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The Principle of Complementarity: A comparative analysis of the jurisprudence among the *ad hoc* criminal Tribunals, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court

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To the memory of my godfather

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Part III

Section I - The ICTY's and ICTR's Case law on primacy

Abbreviations

AC	Appeals Chamber
ACHPR	African Commission on Human and Peoples' Rights
ALC	Armé de Libération du Congo
art.	article
ASP	Assembly of States Parties of the Rome Statute
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CAT	Convention against Torture
CDR	Coalition pour la Défense de la République
D.P.	Domestic Proceedings
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
et al.	and others (Latin et al)
FARDC	Armed Forces of the DRC
FARDC	Armed Forces of Democratic Republic of Congo
FDLR	Forces Democratiques de Liberation du Rwanda
FPLC	Forces Patriotiques pour la Liberation du Congo
FRPI	Patriotic Resistance Force in Ituri
Genocide Convention	Convention on the Prevention and Suppression of the Crime of Genocide
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCSt	Statute of the International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTRSt	Statute of International Criminal Tribunal for Rwanda
ICTYSt	Statute of International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IsCL	Islamic Criminal Law
JEM	Justice and Equality Movement (Sudan)
LDUs	Local Defence Unit (Uganda)
LRA	Lord's Resistance Army (Uganda)
MICT	Mechanism for International Criminal Tribunals
MLC	Movement for the Liberation of the Congo
MONUSCO	United Nations Mission in the Democratic Republic of the Congo
MRC	Congolese Revolutionary Movement
NCOI	National Commission of Inquiry (Sudan)
NGOs	Non-Governmental Organizations
NLA	National Liberation Army (F.Y.R.O.M)

ODM	Orange Democratic Movement (Kenya)
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
par. (or paras.)	paragraph (or paragraphs)
PNU	Party of National Unity (Kenya)
pp. (or p.)	pages (or page)
PTC	Pre-Trial Chamber
RDF	Rwandan Defence Forces
RPEs	Rules of Procedures and Evidence
RTLM	Radio Télévision Libre des Mille Collines, S.A.
SCSLSt	Statute of the Special Court for Sierra Leone
SDS	Serbian Democratic Party
SGBC	Sexual and Gender Based Crimes
SLA/SLM	Sudanese Liberation Army/Movement
SPLA	Sudan Peoples Liberation Army
SPLM	Sudan Peoples Liberation Movement
SSC	Substantially Same Conduct (test)
TC	Trial Chamber
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations' Security Council
UPC	Union des Patriotes Congolais (DRC)
UPDF	Uganda People's Defence Force
VCLT	Vienna Convention Law Treaties
vol.	volume

Part I

Summary

To begin with, the first chapter concerns the history of complementarity, its stipulation in the Charter of the IMT of Nuremberg and its evolution from the ILC's activities to the final draft Statute. I will explain how the plenipotentiaries concluded to certain elements of art. 17 ICCSt, keeping other elements without any further interpretation.

Secondly, I will be thoroughly engaged in the principle of complementarity and I will try to answer the questions: what are the conditions of complementarity and which is the procedure of applying this principle?, what kind of national prosecution satisfies the principle of complementarity?, why is national prosecution for international crimes better than prosecution for ordinary crimes?.e.tc. In the following parts, we will discover whether national prosecutors and judges can effectively handle national crimes *per se,* instead of international crimes, and when an international case can be prosecuted in national terms. Furthermore, a comparison between subsidiarity as a precondition of universal jurisdiction and complementarity will be drawn. The burning issue of immunitites will be analyzed, for it continues to constantly puzzle the ICC judges.

Next, the jurisprudence of the ICTY, ICTR and ICC will assist us to understand how the two tribunals offer illuminating decisions to several issues, such as, what is primacy?, how can the ICC avoid exercising primary powers?, which are some due process rights of the accused which the ICC should also take under consideration?, how did the ICTR/ICTY's completion strategies embrace complementary features?

I will also compare the most influential strategies on complementarity, and I will conclude to a certain strategy, which I consider to be the most workable. The OTP in the Strategy Plan 2016-2018 tends towards the same direction, as the one supported here, as well.

The fundamental human rights of the suspect/accused, which comprise an important issue, will also be elaborated. The accused's rights are highly and extensively protected in several legal instruments. Nevertheless, there are some ambiguous decisions, where the ICC's judges have been criticized for overlooking

grave breaches of fair process rights in national level. On the contrary, some member – states disagree with the "over-protection" of the above rights, arguing that their legal culture should be brought to the attention of judges and be implemented, where appropriate. My comments on this argumentation are negative, since the ICC cannot be a "two-speed" institution. Finally, I will draw overall inferences on the individual topics.

The analysis of the jurisprudence which is developed in Parts II and III is constructed as follows: Brief summaries of the most important cases will precede the main corpus of the decisions in order to achieve a better understanding of the factual and legal context of each case. The decisions' analyses concern complementarity or primacy exclusively and consist of the Court's admissions and, where appropriate, the submissions of the parties. Consequently, other issues about particular crimes, types of responsibility, sentences, gravity e.t.c. will not be arranged. In some decisions it is crucial to mention the Pre-Trial Chambers' (hereinafter: PTC) erroneous admissions, which were corrected in the second instance and other parties' helpful submissions and remarks. The goal of this thesis is to highlight the similarities and differences between primacy and complementarity and how the *ad hoc* Tribunals directly or indirectly adopted a more flexible approach of primacy, which tends towards to complementarity, with the purpose of contributing to the formation of a concrete legal basis for complementarity.

Key words: complementarity, positive complementarity, article 17 of the Rome Statute, Katanga, Abdullah Al-Senussi, Saif Al-Islam Gaddafi, unwillingness, substantially same conduct, immunities, Simone Gbagbo , Callixte Mbarushimana, Germain Katanga, Karamira, Jorgić v. Germany

Summary in greek -Περίληψη

Η αρχή της συμπληρωματικότητας συνιστούσε μία διελκύνστιδα καθ'όλη τη διάρκεια των διαπραγματεύσεων στη Συνδιάσκεψη της Ρώμης. Αυτή η δικαιοδοτική αρχή θα πρέπει να αναπτύσσει την προθυμία και την ικανότητα των κρατών μελών να ερευνούν, να κινούν την ποινική δίωξη και εκδικάζουν υποθέσεις που αφορούν τη διάπραξη των πιο ειδεχθών παραβιάσεων του Διεθνούς Ανθρωπιστικού Δικαίου και άλλων διεθνών συνθηκών και καταστατικών. Το αίνιγμα της κατάλληλης εφαρμογής της αρχής σε εθνικό και διεθνές επίπεδο είναι ακόμη άλυτο και συνάμα το Διεθνές Ποινικό Δικαστήριο θέτει υπερβολικά υψηλά κατώφλια για το απαράδεκτο των υποθέσεων που εισάγονται ενώπιόν του. Θα μπορούσε η προτεραιότητα- μία αρχή αντίθετη προς τη συμπληρωματικότητα-, όπως έχει εφαρμοσθεί από τα *ad hoc* Ποινικά Δικαστήρια, να συνεισφέρει στην εν λόγω συζήτηση;

Στο πρώτο κεφάλαιο περιγράφεται η ιστορική διαδρομή με την οποία εξελίχθηκε η αρχή από το Χάρτη της Νυρεμβέργης έως το τελικό Καταστατικό της Ρώμης και οι αντικρουόμενες απόψεις που εκφράσθηκαν στις διαπραγματεύσεις του Καταστατικού ως προς τα συστατικά της στοιχεία. Στη συνέχεια, αναλύονται συγκεκριμένα οι προϋποθέσεις του άρθρου 17 του Καταστατικού της Ρώμης και πότε πληρούται το παραδεκτό. Ακόμη, ένα φλέγον ζήτημα είναι αν η ποινική δίωξη για κοινά εγκλήματα μπορεί να λογισθεί επαρκής σύμφωνα με τη διεθνή νομολογία και θεωρία. Η αρχή της οικουμενικής δικαιοδοσίας, μίας εναλλακτικής μορφής άσκησης ποινικής δίωξης, μπορεί εύλογα να υποκαθιστά την εθνική, ακόμα και τη διεθνή δικαιοδοσία του Δικαστηρίου. Η νομολογία που αφορά στην αρχή της προτεραιότητας μπορεί να χρησιμοποιηθεί τόσο στην σωστή εφαρμογή της συμπληρωματικότητας όσο και της οικουμενικότητας. Συν των χρόνω, τα ad hoc Δικαστήρια υιοθέτησαν τη στρατηγική συμπλήρωσης/ολοκλήρωσης των υποθέσεών τους, μία καινοτομία η οποία θα αποδειχθεί ιδιαίτερα χρήσιμη για το Διεθνές Ποινικό Δίκαιο. Επιπλέον, το ζήτημα της παραβίασης θεμελιωδών δικαιωμάτων του κατηγορουμένου πριν, κατά τη διάρκεια και μετά την ολοκλήρωση της ποινικής του δίωξης επίσης δε θα μας διαφύγει την προσοχή. Λόγου χάριν, Μπορεί ένα κατηγορούμενος να καταδικασθεί σε θανατική ποινή και το Δικαστήριο να παραμένει απαθές;

Πέραν των θεωρητικών ζητημάτων, η νομολογία αναλύεται ως εξής: αναπτύσσονται σύντομες περιλήψεις του πραγματικού όπου έλαβαν χώρα τα εγκλήματα καθώς και το νομικό πλαίσιο της ποινικής δίωξης και κατόπιν γίνεται αναφορά αποκλειστικά στα ζητήματα της συμπληρωματικότητας, και όποτε είναι αναγκαίο, θα δίδεται έμφαση σε κάποιες αιτιάσεις των μερών των εκάστοτε δικών. Θα γίνεται αναφορά στις λανθασμένες αποφάσεις που ενίοτε εκδίδουν τα Τμήματα Προδικασίας και θα ασκείται κριτική στον τρόπο διαχείρισης των ζητημάτων σε κάθε μέρος της διπλωματικής εργασίας.

Λέξεις-κλειδιά: συμπληρωματικότητα, θετική συμπληρωματικότητα, άρθρο 17 του Καταστατικού της Ρώμης, Katanga, Abdullah Al-Senussi, Saif Al-Islam Gaddafi, απροθυμία, ουσιαστικά ίδια εγκληματική δράση, αμνηστία, Simone Gbagbo, Callixte Mbarushimana, Germain Katanga, Karamira, Jorgić v. Germany

Introduction

Prosecution and punishment of crimes constitute states' duty and a right *par excellence*. However, after the Nuremberg trials the Westphalian conception of state sovereignty over crimes against peace, war crimes and crimes against humanity partly destabilized, since the international community realized that, there were crimes, whose legal nature goes beyond states' border, that might go unpunished. The Westphalian doctrine that "sovereign states are above the law and entitled to do anything"[1], gradually collapsed, due to the need of the international community to guarantee people with global security and peace.

Nowadays full state sovereignty is inconceivable over cross-border crimes and some groups of crimes committed within the territory of states, which are authorized, incited or commissioned by national governments, dictatorships or paramilitary armed groups. As a consequence, if states violate their nationals' human rights during an armed conflict or armed attack, they divest their sovereignty in a way, and then international institutions or states are empowered to prosecute crimes that affect the international community as a whole. Not only does this development in the ICL protect the international community, but state sovereignty, too, because, even though national judges do not/cannot exercise jurisdictional powers, the desire of citizens to see justice done can be ultimately be satisfied through the international dispensation of justice.

Of course, not all crimes can be subject to international jurisdiction. Therefore, it is crucial to identify the borderline between domestic crimes and crimes against international community, and consequently to form the ratione of subjecting the latter to a special criminal law regime. Answering the political and legal question of the necessity of starting criminal law procedures against state agents, in a different framework, other than the domestic political or criminal framework, is so material a factor, as well.

Firstly, some categories of crimes are originally international in scope, given that the Rome Statute, which documents the criminal doctrine's evolution, stipulates

[1] David Luban, *"Beyond Moral Minimalism: Response to Crimes Against Humanity"* , 20(3) Ethics & International Affairs (2006), 353-60, footnote in Kristen Hessler, *"State Sovereignty as an Obstacle to International Criminal Law"*, in Larry May and Zachary Hoskins, "*International Criminal Law and Philosophy",* Cambridge University Press, (2010), 42

that genocide and crimes against humanity need not have cross-border features to be committed and genocide although need not be widespread or systematic either, it requires genocidal intent (intent to destroy a whole community/group of people), while the crime of aggression is conceptually international. Sexual Slavery and recruiting of child soldiers have recently been recognized as international crimes, too.

Secondly, Altan and Wellman (2004), justifying why international fora entertain cases, claim that, although governments justly have somewhat wide discretion to regulate internal affairs, there is a moral impenetrable barrier upon the way they can treat the citizens of their states, for they are obliged to protect the populace's fundamental rights. When governments tolerate or provoke this violation, third states and the UN have a moral right and a duty to interfere.[2]

States do not have the prerogative to prosecute, try and punish these crimes only on the grounds that they take place in their territory or only concern their nationals. States serve an existential purpose, from which they extract legitimacy, of providing their citizens with sufficient protection from any kind of harm or threat of their lives. The monopoly of the use of force throughout their territory is an essential prerequisite for this purpose, though. However, someone could argue that, when states fail to timely and aptly exert force, they instantly attenuate their legitimacy and this monopolization of prosecution and adjudication can easily be challenged. Certainly, international actors have considered this ceaselessly problematic issue and have adopted corresponding decisions/resolutions.

Thirdly, the UN comprehended that the legal lacunae in criminal accountability should finally be eliminated through collective political decisions and work. Thus, pursuant to article 41 UN Charter, the Security Council may play a significant political role to fight impunity, by adopting measures- not involving use of armed force- to give effect to its decision and may call upon the Members of the United Nations to apply such measures. The UNSC's Resolutions 827 (1993) and 955 (1994) introduced the establishment of two International Criminal Tribunals as a response to mass atrocities and grave breaches of IHL, which took place in former Yugoslavia and in Rwanda, respectively. Additionally, in par. 7 of the Preamble of the

[2] Ibid, Andrew Altman and Christopher Wellman, "*A Defense to International Criminal Law*" 115, Ethics, (2004), 42, footnote in pp. 44-48.

Rome Statute the purpose of Chapter VII of UN Charter is expressly stipulated, which is the abstention from the threat or use of armed force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. The preambular paragraph 10 ICCSt, also stipulates that the International Criminal Court (henceforth; the ICC) is tightly linked to the system of the United Nations. Article 13(b) ICCSt, envisaged the crimes' referral by the UNSC, acting under Chapter VII, as a way of triggering the Court's jurisdiction over the crimes, even though the state in question has not ratified the Rome Statute. All these provisions lead us to the conclusion that criminalization of some categories of acts constitute a clear-cut form of implementing UNSC's political decisions.[3] In other words, the international community orders the commencement of criminal procedure via UNSC, while the ICC is the ultimate confidant addressee, which purports to be impartial and equitable. So, we gradually see the vision of the International Community fathers to be materialized to its core, as currently there are at least two distinct state-like "authorities", the political one via UNSC and UNGA and the criminal justice one via the ICC.

The Rome Statute of the International Criminal Court includes two main ideals; the restorative justice one and the preventive one. The Trust Fund for Victims is a parallel mechanism to the ICC that actually provides reparation, and psychologically and materially supports victims of the most serious crimes. The International Criminal Court's *telos* is "to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes" and to:"recalling that it is the duty if every state to exercise its criminal jurisdiction over those responsible for international crimes",[4] correspondingly. Prevention means that, if international criminal justice works effectively and promptly, the afflicted societies shall have long-term stability or the aspiring perpetrators will be daunted by the idea that one day they shall face justice.

Apart from the ICTR/ICTY, and the ICC, the UN proceeded to the establishment of internationalized and mixed criminal tribunals/chambers/courts such

[3] Prosecutor v. Ahmad Muhammad Harrun ("Ahmad Harun") and Ali Muhamad Ali ABD-Al Rahman ("Ali Kushayb"), "Decision on the Prosecution Application under Article 58(7) of the Statute", Case No: ICC-02/05-01/07, par. 15-17, https://www.icc-cpi.int/CourtRecords/CR2007_02899.PDF

[4] Preambular paragraphs 5, 6 ICCSt

as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon, Kosovo Specialist Chambers & Specialist Prosecutor's Office e.t.c., which have special jurisdictional regimes than mere primacy over or concurrent jurisdiction with domestic courts.[5]

A major jurisdictional issue of the ICTY/ICTR was, whether they had primacy over national courts, or not. In the beginning states were willing to accept the jurisdiction and primacy of the tribunals. Nevertheless, states gradually expressed their commitment to handle their cases by themselves, so international courts should only complement national judicial systems, where there were failed states, states in transition, unable judicial systems and so on and so forth. *Ergo*, the principle of complementarity of the ICC replaced primacy.

In brief the principle of complementarity (art. 17 ICCSt) is negatively stipulated in the Statute and defines that the ICC can exercise jurisdiction, only if state-parties are 'unwilling or unable genuinely' to conduct investigations and prosecutions. Naturally, in the following pages we will discover that the principle is neither that short nor plain to conceptualize. It is a complicated, manifold notion, the axis of the Rome Regime. Even the ICC's judiciary sometimes in their decisions fails to correctly subsume facts into the conditions of this principle.

The principle of complementarity constituted a tug-of-war throughout the negotiations of the Rome Conference. This jurisdictional principle should enhance the willingness and ability of states parties to investigate, prosecute and adjudicate cases concerning the commission of the most egregious violations of the International Humanitarian Law and other international conventions and statutes. The conundrum of the proper implementation of the principle in national and international level is still unresolved while the International Criminal Court establishes overly high thresholds for the inadmissibility of the cases brought before it. Could primacy - an opposite principle to complementarity-, as has been applied by the *ad hoc* Tribunals, contribute to the discussion in question? The answer to this question is positive, for in many cases the Tribunals implicitly or expressly adopted a wide approach of primacy which

[5] For extensive information on the theme see: International Justice Resource Center, "Internationalized Criminal Tribunals", available at: http://www.ijrcenter.org/international-criminal-law/internationalized-criminal-tribunals/

encompassed complementarity features. This thesis serves the aim of answering to burning questions such as in which extent should due process considerations affect the cases' admissibility, whether universal jurisdiction is a preferable means of triggering jurisdiction, or whether amnesties should prevail international justice or not. Above all, when answering the numerous issues, we should always bear in mind that complementarity is the safeguard of state sovereignty, so that international and national competence should be kept in equilibrium.

It was defined that complementarity requires close cooperation and communication between the Office of the Prosecutor and the State in question. Both the ICC and states parties must strive to achieve the goals of the Statute, since the principle entails the division of labour between national organs and the international system of criminal justice. This principle should function towards the reinforcement of the sovereign right of every state to exercise its criminal jurisdiction, so it set the method to reconcile the imperatives of sovereignty and global criminal justice. In some cases, though, the ICC has adopted quite strict versions of complementarity, which are not in line with the promotion of states parties' primary jurisdiction. Therefore, the principle of primacy, as applied by the *ad hoc* Tribunals, could be accommodating in the course of defining a balanced version of complementarity.

Finally, another crucial and puzzling issue is the protection of fair trial and due process rights of the suspect/accused. In the negotiations of the draft Statute, in spite of the fact that some delegations argued against flexible approaches towards penal issues, the majority voted for a more "European" disposition of the Statute as far as the punishment, the criminal procedure and the correction circumstances are concerned. For instance, capital punishment is strictly forbidden under the statutory provisions, since the correction policy would be deprived of its significance and would lead to the very same act as the perpetrator one's, if death penalty was being applied. So, human rights are manifestly being fostered no matter how cruel or degrading the perpetrator's deviance was.

To sum up, these were some aspects of the ratione of allocation criminal judicial powers to international fora and a brief introduction to the concept of complementarity. In the following parts, I shall advance the relevant themes in depth.

Section I - Towards the ultimate draft Statute

1. The four models of complementarity[6]

1st model: League of Nations, 1937. Based on the optional complementarity model, states are able to voluntarily divest their jurisdiction.

2nd model: The London International Assembly, 1941. This model focuses on the allocation of duties between national and international jurisdictions. It was introduced in the Charters of Nuremberg International Military Tribunal[7] (IMT) and the Tokyo International Military Tribunal for the Far East (IMTFE). [8]

3rd model: Committees on International Criminal Jurisdiction[9],1951, 1953. This model comprises the two above models, namely the states consensually relinquish their jurisdiction in favour of the international courts, after they have already divided judicial labour.

4rd model: Rome Statute, 1998. The first and third models jointly constitute the final model provided in the Rome Statute.

2. Negotiations on the Draft Statute

The preparation for the future negotiations on a permanent criminal court, in response to illicit drug trafficking, begun in 1989 under the U.N.G.A.'s request to the ILC.[10] From 1991 to 1994 the ILC developed a draft Statute in the form of a treaty and in 1993 the U.N.G.A. requested governments to contribute ideas, comments and remarks for the formation of the Draft. In 1994 a Preparatory Committee established by the U.N.G.A. undertook the responsibility to work on all the up-to-date

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[6] Hilmi M. Zawati, *"The International Criminal Court and Complementarity*", Journal of International Law and International Relations, Vol. 12 No. 1, (2016), pp. 208-228, at p.215, Review on: Carsten Stahn & Mohamed M. El Zeidy, eds., *"The International Criminal Court and Complementarity: From Theory to Practice*", 2 Vols. , New York, NY: Cambridge University Press, (2011) pp. 1292, XXV.

[7] The Charter of IMT, preambular paras:2-3 and Articles 3-4, 6, available on:http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

[8] International Military Tribunal for the far East, Special Proclamation Establishment Of an International Military Tribunal for the Far East ,attached to the Charter of IMTFE, Treaties and Other International Acts Series 1589, article 3, available at: http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf

[9] The ILC Working Group's Report and the 1994 ILC Draft Statute of the International Criminal Court.

[10] G.A. Res. 44/39, U.N.G.A. Doc. No. A/RES/44/39, 72nd Plenary Meeting, 4 December 1989, available at: http://www.un.org/documents/ga/res/44/a44r039.htm

documentation with the intention of shaping a final draft Statute.

Achieving the main goal of constructing International Criminal Law (henceforth; ICL) was a hugely intractable problem, since the multitude of diverse criminal systems contested with each other for adoption and implementation. Furthermore, the fluidity and no consolidation of the national criminal jurisprudence was determinant to the Statute's vagueness. During the negotiations on the ICCSt, the delegates justified, why some categories of crimes should be subjected to an international criminal regime, in other words, they provided reasons for differentiating serious international crimes to common crimes.

In the third preambular paragraph of the Draft Statute, the principle of complementarity was dominant, with emphasis on the non-exclusion of national jurisdictions and interstate cooperation, regulating situations where national judicial systems were 'unavailable' or 'ineffective' and wherein there was the risk of miscarriage of justice. [11]

There is not a clear definition of the principle in the Statute, although it was argued that the Preamble should include one, on the grounds that, in light of Article 31 Vienna Convention on the Law of Treaties (1969) the Preamble is an inextricably linked part of conventions, which can be used for interpretative purposes, while others argued in favour of a separate article, which would be envisaged in the main corpus of the Statute, that would leave no room for misinterpretations and that would be totally binding.[12]

At the outset, the negotiators were discussing "*ceded jurisdiction",* since it was up to member-states to willingly concede their sovereign right to the Court[13.] At a later time, this approach gradually altered. Nevertheless, there were contrasting voices that, this kind of jurisdiction would prove dissatisfactory in the future, inasmuch as there were stipulated some other jurisdictional barriers, for example article 21 of the Draft Statute -*"Preconditions to the exercise of jurisdiction"*, the gravity threshold,

[11] Triffterer O, *"Commentary on the Rome Statute of the International Criminal Court; Observer's Notes, Article by Article*",C.H.Beck • Hart • Nomos, (2008), 605-625, at 607, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court General Assembly Official Records · Fiftieth Session Supplement No. 22 (A/50/22), paras: 29-51, available at: http://www.legal-tools.org/doc/b50da8/pdf/

[12] Ibid, Triffterer O, p.609

[13] Draft Statute for an International Criminal Court with Commentaries 1994, United Nations 2005, pp.27, 36, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf

e.t.c.[14], which could be obstacles to the Court's authority. The ILC Draft mentioned that further particularization of the principle is of utmost importance, *"so that its implications for the substantive provisions of the draft statute could be fully understood".*

Because majority indicated that the principle was already contained in article 17 of the Statute, delegations at the Rome Diplomatic Conference decided that it was no longer necessary to have further elaboration in the Preamble *"and that the basic principle would suffice*".[15]

What should be emphasized is that, in order for the Pre-Trial Chambers to hold a case admissible, the case must have not be already been under due investigations by any appropriate domestic authority and if it is a case of multiple states which assert national jurisdiction, the Prosecutor must scrutinize their own position on the matter concerned. Nor was it the intent of the negotiators to grant the Court any effect on bilateral inter-State extradition or international judicial cooperation.

On the one hand, the wording's ambiguity was to some extent conscious; the mildest opinion on the roundtable was the achievement of equilibrium between the primacy of national courts and a more energetic role of the ICC. In contrast to this option, U.S.A. delegates insisted on the amendment of the Preamble so as the prosecution *in bona fide* will be stipulated. Other plenipotentiaries denied to form this kind of presumption, so as the Court could be provided with primacy and concurrent jurisdiction, just like the status of *ad hoc* International Criminal Tribunals.[16]

On the other hand, a part of delegations suggested that the principle of complementarity must not be vague and general. Thus, the ICC should mould an articulated assumption concerning the principle in agreement with national criminal jurisdiction, and States should prosecute themselves and punish violations in their laws. In this way, States could achieve the desired effects of national reconciliation, political stability, and considerable development in judicial system's mechanisms and prompt victim reparation.

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[14] Ibid, Draft Statute, p.41
[15] Ibid, Triffterer O, p.607-608
[16] Ibid, Triffterer O, p.607-608, Hans-Peter Kaul, "The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions" at. 59-62 in Mauro Politi and Giuseppe Nesi*, "The Rome Statute of the International Criminal Court: A challenge to impunity",* Aldershot, Ashgate, (2001)

In any case, there is an indispensable feature every International Court possesses, in order to act effectively. The Court kept for itself the *kompetenz – kompetenz*, to examine by itself, if cases before it are or not admissible, although China expressed a contrasting view and some states (C.A.R, D.R.C., Libya, Uganda) challenged this certain power of the Court.[17]

3. The Preparatory Committee Sessions 1996-1998

Article 35 of the Draft Statute - Issues of admissibility

The Court may, on application by the indictee or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

(a) Has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;

(b) Is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) Is not of such gravity to justify further action by the Court.

Throughout the negotiations in the Preparatory Committee it was evident that the experts should strike a fair balance between the ICC and national authorities as far as the complementarity was concerned in order to encourage more states to sign and ratify the Statute. The 'sham trials' notion due to *male fide* and unreliability of national judicial system came to surface. It was argued that police power, an inherent prerogative of states, would be conceded to the Court. This committee introduced the art. 35 Draft Statute, which was the correspondent article of art. 17 of the Statute in use. The three grounds of admissibility challenge articulated in Article 35 of the Draft

[17] Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the ICCSt on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Trial Chamber III, Case No: ICC-01/05-01/08, Date: 15 June 2009, paras. 23-25, available at: https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF

Statute were supposedly too narrow. Others proposed that the scope of the article and admissibility should widen with the purpose of examining cases that were being prosecuted or had been prosecuted raising concerns of impartiality, negligent prosecution, breaches of the defendant's rights e.t.c apart from the cases that were being investigated. Procedural challenges to admissibility, *ne bis in idem* and other principles were left to the negotiations of the Rome Conference, while the coordinator of the informal session attended to the complementarity in intense negotiations and succeeded in constructing the initial concept.[18]

Some legal and politically sensitive notions, which were the object of harsh dispute, will be examined hereunder.

At the outset, as laid down on art. 35(1) the Court on its own motion could rule on the admissibility of a case. The right of the accused or the interested state or a state which has jurisdiction over the crime to challenge admissibility prior to the commencement of the trial was inserted, afterwards. When the draft article was presented before the delegations, it included the comment:"[the article is] intended to facilitate the work towards the elaboration of the Statute of the Court". In no way were the delegations bided by the stipulation of the article, so they had room and time for extensive debate. It is important to mention the initial wording of the article's fourth paragraph which reads: "The Court has no jurisdiction where the case is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it". Supposing that this wording were adopted, the Court would have no power to evaluate the national proceedings' genuineness, so it would lose an essential power for its workings.[19]

France, U.K. and U.S.A. expressed the view that the ICC should not function as an appeal tribunal or as a court of review for national decisions. Other representatives thought that effectiveness of national judicial system should trigger the subsequent intervention of the Court. The terms 'unable or unwilling genuinely to prosecute' progressively emerged.

While 'inability' was a relatively easy notion to negotiate, 'unwillingness'

[18] Ibid,Triffterer O. pp.609-610, Antonio Cassese, Paola, Gaeta, and John.R.W. Jones, *"The Rome Statute of the International Criminal Court: A Commentary"* Volume I, Oxford University Press, (2002), 670-671, Antonio Cassese, *"International Criminal Law*", Oxford University Press, (2008), pp.328-332

[19] Ibid, Triffterer O, p. 610

caused many difficulties, for plenipotentiaries puzzled over state sovereignty as well as constitutional guarantees in national systems against double jeopardy. Finally, the idea that 'unwillingness' developed into an indispensable element for the determination of the Court's jurisdiction was carved out and accepted by the majority. Under the pressure of other delegates the 'inability' element was also included as a disjunctive criterion to 'unwillingness'.[20]

It was agreed that the principle of complementarity be stipulated in a preambular paragraph, as well. Zutphen's proposition that only serious crimes should be the object of the Court's jurisdiction was endorsed.[21]

Amnesties/pardons were inserted in the draft text in footnotes 42 and 43, whereby art. 35(1) should address, among other issues, the issue of cases in which amnesties/pardons were overriding. Despite the consensus that these issues would be reviewed after the revision of art. 18 on *ne bis in idem,* the theme of amnesties/pardons which could possibly prevent a prosecution before the Court remained confused. The only provision that somehow alludes to this theme is art. 27(2) ICCSt. The chapeau of this provision, though, articulates that immunities should not impede prosecutorial discretion.[22]

U.S. plenipotentiaries attempted, in spite of other delegates' skepticism, to add to art. 15 a provision by which a new art. 16 would provide for complementarity at an earlier stage, prior to the beginning of an investigation of art.15. Opponents argued that this provision would form lengthy procedures and art. 13 and 17 contained enough guarantees. The Preparatory Committee corrected ILC's art 15, by expanding the basis to claim jurisdiction on behalf of the Court. This article is now the directional mechanism for assessing the ICC's jurisdiction. U.S.A.'s dread of one overly strong and dynamic Court led to a mandate somehow restricted. For instance, UNSC's referrals under Chapter VII may broaden ICC's jurisdictional scrutiny every now and again, while passive and active personality jurisdictional principles are weakened. [23]

[20] Ibid, Triffterer O, p.610
[21] Ibid, Triffterer O, p.611
[22] Ibid, Triffterer O, p.611
[23] Ibid, Triffterer O, p.611

4. The Rome Conference's added value to the principle

The debate during negotiations on this article was particularly heated and tense. The delegations were steering towards a concept of complementarity that would not seize the national jurisdiction. Thus, the ICC would only then be entitled to claim jurisdiction, when the State was 'unable' or 'unwilling' to initiate criminal procedure against the alleged perpetrators in good faith. The final article remained generally unaltered in comparison with the draft article causing some states not to be satisfied, but ultimately respected that it would function as equilibrium to the future jurisdictional conflicts.

