance between a society's right to its sovereignty and the right of the international community to ensure punishment of criminal behaviour for certain acts which otherwise would go unpunished. In that context, the ICC would give the international community the power to act against the crimes of universal concern[40]. As distinct from the right of states to exercise criminal jurisdiction over crimes contained in the Statute, the Preamble refers to the duty of every state (not limited to states parties) to exercise its criminal jurisdiction over those responsible for international crimes. Thus, a purpose of the complementarity may be to ensure that states abide by that duty, either by prosecuting the alleged perpetrators themselves, or by providing for an international prosecution in case of their failure to do so[41].

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[36] See Stigen, p.19.

[37] See Stigen, p.18.; Yang Lijun, ''On the Principle of Complementarity in the Rome Statute of the International Criminal Court'', Chinese Journal of International Law, Vol. 4, No. 1, 2005, pp.121-132.

[38] At its inception, the idea of complementarity was meant to balance the competing interests of those who sought a court with universal jurisdiction and those who placed a priority on state sovereignty. See Leonard Eric K., ''Discovering the New Face of Sovereignty: Complementarity and the International Criminal Court'', New Political Science, Vol.27, 2008, pp.87-104.; Jurdi p.74.; Kyriakakis Joanna, ''Corporations and The International Criminal Court: The Complementarity Objection Stripped Bare'', Criminal Law Forum, Vol.19, 2008, p.124.

[39] Benzing, p.595.

[40] See Solera, p.170.

[41] See Benzing, p.596.; This principle aimed to strike a balance between sovereign privileges and world community responsibilities, a balance that some have hoped would

The second purpose, potentially rivalling with the concept of state sovereignty, is the interest of the international community in the effective prosecution of international crimes the endeavour to put an end to impunity, and the deterrence of the future commission of such crimes[42]. Traditional notions of deterrence are based on the idea that the prospect of punishment will prevent an individual from taking unlawful action[43]. Indeed, the most commonly cited purpose underlying criminal justice is crime prevention, and preambular paragraph 5 expresses determination to put an end to impunity and 'thus to contribute to the prevention of such crimes'[44]. While the Court's existence and operation will serve as an example and help to create necessary standards in the developing field of international criminal law, perhaps the most direct contribution it can make towards prevention is through engagement with states parties to strengthen domestic judicial institutions. Thus, the complementarity regime serves as a system to encourage and facilitate the compliance of states with their responsibility to investigate and prosecute international core crimes[45].

Apart from these two rationales, other possible purposes are also to be taken into consideration. Some argue that the ICC is an institution entrusted with the protection of human rights of the accused in the national enforcement of international criminal justice and that this mandate is expressly provided for or at least implied, in the complementarity regime[46]. Another possible reason behind the principle may be seen in a right of the accused to be prosecuted by domestic authorities and tried before a domestic court, unless those authorities or courts are unable or unwilling to do so. Finally, a more practical aspect may be limited for reasons of resource constraints and in the fight against impunity, the ICC will only be able to

shift toward a change in the values of the world order toward global humane governance. See Jurdi, p.74.

[42] Benzing, p.597.; Krings, p.751.; The complementarity principle seeks to strike a proper balance between ensuring the effective prosecution of international crimes and safeguarding sovereignty. See Stigen, p.17.

[43] Deterrence theory falls into two categories: general and specific deterrence, with specific deterrence focusing on the individual and general deterrence on preventing crime in society at large. See Benzing, p.596.

[44] See Stigen, p.12.

[45] Jurdi, p.74.; Solera, p.170.; Almqvist, p.335.

[46] The purposes of establishing the ICC are both to avoid the crimes and to heal the damages that they cause, to promote peace and to restore peace once it is broken and to protect humanity's conscience and to restore it once it is disturbed. See Stigen, p.13.

serve as a court of last resort where justice cannot be achieved on a national level[47].

Finally, it should be stated that the principle has been primarily designed to strike a delicate balance between state sovereignty to exercise jurisdiction and the realisation that, for the effective prevention of such crimes and impunity, the international community has to step in to ensure these objectives and retain its credibility in the pursuance of these aims. At the same time, the principle is an implicit restriction of state sovereignty, not because it establishes a duty to prosecute, but because it takes away the possibility for states parties to remain inactive, even under a breach of international law in cases where a duty to prosecute exists under other instruments[48].

V- Complementarity in the Rome Statute

The term 'complementarity' does not appear as such in any of the provisions of the Rome Statute. The only similar reference is to be found in the tenth paragraph of its Preamble and in Article 1, where it is stated that the ICC established under the Statute 'shall be complementary to national criminal jurisdictions'. Although the Statute does not define the term complementarity anywhere, it is to be found in many different forms throughout the Court's procedure, and even in the investigation phase to be carried out by the Prosecutor[49]. Both the Preamble and Article 1 of the Statute note that the jurisdiction of the ICC shall '*be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdictions*'. The principle is further developed in Article 17, and provisions included in Articles 18 and 19 are also directly related to the concept of complementarity.

First, the introduction to the complementary character of the Court was spelled out and emphasized in the Preamble: "(...*Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions*...)". This statement is supplemented by the preceding paragraphs, which establish the grounds for complementarity and the manner in which it should be understood: international crimes shock the conscience of humanity, threaten the peace,

[47] Benzing, pp.598-599.
[48] See Benzing, p.600.
[49] See Kyriakakis p.115.

security and wellbeing of the world, and should not go unpunished; states have the main responsibility for taking the required measures to avoid impunity; and an international criminal court is needed, for the sake of present and future generations, to guard them against the most serious crimes of concern to the international community as a whole[50].

Secondly, the Statute prescribes in Article 17 that "*the Court shall determine that a case is inadmissible where: "(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*". Article 17 provides some guidance as to what constitutes an acceptable 'investigation' or 'prosecution'. The Statute declares that domestic proceedings must be in accord with 'principles of due process recognized by international law'[51] and 'conducted independently and impartially…in a manner which, in the circumstances, is consistent with an intent to bring the person concerned to justice'. If a state fails to investigate or prosecute in accordance with these standards, the Court can decide that the state is either 'unwilling' or 'unable' to genuinely carry out the investigation or prosecution.

Thirdly, Articles 18 and 19 complement the provisions laid down in Article 17. Article 18 establishes the procedure to be followed for rulings on admissibility. It should be stressed that this article calls for close contact between the Prosecutor and the competent State regarding the progress of an investigation or a prosecution at the national level. This precaution is intended to avoid any unjustified delay in the proceedings. On the other hand, Article 19 contains the rule that the Court must establish that it has jurisdiction in any case brought before it. Its decision to admit a case may be challenged by the accused or by a state which has jurisdiction over the case, either because that the state is already investigating the case or because its acceptance of the Court's jurisdiction was required under Article 12[52].

