# The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity

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## I. Introduction

The Preamble of the Rome Statute of the International Criminal Court[1] and article 1 refer to the International Criminal Court (ICC) as an international institution that "shall be complementary to national criminal jurisdictions".[2] This complementary relationship between the ICC and national criminal jurisdictions means that, as opposed to the two *ad hoc* Tribunals,[3] the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) the ICC does not have primary jurisdiction over national authorities,[4] but plays a subsidiary role and supplements the domestic investigation and prosecution of the most serious crimes of international concern.[5] The Court is only meant to act when domestic authorities fail to take the necessary steps in the investigation and prosecution of crimes enumerated under article 5 of the Statute.

The Statute does not explicitly use or define the term "complementarity" as such; however, the term has been adopted by many negotiators of the Statute, and later on by commentators to refer to the entirety of norms governing the complementary relationship between the ICC and national jurisdictions.[6]

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1 Preamble, para. 10 of the Rome Statute, reprinted in this Volume, see Annex.

2 As to the negotiation history of the relevant norms, see S.A. Williams, "Article 17", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, MN 1 et seq.

3 Arts 9 (1) ICTY Statute and 8 (2) ICTR Statute.

4 Including courts, investigating authorities, prosecution and international co-operation in criminal matters, cf. I. Tallgren, "Completing the International Legal Order", *Nord. J. Int'l L.* 67 (1998), 107 et seq. (120).

5 M.A. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent With the Rome Statute of the International Criminal Court", *Mil. L. Rev.* 167 (2001), 20 et seq. (26).

6 "Complementarity" in the present context is thus understood in a "narrow" sense and does not reflect the wider complementary relationship between the Court and states in that, even where the Court exercises its jurisdiction, it will have to rely on the co-operation of national states to investigate under Part 9 of the Statue: cf. H. Duffy/ J. Huston, "Implementation of the ICC Statute: International Obligations and Constitutional Considerations", in: C. Kreß/ F. Lattanzi, *The Rome Statute and Domestic Le-*

Apart from the jurisdictional regime established by the Statute,[7] the principle of complementarity is the salient instrument to delineate the exercise of jurisdiction by the ICC from that of national authorities, including national courts,[8] and as such may well prove to be one of the most contentious features of the Statute in its application. Bearing this in mind, it is clear why the principle of complementarity has been described as essential for the acceptance of the Statute by states[9], and is often referred to as the underlying principle[10], the cornerstone[11] of the Statute, or the key concept of the ICC, which permeates the entire structure and functioning of the Court.[12] It will require the Court's attention from a very early stage, given that the Prosecutor has to take into consideration the issue of complementarity as early as when he or she thinks about initiating an investigation[13] and that, following this decision (and, in cases of *poprio motu* investigations, an authorisation by the Pre-Trial Chamber to proceed under article 15 (4)), article 18 provides for the possibility to institute preliminary proceedings regarding admissibility.

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*gal Orders*, Vol. 1 (*General Aspects and Constitutional Issues*), 2000, 29 et seq.

7 To this see the article of M. Wagner in this Volume.

8 Cf. Report of the Preparatory Committee on the Establishment of an International Criminal Court, GAOR 51st Sess., Suppl. No. 22 (Doc. A/51/22), para. 153.

9 Cf. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR 50th Sess., Suppl. No. 22 (Doc. A/50/22), para. 29; W. Bourdon/ E. Duverger, *La Cour pénale internationale: Le statut de Rome*, 2000, 94.

10 J.I. Charney, "International Criminal Law and the Role of Domestic Prosecutions", *AJIL* 95 (2001), 120 et seq. (120).

11 E. La Haye, "The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction", *NILR* 46 (1999), 1 et seq. (8); B. Swart/ G. Sluiter, "The International Criminal Court and International Criminal Co-operation", in: H.A.M. von Hebel/ J.G. Lammers/ J. Schukking (eds), *Reflections on the International Criminal Court*, 1999, 91 et seq. (105).

12 M. Bergsmo, "Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council", *Nord. J. Int'l L.* 69 (2000), 87 et seq. (96); O. Solera, "Complementary jurisdiction and international criminal justice", *Int'l Rev. of the Red Cross* 84 (2002), 145 et seq. (147).

13 Article 53 (1)(b) and Rule 48 of the Rules of Procedure and Evidence.

The present article does not purport to describe conclusively the principle in all its substantive and procedural aspects, but rather seeks to contribute to the discussion on one of the most opalescent notions of the Statute.

## II. The Nature of the Principle of Complementarity

### 1. Admissibility v. Jurisdiction

Article 17 establishes the substantive rules that constitute the principle of complementarity. The Statute defines the question of complementarity as pertaining to the admissibility of a case rather than to the jurisdiction of the Court. As is the case with other international judicial institutions, such as the ICJ or human rights courts, the issues of admissibility and jurisdiction in the sense of competence in the pending case have to be distinguished, even though both concepts are closely related.[14] The Court cannot exercise the jurisdiction that it has if a case is inadmissible;[15] thus, the principle of complementarity does not affect the *existence* of jurisdiction of the Court as such, but regulates when this jurisdiction may be *exercised* by the Court[16]. Article 17 thus functions as a barrier to the exercise of jurisdiction.[17] The Rules of Procedure and Evidence of the ICC recognise this by providing that the Court shall rule on any challenge to its jurisdiction first before dealing with matters of admissibility.[18]

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14 Cf. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 2, 1986, 438-439.

15 J. T. Holmes, "Complementarity: National Courts *versus* the ICC", in: A. Cassese/ P. Gaeta/ J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, Vol. 1, 667 et seq. (672).

16 J. Crawford, "The drafting of the Rome Statute", in: P. Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, 2003, 109 et seq. (147). Seen like this, the heading of article 12 of the Statute is strictly speaking a misnomer, since it does not concern the *exercise* of jurisdiction, but the *existence* of it.

17 Holmes, see note 15, 672.

18 Rule 58 (4): "The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility".

## 2. The Rationale of Complementarity

The Statute establishing the ICC is an international, multilateral treaty. According to article 31 of the Vienna Convention on the Law of Treaties, provisions of a treaty shall be interpreted, *inter alia*, with regard to its object and purpose.[19] In order to understand the principle of complementarity and to facilitate and structure the interpretation of the different provisions that define the concept substantively and procedurally, it seems pertinent to enquire about the rationale of complementarity.[20]

The most apparent underlying interest that the complementarity regime of the Court is designed to protect and serve is the *sovereignty* both of State parties and third states.[21] Under general international law, states have the right to exercise criminal jurisdiction over acts within their jurisdiction.[22] The exercise of criminal jurisdiction can indeed be said to be a central aspect of sovereignty itself.[23]

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19 The rules of interpretation codified in article 31 of the Vienna Convention on the Law of Treaties are also valid under customary international law: G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, 2002, 640.

20 The following discussion relates mainly to article 17 (1)(a) and (b) and the procedural scaffolding relating to these subparas; article 17 (c) and (d) operate within a somewhat different purview (see under IV. 6.). In essence, it is these two factors that are normally referred to when the "principle of complementarity" and its theoretical background are analysed.

21 Bergsmo, see note 12, 99; R.E. Fife, "The International Criminal Court – Whence It Came, Where It Goes", *Nord. J. Int'l L.* 69 (2000), 63 et seq. (72).

22 D.D. Ntanda Nsereko, "The International Criminal Court: Jurisdictional and Related Issues", *Criminal Law Forum* 10 (1999), 87 et seq. (117); ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Separate Opinion Judge Sidhwa, reprinted in: A. Klip/ G. Sluiter, *Annotated Leading Cases of International Criminal Tribunals*, Vol. 1 (*The International Criminal Tribunal for the Former Yugoslavia 1993-1998*), 97 et seq. (121, para. 83). This was also stressed during the negotiations leading to the adoption of the Statute: Report of the Preparatory Committee on the Establishment of an International Criminal Court, see note 8, para. 155.

23 Cf. I. Brownlie, *Principles of Public International Law*, 5th edition, 1998, 289 and 303. See ibid. to the different bases on which states may exercise jurisdiction.

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.[24] A purpose of the complementarity principle may thus 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. The declaratory wording of the Preamble may suggest that this duty precedes the coming into force of the Statute ("recalling that it is the duty").[25] While such a duty unquestionably exists with regard to some international crimes,[26] it is questionable whether it covers *all* crimes in their different facets under the Statute, especially as regards crimes against humanity.[27] Be that as it may, it is clear that the principle of complementarity was designed to allow for the prosecution of such crimes at the international level where national systems are not doing what is necessary to avoid impunity and to deter a future commission of crimes. Moreover, and independent from the existence of a duty to prosecute, the complementarity regime is surely designed to *encourage* states to exercise their jurisdiction and thus make the system of international criminal law enforcement more effective.[28]

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24 Preamble, para. 6.

25 Duffy/ Huston, see note 6, 31.

26 On this question see the article of A. Seibert-Fohr, in this Volume; A. Zimmermann, "Auf dem Weg zu einem deutschen Völkerstrafgesetzbuch – Entstehung, völkerrechtlicher Rahmen und wesentliche Inhalte", *ZRP* 35 (2002), 97 et seq. (98); M.P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court", *Cornell Int'l L. J.* 32 (1999), 507 et seq. (514 et seq.); J. Dugard, "Possible Conflicts of Jurisdiction with Truth Commissions", in: Cassese/ Gaeta/ Jones, see note 15, 693 et seq. (698) who concludes that international law is moving towards a duty to prosecute.

27 The Preamble may indeed recognise this by using the term "international crimes", as opposed to "crimes within the jurisdiction of the court" contained in arts 14, 15 or 53 (1). "International crimes" may thus refer to those crimes for which a duty to prosecute exists under other instruments in international law.

28 P. Kirsch, "La Cour pénale internationale face à la souveraineté des États", in: A. Cassese/ M. Delmas-Marty, *Crimes internationaux et juridictions internationales*, 2002, 31 et seq. (34); D. Sarooshi, "The Statute of the International Criminal Court", *ICLQ* 48 (1999), 387 et seq. (395); Duffy/ Huston, see note 6, 31.