The delineation of the 'unwillingness' element was at first the phrase: *"The proceedings were not or are not being conducted independently or impartially* [,..] *in accordance with the norms of due process recognized by international law"*. The stipulation altered, afterwards: *"having regard to the principles of due process recognized by international law*". This amendment implies that due process requirements should be applied in a flexible manner, in order for the Court not to acquire powers or mandate of a human rights court. The 'undue delay' element amended to 'unjustified delay' with the purpose of not endowing the Court with revisory power, providing for a higher threshold than 'undue'. 'Partial collapse' was and still is a highly controversial condition; since some considered that an investigation and/or prosecution could be conducted in *bona fide*, even though the national judicial system of a country is subject to 'partial collapse'. After the proposition of Mexico the 'substantial' defined the term 'collapse'.[24] The Drafting Committee recommended that the reference of complementarity in a preambular paragraph could clarify the concept's nature. The principle *ne bis in idem*, art. 18 ICCSt (art. 16 Draft Statute) was also vital for the acceptance of complementarity regime and the *proprio motu* role of the Prosecutor.

The discussion's conclusion was that future member states will be obliged to exercise jurisdiction over the alleged perpetrators of international crimes. However, the Statute's negotiators, forming a new regime for national and international authorities and judiciary, considered that the ICC must not substitute, but complement domestic courts. The complementarity principle comes second to impose order of law

[24] Ibid, Triffterer O, p.612

and put an end the ongoing status of impunity.

NGO's together with states moulded the article's stipulation that the ICC had to play a rather dynamic role in transitional legal issues and not just have full confidence in the state's willingness or readiness to genuinely prosecute those responsible in opposition to the contrary argumentation of states' delegations. So, the Court should be authorized to estimate *"where the proceedings under a national judicial system were ineffective and where a national judicial system was unavailable".*

To summarize we can say that, the complementarity principle functioned as equilibrium in the complex negotiations of the Rome Statute and that it was a necessary condition for the ratification of the Statute by a plethora of States. While primacy proved to be workable in extreme paradigms, the international community and especially the judges realized that state sovereignty, national judiciary and courts could be reinforced via the operation of an International Criminal Court.

Section II - Conceptualization of the principle

1. Conceptual Content of Article 17 ICCSt

Article 17 - Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the indictee or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Complementarity concerns two separate stages of proceedings, the preliminary stage- or the so called the 'situation' stage, where preliminary examinations commence after the authorization of the PTC, and the case stage, where prosecutions against certain people/conduct initiate. The ICC may only exercise jurisdiction in cases where domestic judicial and prosecutorial systems fail to do so, and where, although they assert that their proceedings are continuing, they are actually neither willing nor able to genuinely undertake them.[25]

As Nouwen *(2013)* elaborately states: *"Art. 17* [ICCSt] *reflects the object and purpose of the principle of complementarity, which is 'to protect sovereign interests in*

[25] ICC Office of the Prosecutor, Informal Expert Paper: The Principle of Complementarity in Practice (2003), 3, available on : http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF
, Lecturem Lexsitus Lecturer: Dr. Mohamed El Zeidy (Legal Officer, Pre-Trial Division, ICC), Topic: *"ICC Statute Article 17*", Center for International Law Research and Policy (CILRAP), 28.09.2017, available on: https://www.cilrap.org/cilrap-film/17-zeidy/, Fani Daskalopoulou –Livada*, "International Criminal Court: From Nuremberg to the Hague",* Nomiki Vivliothiki, Athens, (2013), 177-180

the pursuit of justice for crimes within the Court's jurisdiction".[26]

Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes.[27]

Admissibility and **Complementarity** are two distinct notions. Complementarity is a subset of admissibility's general notion. When read, in conjunction with *"ne bis in idem*" principle and gravity, complementarity works properly and leads us to the conclusion whether a case is admissible or not. The negative structure of the article implies that a case is **generally admissible** before the Court, unless the prerequisites of grounds of admissibility are fulfilled.

Respect for primary jurisdiction of states and considerations of efficiency and effectiveness are inherent concepts of complementarity. So, we should bear in mind that (i) Court's resources are limited, so its activity spectrum is limited, respectively, and (ii) national authorities have easy access, compared to the ICC, to the crime scene, the witnesses, the evidence and a better understanding of regional features and circumstances associated with the commitment of atrocities. If the principle functions effectively, national prosecutorial and judicial systems will operate effectively, and *vice versa*, although states may have earlier sustained crisis or political instability.[28]

This certain article, tightly linked to the paragraph 10 Preamble and article 1 of the Rome Statute, is rightfully characterized either as the "cornerstone" of the ICCSt, or as the "fundamental strength", for (coupled with other principles of the Rome Regime) this one directly regulates the Court's jurisdictional system. Among other principles this article contains, the principle of complementarity, and functions as equilibrium between the claim of national sovereignty and the granted power of the Court to entertain highly serious cases.

Till today the delineation of the term's content is politically sensitive and legally indinspensable. As the first ICC Prosecutor, Moreno Ocampo, noted:[29]

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[26] S.M.H. Nouwen, "*Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan"*, Cambridge University Press, (2013), p. 58.

[27] Situation in Uganda in the case of the Prosecutor v. Joseph Cony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, "Decision on the admissibility of the case under article 19(1) of the Statute", Case No: ICC-02/04-01/05, Date: 10 March 2009, par. 34, available at: https://www.icc-cpi.int/CourtRecords/CR2009_01678.PDF

[28] Ibid, Triffterer O, pp.605-625

[29] Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 5, available at:

"as a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned [...] *the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States".*

Being inherently the *locus delicti*, States do have the primary responsibility to mount investigations, collect evidentiary material, arrest the perpetrators, and directly compensate victims and timely act towards the unraveling of complex cases.

Two guiding principles which should blanket OTP's work in conjunction with states are '*partnership'* and *'vigilance'*. Partnership implies that states and the Court shall enhance their collaboration, namely the Prosecutor should urge states to commence the criminal course, assist in the abolishment of immunity legislation, bilateral conventions, and agree with states to a possible division of labour. 'Vigilance', conversely, reminds the Prosecutor not to refrain from his/her obligation to check, if national proceedings are carried out genuinely based on the principle of objectivity, and if necessary, to exercise jurisdiction.[30]

2. Sufficient gravity

The first ground of inadmissibility that the ICC must first entertain is whether the case is of sufficient gravity within the art.17 (1)(d) ICCSt. In *Lubanga* the PTC I said that the gravity threshold was mandatory and should be examined before applying the complementarity test. Gravity concerns art.6-8 ICCSt (*rationae materiae* jurisdiction) and obliges the ICC to select among the most serious crimes in order to investigate and adjudicate serious cases, while respecting state sovereignty.[31]

International social alarm must inhere in the crimes at hand and "the relevant conduct must present particular features which render them especially grave". The

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https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf

[30] Ibid, Informal expert paper, p. 4

[31] Kai Ambos, *"The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach",* Springer-Verlag Berlin Heidelberg, (2010), p.43, DOI 10.1007/978-3-642-11273-7_5

crimes also must be either systematic or large-scale.[32] An important example where the Prosecutor accepted insufficient gravity of a situation was the Iraq, explaining that the total number of victims is 20 individuals. Intense reaction followed, as a reverberation of such stance, which was abated by the decision of Prosecutor Fatou Bensouda to re-open preliminary examinations on the situation.[33]

Sufficient Gravity of crimes is included in ICTR/ICTY's jurisprudence and the completion strategy (prosecution of the senior leaders), as well.[34]

3. Elements of the Principle:

3.1.a. 'Case', art. 17(1)(a) ICCSt

This term comprises the suspect under investigation and the conduct that triggers criminal responsibility in light of the Rome Statute.[35]

3.1.b. 'Conduct', art. 17(1)(a) ICCSt

This term comprises the suspect and the situation described in the incidents under investigation which are attributed to the suspect.[36]

3.1.c. 'Incident'

'Incident' pertains to a *"historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more perpetrators*". The specific spectrum of an incident cannot be abstractly ascertained.[37]

3.2.a. 'Same person/same conduct test' at the *'situation phase'*

In *Lubanga* PTC I ruled that a determination of a case's inadmissibility demands that the *"the national proceedings…encompass both the person and the*

[32] *Prosecutor v. Lubanga,* "Decision on the Prosecutor's Application of a Warrant of Arrest", Case No ICC-01/04-02/06-08, Date: 10 February 2006, paras. 41, 45-46, 65-66

[33] "Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq", Statement, 13 May 2014, available at: https://www.icc-cpi.int//Pages/item.aspx?name=otp-statement-iraq-13-05-2014

[34] For relevant case law see: UN MICT,Case law database, available at:http://cld.unmict.org/advanced-search/?&notion[0]=397

[35] Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi', "Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled , Decision on the admissibility of the case against Saif Al-Islam Gaddafi", The Appeals Chamber, Case No: (ICC-01/11-01/11 OA 4), Date: 21 May 2014, paras. 1, 61, available on: https://www.icc-cpi.int/CourtRecords/CR2014_04273.PDF

[36] ICC-01/11-01/11 OA 4, paras.1, 62

[37] ICC-01/11-01/11 OA 4, par. 62

conduct which is the subject of the case before the court"[38] and the AC continued that this test must be applied at the *'situation phase'*, when the suspects are typically unidentified.[39] However, in its decision to authorize the Prosecutor to commence investigation into Kenyan post-election violence, the PTC II arranged the issue by accepting that:

> *"admissibility at the situation phase should be assessed against certain criteria defining a 'potential case' such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)".*[40]

3.2.b. Same person/same conduct test' at the *'case phase'*

At the 'case phase' the admissibility's determination becomes more specific, for the Court assesses, if national proceedings concerning those particular individuals who, at the same time, are subject to the OTP's proceedings, are ongoing.[41] The AC approved the PTC's determination and added that: *"the national investigation must cover the same individual and* ***substantially*** *the same conduct as alleged in the proceedings before the Court"*.[42] As it will be explained below, severe criticism has

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[38] *Lubanga* Arrest Warrant, ICC, Pre-Trial Chamber I, Case No: ICC-01/04-01/06-8-US-Corr, Date:10 February 2006, par 31, available at: https://www.icc-cpi.int/CourtRecords/CR2006_02234.PDF

[39] The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Case No: ICC-01/09-02/11 O A Date: 30 August 2011, par.37, available at: https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF Situation in the Republic of Kenya in the Case of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang , "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Case No:ICC-01/09-01/11 OA , Date: 30 August 2011, par. 38, available on: https://www.icc-cpi.int/CourtRecords/CR2011_13814.PDF

[40] Situation in the Republic of Kenya, "Decision pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", Pre-Trial Chamber II, Case No:ICC-01/09-19, Date: 31 March 2010, par. 50, available at: https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF

[41] *Muthaura* Pre-Trial, Pre-Trial Chamber II, Case No: ICC-01/09-02/11-96, Date: 30 May 2011, par. 50, *Ruto*, Pre-Trial Chamber II, Case No: ICC-01/09-02/11-101, Date:30 May 2011, par. 54

[42] *Muthaura*, Appeals Chamber, Case No ICC-01/09-02/11-274, Date:30 August 2011, par. 39, *Ruto*, Appeals Chamber, Case No: ICC-01/09-01/11-307, Date: 30 August 2011, par. 40

been offered to the '*substantially* same conduct requirement'.[43]

3.3. Inactivity

A State's inactivity may emerge from manifold factors, including the lack of an adequate legislative framework; the existence of laws that impede the development of domestic proceedings, such as amnesties, immunities or statutes of limitation; the deliberate concentration on proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity.[44]

3.4.a. Genuineness of proceedings

The Court's discretion is limited to the evaluation of the quality of domestic proceedings. During the negotiations the "effectiveness" criterion was rejected as too subjective, while the "genuineness" criterion was considered by most delegations to be the most proper wording. U.S. delegations insisted on *'bona fides'* term, explaining that effectiveness was vague, as well.

3.4.b. Unable or unwilling state

First of all, the assessment of the inability or unwillingness of a state is not a simple task. If the former government of a state abets, funds, or in any other way contributes directly or indirectly to the commission of a crime, does it suggest that the state is currently been malfunctionally or dysfunctionaly governed, so it cannot possibly genuinely prosecute? The answer is not straightforward, since the next government in a state in transition is usually attaching great importance to criminal accountability. The *Fund for Peace* has placed thirty five states on an alert list of failing states and another eighty two states on the warning list of states that are at risk of failing.[45] It may prove politically incorrect to intervene in a failed or politically

[43] Professor Kevin Jon Heller mentions: *"The same-conduct requirement expects states to be mind-readers"*in Kevin Jon Heller, "*A Sentence-Based Theory of Complementarity*", Harvard International Law Journal /Volume 53, number 1, (2012) , 86-133, p. 125

[44] OTP, Policy Paper on Preliminary Examinations, November 2013, par.48, available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

[45] Fund For Peace, Fragile States Index 2017- Annual Report, https://reliefweb.int/sites/reliefweb.int/files/resources/951171705-Fragile-States-Index-Annual-Report-2017.pdf

unstable state, by exercising universal or international jurisdiction, on the grounds that, seeking to prosecute former or sitting leaders, who may enjoy populace's endorsement under these precarious circumstances, may trigger further turmoil in a whole region. Prosecution and adjudication by exterior international actors may induce further turbulence to a population, while inaction may lead to prolonging victimization. The complementarity principle can play a significant role in the effective dispensation of justice in states that confront grave risks, since the ICC is generally either directly (by ratification of the ICCSt) or indirectly (by membership in United Nations and the duty of governments to cooperate in such matters) approved.

The Court has held that prolong and fruitless proceedings can lead to the acceptance of a state's "inability" to prosecute in *Bemba Gombo*. Notably, on no occasion did the drafters intend to coincide unwillingness with "total collapse". On the contrary the notion of unwillingness approximates the 'ineffectiveness' of national judicial systems. Importantly, in *Katanga* the 'unwillingness' notion was analyzed.

Some scholars claim that extreme violations of the accused's rights can be assumed indicators of unwillingness such as unjustified delays, deprivation of legal assistance, continuance of the procedures without taking an apology, use of torture to acquire evidence, bribery of civil servants and judges, impartial/unbiased official proceedings that are *"inconsistent with an intent to bring the accused to justice"*. The extent of the violation of rights must be quite high and indicate that there had been no trial at all, according to the authors Mégret and Samson (*2013*) [46], but in my view that threshold is still inapproachable.

3.4.b.i. Due Process Thesis

The Informal Panel of Experts mentions that human rights thresholds may be relevant and useful in the assessment, regarding whether the proceedings are undertaken genuinely or not. Of course, this must be the exception to the rule (art. 17(2) ICCSt).[47]

Due process thesis is valid when states, which seek to maintain control over

[46] Frédéric Mégret and Marika Giles, *"Holding the Line on Complementarity in Libya The Case for Tolerating Flawed Domestic Trials"*, Journal of International Criminal Justice 11, (2013), 571-589 DOI:10.1093/jicj/mqtO35, pp. 585-586

[47] Ibid, Informal Expert Paper, p.8

cases, must ensure that trials meet international standards of due process, as elaborated by international human rights fora.[48] Therefore, breaches or insufficiencies of due process safeguards of domestic prosecutorial and judicial activities may act as catalysts to the admissibility of the case before the ICC on the basis of either 'unwillingness' or 'inability' genuinely to prosecute. Others stand in favour of national systems' 'unavailability' pursuant to art. 17(3) ICCSt. [49]

This theory pronounces that states carrying out investigations in a situation should take under consideration international standards of the accused's human rights.

Prof. Heller's view is that, the ICCSt provides the Court with power to aver the "unwillingness or inability" of a state, when State's legal action is designed to make a defendant more difficult to convict, namely, when the due process and legal framework thresholds are especially high. He adds that, when infringing upon due process rights, national systems fall into a considerable legal amiss but it cannot culminate in 'inability to prosecute'.[50] Similarly, the former ICC's Prosecutor M. Ocampo stated that ICC is not a Human Rights Court, as the judges do not determine the fairness of the proceedings. They determine the proceedings' genuineness, instead.[51] Grave breaches of the accused's rights could lead to the acceptance of 'unwillingness', as it happened in *Gaddafi* case.

With due regard being given to the principle of proportionality, I personally think that, outrageous violations of the substance of fair trial rights, which are vastly respected, could amount to a case's admissibility. If domestic proceedings are organized in such a manner, inconsistent with the intent to bring the person to justice, and it either makes easier (show trials) or more difficult (sham trials) for judges to convict indictees the debate on admissibility opens. To support my opinion, art. 20 (3)(b) ICCSt, art. 21(1)(b) and (c) ICCSt, imply that several instruments could be

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[48] Ibid, Frédéric Mégret and Marika Giles, at 572- 574, See elaboration on this theme: Daniel Sheppard, *"The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute"*, International Criminal Law Review 10 (2010), 43-71.

[49] Hermanus Jacobus van der Merwe, *"The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions*", International Criminal Law Review 15, (2015), pp. 40-75, at p. 47, Most scholars support the 'unwillingness' of states because of egregious breaches of due process safeguards.

[50] Kevin Jon Heller, *"The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process",* 17 Criminal Law Forum, (2006), 255-280, at 257,

[51] Former ICC Prosecutor Luis Moreno-Ocampo's statement during a visit to Libya in November 2011, available on: http://www.aljazeera.com/news/africa/2011/11/ 20111123958211709 09.html

used for the protection of the rights of the accused, the decisions in *Lubanga,*[52] *Gaddafi* and *Al-Senussi*, indicate that not every breach of fair trial rights culminate in the admissibility of the case, without expressly excluding this probability. Art. 21 and 22 ICTYSt, 20 and 21 ICTRSt explicitly secure the accused's rights in the same way as the victims' and witnesses' rights providing him/her with fair trial rights. Rights stipulated in art. 55 ICCSt could be legal tools in the assessment of the violation of the suspect's/accused's rights, too.

We should also not disregard that in many countries trials in absentia are legitimate and rife and capital punishment has not been abrogated. Of course in the Statute such tactics are forbidden, but in *Al-Senussi*, in which the defendant asserted that, if he was going to be tried by Libyan judges, capital punishment was a possible sentence, the Court dismissed this allegation. The defendant was indeed sentenced to death. His appeal on the decision of sentence is pending at the moment. Therefore, the Court should not have allowed the imposition of such a sentence by suggesting the Libyan executive amend national law towards a more humane lenient sentence, otherwise it should hold the case admissible.

3.4.c. Unavailability of the national judicial system

This term was intentionally left abstract by the delegates in Rome Conference and thus remained open to multiple interpretations and extent conceptualization. In the ILC's Report (1994) it was clearly stated that the Court must operate, when cases are predetermined to be mistried in national courts, in other words when the system does not fully function. Other scholars deem that the term implies the failure of national systems to reach the purpose of the Statute. According to the Informal Expert Paper, minor gaps or deficiencies that may affect due process do not constitute unavailability. Instead, if the capability of the judicial system to prosecute and punish perpetrators of international crimes is affected, then unavailability is imminent; hence any "lack of access", or "lack of substantive or judicial penal legislation" or "any

[52] *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006",Case No.: ICC-01/04-01/06 (OA4) Date: 14 December 2006, par.37, available at: https://www.icc-cpi.int/CourtRecords/CR2007_01307.PDF

obstruction by uncontrolled element" can debase the systems' availability. [53]Another view mirrors the notion that if a system aims at perpetrators' shielding from criminal responsibility, then it definitely is "unavailable".[54] The terms of *'total or substantial collapse'* or *'unavailability'* are composed of the following features: i) lack of necessary personnel, judges, investigators, prosecutor, ii) lack of judicial infrastructure, iii) lack of substantive or procedural penal legislation rendering the system *'unavailable'*, iv) deprivation of access to the prosecutorial or judicial system, v) obstruction by uncontrolled elements rendering the system "unavailable", vi) amnesties, immunities rendering system "unavailable".[55]

3.5. Intent to shield a person from justice[56]

This element may be evaluated in view of indicators such as, serious discrepancies in the consolidated practices and procedures; blatantly insufficient steps in the investigation or prosecution; ignoring evidentiary material or giving it insufficient weight; threat of victims, witnesses or judicial personnel; fabricated evidence, refusal to provide information or to cooperate with the ICC, e.t.c.

3.6. Unjustified delay in the proceedings

The slow pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; if there is evidence of a lack of volition to bring the perpetrators concerned to justice or not demonstrate unjustified delay in the proceedings.[57]

3.7. Independence in the proceedings

Clues of this condition are the following: the alleged interference of state organs or politicians, in the concealment of the alleged crimes during the preliminary

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[53] Nidal Nabil Jurdi, *"The Complementarity Regime of the International Criminal Court in practice: is it truly serving the purpose? Some lessons from Libya",* Leiden Journal of International Law, Volume 30, Issue 1, (2016), 1- 46, at. 5-7, Published online: 7 June 2016, available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2790795

[54] A. Walker, *"The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process",* 18 UCLA Journal of International Law and Foreign Affairs, (2014), p.303

[55] Informal Expert Paper: the Principle of Complementarity in practice, p. 31.

[56] Policy Paper on Preliminary Examinations, par. 51

[57] Policy Paper on Preliminary Examinations, par. 52

investigations and so on, the substantial deficiency in judicial and prosecutorial independence, the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to governmental institutions; recourse to extra-judicial bodies; bribery and corruption of investigators, prosecutors and judiciary e.t.c.[58]

3.8. Impartiality in the proceedings

Public statements to the detriment or in favour of the suspect, breach of the presumption of innocence, confidentiality, discriminatory stance of officials or the executive towards personnel involved in the criminal procedure e.t.c could be indicators of impartiality in the proceedings

4. The statutory procedure of applying complementarity

- At the preliminary stage 'situation'-

A. The Prosecutor has the duty to notify states parties for his/her intent to commence preliminary investigations over a situation in four instances. (art.18 ICCSt)

i) when the UNCS refers the case to the Prosecutor (art.13(b) and art.14 ICCSt)
ii) when a State party has referred a situation to the ICC.(art.13(a) ICCSt)
iii) when the Prosecutor in his/her own initiative commences an investigation (art. 13(c) art. 15 ICCSt and Rules 46-50 RPEs).[59]

B. Art.18 (2) ICCSt provides the State with the right of asking the Prosecutor to suspend the preliminary investigations, insofar as the former adduce evidence proving that they are already investigating the situation in question.

C. The Prosecutor has two alternatives:

[58] Policy Paper on Preliminary Examinations, par. 53

[59] The situation in Burundi is a characteristic example of lack of this notification. Noteworthy literature on the theme is: Kevin Jon Heller, *"How the PTC Botched the Ex Parte Request to Investigate Burundi*" *"A Response to Dov Jacobs on the Burundi Investigation",* Articles, Opinio Juris, 10 November 2017 and 12 November 2017, available on: http://opiniojuris.org/2017/11/10/33332/,and http://opiniojuris.org/2017/11/12/a-response-to-dov-jacobs-on-burundi/ , respectively, Dov Jacobs, *"Peek-A-Boo: ICC authorises investigation in Burundi, some thoughts on legality and cooperation"*, article, Spreading the Jam, 11 November 2017, available on: https://dovjacobs.com/2017/11/11/peek-a-boo-icc-authorises-investigation-in-burundi-some-thoughts-on-legality-and-cooperation/

iv) he/she can defer examinations according to the request for suspension of proceedings. If the Prosecutor chooses this path, he/she is able to review the development of national procedure after six months or sooner. He/she must also decide whether the state is investigating the 'same case' as he/she does.
ii) he/she can file an application to the PTC in order that it authorizes an investigation. If the PTC approves this request, the state can appeal the decision of authorization.

D. Before commencing an investigation the Prosecutor is required to assess whether "the case is or would be admissible under article 17 ICCSt". Having had insufficient evidence to support the admissibility of the case, he/she informs the PTC that the proceedings will not be initiated. In other words, the Prosecutor must fulfill the requirements of art. 53(1) ICCSt and Rules104-106 RPEs.

-At the investigation stage 'case'-

Art 19 and art. 82 (1)(a) ICCSt provide that either the Chamber, the State or the accused in question can challenge the admissibility of the case in first and second instance and Rules 58-62 RPEs are applied during the trial of the challenges'. In exceptional circumstances, the PTC may allow the State a second challenge on the admissibility.[60] Furthermore, the Prosecutor has the power, if the case was considered inadmissible by the PTC, to request the review of the decision under the condition that he/she is fully satisfied that *new* facts have appeared.[61]During the investigation stage all the above provisions continue to be invoked, namely the assessment of cases' admissibility and fulfillment of complementarity is a continuing process and may alter in the course of the international proceedings.

It would be a serious omission not to mention the significant role the Jurisdiction, Complementarity and Cooperation Division of the Court plays to the Prosecutor's work, for the Division's members examine and evaluate data according to art. 15 and 53 (1) ICCSt and rules 48 and 104-106 RPEs with the purpose of assisting the Prosecutor in his/her decision to proceed with an investigation.[62]

[60] See art. 19(4) ICCSt
[61] See art. 19(10) ICCSt
[62] See Regulation 7 Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Official Journal Publication, 23th April 2009, available at: https://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf

Section III – Topical topics on the principle

1. The primacy regime in contrast to the complementarity regime

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are *ad hoc* Tribunals and were established with resolutions 827 (1993)[63] and 955 (1994)[64] respectively, in order to engage in the administration of justice following the armed conflicts that took place in former Yugoslavia and Rwanda. Art. 9 ICTYSt and art. 8 ICTRSt provide a legal framework on the relations between the Tribunals and national courts. Contrary to the principle of complementarity, which regulates the relation between states and the ICC in favour of the primacy of the national jurisdiction over international crimes, these Tribunals, have in principle concurrent jurisdiction with the states, but, in any event, the Tribunals are entitled to request the deferral of cases so as to try them themselves. This is the so-called 'principle of primacy', based on the vertical concurrent jurisdiction. The rationale of the Tribunals' primacy lies to the special cause they must serve, namely the contribution to the instauration and preservation of peace in these territories and to the prevention of the threat to international peace and security.

It is appropriate to mention, for the purpose of the thesis at hand, some interesting issues which came in light after the voting of the U.N.S.C. on resolution 827.

On the one hand, once the UNSC had recognized that ongoing armed conflict in the above states consisted 'threat to peace', the establishment of *ad hoc* tribunals, with the aim of ensuring that justice would be seen in cases of great international gravity, had been considered an imperative. After the adoption of the ICTY's Statute, France, U.S.A., U.K. and Russian Federation expressed their reservations on art. 9 ICTYSt in statements, as follows: a) French and U.S. delegates stated that if there were cases of serious international crimes wherein national courts showed partiality

[63] Resolution 827 (1993), S/RES/827 (1993), 25 May 1993, Adopted by the Security Council at its 3217 th meeting. on 25 May 1993, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

[64] Resolution 955 (1994) , S/RES/955 (1994), 8 November 1994, Adopted by the Security Council at its 3453rd meeting, on 8 November 1994, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement

then, and only then, could primacy be applied (art. 9 in light of art 10(2) ICTYSt), b) U.K.'s delegate suggested a 'two-speed' primacy, namely that art. 9(2) ICTYSt should be applied in cases within the territory of former Yugoslavia and in cases which concern all the other national judicial fora, primacy under the interpretation of art. 10(2) ICTYSt should be exceptionally applied, c) the Russian representative proposed that, when states assess, whether they should refer their cases to the jurisdiction of the Tribunal they should be carefully weighing up all possibilities. If states refused to refer cases to the Tribunal, they should justify their decision. The ICTY declared that those statements would be employed as 'authoritative interpretations', where appropriate, while it had retained the discretion to independently specify the principle, according to Rule 9 (iii) RPEs. On the other hand, the wording of art. 8(2) ICTRSt is clear-cut as regards primacy, because primacy in this Statute is granted not only over national but over *all* courts, too. Thus, there is no room left for ambiguities and misinterpretations in this Statute.[65]

Implications of the aforementioned statements emerged in *Tadić,* in which the AC emphasized that a) prosecution for ordinary crimes, b) proceedings designed to shield the accused from justice and c) cases being not diligently prosecuted constitute hurdles to the genuine prosecution of Tadić. The defendant recommended the reservations expressed by France/U.S.A. in order to assert that primacy concerns only the *ne bis in idem* principle and not the crimes defined in art. 2 to 5 ICTYSt, and insofar as Germany commenced proceedings against him, the case should be held inadmissible before the Court. The ICTY judges, though, rejected the validity of the reservation, because primacy covered crimes under art. 2 to 5 ICTYSt and the implementation of double-jeopardy, for German authorities had not delivered yet any judgement either on preliminary issues or on the merits.[66] Finally, the ICTY rightfully did not implement the aforesaid reservations, for they could hinder all the work and procedures before the Tribunal.

However, in some instances notwithstanding the fact that the Prosecutors of ICTY/ICTR could have requested the deferral of a case with the aim of lifting

[65] Bartram S. Brownt, "*Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*", The Yale Journal of International Law, Vol 23: 383, (1998), 383-436, pp.398-403

[66] Ibid, Bartram S. Brownt, pp. 403-406

jurisdictional conflicts, they preferred to refer cases to national courts. Thus, they formed a prosecutorial practice more relative to complementarity. Professor El Zeidy *(2008)* argues that both the *ad hoc* Tribunals and the ICC are in fact regulated by the complementarity principle, although through dissimilar legal mechanisms.[67]

Moreover, the newly introduced "completion strategy" and the amendment of Rule 11 *bis* of the ICTY/ICTR RPEs enable the Tribunals to refer back to national courts mid level and lower level cases. Thus, domestic courts recover their sovereign rights to investigate, prosecute and try those most responsible. This referral can be forestalled by the Referral Bench, if the State does not comply with its obligations to conduct proper investigative and judicial activities. The notions of cooperation, allocation of duties and cessation of national proceedings in favour of the Court, if states do not diligently prosecute, are found in the complementarity itself, but, in any case, this strategy is autonomous in nature.[68] The Office's prosecutorial strategy of investigating and prosecuting those most responsible for the most serious crime of the ICC has been influenced by the ICTY/ICTR's prosecutorial strategy. [69] Nonetheless, as detailed below, the OTP's Strategic Plan for 2016-18 obscures the genuineness of complementarity.

In *Tadić*, *Mrki* and *Re: The Republic of Macedonia* before the ICTY and in *Musema*, *Bagosora*, or in the Radio *Televission Libre des Mille Collins SARL* before the ICTR, as will be analyzed below, the Prosecutors applied Rule 9(iii) RPEs of the ICTY/ICTR for the cases specially concerned factual or legal dilemmas that may have had repercussions to the international prosecutorial actions. Thus, the dilemma in the referral of these cases was not whether the states have undertaken judicial charades or not, but whether they were of great importance to the Tribunals' operation and jurisprudence.[70]

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[67] Mohamed M. El Zeidy, "*From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 bis of the Ad Hoc Tribunals*", British Institute of International and Comparative Law, The International and Comparative Law Quarterly, Vol. 57, No. 2 (Apr., 2008), 403-415, p. 405

[68] Ibid, Mohamed M. El Zeidy, pp. 405-406

[69] ICC - OTP, Strategic Plan – 2016-2018, published on: 6.07.2015, paras. 35-36, available at: https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf, In appropriate cases the OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes. The Office may also consider prosecuting lower level perpetrators where their conduct was particularly grave and has acquired extensive notoriety.

[70] Ibid, Mohamed M. El Zeidy, p.407

In *Karamira*[71] (Colonel Théoneste Bagosora), after a friction with the Rwandan Government, the Prosecutor referred the case to national courts, even though he could easily have kept the case before the ICTR by invoking the principle of primacy. In *Djajić* and *Jorgić*, German authorities had already been investigating the cases, when the ICTY's Prosecutor decided to assist them and decided that it was not pragmatic to request the cases' deferral. By no means does this approach of handling the cases entail the exercise of absolute primacy over these cases. It rather forms a new model of complementarity based on the concept of allocating duties purely based on the prosecutorial discretion.[72]

As it will be analyzed below, primacy has gradually moderated, leaving room for national jurisdiction to deal with more cases, so primacy developed a tendency towards complementarity.