[50] See Solera, p.164.; Leonard, p.95.

[51] The term 'due process', with its special meaning in law, has to be that recognized by international law, i.e. the procedure that is only in conformity with national procedural law cannot be regarded as a due process, and it is the ICC that will determine whether a state's criminal procedure, including non-party states' criminal procedures, is in conformity with the principles of ''due process'' or not. See Yang, p.126.; Almqvist, p.339.

[52] See Solera, p.167.

1- Article 17

Article 17 of the Rome Statute lists three scenarios in which a case is inadmissible before the ICC due to the existence of national proceedings. The first paragraph of the Article reads: ‘‘*1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; the case has been investigated by a State which has jurisdiction over it, and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; the person concerned has already been tried for the conduct, unless the trial was for the purpose of shielding the person concerned from criminal responsibility or otherwise was not conducted independently or impartially.*’’.

The provision has a negative and a positive effect: A case is inadmissible when two cumulative criteria are met: the case must be or have been investigated or prosecuted by a state with jurisdiction, and the state must not be unwilling or unable to proceed genuinely. Conversely, a case is admissible when one of two alternative criteria is met: the case must not have been investigated or prosecuted by a state with jurisdiction, or the case must be or have been proceeded with by a state unwilling or unable to do so genuinely[5353].

Under the ‘rubric of admissibility’ in Article 17, the Rome Statute reflects the balance and the complex relationship between national legal systems and the ICC[5454]. In this regard, the complementarity is intended to preserve the ICC’s power over irresponsible states that refuse to prosecute those who commit heinous international crimes[5555]. On the other hand, domestic jurisdictions enjoy primacy to deal with their own alleged human rights violations, and only if remedies were deemed ‘inadequate or ineffective’, the international body could proceed.

The legal framework resulting from the complementarity is laid down in Article 17 of the Rome Statute, which regulates ‘issues of admissibility’. The hardest part of the complementarity test lies in the exceptions to the conditions for inadmissibility set out in Article 17. Paragraph (1) suggests

[53] See Stigen, p.185.
[54] See Benzing, p.600.
[55] Yang, pp.121–122.

that there are four main situations that require close examination in order to determine the question of admissibility[56]. Firstly, whether the case is being investigated or prosecuted by a state having jurisdiction; secondly, whether a state has investigated and concluded that there is no basis on which to prosecute; thirdly, whether the person has already been tried for this conduct; and, finally, whether the case is of insufficient gravity to be brought before the Court. The terms 'investigation' and 'prosecution' can be defined by recurring to national practice and the experience of the ad hoc tribunals[57].

The key consideration for the Court to admit a case is whether a State is unable or unwilling to investigate or prosecute a case[58]. As both 'unwillingness' and 'inability' are subjective concepts, the drafters of the Statute included provisions that the Court must refer to in order to determine if there is such unwillingness or inability on the part of a domestic judicial system[59]. Often discussed among scholars is the question of a standard of the unwillingness or inability to genuinely carry out investigations or prosecutions[60]. A preliminary question, both with respect to unwillingness and inability, is the meaning of the term 'genuinely', which qualifies the actions of a state, taken to investigate or prosecute a case[61]. No precedent in international law for the use of the term was quoted during the negotiations. Commentators observe that it proved to be the least subjective concept considered during the negotiations; among other proposals that were considered to be excessively subjective were 'effectively', 'diligently', and 'in good faith'[62]. Indeed, the notions underlying the terms unwillingness and inability remain extremely difficult to ascertain, and labelling a state as unwilling or unable to exercise its sovereign rights is not an easy accusation in practice. The Statute itself provides some clues as to how to assess the notions of 'unwillingness' and 'inability'. Unjustified delays, sham trials which serve to shield the perpetrator from criminal responsibility, or proceedings lacking independence or impartiality are indicative of unwillingness, while 'inability' is more precisely defined as the incapacity to

[56] See El Zeidy p.159.
[57] Benzing, p.602.
[58] SeeYang, p.122.
[59] See Benzing, p.603.
[60] Krings, p.74.; Leonard, p.100.
[61] See Jurdi, p.88.
[62] Benzing, p.604-605.; Tedeschini Michele, ''Complementarity in Practice: the ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions'', Amsterdam Law Forum, Vol.7, 2015, p.78.

obtain the accused or necessary evidence and testimony, due to a total or substantial collapse or unavailability of the national judicial system[63].

Finally, it should be noted that the provision of Article 17 is far from being perfectly drafted, leaving its full understanding and interpretation to the assessment of the Court[64]. Indeed, the details of complementary are not explicitly described in the Statute, and Article 17 provides the framework for understanding complementarity, but lacks detail about use of the concept in practice[65].

1.a. The Criterion of 'Unwillingness'

Article 17(2) of the Rome Statute states that ''*In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:*''. The first of the two admissibility criteria in Article 17 of the Statute is the state's 'unwillingness' to proceed genuinely. The term 'unwillingness'[66] is not defined, but some factors as to its application are listed. Article 17(2) lists three factors for the determination of unwillingness, and these factors were

[63] See van der Wilt Harmen, Lyngdorf Sandra, ''Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle'', International Criminal Law Review, Vol. 9, Issue 1,2009, pp. 39-75.

[64] So far, the Court has neither fully dealt with these provisions nor provided interpretations for significant questions arising from the application of the Rome Statute. There is a fear that the Court would have too much power to criticize the procedures of national courts. See El Zeidy p.157.; McKeon, p.556.; In determining unwillingness in a particular case, the Court shall consider whether national proceedings are intended to shield the accused or avoid impartial prosecution. See Bantekas Ilias and Nash Susan, İnternational Criminal Law, Second Edition, 2003, p.379.; ''The Principle of Complementarity'' The American Non-Governmental Organizations Coalition for the International Criminal Court Publication, available at: http://www.amicc.org/docs/Complementarity.pdf., 13.05.2020.

[65] See Marshall, 2010, p.22.