The second interest, potentially rivalling with the concept of state sovereignty, is the *interest of the international community* in the effective prosecution of international crimes,[29] the endeavour to put an end to impunity, and the deterrence of the future commission of such crimes.[30] A primary concern of the Statute, and specifically the complementarity principle, is thus to strike an adequate balance between this interest and state sovereignty.

Apart from these two core concepts, other possible rationales are also to be taken into consideration. For instance, it may be argued that the Court 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 principle as defined by arts 17 to 19. Article 17 itself stipulates that, in determining whether a state is unwilling to prosecute, the Court shall have regard to the "principles of due process recognised by international law", begging the question whether the Court could theoretically step in and declare a case admissible if a state fervently and overzealously prosecutes war criminals with blatant disregard for the fair trial rights of the accused. If so, the principle of complementarity may thus enable the Court not only to intervene in cases of *inaction* of a state, but also in situations where such action leads to breaches of human rights of the accused. The idea of the Court as a protector of fair trial standards is not so far-fetched as it may seem at first glance: for instance, it has been remarked in relation to the notion of "ineffectiveness", a term that was later substituted by "inability" but that fulfilled essentially the same functions within the scheme of complementarity, that the concept was meant to comprise various situations, "including lack of action or absence of good faith in national procedures, *instances in which procedures did not guarantee full respect for the rights of the accused* or could not be considered sufficiently impartial."[31] The accused, it could be said must be protected from victor's justice, granting the Court the right to reconsider the case.[32] Further-

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29 J. Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, 2003, 68.

30 Preamble, paras 4 and 5.

31 M. Politi, "The Establishment of an International Criminal Court at the Crossroads: Issues and Prospects After the First Session of the Preparatory Committee", *Nouvelles études pénales* 13 (1999), 115 et seq. (143) (emphasis added).

32 Nsereko, see note 22, 116.

more, the original purpose behind the inclusion of the factors of lack of *independence and impartiality* in article 17 (2)(c) was to relate to procedural fairness and due process.[33] Were the principle of complementarity designed to cover such situations, this could possibly affect the interpretation of the entire provision.

However, the line of reasoning is questionable. The ICC was not created as a human rights court *stricto sensu*.[34] It was established to address situations where a miscarriage of justice and a breach of human rights standards works *in favour* of the accused and he or she profits from this irregularity by evading a just determination of his or her responsibility. These are the cases envisaged by article 17,[35] which attempts to capture and more closely define those scenarios. The same goes for the *ad hoc* Tribunals, where the inconsistency of national proceedings with standards of a fair trial exceptionally allows the Tribunals to exercise jurisdiction in a *ne bis in idem* situation only if the defendant benefited from such deviations.[36] Besides, international law provides other, more suitable remedies to address breaches of human rights of the accused in the context of other instruments and institutions.[37] Were the protection of human rights of the accused in national jurisdictions added to the mandate of the Court, this would indeed add a dimension entirely different from the initial idea for its establishment.[38]

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. The fact that not only a state, but also the accused or suspect may challenge the admissibility of a case under article 19 (2)(a) and its prominent place (before a challenge brought by states in sub-paras (b) and (c)) may support this conclusion. Whether or not an international legal instrument does indeed create rights of an individual is a

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33 Holmes, see note 15, 676.

34 Fife, see note 21, who also correctly points out that this does not mean that the work of the Court may not lead to an increased protection of human rights and that the Court is not obliged to respect human rights when operating itself (67).

35 Bourdon/ Duverger, see note 9, 98.

36 See arts 10 (2) ICTY Statute and 9 (2) ICTR Statute.

37 Bourdon/ Duverger, see note 9.

38 C. Van den Wyngaert/ T. Ongena, "*Ne bis in idem* Principle, Including the Issues of Amnesty", in: Cassese/ Gaeta/ Jones, see note 15, 705 et seq. (725) in relation to article 20 (3)(b).

difficult question to answer. The ICJ opined in the *LaGrand* case that article 36 (1)(c) of the Vienna Convention on Consular Relations granted a right to the individual,[39] mainly on grounds of the language of the provision in question, which clearly and unambiguously referred to the duty of the state detaining the person to inform the state of nationality as a *right* of the detainee itself. The Rome Statute does not contain such language. Article 19 (2)(a) should consequently rather be interpreted as vesting the accused or suspect with *standing* to raise an issue that relates to state sovereignty.[40] A right of the accused to be tried before a domestic court is thus not established. The Appeals Chamber of the ICTY, although admittedly operating in the context of primacy, rather than complementarity, reached a similar conclusion in the *Tadić Interlocutory Appeal on Jurisdiction*: the Chamber rejected the appellant's argument that he had an exclusive right to be tried by national courts under national laws. Given that the ICTY's statutory framework granted the same fair trial rights to the accused as national courts, the transfer of jurisdiction to an international tribunal did not infringe any rights of the accused.[41]

Finally, a more *practical aspect* may be a basis of the principle of complementarity: The realisation that the Court's scope for action will necessarily be limited for reasons of resource constraints.[42] The Rome Statute envisages a network of courts on the national and international level (possibly including hybrid tribunals, similar to those established in Sierra Leone, Kosovo or East Timor). In the fight against impunity, the ICC will only be able to serve as a court of last resort where justice cannot be achieved on a national level. Besides, the complementarity principle pays tribute to the realisation that national authorities are

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39 ICJ, *LaGrand* case (Germany v. United States of America), Judgment of 27 June 2001, *ILM* 40 (2001), 1069 et seq. (1088, para. 77). See K. Oellers-Frahm, "Die Entscheidung des IGH im Fall LaGrand – ein Markstein in der Rechtsprechung des IGH", in: T. Marauhn (ed.), *Die Rechtsstellung des Menschen im Völkerrecht*, 2003, 21 et seq.

40 In this context *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, reprinted in: *ILM* 35 (1996), 35 et seq. (50, para. 55), where the accused was held to have standing to challenge the jurisdiction of the *ad hoc* Tribunal on the grounds that it infringed state sovereignty.

41 Ibid. para. 62.

42 ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 14 February 2002, Diss Op. Van den Wyngaert, reprinted in: *ILM* 41 (2002), 536 et seq. (639, para. 65).

closer to evidence and that the crimes under the jurisdiction of the Court are normally best prosecuted in the state where they have been committed.[43] The principle is thus not just "a reluctant concession to *realpolitik* but a substantive and sound operating rule that recognizes that trials closer to the scene of events at issue have inherent practical as well as expressive value".[44]

In conclusion, it may be stated that the principle of complementarity 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.[45] At the same time, the principle of complementarity 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. The principle thus gives effect to, and indeed completes the idea of an effective decentralised prosecution of international crimes.[46]

## III. Article 17 Analysed: The Substance of the Principle

Article 17 sets out the substantive criteria for a determination of the admissibility of a case. Interestingly, it is not formulated in a positive manner ("a case is *in*admissible"). This, however, does not *per se* create

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43 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, see note 9, para. 31. The availability of evidence argument normally only applies to proceedings in the state of the commission of the crime(s) in questions.

44 J.E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences", *Tex. Int'l L. J.* 39 (2003-2004), 405 et seq. (437); similar: O. Triffterer, "Der lange Weg zu einer internationalen Strafgerichtsbarkeit", *Zeitschrift für die gesamte Strafrechtswissenschaft* 114 (2002), 321 et seq. (362).

45 Williams, see note 2, MN 20.

46 See R. Wolfrum, "The Decentralized Prosecution of International Offences Through National Courts", in: Y. Dinstein/ M. Tabory, *War Crimes in International Law*, 1996, 233 et seq.

a presumption, in the technical sense of the word,[47] in favour of inadmissibility.[48] A case is thus inadmissible where one of the four factors enumerated in the first paragraph of article 17 is given. At the same time, article 17 (1) establishes a mandatory but exhaustive list of inadmissibility criteria, i.e. where non of these exists, the case is admissible.[49] However, all cases and situations before the Court have to be carefully measured against the factors mentioned in article 17 so as not to circumvent the requirements established in article 17, which reflect the above mentioned compromise between state sovereignty and the effective administration of justice.

## 1. Article 17 (1)(a)

The first requirement provided by article 17 (1)(a) is that a state — both a State party or a non State party — either is investigating or prosecuting the case at hand, or has investigated it and refrained from prosecuting the person concerned. Mere inaction of a state in the face of crimes having been or being committed thus leads to the admissibility of situations and cases before the ICC.[50]

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47 Meaning that a presumption of inadmissibility would have to be rebutted by the Prosecutor. Such presumptions do to a certain extent exist within the different factors of article 17 (a) to (d). See under IV. 5.

48 It does, however, by its choice of words, create a presumption in favour of *action at the level of states*: A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", *EJIL* 10 (1999), 144 et seq. (158).

49 B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2003, 90; Meißner, see note 29, 70; Solera, see note 12, 165.

50 It should be mentioned, however that, where a state refrains from instituting investigative proceedings since it is clear that a (e.g. procedural) bar to such proceedings exists and initiation of such proceedings would consequently be futile under national law, this "inaction" is to be measured against article 17 (1)(b). In this case, it should be enough that the authority dealt with the matter at least in terms of *considering* whether to initiate proceedings. The bar to the proceedings should then be analysed under the terms of "unwillingness" and "inability". Broomhall (see note 49, 91) refers to this scenario as falling out of the scope of article 17 (1)(a) to (c) altogether and thus treats it as always admissible without any further qualifications.