2. Universal jurisdiction and subsidiarity

Universal jurisdiction is a form of states' extraterritorial jurisdiction, concerns crimes which cause harm to the international community as a whole, such as piracy, terrorism, grave breaches of the four Geneva Conventions and the Additional Protocols, drug trafficking, human trafficking e.t.c and can be exercised by a state insofar as the *forum non conveniens*[73] is unable or unwilling to exercise jurisdiction over the purported serious crimes. This form of jurisdiction is based mainly on three pillars; the presence of the suspect, subsidiarity and respect for personal immunities. Most times the state which expresses the volition to prosecute and try those crimes is the state that arrests the suspect(s). There are conventions stipulating the obligation of all states parties to commence national proceedings if crimes, as provided in those conventions, were committed (primacy of universal jurisdiction)[74], while others

[71] Karamira, Tribunal de première instance de Kigali, 14 Février 1997, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=DF3A3F7FF0EE007CC125708500423566&action=openDocument&xp_countrySelected=RW&xp_topicSelected=GVAL-992BU6&from=topic&SessionID=DNMSXFGMJQ

[72] Ibid, Mohamed M. El Zeidy, pp.408-409

[73] The state, which has active or passive personality jurisdiction or territorial jurisdiction over the alleged crimes, but demonstrates the unwillingness to handle the case in question.

[74] Jordan J. Paust, M. Cherif Bassiouni, Michael Scharf, Jimmy Gurulé, Leila Sadat, Bruce Zagaris, *"International Criminal Law: Cases and Materials",* Carolina Academic Press, Durham, North Carolina, 3rd edition, (2006), p. 155, United Nations Convention on the Law of the Sea, 1982, art. 105, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf,

stipulate the primary responsibility of the state having arrested the accused to prosecute, otherwise, it has the obligation to extradite him/her (subsidiarity of universal jurisdiction).[75] In customary law the subsidiary basis of the principle of universality is dominant. Moreover, it could be asserted that, states by invoking universal jurisdiction, could relieve the ICC's work. In the event of states' relative inertia, where vague proceedings and questionable volition to investigate and prosecute take place, subsidiarity could be invoked by interested states.[76]

However, some puzzling questions then arise: a) which state should address the issue of 'inability' or 'unwillingness' of the state that primarily has jurisdiction over the alleged crimes?, b) how the third state, willing to adjudicate, can assure the achievement of mutual cooperation and how the state, that divests its jurisdiction in favour of another state can balance the political cost of such a decision?, c) does the principle of *jus de non evocando* remain intact?, d) in which way does this principle avoid the fragmentation of (inter)national criminal justice? e) How can competent states be obligated to extradite a perpetrator who committed offences of 'political nature'?

The UNSC's prerogative to refer situations to the ICC, despite the fact that, the states concerned may not be member states to the Rome Statute, led some scholars to call the ICC's jurisdiction as "universal international jurisdiction".[77] Seeking to give primacy to territorial and national principles of jurisdiction the ICC's *desideratum,* though, differs to the one of universality, which is to give primary powers to a more competent state to adjudicate a case. The ICC is the most proper forum for the definition of inability' or 'unwillingness' of a state, since it can provide

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Geneva Convention Relative to the Protection of Civilian Persons in time of war of 12 august 1949, available at: http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf

[75] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, available at: http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, art. 4(2)(b), available at: https://www.unodc.org/pdf/convention_1988_en.pdf, Convention on the Physical Protection of Nuclear Material, art. 8(2), available at: https://www.iaea.org/sites/default/files/infcirc274.pdf, International Convention for the Suppression of the Financing of Terrorism, art. 7(4), available at: http://www.un.org/law/cod/finterr.htm

[76] Fannie Lafontaine, *"Universal Jurisdiction - the Realistic Utopia",* Journal of International Criminal Justice 10, (2012), 1277-1302, at. 1286, Electronic copy available at: http://ssrn.com/abstract=2176730

[77] Diane F. Orentlicher, "*The Future of Universal Jurisdiction in the New Architecture of Transnational Justice"*, pp.217-218, in Stephen Macedo, "*Universal Jurisdiction: National Courts and Prosecution of Serious Crimes under International Law*",PENN, University of Pennsylvania Press, Philadelphia, (2006)

states with case law and expertise on the issue. It is also authorized to try serious cases and can overlook possible 'customary' immunities or immunities established via treaties.[78] The ICC eliminates the chances of lack of judicial cooperation, for it can promptly and directly refer to the UNSC states refusing to extradite the alleged perpetrators. The principle of complementarity is virtually different than subsidiarity in many ways. Not only does the former principle apply in cases where states' inertia take place, but in more complex instances as described in art. 17 ICCSt and developed by the Court. Complementarity is not restricted to individual cases, but applies in a more wide perspective, namely in situations, and at the same time complementarity can be used as the strategy through which stimuli and leverage can be given to states parties to improve national judicial and prosecutorial systems. Not to forget that the ICC is authorized to commence proceedings when proper, either due to the ratification of the Statute by states or the UNSC referral. Contrariwise, a state willing to exercise universal jurisdiction, as a right deriving from certain treaties, should first request a state to extradite the accused or prosecute, and secondly, if the requested state refuses all the options, it should file an application before the ICJ.

For instance, the ICJ has addressed the issue of applying the principle of universal jurisdiction in *Belgium v. Senegal*.[79] Belgium issued an international arrest warrant for the former President of Chad, Hisséne Habrè (1982-1990), for crimes against humanity, war crimes, torture, other violations of IHL committed during his dictatorship. In Senegal, where the accused resided, the Court of Appeal in Dakar held that Habrè continued to enjoy immunity. Belgium lodged an application instituting proceedings before the ICJ against Senegal arguing that the latter state was obligated to implement CAT, namely it should either respect the principle *aut dedere aut judicare* (art. 7(1) CAT). Senegal actually breached this obligation and it could not invoke the implementation of domestic law or financial difficulties in order to abstain from the execution of the arrest warrant.

[78] Situation in Darfur, Sudan in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, "Public Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir", Pre-Trial Chamber II, Case No: ICC-02/05-01/09,Date:11 December 2017, par. 27,available at: https://www.icc-cpi.int/CourtRecords/CR2017_07156.PDF

[79] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Summary of the Judgment of 20 July 2012, available at: http://www.icj-cij.org/files/case-related/144/17086.pdf, International Crimes Database, "Belgium v. Senegal", available at: http://www.internationalcrimesdatabase.org/Case/750

> "[…] The choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight because, while extradition is an option offered to the State by the Convention, prosecution, on the other hand, is an international obligation laid down by the Convention, the violation of which is a wrongful act engaging the responsibility of the State.[…]"[80]

Therefore, both the subsidiarity and complementarity are different ways of seeking international criminal justice. Subsidiarity could substitute complementarity in case the ICC does not have *ratione personae, ratione materiae or ratione temporis* jurisdiction over the alleged perpetrators (e.g. aircraft piracy, child pornography e.t.c.) and if the case(s) under examination are not of sufficient gravity. Plus, if a state has forestalled the exercise of universal jurisdiction, the ICC should not bar national proceedings but cooperate with the state.

3. Amnesties: Do they hinder complementarity?

Schabas *(2007)* on immunity: *"it is unreasonable to believe that a group of States, acting collectively, can withdraw an immunity that exists under international law with respect to third states, when they cannot do this individually".*[81]

Prof. Stahn was elaborately engaged in the problem of amnesties and pardons proposing four main principles for handling the problem: a) it should be the Court's autonomy to judge on the permissibility of amnesties/pardons,[82] b) it must be generally forbidden to interfere with the criminal responsibility deriving from core crimes by conferring amnesties or pardons, c) targeted prosecution, namely prosecutorial orders that are confined to the most serious violations of IHL and the most responsible individuals, is preferable, d) amnesties/pardons should be the

[80] Ibid, Summary of the Judgment of 20 July 2012**,** paras: 92-95
[81] William Schabas, "*An Introduction to the International Criminal Court",* Cambridge University Press, (2007), at. 232
[82] Nevertheless, a UNSC's request under art. 16 ICCSt in conjunction with art. 39 UN Charter, takes the form of obligatory resolutions and undemines this autonomy, because the political discretion of Security Council precedes any other form of judicial power.

exception, not the rule and applied under strict conditions like alternative forms of justice.[83] Art. 53(3) and art.18, art.19, and art.12 ICCSt regulate the permissibility of amnesties/pardons, the application of which will be examined.

Prof. Stahn after analyzing the aforementioned possible cases introduces four guidelines on how the ICC should review amnesty laws:

Amnesties/pardons that completely exempt from criminal accountability the statutory crimes are generally adverse to the spirit of the Statute and they could be applied in a limited number of crimes. IHL, the Rome Preparatory Committee, ICTY[84] jurisprudence and paragraph 6 of the Preamble ICCSt have developed the general rule that amnesties/pardons are incompatible with the core crimes of the Geneva Conventions, even though they are not broadly forbidden. Therefore, if there is an apparent rule to prosecute some sorts of crimes (e.g. genocide), the ICC should not accept amnesties/pardons as legitimate alternatives.[85]

In *the Prosecutor v. Omar Hassan Ahmad Al Bashir*[86] (Darfur), the accused was charged with war crimes, crimes against humanity and genocide during the period from March 2003 to 14.07.2008, the PTC II found that immunities concern only member states in the Convention on the Privileges and Immunities of the Arab League ("1953 Convention") and not third states, even though they may be members in the League of Arab States. The Registry expected Jordan to arrest and surrender the accused, but the state, by invoking art. 98(2) and 27(2) ICCSt, asserted that i) it was obligated under the 1953 Convention to respect the immunity of the sitting Head of State of Sudan, owing to the fact that Sudan did not consent to surrender President Al Bashir to the ICC[87], ii) the relations between the two states were subjected to customary law, treaty rules and not the ICCSt, as Sudan is not a state party in the Rome Statute, iii) the UNSC could had explicitly lifted the immunity of Sudanese

[83] Carsten Stahn, *"Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court",* Journal of International Criminal Justice 3 (2005), 695-720, at 700-701

[84] Prosecutor v. Ljube Boskoski Joran Tarculovski, Judgement of the Appeals Chamber, Case No: IT-04-82-A, Date: 19 May 2010, par. 220, available at: http://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_ajudg.pdf,
Prosecutor v. Jelena Rašić, Contempt Appeal Judgement, Case No:IT-98-32/l-R77.2, Date: 16 November 2012, paras:17-18, available at: http://www.icty.org/x/cases/contempt_rasic/acjug/en/121116_judgement.pdf

[85] Ibid, Carsten Stahn , at.701-703

[86] Ibid, ICC-02/05-01/09, par. 2

[87] ICC-02/05-01/09, paras. 5, 7,17

individuals in the resolution 1593 (2005) or subsequent resolutions but it did not proceed towards that direction.[88] The PTC II held that there is no customary law on immunities concerning the *commission international crimes,* the UNSC implicitly waived Al-Bashir's immunity in the resolution 1593[89] and Sudan has not officially confirmed that it is a member of the Convention in question, that art. 98 (1) and (2) ICCSt cannot be applied in this case and in light of the article 27 (2) ICCSt, Sudan cannot invoke immunity of individuals by virtue of their official capacity.[90] To sum up, the ICC referred the matter of non-compliance of Jordan to UNSC and the ASP.[91]

Findings of a reconciliation committee, though, could be employed as mitigating factor when deciding on the accused's sentence. For instance, ICTY has accepted that the public expression of remorse is a mitigating factor. Similarly, it could be appraised as a mitigating factor, the potential case in which a perpetrator willfully ceased his criminal conduct and surrendered his weaponry in the context of an amnesty-peace deal, as well.[92]

Amnesties/pardons must have been developed in consensus and ratified by states involved in armed conflicts or attacks and by states whose nationals were the perpetrators of grave breaches (self-granted amnesties/pardons are generally unacceptable).

Targeted prosecution may be another viable solution. Targeted prosecution means prosecution focusing on the most serious crimes and the most responsible perpetrators (i.e. planners, inciters, leaders, persons who showed the most outrageous conduct). Thus, if this method was applied, some of the cases brought before the Court would be inadmissible. The gravity of a case (art. 17(1)(d) ICCSt) could be a significant indicator for applying targeted prosecution. The Court should balance, if a case is of sufficient gravity in order to decide whether it is admissible; hence, crimes committed in a restricted manner (e.g. few victims, few acts e.t.c.), the perpetrator is low-ranked or was "forced to commit crimes", may be considered of not sufficient

[88] ICC-02/05-01/09, paras. 15,16
[89] Abel Knottnerus, *"The Immunity of Al-Bashir: The Latest Turn in the Jurisprudence of the ICC"*, EJIL:Talk!, 15 November 2017, available at:https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/. Mr. A. Knottnerus argued that the UNSC's referral only triggered the ICC's jurisdiction and not the application of the Rome Statute in its entirety.
[90] ICC-02/05-01/09, paras. 27,30,32,38,39
[91] ICC-02/05-01/09, par. 55
[92] Ibid, Carsten Stahn, at. 704-706

gravity. To that end, ICTY has adopted the principle that the prosecution must concern 'leaders', and art. 1 SCSLSt reads that, the Court's competence is limited to *"persons who bear the greatest responsibility for serious violations"*. Of course, the borderline between the most responsible individuals and those who are not responsible is quite unclear, so it should be analyzed on a case-by-case basis.[93]

At this point, it is useful to examine each article which could be the basis for requests of amnesty/pardons' recognition.

Art. 53 ICCSt – the prosecutorial discretion and immunities/peace deals e.t.c.

Specifically, art. 53(1)(c) and Art. 53(2)(c) ICCSt concern the OTP's decision to refrain from prosecution so as to serve the interests of justice. The Prosecutor, when forming his/her view and answering to the question if the future prosecution will serve the interests of justice, considers the indicia of case's gravity, victim's parameters, and special circumstances, age and infirmity of the alleged perpetrator', 'the perpetrator's role in the alleged crime'. The employed indicia do not derive exclusively from criminal justice and law, but they may lie in the national socio-political sphere. Art. 53(3)(b) and (1)(c) and (2)(c) ICCSt grant the Prosecutor discretion to decide whether amnesty laws can be considered as an exemption to the Court's jurisdiction. For this reason, he/she might, in terms of "prosecutorial activism", select to adopt the policy of amnesty deals, whereas the Statute poses equilibrium to this selection by allowing the PTC to reassess the scope and purpose of such a unique activism and to oblige him/her to pursue investigation or prosecution (Art. 53(3)(b) ICCSt)[94], if it disagrees with her/his submissions.

Nevertheless, these provisions do not interact with the general interests of national reconciliation but they are solely connected to personal interests. In other words, the Prosecutor will have the right to initiate proceedings in a certain situation and consider all the above criteria on a case-by-case basis. That is to say, the fact that a person has stood before a truth and reconciliation commission does not necessarily entail his innocence before the ICC. *Ergo*, the procedure before such a commission could be considered as a mitigating factor but not as a hindrance to his/her

[93] Ibid, Carsten Stahn, pp. 707-708
[94] Ibid, Carsten Stahn, pp. 697-698

international prosecution.

Alternative mechanisms to administer justice may be invoked with regard to art. 18 and art. 19 ICCSt. Governments which set up truth and reconciliation committees may endow them with the power to examine the possible commission of mass atrocities. Doing so could allow them to invoke art.18 ICCSt, namely to invoke the deferral of international prosecution in support of genuine national investigations (art. 17 (a) and (b) ICCSt). Of course, it is the PTC members' decision whether genuine investigation can domestically be materialized.[95]

Another provision that could permit amnesty laws to be implemented is art.16 ICCSt, which provides the UNSC with the right to suspend international investigations, aiming at conducting negotiations in the context of a national reconciliation deal. According to the purpose of this article, the UNSC is able just to adjourn proceedings before the Court, if it proves that investigations or proceedings are obviously antithetic to the goals of peace and security. Naturally, this is totally inconvenient to prove, even for the UNSC, owing to United Nations' own sharp policy towards amnesties and to the increasing acceptance that 'justice' and 'peace' are inextricably linked. Art. 24(2) UN Charter is also a possible bar to this UNSC's particular right, as amnesty deals are usually opposite to IHL and the UNSC should not lower criminal justice's standards. Furthermore, this right has certain time limits - the postponement of proceedings lasts 12 months, with possibility of renewal-, whereas amnesty deals have commonly permanent status.[96] The provisional nature and difficulties to prove renders the article's applicability almost impossible in the context of transitional justice.

3.1. Immunities for peacekeepers in the Darfur Situation- art. 16 ICCSt

Applying art. 16 ICCSt in preambular par. 2 and par. 6 UNSC Res 1593(2005)[97] , the Security Council emphasized that, in principle, crimes committed by nationals, current or former peacekeepers related to the operations in Sudan or authorized by the AU, will fall under the jurisdiction of the state which contributes to

[95] Ibid, Carsten Stahn, p. 698
[96] Ibid, Carsten Stahn, pp. 698-699
[97] UNSC Res1593, (31 March 2005), UN Doc S/RES/1593, available at: https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf

the missions in the territory (mainly U.S. nationals) and not under the ICC's jurisdiction. However, in my opinion, it is doubtful, if the spirit of the afore mentioned articles allow the Security Council to exclude one group of possible offenders from the criminal jurisdiction of the ICC, while it authorizes the Prosecutor to move forward with the investigation of crimes committed by Sudanese nationals and makes zero mention of the suspensive effect of art. 16 ICCSt. Moreover, in Resolutions 1422 and 1487, even though the Security Council refers to the suspension of proceedings against the same group, it implies that it can renew the deferral for more than one time.[98] It should be underlined that representatives of Philippines, Argentina and Tanzania were vehemently opposed to the legality of the resolution 1593, while the French representative stated that immunities would not be a barrier to the international obligations of France. Academics, also, were discussing on political incentives lying behind this resolution.[99]

Art. 17 ICCSt

The wording of art. 17(1)(a) and (1)(b) ICCSt may allow for amnesties insofar as alternative fora of justice handle the case in question. Naturally, a more flexible interpretation of the abovementioned legal pattern, so as to include not only criminal investigations but other forms of investigations, is preferable, as well. To give an illustration, the term *'investigations'* under the chapeau of art. 17(1) ICCSt could include procedures designed to accumulate evidentiary material and facts surrounding the context in which crimes committed and to record the specific perpetrator's conduct. If the ICC espouses this interpretation, it qualifies truth and reconciliation commissions to commence proceedings following the examples of South Africa and East Timor.[100] In these situations personalized testimony allowed the purported perpetrators not to be liable for their crimes.

The '*decision to prosecute'* element, laid down on art. 17(1)(b) ICCSt, implies that the prosecution must be conditional, complete and specific. Plus, when

[98] UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422 para 1. UNSC Res 1487 (12 June 2003) UN Doc S/RES/1487 para 1, avalaible at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement and http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1487(2003)

[99] Victor Tsilonis, "*The jurisdiction of International Criminal Court*", Athens, Nomiki Viliothiki, (2017), 272-277

[100] Ibid, Carsten Stahn, pp. 710-711

determining if a person deserves to be discharged under pardon/amnesties, certain criteria of inadmissibility should be followed: i) the crimes are investigated by a domestic or internationalized truth commission, or ii) criminal proceedings are held but sanctioned with symbolic or minimal punishment (pardons/quasi-pardons).

When a deal for peace and reconciliation derives from multiple sides, so neither side is privileged and the overall goal is reconciliation and not the improper use of law, it could be argued that it falls below the standard of Art. 17(2)(a) ICCSt., (c) '*Intent to bring the person to justice'*: Quasi-judicial mechanisms could handle criminal incidents after effective inquiries collect all the necessary evidence and facts and at least impose some forms of sanctions like community service, reparation e.t.c. so as the rights of the affected populace will be served.

3.2 Informal expert paper on complementarity on immunities:[101]

Considering the issues of alternative forms of justice within the art. 53(1)(c) and (2)(c) ICCSt, the OTP may suspend international process by justifying its decision by reference to the "interests of justice", according to the Informal expert paper. These alternative mechanisms of administering justice when supplementing international criminal justice may author several problems such as promoting impunity for ICC crimes.

Some elements should be taken into account in the case a state introduces an amnesty deal/pardon: a) the offenders most responsible, b) international legitimacy of an amnesty deal/pardon, c) self-amnesty, d) bringing to justice, e) quality of measures, f) Gravity and severity of crimes; g) international community interest in repression of such crimes; h) rights and interests of individual victims and groups of victims, as communicated by themselves or their representatives; i) interest of the affected society, as conveyed by its political representatives; and j) consistency in ICC prosecutorial policy, k) the imperative not to let the most serious crimes go unpunished.

The informal expert paper adopts a proactive approach on how the state should develop amnesty/pardons policies, namely that states should consult the OTP before applying any such policy.

[101] Informal expert paper, paras. 71-74

After considering all the above and despite the very convincing argumentation, I am of the view that amnesty deals, reconciliation and quasi-judicial procedures which result from consensus and thorough negotiations among the involved members could be leveraged, under strict conditions, as mitigating circumstances under the Rule 145(2)(a)(ii) RPEs, since political agreements cannot and should not prevail over the ICC's commitment towards fighting impunity. Besides, in its recent decision the PTC II made absolutely clear that, the most responsible people cannot hide behind immunity treaties in order not to be prosecuted for international crimes. So, the Chamber put emphasis on the need to prosecute core crimes, namely the crimes of the Rome Statute, grave breaches of IHL cannot go unpunished. Indeed amnesties hinder complementarity.

4. Domestic Prosecution of International Crimes

Having adopted a decentralized approach of criminal justice, the Rome Statute's drafters did not include any provision in the Statute, obliging states parties to adopt copy, adapt, and integrate the ICCSt or RPEs into their national legal systems. In *L. Gbagbo and Al Senussi* the Court accepted that prosecution of ordinary crimes suffices, *while in Gaddafi* the complete lack of certain group of statutory crimes implied the inability of Libya to prosecute. Under ICTR/ICTY jurisprudence minor deficiencies in national legal frameworks were enough for the admissibility of cases (e.g. *Bagaragaza*, *Musema*, *Radio Television Libre des Mille Collines SARL).*

'Hard mirror thesis' and 'Soft mirror thesis'

'Hard mirror thesis' is the collective view of a part of scholars who maintain that prosecuting ordinary crimes never accomplishes the principle of complementarity, since, if national authorities prosecute international crimes in an ordinary fashion, implies the state's 'unwillingness' or 'inability' genuinely to prosecute.[102] On the contrary, supporters of 'soft mirror thesis' contend that the above

[102] Amnesty International, *"The International Criminal Court: Checklist for Effective Implementation"*, (2000), available on: https://www.amnesty.org/en/documents/ior53/009/2010/en/
Among the advocates of this thesis, Amnesty International points out the risk of prosecuting

prosecutorial fashion does not necessarily lead to the acceptance of a state's 'unwillingness' or 'inability'. In any case, states should, under this thesis, prosecute international crimes as they are whenever possible, on the grounds that, they can better defend their position when explaining their arguments in the context of an admissibility challenge and better fostering the desiratum of Rome regime.[103]

According to Prof. Heller the former thesis is not based in the Statute, is incompatible to the 'same conduct test' and only a formalistic approach of the Statute could lead to such a thesis. The ICC has expressly espoused of the latter thesis in *Al Senussi*, too. The problem arises when national prosecutorial activities based on common criminal law result in suspicion on whether the proceedings serve the *"purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court."* The *ne bis in idem* principle bars a new trial to be initiated, if a state has prosecuted the perpetrator for *"conduct **also** prescribed under article 6, 7, or 8"*(art 20(3) ICCSt), which translates to the allowance of national authorities to conduct penal proceedings against ordinary crimes, insofar as they are included in the above provisions.[104] Furthermore, it is obvious that, if the judges adopted this thesis, it would be an insurmountable disincentive for non-member states to sign and ratify the Statute. Non-member states, which have not adapted their domestic legislation to special international provisions, but have successfully developed a certain policy similar to those provisions, are unlikely to prefer to participate in the ICC's workings and bear full responsibility for their judicial and prosecutorial system, if this thesis was adopted by the judges in ICC.[105]

The latter 'thesis' is welcomed by most scholars who contend that the ultimate *telos* of member states, and a means of materializing positive complementarity, is to integrate the Rome Statute into national legal system, supply, adjust and correct any legal controversies, ambiguities or *lacunae*. Prosecuting international crimes instead

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International crimes as national crimes which is to accept cases' admissibility before the ICC.

[103] Ibid, Kevin Jon Heller, (2012),p. 87

[104] Ibid, Kevin Jon Heller, (2012), pp. 90-91, ICTY/ICTR Statutes, expressly allow Tribunals to adjudicate cases which were the object of national trials against ordinary crimes instead International crimes, U.N. Secretary-General, Aspects of Establishing an International *Tribunal* for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 (May 3, 1993), paras: 64-68, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTY%20S%2025704%20statute_re808_1993_en.pdf;

[105] Ibid, Kevin Jon Heller,(2012), at. 95-96

of national ones, is preferable by the international community, given that prosecuting and adjudicating international core crimes reflects criminal conduct's true scope, scale and gravity rather than respective national crimes. Then again, domestically prosecuting international crimes is a rather tough work and not a successful one, as in many cases international case-law failed to be embodied by western national courts let alone non western ones. [106]

However this position carries drawbacks as well. States bear reputational costs for no prompt incorporation of and commitment to the Rome Statute, and are more likely to be thought as 'unwilling', if they finally prosecute common criminal offences, even though they have already ratified the Statute. In addition, the qualified staff and increased funding required for prosecution against international crimes may frustrate states with limited resources from performing domestic investigative activities (e.g. regional inspectors/prosecutors must prove that widespread and systematic attack took place in crimes against humanity, perpetrators had genocidal intent, crimes committed under a specific state or organizational policy, and must have utterly comprehended international criminal jurisprudence on such matters).

As analyzed in following chapters Uganda and DRC have admittedly, in wont of indispensable means and capacity, proved 'inactive' or 'unable' to prosecute criminally responsible people. The ICC could exploit positive or proactive complementarity, as advocated in this dissertation, so as to provide States with expertise, funding and technical assistance. Prof. Heller is definitely in favour of a more pragmatic approach; maintaining that nationally prosecuting common crimes instead of international crimes is more likely to forward the punishment of the most liable individuals and in any event, the complementarity principle must secure the general genuineness of the proceedings.[107]

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[106] Ibid, Kevin Jon Heller, (2012), at 97-106, an interesting instance of applying domestically international crimes was the Serbia's Special Court for War Crimes (2003) which tried many cases in an International fashion. Its approach was characterized as unpredictable and unstructured, though. It acquitted plethora of criminals or sentenced delinquents to lenient punishment. In *R.v. Finta* the Supreme Court of Canada erroneously held that discriminatory intent was a *sine qua non* element of *all* crimes against humanity, not simply the persecution crime against humanity. This decision was totally opposed to the WWII jurisprudence.
Balkan Transitional Justice/ Balkan Insight.com, "Serbia Failing to Prosecute War Crimes, HLC Says", 18.05.2017, available at: http://www.balkaninsight.com/en/article/report-highlights-serbia-s-shortcomings-in-prosecuting-war-crimes-05-18-2017

[107] Ibid, Kevin Jon Heller, (2012), pp. 106-107

In his study, he discusses, how a sentence-centric approach of complementarity can exclusively be applied in order for the Court to decide whether a prosecution of ordinary crimes renders a case admissible or not. A national sentence should be equal or higher than the ICC's respective one independent of the gravity of the crime or whether it emerges from a prosecution based on the same conduct in order for the case to be rendered inadmissible. The average sentence for common crimes and the average sentence for the international crimes brought before the ICC would be employed as criteria for the admissibility test. If there is no average in ICC's jurisprudence concerning some types of crimes, the ICTY/ICTR's jurisprudence as well as the statutory provisions could be employed instead. In the event of acquittal under a sham trial or a very lenient sentence, the Court could review the case in light of art. 20(3) ICCSt.[108]

The Statutory jurisdictional system is characterized by gravity-centered complementarity. In 'soft mirror thesis' terms, the Prosecutor, when appraising the gravity of ordinary crimes, compares it with the gravity of crimes stipulated in the Statute. The conundrum that appears is, with which criteria this appraisal materializes. Statutory crimes will always possess more gravity than common crimes, owing to the collective notions they include (e.g. collective victimization). For instance, if national authorities charge a person with rape, the question of how many counts of rape they should include in their warrant of arrest so as to satisfy the gravity condition, (namely the rape to be equal to war crime/crime against humanity) and consequently to render the case inadmissible before the Court based on the SSC requirement, arises.

Thus, as soon as gravity is an undefined notion, the gravity threshold of ordinary crimes will remain obfuscated, as well. If we follow the 'hard mirror thesis', in light of the aforementioned, almost all cases will be admissible before the ICC, but the purview of complementarity will be importantly degraded/diminished. Therefore, this thesis should be rejected as overly strict to national prosecutorial organs and the gravity-centered approach on complementarity, as well.

On the contrary, the 'sentence-based' approach could effectively be applied when comparing the average sentences of common crimes and international crimes. This approach, though, has some disadvantages. If national prosecutor accuses a

[108] Ibid,Kevin Jon Heller, (2012), pp. 109-110

perpetrator of serious crimes but narrows the scope or alters the mode of participation (e.g. although someone should be charged as a co-perpetrator, he is actually charged as an aider-and-abettor), PTC would hold the case admissible. The Professor asserts that this deficit can be eliminated insofar as sentences are adequate to fulfill the gap of differentiated modes of participation. Even though the perpetrator in the above example is accused of aid-and-abet, if his sentence is similar to the ICC's jurisprudential sentence of co-perpetrator, the skepticism of admissibility is null and void.[109]

The most difficult part of this theory of sentence-based complementarity is how the ICC could collect data on the average sentences for common crimes of national courts, because of the uniqueness of each case. Studies of the ICTY/ICTR indicate, though, that national punishments for ordinary crimes are seldom more lenient than international punishments for international crimes. Accordingly, 'soft-mirror thesis' implies that national punishments for ordinary crimes are more lenient than national punishments for international their counterparts. So, even though the 'soft-mirror thesis' appears to advantage national prosecutions, the problem that the majority of member-states have not yet integrated the statutory crimes in their national legislation remains unsolved. Thus, the ordinary crimes are more likely to be the object of national preliminary investigations/prosecutions. Moreover, the 'soft-mirror thesis', if implemented, allows for the continuance of impunity gaps in national legal systems (e.g. command responsibility).[110]

Considering all the above and adopting the ICTY/ICTR/ICC's jurisprudence on the issue, I am of the view that the Court should endorse the 'soft mirror thesis', encourage, motivate and assist states parties or states which intend to join the Rome regime to promptly adopt and integrate the Rome Statute into their legal systems or just amend their existing laws/criminal codes, proceed to modified incorporation of the ICCSt. In this way the states will have a significant 'legal arsenal' for holding cases into their jurisdiction and protecting their state sovereignty. Indeed, the *nullum crimen nulla poena scripta* principle entails that national authorities must be equipped with the relevant legal tools in order to initiate genuine criminal proceedings.

[109] Ibid, Kevin Jon Heller (2012), pp. 113-114
[110] Ibid, Kevin Jon Heller (2012), pp.121-123

Someone, of course, could argue that such an urge may convert complementarity into primacy. The response is that, ratifying and incorporating the Statute or harmonizing domestic law to the Statute's norms will provide states- and especially third states and states which *ad hoc* give their consent to the Court- with the ability to keep their cases into their own jurisdiction more easily, without changing the whole national legal and juridical system in the long run. Thus, admissible cases before the Court will be decreased and states will bear a 'lighter' burden of proof of their allegations on inadmissibility. The demand for 'alteration/supplementation of the domestic criminal justice' will concern only a part of the whole criminal judicial system, so the risk of (their) yielding state sovereignty to the ICC will be minimal. Keeping judicial system unaltered, so as to render domestic proceedings prompt, undermines the core of the statutory provisions. Prof. Heller's theory of 'sentence-based complementarity' could also be used as one of the aforementioned criteria (e.g. gravity, victims' interests e.t.c.) endowed with more significance than other requirements, when assessing complementarity. Besides, the Court in *Gbagbo* and the ICTR's Prosecutor in *Bagaragaza* have mentioned the role of domestic sentences in the evaluation of the national prosecution's general context. When States have inadequately incorporated international crimes or have neglected to fulfill their duty to incorporate the Rome Statute into their national legislation, they endanger rendering their cases admissible before the Court or diminishing their primary jurisdiction. The consequences, though, of such a deficiency are bilateral. Not only are States disempowered due to lack of proper legal framework, but so is the ICC itself, as well. The ICC bases its activities both on national prosecutorial and judicial systems and on the efficient cooperation with Governments. Therefore, the principle of effectiveness could be better served, if states' executive amended national laws in favour of the international legal heritage and proceeded into the enactment of the Rome criminal legislation. Deficiency in penalization of international crimes may lead to the inability to prosecute, sham trials and/or sham investigations.