[66] Linguistically, the term means 'not intending, purposing, or desiring (to do a particular thing)'. The French 'manque de volonte', the Spanish 'no este dispuesto' and the Russian 'nezelanie' (lack of wish) convey the same meaning as the English term. See Stigen, p.251.; The meaning of 'unwillingness to act' was laid down in Article 17(2) as: a) shielding a person from criminal responsibility; b) causing a deliberate delay in carrying out the national proceedings; and c) conducting the domestic proceedings in a non-independent or impartial manner. The Statute defines the situations that may assist the Court in making a determination of a state's unwillingness. See Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?', International Review of the Red Cross, Vol.88, Number 862, June 2006, pp.375-398.; Jurdi, p.78.

introduced to address a concern that the term 'unwillingness' was so vague and subjective that it would leave too much discretion with the Court[67].

Indeed, unwillingness is quite simple to understand but is more complicated to evaluate. There are three types of unwillingness mentioned in Article 17(2). The first criterion requires the Court to establish that the proceedings (a) 'were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility'; or (b) that there 'has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice'; or (c) that 'the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.

The first is that the proceedings ''*were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility*'' for crimes within the jurisdiction of the Court. The language of Article 17(2)

(a) suggests that that the notion of 'shielding the person from criminal responsibility' is broad enough to cover the situations explored in sub-paragraphs (b)-(c). An 'unjustified delay' accompanied by an intent not to bring the person to justice is indeed a scenario that reflects the idea of 'shielding the person from criminal responsibility'[68]. Similarly, the lack of independent or impartial proceedings, with the intention that the accused escapes justice, is another scenario that falls under the umbrella of 'shielding from the criminal responsibility'[69]. Article 17 (2)(a) requires proof of a purpose of shielding, which is a considerably high threshold and

[67] "Unwillingness" is not as easy to define or to objectively prove. See Ambos Kai, The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court, Springer-Verlag Berlin Heidelberg, 2010, p.89.; Henzelin M., Heiskanen V. and Mettraux G., ''Reparations to Victims before the ICC: Lessons from International Mass Claims Processes'', Criminal Law Forum, Vol. 17, 2006, pp.317-344.; Stigen, pp.256-257.; Benzing, p.606.; Leonard, p.100.

[68] The term 'shielding' means 'protecting somebody', but in the present context the meaning is clearly negative: it means protecting the perpetrator against due criminal responsibility. A person is not shielded, for the purpose of article 17, if he or she avoids prosecution due to his or her inferiority, insanity or for another legitimate reason. See Stigen, p.260.

[69] In an early historical context, a relevant precedent that may perhaps be close to the idea of shielding the 'person concerned from criminal responsibility' is the Leipzig trials of Germans after the First World War. See El Zeidy p.172.

raises the question of how such intent is to be proved before the Court. By contrast, paragraphs (b) and (c) have more objective criteria as bases, i.e. an unjustified delay or proceedings which are not conducted independently or impartially. To establish a purpose of shielding, it is not sufficient to find that a state only initiated proceeding in order to prevent the Court from acting, since this is clearly permissible under and envisaged by the complementarity regime. Besides, the Statute clearly encourages and relies on national action[70]. Thus, when determining whether a state is unwilling, the ICC will mainly make a judgment on the intention of a state behind its trial procedure or decision making[71].

The second is that ''*there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice*''. However, the Statute does not give a definition on what an unjustified delay is but leaves it to the ICC to make a decision[72]. The drafters agreed to add a second criterion, 'undue delay', to facilitate the application of the complementarity test. This phrase was originally attached to the intention of the State to bring the accused to justice. As the term was subject to criticism in the Committee of the Whole, and it was replaced, upon a proposal from Mexico, by 'unjustified delay', as it currently appears under Article 17(2) (b)[73]. To establish an 'unjustified delay' in the proceedings, the test must be stricter than one of mere 'undue delay'[74] since this expression was considered too low threshold at the Rome Conference. It is uncertain how such delay should be determined. It could be argued that a delay should be assessed by reference to the usual procedures and time-frames within each individual state[75].

The third is that ''*the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring*

[70] Benzing, p.610.
[71] Yang, p.123.
[72] Yang, p.123.
[73] [73] In the negotiations, some states suggested that an 'unjustified delay' could be relevant for the determination of 'unwillingness' even where the state had acted in good faith. See Stigen, p.291.; El Zeidy p.181
[74] The term 'undue delay' was originally proposed, but some states viewed it as too strict. States should be allowed to explain the reasons for the delay and have a dialogue with the ICC Prosecutor, they argued. Others noted, however, that the term 'unjustified' invited unwilling states to forward justifications, further delaying the proceedings at both levels. See Stigen, p.289.
[75] See Benzing, p.610.

the person concerned to justice''. The third criterion in determining unwillingness is the 'independence and impartiality' of the proceedings. If the ICC determines that the proceedings 'were not or are not being conducted independently or impartially', but are in fact being conducted in a manner 'which in the circumstances is inconsistent with an intent to bring the person to justice', the case will be admissible[76].The terms 'independently' and 'impartially' are not defined in the Rome Statute[77]. As for the relationship between the two concepts, impartiality may or may not be the result of lacking independence. Independence implies freedom to follow the law and brings with it the responsibility to be impartial, but it is no guarantee of it[78].

Considered closely, Article 17 (2) (c) establishes two cumulative criteria: (i) the proceedings must fail to be independent or impartial, and (ii) they must be conducted in a manner inconsistent with an intent to bring the alleged perpetrators to justice. One important indication to establish the second criterion may be that the lack of independence or impartiality in fact worked in favour of the accused. Some argue that the Rome Statute requires all the States concerned, including non-party States, to follow the human rights standards and proceedings provided in the Statute, including the presumption of innocent, non-retroactivity ratione personae, ne bis in idem, the rights to have public hearings, choose lawyers at the accused's free will and obtain legal assistance free of charge, and the rights to be informed, examine the witness, remain silent, not to be compelled to self-incrimination, etc[79]. According to some, to define the terms of 'independence and impartiality', one may look to the jurisprudence of human rights courts[80]. For instance, according to the European Court of Human Rights, in order to establish whether a tribunal is independent, regard must be had, inter alia, to the manner of appointment of its members and its term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of

[76] See El Zeidy p.195.

[77] The term 'impartial' means 'not favouring one party or side more than another'; 'unprejudiced, unbiased, fair, just, equitable'. 'Independence' means 'the fact of not depending on another; exemption from external control or support; freedom from subjection, or from the influence of others; individual liberty of thought or action'. See Stigen, p.300, 305.

[78] Stigen, p.299.

[79] Yang, p.123.

[80] Benzing, p.612.

independence[81]. As to 'impartiality', the tribunal must be subjectively free of personal prejudice or bias, and it must be impartial from an objective point of view, i.e. it must offer sufficient guarantees to exclude any legitimate doubt in that respect[82].