The terms "investigation" and "prosecution" can be defined by recurring to national practice and the experience of the *ad hoc* Tribunals. The Statute itself, in its Part 5, understands investigation as a procedure to determine whether a crime within the jurisdiction of the Court has been or is being committed and that aims at bringing the alleged perpetrator to criminal justice. It is questionable whether "investigation" can be assigned a broader meaning than *criminal* investigations to include a "diligent, methodical effort to gather the evidence and ascertain the facts relating to the conduct in question, in order to make an objective determination in accordance with pertinent criteria",[51] so as to comprise alternative mechanisms such as truth and reconciliation commissions.[52]

The next element stipulated by article 17 (1)(a) is that the state that has investigated or is investigating or prosecuting the case has jurisdiction over the case at hand. A state's (or the accused's or suspect's) claim that a case would be inadmissible does not have to be considered if such jurisdiction is not established. Jurisdiction, in this context, is not limited to the permissibility to exercise jurisdiction under a principle of international law[53] but should also be taken to include the actual competence under the respective domestic legal system to adjudicate and enforce a judgement concerning a crime under the jurisdiction of the Court.[54]

The most problematic part of article 17 (1)(a), and indeed of the complementarity principle as such, is the third prong of the admissibility test, i.e. the exception to inadmissibility: even though a case is investigated or prosecuted by a state which has jurisdiction over it, it can nevertheless be admissible if the state is "unwilling or unable genuinely

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51 D. Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", *EJIL* 14 (2003), 481 et seq. (500).

52 Cf. Seibert-Fohr, see note 26; J.J. Llewellyn, "A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?", *Dalhousie Law Journal* 24 (2001), 192 et seq.; Robinson, see note 51.

53 Dahm/ Delbrück/ Wolfrum, see note 19, 1155.

54 Meißner, see note 29, 75; C. Hall, "Article 19", in: Triffterer, see note 2, MN 11.

to carry out the investigation or prosecution".[55] The notions of "unwilling" and "unable" are disjunctive.[56]

It may be argued that the credibility of the Court hinges on the interpretation and application of this part of the test. On the one hand, it has often been observed that it is difficult to imagine the Court sitting in judgement over a whole national criminal justice system — a task not easy to fulfil in general and even more awkward to shoulder as a fledgling international institution facing fierce opposition from some flanks. On the other hand, too narrow an interpretation of the terms is likely to provoke criticism from non-governmental organisations and other supporters of the Court that the Court is excessively deferent to states. Applying the terms may well mean walking a judicial tightrope.

Even though the apprehension of states and other actors sceptical of the Court's purportedly intrusive character should not be underestimated but taken seriously, it should at the same time be pointed out that, according to the wording of article 17, the Court will always assess the situation in a state merely in relation to a *specific case*, rather than make a general and all-embracing examination of the system as such.[57] Nevertheless, the terms "unwilling" and "unable" make clear that the Court will not simply notarise the exercise of jurisdiction by a state. They require a certain degree of scrutiny of the quality and standard of national proceedings.[58]

In interpreting the notions, one may seek guidance in the rule of exhaustion of local remedies.[59] As a *caveat*, however, it should be men-

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55 It is interesting to observe that this formulation has found its way into article 1 (3) of the Statute of the Special Court for Sierra Leone, reprinted in: R. Dixon/ K.A.A. Khan/ R. May (eds), *Archbold, International Criminal Courts, Practice, Procedure and Evidence*, 2003, 1182 et seq.

56 Holmes, see note 15, 675.

57 However, it is doubtful whether this will also be the case in relation to inability: to state a total collapse of a national judicial system comes close to "sitting in judgement of an entire national criminal justice system": cf. M. Bergsmo, "The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11-19)", *European Journal of Crime, Criminal Law and Criminal Justice* 6 (1998), 29 et seq. (43).

58 M. Politi, "The Rome Statute of the ICC: Rays of Light and Some Shadows", in: M. Politi/ G. Nesi (ed.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, 2001, 7 et seq. (15).

59 C. Stahn, "Zwischen Weltfrieden und materieller Gerechtigkeit: Die Gerichtsbarkeit des Internationalen Strafgerichtshofs (IntStGH)", *EuGRZ* 25 (1998), 577 et seq. (589). L. Caflisch, "Der Internationale Strafgerichtshof:

tioned that the limits to the principle of the exhaustion of local remedies (ineffectiveness or unavailability) cannot lightly be drawn upon in order to interpret the terms of unwillingness or inability in article 17, since the expressions "ineffectiveness" and "unavailability" were included in the ILC draft[60] but have not found their way into the Rome Statute for lack of clarity.[61]

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. No precedent in international law for the use of the term was quoted during the negotiations.[62] It is questionable whether it adds anything to the terms unwilling and unable. Commentators observe that it proved to be the least subjective concept considered during the negotiations;[63] among other

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Straftatbestände, Schutz der Menschenrechte, kollektive Sicherheit", *Liechtensteinische Juristen-Zeitung* 24 (2003), 73 et seq. (75). The rule of exhaustion of local remedies regulates the admissibility of proceedings before international courts, be it in relation to classical proceedings of diplomatic protection or international human rights remedies. In both areas, the base of the rule is that the state having allegedly committed a breach of international (human rights) law is the first place where the individual should seek a remedy for this breach (proximity argument) and gives the state in question the opportunity to examine and, if necessary, redress, the violation before an international body deals with the matter (safeguard of sovereignty aspect). At the same time, the principle finds its limits where the implementation of quick and efficient justice or the effective and peaceful settlement of disputes take precedence over state sovereignty. The rule is consequently a manifestation of the attempt to reconcile state sovereignty with these values. It should be added that the rule, in addition to relating to procedural law, may also have a substantive aspect, see: Report of the ILC, GAOR 56th Sess., Suppl. No. 10 (Doc. A/56/10), Chapter IV (State Responsibility), 304 et seq. (commentary on article 44).

60 Report of the ILC on the work of its 46th Sess. (2 May – 22 July 1994), GAOR 48th Sess., Suppl. No. 10 (Doc. A/49/10), 44, third preambular paragraph.

61 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, see note 9, para. 41; compare also Holmes, see note 15, 674; Williams, see note 2, MN 18; A. Bos, "The Role of an International Criminal Court in the Light of the Principle of Complementarity", in: E. Denters/ N. Schrijver (eds), *Reflections on International Law from the Low Countries*, 1998, 249 et seq. (257). See however article 17 (3), which mentions "unavailability" as one example of inability.

62 Holmes, see note 15, 674.

63 Ibid.

proposals that were considered to be excessively subjective were "effectively", "diligently", and "in good faith".[64] Textually, the term qualifies and possibly objectifies the act of investigating or prosecuting, rather than the ability or willingness to do so. It underlines that only those national criminal proceedings undertaken with the serious intent of eventually bringing the offender to justice shall bar the exercise of jurisdiction by the Court[65] and thus mainly serves to stress the need for effective prosecution already referred to in the Preamble.[66]

### a. Unwillingness

In order to give the Court criteria at hand to determine when a state is unwilling to genuinely carry out the investigation or prosecution, article 17 (2) sets out three specific situations of unwillingness. The provision reads:

> "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

The language of article 17 (2) unambiguously requires the Court to take into account the factors listed under paras (a) to (c). Another question is

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64 P. Benvenuti, "Complementarity of the International Criminal Court to National Criminal Jurisdictions", in: F. Lattanzi/ W. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, 1999, 21 et seq. (42).

65 A. Zimmermann, "The Creation of a Permanent International Criminal Court", *Max Planck UNYB* 2 (1998), 169 et seq. (220, note 184).

66 Para. 4.

whether the Court, in determining unwillingness, is limited to these criteria, or whether it may also refer to other, unnamed factors. The text itself does not inevitably point into one direction or the other. The lack of a clarifying addition, such as "*inter alia*" or "including but not limited to", as used in arts 90 (6) and 97, may be taken to indicate that it is a closed and exhaustive list.[67] The word "consider", however, has been interpreted as having been deliberately chosen in order not to tie the Court's hands in respect to the criteria but to allow it to take other factors into consideration.[68] In the light of the consideration that "unwillingness" is meant to be an exception to the general rule that a case is inadmissible if the state investigates or prosecutes, the factors specifying the term should be construed narrowly and the list deemed exhaustive.

The chapeau of article 17 (2) requires the court to have "regard to the principles of due process recognised by international law" in its assessment of the three factors circumscribing unwillingness. It has been observed that the phrase was introduced to ensure that the Court uses "objective" criteria in its consideration of national procedures[69]. First meant to apply only to the criteria in article 17 (2)(c) (independent or impartial), it was later included in the chapeau of article 17 (2), thus applying to all subparagraphs.[70] The meaning of the formula is unclear[71] and needs some further illumination.

It could be argued that the reference to due process rights implies that where a trial breaches due process rights of the accused a state is "unwilling" to genuinely carry out the investigation or prosecution. As already mentioned, some authors apparently contend that in case an accused has been convicted in proceedings that breached his or her due

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67 Holmes, see note 15, 675; Meißner, see note 29, 72.

68 Robinson, see note 51, 500.

69 J.T. Holmes, "The Principle of Complementarity", in: R.S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, 1999, 41 et seq. (53-54).

70 Holmes, see note 69, 54. The original order and context seems to have been "preserved" in article 20 (3)(c), where "due process" only applies to the terms "impartially" and "independently".

71 J. Gurulé, "United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?" *Cornell Int'l L. J.* 35 (2001-2002), 1 et seq. (16 (note 61) and 26). Gurulé even suggests deleting the passage from the Statute (29 *in fine*). In relation to article 20 (3) which uses similar words, see Van den Wyngaert/ Ongena, see note 38, 725.

process rights, the Court could theoretically step in,[72] since the phrase suggests an assessment of the quality of justice from the standpoint of procedural and perhaps even *substantive* fairness (to the accused).[73] However, such a conclusion is doubtful in the light of the above concerning the rationale of the complementarity principle. The Court is not and cannot be a forum to redress human rights breaches of an accused. The normal situation envisaged by article 17 (2)(c) would not prejudice the accused, but, on the contrary, would be to his or her benefit.[74]

Given that the Statute grants extensive rights of participation in the proceedings to victims of crimes under the jurisdiction of the Court, another possibility may be to interpret the phrase in the light of the victim's right to have a perpetrator punished under international law. Indeed, some commentators seem to read the reference to "due process" rights as referring to the rights of victims in relation to criminal proceedings.[75] The first question to be asked in this respect is whether a victim of an international crime indeed has an individual right under existing international law to see the perpetrator investigated and punished. In the *Velasquez Rodriguez* case, the Inter-American Court of Human Rights deduced from article 1 (1) of the Convention an obligation of states to "prevent, *investigate* and *punish* any violation of the rights recognised by the Convention".[76] It is however questionable whether this can be generalised from the regional to the international level.[77] For instance, within the framework of the International Cove-

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72 Gurulé, see note 71, 26; I. Tallgren, "Article 20", in: Triffterer, see note 2, MN 29; implicitly also: O. Triffterer, "Legal and Political Implications of Domestic Ratification and Implementation Processes", in: Kreß/ Lattanzi, see note 6, 1 et seq. (14 and 16).