5. State – Referrals and its relations admissibility challenges

State referrals under the art. 14 ICCSt have been issued twice by C.A.R. and once by Mali, Comoros, D.R.C. and Uganda. In spite of the preambular par. 6 ICCSt which manifestly stipulates that it is state's obligation to exercise jurisdiction, art. 14 ICCSt allows for state referrals or "self-referrals" in case a state acknowledges that the most proper judicial forum to undertake the investigation, prosecution and trial of the most responsible offenders of IHL for crimes committed on its own territory is the ICC. The preambular paragraph does not hinder the implementation of art. 14 ICCSt in broad reading.

The Prosecutor should take all the necessary precautions with the aim of remaining indifferent towards governments, which issue referrals seeking the prosecution of their political rivals and eagerly cooperate with the OTP under these circumstances in order to "secure" their impunity. According to William Schabas, self- referrals indicate that states are willing to prosecute and try the suspects and that states only seek the Court's assistance in doing so.[111]

That value of the complementarity is twofold test becomes apparent in the case of self-referrals, for states cooperate and rely on ICC's intervention. In 2003, the Government of Uganda employed article 14 ICCSt to initiate proceedings in the ICC for crimes taken place within its territory, trusting that the warrant of arrest would put pressure on the rebel leaders, as well. The local populace of northern Uganda protested against the alleged impartiality of the ICC Prosecutor, when he declared that, he was going to investigate the situation at hand, in collaboration with the President Y. Museveni, who was accused of having planed the commission of serious crimes throughout the course of the armed conflict against the L.R.A.'s members. Despite the efforts of the Prosecutor to manifest his prosecutorial dignity and impartiality, local people were not convinced that he was unprejudiced.[112]

Likewise, the government of the DRC triggered ICC jurisdiction via a self-referral. The ICC viewed that inactivity was dominant in both cases and overhauled

[111] William Schabas, *"An Introduction to the International Criminal Court",* Cambridge University Press, (2011), pp. 192-193

[112] Patrick Wegner, *"Self-Referrals and Lack of Transparency at the ICC-The case of Northern Uganda"*, Justice in Conflict, 4 October 2011, available on: https://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc-%E2%80%93-the-case-of-northern-uganda/?blogsub=confirming#blog_subscription-3

the unwillingness and inability criteria. The Kenyan paradigm, though, is substantially different from the abovementioned cases, since there had been strong opposition to the self-referral issued by the Kenyan Government in 2010 on behalf of influential parts of the leadership in that country, which culminated in a challenge of admissibility with several arguments in favour of the existence of national proceedings. [113]

The Chamber should first assess whether the state is indeed investigating the case, namely that there have been certain investigating steps and secondly whether the state is "unwilling or unable to carry out the investigation or prosecution" (*Katanga)*. To this judge-made criterion another criterion is added the "same person/same conduct test". In *Prosecutor v. Lubanga* the OTP issued an arrest warrant to the DRC authorities against Lubanga on charges of having committed serious crimes and especially the war crime of conscription of child soldiers. The PTC in order to overcome admissibility hurdles propounded that: *"national proceedings...* [should] *encompass both the person and the conduct which is the subject of the case before the court*". Nevertheless, the AC in its "infantile decisions" in the Kenyan cases had not examined the rightness of the 'same person/same conduct' test. This case eventually referred to the ICC due to the comparatively superficial charges of recruiting child soldiers and was characterized as *abusive to complementarity principle*, for the ICC chose to adjudicate a historic case.[114]

According to the AC, article 17 ICCSt must be applied differently in indiscrete stages of the proceedings, namely that article 17 ICCSt in conjunction with art 15 and 18 ICCSt and 53 paragraph 1 ICCSt applies to the determination of admissibility at the preliminary stages as well as in conjunction with art 19 ICCSt when the state or suspects submit admissibility challenges to a specific case. Described in a linear fashion, the events are the following: At the preliminary stages where a "situation" (potential case) is at hand and the suspects have typically not yet been identified, the inadmissibility test deals with the question whether the state is investigating the same overall conduct which is being examined by the ICC or not. That is to say, (i) the groups or persons involved are likely to be the focus of an

[113] Thomas Obel Hansen, *"A critical review of the ICC's recent practice concerning admissibility challenges and complementarity"*, Melbourne Journal of International Law, 13, (2012), p.217-234
[114] Ibid, Fredéric Mégret and Marika Giles, p.588

investigation for the purpose of shaping the future case(s), (ii) the alleged crimes within the jurisdiction of the Court on which an investigation will be focused with the purpose of shaping the future cases. Secondly, at the case stage it is useful to recall the Kenyan admissibility challenge. The government of Kenya asserted that, as long as this conduct is being attributed "to persons at the same level in the hierarchy being investigated by the ICC and national authorities" and seeing that national authorities do not possess the same quantitative and qualitative evidence available as the ICC prosecutor, it is justifiable that there have not been investigations for the same suspects as the Court's. The PTC II refused these arguments noting that an admissibility determination at the 'case stage' must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings", because this reasoning "disregards the fact that the proceedings have progressed and that specific suspects have been identified. If summons to appear have already been issued, the question is no longer why the suspects at the same hierarchal level have been under investigation by Kenya but whether the same suspects are the object of investigation by both jurisdictions for 'substantially the same conduct'.

6. General Conclusion

In the first Part the requirements, elements and the procedure of applying complementarity were analyzed in a theoretical perspective, while in the next part the analysis is based on exclusively on jurisprudence. Firstly, historical reflections helped us understand how art. 17 ICCSt was formed and why the drafters chose to empower the international judges to illuminate by themselves all dark sides of complementarity. Secondly, essential terms were defined with the view to comprehend the jurisprudence that follows. 'Due process' thesis is a proactive theory that could be proved quite fruitful in the future. Thirdly, a short introduction to primacy touched upon the controversy UNSC's members' expressed after the adoption of the ICTY Statute. Complementarity and Primacy are two dissimilar principles of jurisdictional regimes, but in time primacy relented in favour of complementarity. In the *Tadić* case ICTY's judges addressed the issue of primacy and stressed the importance of universal jurisdiction. Fourthly, universal jurisdiction is another form of administering justice when the initially competent state is 'unable or unwilling' to prosecute its own

nationals. This form of international jurisdiction can harmoniously coexist with complementarity, as it was implemented in the past in the context of primacy. One possible hurdle to universality could be the management of immunities (offences of political nature).

Fifthly, if the ICC is determined to not accept them, pardons/immunity deals could be used as mitigating factor in the assessment of sentences.

Sixthly, as far as the national prosecution for ordinary –instead of international -crimes is concerned, I conclude that states should be assisted in their efforts to investigate and prosecute ordinary crimes. States Parties should be encouraged to integrate the Rome Statute into their legal systems or harmonize, adapt them to the statutory provisions. Furthermore, the ICC should take into account among other factors the national sentence of crimes when deciding on cases' admissibility.

Finally, although state referrals or 'self-referrals' are essential means of triggering the international jurisdiction, they sometimes undermine state sovereignty and primacy of national judicial fora.

Part II

Section I - ICC's Jurisprudence on complementarity

Chapter I – Situation in the Republic of Kenya

1. The Prosecutor v. William Samoei Rutto, Henry Kiprono Kosgey and Joshua Arap Sang

Case summary

In December 2006, Rutto, jointly with Henry Kiprono Kosgey and Joshua Arap Sang, allegedly set up a network with the purpose of committing crimes directed against supporters of the Party of National Unity (PNU). The results of the presidential elections in Kenya triggered violence from 30.12.2007 to 16.01.2008. A certain strategy implemented during attacks in a plethora of districts (e.g. Eldoret area, Kapsabet town and Nandi Hills town e.t.c.) where it was considered that PNU's supporters resided, namely Kikuyu, Kamba and Kisii ethnic groups. In the arrest warrant the criminal conduct included murder (article 7(l)(a) ICCSt), deportation or forcible transfer of population (article 7(l)(d) ICCSt), and persecution (article 7(l)(h)ICCSt). The perpetrators have essentially organized and implemented the commission of the above crimes (e.g. they had established a rewarding mechanism with fixed amounts of money to those who successfully murdered PNU's supporters or destructed their possessions e.t.c). The ICC Prosecutor requested the PTC II on 15.12.2010 to issue summonses to appear for six Kenyans explaining that there existed reasonable grounds to believe that they were criminally liable for crimes against humanity (Ocampo Six). The case was ultimately brought before the ICC and on 31.03.2011 the Kenyan Government filed an application, challenging the admissibility of the case before the ICC. The case was found admissible, but at the 'confirmation-of-charges' stage Kosgey was released. Later on 05.04.2016 the TC V(A) also vacated the charges against Rutto and Sang by reason of inadequate evidence. The PTC could not proceed because evidence emerged

after widespread bribery and intimidation of witnesses testifying against the accused. [115]

The PTC applied the 'same person/same conduct' test so as to rule on the issue of whether the case was admissible under art. 17(1)(a) ICCSt. It is common that neither suspects will have been identified, nor will certain conduct nor legal classification have been distinguished, when examining the 'same person' test at the stage of preliminary admissibility challenge under art. 18 ICCSt. So, in the 'situation phase' the framework of proceedings is generally outlined under art. 15, 53 (1) and 18 ICCSt. Art. 19, by contrast, pertains to the admissibility challenge of concrete cases. The warrant of arrest or summons to appear issued under art. 58 ICCSt or charges brought by the Prosecutor and confirmed by PTC under art. 61 ICCSt precisely set out the cases (individuals and conduct). In order for a case to be inadmissible under art. 17(1)(a) ICCSt, the national investigation must cover the same individual and substantially the same conduct as described in the proceedings before the Court. The components of 'case' in question (art. 17(1)(a) ICCSt) are provided with the summonses.[116]

The wording 'is being investigated' in the 'case phase' underlines the governmental steps moving towards ascertaining whether those suspects are responsible for that conduct. Those steps can be comprised of interviewing witnesses or suspects, collecting documentary evidence, carrying out forensic analyses e.t.c. The sole preparedness to take such steps with regards to the investigation or other suspects does not suffice."*Providing evidence to substantiate an allegation is the hallmark of judicial proceedings*".[117] On no occasion can mere governmental statements indicating that the Government is actively investigating the case be sufficient.

[115] The *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Case Information Sheet, ICC-PIDS-CIS-KEN-01-012/14_Eng, April 2016, available on: https://www.icc-cpi.int/kenya/rutosang/Documents/RutoSangEng.pdf, TRIAL International, Profile: *"William Samoei Ruto"* 19.04.2016, Last modified 12.07.2016, available on: https://trialinternational.org/latest-post/william-samoei-ruto/

[116] Prosecutor v. William Samoei Rutto, Henry Kiprono Kosgey and Joshua Arap Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Case No: ICC-01/09-01/11 OA, Date: 30 August 2011, paras: 39-40 ,available on: https://www.icc-cpi.int/CourtRecords/CR2011_13814.PDF

[117] ICC-01/09-01/11 OA, par. 41

Contrariwise, the Government in question must adduce concrete proof demonstrating that it truly undertook investigations. Kenya simply asserted -without proving- that *the "officers have been revisiting the crime scene to make inquiries and gather only evidence that could assist their investigations in respect of the six suspects*".[118]

Kenya opposed to the Court's determination by suggesting that, national authorities possess different evidentiary material from the material of the Court, so this may justify the domestic investigation on different suspects to the Court's. The AC responded that, when the State does not investigate a given suspect because of lack of evidence, there is no conflict of jurisdiction and the case should be admissible before the Court. Additionally, the core of art. 17(1)(a) and 19 ICCSt do not concern the 'same evidence' possessed both by the Prosecutor and the State.[119]

In case of inactivity, there is no conflict of jurisdiction and art. 17(1)(a) to (c) ICCSt do not favour national jurisdiction under this provision. Art. 19(5) ICCSt does not require a State to challenge admissibility just because the ICC has issued a summons to appear.[120] However, since the wording of art. 17(1)(a) to (c) ICCSt is negatively expressed, would it not be reasonable to favour the primary jurisdiction of Kenya?

2. The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali[121]

Case Summary

Francis Kirimi Muthaura was appointed as the head of the Public Service and Secretary to the Kenyan Cabinet in 2003. Uhuru Kenyatta is the first son of founding President Jomo Kenyatta and was the KANU's (Kenyan African National Union) candidate at the presidential election of December 2002 but he was defeated by the opposition leader Mwai Kibaki. In 2007 Kennyata changed political wing by supporting Mwai Kibaki, who ultimately won the elections. In

[118] ICC-01/09-01/11 OA, paras. 59,60,62,69
[119] ICC-01/09-01/11 OA, par. 43
[120] ICC-01/09-01/11 OA, paras. 44-46
[121] Situation in the Republic of Kenya on the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute", Case No: ICC-01/09-02/11- 30/05/2011

2009, he was designated Minister of Finance, maintaining his position as Deputy Prime Minister.[122] Mohammed Hussein Ali in September 2009, was appointed Chief Executive of the Postal Corporation of Kenya.[123] The Electoral Commission of Kenya declared Mwai Kibaki (Party of National Unity/PNU) as the winner of presidential election on 30.12.2007, when awfully violent conflict between supporters of Orange Democratic Movement (ODM) and the government forces supporting the PNU erupted on the pretext of electoral fraud. Uhuru Muigai Kenyatta and Mohammed Hussein Ali drew up and executed a plan to attack alleged ODM supporters in order to keep the PNU in power. Kenyan Police also were involved in favour of ODM by using excessive force against protesters in Kisumu, and in Kibera. Being Chairman at the National Advisory Committee Muthaura from the end of December 2007 until the middle of January 2008 authorized the Police to kill more than a hundred ODM supporters in these districts. Members of this movement ambushed ODM supporters afterwards. He was the mastermind of planning and implementing heinous attacks conducted by both PNU youth's movement and the Police by providing them with logistics and other support or by authorizing the Police not to intervene in bloodsheds. All the acts were translated into charges of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts, and persecution as crimes against humanity. On 23.01.2012, the PTC confirmed the charges of crimes against humanity against Muthaura and Kenyatta but declined to confirm the charges against Mohammed Hussein Ali on the basis of insufficient evidence. On 11 April 2013, the ICC commenced the trial against the indictees but after some unresolved preliminary issues the Prosecutor on 13.03.2013 submitted a notification of withdrawal of the charges against Muthaura justifying that there was no reasonable prospect of conviction.[124]

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[122] Trial International Profile, *"Uhuru Muigai Kenyatta"*, TRIAL International Mission, 19.04.2016 (Last modified: 13.06.2016), available on: https://trialInternational.org/latest-post/uhuru-muigai-kenyatta/

[123] Trial International Profile, *"Mohammed Hussein Ali"*, TRIAL International Mission,19.04.2016 (Last modified: 13.06.2016), available on: https://trialInternational.org/latest-post/mohammed-hussein-ali/

[124] Trial International Profile, *"Francis Kirimi Muthaura"*, TRIAL International Mission, 25.04.2016 (Last modified: 08.11.2016), available on: https://trialInternational.org/latest-post/francis-kirimi-

At the trial of the Kenya's application pursuant to the art. 19 ICCSt, Kenya submitted that (i) Kenya has undergone profound and extensive constitutional and judicial reforms recently, (ii) the investigatory processes were in progress, (iii) the new Constitution guaranteed fair trials, rightful judiciary and effectively replaced deficiencies and feebleness of Kenyan judicial administration, (iv) Kenyan national courts had competence to entertain the case and there is also no need for the Government to establish a special local Tribunal, (v) appointment of new upper echelons judiciary was an indicator of impartiality and ability to prosecute all relevant cases, (vi) the prosecutorial authorities were committed to end investigations by September 2011, which would be most successfully conducted, once the new Director of Public Prosecutions would had been appointed by the end of May 2011, (vii) the Government would be able to gradually provide the Chamber with progress reports on the criminal procedure.[125]

To the contrary of those arguments, the Prosecutor elaborated the following; (i) progress in national criminal process is merely hypothetical and should be ongoing, (ii) there was not any process against the same persons and same conduct as regards the cases brought before the Court and those prosecuted in Kenya, (iii) evaluation of efficiency of the local judicial system was not prescribed in the ICCSt and would obstruct the Court's work.

The OPVC added that (i) the reforms to the Constitution, criminal law e.t.c. do not constitute investigations under art. 17 ICCSt and that there is not enough evidentiary material to prove the assertions, (ii) ethnic considerations brought the judicial system into profound discredit with the people, (iii) the rejection of the Special Tribunal, given that other concrete and specific steps are absent, consists an evident indicator of the State's 'unwillingness to genuinely prosecute'.

The Chamber stressed that (i) granting or denying a request for assistance by the Court under article 93(10) ICCSt is absolutely irrelevant to the determination on

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muthaura/

[125] "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Case No:ICC-01/09-01/11, Date: 30/05/2011, paras: 2, 14, 17,31,32,34, 66,67,69, 71,72,79, available at: https://www.icc-cpi.int/CourtRecords/CR2011_06778.PDF

the inadmissibility of a case pursuant to article 17 of the Statute,[126] for the two processes in domestic and international level are independent, (ii) under the Court's legal framework, the exercise of national criminal jurisdiction by States is not unlimited, but Articles 17 to 20 of the Statute pave the way for admissibility's test[127], (iii) the Chamber applied the two-fold test of the complementarity principle first developed in *Katanga* case[128], (iv) the Government has partly understood the meaning of the Article 17 ICCSt as regards the "*substantially* same conduct" test, namely that *"national investigations must [...] cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC"*.[129] This phrase means that in the preliminary investigations, when the examination is broader and refers to a whole situation in which one or more 'potential' case(s) and group of persons may be eventually disclosed, but still, the identification of specific perpetrators, whom the domestic authorities should investigate, is complicated. There should be also concrete evidence (for example, police reports attesting to the time and location of visits to crime scenes and written testimonies of eyewitnesses, expert witnesses and the (ICC's) suspects) that progressive – investigative steps have been undertaken.[130] The AC regulated that the burden of proof lies on the State or the indictee, whom challenges the admissibility.

Timeframe of filing an admissibility challenge: "*at the earliest opportunity, once it is in position to actually assert a conflict of jurisdiction"* and *"prior to the commencement of the Trial"*. The timeframe is not limited till the moment the Court has issued a summons to appear (as the Kenyan Government argued so as to justify its obscure motion) and this challenge must be unique, but in exceptional circumstances it is at the Court's discretion to allow another challenge. The Defence argued that it had not enough time to prepare itself for the Trial and adduce further evidentiary material, but the PTC appraised that two months between the challenge's filing and the ruling on it is reasonable and that the Defence should be totally prepared to prove

[126] ICC-01/09-02/11- 30/05/2011, par.30
[127] ICC-01/09-02/11- 30/05/2011, par.40
[128] ICC-01/09-02/11- 30/05/2011, par.44
[129] ICC-01/09-02/11- 30/05/2011, par.48
[130] "*evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case",* Muthaura Appeal (ICC , Appeals Chamber, Case No: ICC -01—09-02/11/274, 30 August 2011, par. 61

its assertions before filing the motion. In her dissenting opinion Judge Ušacka[131] considered that the evaluation of complementarity is a continuing process, so the PTC should let the Defence bring additional evidence so as to support its claims. The fact that the Chamber satisfied itself to written documents and subsequently refused to listen a Kenyan police commissioner, who was going to testify on the course of national investigations, is truly questionable. Nor did the AC lift this decision.[132]

Request for Judicial Assistance under art. 93(10) ICCSt and the high threshold of the 'same person/*substantially* same conduct' test

Another controversial point of the abovementioned judgment is the denial of the PTC II to grant access to statements, documents or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the post-election violence to the Government of Kenya. First, the PTC II dismissed the admissibility challenge, whereupon it dismissed the request for judicial assistance, as it has full discretionary power for doing so. The Defence objected, that the admissibility challenge and receiving assistance from the ICC prosecutor are interconnected, so the refusal of the AC to look into new evidentiary material was unfair.[133]

In my point of view, which is the same as the Defence's, the challenge and the request are interconnected and their dismissal should be justified *a fortiori* to the fullest. The fact that the PTC used its discretion at the expense of the state is controversial. Positive Complementarity, which is supposed to be promoted by the judges and the OTP, could be best served through the implementation of art. 93(10)

[131] "Judgement on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" Dissenting Opinion of Judge Anita Ušacka", Case No. ICC-01/09-02/11 OA, Date: 20 September 2011, available at: https://www.icc-cpi.int/CourtRecords/CR2011_16047.PDF

[132] "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Case No: ICC-01/09-02/11 O A Date: 30 August 2011, par: 100, available at: https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF

[133] *Muthaura*, Pre-Trial Chamber II, ICC-01/09-02/11-96, 30 May 2011, paras. 30-31, *Ruto* Pre-Trial Chamber II, Case No: ICC-01/09-01/11 -101, Date: 30 May 2011, paras.34-35, Situation in the Republic of Kenya Decision on the Request for Assistance Submitted on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) of the Statute and Rule 194 of the RPEs, ICC, Pre-Trial Chamber II, Case No: ICC-01/09-63, Date: 29 June 2011

ICCSt. The scenario that the Court first holds the case's admissibility and then it looks forward to activate the mechanism of judicial cooperation is truly oxymoron. The exclusive chance of a state to assert its competence to try the perpetrators would be only on an appeal, for a possible second challenge before the PTC must be chronically close to the issuance of the decision on the first challenge.

The political situation in Kenya

Prof. Hansen *(2012)* elucidates the dark sides of the Situation in Kenya indicating that an important political part of Kenya's Government in office was involved in the planning of the 2008 post-election violence. For that very reason, some Kenyan politicians subverted the international criminal justice, while others declared absolute commitment to ICC's intervention in the country. The Kenyan Parliament voted for a motion in 2010 so as to oblige the government to withdraw from the Rome Statute on peace and stability reasons. Of course, the government did not conform itself with the motion, for it would be paradox on the one hand for a State to entrust its remarkable efforts to hold the perpetrators of mass atrocities accountable to the ICC and on the other hand to impugn the ICC's powers. Similarly, it is controversial why the defendants Mr. Ruto, Mr. Kenyatta and Mr. Muthaura took part directly or indirectly in 2013 elections. In light of these events and seeing that national investigators had had three years of partial inaction, the admissibility challenge seems to have played the role of hampering prosecutorial proceedings both at national and international level obfuscating the accountability in the context of post-election violence.[134]

The article 17(2) ICCSt could be applied in this case because Kenyan authorities initiated national proceedings with the purpose of shielding the individual concerned from criminal responsibility, which indicates the State's unwillingness to genuinely prosecute. The ICC demonstrates judicial activism as far as the Kenyan cases are concerned, but the high threshold of "same person/same conduct test" may put hurdles to regional authorities' activities. That is to say, there will be cases where the national authorities (and a new government) are both able and willing to prosecute crimes under their jurisdiction, but due to the fact that local accountability process

[134] Ibid, Thomas Obel Hansen, pp. 230-231

does not concern the same individuals and the same crimes engaged by the ICC, almost all cases will be admissible before the Court.[135]

Prof. Hansen *(2012)* [136] concludes that proceedings existed in Kenya, aiming at achieving with the admissibility challenge rather than ensuring criminal liability for the perpetrators. He criticizes the Court as an *institution with teeth* which reflects a *"more general trend of judicial activism"* and keeps for it powers not expressly envisaged by the Statute's drafters. Although in its early years it respected state sovereignty, it has recently demonstrated a more favourable tendency towards international jurisdiction.

Commission of Inquiry on Post-Election Violence
& endless turbulence

In January 2008 Kenyan Government founded several inquiry commissions with the purpose of investigating offences committed after the 2007 presidential elections. The "*Waki* Report", published on the 15.10.2008 by the Commission of Inquiry on Post-Election Violence, proposed the establishment of an independent court which would try cases of international crimes and especially masterminds belonging to the upper class.[137] In February 2009, the Parliament rejected the Constitution Amendment Bill, which would have allowed for the creation of that special court, triggering the '*Waki Commission*' to disclose the purported perpetratorsto the Prosecutor, who in turn gave rise to investigation and formal prosecution. The fact that both Kenyatta and Ruto faced charges of crimes against humanity before the ICC, which was publicly known before the elections of 2013, did not prevent them from winning. Ultimately, on 20.09.2017 Kenya's supreme court annulled the presidential elections held on 8.08.2017 in which Kenyatta was declared winner, on the basis that the election's result was declared sooner than the time vote's counting procedure had been completed.[138]

[135] Ibid, Thomas Obel Hansen, p. 234
[136] Ibid,Thomas Obel Hansen, pp. 233-234, Darryl Robinson, *"The Mysterious Mysteriousness of Complementarity"*, Criminal Law Forum, Vol. 21, No. 1, (2010), 1-37, pp.7-9, Electronic copy available at: http://ssrn.com/abstract=1559403
[137] Commission of Inquiry into Post-Election Violence, (CIPEV), Report, 1.1.2008, available on: http://kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf
[138] J. Burke, *"Kenyan election annulled after result called before votes counted, says court*",The

Kennyatta stated that the annulment was a "judicial coup".[139]

Chapter II – Situation in the Republic of Côte d' Ivoire

1. The Prosecutor v. Simone Gbagbo

Case Summary

Even though presidential elections in Côte d'Ivoire should be scheduled in 2005, they were adjourned for November 2010, whereupon Alassane Ouattara won with 54%. Heinous violent crimes were the reverberations of the electoral results and the corresponding report issued by United Nations Observers (Ivorian crisis). His political rival, L. Gbagbo has not ever accepted the results' authenticity. He accused the Electoral Commission of massive fraud in nine northern precincts controlled by the rebels of the New Forces, contesting that, pursuant to the Constitutional Council-(in which pro-Gbagbo supporters were officials)- he had himself won the elections with 51% of the vote. The 2010 - 2011 Ivorian crisis led to the second Ivorian civil war in 2011, where war crimes and crimes against humanity were widespread, attacks were constant and thousands fled the country. UNSC imposed targeted sanctions against L. Gbagbo and his associates (S/RES/1975). Likewise, the United Nations Human Rights Council appointed a team of human rights experts as members of the Commission of Inquiry to investigate the allegations of serious violations of the Geneva Conventions. The Commission found that Simone Gbagbo played an essential role by planning together with her husband and his inner circle, in the commission of those crimes (e.g. murder, rape, other forms of sexual violence e.t.c.) and in exercising joint control over them. At a national level, she was also charged with economic crimes.[140]

Guardian, 20 September 2017, available on: https://www.theguardian.com/world/2017/sep/20/kenyan-election-rerun-not-transparent-supreme-court, see also op. cit. note, Trial Watch Profile,*"Francis Kirimi Muthaura"*

[139] S. Gebre, "Kenyan President Slams Election Annulment as 'Judicial Coup", Bloomberg Politics, 21 September 2017, available on: https://www.bloomberg.com/news/articles/2017-09-21/kenyan-president-suggests-vote-dppe-may-change-as-ruling-slammed

[140] "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, Case No: ICC-02/11-01/11, Date: 30 November 2011,

Admissibility challenge on First Instance:

Côte d'Ivoire submissions- 1) the national authorities are investigating the same case and conduct as the ones written on the arrest warrant. So the "same conduct/case" test is fulfilled[141], 2) Ivorian judicial investigation is complex due to the broad nature and diversity of the alleged crimes, as well as, the expanse of the area in which they were committed. However, it is currently pursued in an efficient and regular manner[142], 3) 'unwillingness' criterion - the undertaken domestic proceedings do not serve the purpose of shielding Mrs. Gbagbo from her criminal responsibility and the documentation indicates that authorities took the case seriously. 4) Any delays whatsoever derive from the complexity and gravity of the case and they are altogether justified[143], 5) as far as the inability criterion is concerned, the post-electoral crisis led to judicial system's failure, but in time and especially on 03.12.2012 all the national courts and judicial institutions started to regularly operate. A Special Investigative Unit established in July 2011 engaged in Mrs. Gbagbo's case.[144]

Prosecutor's submissions: i) the evidence adduced did not satisfy him that the "same conduct" was applied and especially: "[the admissibility challenge does not] *cover all aspects of the offences which are the subject of the case before the Court*".[145] ii) Côte d' Ivoire did not provide the court with direct evidence pointing out concrete and progressive investigative steps taking against the accused[146], iii) the PTC should not proceed to the 'genuineness' element, because the appraisal stops at the "same conduct" test.

The PTC reiterated that the challenging State *"bears the burden of proof to show that the case is inadmissible"* and sole assertions (without evidence) that investigations are ongoing and cover the same case as the case before the Court are not enough.[147] Art. 17 (1)(a) of the Statute's wording *"the case is being investigated"*

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https://www.icc-cpi.int/CourtRecords/CR2015_05368.PDF

[141] Decision on Cote d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, PTC-I, Case No: ICC-02/11-01/12, Date:11 December 2014, par.12

[142] ICC-02/11-01/12, par.13

[143] ICC-02/11-01/12, par.14

[144] ICC-02/11-01/12, par.15

[145] ICC-02/11-01/12, par.17

[146] ICC-02/11-01/12, par.18

[147] ICC-02/11-01/12, par.28

entails that *"concrete and progressive investigative steps"* were being undertaken.[148] Yet, *"evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes"*, is not enough, but extends to all material capable of proving that an investigation or prosecution is ongoing, including, for example, *"directions, orders and decisions issued by authorities in charge […] as well as internal reports, updates, notifications or submissions contained in the file arising from the [domestic proceedings]"*so as for the state to fulfill the 'same conduct' requirement.[149] The "same - case" pre-requisite is fulfilled, if evidentiary material brought by national authorities *"is strong enough to establish the [person's] criminal responsibility*".[150] (Comment: If national authorities had collected concrete evidence showing that the purported perpetrator was innocent, contrary to the Court's evidence showing that he/she was liable, would the case be automatically admissible, or the Court should first evaluate the genuineness and quantity of the evidence?) "Sufficient investigation" must been proved via the adduced contours or parameters of the investigation being carried out both by the Prosecutor and by the State.[151] The case-by-case analysis is also adopted, so there is no general rule for this requirement, and in relation to the ***parameters of a case*** before the Court the PTC accepted, that the "same suspect" and "same conduct" giving rise to criminal accountability under the Statute must be under national and international investigation.[152] In relation to ***national parameters***, these *"must be clear even during an investigation and irrespective of its stage"*.[153] The investigation concerning Ms Gbagbo's economic offences is irrelevant to the "same-case", albeit she was *"essentially accused, and committed to trial"*[154]and investigative steps against these individual crimes were taken. Finally, the PTC found that Ivorian authorities initiated proceedings for the same crimes as the ones of the OTP[155], and it did not consider allegations for offences from January 2013 up to February 2014[156], because national

[148] ICC-02/11-01/12, par.30
[149] ICC-02/11-01/12, par.29
[150] ICC-02/11-01/12, par.31
[151] ICC-02/11-01/12, par.31
[152] ICC-02/11-01/12, par.33
[153] ICC-02/11-01/12, par.34
[154] ICC-02/11-01/12, paras.47-48
[155] ICC-02/11-01/12, paras.50-56
[156] ICC-02/11-01/12, par.61

preliminary examination remained stable since 2012,[157] so the PTC's members were not satisfied with the case's inadmissibility.