Finally, it should be noted that although the criteria of 'shield' and 'unjustified delay' or the lack of 'independent' and 'impartial' proceedings are subjective and unclear, the drafting history of the Rome Statute reveals enormous efforts to reduce the elements of subjectivity when defining these criteria[83].

1.b. The Criterion of 'Inability'

'Inability' is a separate criterion, distinct in terms of application from that of unwillingness. The term 'inability' is not defined in the Rome Statute[84], but Article 17(3) provides some clarifying factors that shall be considered for the determination. In contrast to the term unwillingness, in the view of some commentators, it is an objective criterion[85]. The term was inserted to cover situations where a state lacks a central government due to a breakdown of state institutions or suffers from chaos due to civil war or natural disasters, or any other event leading to public disorder[86].

Article 17(3) states: In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. The paragraph lists two alternative causes of inability, and two alternative meanings of being unable. As for the causes, the state must experience either 'total or partial collapse' of the national judicial system or the same system's unavailability. As for the meaning of

[81] See Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, Report from Interights, London, 2003.
[82] Stigen, p.308.
[83] See El Zeidy, p.236.; Jurdi, p.78.
[84] Linguistically, ''inability'' means 'the condition of being unable'; 'want of ability, physical, mental, or moral'; and 'lack of power, capacity, or means'. The French 'incapacite', the Spanish 'no pueda' (cannot) and 'incapacidad' (incapacity), and the Russian 'ne sposobno' (unable) and 'nesposobnostj' (inability) appear to be synonymous with the English term. See Stigen, p.313.; Jurdi, p.80.
[85] See Xavier, p.384.; Gioga Federica, ''State Sovereignty, Jurisdiction, and 'Modern'International Law: The Principle of Complementarity in the International Criminal Court'', Leiden Journal of International Law, Vol. 19, pp.1095-1123.
[86] See Benzing, p.613.; Leonard, p.100.

being unable, the state must be 'unable to obtain the accused or the necessary evidence and testimony', or 'otherwise unable to carry out the proceedings'[87].

The provision entails different situations in which the ICC may rule a case admissible: 1) where the State fails to secure the custody of the accused; 2) where the State could not gather the necessary evidence and testimony; or 3) where the State is otherwise not able to conduct the proceedings. These situations must be resulting from either a total or substantial collapse or the unavailability of the State's national judicial system[88]. In terms of 'inability', Article 17(3) includes three criteria that the ICC will take into consideration in determining whether the national system is able or not. The first two criteria are total or substantial collapse of the national judicial system, or unavailability of its national judicial system. The third criterion is the state's inability to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings[89].

A 'total collapse'[90] of a state's judicial system can be assumed where the state authorities have lost control over its territory to an extent that the administration of justice has broken down completely, or where the authorities, while exercising effective (military or police) control over the territory, do not perform such administration. A 'substantial collapse'[91] is different from and probably more stringent than a mere 'partial' collapse[92]. The striking part of the inability test lies in the criteria of 'total' or 'substantial' collapse[93]. The term 'substantial' replaced the originally

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[87] Stigen, p.314.

[88] See El Zeidy, p.223.; In all three set-ups, the deficiency has to be due to the total or substantial collapse or unavailability of the judicial system, thus requiring proof of a causal link in each case. See Benzing, p.614.

[89] Jurdi, p.83.; Almqvist, p.338.

[90] The term ''total'' means 'pertaining, or relating to the whole of something; comprising a whole'. As to the impact of the collapse, the basic functions of the judicial system must arguably be paralysed as 'total' also implies 'complete in extent or degree; absolute, utter; involving all resources'. See Stigen, p.314.

[91] The term ''substantial'' means 'that is, constitutes, or involves an essential part, point, or feature; essential, material'. Thus, the term 'substantial collapse' would arguably cover a collapse affecting the legal system in a region if that region represents an essential part of the whole judicial system. See Stigen, p.315.

[92] Benzing, p.614.

[93] Some argue that this change may cause some confusion in practice. See El Zeidy p.236.; Stigen, p.82.; Burke- White, William W. ''Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo'', Leiden Journal of International Law, Vol.18, pp.557-590.; William

proposed term 'partial'[94]. The term "substantial collapse" should be understood as implying that the system is sufficiently damaged so as to render it useless for the relevant purpose.

The third alternative 'unavailability' cause for inability is broad. Linguistically, the term 'unavailability' has three related but distinct aspects: First, the term may refer to the non-existence of something, indicated by the definitions of 'available' as 'obtainable; within one's reach'. Second, the term may refer to the non-accessibility of something irrespective of its existence, indicated by the definition 'accessible; at one's disposal'. Third, it may refer to the non-usefulness of a remedy irrespective of its existence and accessibility, indicated by the definition 'capable of producing a desired result; of avail, effectual, efficacious'[95]. Unavailability of the national legal system is a separate requirement from a substantial collapse. It can generally be said that a national legal system is unavailable where 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[96]. The unavailability criterion allows the Court to consider a relatively broad spectrum of reasons as to why a given case has not been dealt with satisfactorily[97].

Burke-White takes a constructivist stance on 'positive complementarity'. He endorses the idea that the Court should actively encourage domestic investigations and prosecutions. He argues that a proactive policy is inherent in the system of justice established by the Rome Statute and necessary to align the Court's mandate to its resources and capacity. He develops a differentiated policy scheme, which distinguishes strategies concerning (i) states unwilling to prosecute, (ii) states unable to prosecute and (iii) potential divisions of labour between the Court and domestic jurisdictions.

[94] The provision establishes that all these situations have to be "due to a total or substantial collapse or unavailability of [the concerned State's] national judicial system". This last clause was the object of discussions at the Rome Conference, and the wording "total or substantial collapse" was finally preferred to "partial collapse", which appeared in the Draft Statute of the Preparatory Committee. Some states wanted to replace it with a narrower criterion and they argued that it was conceivable that a state could experience a partial collapse, for example in one region of the state, but still be able to undertake genuine proceedings. Such a change allowed States to retain exclusive jurisdiction in situations where an armed conflict, while affecting some regions, does not extend to the whole country, so that prosecution at the national level is still possible in other venues. See Tedeschini, p.80.; Stigen, p.315.

[95] Stigen, p.316.

[96] Benzing, p.614.

[97] Stigen, p.325.