73 W. Schabas, *An Introduction to the International Criminal Court*, 2001, 68.

74 Gurulé, see note 71, 26.

75 R.B. Philips, "The International Criminal Court *Statute*: Jurisdiction and Admissibility", *Criminal Law Forum* 10 (1999), 61 et seq. (79); Nsereko, see note 22, 116; Meißner, see note 29, 82.

76 Inter-American Court of Human Rights, *Velasquez Rodriguez* case, 29 July 1988, reprinted in: *ILM* 28 (1989), 291 et seq. (324, para. 166) (emphasis added).

77 As to the uncertainties generally pertaining to this question see: *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity*, Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, submitted

nant on Civil and Political Rights, states generally have the obligation to protect human life, the physical integrity and freedom of the person, but victims are usually not accorded the right that authors of offences against these values be criminally prosecuted by the state.[78] However, the European Court of Human Rights has held that "the notion of an effective remedy for the purposes of Article 13 [ECHR] entails, in addition to the payment of compensation where appropriate, a *thorough and effective investigation* capable of leading to the identification *and punishment* of those responsible and including effective access for the relatives to the investigatory procedure."[79] Analysed more closely, the Court, far from establishing an individual right to see the perpetrator punished, merely gives the victim the right to have the state conduct an investigation which is *capable* of leading to punishment. More importantly, this holding seems to be limited to the specific facts of the case, and the right only arises in cases of intentional and direct infringement of the right to personal integrity and life;[80] the decision itself is restricted to situations where the crime was committed by state agents.[81] The duty thus cannot be said to apply generally to all situations covered by the Rome Statute. Finally, the Rome Statute itself does not explicitly provide for such a right of victims.

This result is consistent with a textual interpretation of article 17 (2): "due process" rights are generally defined as rights of the accused, not

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pursuant to Commission on Human Rights Resolution 1998/43, by Mr. M. Cherif Bassiouni, Doc. E/CN.4/1999/65, 8 February 1999, especially paras 18 et seq.

78 C. Tomuschat, "Human Rights and National Truth Commissions", in: P.R. Baehr (ed.), *Innovation and Inspiration*, 1999, 151 et seq. (158); A. Seibert-Fohr, "The Fight against Impunity under the International Covenant on Civil and Political Rights", *Max Planck UNYB* 6 (2002), 301 et seq. (312 et seq.). Human Rights Committee, Communication No. 578/1994 (*L. de Groot v. The Netherlands*), 14 July 1995, Doc. CCPR/C/54/D/578/1994. See, however, the revised final report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119, Doc. E/CN.4/Sub.2/1997/20/Rev.1, para. 26.

79 European Court of Human Rights, *Kaya v. Turkey*, 19 February 1998, para. 107; also: *D.P.&J.C. v. The United Kingdom*, Judgment, 10 October 2002, para. 107 (emphasis added).

80 C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, 2003, 331.

81 In relation to a possible extension to human rights infringements by private actors pursuant to article 13 ECHR cf. Dröge, see above, 59.

of the victims.[82] Under the United States Constitution, for example, the Fifth Amendment (Due Process Clause) guarantees that no person shall "be deprived of life, liberty, or property, without due process of law".[83] Also on the international plane, it is a right of the defendant in criminal proceedings.[84]

Considering the above, the objective of the phrase "having regard to the principles of due process recognised by international law" cannot be to protect the individual (victims or accused) in that a state may be deemed unwilling where it breaches their rights, but may be interpreted to give the Court some criteria at hand in order to interpret the terms used by article 17 (2). Thus, in order to establish what amounts to an "unjustified delay" in article 17 (2)(b), the Court may look at jurisprudence defining such delay under the relevant human rights instruments. In addition, one may look at how courts, under different instruments, have interpreted the duty of a state with respect to the administration of its criminal justice system. However, one has to take into account that the background of these provisions is the protection of the individual exposed to criminal prosecution and thus diverges substantially from the issue determined by article 17.

On that premise, the factors enumerated in paras (a) to (c) can be more closely considered.

*aa. Article 17 (2)(a)*

Article 17 (2)(a) requires proof of a *purpose of shielding*, which is a considerably high threshold and raises the question of how such intent is to

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82 Gurulé, see note 71, 26. See also: S. Rosenne, "The Jurisdiction of the International Criminal Court", *Yearbook of International Humanitarian Law* 2 (1999), 119 et seq. (131).

83 U.S. Constitution, Amendment V.

84 Cf. DeFrancia, "Due Process in International Criminal Courts: Why Procedure Matters", *Va. L. R.* 87 (2001), 1381 et seq. The same goes for the French version "procès équitable": A. La Rosa, "Réflexions sur l'apport du Tribunal pénal international pour l'ex-Yougoslavie au droit à un procès équitable", *RGDIP* 101 (1997), 945 et seq. In relation to fair trial before the ICTY see also: C. Hoß, "Das Recht auf ein faires Verfahren und der Internationale Strafgerichtshof für das ehemalige Jugoslawien: Zwischen Sein und Werden", *ZaöRV* 62 (2002), 809 et seq.

be proved before the Court.[85] By contrast, paras (b) and (c) have more objective criteria as bases, i.e. an unjustified delay or proceedings which are not conducted independently or impartially, and require that these, "in the circumstances" be "inconsistent with an intent to bring the person concerned to justice". In other words, for the latter two provisions, it is not necessary to positively prove that no such intent existed (or, *a fortiori*, that there was an intent to shield the perpetrator from justice), but mere "inconsistency" with a *bona fide* investigation and prosecution.[86]

To establish a purpose of shielding, it is not sufficient to find that a state only initiated proceedings in order to prevent the Court from acting, since this is clearly permissible under and envisaged by the complementarity regime.[87] Besides, the Statute clearly encourages and relies on national action. If the state has the intent to establish the relevant facts, to evaluate these facts according to the pertinent laws and, in case of conviction, to impose an adequate sentence, this precludes an intent to shield a person, even if, at the same time, the state wishes to prevent the Court from stepping in.[88]

*bb. Article 17 (2)(b)*

To establish an "unjustified delay" in the proceedings, the test must be stricter than one of mere "undue delay" since this expression was considered too low a threshold at the Rome Conference.[89] It is uncertain how such delay should be determined. One core rationale of the complementarity principle being to protect sovereignty, it could be argued that a delay should be assessed by reference to the usual procedures and time-frames within each individual state.[90] For reasons of consistency, it

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85 B. Broomhall, "The International Criminal Court: A Checklist for National Implementation", *Nouvelles études pénales* 13 (1999), 113 et seq. (145), suggests that the Court take into account "all the circumstances, including the factors taken into account in making a decision not to prosecute, and the manner in which an investigation or prosecution was being undertaken".

86 Cf. Broomhall, see above.

87 L.N. Sadat/ S.R. Carden, "The New International Criminal Court: An Uneasy Revolution", *Geo. L. J.* 88 (2000), 381 et seq. (418).

88 Meißner, see note 29, 83.

89 Williams, see note 2, MN 17.

90 Holmes, see note 15, 676; Zimmermann, see note 65, 222.

may however be preferable that a common threshold for all states be accepted, e.g. an average of what is usual in all domestic systems, or the relevant rules regarding the length of criminal procedures in international law.[91] If the reference to "due process" rights can be interpreted in the way proposed above, this would speak in favour of the latter interpretation, as well as Rule 51 of the Rules of Procedure and Evidence of the Court, even though it admittedly only explicitly refers to impartiality and independence.[92] It would then still be possible and in fact necessary to take into consideration the peculiarities of the specific case,[93] but measured against an international standard. A differentiating view would only compare the delay to other international standards where the national system deviates *substantially* from these standards.[94] In all circumstances, the unjustified delay is only an *indication* of the lacking willingness of the state, which still has to be positively established and of which the judges have to be convinced.[95]

A delay in the proceedings may in particular be justified with rules mandated by human rights instruments. Whenever a delay is caused by the adherence to human rights standards, this cannot be held against the state conducting these proceedings.[96] This may be another example of the significance of the "due process" phrase in article 17 (2). On the other hand, a delay is unjustified where no specific circumstances are

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91 This, however, again raises the question of comparability of the rationale of these rules which is different from the specific situation in which article 17 operates; see the discussion on the "due process" phrase under III. 1.a.

92 Similar: Holmes, see note 15, 677. Rule 51 reads: "*Information provided under article 17*: In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted."

93 Just as with the undue delay exception to the exhaustion of local remedies rule: C.F. Amerasinghe, *Local Remedies in International Law*, 1990, 205. Such peculiarities may be, *inter alia*, the complexity of the facts or the availability of evidence.

94 Meißner, see note 29, 84.

95 Ibid., 85.

96 The author owes this thought to Ms. Tatjana Maikowski.

given which would explain the delay, such as a particularly complex investigation.

*cc. Article 17 (2)(c)*

Article 17 builds on the language of arts 10 (2) of the ICTY and 9 (2) of the ICTR Statutes. However, in the case of the ICC, the terms are not only used in the context of *ne bis in idem*,[97] determining the question when an accused may be tried by the ICC where he had previously been tried by a national court, but also in relation to admissibility. In the light of what has been said about the rationale of complementarity above, and considering the interpretation given to the "due process" phase in the chapeau of article 17 (2), a lack of impartiality and independence of the proceedings can only lead to the admissibility of a case where these worked in favour of the accused. This interpretation is supported by the ILC commentary to the draft statute for an international criminal court.[98]

Keeping this in mind, to define the terms of independence and impartiality, one may look to the jurisprudence of human rights courts. 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 independence.[99] 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 this

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97 Article 20 (3).