Côte d'Ivoire impugned the decision and claimed in the second instance that: (i)(a) The PTC applied overly rigorous criteria for the determination of the existence of investigation/prosecution but national investigations on a general terms would not be enough for the SSC requirement's fulfillment (b) when applying the "same person/same conduct" test, the PTC requires purely formal examination of the proceedings, (c) the PTC introduced a false approach so as to apply the abovementioned test by restricting itself only to four incidents mentioned in the Arrest Warrant Decision, when comparing international proceedings and the conduct covered by the domestic proceedings[158], (ii)(a) the domestic investigative steps concerning the allegation of the 'same conduct' both before the ICC and national authorities are sufficiently cited, (ii)(b) the PTC did not enter the examining of manifold investigative measures authorities undertook.[159]

The AC rejected all the grounds of appeal as it failed to provide an explanation on how the PTC erred in its findings. It also insisted on (i) the state's duty to present investigative parameters, with the aim of assisting the PTC to fairly adjudicate the case in question[160], (ii) that the PTC considered the whole documentation[161],(iii) the scarcity of evidence complicated the PTC's work to conclude, which investigative measures were still ongoing, and which were not[162], (iv) that the economic crimes are irrelevant to the 'same-conduct' test.[163] Simone Gbagbo has not been arrested yet, so the case is at the Pre-Trial stage at the moment. Nationally she was convicted for undermining state security to twenty years of imprisonment (it is alleged that fair trial rights were gravely infringed upon. A second trial for war crimes and crimes against humanity took place, where, due to the serious violations of due process, she was acquitted.

Domestic Proceedings: The parameters which are used by the PTC for assessing the

[157] ICC-02/11-01/12, paras.36, 65
[158] "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", Case No. ICC-02/11-01/12 OA , Date: 27 May 2015, par. 48
[159] ICC-02/11-01/12 OA, par. 81
[160] ICC-02/11-01/12 OA, par.88
[161] ICC-02/11-01/12 OA, par.90
[162] ICC-02/11-01/12 OA, par.91
[163] ICC-02/11-01/12 OA, paras. 98-99

admissibility of a case are the following[164]:

2. The Prosecutor v. Laurent Gbagbo and Blé Goudé[165]

Case Summary

Mr. Gbagbo' s activities are included in the aforementioned context. Since his arrest and detention in Korhogo, the President Ouattara' s camp expressed its intention to open proceedings against him as soon as was made possible ambit the formation of an *'independent truth and reconciliation committee'* that would consider atrocities from the 1990s to that date. On 18 April 2003, the Republic of Côte d'Ivoire, which is not a State party to the Statute, lodged a declaration under Article 12(3) of the Statute and Rule 44(2) of the Rules accepting the jurisdiction of the Court for crimes committed in its territory since the events of 19 September 2002 and, additionally, *"for an unspecified period of time*". On 14 December 2010, the President, the Prosecutor and the Registrar of the Court received a letter from Mr. Ouattara, in his capacity as newly elected President of Côte d'Ivoire, reiterating the continuing validity of the Declaration and

[164] ICC-02/11-01/12, 11 December 2014, paras. 33, 34, 35

[165] Situation in the Republic of Côte d'Ivoire Gbagbo and Blé Goudé Case , "Request for Authorization of an Investigation pursuant to article 15", Case No. ICC-02/11, paras.45-54

committing his country to full cooperation with the Court, in particular with respect to crimes and abuses committed since March 2004.[166] The OTP started a preliminary examination to collect evidence and to assess whether this situation could eventually turn into certain cases. The PTC deduced that Gbagbo was criminally responsible as indirect co-perpetrator for the crimes against humanity, namely murder, rape and other forms of sexual violence, other inhumane acts and persecution committed in the territory of Côte d'Ivoire during the period between 16.12.2010 and 12.04.2011. Meanwhile he and his wife were domestically indicted for economic crimes (e.g. economic infraction, aggravated robbery, looting, and embezzlement of public goods). In the wake of two admissibility challenges, the PTC I rejected the second challenge to the admissibility raised by Gbagbo's Defence on 15.02.2013. The TC joined Gbagbo's case with that of Charles Blé Goudé on Prosecutor's request, on the grounds that both cases arise from the same allegations and both individuals were facing similar charges. The latter indictee was militant activist and Gbagbo's right-hand during the post-electoral crisis.[167]

The Declaration of Acceptance of jurisdiction is not inextricably linked to the admissibility issues let alone to the complementarity principle. Thus, the Prosecutor is always bound to scrutinize whether the complementarity principle's preconditions are actually fulfilled.

At the 'situation phase', when authorization for prosecution has not been issued yet, the complementarity test has a different form to the form it has during the 'case phase'. First of all, the Prosecutor must define a "potential case", which consists of two strands: (a) the groups of persons involved that are likely to be the focus of future investigations; and (b) the crimes within the jurisdiction of the Court purportedly committed in the course of events that are likely to be the focus of future investigation. Tracking the group of persons and the crimes at this early stage, does

[166] Situation in the Republic of Côte d'Ivoire, Gbagbo and Blé Goudé Case, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire", Case No: ICC-02/11, Date: 15 November 2011, paras.10-15, available at: https://www.icc-cpi.int/CourtRecords/CR2011_18794.PDF

[167] Trial Watch Profile, "*Laurent Gbagbo*", TRIAL International Mission, (23.04.2016), available on: https://trialInternational.org/latest-post/laurent-gbagbo/

not bind the Prosecutor on admissibility assessments, namely he/she shall be able to add or remove persons and crimes at the 'case phase'. [168]

Thus, the Prosecutor in that case composed two Annexes in which there was an indicative enumeration of individuals who bore the major responsibility and were at the top of the chain command, as well as, a list of the most serious crimes. According to the AC in case of inactivity the "unable and unwilling state" test is redundant and only a presumption of admissibility in relation to article 53(1)(b) ICCSt, subject to article 17(1)(d) ICCSt suffices.

The sole attempt of showing willingness on behalf of Côte d'Ivoire was the instruction given by the *Military Prosecutor of Abidjan to the National Gendarmerie* to proceed with an inquiry into the alleged killing of women during a demonstration and the shelling of civilians in Abobo by security forces. Nonetheless, there was no follow up on the instructions' execution and the things got worse due to the appointment of a new Military Prosecutor. Moreover, President Ouattara pointed out in his appraisal that "*the Ivorian judiciary is not at this stage in the best position to address the most serious of the crimes"* committed since 28 November 2010, and *"any attempt at trying the most responsible individuals may face multiple obstacles".* The military prosecutor initiated preliminary investigations for potential cases which at the time of the submission of Request for authorization of an investigation by the OTP seemed fruitless. Hereupon, the Ivorian Government announced the creation of a national commission of inquiry for human rights violations during the post election crisis in the state, which in fact would not be engaged in criminal investigations. As a result, the ICC's Prosecutor reckoned that international criminal conduct of investigations e.t.c. would be valuable to the future prosecution of the most serious IHL's violations.[169]

The Prosecutor observed, however, that lawyers for L. Gbagbo have lodged a

[168] Situation in the Republic of Côte d'Ivoire in the Case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", Case No:ICC-02/11-01/15 OA 7, Date:18 December 2015, available on: https://www.icc-cpi.int/courtrecords/cr2015_25155.pdf

[169] Situation in the Republic of Côte d'Ivoire in the Case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Document in support of the appeal against the "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", Case No: ICC-02/11-01/15-185, Date:21 September 2015, available on: https://www.legal-tools.org/doc/4ee5ab/pdf/

complaint in France for crimes against humanity committed in Duékoué.[170] Following the sequence of events with respect to that complaint, the Prosecutor underlined that the investigations which began by the French judicial authorities were confined to two distinct incidents and they did not relate to the most serious crimes under the jurisdiction of the Court.[171]

The Prosecutor adduced that proceedings by the Abidjan Prosecutor were relevant to (a) economic crimes; (b) crimes against state security; and (c) so called 'blood crimes' (genocide, crimes against the civilian population and murders, killings and voluntary injuries). Economic crimes, which were under investigation, were irrelevant to ICC's jurisdiction *ratione materiae*. With respect to "crimes against state security", the individuals indicted and placed under arrest were not among those listed in Annex IB of the Prosecutor's Request. Similarly, neither did the Military Prosecutor direct investigative proceedings against those who bear the "greatest responsibility". As far as the "blood crimes" were concerned, the investigations focused on low-and-mid level perpetratorswith the exception of one person, who bore the "greatest responsibility". He was charged, though, merely with one count and his criminal conduct was thought to be occasional. Additionally, the Daloa Prosecutor waited to receive instructions on how to prosecute the most serious crimes by the Ministry of Justice, suggesting that the ICC's Prosecutor should investigate this group of crimes. [172]

The Court adhered to its previous jurisprudence[173] by applying the two fold test of complementarity; hence it confirmed the case's admissibility at the 'situation phase'.

L. Gbagbo challenged the admissibility of the case pursuant to art. 17 and 19 ICCSt, afterwards. Firstly, the Defence submitted that (i) proceedings for economic crimes were ongoing, that the "substantially same conduct" criterion was not accurately defined in the case law, suggesting that a flexible interpretation of the term "conduct" should be adopted, namely it should encompass the suspect's general conduct in relation to the context in which the purported crimes were committed.

[170] ICC-02/11-14-Corr, par.195
[171] ICC-02/11-14-Corr, par. 200
[172] ICC-02/11-14-Corr, paras.197-199
[173] *Katanga* case

Thus, the general conduct implied that not all crimes brought before the Court should necessarily be the same as the ones which were domestically under investigation. Other grounds of challenge were, (ii) the burden of proof of art. 17(1)(a) ICCSt should be shifted onto the party disputing the "willingness or ability of the state to carry out proceedings and (iii) the PTC II failed to apply positive complementarity; hence, it should seek to hold the case inadmissible, in order to assist Côte d'Ivoire in enhancing its judicial system in the framework of the peace building process.[174]

The PTC I rejected the first ground, for the economic crimes could not be included in the 'same case' criterion and -in any event- the adduced evidence could not prove that national proceedings for those crimes were active. Insofar as the Chamber found that national authorities remained inactive, the case was held admissible and there was no reason to answer to the other grounds of the challenge.[175]

Chapter III- Situations in Libya, CAR, Uganda

1. The Prosecutor v. Saif Al-Islam Gaddafi[176]

Case Summary

Inspired by events in neighbouring Tunisia and Egypt and sparked by the arrest of the Libyan human rights campaigner Fathi Terbil, demonstrations against the Muammar Gaddafi regime burst in February 2011 and escalated into a civil war for territory between the government and rebel forces in the west and east of the oil-rich country. From 15.02.2011 until at least 28.02.2011 the Libyan Security Forces by using security and military systems, attacked against individuals participating in demonstrations against Gaddafi's regime or those perceived to be dissidents throughout Libya – and in particular in Tripoli, Misrata and Benghazi as well as in other cities. Saif Al-Islam Gaddafi, son of Muammar Gaddafi, had possessed powers of a de facto Prime Minister and the head of Military Intelligence. Via his influence he exercised control over crucial

[174] "Decision on the "Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut", Pre-Trial Chamber I, Case No: ICC-02/11-01/11, Date: 11 June 2013, paras: 6,9,12, available at: http://www.legal-tools.org/doc/8b3a54/pdf/

[175] ICC-02/11-01/11, paras: 22-29

[176] M. Tedechini, *"Complementarity in Practice: the ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions*", Opinion, 7 Amsterdam Law Forum, (2015), 76-87, pp. 76-84

parts of the State apparatus and in concert with his father drew up and, for the most part, he implemented a plan to squash and discourage the civilian demonstrations against the regime by every possible means.[177] On 26.02.2011, the UNSC referred the situation of Libya to the ICC's Prosecutor, who issued warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al Senussi. On 2.04.2013, Libya challenged the admissibility of the case before ICC on the basis of that national judicial authorities were actively investigating the accused in order to administer justice. His trial, coupled with the trial of Abdullah Senussi, was scheduled to start on 19 September 2013. He was considered liable for murder and persecution as crimes against humanity.[178] In 2014, because of Libya's non-compliance to its obligation to transfer him to the Hague, the ICC referred the issue to the UNSC.[179] He was domestically sentenced to death jointly with A.Senussi. Nonetheless, in April 2016, the interim Government of Libya ordered Gaddafi's release due to an amnesty law.[180] On 14.06.2017, the OTP requested Libya to transfer him together with Al-Tuhamy Mohamed Khaled based on reports mentioning that he was released from the custody of the Abu-Bakr al-Siddiq, Brigade of Zintan.[181]

Although Libya's challenge concerning S. Gaddafi, was dismissed, the Al-Senussi case was found inadmissible before the court by the AC. The PTC when applying art. 17(3) ICCSt examined the following preconditions: (a) Firstly, whether

[177] BBC News Africa, "Libya: The fall of Gaddafi", 20 October 2011 available on: http://www.bbc.co.uk/news/world-africa-13860458, Case Information Sheet, Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi, ICC-PIDS-CIS-LIB-01-011/15_Eng, 13 June 2016, available on: https://www.icc-cpi.int/libya/gaddafi/Documents/gaddafiEng.pdf

[178] Situation in the Libyan Arab Jamahiriya, Warrant of Arrest for Saif Al-Islam Gaddafi Pre- Trial Chamber I, Case No:ICC-01/11, Date:27 June 2011, at. 7, available at: https://www.icc-cpi.int/CourtRecords/CR2011_08503.PDF

[179] "Saif Al-Islam Gaddafi Case: ICC Pre-Trial Chamber I issues non-compliance finding for Libyan Government and refers matter to UN Security Council", Press Release, 10 December 2014, available at: https://www.icc-cpi.int/Pages/item.aspx?name=PR1074, and "Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council", Pre- Trial Chamber I, Case No.: ICC-01/11-01/11, Date: 10 December 2014, available at: https://www.icc-cpi.int/CourtRecords/CR2014_09999.PDF

[180] Chris Stephen, *"Gaddafi son Saif al-Islam 'freed after death sentence quashed'"*, The Guardian, 7 July 2016, available at: https://www.theguardian.com/world/2016/jul/07/gaddafi-son-saif-al-islam-freed-after-death-sentence-quashed

[181] OTP –ICC, "ICC Prosecutor calls for the immediate arrest and surrender of the suspects, Mssrs Saif Al-Islam Gaddafi and Al-Tuhamy Mohamed Khaled to the Court", Statement, available at: https://www.icc-cpi.int/Pages/item.aspx?name=170614-otp-stat

the judicial system is either "fully or substantially collapsed" or "unavailable" for the case in question - and if affirmative- (b) whether the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to conduct its proceedings. The PTC considered Libyan judicial system 'unavailable', on account of its failure to obtain the accused, without elaborating the meaning of the term[182] and held that it could not assess the precise scope of national proceedings, by reason of deficiency of evidence.[183] If the Court follows the above unspecified determination of unavailability may open the back door for a flurry of admissible cases, especially as regards developing countries or countries in transition, for it is a common phenomenon for these states –even for western countries- not to obtain the accused promptly. With due regard to the principle of legal certainty, the PTC should specify the above notion; otherwise, its future decision can be unsubstantiated.

In comparison with *Al-Senussi* case, in which the accused was also detained and prosecuted by the same prosecutorial authorities in the same manner as in Gaddafi's case, the question of whether the judicial system is able to prosecute depends on the nature of detaining forces or not, remains unanswered.

The extradition request's rejection and the 'inability' to prosecute are two overlapping affairs, but arouse an admissibility oxymoron: In *Ongwen* case, Uganda had already referred the situation to the ICC via a self-referral, because it was unable to arrest L.R.A. leaders, including Mr. Ongwen. The leaders were finally arrested under CAR authorities, whereupon Uganda - now able to prosecute- strived for his extradition. However, Ongwen was transferred by CAR to the Hague. The Court held the case admissible after it had been brought before the ICC. Effective though it was, this decision was totally not in line with positive complementarity, an eminent principle which should not be disregarded. Scholars would rather Gaddafi (Libya) and Kony (Uganda) had not been prosecuted by the ICC's Prosecutor. Likewise, the Defence asserted that the state, subsequently acquired ability to initiate investigations,

[182] Situation in Libya in the case of the Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi, "Public redacted Decision on the admissibility of the case against Abdullah Al-Senussi", Case No.: ICC-01/11-01/11, Date: 11 October 2013, paras.199-202, available at: https://www.icc-cpi.int/CourtRecords/CR2013_07445.PDF

[183] Situation in Libya in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Public redacted Decision on the admissibility of the case against Saif Al-Islam Gaddafi", Case No: ICC-01/11-01/11, Date:31 May 2013,paras. 133-135, available on: https://www.icc-cpi.int/CourtRecords/CR2013_04031.PDF, Watch in particular: "Libya situation - Abdullah Al-Senussi case: "Ask the Court" programme", available on: https://www.youtube.com/watch?v=BPCffGVFFJo

so the conditions throughout the proceedings constantly altered and this alteration should be welcomed.[184]

It is noteworthy that, the PTC directly entered into the assessment of the inability test while it overlooked the "same conduct test".[185] Commentators claim that the PTC would have come to the same conclusion, if it had chosen the second path. The PTC found that facts as they exist at the time of the proceedings are crucial for assessing all the grounds of the challenge. These cases include the evaluation of the criterion of 'otherwise' inability to carry out proceedings and the interaction between fair trial breaches and the unwillingness of a State. Nonetheless, the PTC positively evaluated Libya's willingness to prosecute S.Gaddafi, as it evaluated the 'satisfactory' evidence which was presented before it'.[186] Contrariwise, the AC assessed the SSC, whereby it concluded that Libya was thought not to have investigated the same case as the ICC did. The AC reiterated the same reasoning as in the *Al Senussi*.[187] As a consequence, the AC did not proceed to the research whether the 'inability to genuinely prosecute' test was satisfied.

The results of the "substantially same conduct" test (AC) were that[188] a) a domestic investigation or prosecution for ordinary crimes is sufficient, **b) Libya's lack of legislation analyzing crimes against humanity was an indicator of case's admissibility before the court, c) *all* the events written in the arrest warrant are *not* necessarily the same as the ones covered by the national investigation, but the alleged *same general course of conduct suffices*, such as Gaddafi' s control of the state apparatus and security forces to deter -even using lethal force- the demonstrations of civilians against the regime**, d) notwithstanding progressive steps undertaken to bring Gaddafi to justice, **Libya failed to prove that it was investigating the 'same case' already brought before the Court**, e) the evaluation of "the relevant national system and procedures" is a major condition included in the

[184] Ibid, Nidal Nabil Jurdi, pp. 37-41

[185] The AC in the *Katanga* stated that the SSC requirement should be analyzed first.

[186] Amin Nouri, *"The Principle of Complementarity and Libya Challenge to the Admissibility before the International Criminal Court",* Master Thesis, Faculty of Law, Lund University, pp.47-49

[187] ICC-01/11-01/11 OA 4, paras. 70-72

[188] Situation in Libya in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi "Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled -Decision on the admissibility of the case against Saif Al-Islam Gaddafi", Case No: ICC-01/11-01/11 OA 4, Date: 21 May 2014, para. 63, available at: http://www.legal-tools.org/doc/0499fd/pdf/

second limb of the admissibility test. Therefore, the PTC held that 1) Libyan Government still had not full exercise of its jurisdiction statewide, 2) it was unable to obtain the accused, who was deprived of legal representation, and of the necessary apology, and 3) it was unable to guarantee witnesses' safety throughout proceedings. Libya asserted that it was unable to secure a safe transfer of the accused since Zintan militia had captured him on November 2011 when he was trying to flee from Libya.

Prosecutor proposed a new definition of the SSC test: *"a case will be "substantially the same" if any difference in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter"*. She pointed out that the notion of incident is an indispensable element to determine the relevant parameters of time, place, and subject matter that enable to compare the ICC case with the domestic case.[189]

With respect to critique exercised on this judgement one can concentrate on the following reflections: a) the PTC established a particularly high burden of proof on Libya, since it was not satisfied with the presented documents, including concrete investigative steps, which were provided in a dossier, that allowed the PTC to comprehend all the respects of the domestic investigation. Therefore, the PTC's obligation to understand the country's context and investigative actions was apportioned to the challenging state. As highlighted above, in the decision on the admissibility challenge in *Gbagbo*, the threshold further raised to the extent that, if a state is investigating the same case as the ICC in general, that would **not** be enough to fulfill the admissibility precondition in the event of the investigative activities conducted being sparse and disparate.[190] Thus, an additionally cumbersome requirement of providing sufficient information demonstrating that investigation should be tangible, concrete and progressive is added, indicating that states should adopt the criminal procedure of the ICC. Considering that in the lack of legislation is a determining factor for the admissibility's assessment, the question arises: does this decision embraces 'hard mirror thesis', subverting Libya's primary jurisdiction? To

[189] ICC-01/11-01/11 OA 4, paras. 67-68
[190] Ibid, Nidal Nabil Jurdi, pp.30-32

conclude, it could be asserted that Libya demonstrated willingness and ability to prosecute him.

According to Nidal Nabil Jurdi's[191] article *(2016)*; a) Commenting the PTC's judgement that the lack of domestic law on crimes against humanity constituted an indicator of the case's admissibility, he answered that: "*this is nowhere stipulated in the Statute and it is hardly imaginable that states in Rome have accepted such a further restriction to allow the ICC to dictate their domestic prosecutorial strategies on how to prosecute international crimes"*, b) the Chamber surpassed every effort later when the case taken before the Court that took place during national proceedings because of its persistence that the crucial circumstances should exist at the time of challenge of admissibility. It just confined itself to mentioning that *"Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory"*. To that end, it accentuated Libya's failure to provide two elaborated testimonies for two witnesses, who remained detained in a prison, which was beyond the control of the previous central government, instead of accepting and number of exhibits, accepting testimonies and phone intercepts that consolidated a sound basis for incriminating evidentiary material. On the contrary, Libya provided documentation that demonstrated its progress on investigations against the certain perpetrators (e.g. assembly of qualified attorneys and investigators who had already taken relevant specific investigative steps to prosecute Gaddafi (e.g. testimonies and phone intercepts, Libyan criminal code analysis), though with some foreseeable transitional inadequacies. It must be pointed out that, by no means did the statute's fathers strive for the states' partial collapse to meet the 'inability' requirement. Nidal Nabil Jurdi's point of view is that *"the Libyan judicial system at the time was in a state of partial collapse combined with weak law enforcement capabilities [...]"* which could not possibly justify the implementation of article 17 (3) ICCSt. Instead he proposes firstly the full or substantial unavailability of the Libyan judicial system in order for the ICC to implement article 17(3) ICCSt. Secondly, the condition that the failure to obtain the accused or the indispensable evidentiary material and testimony or the inability to carry out its proceedings could be adopted, whereas the

[191] Ibid, Nidal Nabil Jurdi, pp.32-35

Court had previously approved the full or substantial availability's condition. However, the ICC headed straight for the second limb of art 17(3) ICCSt.

This decision justifiably became the object of animadversion on the grounds that the notion of 'unavailability' remained vague and "precarious", and preconditions setting a heavy burden of proof on the 'ability' of states in transition to prosecute. Thus, the Court – *the Court of last resort*- overlooked in this decision the Statutes' core, which is to eliminate impunity mainly via national means, to enhance the positive complementarity principle by refusing to cooperate with transitional governments to manage such burdensome situations. Instead, the judges should consider political, legal and actual developments on each separate case, specifying their due process standards, for in this case it was not evident which relevant grave violations of human rights law prevented a genuine form of justice to take place.

2. The Prosecutor v. Abdullah Al-Senussi
Case Summary

Abdullah Al-Senussi was the brother-in-law of Muammar Gaddafi and chief of Libya's Military Intelligence until at least 20.02.2011. In the mentioned above context of violent response against demonstrations in Libya, he allegedly ordered homicide, injury, arrest, and imprisonment of hundreds. Al-Senussi was charged with the crimes against humanity of murder and persecution. On 17.03.2012, Al Senussi was arrested in a Mauritanian airport. Then, Libya sent an extradition request to the Mauritanian government and declared that the accused would be judged in Libya. Similarly, France issued an extradition request, for he had been sentenced to life imprisonment there due to his involvement in the terrorist attack against UTA flight 772 in 1989. At first, Mauritania claimed that it would hold a trial against him for forged documents and illegally entering the country, but on 5.09.2012 he was extradited from Mauritania to Libya. On 10.09.2012 the ICC sent a *note verbale* to Libya requesting confirmation of the extradition in question. A request for surrender issued twice by the ICC to Libya which did not change the latter's commitment to try Al Senussi by itself. The PTC I found (11/10/2013) and the AC (24/07/2014) confirmed the case inadmissible. On 28 July 2015, the Criminal Court of Tripoli sentenced Al-Senussi and Saif al-Islam Gaddafi to death by firing squad for war crimes committed during the Libyan revolution in 2011. The accused appealed the decision. [192]

The judgment on *Al Senussi* was hailed as a triumph of genuine complementarity, as envisaged in Prosecutorial Strategy Reports.[193] The PTC delivered a decision that contained another contradictory ascertainment: The PTC in *Gaddafi* deemed Libyan judicial system as "unavailable", since it was impossible for authorities to obtain testimonies and the accused, whereas in this case, the latter was considered 'available'.

[192] Trial Watch Profile,"Abdullah Al-Senussi", TRIAL International Mission, 25.04.2016 (Last modified: 08.11.2016), available on: https://trialinternational.org/latest-post/abdullah-al-senussi/, BBC News, "Profile: Abdullah Al-Senussi", 16.10.2015, available at: http://www.bbc.com/news/world-middle-east-17414121

[193] Ibid, Frédéric Mégret and Marika Giles, pp. 588

Libya's and Defence's submissions on the admissibility challenge:[194] a) the Court's jurisprudence is imprecise on the same conduct test's conditions, seeing that states were regarded as responsible to investigate precisely the same incidents under investigation by the OTP, b) it is of utmost importance for a state to have the wide discretion while it describes occurrences that might lead to official prosecution, so an flexible definition of "case" should be adopted. Thus, Libyan investigative action fell under this flexible interpretation of "case". The PTC took the view that it was not necessary to ascertain whether domestic criminal activities covered *all* the incidents investigated by the court and if some of the incidence were truly investigated by national authorities these could be considered as relevant indicators- the arrest warrants includes ***illustrative*** and non- exhaustive examples of the accused's criminal activity.

On the one hand, the inability to obtain the accused-although important-*cannot alone* preset the inability test. On the other hand, national authorities' deficiency to assign attorneys mirrors the "otherwise" inability to carry out proceedings.

In the second instance, the AC held that the most appropriate remedy for the indictee, so as to bring more counts/evidence on jurisdictional issues that are post-dated to the first admissibility challenge, is to file a second challenge on admissibility under art. 19(4) ICCSt. This is because the AC did not allow new allegations and evidence to be brought before it for the first time.[195] In a comparison made between the cases of Gaddafi and Al Senussi, the AC held that Gaddafi's criminal conduct was carried out throughout Libya and -in collaboration with his father- he drew up a plan to commit serious crimes. Al Senussi, by contrast, committed crimes in the city of Beghazi and implemented the aforesaid plan. Libya also led more evidence in that

[194] Situation in Libya in the case of the Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi, "Decision on the admissibility of the case against Abdullah Al-Senussi", Pre –Trial Chamber I, Case No.: ICC-01/11-01/11, Date: 11 October 2013, paras.31-42, available at: https://www.icc-cpi.int/CourtRecords/CR2013_07445.PDF

[195] The Prosecutor v. Saif al-Islam Gaddafi and Abdullah AL-Senussi, "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled Decision on the admissibility of the case against Abdullah Al-Senussi", Case No:ICC-OI/II-OI/IIOA6, Date:24 July 2014, paras 57-58, available on : https://www.icc-cpi.int/pages/record.aspx?uri=1807073

case than in the *Gaddafi*.[196] Consequently, although the two cases were tried jointly, they had different progress.

The 'substantially same conduct' condition: The AC corrected PTC's ruling that Libyan investigations had not covered the Court's own activities and confirmed the adopted approach of the PTC in *Gaddafi* Admissibility Challenge.[197] PTC's specifically erred by adopting the view that it was unnecessary to consider each of those events demonstrated by Libya, when evaluated whether the SSC requirement was fulfilled.[198] The PTC should *not* have set excessively high threshold in order for a state to provide evidentiary material that the same case is being investigated by the national judiciary and criminal authorities and the OTP.

The decision in *Ruto* case was reiterated, for the AC held the SSC condition requires that the extent to which it must be demonstrated that the same incidents must be under investigation by both the Prosecutor and the national authorities, and the alleged conduct in those incidents should be an integral part of the case against the suspects. Thus, no resemblance of incidents renders a case admissible, while, if the degree of overlap between national and international process is large, the state is actually investigating 'substantially the same conduct', as the corresponding before the Court. Nevertheless, if the overlap is smaller or merely related to a very small part of the Prosecutor's case, the indictee must show *precise facts* indicating that the SSC requirement is satisfied (e.g. he/she needs to demonstrate that the *most serious aspects* of the case are under examination).[199]

The conundrum of "persecution"/whether national authorities can genuinely prosecute international crimes as ordinary crimes: The dilemma the AC managed was the following: Can an ordinary crime substitute an international crime, in absence of integration of international crimes within the national legal system?

It was accepted that Libya did not need to accuse Al Senussi of persecution *per se*. This phrase leads us to the conclusion that the Court follows the aforesaid 'soft-mirror thesis', being flexible in its evaluation on the fulfillment of SSC

[196] ICC-OI/II-OI/IIOA6,paras. 95-96
[197] ICC-OI/II-OI/IIOA6, par. 93
[198] ICC-OI/II-OI/IIOA6, par.101
[199] ICC-OI/II-OI/IIOA6, paras.99-100

requirement. Libya charged Al Senussi for the common crimes of civil war, assault of the political rights of the citizens, stirring up hatred between the classes and other crimes associated with fomenting sedition and civil war in the context of the use of the Security Forces to suppress demonstrators against the political regime. Broad elements of the international crime of persecution could be used as an aggravating factor under articles 27 and 28 of the Libyan Criminal Code. Finally, the AC determined that the domestic conduct investigated, which corresponds to the international crime of 'persecution', is sufficiently covered by Libyan authorities, so that, it is -substantially the same- as that dealt with the ICC. [200] In the previous case, by contrast, the Court addressed the issue against the state.

The Defence also submitted that the PTC committed a procedural error, as Al Senussi was devoid of his right to access the Defence, while he was imprisoned in Libya, whereupon Libya's failure to grant access to Al Senussi was an evident indication of Libya's unwillingness and/or inability to try him.[201] The AC replied that art. 19(2)(a) ICCSt and rule 58(3) of the RPEs provide that, the suspect is entitled to join in the admissibility proceedings triggered by others, by filing written submissions (participatory right). To that end, the suspect should either have been surrendered to the Court or have appeared before it. Granting this right to the accused, namely the right of Al Senussi to submit his allegations via the Defence counts at the trial of the Libya's Admissibility Challenge lies within the discretionary power of the PTC.[202]

Under the wording of art. 17(2)(c) ICCSt, the question is "whether the deprivation of an attorney constitutes a breach of the accused's rights which is *"so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed [...] to be 'inconsistent with an intent to bring [Mr Al-Senussi] to justice*". The AC recalled the PTC's findings that the main reason why the accused had not access to an attorney during the preliminary phase was the security situation in the country, which did not entail 'unwillingness'. The security situation in Libya had substantially altered from the date the PTC delivered its decision on admissibility challenge in *Gaddafi* case to the date Al Senussi's trial on challenge of admissibility initiated. This reversal

[200] ICC-OI/II-OI/IIOA6, paras.118-122
[201] ICC-OI/II-OI/IIOA6, par. 133
[202] ICC-OI/II-OI/IIOA6, paras. 146-150

was neither obvious to the PTC, nor the Defence made clear to the AC, which the specific evidence the PTC passed over. Furthermore, the AC reiterated PTC's judgement that security problems only affected the appointment of the counsel and not the investigation as a whole. Therefore, Libya in *Al-Senussi* was willing to genuinely prosecute the indictee.[203] A consequent allegation of the Defence concerning the 'inability of Libya to genuinely prosecute', because of lack of legal representation in the early stages of the procedure (unfair trial) was also disapproved by the AC, due to the fact that this assertion remains unrelated to complementarity and the 'inability to genuinely prosecute', because a domestic process is possible to end up in an acquittal, even though a genuine prosecution could have taken place.[204] To put it another way, the AC distinguished the notions of *fair trial* from *genuine prosecution,* in order for the 'ability' consideration only to concern the latter and not the former notion. Also, fair trial issues could not render the state 'unwilling' genuinely to carry out the investigation or prosecution under art. 17(2)(c) ICCSt, for this article sets the certain circumstances under which a state can be characterized as unwilling or not, while unwillingness relates to the suspect' s ability to evade justice and not generally to unfair trial issues. (The Court is not an international court of human rights). Fair trial rights may avail the Court when evaluating, if the proceedings are or were carried out "independently or impartially" within the meaning of article l7(2)(c) ICCSt.[205] However, in the previous case, the PTC found that the deprivation of a legal counsel was a sound ground for the admissibility of the case.