For the purpose of determining whether a state in fact is rendered genuinely unable, Article 17(3) lists certain steps that are crucial to a successful investigation and prosecution, namely obtaining the accused and the necessary evidence and testimony. In addition, the more general notion 'otherwise carry out its proceedings' is included. As for the 'necessary evidence and testimony' criterion, the term 'necessary' indicates that the factor deals with the obtaining of sufficient evidence and testimony to conduct a genuine criminal proceeding according to the allegations. Other evidence can scarcely be referred to as 'necessary', even if it might be important in other ways, for example in the sense that it would shed light on the causes of the crimes[98].

Another question which is closely relevant to the application of Article 17 is that of self-referrals and waivers of complementarity. In the contemporary practice of international criminal justice, the question of self-referrals and waivers of complementarity has become of great relevance to the discussion on complementarity before the ICC[99]. In the Ad hoc Committee in 1995, the issue of waiver of complementarity was raised in general terms for the first time during the negotiations of the Rome Statute. The term 'waiver' or 'waiver of complementarity' is neither found nor defined in the Statute. Also, the expression 'self- referral' does not appear in the Rome Statute either. The question was finally left to the Court's interpretation; so far, the practice of the Court seems to have welcomed the idea of self-referrals. The idea of waivers of complementarity was not explicitly referred to in the decisions. Thus, accepting waivers of complementarity and self-referrals should be subject to a case-by-case assessment[100].

2- Complementarity-Related Provisions (Articles 18-20)

Assessing the complementarity regime under the Rome Statute does not end with Article 17. Articles 18, 19, and 20 are other provisions that regulate the procedural regime of its application. The procedural framework relating to complementarity is intricate and primarily designed to reconcile the two opposing maxims of effective operation of the Court and preservation of states' right to investigate and prosecute.

[98] See Stigen, p.326.
[99] See Schabas William A. ''Complementarity in Practice: Some Uncomplimentary Thoughts'', Criminal Law Forum, Vol.19, 2008, pp.5-33.
[100] See El Zeidy p.237.

While Article 17 is central to the interpretation of complementarity; Articles 18, 19 and 20 regulate the procedural regime of its application. These three articles deal with claims brought by states which assert that they are conducting national investigations of the criminal acts the ICC is looking into. Each article applies to a different stage in the proceedings before the Court.

2.a. Article 18

Article 18 elaborates on the complementarity principle, as set out in Article 17, by providing a mechanism for preliminary rulings on admissibility. The provision was inserted by the Preparatory Committee and examined in depth at the Rome Conference[101]. According to Article 18(1), when a State Party refers a situation to the Court and the Prosecutor identifies a reasonable basis for commencing an investigation into a situation or initiates an investigation *propriomotu*, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The reference to 'an investigation' indicates that the Prosecutor does not have to notify states when he or she initiates a preliminary examination[102]. Under the clear wording of the provision, this duty exists also vis-a-vis non-States parties. The norm thus provides for a right for third states, i.e. states that are not party to the treaty[103]. A possible interpretation may be that it indeed includes all states that have incorporated jurisdiction regarding the crimes under Article 5 of the Statute in their domestic jurisdiction. In practice, however, few states actually do prosecute alleged perpetrators under the principle of universality in the absence of any specific link to the crime[104].

Article 18(2), on the other hand, obliges the Prosecutor to defer to a state's investigation, if informed of the existence of domestic proceedings within one month of the notification sent to all States Parties and other states which would normally exercise jurisdiction. Based on this, a state may request the Prosecutor to 'defer to the State's investigation of those persons'. The reference to investigations clearly does not imply that a state cannot invoke the fact that it is or has been prosecuting, in which case the state also "has investigated". In order to avoid ICC interference, a state's

[101] See El Zeidy p.239.
[102] See Stigen, p.126.
[103] Benzing, p.622.; Krings, p.755.
[104] Benzing, p.622.

submission must not merely be that it is dealing or has dealt with the case in question, but that it is doing or has done so genuinely, as required by Article 17. In addition to information relating to specific cases, Article 51 provides that a state ''may choose to bring [information] to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct''.

The Statute does not regulate the question of in how far a state has to substantiate the claim that (a) it has jurisdiction and (b) is investigating or has investigated. Article 53 merely provides that a state shall make the request for deferral in writing and provide information concerning its investigation[105]. According to Article 53, a state shall 'provide information concerning its investigation, taking into account article 18, paragraph 2'. This indicates that a state must provide sufficient information for the Prosecutor to determine whether he or she shall defer or seek an authorisation as provided for in paragraph 2, and, when the Prosecutor seeks an authorisation, for the Chamber to determine whether to authorise an investigation or not. If a state does not provide sufficient information, the proceeding's genuineness cannot be assessed properly[106].

The Statute does not solve the question of what happens where the state concerned does not respond at all to the Prosecutor's notification or, if it does, does not explicitly 'request' the Prosecutor to defer to its investigations. As to the first part of the question, the absence of a reply from one or more states would implicitly mean that a state or states waived the right provided under Article 18(2), and thus the Prosecutor could go ahead with the investigation provided that no other state with jurisdiction had complied with the notification time limit and opposed the Court's investigation. As to the second part where a state informs the Prosecutor that it is investigating or has investigated, yet does not explicitly request deferrals a result of an error or mistake in the state's notification, the Prosecutor should certainly take such information as an implicit request for deferral to domestic investigations.

If the Prosecutor defers to a state's investigation, he may review the deferral after six months or whenever there has been a 'significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation'. Article 18(3) therefore allows the Prosecutor to monitor and reassess a state's ability and willingness to pursue justice. If the

[105] See Benzing, p.622.
[106] See Stigen, p.133.

Prosecutor observes any change of circumstances based on the state's unwillingness or inability prior to or following the six-month period, he will investigate the matter subject to the Pre-Trial Chamber's authorization[107].

2.b. Article 19

Unlike Article 18, which is applicable only in response to the referral of a situation by a state party and in the event of an investigation by the Prosecutor *propriomotu*, Article 19 applies to 'Security Council referrals and cases in which states do not open investigations' in response to the Prosecutor's notification[108].

According to Article 19 (1) '*The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.*'. This duty is limited to 'any case' which is 'brought before it'. A 'case' is narrower than the term 'situation'[109] within the meaning of Articles 13, 14 and 18. The term 'may' implies that the Court is under no obligation to determine the admissibility unless another party has raised the issue[110]. These terms were discussed in the 1996 Preparatory Committee in relation to the ex officio powers to be granted to the Prosecutor[111].

Article 19(2) (a), which states that ''*Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the*

[107] This provision applies both when the Prosecutor has deferred without a ruling by the Court, and when the Prosecutor has deferred in accordance with such ruling. See Stigen, p.140.