98 Report of the ILC on the work of its 46th Sess. (2 May – 22 July 1994), GAOR 48th Sess., Suppl. No. 10 (Doc. A/49/10), 119. The Commission comments on draft article 42 (2)(b) which includes impartial or independent proceedings, as follows: "[P]aragraph 2(b) reflects the view that the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a 'sham' proceeding, possibly even designed to shield the person from being tried by the Court." It thus seems that proceedings not impartial or independent are the generic term for "shielding", which would be a specifically severe form of partial proceedings.

99 European Court of Human Rights, *Morris v. United Kingdom*, App. no. 38784/97, Judgment of 26 February 2002, para. 58; see N. Jayawickrama, *The Judicial Application of Human Rights Law*, 2002, 514.

respect.[100] Regard may also be had to various principles established or endorsed by the UN General Assembly, such as the UN Basic Principles on the Independence of the Judiciary.[101]

Considered closely, article 17 (2)(c) establishes two cumulative criteria,[102] i.e. (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.

### b. Inability (Article 17 (3))

The notion of inability was inserted to cover situations where a state lacks a central government due to a breakdown of state institutions[103] (i.e. the situation of a *failed state*[104]), or suffers from chaos due to civil war or natural disasters, or any other event leading to public disorder.[105] The Statute identifies three scenarios for inability (i) a state is unable to obtain the accused; (ii) a state is unable to obtain the necessary evidence and testimony for putting the persons allegedly responsible on trial or; (iii) the state is "otherwise unable to carry out its proceedings". Criterion (iii) is the subordinate concept of the other two, and at the same time serves as a generic term capturing all other possible situations. 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.

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100 *Morris v. United Kingdom*, see above; European Court of Human Rights, *Findlay v. United Kingdom*, App. no. 22107/93, Judgment of 25 February 1997, para. 76; also compare European Court of Human Rights, *Castillo Algar v. Spain*, App. no. 79/1997/863/1074, Judgment of 28 October 1998, paras 43 et seq.

101 <http://www.unhchr.ch/html/menu3/b/h_comp50.htm>.

102 I. Tallgren, see note 72, MN 28; Broomhall, see note 85, 145; Meißner, see note 29, 86.

103 M.M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", Mich. J. Int'l L. 23 (2002), 869 et seq. (903); Benvenuti, see note 64, 44.

104 Zimmermann, see note 65, 220.

105 M.H. Arsanjani, "Jurisdiction and Trigger Mechanism of the ICC", in: von Hebel/ Lammers/ Schukking, see note 11, 57 et seq. (70).

A total collapse 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.[106] A substantial collapse, which is different from and probably more stringent than a mere "partial" collapse,[107] is given only where the state authorities, even though not completely dysfunctional, are not generally capable of ensuring the investigation of the case and the prosecution of the responsible individuals, e.g. by "shifting resources or transferring the trial to other venues"[108] than the one affected by a breakdown.

*Unavailability* of the national legal system is a separate requirement from a substantial collapse. Taking up the Preamble of the ILC draft,[109] the term is originally borrowed from an exception to the rule of exhaustion of local remedies in international law and can in principle be interpreted with regard to the jurisprudence developed in relation to this rule.[110] However, it is crucial to see that the exception was established for an *individual* seeking relief for a wrong done by a state, while in the present context, the question is whether a *state* has the means and resources to administer justice against one or more individuals. The value of the comparison may thus be limited. However, 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,[111] such as sheer capacity overload.

It has been pointed out that a state might be declared "unable" if, under its domestic law, crimes are or can potentially be punished only as "*ordinary crimes*".[112] In the terms of article 17 (3), such a situation

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106 Meißner, see note 29, 86.

107 Since "partial" was rejected as a standard at the Rome Conference, cf. Holmes, see note 15, 677.

108 Ibid.

109 Third preambular paragraph: "where such trial procedures may not be *available* or ineffective" (emphasis added).

110 CF. N.J. Udombana, "So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights", *AJIL* 97 (2003), 1 et seq. (22).

111 Meißner, see note 29, 87.

112 As to a definition of the category of "ordinary crimes", see ILC Report, see note 98, 118: "The Commission understands that the term 'ordinary

may be said to constitute a case where the state is "otherwise unable to carry out its proceedings" due to an "unavailability" of its national judicial system for legal reasons.[113] The *Tadić* Interlocutory Appeal on Jurisdiction Decision indeed suggests that a paramount concern for the creation of international tribunals is to prevent such "trivialisation" of crimes, presumably to avoid revisionism.[114] The exceptions to the rule of *ne bis in idem* in articles 10 (2) of the ICTY and 9 (2) of the ICTR Statutes also strive for this proposition.[115] Article 17 (2) itself is not clear, yet commentators have reasoned that the system of complementarity at least presupposes that states must have adequate legislation (both in terms of substantive and procedural law) enabling them to genuinely prosecute war criminals according to "proper" categories of crimes.[116] Having said that, others have argued that such interpretation

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crimes' refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in article 20 of the Statute [crimes within the jurisdiction of the Court]".

113 L. Condorelli, "La Cour pénale internationale: Un pas de géant (pourvu qu'il soit accompli...)", *RGDIP* 103 (1999), 7 et seq. (21); Meißner, see note 29, 83.

114 *Prosecutor v. Tadić*, see note 40, 51, para. 58.

115 See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 of 22 February 1993, Doc. S/25704, 3 May 1993, reprinted in: V. Morris/ M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2, 1995, 3 et seq. (15, para. 66).

116 Benvenuti, see note 64, 45; Condorelli, see note 113, 19; J. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", *Journal of International Criminal Justice* 1 (2003), 86 et seq. (89). Kleffner contends that the Statute, together with subsequent state practice, imposes a duty on states to implement the substantive law of the Statute into their domestic system.
Different in that he only sees a political pressure, as opposed to a legal duty, on states to that effect: H. Satzger, "Das neue Völkerstrafgesetzbuch – Eine kritische Würdigung", *Neue Zeitschrift für Strafrecht* 22 (2002), 125 et. seq. (127); Zimmermann, see note 26, 98, who sees an "Obliegenheit" (non-enforceable legal duty) to incorporate the crimes under article 5 into domestic law; Broomhall, see note 85, 148: no express obligation and id., see note 49, 86: only an "indirect effect on State practice"; W. Schabas, "Follow up to Rome: Preparing for the Entry Into Force of the International Criminal Court Statute", *HRLJ* 20 (1999), 157 et seq. (160).

would undermine the respect for national sovereignty as formulated by the complementarity principle.[117]

The problem cannot be solved in isolation from article 17 (1)(c) read in connection with 20 (3). As opposed to the Statutes of the *ad hoc* Tribunals, the double jeopardy provision of the ICC Statute does not make explicit reference to "ordinary crimes", but rather refers to "conduct also proscribed under article 6, 7 and 8". Even though one might argue that the abandonment of the language used in the respective Statutes of the *ad hoc* Tribunals does not necessarily mean that the underlying idea as such was also rejected in its entirety,[118] it is clear that the different wording must influence the interpretation of the norm. Article 20 (3) is much broader in ambit and also accommodates prosecutions of behaviour falling into the categories of article 5 for crimes where the charges are not classified as "genocide", "war crimes" or "crimes against humanity".[119] Taking this into account, it may be argued that a more flexible approach is called for than merely stating that the prosecution of such acts as "ordinary crimes" automatically and without further requirements entails an exception to the rule of double jeopardy. Where the charge chosen by national authorities does not reflect and adequately capture the severity of the perpetrator's conduct,[120] or where the national legal system provides for excessively broad defences or statutes of limitation, this may be seen as conflicting with an intent to bring the perpetrator to justice or even to shield him or her from criminal responsibility and thus falls under one of the exceptions of article 20 (3)(a) and (b).[121]

It is now decisive whether the same should go, for reasons of consistency, for article 17 (3),[122] given that article 20 (3) in its formulations

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117 M.A. Newton, see note 5, 70.

118 Van den Wyngaert/ Ongena, see note 38, 726.

119 Cf. Holmes, see note 69, 59, who refers to the negotiations within the Preparatory Committee, where the majority of states did not agree with the necessity to try crimes as international crimes. Tallgren, see note 72, MN 22 remarks that the notion "ordinary crimes" was rejected because it was not known to many legal systems; Newton, see note 5, 71; Meißner, see note 29, 83.

120 Tallgren, see note 72, MN 27 gives the example of an atrocity amounting to genocide being charges as an assault.

121 Similar, Meißner, see note 29, 83.

122 It should be noted that article 20 (3) does not envisage an "inability" option as elaborated in article 17 (3). However, the general considerations are similar.

is closely related and has been drafted with regard to article 17.[123] It could be argued that it would be a contradiction if one took a different approach to situations where the alleged perpetrator is or has been under investigation, or is being prosecuted, on the one hand (article 17) and the scenario where he or she has already been tried (article 20). However, such difference may be explained by the greater respect accorded to the sovereignty of the state where a judicial procedure before a court has already been concluded.[124] From a factual point of view, it may be also said that several states have incorporated or are incorporating the substantive rules of the Rome Statute with a view to forestalling being declared unwilling by the Court, which may be taken to point to a conviction of these states that punishing crimes under the Statute as "ordinary crimes" is insufficient with regard to article 17. Nevertheless it has rightly been pointed out that the prosecution or conviction of a perpetrator on the charge of an "ordinary crime", such as murder or rape, does not necessarily benefit and privilege him or her.[125] Furthermore, to impose such a duty may be tantamount to establishing an obligation of states to prosecute the crimes under the Statute, which the Statute does not establish.[126]

Cases where a state is declared unable because its national legislation differs from the substantive provisions of the Rome Statute should therefore be limited to situations where it either does not penalise a conduct proscribed under the Statute at all,[127] or where the legislative path chosen by the state does not enable courts to impose an adequate sentence and would lead to a gross understatement of the actual gravity of the offence that falls significantly short of the characterisation that act received in the Statute. The first case would possibly even amount to mere inaction of the state, which would make the case admissible without having to have recourse to the notions of unwillingness or inability.[128]

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123 Tallgren, see note 72, MN 29.