With regard to the 'independence or impartiality of the court', art. 20(3)(b) ICCSt[206] provides the same condition as the art. 17(2)(c) ICCSt, namely in order for the these elements to be considered as indicators of 'unwillingness', the suspect's position must be unjustly ameliorated. So, in a case where his/her position deteriorates, the deterioration will be irrelevant to the purpose of the above

[203] ICC-OI/II-OI/IIOA6, paras. 190-196
[204] ICC-OI/II-OI/IIOA6, paras. 200
[205] ICC-OI/II-OI/IIOA6, paras. 216-222
[206] Article 20, *Ne bis in idem*, "No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by International law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

provisions: *"the Court should intervene where an operating national judicial system was being used as a shield"*. Moreover in the *travaux préparatoires* the proposal of including the fundamental rights of the accused into the other preconditions of the above articles was rejected. All in all, article 17 ICCSt[207] *"was not designed to make principles of human rights per se determinative of admissibility"*. Exceptionally, the breaches of fundamental rights of the suspect must be so egregious that indicate that there was no genuine form of justice and under such circumstances "*inconsistent with an intent to bring that person to justice"*. [208] Plus, considering the Defences's arguments that death penalty was probable, if Al Senussi was tried in his own country, the AC rejected his count as unsupported. [209]

Al-Senussi was being detained in the Al-Hadban prison over which Libya exercised sufficient control. The collected evidence indicated that proceedings against Al-Senussi had reached the accusation stage. Despite the deficiencies in access to appropriate witnesses, in protection programs for governmental authorities, local prosecutors and judiciary in the country, the accused was questioned five times during his detention, the necessary evidence was accumulated, a hearing took place in a courtroom in the facilities of the prison complex and there was not enough evidence to prove that militia could interfere with his treatment, so the PTC concluded and the AC affirmed that the State was 'able genuinely to carry out its proceedings' under art. 17(3) ICCSt.[210]

In conclusion, the AC deemed that, it struck itself a delicate balance between human rights violations that do not affect the effective administration of justice and the admissibility conditions and those 'relevant' serious violations that can bar genuine form of justice to be accomplished. However, the above reasoning fails to provide consistent criteria on the issue, when a due process violation is as grave as to bar the authorities from genuinely accomplishing justice, whereupon the complementarity conditions' ambiguity increases.

Another critical point is the imposed capital punishment on Abdullah Al Senussi and Saif al-Islam Gaddafi by the Appeals Court of Tripoli. Even though the

[207] See also art. 51 RPEs
[208] ICC-OI/II-OI/IIOA6, paras. 222-230
[209] ICC-OI/II-OI/IIOA6, paras. 254-260
[210] ICC-OI/II-OI/IIOA6, paras. 274-296

AC and TC were aware of the possibility that Libyan judges had the discretion to impose this form of sentence, they entertained the issue in favour of the State contributing to the overall abuse of the indictees' human rights and to the violations of fundamental principles of justice.

Giving that there was not a concise plan on complementarity in the jurisprudence, the ICC in the Libyan cases could not conform itself with the accelerating progress of the Libyan transitional system.

3. The Prosecutor v. Jean-Pierre Bemba Gombo

Situation in C.A.R.

Case Summary

In 1998 Bemba Gombo under the auspices of Uganda established the movement for the Liberation of the Congo (MLC) and its military branch, the Armée de Libération du Congo (ALC). The party later developed into one of the major politico-military actors in the country. The MLC was substantially active from 1998 to 2003. In 2002 in neighbouring CAR, F. Bozizé raised a rebellion, which culminated in civil war, against the CAR's President, A.F. Patassé, who asked Bemba for his aid. Bozizé's coup d' état successfully ended in 2003, whereupon he came to power.[211] The MLC soldiers directed a widespread attack against civilians, namely acts of pillaging, rape, and murder against civilians, over a large geographical area, including in and around Bangui, PK12, PK22, Bozoum and many other administrative districts. Their leader, Bemba acting as a military commander failed to take all necessary and reasonable measures to interfere with or to suppress the commission or to notify competent authorities of those crimes. Bemba has been Vice- President of DRC, until CAR prosecutor commenced proceedings against him and others. Finally, CAR referred the case to the ICC. This case is particularly interesting for the implementation of art. 28 (a) ICCSt[212] (Command Responsibility).

[211] TRIAL International, Profile "Jean-Pierre Bemba Gombo", 12.04.2016 (last modified: 16.10.2017), available on: https://trialInternational.org/latest-post/jean-pierre-bemba-gombo/

[212] Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo. Case Information Sheet, ICC-PIDS-CIS-CAR-01-016/16_Eng, Updated: 26 July 2016, available on: https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf

The Defence asserted that invoking jurisdiction via referrals by a State Party should not be welcomed, for the "fathers" of the Statute had not supported this method of initiating the international criminal proceedings and because using this legal tool to prosecute leads to the omission of judicial scrutiny laid down in art. 15 ICCSt, which -together with all its components- should be implemented, instead. It also submitted that the CAR was able and willing to genuinely prosecute, for national preliminary investigations were ongoing till the moment the 'self-referral' issued.[213]

(i) Dismissal of charges

The Senior Investigating Judge issued a decision (including an Order) dismissing all the charges against him.[214] That was not a final decision on the merits of the case, since the *Deputy Prosecutor of the* Tribunal *de Grande instance* the following day 17.09.2004, filed a *prima facie* valid appeal against the aforementioned decision on behalf of the *Ministère Public*. (The Defense contended that this Order was subject to an invalid appeal.)[215] The discontinuance of uncompleted domestic proceedings did not constitute a decision not to prosecute under Article 17(1)(b); it prepared the case to be referred to the ICC,[216] instead. Art. 17(1)(b) Statute envisages **the completion of the relevant investigations.**[217]

(ii) Article 17(3) collapse of national judicial system

The Defense adduced evidence so as to prove its concept (e.g. significant investigative steps had been taken, CAR judicial system functions properly, infrastructure was in place). Nevertheless, the Prosecutor asserted that the CAR judiciary authorities were not well trained on such matters, that 'general

[213] Situation in the Central African Republic in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the ICCSt on the Charges of the *Prosecutor Against Jean-Pierre Bemba Gombo",* Trial Chamber III, Case No:ICC-01/05-01/08 OA 3, Date:19 October 2010, paras.74, 83, available on: https://www.icc-cpi.int/CourtRecords/CR2010_09017.PDF
[214] Order of 16 September 2004, ICC-01/05-01/08 OA, par. 60, The defense refers to a decision of the ECJ of 11 February 2003 in which it is said an agreement between the indictee and the prosecution was found to constitute a final decision and ly the principle of ne *bis* in idem was applicable, Judgment of the ECJ in joined cases C-187/01 (*Gözütok*) and C-385/01 (*Brügge*), 11 February 2003, available at: http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d51fe83aaaa0994a559b94f5ab3ea922bd.e34KaxiLc3eQc40LaxqMbN4PaNmLe0?text=&docid=48044&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1613942
[215] ICC-01/05-01/08, par. 237
[216] ICC-01/05-01/08, par. 47
[217] ICC-01/05-01/08 OA 3, par. 104

unavailability', was proved by the accused's personal immunity, by victims' security issues (MLC militia were on the territory of the CAR as well as there were still areas in conflict) and by adverse circumstances in collecting the necessary evidentiary material (inability to afford proper investigation and trial).[218] In addition, pursuant to Article 17(3) ICCSt, the criteria "a total or substantial collapse" or "unavailability of the national judicial system" are cumulative.

(iii) Personal immunity

Defense's arguments were inconsistent because, on the one hand, there was the assertion that CAR's authorities should have recommenced the proceedings at the time personal immunity (the accused was Vice-President of the DRC) ceased to exist, and on the other hand, there was raised the *res judicata* argument.[219]

(iv) Residence outside the territorial jurisdiction of CAR

CAR was unable to prosecute because Bemba was in exile in Portugal.[220] The *Bangui Court of Appeal* and the *Cour de Cassation* have issued decisions clearly describing those Courts' inability to undertake these proceedings and have stressed that since Patassé and Bemba did not live in the CAR, the CAR's judiciary did not have the power to oblige Togo and the DRC, respectively, to extradite them.

(v) Article 13(a) ICCSt "self-referrals"

When the government of CAR decided to refer the case to the ICC, it divested the prosecution of the crimes currently under examination. Therefore, the principle of withdrawal made CAR unable to resume the prosecution once it withdrew from handling the case. This kind of 'unwillingness' does not fall within the meaning of the relevant term in Article 17(1)(b).[221]Under these circumstances, CAR is unable to prosecute and try the purported perpetrators.[222] The AC held that: *"a general prohibition against self-referrals is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction, and the Court retains the discretion to decline the exercise of jurisdiction on the basis of a State referral"*. The

[218] ICC-01/05-01/08 OA, par. 105
[219] ICC-01/05-01/08 OA, par. 38, ICC-01/05-01/08 par.108, *res judicata principle* in this case means that the investigating judge, when dismissed the charges ultimately concluded the case against Bemba.
[220] ICC-01/05-01/08 par.78
[221] ICC-01/05-01/08 OA, par. 41-45
[222] ICC-01/05-01/08,par. 15, ICC-01/05-01/08 par.105

ICC cannot forbid a State to divest its jurisdiction in favour of the Court (the Prosecutor).[223]

(vi) Allegations on judiciary's impartiality

The Prosecutor accepted Defense's contention that, the CAR judiciary was rendered *"ineffective, unaccountable, corrupt, and dependent on the executive"*[224] following General Bozizé's ascension, thereby substantiating the argument that the judiciary was genuinely unable to proceed against the indictee. As a member of CAR's judiciary stated in a letter sent to the OTP; *"the national proceedings were dropped to avoid difficulty with the DRC"*.[225] The TC III held that, this letter raised OTP's awareness as regards the referral's purposes and the current situation in CAR's judiciary.[226]

(vii) After the case fulfilled the "same-case", "same-conduct" requirements[227], the TC III held Inactivity (17(1)(a) Statute

Inertia established the case's admissibility due to lack CAR authorities' evaluation on the merits[228] (Order for dismissal of charges due to lack of sufficient evidence)[229] and the CAR proceedings were not terminated on the grounds that prosecution was unwarranted.[230] *"Thus, a "decision not to prosecute" in terms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC"*.[231] The inactivity precondition is totally distinct from inability or unwillingness. It is irrelevant, if the judiciary is able and willing to prosecute and try other cases. In any case, the TC III stated that the 'willing' and "unable" criteria 17(1)(b) ICCSt are fulfilled, for the state is no longer prepared to prosecute the accused in national courts nor does it have the capacity to conduct a successful trial,[232] either, according to

[223] ICC-01/05-01/08 par. 102
[224] ICC-01/05-01/08 par. 107
[225] ICC-01/05-01/08 par.79
[226] ICC-01/05-01/08 par.234
[227] ICC-01/05-01/08 par.218
[228] ICC-01/05-01/08 par.101
[229] ICC-01/05-01/08 OA, par. 58
[230] ICC-01/05-01/08 par. 103
[231] ICC-01/04-01/07-1497, par. 83
[232] ICC-01/05-01/08 par. 245, the budget of the Ministry of Justice is described as "ridiculously insignificant", and insufficient for a case of this kind.

CAR's submissions in Oral Proceedings.[233]

(viii) Lack of domestic law incorporating Article 5 ICCSt.

Unwillingness and inability were fulfilled due to lack of the abovementioned indispensable legal framework, so the imminent risk of applying the principle of non-retroactivity was abolished.[234]

(ix) Sequence of events related to the admissibility challenge

The Judges recall the important factor of sequence of events in criminal proceedings; all facts connected to admissibility challenges must exist at the time, when PTC or TC examine these issues, because admissibility prerequisites depend heavily on the investigative and prosecutorial activities of States having jurisdiction. Nonetheless, these activities are depending on the time. Thus, a case that was originally admissible may at a next phase be rendered inadmissible by virtue of a change of circumstances in the concerned State and *vice versa*.[235]

4. The Prosecutor v. Joseph Cony, et *al.*

Situation in Uganda

Case Summary

For almost two years (1.07.2002 - an unspecified date in 2004) Ongwen in his capacity as Brigade Commander of LRA ordered the commission of war crimes and crimes against humanity including murder, abduction, sexual enslavement, mutilation, mass burnings of houses and looting of camp settlements in the context of a rebellion against the Government of Uganda the Ugandan Army (also known UPDF - LDUs). Children and adolescents are believed to have been abducted and forcibly "recruited" as fighters, porters and sex slaves to serve the LRA. His case was separated from the cases of his co-accused, because of their non-appearance. (Commencement of Trial in absentia of suspects is forbidden).[236]

[233] ICC-01/05-01/08 par. 243
[234] ICC-01/05-01/08 par.133
[235] ICC-01/05-01/08 paras. 57-66
[236] The Prosecutor v. Dominic Ongwen, Case Information Sheet, ICC-PIDS-CIS-UGA-02-012/16_Eng, January 2017, available pp: https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf

(i) Obligation or discretion to make a determination of a case's admissibility?

The use of the word *'may'* in article 19(1) ICCSt, second sentence, of the Statute indicated that a Chamber has *discretion* as to whether making a determination of the admissibility of a case.[237]

(ii) How many challenges can be submitted?

Article 19(4) second sentence ICCSt explicitly allows for a challenge to jurisdiction or admissibility to be brought "more than once" prior to the commencement of the trial, on leave to be granted by the Court in exceptional circumstances. So the issue of admissibility is not static, depends on development in the case so the Court's admissibility can be challenged anew, cannot be confined in a joinder of challenges to admissibility by different parties and can arise during the course of the proceedings even at a time later than the commencement of a trial. The indictee will always be entitled to raise a challenge under article 19(2) ICCSt, whether or not the Chamber has exercised its powers under article 19(1) ICCSt.[238]

(iii) Uganda's inability to prosecute

The Attorney General of Uganda implied that, theoretically Ugandan authorities were "both willing and able" to prosecute the perpetrators of the crimes allegedly committed in Northern and Western Uganda during the preceding seventeen years but practically the Ugandan judicial system had been unable to secure their arrest, mainly because those purported perpetrators operated from bases in Southern Sudan, where Uganda could not exercise its principal right of prosecution. The *Solicitor General of Uganda* remarked to the Court's Prosecutor that, the Ugandan Government was convinced that the Court was *"the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility for the crimes within the referred situation"*, regardless of the fact that the national judicial system *"widely recognised for its fairness, impartiality, and effectiveness"*.[239] The question arises then: why the PTC did not found Ugandan

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[237] *Prosecutor v. Joseph Cony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, "Decision on the admissibility of the case under article 19(1) of the Statute", Case No: ICC-02/04-01/05, Date:10 March 2009, par. 20

[238] ICC-02/04-01/05, paras. 26-27

[239] Ibid, ICC-02/04-01/05, par. 37, "*the Government of Uganda had not conducted and did not intend to conduct national proceedings in relation to the persons most responsible for these crimes, so that the*

judicial system unavailable by virtue of its failure to obtain the accused?

Being important, some other criteria also were included in support of the Referral; The scale and gravity of the relevant crimes, the fact that victims could find more comfort and the sense of justice in an international forum rather than in a national forum and that this would contribute favourably to national reconciliation and social rehabilitation. Therefore, we conclude that the complementarity principle is not a monolithic doctrine, but interacts and is correlative of other factors. This stance, though, shows that Uganda sifted the burden of prosecution to the OTP, ignoring that it was its primary duty to investigate/prosecute/try those most responsible for serious crimes.

(iii) Special Division within the High Court of Uganda

Contrary to the complementarity principle, and aiming at the mitigation of the reputational cost, Uganda set a barrier on the international prosecution, seeing that the Annexure[240] provides for the establishment of a *Special Division within the High Court of Uganda (the "Special Division")*, with jurisdiction to *"try individuals who are alleged to have committed serious crimes during the conflict"* in Uganda. Traditional justice mechanisms and any other alternative justice fora established under the Agreement would not be precluded, either.[241] The Ugandan First Response pretty vaguely addressed the conflict of the plurality of jurisdictional fora by noting that the Special Division *"is not meant to supplant the work of the International Criminal Court"* and that individuals for whom a warrant has been issued by the latter "*will have to be brought before the Special Division of the High Court for trial"*. The Ugandan Second Response noted that there must be put an end to impunity in any case, and that the Special Division of the High Court will adhere to the provisions of the Cooperation Agreement not putting obstacles in the cooperation between Government of Uganda and the Office.[242]

Despite the Agreement and the Annexure, the Chamber needed to eradicate the

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cases may be dealt with by the ICC instead"

[240] "Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement" 19 February 2008, available at: http://www.ucdp.uu.se/downloads/fullpeace/UGA%2020080219.pdf

[241] ICC-02/04-01/05 , par. 43

[242] ICC-02/04-01/05 par. 48

abovementioned ambiguity, as to which was appropriate the judicial venue that should be followed.[243] The Chamber leveraged the latest statements by Uganda, according to which, the national proceedings would be initiated once there was a peace agreement signed. Considering this problematic jurisdictional regime the Chamber conduced to the exercise of *proprio motu* review and to the determination of the kompetenz – kompetenz. It stated that it is the power of the Court -not the state's- to determine and interpret the complementarity-associated provisions once the jurisdiction of the Court is triggered.[244] As observed by the ICJ, "*in the absence of any agreement to the contrary, an international* Tribunal *has ... the power to interpret for this purpose the instruments which govern [its] jurisdiction"*.[245] The Chamber considered that, when the Court had jurisdiction concurrently with one or more national judicial systems, it should adopt the investigation and prosecution rules of the complementarity regime.[246] This seems a satisfactory handling of the issue at the moment. Nonetheless, there are supporters of primacy or regional complementarity who argue for the effectiveness of national or regional means for administering justice.

On the one hand, there was elaboration of the national judicial authorities' progress on the matter, namely, there was formed a *"Transitional Justice Working Group"*, that was working on new substantive and procedural legislation, on the judicial education and comparative studies. On the other hand, there was no progress accomplished on a political level, so the judicial progress mired in theory. The situation was being deteriorated due to the enactment of Amnesty Act passed in 2000. Therefore, the Chamber deemed the jurisdiction of the national Special Division to be hypothetical and the case admissible before the Court.[247] The Counsel of Defense submitted an Appeal against that decision citing only procedural errors.

[243] ICC-02/04-01/05, par. 44
[244] ICC-02/04-01/05, par. 45
[245] ICC-02/04-01/05, par. 46, International Court of Justice, Judgment of 18 November 1953, *Nottebohm case, (Lichtestein v. Guatemala),* ICJ Reports 1953, p.119
[246] ICC-02/04-01/05, par. 46
[247] ICC-02/04-01/05, par. 47-52

Chapter IV - Situation in Democratic Republic of Congo

1. The Prosecutor v. Callixte Mbarushimana

Case Summary

In 2001 Callixte Mbarushimana an ethnic hutu arrested in Kosovo after Rwandan authorities issued a warrant of arrest for the crimes of murder against 32 individuals during the Rwandan genocide, including UN employees. Kosovo did not allow his extradition due to capital punishment still in use in Rwanda. On 04.05.2001 the ICTR's Prosecutor took the initiative to investigate his case. However, in September 2002 the lack of sufficient evidentiary materials against him led the Prosecutor to refuse to indict him. In 2003 in France he was protected as a refugee. On 19.4.2004 the Government of DRC referred its situation to the ICC's Prosecutor. In July 2007 Mbarushimana became Executive Secretary of the FDLR. From 20.01.2009 to 31.12.2009 in North and South Kivu in DRC the FDLR troops launched a widespread and systematic attack against civilians, committing war crimes and crimes against humanity, for an armed conflict between FDLR and the FARDC together with the RDF, and with the MONUSCO erupted. On 28.09.2010 a warrant of arrest was issued based mainly on art. 25(3)(c) ICCSt by the ICC, whereupon he was surrender to it by French authorities. On 16.12.2011 the PTC did not confirm any charges against him because of insufficient evidence establishing his accountability.[248]

The defendant submitted *ratione temporis, ratione loci* grounds, and the ground of *non sufficient nexus between the self-referral and FDLR's crimes* as basis of the case's inadmissibility,[249] and that there is not sufficient nexus between the charges and the scope of the situation. The Prosecutor replied that: *"DRC did not geographically or temporally limit the scope of the situation"*[…] *"did not subsequently contest the temporal or geographic scope of the current investigations relating to events during 2009 in the Kivu"*[…] [250] the State fully cooperates with the Court and the material

[248] TRIAL International, Profile *"Callixte Mbarushimana*" 16.03.2013 (Last modified: 10.06.2016 available on: https://trialInternational.org/latest-post/callixte-mbarushimana/
[249] ICC-01/04-01/10, par 6
[250] "The Prosecutor v. Callixte Mbarushimana, "Decision on the Defence Challenge to the Jurisdiction of the Court", PTC I, Case No:ICC-01/04-01/10, Date:26 October 2011, available at: https://www.icc-

elements of the case are inextricably linked to the DRC situation; hence the Court has jurisdiction over that case.[251] Investigations based on a self-referral cover crimes not only committed before its issuance, but afterwards, as well, when sufficiently linked to that particular situation of crisis. The self-referrals also do not limit the scope of the ICC's jurisdiction over certain provinces within a country.[252] In complementarity terms, a State cannot issue a temporally and territorially general self-referral, but a referral can include several acts and perpetrators in the context of a particular crisis/situation, *"a specifically identifiable series of crimes".* Otherwise, and contrary to the idea of complementarity, a State could abdicate its responsibility for exercising jurisdiction over serious violations of IHL for all time.[253] The fact that the OTP's investigators had focused mainly in certain areas in the past did not imply that the jurisdiction was limited.[254] Similarly, the aforementioned nexus existed because UNSC adopted Resolution 1445 (2002) and its President stated the UNSC's awareness on the issue and urged FDLR troops to renounce the use of force[255] etc. Thus, even though the UNSC had expressed its concern over DRC until 2000 and the self-referral issued in 2004, the general context of the crisis lasted for more than 10 years.

2. The Prosecutor v. Thomas Lubanga Dyilo

Case Summary

Thomas Lubanga Dyilo a DRC national belongs to the Hema ethnic group. On 15.09.2000 he established and presided over the UPC. He also set up a corresponding armed wing FPLC in which he sat as Commander-in-Chief. It was alleged that before its formation FPLC enlisted children under the age of 15 years and coerced them to undergo military training basically at its camp at Sota. Lubanga allegedly forced children, especially from September 2002 to August 2003, during the armed conflict in Ituri, to join the army by becoming

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cpi.int/CourtRecords/CR2011_17842.PDF

[251] ICC-01/04-01/10, par. 7

[252] ICC-01/04-01/10, paras. 16, 20-21, 26

[253] ICC-01/04-01/10, par 16

[254] ICC-01/04-01/10, par. 33-36

[255] ICC-01/04-01/10,par.45, S/RES/1445 dated 4 December 2002, available on: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1445(2002), S/PRST/2004/15, 14 May 2004, available on: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2004/15

bodyguards to high ranking officers in the FPLC. In Ituri and in Bunia civilians of Lendu origin were targeted and thousands killed or displaced He was arrested on 19.03.2003 and put in jail in Kinhasa. On.14.03.2012 he was found liable for the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.[256]

The PTC I admitted that the DRC was not any longer 'unable to prosecute', as DRC had previously stated when it issued the self-referral. To support its reasoning the PTC mentioned that certain charges had been leveled against the indictee, he was detained, and the Tribunal *de Grande Instance* had been re-opened in Bunia, so he could be formally tried.[257] In the arrest warrant the PTC charged Thomas Lubanga Dyilo with war crimes, including the recruitment and use of child soldiers and at the same time he was domestically prosecuted for murder, illegal detention, and torture. The PTC I decided that national authorities did not cover the identical criminal activity to the one the PTC described in the arrest warrant. In *S. Gbagbo* and *Al Senussi*, though, the Chambers held that the delineation of the general conduct suffices.

Lubanga lodged an admissibility challenge which was dismissed whereupon he filed a motion of appeal on counts of abuse of process prior to his arrest under the warrant of the Court, of his unlawful detention (the warrant of arrest was endorsed by a military and not an ordinary court) and mistreatment by Congolese authorities, invoking art. 21(3) and 19(2) ICCSt, commending that, proceedings against him should discontinue.[258] The PTC found that the indictee did not adduce any evidence to support his allegations of concerted action to abuse his rights between the Prosecutor

[256] TRIAL International, Profile, *Thomas Lubanga Dyilo*, 02.05.2016 (Last modified: 07.06.2016), available on: https://trialInternational.org/latest-post/thomas-lubanga-dyilo/, Situation in the Democratic Republic of the Congo The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06, Case Information Sheet ICC-PIDS-CIS-DRC-01-015/16_Eng, October 2016, available on: https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf, *Prosecutor v. Dyilo*, Warrant of Arrest, Case No: ICC-01/04-01/06, Date:10 February 2006, available on: https://www.icc-cpi.int/CourtRecords/CR2006_02234.PDF

[257] Prosecutor v. Dyilo, "Decision on the Prosecutor's Application for a Warrant of Arrest", PTC I ,ICC-01/04-01/06, , Date: 24.02.2006, paras. 36-40

[258] The Prosecutor v. Thomas Lubanga Dyilo, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", Case No:ICC-01/04-01/06 (OA4), Date: 14 December 2006, paras 4-5, available on: https://www.icc-cpi.int/CourtRecords/CR2007_01307.PDF

and the DRC.[259] The AC disallowed the Appellant's submissions that the abuse of process or gross infringements of suspect's basic rights result in cessation of the criminal process, because these counts of appeal are not envisaged, not even in art. 19(2) ICCSt, as grounds for which the Court may desist from exercising its jurisdiction. Abuse of process, by contrast, may be included as an applicable *principle of law* under either sub-paragraphs (b) or (c) or paragraph 1 art.21 ICCSt.[260]Breaches of the suspect's human rights confers a right to compensation under art.85(1) ICCSt and may irreversibly rupture fair trial to the extent that any further judicial process becomes void under art. 21(3) ICCSt. The PTC and the AC concluded that he did not suffer from any mistreatment or violation of his rights.[261]

To sum up, the Court observed that the national authorities failed to meet the 'same-conduct' requirement and serious violations of the suspect's human rights could probably -under certain circumstances- be used as a barrier to criminal proceedings. In any case, the appellant did not lead evidence to the Court so as to prove his allegations.

3. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

Case Summary

Katanga had been the highest ranking leader of FRPI since 2003, while on 11.12.2004 he was promoted to General in DRC's army. As a commander of the FRPI Katanga, in concert with other commanders, planned and executed an indiscriminate attack against the village of Bogoro in Ituri (24.02.2003). Under his commands, militia attacked against the Hema ethnic group, whose residence is the village of Bogoro. The FRPI used as combatants children under the age of fifteen as fighters, as well. Women and adolescent girls were abducted to be turned into sexual slaves. Militia literally obliterated the village by pillaging it. In a dramatic series of events, in which nine peacekeepers were killed, Katanga and others were finally arrested by the Congolese authorities. After his transfer to the

[259] ICC-01/04-01/06 (OA4), paras. 8-9
[260] ICC-01/04-01/06 (OA4), paras. 24, 34
[261] ICC-01/04-01/06 (OA4), paras. 40-43

ICC, based on a warrant of arrest, the PTC I decided to join the cases of Katanga and Mathieu Ngudjolo Chui. With a letter the President of the DRC highlighted that at the time of the events the DRC authorities were unable to take all the necessary investigative measures. The PTC I averred the numerous charges. On 8.12.2015, the ICC Presidency decided that the accused's sentence would be served under the supervision of the ICC in the DRC, under the provisions of the Rome Statute. However, new similar charges to the ones he was convicted had been raised against him concerning the years 2003-2005. So, a trial began before the High Military Court in Kinshasa on 3.12.2016. The High Court requested the ICC's President to approve national prosecution. The Presidency replied that the proposed domestic prosecution did not "undermine fundamental principles or procedures of the ICCSt or otherwise affect the integrity of the Court".[262]

Mathieu Ngudjolo Chui in June 2005 was co- founder and head of the MRC, a movement which continued to sow terror in Ituri. In December 2006 he was appointed Colonel of the FARDC (Armed Forces of the RDC), and left Ituri in November 2007 to follow a military training center in Kinshasa, where he was arrested on 6.02.2008. He was being held accountable as an accessory for planning and committing crimes in Ituri. On 27.02.2015, the AC rejected the three grounds of the Prosecutor's appeal and confirmed TC II's decision acquitting him of charges of crimes against humanity and war crimes.[263]

The sequence of the admissibility preconditions unfold as follows;

(i) Timeframe of the admissibility challenge's filing (art. 19 (4) ICCSt)

The indictee can petition for an admissibility challenge prior to or at the commencement of the trial. 'Commencement of the trial' according to TC implies 'the

[262] TRIAL International, Profile *"Germain Katanga*" 18.04.2016 (Last modified: 29.07.2016 available on: https://trialInternational.org/latest-post/germain-Katanga/, Situation in the Democratic Republic of the Congo The Prosecutor v. *Germain Katanga*, ICC-01/04-01/07, Case Information Sheet, ICC-PIDS-CIS-DRC-03-014/17_Eng, Updated: 27 March 2017, available on: https://www.icc-cpi.int/drc/Katanga/Documents/KatangaEng.pdf

[263] Situation in the Democratic Republic of the Congo, The Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12, Case Information Sheet, ICC-PIDS-CIS-DRC2-06-006/15_Eng Updated: 27 February 2015, available on: https://www.icc-cpi.int/drc/ngudjolo/Documents/ChuiEng.pdf, TRIAL International, Profile *"Mathieu Ngudjolo Chui,"*8.06.2015 (Last modified: 27.09.2016 available on: https://trialInternational.org/latest-post/Mathieu-ngudjolo-chui/

point in time when the TC is constituted'.[264] The TC overlooked the overdue challenge and considered the merits. The AC confirmed the TC's judgement and reiterated that the indictee did not suffer from it, which merely constitutes an obiter dictum; The AC answering to the Appellant's assertion that the TC erred in law, stated:*"the error must have materially affected the impugned decision".* The AC highlighted, though, that the aforementioned interpretation is not binding for its own judgements.[265]

According to the Statute's travaux préparatoires, the deadline to impugn a decision on admissibility should be confined to pre-trial hearings or to the commencement of the trial, before any step in the trial phase was taken.[266] Challenges based on article 17(1)(c) ICCSt -and only them - are allowed after the confirmation of charges. Challenges to admissibility stemming from the protection of the sovereign right of States to investigate and prosecute in cases of crimes committed by their nationals or in their territory, or from the sufficient gravity of the case, must be submitted before the phase of confirmation of the charges.[267]

(ii) Does there exist an obligation of the Prosecutor not to disclose evidence before the TC?