[108] Krings, p.755.

[109] The distinction between a 'situation' and a 'case' does not refer to any specific procedural step taken by the Prosecutor or the Court. According to Articles 18 and 19, the distinction marks the default line as to when an admissibility challenge may be made under Article 19. See Stigen, p.93.

[110] Stigen, p.152.

[111] At the Rome Conference, there was a division of opinions as to whether the Security Council should refer 'situations', 'cases' or 'matters'. The majority of delegates rejected the possibility of referring 'cases' by the end of the preparatory negotiations, finding 'cases' to be too narrow and not mindful enough of the Court's independence in the exercise of its jurisdiction. Consequently, only 'matters' and 'situations' were submitted to the Diplomatic Conference. Those who favoured the narrow concept of a 'matter' believed that there ought to be 'some degree of specificity in the referral before the Court could assert jurisdiction'. Others who were inclined towards the term 'situation' thought that the Council referring a 'matter' would interfere with the Court's independent functioning, especially because the term is 'still too specific'. Despite the diversity of opinions, the term 'situation' was finally adopted. See El Zeidy, p.250.

jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12.'' leads to the same conclusion, namely that Article 19 does not seem to cover arrest warrant proceedings under Article 58. Article 19(2) (a) is therefore an important provision which highlights the individual's right to challenge the admissibility in absence of a challenge from a state concerned[112]. Although the chapeau of Article 19(2) refers to 'challenges to the admissibility of a case on the grounds referred to in article 17', an examination of the language of Article 19(2)(b) suggests that it limits these grounds to those listed in Article 17(1)(a) and (b). Article 19(2)(c), on the other hand, allows a state from 'which acceptance of jurisdiction is required under Article 12' to challenge the jurisdiction of the Court and the admissibility of a case. Acceptance of a state's jurisdiction is not required if the Security Council, pursuant to Article 13(b), refers a situation to the Prosecutor[113].

Article 19(3) entitles the Prosecutor to seek a ruling from the Court on a question of jurisdiction or admissibility. In such proceedings victims and those who have referred the situation under Article 13 may submit observations to the Court[114]. As a general rule, in accordance with Article 19(4) a state or a person referred to in paragraph (2) is permitted only one challenge to a determination of jurisdiction or admissibility[115]. Article 19(4) provides that a challenge to the admissibility (or jurisdiction) may be made only once and it must be made 'prior to or at the commencement of the trial'. This limitation shall reduce the risk of excessive delays[116]. Article 19(5) provides that a state referred to in paragraph 2 (b) "shall make a

[112] See Stigen, p.153.

[113] El Zeidy, p.262.; See Stahn Carsten, ''Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility''', Journal of International Criminal Justice, Vol.10, 2012, pp.325-349.; Stahn revisits the normative features of 'positive complementarity' and its distinction from classical complementarity. He submits that the notion of positive complementarity encompasses a spectrum of normative propositions with different degrees of support. He argues that the individual elements of this concept should be assessed in light of their impact on the impartiality and independence of the Court and the effectiveness of justice.

[114] See Stigen, p.161.

[115] El Zeidy, p.263.

[116] Stigen, p.164.

challenge at the earliest opportunity". Again, the purpose is to minimise the possibility of delays. The criterion 'earliest opportunity' might be interpreted as referring to the time when a state should have known that the ICC proceeding was interfering with its own proceeding, or as referring to the time when the state actually knew this[117].

Article 19(6) regulates which organ shall be the recipient of a challenge at the respective stages of the proceedings. Prior to the confirmation of the charges, challenges shall be referred to the Pre-Trial Chamber, and once the charges are confirmed, challenges shall be referred to the Trial Chamber. Article 19(6) also provides that decisions regarding jurisdiction or admissibility 'may be appealed to the Appeals Chamber in accordance with article 82'[118].

Article 19(7) provides that once the admissibility has been challenged, the Prosecutor's investigation is suspended 'until such time as the Court makes a determination in accordance with article 17'. Combined with the provision in Article 82(3) that an appeal 'shall not of itself have suspensive effect unless the Appeals Chamber so orders', this signifies that the Prosecutor may resume his or her proceeding as soon as the Pre-Trial Chamber or the Trial Chamber has ruled on the question in the first instance[119].

Article 19(8) aims at counterbalancing the suspensive effect of admissibility challenge. Where an investigation presents a 'unique opportunity', the Prosecutor may, despite the suspensive effect of a challenge, seek authorisation from the Court to (a) pursue 'necessary investigative steps' as described in Article 18(6); (b) complete a 'statement or testimony' or the 'collection and examination of evidence', which was begun before the challenge; and (c) prevent the 'absconding of persons' sought arrested[120].

Article 19(9) provides that 'the making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge'. This provision limits the possibility of a state to impede the investigation and prosecution by making a challenge[121].

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[117] See Stigen, pp.165-166.
[118] See Stigen, p.167.
[119] Stigen, p.169.
[120] Stigen, p.170.
[121] Stigen, p.175.

Article 19 (10) imposes three requirements on the Prosecutor before he may ask the Court to review its decision. It first requires that 'new facts have arisen'. The reference to 'new facts' means that the Prosecutor may not request a review arguing that the interpretation of the law has been incorrect[122]. As for the requirement that new facts 'have arisen' it might be asked whether the facts must have occurred after the case was found inadmissible, or whether it suffices that the facts are discovered thereafter. Another requirement is that these facts must 'negate the basis on which the case had been previously found inadmissible'. The criterion that the facts must 'negate the basis' on which inadmissibility was previously determined means that the facts must be relevant in light of Article 17 and sufficient to convince the Court that the previous decisions should be reversed[123]. Finally, the Prosecutor must be 'fully satisfied' that the other two requirements have been met[124].

If the Prosecutor, having considered the criteria set out in Article 17, decides that the case is inadmissible and thus defers investigation to the state with jurisdiction, he may request 'information on the proceedings' from the relevant state pursuant to Article 19(11). The language of Article 19(11), 'if the Prosecutor thereafter decides to proceed with an investigation', reflects a wide discretionary power to intervene at any time, according to his assessment. Article 19(11) provides that the Prosecutor upon deferral may request that the relevant state 'make available to the Prosecutor information on the proceedings'[125].

As mentioned above, Articles 18 and 19 reflect the severe tension between the powers of the Prosecutor and the priority of states in the complementarity regime. Under these provisions, certain paragraphs work in favour of states, while others serve the interests of the Court. A more plausible solution favours a delicate balance in interpreting these provisions that compromise neither the primacy of states nor the effectiveness of the Court[126].