124 Meißner, see note 29, 89.

125 Zimmermann, see note 65, 221; Meißner, see note 29, 83; Tallgren, see note 72, MN 22.

126 See under II. 2.

127 See the example given by J.D. van der Vyver, "Personal and Territorial Jurisdiction of the International Criminal Court", *Emory International Law Review* 14 (2000), 1 et seq. (95-96).

128 See under III. 1.

## 2. Article 17 (1)(b)

Article 17 (1)(a) and (b) differ in that para. (a) envisages a situation where the state is still in the process of investigating or prosecuting, whereas para. (b) regulates the case in which the state has concluded an investigation, but has decided not to pursue the case to the stage of criminal prosecution, whether for reasons of procedural or substantive law.[129]

Article 17 (1)(b) raises the same questions as to a state having jurisdiction and being unwilling or unable as article 17 (1)(a); the analysis pertaining to that provision may therefore be referred to.

## 3. Complementarity and *ne bis in idem* (Article 17 (1)(c))

Article 17 (1)(c) captures the situation where a person has already been tried by another domestic *court*. It refers to article 20 (2). From the wording of the provision, it is clear that the court proceedings have to be completed.[130] However, the omission of the words "for which the person has (...) been convicted or acquitted" which are included in article 20 (1) and (2) suggests *a contrario* that a final judgement on the merits is not necessary for para. (3). Instead, any termination of the proceedings, e.g. on procedural grounds, would suffice as long as the proceedings have been conducted *bona fide* before and by the national courts.[131] It thus seems that the Statute has taken a different path to the ICTY: in the *Tadić* case,[132] an ICTY Trial Chamber, interpreting article 10 (2) of the ICTY Statute, which also does not contain the relevant phrase, stated that "there can be no violation of *non-bis-in-idem*, under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been the subject of a *judgment on the merits* on any of the charges for which he has been indicted, he has not yet been tried for those charges".[133] This may be yet another illustration for the complementary nature of the ICC, in that the Statute

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129 Meißner, see note 29, 77.

130 Meißner, see note 29, 78.

131 Tallgren, see note 72, MN 26.

132 ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion on the Principle of Non-Bis-in-Idem, Case IT-94-1-T, 14 November 1995, reprinted in: Klip/ Sluiter, see note 22, 143 et seq.

133 Ibid., para. 24 (emphasis added).

appreciates state sovereignty by posing a greater trust in national systems.

The point in time decisive to distinguish between article 17 (1)(b) and (c) is the transition of responsibility for the case and the competence to decide on its progress on the judge.[134] Article 20 (3) does not provide for the situation of inability.[135]

## 4. Gravity of the Offence (Article 17 (1)(d))

Article 17 (1)(d) is distinct from the other criteria in article 17 (1), as it applies to *all* cases which are brought before the Court, not just those with respect to which national authorities have already taken action;[136] it is not a subsidiary criterion but stands on an equal footing with the other factors enumerated in article 17 (1). The concern leading to the rule was that the Court may be flooded with cases;[137] it thus serves purposes of practicability, but is also an expression of the will of states to tackle impunity for the "*most serious* crimes of concern to the international community as a whole".[138]

The meaning of "sufficient gravity" is not defined by the Statute and will have to be developed by the Court over time;[139] in its application of the term, the Court will enjoy a considerable margin of appreciation.[140] As relevant factors for sufficient gravity, the Court may take into account the degree and magnitude of the wrongdoing, including the extent to which they were planned or part of a general policy,[141] and the detrimental effect the crimes (potentially) had or still have on the social

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134 Meißner, see note 29, 77.

135 This may be due to the fact that the negotiators had in mind that in case of inability there would be no judgment of a national court at all.

136 Broomhall, see note 85, 144.

137 Benvenuti, see note 64, 43.

138 Preambular para. 4 (emphasis added).

139 L. Sadat Wexler, "A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court", in: M.C. Bassiouni, *International Criminal Law*, Vol. 3, 2nd edition, 1999, 655 et seq. (677).

140 Bourdon/ Duverger, see note 9, 96.

141 Sadat Wexler, see note 139, with reference to the chapeau of article 8.

and cultural fabric of the region or state where they (allegedly) occurred.[142]

The policy paper issued by the Office of the Prosecutor,[143] taking up suggestions in literature,[144] envisages that the gravity requirement is not exclusively interpreted as relating to the acts that constituted the "crime base" but also to the degree of participation in their commission. This is not necessarily synonymous with a limitation to "high-level perpetrators" from the higher echelons of the state, but can also connote a substantial role in the commission of the crime. It is however debatable whether this additional restriction should be read into article 17 (1)(d), with the consequence that the possibility of the Court to exercise jurisdiction would strictly be limited to these categories, or whether the place better suited for such considerations is the decision of the Prosecutor to abstain from an investigation or prosecution under article 53 (1)(c) and (2)(c).

It is interesting to analyse the relationship of this provision with article 5 (1), pursuant to which the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. This is often interpreted to confine the jurisdiction of the Court to such acts which would fall under article 5 (1)(a) to (c), but additionally are of an especially high gravity and severity.[145] If this were so, the question of inadmissibility under article 17 (1)(d) would never arise, at least not within the procedural framework of the Court,[146] rendering the provision essentially redundant. It is submitted that the reference in article 5 to "the most serious crimes" is merely a general characterisation of the crimes that are set out in this norm, thus clarifying that genocide, crimes against humanity, war crimes and aggression are, *per se,* and without having regard to any specific occurrence of such crimes, the most serious crimes of concern to the international community as a whole. The chapeau of article 5 (1) does not restrict the Court's jurisdiction more than paras (a) to (d) of article 5 (1) read in connection with arts 6 to 8. With this interpretation, article 17 (1)(d) retains its relevance by giving the Court the possibility to distinguish between different levels of crimes within its jurisdiction.

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142 Meißner, see note 29, 79.

143 <www.icc-cpi.int/otp/policy.php>.

144 Sadat Wexler, see note 139.

145 Newton, see note 5, 39; similar: A. Zimmermann, "Article 5", in: Triffterer, see note 2, MN 9.

146 Cf. Rule 58 (4).

## IV. The Procedural Framework

The procedural framework[147] 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. The sovereignty-protecting aspect of the principle is "strengthened" by the possibility of challenging the admissibility of a case at a very early stage in the proceedings, which is counterbalanced by the one-month preclusion period provided for in article 18 (2) and the limitation for bringing such challenges in article 18 (7).[148] The exact development of the procedure to be followed with regard to a challenge to the admissibility of a case has been described in detail elsewhere.[149] Some important issues should, however, be highlighted.

### 1. The Court as Arbiter over the Complementarity Regime

The procedural regime governing complementarity is clearly based on the assumption that it is the Court as a judicial body[150] itself that determines conclusively whether or not a case is admissible, including all necessary criteria for such determination.[151] However, as opposed to its jurisdiction, it is not *per se* obliged to consider the matter on its own initiative, but *may* raise the issue *proprio motu* (article 19 (1)) if it wishes to.[152]

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147 Arts 18, 19 and Rules 51 to 62 of the Rules of Procedure and Evidence.

148 Compare Holmes, see note 15, 681-682.

149 Bergsmo, see note 57; Holmes, see note 15; C. Kreß, "Römisches Statut des Internationalen Strafgerichtshofs – Vorbemerkungen", in: H. Grützner/ P.G. Pötz (eds), *Internationaler Rechtshilfeverkehr in Strafsachen*, 2nd edition, 2002, Vor III 26, MN 22 et seq.; Meißner, see note 29, 89 et. seq.

150 I.e. the Chambers of the Court.

151 Cf. Dahm/ Delbrück/ Wolfrum, see note 19, 1155; G.S. Goodwin-Gill, "Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute", in: Goodwin-Gill/ S. Talmon, *The Reality of International Law, Essays in Honour of Ian Brownlie*, 1999, 199 et seq. (221); Kreß, see note 149, MN 23; Fife, see note 21, 68; Meißner, see note 29, 69.

152 Cf. Broomhall, see note 49, 88.

## 2. Duty of the Prosecutor to Inform States under Article 18

Under article 18 (1), the Prosecutor has an obligation to notify states when a State party has referred a situation to the Court or where he or she initiates an investigation *proprio motu*.[153] Under the clear wording of the provision, this duty exists also *vis-à-vis* non-States parties.[154] The norm thus provides for a right for third states, i.e. states that are not party to the treaty.[155]

The duty to notify only extends to such states as, "taking into account the information available, would normally exercise jurisdiction over the crimes concerned". It thus begs the question which states are included by that phrase. A possible interpretation may be that it indeed includes all states that have incorporated universal jurisdiction regarding the crimes under article 5 of the Statute in their domestic jurisdiction.[156] 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.[157] Thus, "normally" could and should be interpreted to refer to actual state practice. One may further argue that the term "normally" limits the number of states to be notified to those

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153 It is not applicable for Security Council referrals under article 13 (b). The duty to inform arises as soon as the Prosecutor has concluded that there is a reasonable basis to proceed with an investigation under article 53 (1), or, in the case of an initiation *proprio motu*, when the Pre-Trial Chamber has authorised such commencement under article 15 (4), see S. Fernández de Gurmendi/ H. Friman, "The Rules of Procedure and Evidence of the International Criminal Court", *Yearbook of International Humanitarian Law* 3 (2000), 289 et seq. (295).