When the Court considers the admissibility challenges, it must take into account facts as they exist at the time of the proceedings concerning the admissibility challenge. The investigative activities and progress may change over time. So, a case can be first rendered admissible and at the end of investigations may be rendered inadmissible. The Prosecutor has the right, laid down in art. 19 (10) ICCSt, to file a request for review of previous decision rendering a case inadmissible if he/she is satisfied "that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17."[268] The AC avoided considering this ground of Appeal, because it would examine the correctness of the PTC's decision on the warrant of arrest, to disclose all the available evidence, and not the

[264] "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", Case No. ICC-01/04-01/07 OA 8, Date: 25 September 2009, available at: https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF
[265] ICC-01/04-01/07 OA 8, par. 38
[266] Ibid, Report of the Preparatory Committee,pp. 57 and 58. par. 249
[267] Ibid, par.47
[268] ICC-01/04-01/07 OA 8, par. 56

correctness of the TC's decision, which was impugned in that motion to appeal.

(iii)Interpretation of "unwillingness", complementarity test

a) At the outset, the Prosecutor examines two cumulative elements; whether there are ongoing investigations or prosecution, or (b) whether the authorities which have undertaken investigations and the State which has jurisdiction over the alleged crimes arrived to the conclusion that, it would be better if they did not exercise their right to prosecute (Article 17 (a) and (b) of the Statute). Consequently, if the above elements are affirmative, the Prosecutor will examine, if there is space for implementation of the 'unwillingness or inability' test.[269]

The 'unwillingness' element presupposes investigations and proceedings have taken place at national level. Inaction is substantially dissimilar to unwillingness and it cannot possibly comprise one strand of it.[270]

The TC distinguished two types of unwillingness: a) "unwillingness motivated by the desire to obstruct the course of justice", art. 17(2) ICCSt. In other words, that State has no intention of bringing a person to justice, for it aims at shielding that person from criminal responsibility,[271] b) unwillingness which seeks to bring the perpetrator to justice, but not before national courts. The TC insisted on the importance of the second type of 'unwillingness' which is in full conformity with the complementarity principle, and protects the jurisdictional power of states when in bona fides wish to exercise it.[272] So it seeks to fully cooperate with the Court, since it considers it more opportune.[273]

Unwillingness test; (a) The proceedings were or are being undertaken or the national decision was issued for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court which are referred in article 5 ICCSt; (b) There has been an unjustified delay in the proceedings, which in the circumstances in question, is inconsistent with an intent to bring the person concerned to justice; [274] (c) The proceedings were not or are not being

[269] ICC-01/04-01/07 OA 8, par. 56, 78
[270] ICC-01/04-01/07 OA 8, paras.65-66
[271] ICC-01/04-01/07 OA 8, paras. 76-79
[272] ICC-01/04-01/07 OA 8, par. 59
[273] ICC-01/04-01/07 OA 8, par. 59
[274] ICC-01/04-01/07 OA 8, par. 77

conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances in question, is inconsistent with an intent to bring the person concerned to justice.[275]

Defence's argumentation

The Defense is of the opinion that the "same conduct test", imposes "an absolute requirement for identical charges" and has no basis in law. The Court's current case law does not allow the term to be accurately defined or its factual and legal scope to be ascertained.[276]

In this case two criteria have been introduced over admissibility by the Defense; the "comparative gravity test" and the "comprehensive conduct test". The latter one, which concerns us in this thesis, entails comparison of the factual scope of the investigations between ICC and the State in question. In other words, the case would be admissible before the Court, only if the Prosecutor's order for investigations was wider and more thorough than the one issued by national criminal authorities. This test favours a narrow interpretation of the concept of 'case' and results in an erroneous application of the complementarity principle, which then becomes synonymous with primacy, the Court replied.

A wide interpretation of the principle leads to the violation of preambular paragraph 6 and the fundamental values that are founded in the Articles 1 and 17 ICCSt. The Defence, also, asserted that the drafters of the Statute were clear-cut as far as the scope of their purpose is concerned. The Court should, namely, exercise jurisdiction over a case unless the State in question is 'unwilling and genuinely unable' to bring the perpetrator to justice, not simply, if a State prefers the ICC to commence the criminal proceedings.[277] Moreover, the interpretation of the principle in question abuses the accused's rights, such as the right to be tried by his natural judge, the right to family life, etc. [278]

[275] ICC-01/04-01/07 OA 8, par. 75
[276] The Prosecutor v. Mathieu Ngudjolo Chui, "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", Case No.: ICC-01/04-01/07, Date: 16 June 2009, par.12, available on: https://www.icc-cpi.int/CourtRecords/CR2009_05171.PDF
[277] ICC-01/04-01/07 OA 8, par. 63
[278] ICC-01/04-01/07 OA 8, par.83, His relocation to the seat of the Court may deprive him of the right to family life according to the Defence.

The AC's Response to the argumentation

Contrariwise, the AC held that the accused's rights may actually be fundamental to the accused, but still irrelevant to the admissibility challenges.

When, a State considers itself unwilling to bring the indictee to justice, the fact of the matter is that a challenge to admissibility by the Defence can only be made within the scope of the expression of the sovereignty of the State in question, although the warrant arrest of the Court may include crimes altogether different from the ones, for which national investigations have already been initiated.

Addressing the grounds of appeal, the AC highlighted that the admissibility of a case exclusively depends on real –not hypothetical- facts, the comparison of due process between the ICC and the national courts is totally irrelevant to the admissibility. The criteria stipulated on article 17 ICCSt are those which must be emphasized, instead. Furthermore, the Statute does not provide the indictee with the right to allege that the case was rendered inadmissible, owing to States' or ICC organs' abuse of the prosecutorial process.[279] Another rule was pointed out, namely that States should not all over preclude the possibility of referring cases to the Court, because this tactic leads to the breach of their primary obligation to exercise criminal jurisdiction.[280]

Having regard to the complementarity principle, the Court cannot obligate States to commence criminal procedure. Conversely, the Court cannot refuse to investigate or prosecute a case, on account of its perception that the State in question ought to accept the responsibility, so as not to contribute to impunity's solidification.[281]

The victims represented by the OPCV state that hat the list of article 17 (2) of the Statute is only illustrative. The Court did not accept this view.[282]

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[279] ICC-01/04-01/07 OA 8, paras. 99,106, 111

[280] ICC-01/04-01/07 OA 8 par. 86, *"In any case, the principle of complementarity in no sense gives the Defence the right to select a jurisdiction to the detriment of another lawfully seized of the case. Such an approach would empty the complementarity principle of all substance and undoubtedly encourage impunity in respect of serious crimes"*, Annex- Observations Of The Democratic Republic of the Congo on the Challenge to Admissibility made by the Defence for Germain Katanga in the Case of the Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui, Case No: ICC-01/04-01/07-1189-Anx-tENG, Date:16 July 2009, at II.b., available on: https://www.icc-cpi.int/RelatedRecords/CR2009_05185.PDF

[281] ICC-01/04-01/07 OA 8, par. 67

[282] ICC-01/04-01/07 OA 8, par. 71

However, the TC has mistaken by applying the 'one-step slogan' version of the complementarity principle, while by stating that inaction is a new form of unwillingness, it confused 'inactivity' with 'unwillingness'.[283]

The AC corrected the above decision giving reasons that the Court first examines whether there have been any proceedings in relation to the case under Article 17(1) from (a) to (c) ICCSt and if there had been none, the case will be admissible.[284]

Prof. Darryl Robinson *(2010)* underlined that some commentators are puzzled over the requirement established by the Court that "state inaction is a new form of unwillingness", alleging that it is not in line with the Statute's chapeau and spirit. Schabas' view on the issue is that: *"this 'activist' interpretation" was adopted to "[solve] a little problem for the Pre-Trial Chamber", allowing the Court to avoid the embarrassment that the complementarity test was no longer satisfied*" and continues that this requirement is quite helpful for the OTP, the Prosecutor and the accused, while victims are not able to see justice done.[285]

4. The "same person/substantially same conduct" requirement

The "same-person" test

The AC in Kenyan cases affirmed that investigative steps must lead to a certain suspect to discover whether he/she is culpable*, "The mere preparedness to take such steps or the investigation of other suspects is not sufficient"*.[286] What those specific steps are, though, remains unanswered. But the AC, as has already been cited, has set two guiding principles to settle the issue: i) a state must 'provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case', because 'it is not sufficient merely to assert that investigations are ongoing' and ii) evidence of 'concrete and progressive investigative steps' is required. Since art.17 ICCSt requires that "the case

[283] Ibid, Darryl Robinson, p.13, *"when a State which has jurisdiction over an international crime is either unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators"* the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", Case No. ICC-01/04-01/07, Date: 16 June 2009, paras. 74-77, available at: https://www.icc-cpi.int/CourtRecords/CR2009_05171.PDF

[284] ICC-01/04-01/07 OA 8, paras. 75-83

[285] Ibid, Darryl Robinson, pp.13- 14

[286] Ibid e.g. Kenyatta Appeal Judgment, par. 40.

is being investigated", one could assume that *any* concrete investigative step could meet this requirement. For that very reason, it is argued that the PTC's test of whether the state is 'genuinely willing to investigate' is correct. In other words, if states have already initiated investigations, which remain stagnant in due course, the Court should infer 'unwillingness'.[287] Judge Ušacka in *Ruto* case[288] insisted that inactivity and unwillingness are distinct and the majority of judges by demanding initiated and advanced investigation in order for states to go beyond inactivity, puts a high threshold which should be utilized in cases of 'unwillingness'. In *Gbagbo* there was unobjectionable evidence adduced proving that Ivorian authorities, had formally initiated investigation, had imprisoned her, interrogated her, questioned a *partie civile* about her actions, and endeavored to accumulate evidence relevant to her crimes. The PTC, as was mentioned earlier, rejected evidence's gravity, but in any case, Côte d'Ivoire's prosecutorial activities implied its activity, allowing space for willingness or substantially the 'same conduct' test considerations. Therefore, Côte d'Ivoire asserted that on account of its recent past, namely armed conflict, the State lacked the considerable material and human resources, which are essential to efficiently investigate this particular complex and politically-charged case. Both the PTC and AC dismissed that argument as irrelevant allowing scholars to express caustic comments like bias against southern member-states and inconsistency –of- the- "progressive steps"- aspect with the Rome Statute.[289] Another important point was highlighted by former Chief Prosecutor Carla Del Ponte who insisted that such stringent requirements lead states to prosecute low-ranked perpetrators for whom the path to gather evidence and to charge is pretty easier than the high-ranked' one. As a result, the ICC may invert ICTY's so-called "pyramidal prosecutorial strategy" (recently adopted by the OTP itself)[290] which translates in starting investigative action

[287] Kevin Jon Heller, Kevin Jon Heller, *"Radical Complementarity",* Journal of International Criminal Justice, Vol. 14, (2016), 1-38, pp.10

[288] Ibid, Dissenting Opinion of Judge Anita Uŝacka, ICC-01/09-01/11 OA, par. 27

[289] Ibid, Kevin Jon Heller, pp.12

[290] ICC-OTP, Strategic Plan June 2012-2015 (2013), p. 6, available on:https://www.icccpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20stppements/stppement/Documents/OTP%20Strategic%20Plan.pdf*:"The required evidentiary standards to prove the criminal responsibility of the most responsible might force the OTP sometimes to change its approach due to limitations on investigative possibilities and/or a lack of cooperation. A strategy of gradually building upwards might then be needed in which the Office first investigates and prosecutes a limited number of mid and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible".*

with lower-level suspects (which can provide the authorities with specific and serious information) and gradually continuing with senior leaders. A possible advantage may be that a national court by adjudicating cases of lower-level individuals, demonstrates its *bona fides* to fight impunity as well as its impartiality. Art 18(5) ICCSt could be a useful tool for OTP and for states' assiduity to bring officials and dignitaries to justice. The AC though did not approve the aforementioned strategy in *Ruto* case, rendering Kenya 'inactive' since it found Kenya was merely investigating lower-level suspects- and no Ocampo Six, although it intended to convince them to testify against the Ocampo Six.[291] The OTP discounted the fact that indirect means can be equally fruitful to or –sometimes- more fruitful than the direct means of conducting an investigation. As mentioned in Proactive Complementarity, the OTP recently adopted the "pyramidal prosecutorial strategy".

'*Substantially* same conduct' test

Even though the admissibility of cases should be the exception, the very high threshold of the SSC requirement will reverse this norm.

It is argued that the requirement is *profoundly counterproductive.*[292] The AC applies the SSC requirement in two separate admissibility frames: a) when the OTP decides to open a formal investigation into a situation and the state concerned objects to this decision (situation phase); and b) when a state or suspect contests the admissibility of a certain case (case phase).

It is quite troublesome for the Court to assess the first possibility, considering that OTP has itself superficial information and knowledge of the specific suspects that it is going to investigate. At this stage the PTC adopts a general standard for examining the test's essence:

> *(i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the*

[291] Ruto Admissibility Decision, par. 58; "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Ruto, Kosgey, and Sang", Appeals Chamber, Case No: ICC-01/09-01/11 OA, Date: 30 Aug. 2011, par. 83

[292] Ibid Kevin Jon Heller, p.15

incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[293]

As far as the (a) point is concerned, national preliminary examinations much be initiated at earlier than OTP's ones more often than not. State's *desideratum* in this phase is to predict OTP's possible enquiring target- incidents which could jointly consist *conduct*. Of course this is unreachable, given that OTP's action plan-following the pyramidal strategy aiming at the most responsible for international crimes- includes prosecution of mid-level suspects, so suspects' spectrum grows substantially.

Being unable to predict it, due to the expanded context in which international crimes are being committed, states face the scenario of permitting the OTP to proceed first and challenge the admissibility afterwards. However, this option seems undesirable, because initiating investigation over the territory of a state automatically subtracts credence from it. Depending on their resources, states could realize a more feasible alternative, which is reconfiguring their investigative plans so as to be closely-related to the OTP's data written down on its authorization request. The first scenario, though, is more likely to be applied in the future but in a more protracted period of time, namely states might delay to initiate the criminal procedure until the moment they receive information about the specified suspects and conduct whom the OTP intends to investigate[294]. To avoid this detrimental tactic, OTP should provide the states from day one e.g. at the very first days of an armed attack or in a case of genocide- from the first day it receives reports, pieces, articles that charge such a crime, with instructions and information about possible perpetrators, crimes, *modus operandi* and it should appoint experts, officers and so on and so forth in place, too.

With respect to the point (b) admissibility frame, the PTC is called to answer the question, if domestic criminal actions sufficiently mirrors the OTP's ones. At first, it was observed that the parallel proceedings must comprehend the "same conduct", but the AC, modifying this prerequisite, held that proceedings must involve "substantially the same conduct".[295] Its estimation has been criticized as legally baseless, obscure[296], and that the AC borrowed it from Art. 35 (2) (b) ECHR, but the

[293] Ibid, ICC-01/09-19, par. 50
[294] Ibid Kevin Jon Heller, pp.16-18
[295] Kenyatta Appeals Judgment, par. 39
[296] Carsten Stahn, *"Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified*

OTP simply replied that the AC rendered the criterion workable[297]:

> "[the word "substantially"] *introduces a small degree of flexibility into the same conduct test, but not to the point that it undermines the purpose of the test altogether."*

The PTC in *Al-Senussi*[298] accepted the notion that the comparison should be founded on "temporal, geographic and material parameters", while the AC in *Gaddafi* followed a case-by-case practice for such a comparison.[299]

As noted in a previous chapter – pursuant to the complementarity principle- admissibility of a case in the ICC must be the *ultimum refurium* and not the norm. The ICC's jurisprudence on the "same-conduct" test enables it to grant each case admissible. Likewise, art. 61(4) ICCSt stipulates that OTP has the power to "continue the investigation and amend... any charges' until the confirmation of charges hearing", and paragraph 9 of the same article continues that "after the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charge". Consequently, one would expect that a state should wait to fulfill the SSC requirement so as to challenge admissibility until the commencement of the trial but this hypothesis diverges the obligation "to make a challenge at the earliest opportunity" (art. 19(5) ICCSt). It could alternatively take advantage of art. 19(4) ICCSt and challenge twice a case's admissibility insofar as it obtains Court's permission.

All things considered, we should keep in mind Judge Ušacka' s dictum in *Gaddafi*[300] that the SSC criterion leads to an antagonistic relationship and not to a horizontal one between the Court and states, namely, that OTP gains primacy powers to prosecute suspects. Therefore, this pre-condition should be reversed.

Deference?", in: C. Stahn (red.), "*The Law and Practice of the International Criminal Court*", Oxford University Press 2015, p. 242

[297] "Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, Gaddafi and Al-Senussi", Pre-Trial Chamber I, Case No:ICC-01/11-01/11), Date: 2 May 2013, par. 32.

[298] "Decision on the admissibility of the case against Abdullah Al-Senussi, Gaddafi and Al-Senussi" Pre-Trial Chamber I, Case No:ICC-01/11-01/11, Date: 11 October 2013, par. 75 (Al-Senussi Admissibility Decision).

[299] "Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', Gaddafi and Al-Senussi", Appeals Chamber, Case No:ICC-01/11-01/11 OA 4, Date: 21 May 2014, par. 72 (Gaddafi Appeals Judgment).

[300] Ušacka Gaddafi Dissent, par. 52

The SSC prerequisite, also, hampers national prosecutorial authorities when the latter wish to initiate proceedings for a wide variety of conduct, which will likely result in conviction and the OTP insists on certain conduct that will probably lead to an acquittal. An acquittal, though, according to *vox populi,* most times translates in system's illegitimacy and lack of transparency-notwithstanding the fact that it has been carried out in *bona fides*- as well as in waste of investigative, prosecutorial and judicial resources.[301]

Furthermore, the OTP may seek to acquire completely different types of evidence from those national authorities may prefer for various reasons (e.g. the victims' interests). To give an illustration, national authorities may not yet have access to a certain territory, witness, or officials chosen by the OTP or may have knowledge *a posteriori* that some witnesses are not reliable so as to decide on other credible testimonies or documents.[302] We should now hark back to an earlier comment that member-states should raise funds for sponsoring the OTP's activities, which at the earliest moment should boost national authorities with personnel specialized in International Criminal Law and Procedure and in domestic criminal law, in order to achieve the primary cause of ending impunity.

The SSC requirement also affects crimes' status in law, which entails serious ramifications for national prosecutors. The OTP as an external and impartial factor to a case would exercise its discretion without considering political and stability repercussions, but if national prosecutors would reflected OTP's cases, political destabilization, due to upper class's penalization for committing serious crimes, could be imminent. Thus, if the AC eliminated this onerous requirement, national prosecutors could charge perpetrators for less controversial conduct (e.g. as the prosecutor charged *Simone Gbagbo*, for economic crimes).[303]

In *Katanga* the accused argued that the complementarity principle had nothing to do with the "same conduct" case since he was domestically charged with more grievous crimes (i.e. genocide vs. crimes against humanity and war crimes). So we can safely assume that the SSC requirement impede national authorities to

[301] D.D. Ntanda Nsereko, *"Prosecutorial Discretion Before National Courts and International Tribunals"*, 3 JICJ (2004), 124-144, p. 131
[302] Ibid Kevin Jon Heller, pp.21-22, where he elaborately analyzes lots of instances.
[303] Ibid Kevin Jon Heller, pp. 24-25

potentially prosecute more serious crimes.[304]

What's more, national authorities are more likely to prosecute a suspect for fewer crimes as compared with the OTP[305] keeping in this way its resources. They are sufficiently aware of the context, the political and military figures, as well as the charges that are more convenient to prove. A succinct domestic process could be as effective as the long-term one before the ICC. Having said that, it is unlikely that the PTC would hold such case inadmissible. The AC in *Gaddafi* case examined this concern abstractly holding that, when a State commences a more targeted national case it conforms to the SSC requirement, if it covers the OTP's case core which is "*the most serious aspects"*.[306] But, this ruling arises prosecutorial-discretion concerns.[307]

5. General Conclusion

Firstly, in *S.Gbagbo* the PTC should evaluate all the adduced evidence brought before it, which could possibly prove the state's activity on her case. Secondly, it held that in order to fulfill the SSC requirement, the state should not just outline the general contours of national proceedings. The high threshold of providing evidence relating to the SSC condition should be lowered. In *Al Senussi* and in *Ruto,* by contrast, if the authorities have undertaken procedures against the general conduct of the situation that would be enough for the case's inadmissibility. Thirdly, in the Kenyan cases, art. 93(10) ICCst should be employed for the purpose of practically assisting the state which faces difficulties in the dispensation of justice. Thus, the PTC should have held that the above provision, the admissibility challenge and complementarity are interconnected. National Commissions of Inquiry, insofar as, they observe international standards of due process and are comprised of judges, could contribute to the operations of national courts and prosecutors. Fourthly, in *Ongwen* and in *Gadaffi* the 'inability to obtain the accused' was not deemed to be a

[304] Ibid Kevin Jon Heller, pp. 26
[305] In Ongwen case the OTP charges against the accused reached 67 counts Pre-Trial Chamber II. "Decision on the confirmation of charges against Dominic Ongwen", Case No:ICC-02/04-01/15, Date: 23 March 2016 https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF
[306] Gaddafi Appeals Judgment, par. 72.
[307] Ibid Kevin Jon Heller, pp 28

permanent obstacle for the determination of complementarity and the "availability" of states. Fifthly, in the latter case, the Court accepted that, the absence of international crimes in the domestic legal legislation indicated the state's 'inability' to prosecute (adoption of the 'hard mirror' thesis) and the Prosecutor gave a relatively concise definition of the SSC condition. Contrariwise, in *Al Senussi* the inability to obtain the accused could not by itself render the state 'unavailable", (therefore, the Court should give a definition to the term 'unavailability' in the future), and the crime of 'persecution' did not need to be the object of the investigation *per se*. In this case, the Court drew the distinction between fair trial and genuineness of proceedings, of which the latter concerns national authorities' impartiality and the volition of the authorities not to prosecute and try the suspects, so the deprivation of an attorney did not affect the evaluation of "genuineness". Furthermore, the AC overlooked the most substantial right of the accused not to receive the capital punishment by national courts, even though the judges were aware of the existence of this alternative penalty. Consequently, the ICC should revise its policy on due process. Sixthly, in *Bemba* the concern of the self-referrals' legal nature as a means of triggering the international jurisdiction was addressed. Accordingly, in *Cony,* Uganda shifted the burden of prosecution to the OTP via a 'self-referral' relatively easily, while in *Mbarushimana* it was held that a 'self-referral' may encompass several crimes and conduct throughout the situation and the state. In *Bemba,* the Prosecutor tried to outline the components of the term 'unavailability' (e.g. immunities in use indicate the system's unavailability) and the Court found that, discontinuance of uncompleted domestic proceedings, because of the accused's surrender to the Court, did not constitute a 'decision not to prosecute' (art.17(1)(b) ICCSt). Seventhly, in *Cony* and *Katanga,* the Court set the rules on when and how many challenges could be filled, and in the former case, it was evident that a newly-established national tribunal may complicate the international course of administering justice. In *Lubanga* given that the individual was prosecuted for other serious offences but recruitment of child soldiers, the PTC reiterated its findings in *S.Gaddafi* on this matter, and considered that the SSC condition did not fulfilled. Plus, breaches of international/national process generally invoke art. 85 (1) ICCSt – and do not entail other further repercussions- which means that the indictee can be just compensated. The issue of, whether it is correct not to disclose evidence

on behalf of the PTC, was handled by the AC in *Katanga*, which admitted that stance's correctness. Finally, the unwillingness test was defined in the above case. The AC also corrected the application of the slogan version of complementarity which was adopted by the PTC.

Section II - Comparison among the strategies of complementarity

1. Passive Complementarity

The idea that, "the Court is a 'court of last resort", is based on the theory of passive complementarity, which was discussed before the establishment of the ICC. Passive complementarity means that, if states fail to try 'tyrants and torturers', the ICC will vigorously intervene in order to try them by itself. This is the reason why its operation would be originally limited. This theory included the 'hard mirror thesis', namely states had the obligation both to incorporate international crimes in their domestic legislation and to efficiently administer justice. The ICC, respecting state sovereignty and the principle of non-intervention, would not permit the Prosecutor to exercise *proprio motu* powers so as to commence proceedings towards investigations/prosecutions. The practical problem of this theory is that, some states do not exercise their primary responsibility of prosecuting (free-rider effect, see below; Proactive Complementarity), since they deem the Court as an institution of experts and adequate resources to investigate and prosecute international crimes: hence, they issue referrals of their situations[308]

2. Positive Complementarity

Positive Complementarity (art. 93(10) ICCSt), a strategy promoted by the former prosecutor Luis Moreno Ocampo[309], is that the number of admissible cases before the Court should be reduced to the minimum. [310] *Ergo,* the OTP is bound to

[308] Ovo Catherine Imoedemhe , "*National Implementation of the Complementarity Regime of the Rome Statute of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study",* Doctoral Dissertation, School of Law University of Leicester Leicester United Kingdom, (March 2014), pp.52-53

[309] Luis Moreno-Ocampo, Prosecutor of the ICC, ''Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court" (June 16, 2003), available on: http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf

[310] Ibid, Luis Moreno-Ocampo, "Statement made at the Ceremony for the Solemn Undertaking of the

foster national possesses in multiple ways. Nevertheless, the initial idea of this strategy gradually altered, for fostering national proceedings depends mainly on the cooperation among states, governments and NGO's. This alteration first captured in the Review Conference taken place in Kampala and meant that, although the ICC may assist states to genuinely perform proceedings and trials, it will abstain from offering capacity building, funding and technical assistance. The ICC's allocation of capital now concerns investigations and prosecution of crimes within its jurisdiction, as the political figures of member-states do not envisage the Court operating as a "development agency" any more.[311]

The OTP's strategy to urge member-states to carry out investigations/prosecutions by themselves may be useful, but it can hardly be productive in reality. Proactive complementarity, by contrast, seems to be the most compelling strategy, as will be analyzed hereunder.

3. Proactive Complementarity[312]

Professor Burke-White' s novel concept, dissimilar to the statutory notion of 'passive complementarity', is that the ICC must become more active with governments, embolden them and from time to time assist them to carry out national prosecutions of international crimes. He defines this policy as "proactive complementarity". Firstly, he highlights the utopian expectations of global community as regards the ICC, which all failed, due to limited capacity and scarcity of state cooperation. He adds that governments must provide accountability so as to achieve the fundamental cause. ICC would take advantage of interstate political influence for encouraging states to initiate their own criminal procedures. The former Prosecutor Moreno Ocampo, though, stated that he has a clearly judicial mandate and he is not intended to apply law with political considerations.[313]

The Statute seen as an enforcement institution can be utilized for this purpose

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Chief Prosecutor of the International Criminal Court"

[311] "Stocktaking of international criminal justice Taking stock of the principle of complementarity: bridging the impunity gap Informal summary by the focal points". Annex V(c), available on: https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.c-ENG.pdf

[312] W.W. Burke-White, *"Proactive Complementarity: The International Criminal Court and Nppional Courts in the Rome System of International Justice",* University of Penn Law School, Public Law Working Paper No. 07-08, Harvard International Law Journal, Vol. 49, (2008) 1-56, p. 53

[313] Ibid, Paper on some policy issues before the Office of the Prosecutor

on the grounds that it includes the delineation of prosecutorial national and international parameters and principles of proper conduct, given that states are bound to provide their assistance to the Court; Contrarily, would it not be logical that the Court should facilitate some prosecutorial duties of states? Such a workable strategy could be characterized as the "Rome System of Justice".[314] In his point of view, requirements of art. 17 ICCSt arrange the distribution of authority between the ICC and member-states. The aim of the Rome System of Justice is to *"contribute to the effective functioning of national judiciaries"*.[315] An OTP's dynamic record provided to national authorities would be crucial for their project's enhancement.

The Professor expresses his concern of burden-shifting in the form of unwillingness of states to exercise universal jurisdiction. Since the ICC shows readiness to exercise its own powers states may abuse the Court's principle of complementarity, in the form political cover, so as to reverse to the ICC the financial and political cost of prosecution to the ICC (the so-called free-rider effect). The latter risk actualised in Uganda, the government of which shifted the political and economic burden to the ICC, although they might have been capable of using their own personnel and facilities.[316] Distributing economic burden on states is the major drawback of proactive complementarity theory. In ICTY this issue was debatable due to referral – back mechanisms used by the ICTY, namely it send back cases to national judiciaries against the backdrop of its completion strategy, but without financing them. A possible solution to the problem could be that the ICC should assure that states in transition or in economic crisis, which are willing to exercise primary jurisdiction but unable to organize investigations/prosecutions/trials and the secure victims' safety, be granted loans by international or regional banks in order to reconstruct all the facilities and fund the proceedings.

The ICC is economically healthier with a program budget of approximately €145 million[317] for 2017 instead of its opening budgetary programs[318], and so it

[314] Ibid William W. Burke-White, p. 56-57
[315] Ibid William W. Burke-White, p. 57
[316] Ibid William W. Burke-White, p. 62
[317] Resolution ICC-ASP/15/Res.1, ICC-ASP/15/Res.1 Resolution of the Assembly of States Parties on the proposed programme budget for 2017, the Working Capital Fund for 2017, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2017 and the Contingency Fund, available on: https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP15/ICC-ASP-15-Res1-ENG.pdf

should manage its resources towards cooperation (e.g. with the intention of at least ensuring the suspect's extradition from non-member states), seeing that, national prosecutorial authorities and judiciary can rather easily prosecute and try individuals than an international court.

Consequently, this policy's target is to form *stimuli* so that states will seek their own criminal procedures and systems, to enhance the Court's substantial service and to alleviate the free-rider problem.[319]

OTP's commitment towards proactive complementarity

In lack of evidence, the OTP expressed its volition to implement a building-upwards strategy, which means that OTP members will first legally pursue a small number of mid- and high-ranked perpetrators with the view to identify the most responsible offenders. Furthermore, the gravity of crimes will be the guiding objective for initiating proceedings against individuals, namely lower level suspects will not be exempted from the Prosecutor's scrutiny. Furthermore, the OTP will develop "exit strategy" for situations which should be no longer under preliminary investigations. At the phase of preliminary investigations, the OTP shall further promote complementarity and cooperation activities and networks, through i) annual overviews on the investigative/prosecutorial conduct, ii) situation-specific reports or statements, iii) the undertaking of field activities.[320] One main goal provided in the Strategy Plan is to diminish the time gap between the commission of crimes and the national/regional/international response via sophisticated technology. Subsequently, bilateral and multilateral cooperation among international actors shall be effectively developed, through the consolidation and further expansion the Office's network of general and operational focal points and judicial actors, the presence in transnational networks of practitioner e.t.c. Additionally, the OTP shall engage in other crimes such

[318] Resolution ICC-ASP/2/Res.1, Programme budget for 2004, Working Capital Fund for 2004, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriations for 2004 (€ 53 million), available at: https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP2-Res-01-ENG.pdf, ICC-ASP/3/Res. 4, Programme budget for 2005, Contingency Fund, Working Capital Fund for 2005, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriations for the year 2005, (€ 67 million)

[319] Ibid William W. Burke-White, p. 70

[320] Ibid, ICC- OTP, "Strategic Plan 2016-2018", paras: 34,36, 54

as terrorism, financial crimes, SGBC and so on and so forth with a 'preventive' aim, namely the OTP shall seek the cessation of serious crimes, military hostilities e.t.c.[321]

4. Radical Complementarity

Ms Gbagbo' s domestic trial mirrors "relative triumph" for complementarity for she was prosecuted and convicted in an Abdijan Court to 20 years imprisonment and in this way it seems that the co-operation in bona fides between the ICC and states parties is successful. Nonetheless, her sentence and conviction was based on the common criminal offences of disturbing the peace, organizing armed gangs and undermining State security, whereas the OTP sought to prosecute her for the crimes against humanity of murder, rape and other inhumane acts and persecution. The Appeals Chamber ignored this decision and upheld the PTC's decision two months after the accused was convicted and sentenced, obliging Côte d'Ivoire to surrender her, for the state remained 'inactive'.