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[122] Stigen, p.175.
[123] Stigen, p.176.
[124] This requirement is a very subjective test, which the Prosecutor can apply with wide discretion. See El Zeidy, p.271.
[125] Stigen, p.177.
[126] See El Zeidy, p.271.

2.c. Article 20 (Ne Bis in Idem)

The principle that a person should not be tried twice for the same offence is found in the majority of legal systems[127] of the world-known as the principle of *ne bis in idem*[128]. This principle protects an individual from repeated prosecution or punishment for the same conduct. The rule enjoys customary status in international law[129]. Within the context of international criminal tribunals, the principle appeared for the first time in the ICTY Statute, followed by a corresponding provision appearing in the ICTR Statute. At the 1998 Preparatory Committee, a proposal was submitted which substituted the following language: ''A person who has been tried by another court for conduct constituting a crime referred to in article 5''. This proposal was rejected on the ground that conduct could constitute a crime only if a court has determined that the conduct was a crime[130].

Article 20 of the Rome Statute emphasizes that "*1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*''.

[127] The principles of 'double jeopardy' and 'ne bis in idem' differ as to their scope and application. In some systems, typically but not exclusively Anglo-American, the principle of "double jeopardy" means that an acquittal on the facts is immediately final and therefore cannot be appealed. In most continental European states, however, the state may, within a limited period of time, appeal an acquittal not only on the law but also on the facts. See Stigen, p.207.

[128] See El Zeidy, p.283.

[129] Stigen, p.207.

[130] The discussions over the principle of ne bis in idem in Rome came in the wake of the hard-fought compromises on the complementarity provisions related to national investigations or ongoing prosecutions. See El Zeidy p.286.

The jurisdiction of the ICC to try an individual who has been the object of sham proceedings in a national court is technically an exception to the principle of criminal law in which a person may not be prosecuted twice for the same crime. Article 20 allows the ICC to prosecute a person for a crime referred to in the Statute, even after being tried for the same act in a national court if: a) the proceedings were aimed at shielding the person from criminal responsibility; or b) the procedure was not independent or impartial in accordance with the norms of due process recognized by international law, and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice[131].

VI- The Effectiveness of Complementarity

The complementarity principle that shapes the relationship of the International Criminal Court with national jurisdictions is both criticized and applauded[132]. As mentioned above, within this general framework the principle respects two functioning principles of international law, namely the principle of state sovereignty and the principle of primacy of action regarding criminal prosecutions. Thus, the principle offers the state the right to exercise jurisdiction and to decide what to do with the perpetrator according to its own penal rules[133]. It is intended to help states and the international community the better to enforce the jurisdiction, and to offer states a possible way out when the absence of trial or punishment for international crimes. That possibility could have a deterrent effect on perpetrators who otherwise feel safe because they know that no prosecution will be conducted against them. The principle could also help to resolve some dilemmas that are not necessarily the result of legal failures but are related instead to diplomatic or political problems[134].

In the view of some commentators, there is tremendous potential for complementarity to be a strength of the ICC as an institution. First, it is worth noting that states give up less sovereignty with complementarity than they would in a system based on primacy of an international criminal court. Secondly, complementarity will prove to be a strength if it leads to increased national capacity to adjudicate international crimes. Because

[131] See Newton, Michael A., ''Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court'', Military Law Review, Vol.167, March 2001, p.58.
[132] See Carter, p.451.
[133] Xavier, p.388.
[134] See Xavier, p.388.

complementarity gives the first option to states to prosecute, states have a strong motivation to develop their national capacities. State capacity provides those states with the option to preempt the ICC from hearing a case. Thus, if the ICC's complementarity regime contributes to the development of national capacity to try international crimes, it should be viewed as a strength of the system[135].

On the other hand, it should be noted that the principle of complementarity will not remedy all deficiencies in the efforts of the international community or individual states to try perpetrators of international crimes. There are some reasons for limiting the effectiveness of the principle in enhancing the enforcement of jurisdiction[136]. Within the international legal system, some problems can be identified: the lack of precise definitions of international crimes[137], and the conditions of implementation of the principle etc. In that sense, some argue that the Statute provisions are complex and often call for difficult subjective assessments by the Court and the Prosecutor[138]. As defined by the Rome Statute in Articles 1, 15 and 17 to 19, the principle of complementarity is precisely framed through various conditions of implementation. However, appreciation of the conditions could be quite difficult to assess: for instance, what exactly is meant by 'unwillingness' or 'inability' to prosecute? These open terms leave the prosecution authority with discretionary power to decide on their content and framework of application. Similarly, there could be some serious contradictions in implementation of the principle, even if states want to respect it, since they can disagree on the conditions of implementation by arguing that some crimes are not covered by the Statute. For example, some war crimes are nationally qualified as crimes against humanity, or genocide is sometimes considered as a crime against humanity. Even if international crimes are defined in the same way at the international and national level, differences in criminal procedure and admissibility of evidence may lead to divergences of appreciation. Thus, if one person is accused of an international crime but insufficient evidence is gathered or the rules for a fair trial are not met, national judges may be reluctant or refuse to prosecute the accused[139].

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[135] See Carter, pp.458-462.
[136] See for objective and subjective reasons, Xavier, p.389.
[137] The distinction between ordinary offenses and ICC crimes is more than simply a terminological exercise. See Newton, p.72.
[138] Newton, p.65.
[139] See Xavier, p.390.

Some argue that there are at least two primary concerns with complementarity. One is inherent in the structure of the ICC, and the other is in the implementation of the statutory mandate. An inherent problem exists because with complementarity the Court is secondary to national jurisdictions, and in that sense, is weaker than other international criminal courts such as the ad hoc tribunals, which have primacy over national jurisdictions. One effect of this inherent weakness is that the Court wields less authority over the states; the states have the option of maintaining the upper hand vis â vis the Court. In addition to an inherent issue, there is also an implementation concern that complementarity at least indirectly creates a tension between the Court and national jurisdictions. This occurs due to admissibility challenges and also to the perception that the ICC is focused on weaker nations[140].

Although banned for perpetrators of international crimes owing to the very nature of those crimes, immunities and pardons granted at national level[141] still raise questions regarding the principle of complementarity[142]. Whereas a general amnesty can never be an obstacle to trials of perpetrators of international crimes before the ICC, there are a number of intermediate situations where these issues will in practice weaken the principle. The constitutional system of a state may also give complete independence to the judicial power. There is consequently a risk of disagreement between the various authorities on the prosecution of an international crime. Even if the executive or legislative authorities are in favour of prosecuting an international criminal, there could be some disagreement from the point of view of the judiciary[143].