154 Cassese, see note 48, 159; El Zeidy, see note 103, 907; E. David, "La Cour pénale internationale: une Cour en liberté surveillé?", *International Law Forum du droit international* 1 (1999), 20 et seq. (26); S. Rosenne, "The Jurisdiction of the International Criminal Court", *Yearbook of International Humanitarian Law* 2 (1999), 119 et seq. (131).

155 The question is governed by article 36 (1) and (2) Vienna Convention on the Law of Treaties which makes the coming into existence of a right dependent on the express or presumed assent of the third state in question.

156 Stahn, see note 59, 589.

157 Schabas, see note 116, 160. A particularly topical case is Belgium: see <www.hrw.org/press/2003/08/belgium080103.htm>. See also National Prosecution of International Crimes from a Comparative Perspective, Project of the Max Planck Institute for Foreign and International Criminal Law, Freiburg, <www.iuscrim.mpg.de/forsch/straf/projekte/nationalstrafverfolgung2_e.html>.

which, apart from having jurisdiction over the case, have some type of additional link to the crime in question,[158] and that link is known to the Prosecutor ("according to the information available").[159] In the interest of expediency and effectiveness of international criminal proceedings and of preventing abuse, it is desirable to keep the number of states to be informed limited to a reasonable number.[160] Moreover, in the absence of an obligation of states to inform the Office of the Prosecutor of their domestic jurisdictional regime, it is hardly conceivable that the Office be obliged to ascertain which states have established universal jurisdiction within their domestic legal system before launching an investigation. Such a link exists where the state in question would be entitled to exercise jurisdiction under traditional international law criteria, i.e. as the state of nationality of the alleged offender; where the crime occurred on the territory of the said state; and where nationals of that state are amongst the victims of the crime. A link can also be made where the suspect or accused resides or is present in the territory of that state.[161] It may also apply where states have informed the Court that they have established and are exercising universal jurisdiction with regard to crimes within the jurisdiction of the Court, even where no such specific connection exists.

An even more restrictive interpretation of the norm has been advocated, concluding that the complementarity principle *as such*, i.e. not only the duty to inform under article 18, merely applies to states which

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158 Kreß, see note 149, MN 25; implicitly: G. Palmisano, "The ICC and Third States", in: Lattanzi/ Schabas, see note 64, 391 et seq. (399, note 18).

159 One may also ask what "available" information means, i.e. whether it only refers to information that is already in the possession of the Prosecutor or whether he or she has to make further inquiries. In order to give effect to the protection of state sovereignty accorded by article 18, the Prosecutor must make a reasonable effort to determine whether such links exist. This should be less onerous than to require the Prosecutor to establish whether a state has provided for universal jurisdiction under its national legal system.

160 Bos, see note 61, 258.

161 This differs from the other criteria in that it is not *per se* a requirement for jurisdiction under international law; however, it has been used in national law to regulate the exercise of universal jurisdiction. For Germany, see C. Hoß/ R. Miller, "German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence", *GYIL* 44 (2001), 576 et seq. (596 et seq.).

have such a link.[162] Only these states, it is argued, may reasonably be presumed to be in a position to successfully collect evidence of the alleged crimes and enforce a judgement.[163] Furthermore, it is maintained that the central goal of the Statute, i.e. the effective repression of crimes under the jurisdiction of the Court, could be frustrated if every state were able to invoke the complementarity principle regardless of the strength of the link or the probability of obtaining the accused and recovering the evidence. However, one should differentiate between the applicability of the principle as such on the one hand, and the duty of the Prosecutor to inform as well as the right of states to bring challenges on the other hand, which is just a corollary designed to give the states concerned an opportunity of raising objections at as early a stage as possible. As observed, this right is coupled with a preclusion period of one month, after the lapse of which no such challenges may be brought, which fosters legal certainty in that area and prevents a waste of resources. Moreover, article 19 (2)(b) does not in any way restrict the number of states entitled to bring challenges to the admissibility of a case, a right not dependent on previous notification.

If once accepts the reasoning offered above, one has to consequently pose the question of the legal consequences of non-notification. Such non-notification may happen (a) following the interpretation given as to the scope of this duty above, because the state in question did not have a specific link to the crime in question, or (b) because of a breach of the Prosecutor's duty to notify such states which can point to a link. Article 18 (2) does not provide for any legal consequences of this situation. The problem arising is whether the time limit of one month for information that the state is investigating or has investigated the situation still applies. General principles in national systems suggest that the time limit is at least not applicable where the failure to notify constituted a breach of the Prosecutor's obligations.

## 3. Request by States to Defer Investigation

Article 18 (2) provides that, within one month of receipt of a notification under article 18 (2), states, again including non-States parties, may inform the Court that they have investigated or are investigating the

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162 Benvenuti, see note 64, 48.

163 F. Lattanzi, "Compétence de la Cour pénale internationale et consentement des Etats", *RGDIP* 103 (1999) 425 et seq. (430-431).

crime. "Within its jurisdiction" must be construed to mean that the state *actually* has jurisdiction under its domestic legal system lest article 18 be used to delay proceedings. This is in line with the interpretation of article 17 (1)(a) and (b) and the requirement laid down in article 19 (2)(b). The Prosecutor has to comply with the request ("shall") inasmuch as he or she needs to challenge it by seeking an authorisation to proceed with the Pre-Trial Chamber (article 18 (2) *in fine*). This also applies in situations where the state has only initiated investigations after having been notified by the Prosecutor. 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. Rule 53 merely provides that a state[164] shall make the request for deferral in writing and provide information concerning its investigation. The Prosecutor may then request additional material. However, this rule seems to be intended solely to put the Prosecutor in a position to consider seeking an authorisation under article 18 (2) *in fine*, rather than giving the Prosecutor the right to evaluate the material submitted by the state and to reject a request for deferral. According to the clear wording, the Prosecutor *has* to comply with the request; questions of evidence and the burden of proof do not arise until proceedings before the Pre-Trial Chamber under article 18 (2) and Rules 54 and 55 have been initiated by the Prosecutor.

## 4. Complementarity and the Security Council

The issue of admissibility has to be considered also in connection with the triggering mechanisms of the Court. Article 17 establishes substantive criteria for admissibility without clarifying its relationship with the different triggering options provided in article 13. The relationship between the Security Council referring a situation to the Court and the application of the complementarity regime is particularly unclear. While article 18 does not apply to Security Council referrals, article 19 clearly does.[165] Still, it has been argued that the complementarity regime as

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[164] Rule 53, from its text, applies both to States parties and non-States parties.

[165] Holmes, see note 15, 683; Bourdon/ Duverger, see note 9, 106.

such does not apply to such a referral.[166] A majority of scholars, however, contends that it does.[167]

It is imaginable that the Security Council, in a resolution referring a situation to the Court, may declare a situation admissible, e.g. by declaring a state unable or unwilling to investigate or prosecute, raising the question whether the Court would be bound by such a decision of the Council. Reference to the ICC being intended as an independent and impartial international organisation with the power to determine its own competence[168] is not sufficient as such: the independence of the Court and its judges only exists within the ambit of the legal framework established by the Statute and does not *per se* preclude the influence of other organs on questions of jurisdiction and admissibility.[169] However, the Statute presupposes that the Court will apply the complementarity principle to Security Council referrals, in particular since article 53 (1)(b) requires the Prosecutor to have regard to the admissibility of the case when deciding whether to initiate an investigation also if the case has been referred to the Court by the Security Council.[170] The fact that article 18 does not refer to the Security Council can be explained by the reason that a resolution would be public and consequently states would be informed without the Prosecutor having to act.

However, the problem cannot be considered by an exclusive reference to the Statute; the obligation of states and the Court with regard to the UN Charter must also be taken into consideration. While some argue that the Court would not be bound by a determination of admissibility by the Security Council since Arts 24, 25 and 103 of the Charter of the United Nations only address UN Member States, not interna-

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166 Dixon/ Khan/ May, see note 55, 30, § 2-41; Newton, see note 5, 49.

167 Holmes, see note 15, 683; Benvenuti, see note 64, 41; Cassese, see note 48, 159; M.H. Arsanjani, "The Rome Statute of the International Criminal Court", *AJIL* 93 (1999), 22 et seq. (28); F. Hoffmeister/ S. Knoke, "Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof – Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht", *ZaöRV* 59 (1999), 785 et seq. (798); Sadat/ Carden, see note 87, 417.

168 G.H. Oosthuizen, "Some preliminary remarks on the relationship between the envisaged International Criminal Court and the UN Security Council", *NILR* 46 (1999) 313 et seq. (326).

169 Cf. article 16 and the ongoing discussions on the crime of aggression.

170 P. Gargiulo, "The Controversial Relationship Between the International Criminal Court and the Security Council", in: Lattanzi/ Schabas, see note 64, 67 et seq. (84).

tional organisations,[171] others correctly contend that decisions of the Security Council under Chapter VII of the UN Charter are binding on international organisations,[172] at least inasmuch as they are established by UN Member States,[173] since states cannot vest an international organisation with more powers than they themselves have[174] and must not circumvent their own duties under the UN Charter by creating an international organisation which exercises its duties in contradiction to the United Nations and its organs.[175] However, it seems reasonable to say that the Security Council may only "utilise" an international organisation by way of Chapter VII resolutions within the framework set by the treaty establishing that organisation;[176] if one accepts this reasoning, it then follows that, since states have created the ICC as a complementary institution and retained the right to investigate and prosecute unless deemed unwilling or unable *by the Court*, the Security Council may not ignore that restriction on the Court's scope of action.

Having said that, from a more practical viewpoint, it is highly unlikely that the Court would disagree with a determination by the Council in the light of its persuasive weight.

It is a different issue whether UN Member States are under an obligation not to bring a challenge to admissibility in case of such determination, given that the Council acts on behalf of all Members States and these are bound by its resolutions. Indeed, the case has been made for such a reading.[177] Moreover, a UN Member State may be under the obligation to defer to the jurisdiction of the Court.[178] However, even if this were the case, this would not prevent the court from making a de-

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171 Arsanjani, see note 167.

172 R.H. Lauwaars, "The Interrelationship Between United Nations Law and the Law of Other International Organizations", *Mich. L. Rev.* 82 (1983-1984), 1604 et seq. (1605-1606).

173 As to the situation of non-member states see generally R. Bernhardt, "Article 103", in: B. Simma, *The Charter of the United Nations: A Commentary*, 2nd edition, Vol. 2, 2002, 1292 et seq. (1298).

174 Cf. E. de Wet, "Judicial Review as an Emerging General Principle of Law and its Implications for the International Court of Justice", *NILR* 47 (2000), 181 et seq. (194).

175 Meißner, see note 29, 105.

176 Ibid. The question raises complex questions of the law of international institutions which are beyond the scope of this article. See also: P. Sands/ P. Klein, *Bowett's Law of International Institutions*, 2001, 460 et seq.

177 Newton, see note 5, 49.

178 Oosthuizen, see note 168, 328.

termination of inadmissibility *proprio motu* or pursuant to a challenge by the accused.

## 5. Burden and Standard of Proof

Even though article 17 establishes a general "presumption" for state action, this only emphasises the fact that national authorities should primarily deal with the matter.[179] The negative formulation ("shall determine that a case is *in*admissible") does not in and of itself give any indication as to the burden of proof in admissibility proceedings. In order to establish which party bears the onus in admissibility proceedings, one has to look at each subpara. of article 17 (1). The Rules of Procedure and Evidence do not further clarify the matter. The way article 17 (1)(a) and (b) are devised ("unless"), it is apparent that the burden to show the unwillingness or inability[180] of a state to genuinely investigate or prosecute rests with the Prosecutor.[181] This is true for both article 18 and 19 proceedings before the Court.[182] A presumption for admissibility to be rebutted by the state that claims inadmissibility may be established if that state fails to respond to a request by the Prosecutor under article 18 (5)[183] or to provide information concerning its investigation in accordance with Rule 53 of the Rules of Procedure and Evidence.[184]

On the other hand, a plain reading of article 17 suggests that the state itself bears the onus to show (a) that it is investigating or prose-

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179 Cassese speaks of a "presumption in favour of action at the level of states", see note 48.

180 In the context of inability, it should be noted that, even though the concept of "unavailability" of national systems may be interpreted with reference to the unavailability of domestic remedies in the exhaustion of the local remedies rule, the burden of proof still lies on the Prosecutor to show that the national system is not available, as opposed to human rights law, cf. *Velasquez Rodriguez* case, see note 76, 305, para. 59.

181 Holmes, see note 15, 677; Bergsmo, see note 57, 43; id., see note 12, 96; Philips, see note 75, 77; Stahn, see note 59, 589; Llewellyn, see note 52, 202.

182 Bourdon/ Duverger, see note 9, 100; Ntanda Nsereko, see note 22, 117.

183 Holmes, see note 15, 682.

184 In the light of the *pacta tertiis* rule, this can only apply to States parties. It is furthermore questionable whether the suspect or accused should bear the consequences of a failure of a state to comply with its obligations to inform where he or she initiates the admissibility proceedings under article 19 (1)(a).

cuting, or has investigated the case,[185] and (b) that it has jurisdiction over the case,[186] since these requirements are not contained in the phrase commencing with "unless". The same goes for authorisation proceedings following a request for deferral under 18 (2) and 19.

Another interesting question is whether the burden of proof is reversed where it is the suspect or accused that challenges the admissibility of a case under article 19 (2)(a). It may be argued that article 66 (2) effects such reversal. However, article 66 (2) only refers to the question of guilt of the accused, not to issues of admissibility of proceedings; as discussed above, article 19 (2)(a) merely provides the suspect or accused with standing to assert that state sovereignty was infringed. Thus, the accused or suspect bears the onus to show that the state investigating or prosecuting him or her, or having done so, has jurisdiction over the case.

As to the standard of proof, the negotiating history evidences that the judges will have to be convinced "beyond reasonable doubt", given that it proved impossible during the negotiations to incorporate a proposal to let reasonable doubts as to the genuineness of a state's efforts to prosecute suffice.[187]

## 6. Waiver of Complementarity

To ask whether a state may "waive" its right to investigate and claim complementarity as a bar to admissibility is as much an interesting as a practical legal question, considering that the Office of the Prosecutor has issued a policy paper in which it refers to a *consensual division of labour* and the sharing of burden between states and the Court,[188] and taking into account that at least one State party has legislated for the possibility to abstain from exercising its jurisdiction in favour of a prosecution by the ICC if such restraint is in the interests of justice.[189]

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185 Fife, see note 21, 72.

186 Meißner, see note 29, 71.

187 H.P. Kaul, "Towards a Permanent International Criminal Court, Some Observations of a Negotiator", *HRLJ* 18 (1997), 169 et seq. (172).

188 <www.icc-cpi.int/otp/policy.php>, 4, last paragraph.

189 Section 28 of the German law on co-operation with the International Criminal Court. Cf. C. Kreß, "Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof", in: Grützner/ Pötz, see note 149, III 26, MN 15.

Possible grounds for such a waiver are well conceivable, for instance if the case is of international importance and/or politically too sensitive for the state to handle it itself.[190] If one reads the complementarity principle as a safeguard of national sovereignty in the form of the right to prosecute, then it is indeed convincing to argue that a state, by declining to exercise the right, under general international law, may waive its primacy and so enable the Court to act.[191] If, however, the complementarity principle did not exclusively protect state sovereignty, but also created a right for the individual (cf. article 19 (2)(a)), then such a waiver by a state would not be possible, as the state cannot unilaterally take away a right of a person that it has agreed to in a multilateral instrument. Given that, as concluded above, the Statute does not grant such right to the individual, a waiver should be possible, if only limited to a state's own right to prosecute; other states (also) having jurisdiction may naturally still raise objections. Neither is a "waiver" of complementarity proscribed where a duty to exercise criminal jurisdiction over those responsible for international crimes exists.[192] Handing over the prosecution to the international plane would not amount to a breach of an international obligation since the state in question would fulfil its obligation by ensuring that the Court investigates and adjudicates the crimes, provided that the Court does actually initiate proceedings.

In considering the question of waiver, however, one must differentiate between the gravity requirement (article 17 (1)(d)) and *ne bis in idem* (article 17 (1)(c)) on the one hand, and inability or unwillingness on the other hand (article 17 (a) and (b)).[193] The requirements of sufficient gravity and *ne bis in idem* are important to the *validity* of a prosecution before the ICC, and to this extent seem quasi-jurisdictional.[194] Both *ne bis in idem* and the gravity requirement are not limited in their rationale to the protection of the right of states to prosecute. More importantly, *ne bis in idem* reflects a fundamental principle of fair trial of

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190 Duffy/ Huston, see note 6, 32.

191 Solera, see note 12, 159; Newton, see note 5, 68-69; G. Seidel/ C. Stahn, "Das Statut des Weltstrafgerichtshofs, Ein Überblick über Entstehung, Inhalt und Bedeutung", *Jura* 21 (1999), 14 et seq. (16). A waiver of rights is generally recognised under international law: Ch. Rousseau, *Droit international public*, Vol. 1, 1970, 428 et seq.

192 See note 26.

193 L.N. Sadat, *The International Criminal Court and the Transformation of International Law*, 2002, 125-126.

194 Ibid.; Meißner, see note 29, 74.

the accused recognised under international law.[195] It is thus not conceivable that by "waiving" its right to prosecute, a state could vitiate these requirements.[196] The Court would still have to rule the case to be inadmissible.

In light of the above, it is also unproblematic to only partially "waive complementarity". If a state can waive a right in its entirety, then it can also decide in how far and to what extent it wants to give up certain rights (*argumentum a maiore ad minus*). The complementarity principle remains open to a consensual approach inasmuch as it is permissible to let the Court deal with some (e.g. the most serious) cases and leave the investigation of other (lower-level) perpetrators to the national state.

## V. Conclusion

The complementarity regime of the Court has some interesting implications which have not been specifically addressed in this contribution, and that will not be easy to resolve in practice. To name but a few, it is obvious that the Court is completely dependent on the co-operation of states for the proper discharge of its functions. It is less clear how the Court will be able to co-operate with a state that it has just declared unable or unwilling to deal with the case at hand itself (complementarity paradox).[197] Another topical issue is how truth and reconciliation commissions, amnesties and pardons should be dealt with.[198]

The principle has received much praise and much criticism. For some, it signifies an ingenious solution to a deadlock in negotiations between sovereignty-anxious states and those who wished the Court to take a more active and prominent role. For others, it is an excessive concession to state sovereignty, potentially endangering the success of the endeavour to establish the first permanent international institution with jurisdiction over the most serious international crimes.

Only the application of complementarity in practice will show whether it will indeed hamper the Court in pursuing its main goal, to ensure that "the most serious crimes of concern to the international

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195 A. Cassese, *International Criminal Law*, 2003, 319 et seq.

196 Meißner, see note 29, 73.

197 Cf. Bergsmo, see note 12, 98.

198 Cf. Seibert-Fohr, see note 26, and Robinson, see note 51.

community as a whole must not go unpunished" and to contribute to the deterrence of future perpetrators from committing international crimes. Thus, without taking sides in this controversy, the essential results of the discussion of complementarity offered here may be summarised as follows:

1. Complementarity is 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 avoidance of impunity and the deterrence of future crimes within the jurisdiction of the Court.
2. Besides being a diplomatic compromise, it is also a recognition of the fact that the resources of the ICC will be limited and that the Court, due to its permanent and global nature, will not be able to act in every case where a crime within the jurisdiction of the Court is committed.
3. Acknowledging that the effective prosecution of international crimes depends on action on the national level, the Statute operates as a catalyst encouraging states to investigate and prosecute crimes under the jurisdiction of the Court.
4. States may generally waive their right to raise complementarity as a bar to the admissibility of the case. The principle permits a flexible approach to co-operation between states and the ICC.
5. The complementary nature of the ICC requires that the Court, in particular the Office of the Prosecutor, monitors the situation in states with a view to identifying possible situations in which the goals of the Statute are in danger of being disregarded.