Another type of challenge faced by the principle of complementarity lies in the diversity of procedures for extradition and judicial co-operation between states. Extradition and judicial co-operation are obviously aimed at improving the enforcement of jurisdiction. However, even though there are some examples of regional co-operation, extradition and judicial co-operation are still mainly based on bilateral relationships between states. Consequently, there can be differences between the conditions set in the

[140] See Carter, pp.455-458.

[141] The Rome Statute is silent on the proper allocation of ICC authority in cases involving national amnesties or executive pardons. See Newton, p.69.

[142] See Kleffner Jann K., ''The Impact of Complementarity on National Implementation of Substantive International Criminal Law'', Journal of International Criminal Justice, Vol.1, 2003, pp.86-113.

[143] See Xavier, p.391-392.

respective texts[144]. There is also a high risk of unequal treatment between states that could lead to bargaining between them; especially those not party to the Rome Statute. If, for instance, it is a developing country, adherence to the Statute or concluding an agreement under Article 98 thereof can be a means of negotiating economic support in exchange[145].

Another aspect has to do with the overall political situation of each country. It must be kept in view, for the nature of political regimes, depending on the type of separation of powers and the existence of checks and balances (authoritarian or democratic regime), will also affect the implementation of the principle of complementarity. The attitude of the international community must not be overestimated either. Behind the official consensus that international criminals should be brought to trial, real politic resurfaces and the situation is viewed differently. The power granted to the UN Security Council to refer a matter to the Court serves as an example. Even if there was a comprehensive assessment of international crimes worldwide, the working methods and rules of procedure of the Security Council could lead to a selective approach in terms of the proceedings that could be initiated by the ICC[146].

There are other reasons, linked to national factors, which create difficulties for implementation of the principle of complementarity. The specific cultural characteristics of each state and investigation problems must be taken into consideration. Relations between authorities, the ability of witnesses to speak, the disinclination of the population to co- operate, priority given to the process of reconciliation and reconstruction, interpretation and translations, reliability of information etc. there are many factors that could make application of the principle more difficult in practice[147].

Finally, complementarity presently is both an advantage and a challenge for the ICC. A consequence of complementarity is that, now and in the future, the ICC will be significant both for the trials it conducts and for its impact on national capacity to try international crimes[148].

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[144] See Xavier, p.393.

[145] International relations and politics should not be ignored in that debate. See Xavier, p.394.

[146] See Xavier, p.395.

[147] See Xavier, p.396.

[148] Increasing the emphasis on building national capacity as an objective and achievement of the ICC as an institution is likely to help ensure that complementarity is a strength in the future. See Carter, p.473.

Conclusion

The entry into force of the Rome Statute in July 2002, marked a major milestone in the process of ensuring accountability for international crimes. The Statute is an important victory against impunity for the large-scale human rights violations, and the creation of the International Criminal Court was widely viewed as a significant contribution toward ending impunity and promoting the global rule of law. Although the ICC is an important tool in the struggle for accountability, national prosecutions should remain the primary option, wherever feasible, because they can handle many more cases and are usually preferable from the perspectives of victims and local justice systems. In this regard, the complementarity provisions of the Statute highlight the Court's role as a backstop to national jurisdictions. Statue provisions are designed to find a balance between the sovereign right of all states to exercise criminal jurisdiction over acts within their jurisdiction and the interest of the international community in the effective prosecution of international crimes.

The term 'complementarity' does not appear as such in any of the provisions of the Rome Statute. The only similar reference is to be found in the tenth paragraph of its Preamble and in Article 1, where it is stated that the ICC established under the Statute 'shall be complementary to national criminal jurisdictions'. One of the fundamental features of the Statute's complementarity regime is that the interpretation and application of the provisions is left to the Court itself. Indeed, the provisions implementing complementarity are complex and often call for difficult subjective assessments by the Court and its Prosecutor. As we can see there are two jurisdictions that might possibly contradict each other: one is the State that has jurisdiction over the suspect(s) and the other is the Court that may claim jurisdiction due to the unwillingness or inability of the State concerned. Unlike ad hoc tribunals, the Court has a vertical nature. This means that national jurisdiction over the crimes comes first and in the absence of effective prosecution (as it is defined by the Statute to be the unwillingness or inability of states) the Court jurisdiction comes later.

The central provision regulating complementarity is Article 17 of the Rome Statute. The procedural embedding of complementarity is inter alia governed by Articles 18, 19, 20, and 53. In particular, Article 17 empowers the Court to take over an investigation and/or prosecution from a state if the Court determines that such state is 'unable or unwilling genuinely to carry out the investigation or prosecution'. Indeed, the hardest part of the

complementarity regime appears in the exceptions to the criteria for inadmissibility under Article 17, defined by the terms 'unwilling' and 'unable' genuinely. In order to determine

whether a state is unwilling genuinely to investigate or prosecute in a particular case, Article 17(2) of the Statute directs the Court to consider whether: (a) domestic proceedings or the decision not to prosecute have been made for the purpose of shielding the person concerned from criminal responsibility; (b) there has been an unjustified delay in domestic proceedings; and/or (c) the domestic proceedings were not or are not being conducted independently or impartially. Articles 18 and 19 deal with claims brought by states which assert that they are conducting national investigations of the criminal acts the Court is looking into. Each article applies to a different stage in the proceedings before the Court. According to Article 18, the Prosecutor must notify all states of the opening of an investigation, and within a month of receipt of this notice, a state can inform the Court that it is investigating the criminal acts that were the object of the Prosecutor's notification and request the deferral of the case. Unless the Prosecutor seeks and obtains an authorization to proceed from the Pre-Trial Chamber, he must defer to the national investigation. Once the one-month period referred to in Article 18 has elapsed, states can still challenge the admissibility of a case by presenting a formal claim before the Court's Chambers. In conclusion, the principle of complementarity is based on respect for state sovereignty and states' primary obligation to exercise jurisdiction, as well as on considerations of efficiency and effectiveness since states generally have the best access to evidence and witnesses. Taking this into consideration, complementarity is not only a principle that rules the exercise of the Court's jurisdiction, but it is also being developed into a tool to encourage states to exercise their obligation to prosecute atrocity crimes. Complementarity is a new concept in international law and will be gradually shaped as the Court issues rulings to interpret its scope and implications.

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