The above decision fully contravenes to "radical complementarity" a concept introduced by Prof. Kevin Jon Heller *(2016)* which reads:

> "*the idea that as long as a state is making a genuine effort to bring a suspect to justice, the ICC should find his or her case inadmissible regardless of the prosecutorial strategy the state pursues, regardless of the conduct the state investigates, and regardless of the crimes the state charges*".[322]

Prof. Heller's theory is more "legally correct" but, at the same time, sets a more stringent threshold of the "same-conduct" test, founding his opinion on the "*ne bis in idem"* principle art. 20(3) ICCSt (ICC must refrain from trying a person for the "same conduct" as the one which was the object of a previous trial) and on Art. 90(1) ICCSt (a state must publicise the fact that it handles the "same conduct" in the event of multiple competing surrender requests).

[321] Ibid, paras.55, 72, 92-96, Annex I, par. 27
[322] Ibid, Kevin Jon Heller, (2016), p. 3

"The international crime requirements": In *Al-Senussi* the AC rightfully and following the 'same conduct' test acknowledged that states do not have the proper expertise to charge a suspect exclusively with international crimes instead of ordinary domestic crimes. Due to Libya's failure to charge him with the crime against humanity of persecution, Al-Senussi took the opportunity to contend that his case was admissible. His allegation was ill founded, given that there is no indication or innuendo in the text, structure, or history of the Statute result in such a conclusion. An auxiliary argument is that, this tactic, in terms of transitional Justice and hindering amendments in national legal systems, is practical and accommodating for the course of penal proceedings. The ICC is benefited accordingly, on the grounds that it economizes its resources. Indeed, it would be illogical for the Court to demand from southern states, which are probably still in war, to consolidate international crimes into national legislation and to accept as admissible every possible case that might have arisen. *Ergo,* it explicitly established this guiding principle. Prof. Kevin Jon Heller reasons that charges for ordinary crimes make it quite convenient for authorities to carry out in-depth criminal proceedings and for domestic courts to prove guilt, instead of charges engaged for international crimes which involve profound knowledge of unfamiliar terms to them (e.g. Widespread and systematic attack, forced pregnancy, using human shields as war crimes e.t.c.) and understanding of byzantine international jurisprudence.

5. Regional Courts- Could they serve complementarity?

Prof. M. Jackson (*2016*)[323] introduces a differentiated model for conceptualizing complementarity, the so-called "Regional Complementarity". In his work, the lively debate over the African Court on Human and Peoples' Rights' possible criminal jurisdiction is the instrument of his discussion of how regional or sub-regional Tribunals beseem to Art. 17(1)(a) ICCSt. According to Professor, *"Complementarity is by no means the sole possible option"*[324] and art.31VCLT should be read in conjunction with the aforementioned article and grant the Court the power to yield its jurisdiction, when a regional Tribunal genuinely wishes to prosecute. He

[323] Miles Jackson, *"Regional Complementarity: The ICCSt and Public International Law"*, Journal of International Criminal Justice, 14 (2016), 1061-1072.
[324] Ibid, M. Jackson, p. 1070

mentions also Prof. Cryer's words,[325] that complementarity can be used as a tool for using sovereignty for international purposes. His position is that, if a state- within the context of exercising state sovereignty- chooses to exercise its jurisdiction, it can delegate its powers to a regional Tribunal. Thus, a regional Tribunal could safeguard that there will be no impunity gap, when it is genuinely examining and prosecuting a case. Such a Tribunal would be in a better position to promptly comprehend and assess regional particularities, features e.t.c., for it would be conveniently close to the crime scene. ICC's legitimacy and political support would also be fortified, since it would refer cases to such Tribunals. Professor Jackson reasons that his concept may have flaws like jurisdictional conflict and *race for judgment* among the ICC and regional Tribunals, which can be lifted by applying *ne bis in idem* principle, principle of comity and relationship agreements.[326] Although he asserts that this interpretation is *both bold and pragmatic*[327], one question could be posed: whether regional Tribunals can lead to international justice system's fragmentation and to lack of coherence and co-operation among the ICC, national courts and the regional ones. (To put it differently, many courts many minds). Most importantly, one of the manifold aims of the ICC by leveraging the complementarity principle is to end impunity and to refortify national transitional prosecutorial and judicial systems; hence, a possible competing regional Tribunal could obstruct that aim's accomplishment.

6. Complementarity and the Islamic legal culture

6.1. Special Characteristics of Muslim legal world

The ICC's activities must not only be legitimate and accepted in western world but in Islamic world, too.[328] Muslim states questions the Court's principles and strategies, and this is the reason why a possible Islamic disapproval or dissatisfaction

[325] Robert Cryer, '*International Criminal Law vs State Sovereignty: Another Round?'* 16 EJIL (2006) 979-1000, p. 986
[326] Ibid, Miles Jackson, pp. 1069-1070
[327] Ibid, Miles Jackson, p.1072
[328] S. Fouladvand, "*Complementarity and Cultural Sensitivity: Decision-making by the International Criminal Court Prosecutor in the Darfur Situation"*, International Criminal Law Review, Brill Nijhoff, 14 (2014), 1028-1066

upon the handling of situations like Libya, Syria, Palestine, Lebanon, Sudan, could culminate in a muslim *vox populi* totally negative to the Court's work. The recent development shows the tendency of Sudan and Jordan to shield President Omar Al-Bashir from the ICC's jurisdiction, invoking immunity conventions. Consequently, judgements disputed by Muslim states could be perceived as another whimsical way of western political domination and interference.[329]

The complementarity principle according to Dr. Fouladvand (*2014)*, can be optimized to the development of positive disposition of Muslim people as regards the ICC, inasmuch as complementarity respects cultural sensitivity. This principle altered the normative structure of justice in respect to the prosecutorial discretion and momentum. The lecturer asserts that the drafters and the Court's officials are overly optimistic and its basis/foundation is far away from achieving global convergence. In order for the Prosecutor to reach the latter, he/she should abstain from the European Kantian approach, when examining a contingent situation in the territory of Muslim states. He/She should now understand/interpret the principle beyond the strict Statute's provisions and reconsider complementarity in light of Shari'ah (the scope and legal force of Shari'ah varies among states.[330]

Some countries such as Saudi Arabia, Qatar, Yemen have entered a course of modernization of their criminal law, but Western Criminal Law (common law and continental law) never replaces Islamic Criminal Law (hereinafter: IsCL), whose premises are mainly doctrinal interpretation and Muslim jurisprudence. It should also be mentioned, that attempts to modify IsCL is religiously forbidden and is thought to undermine to regime legitimacy. Muslim political figures assess that the implementation of IsCL can efficiently contribute to crime control and repression (e.g. when corporal punishment is carried out in public, aspiring authors are discouraged from committing serious offences). Fixed severe punishments which emerge from *huddud* offences –offences 'against the God'- cannot be regarded as cruel, inhuman or degrading, for, pursuant to Muslim society's standard, these repercussions are proportional to the most atrocious and harmful wrongdoings. From *Shari'ah'* s perspective, laws are stable and can never be altered in conformity to differences of

[329] Ibid, S. Fouladvand, p. 1030, others accuse the Statute's drafters for completely ignoring the ample Chinese jurisprudential tradition and its communitarian values.
[330] Ibid, S. Fouladvand, p. 1040

time or place. However, from the Enlightenment's perspective, incorporated to ICCPR, CAT, ECHR e.t.c., humanism is above all society values, even above religions, which are deemed to have the same value as regards truth.[331]

Not all types of jurisdictional regimes, and especially the Islamic ones, were taken under examination, when the Statute's drafters were discussing admissibility issues and complementarity. *Ergo*, Islamic states of North Africa and Middle East are notably suspicious over ICC's investigative activities.[332] The history of colonianism in most Muslim countries raises external interference and selectivity-of-cases skepticism against the OTP and the UNSC. The ICC's abstention from investigating allegation of serious crimes took place in the Gaza strip shocked the muslim world and deteriorated ICC's position in these countries, as well.

6.2. The Darfur Paradigm

Darfur was incorporated into the Anglo-Egyptian Sudan in 1917. Until then it had been an independent region. It counted four million people which mainly were of 'Fur' ethnicity. In 1956, Sudan regained its independence amid a civil war burst between the Christian - Animist southern population, on the one hand, and the Arab Muslim northerners on the other. In 1988, military forces in cooperation with Islamists usurped power, whereupon they neglected Darfur. Thus, the SPLA and the movement SPLM aroused in order to provide civilians with security and better living conditions. The Government then responded with the formation of an alliance of Zurugs, which comprised of Arab tribes and non-Arab groups of Darfur. These paramilitary groups quickly came into conflict (1988-1989) until a Peace Conference in mid-1989 superficially entertained some urgent issues. Yet, in February 2003 African Muslim groups raised up against the Arab high political figures due to the prolonged oppression they had suffered in the past. The Government of Khartoum organized armed local militias, the Janjaweed, with the purpose of spreading terror in the local civilians, destroying villages, killing people, raping women and forcing populaces to starvation.[333] Their militia groups counterparts were SLA/SLM and the

[331] Ibid, S. Fouladvand, pp. 1041-1042
[332] Ibid, S. Fouladvand, pp. 1046
[333] Anupam Jha, *"Darfur Crisis: Acid Test for International Criminal Law"*, 4 ISIL Y.B. International Humanitarian & Refugee Law, (2004), pp143-151, at p.143-144

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All the criminal acts of the Janjaweed militias escalated to the crime of genocide[334] pursuant to some scholars, while others assert that merely crimes against humanity and war crimes took place.[335] The UNSC in 2004 adopted the Resolution 1564[336] by which a Commission of Inquiry would be investigate the alleged violations of IHL and African Union was called upon to proactively cooperate with the monitoring mission in Sudan. Accordingly, the UNHCR reinforced its commitment to contribute to the possible unforced repatriation of internally displaced people and refugees.[337]

The concern of complementarity in this situation relates to the question whether the UNSC's referral (Res. 1593)[338] of a situation, which lies outside the territorial jurisdiction of the ICC, enables the ICC to claim jurisdiction over it and apply the complementarity principle. The PTC follows an interpretation consistent with art. 13(b) and 53 ICCSt,[339] and Chapter VII UN Charter, and from this perspective, we conclude that the ICC has indeed jurisdiction over the situation. Furthermore, even though the UNSC makes reference to 'situations', admissibility concerns 'cases'. There is though the view that *all* the statutory provisions must not be applied to non-member states.[340]

To fight impunity and to subsequently to render cases inadmissible before the Court, the Khartoum government set up five judicial and quasi judicial institutions, an *ad hoc* Investigative Committee specialized in the crimes against women, and most significant the Special Criminal Court on the Events in Darfur, albeit with no

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[334] Ibid, pp. 144-148, See elaboration on the theme: Mominah Usman, *"Restrictions on Humanitarian aid in Darfur: The role of the International Criminal Court",* GA. J. INT'L & COMP. L.,(2007), pp.258-289, at p.273-277

[335] Omer Y. Elagab, *"The Darfur Situation and The ICC: An Appraisal",* Journal of Politics and Law, vol.1, No. (3 September 2008), 43-60, at p.45, For more comments on the theme see: Beth Van Schaack, *"Darfur and the rhetoric of Genocide*" , Whittier Law Review, Vol.26,.(2004-2005), pp.1101-1141, Claus Kress, "*The Darfur Report and Genocidal Intent"*, Journal of International Criminal Justice 3, (2005), pp. 562-578.

[336] S/RES/1564 (2004), preambular par. 2, paras: 2-4 available at:http://www.responsibilitytoprotect.org/files/SC_Res1564_18Sep2004.pdf, See also: Ronli Sifris, *"Darfur, Sudan: As the cat -naps the mice wreak havoc",* AItLJ, Vol. 305, (October 2005), pp. 222-225

[337] Ibid, paras: 6,13

[338] Ibid, S/RES/1593 (2005), See also: Matthew Happold*, "Darfur, the Security Council, and the International Criminal Court",* International and Comparative Law Quarterly,(2006), pp. 226-236

[339] Nsongurua J. Udomband ,"*Pay Back time in Sudan? Darfur in the International Criminal Court"* Tulsa J. Comp. & Int'l L. 1 (2005-2006), Vol. 13:1, 1-57, at p.23-27

[340] See footnote in *Prosecutor v. Omar Hassan Ahmad Al Bashir* case, above.

success.[341] To give an illustration, in the latter court war criminals were charged with minor offences or acquitted, while there were not provisions stipulating command responsibility for crimes committed under a certain policy.[342]

In Darfur, Muslim politicians, namely a Parliamentary speaker (Iran), Ed Hussain and the League of Arab States, strongly supported Al-Bashir, stating that ICC's warrant of arrest was highly insulting[343] and that the accusations were a conspiracy to subvert Sudan's sovereignty.[344] Although Egypt had declared its intention to ratify the Statute, it guaranteed Al- Bahir's immunity through the signing of a Bilateral Immunity Agreement with Sudan.[345] African Union was in favour of Al-Bashir.[346] All these positions were based on the argument that Al-Bahir's arrest and adjudication would lead to Sudan's internal insecurity. All in all, the internal turmoil intensified, once the arrest warrant was made public and at the same time reconciliatory negotiations were suspended on behalf of the state apparatus. [347]

ICC's Prosecutor, when monitoring situations so as to identify possible cases, must first ensure that the Statute's goals are properly served. As far as Sudanese criminal justice is concerned, Shari'ah was interchanged with national criminal law a plenty of times heretofore, rendering the administration of justice unstable and fluctuated. The contemporary military government imposed Shari'ah on the criminal justice system and exerted ultimate control over the judiciary.[348] Even though in 2004 the President of Sudan set up the National Commission of Inquiry (NCOI), investigations for international crimes could not be initiated, because the "*widespread or systematic attack"* criterion could not be fulfilled, according to the NCOI's

[341] Ibid, pp. 31-34
[342] Ibid, p.50-51
[343] Ali Larijani, *"*ICC Warrant, Insult to Muslim*",* JIHAD Watch, 26 December 2013, available on: https://www.jihadWatch.org/2009/03/iran-icc-warrant-for-mass-murdering-sudanese-president-insult-to-muslims
[344] Ed Husain, *"*Where is the Muslim anger over Darfur*?",* comment in 'The Independent', 26 December 2013, available on: http://www.independent.co.uk/voices/commentppors/ed-husain-where-is-the-muslim-anger-over-darfur-1769962.html
[345] Mark Kersten, *"*Egypt to join the ICC but also Guarantee Bashir Immunity*",* Justice in conflict blog, 26 December 2013, https://justiceinconflict.org/2013/02/20/egypt-to-join-the-icc-but-also-guarantee-bashir-immunity/
[346]. K. Mills - A. Bloomfield , "*African Resistance to the International Criminal Court: Halting the advance of the anti-impunity norm",* Review of International Studies, (18 July 2017), 1-31
[347] Gunnar M. S ø rb ø, *"Pursuing Justice in Darfur",* Nordisk tidsskrift for Menneskerettigheter, 27:4, (2009), 393-408, p.407
[348] Ibid, S. Fouladvand, pp 1053-1057

impartial findings.[349] Moreover, sexual crimes as international crimes have not been recognized in this State, gender based crimes are subjected to an inflexible evidentiary debate and victims' protecting measures do not exist.[350] As a result, Sudanese criminal legislation has not been harmonized with IHL and due process thresholds. The best scenario for complementarity principle is that Sudan would amend some case law or introduce new types of crimes into its criminal justice system. Since, this is only a hypothetical paradigm, UNSC's referrals related to Al-Bashir case to the ICC maintained the equilibrium between international community and Sudan.[351]

6.3. Complementarity issues

On 1.06.2005 the OTP commenced a fact-finding process in the region. Sudanese government had already in 2001 set up three categories of special courts in Darfur and continued with the establishment of special courts in 2003 and a new Special Criminal Court on the events in Darfur in 2005, demonstrating in this way sufficient readiness to involve its judiciary into criminal proceedings.[352]

There have been expressed certain dilemmas concerning Art. 17 and 53 ICCSt: (i) since regional and international powers had taken part in the Darfur conflict long before Khartoum government was involved, why did the Prosecutor omit this fact?, (ii) tribal conflicts alteration into political upheavals, because of decolonization, led to the rise of political associations in Darfur that proved a more powerful rival for the government in Khartum. In view of this fact and of factors like physical environment, tribal affiliations and alliances, urging and provoking the selective use of force, the question arises: how could ICC hold juridical accountability in this context?, (iii) in the setting of constant violence and complex circumstances of political transition, by which criteria should the Prosecutor select particular suspects and situations and how he/she should he addresses the issue of "national proceedings' genuineness" according to Art. 17 ICCSt?[353]

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[349] The International Commission of Inquiry on Darfur (UNCOI) report, paras. 459-462, available on: http://www2.ohchr.org/english/darfur.htm
[350] Ibid, S. Fouladvand, pp. 1053-1057
[351] Ibid, S. Fouladvand, pp. 1053-1057
[352] Human Rights Watch, "Lack of Conviction: The Special Criminal Court on the Events in Darfur (2006)", 26 December 2013, available: https://www.hrw.org/legacy/backgrounder/ij/sudan0606/sudan0606.pdf
[353] Ibid, S. Fouladvand, pp. 1057-1060

Furthermore, scholars point out the omission on behalf of the Prosecutor to include Islamic legal tradition and local culture into the general information during preliminary examination of Al-Bashir's case. The Prosecutor should reassess the case's political context again and again in order to avoid being manipulated by opposing elite.

In Muslim terms, Islamic governments are keen on respecting socio-cultural institutions and values when they deal with criminal offences, unlike West societies which cope with them via official legal institutions and instruments. This is the reason behind Islamic world's disapproval of Al-Bashir's prosecution, which was thought to be politically motivated. Of course, Muslim local traditions must not disturb ICC's investigators and prosecutors in their ability to handle cases when the governments fail to do so. Gosnell *(2008)*[354] smartly highlighted that *"an arrest warrant issued for a sitting head of state entails a demand for regime change"*. Therefore, Prosecutor's movements demonstrated his tendency to follow the politics of conciliation with a defiant government.[355]

The above mentioned circumstances could enhance OTP's and Prosecutor's cultural sensitivity, if they were taken under consideration in conjunction with the acceptance of legal and normative pluralism. For instance, individual accountability may be investigated in appropriate indigenous perception of administration of justice. Professor Bassiouni claims that accepting a state as *'unwilling'* solely because the Prosecutor decides to indict the head of state is not well-founded. Likewise, does the refusal to co-operate with the ICC imply that the state is "unwilling genuinely to prosecute"?[356]

The African Union proposed the establishment of a special hybrid court consisting of national and international judges which would cooperate with traditional justice mechanisms with the aim of bringing perpetrators to justice for grave crimes committed in Darfur[357]. Regional Complementarity, which is analyzed above, thus came to the light with lots of Islamic scholars arguing for this judicial mechanism and

[354] Christopher Gosnell, "*The Request for an Arrest Warrant in Al Bashir Idealistic Posturing or Calculpped Plan?"* Journal of International Criminal Justice (2008), 841-851, p. 845.
[355] Ibid, S. Fouladvand, pp1060
[356] Ibid, S. Fouladvand, pp 1061, Gunnar M. S ø rb ø, at p.406
[357] Recommendations of the AU Panel on Darfur, 26 December 2013, available on: http://www.sudantribune.com/TEXT-Recommendations-of-the-AU,32880

giving reasons that transitional justice could be better served domestically, partly under the auspices of international judges.[358]

My view on the matter is that, when Muslim states signed the Rome Statute and Conventions of IHL like CAT, they directly undertook the duty to comply with certain human rights standards. Besides Muslim, non-member states in the Rome Statutes continue to be members in the UN, an organization which strives to fight impunity via the establishment of a plethora of international courts and a flurry of widely -accepted legal instruments. The request for respect of Shari'ah, a totally different legal framework to the ICC's, would render the Court a two speed institution. Moreover, there are in the Statute strict provisions concerning the judiciary's integrity and professionalism. If states or indictees impugn the OTP'S and judges' impartiality, they can advance their assertions according to art.41 ICCSt and Rules 23-35 RPEs with the aim of achieving the disqualification of an impartial judge or the recognition that the procedure is flawed.

7. General Conclusion

In this section the most significant strategies on complementarity were briefly described. All the strategies have positive and negative points and basis in law and judicial practice. However, the OTP in its last Strategic Plan for the years 2016-2018 adopts a more proactive approach towards complementarity. Exit strategy, which is introduced with this plan for the first time, could be employed by third states willing to exercise universal jurisdiction, pursuant to the principle of subsidiarity. The OTP could assist national proceedings as regards the accumulation of evidence, in the context of the OTP's exit from preliminary investigations. For the time being, proactive complementarity seems an innovative strategy, through which, states could also be materially assisted in accomplishing the complementarity test. Muslim world's claim to be subjected to a different legal model than the one envisaged in the Rome Statute could generate a plenty of serious divisions in serious matters.

[358] ST., *"Sudan accuse ICC prosecutor of standing behind AU hybrid court proposal"*, Plural News and News on Sudan, 2 November 2009, available at: http://www.sudantribune.com/spip.php?article32978

Part III

Section I - The ICTY's and ICTR's Case law on primacy

1. Statutory Articles on concurrent jurisdiction

Articles in concurrent jurisdiction

Art. 9 ICTY's Statute reads[359]:

Article 9 Concurrent jurisdiction

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

Article 8: Concurrent jurisdiction

1.The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the RPEs of the International Tribunal for Rwanda.

One difference between the these articles should be mentioned: In spite of the provision in ICTR's Statute that "the tribunal has primacy 'over the national courts of

[359] Updated Statute of the International Criminal *Tribunal* for the Former Yugoslavia, September 2009, available on: http://www.icty.org/x/file/Legal%20Library/Statute/Statute_sept09_en.pdf

all states", there is no similar provision included in the corresponding article of the ICTY's Statute, so it is not clear whether all states or only the UN member-states are bound by the ICTY Statute.

2. The Completion Strategy

Rule 11 *bis* RPEs ICTY/ICTR

Referral of the Indictment to Another Court (Adopted 12 Nov 1997, revised 30 Sept 2002) (A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State. […]

The primacy principle is the *sine qua non* element for ICTY's and ICTR's scope of jurisdiction. Although the ICTY/ICTR and national courts have concurrent jurisdiction over serious violations of IHL committed in the former Yugoslavia and in Rwanda respectively, the Tribunals can claim primacy and may take over national investigations and proceedings at any stage, if this proves to be in the interest of international justice. They can also refer their cases to competent national authorities in the states in question.[360] The ICTY particularized how primacy works in *Karadzić, Mladić, Stanisić* case holding that: The Tribunals issued a formal request to domestic courts with the purpose of deferring the proceedings and referring the cases to the Tribunals. The indictees who concern most the Tribunals are individuals in political, military and police leadership positions. In primacy terms, these categories of

[360] Mandate and Crimes under ICTY Jurisdiction, available on: http://www.icty.org/en/about/*Tribunal*/mandatee-and-crimes-under-icty-jurisdiction

indictees are of vast importance.[361]

Art. Rule 11 *bis* ICTY/ICTR RPEs raises significant *non refoulement* concerns: Transfer of an indictee to a state, where there are violations of fair trial, is prohibited. That is a major difference between the ICC and the *Ad hoc* Tribunals, namely the former has not moral or legal duty to assert admissibility solely on the grounds that the indictee is located in a country that might infringe upon his rights.[362]

In 1993, ICTY vigorously opened penal proceedings against numerous suspects, investigating multitude of cases and collecting plethora of evidence with the intention of bringing perpetratorsof serious violation of IHL to justice. Some cases' prioritisation though, was considered to be of vital importance for the Tribunal's regular operation. Significantly, the Prosecutor divests of his prosecutorial powers in order to refer them to national courts as a part of the Completion Strategy according to which most senior leaders should be prosecuted by the ICTY, while cases of intermediate and lower-rank perpetrators should be referred to national courts (the aforementioned 'pyramid prosecutorial strategy', UNSC also played an essential role in this strategy). First of all, ICTY has referred two main categories of cases to national judiciaries in the region of the former Yugoslavia: a) a large number of files from cases that were investigated to different levels by the Tribunal's Prosecution which did not result in the issuance of an indictment by the ICTY, b) a small number of cases in which the Tribunal issued indictments against named suspects.[363] The Referral Bench shall evaluate the gravity of crimes and the level of responsibility of the accused.[364] Subsequently, it is states' responsibility to effectively complete proceedings and cases.

Till today eight cases involving 13 persons indicted by the ICTY have been referred to national courts, mostly to Bosnia and Herzegovina, and shall be adjudicated under national law.

The national prosecutors are obliged to issue to the ICTY progress reports,

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[361] In the matter of a proposal for a formal request for deferral to the competence of the *Tribunal* addressed to the Republic of Bosnia and Herzegovina in respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic, Trial Chamber Decision on the Bosnian Serb Leadership Deferral Proposal the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-5-D, Date: 16 May 1995, paras: 13,26, available on: http://www.icty.org/x/cases/karadzic/tdec/en/50516DF1.htm

[362] Frédéric Mégret and Marika Giles, p. 575, See *Prosecutor v. Al Senussi* case

[363] ICTY- Transfer of Cases, available on: http://www.icty.org/en/cases/transfer-cases

[364] ICTY RPE, Rule 11 *bis* (C), See Prosecutor v. Gojko Jankovic, (IT-96-23/2-AR1 l*bis*.2), Decision on Rule 11 *bis* Referral (15 Nov 2005), par. 26

which must include reports of international organizations monitoring or reporting on domestic proceedings.

To sum up, the completion strategy approximates the complementarity regime, since the Tribunals are committed solely with the most serious cases involving those suspects who bear the greatest criminal liability without adjudicating the cases of lesser gravity. Political dimensions inhere in Rule 11 *bis*, because there are not *ab initio* certain criteria of referring a case to national courts, whereby the Tribunals retain the prerogative to revoke the order of referral or request the case's deferral on general or specific grounds (e.g. if a state was initially willing and adequately prepared to accept the case, it failed to properly proceed with the case afterwards).

In *Norać et al, Mejakić et al, Janković, Kovašević,and Trbić* the Referral Bench highlighted the importance of the provisions of Rule 11 *bis* (D)(IV) and 11 *bis* (F) which function as preventative means of failure to conscientiously prosecute a referred case.

3. The Prosecutor v. Duško Tadić

The accused registered in the SDS in 1990, whereupon the Party in collaboration to police and military forces occupied the town of Prijedor. Ethnic cleansing in the predominantly muslim town of Kozarac through murders, robberies and persecution followed. Thousands of civilians were killed or fled. The accused was providing his services as a leading member of the SDS in Kozarac and as a member of the paramilitary forces assisting the regular units of the 1st Krajina Corps when attacking. The accused was elected President of the local council of the SDS and undertook the political responsibility in the town of Kozarac in the wake on the ethnic cleansing's completion.[365]

Mr. Tadić was arrested in Germany on 12.02.1994 and pursuant to a request for deferral issued by the ICTY, German authorities transferred him to the location of the Court. He was finally found guilty of nine counts, partly convicted of two counts and acquitted of twenty counts.[366]

[365] TRIAL International, Profile "Duško Tadić", 08.05.2016 (Last modified: 07.06.2016) https://trialInternational.org/latest-post/dusko-tadic/

[366] The Prosecutor v. Dusko Tadic 26 January 2000, "Summary of Appeals Chamber sentencing Judgement", available on: http://www.icty.org/x/cases/tadic/acjug/en/000126_summary_en.pdf

The Defence alleged that the states' sovereignty and two notions deriving from it, namely domestic jurisdiction and *jus de non evocando*, are meaningfully violated due to the primacy principle.[367] Since Tadić was tried before German court, German authorities, who work in compliance with international standards, should have continued their work and not extradite him to BiH after the request of the ICTY. The The AC adopted Prosecutor's reply that, he was not at an actual trial but under investigation, that the accused erroneously makes use of art. 10(2) ICTYSt, while art.9 ICTYSt must be applied, which allows that a request for deferral may be filed *at any stage of the procedure".*[368] Furthermore, Tadić alleged that (i) domestic jurisdiction was active from the moment BiH was recognized as an independent state (i.e. the case of *Karadzić et al*), (ii) since other states cannot intervene in jurisdictional issues of a state, an international Tribunal cannot intervene, either. However, the AC found that art. 2(7) and Chapter VII UN Charter, jurisprudence of Nuremberg trials e.t.c., give UN the authority to intervene, especially when the state in question manifestly co-operates with the Tribunal, which is actually the case of BiH. The Tribunal was endowed with *Primacy*, after BiH and the Federal Republic of Germany accepted the jurisdictional primacy of the ICTY. Likewise, the indictee is not able to employ forum shopping.[369] Not to forget that those crimes were international and not ordinary in nature.

Accordingly, the AC answered, whether the *jus de non evocando* should take precedence over ICTY power. On the one hand, the indictee argues that this right is universally respectable, on the other, the AC provides with examples doubting this argument. Despite depriving of his "natural judge", the indictee will stand an equal trial, more neutralized as far as the political circumstances of the case are concerned.[370] In addition, that principle cannot be applied, when it comes to Chapter VII UN Charter and the establishing for a particular purpose of *ad hoc* Tribunal. Finally, with this fundamental decision the AC established the primary jurisdictional

[367] The Prosecutor v. Duško Tadić alk/a/ "DULE*"*, "Decision on the Defence motion for interlocutory Appeal on jurisdiction", Case No:IT-94-1-AR72, Date:2 October 1995, par. 50, available on: http://cld.unmict.org/assets/Uploads/full-text-dec/1995/95-10-02%20Tadic%20Interlocutory%20Decision%20on%20Jurisdiction.pdf
[368] IT-94-1-AR72, paras. 51-53
[369] IT-94-1-AR72,paras. 54-56
[370] IT-94-1-AR72, par. 62

power of the Court dismissing the defendant's motion of appeal.

4. The Prosecutor v. Drazen Erdemović

The ICTY addressed the issue of which judicial forum, the ICTY itself or the national court should enforce the Tribunal's judgement.[371] It elaborated that, the ICTY is endowed with the power to adjudicate, but it is incapable of enforcing its sentences directly. The burden of the execution of sentence falls onto states in question (art. 27 ICTYSt) and must be supervised by the ICTY. It must be designated on behalf of the International Tribunal in application of international criminal law instead of national law, and states must not modify the nature of penalty so as to degrade its international nature[372] or so as not to respect human rights envisaged in Standard Minimum Rules for the Treatment of Prisoners and other instruments.[373] Only in this way can uniformity and cohesion among national systems be accomplished.

5. The Prosecutor v. Pasko Ljubicić[374]

In accordance with the "Decision to Refer the case [of Pasko Ljubicic/ fourth case transferred from ICTY to BiH] to Bosnia and Herzegovina the national Prosecutor submitted his second progress report to the Court. The Chairman of OSCE in Europe Mission's to Bosnia and Herzegovina also added his report as an annex to the Prosecutor's Report. The findings are the following: a) custody was ordered by the "out-of-trial' Panel for fear of fleeing justice and as a threat to public and property security.[375] The OSCE criticized this stance mentioning that, it was not properly justified in accordance with the relevant jurisprudential threshold of the ECtHR. The

[371] The Prosecutor v. Drazen Erdemovic, "Sentencing Judgement", Case No:IT-96-22-T, Date:29 November 1996, http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf
[372] IT-96-22-T, par.71, also United Nations General Assembly resolution 3074 (XXVIII) of 3 December 1973, Principles of International co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, available on: http://www.ohchr.org/EN/ProfessionalInterest/Pages/PersonsGuilty.aspx
[373] Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; European Prison Rules and Rules governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal
[374] The Prosecutor v. Pasko Ljubicic, "Prosecutor's Second Progress Report", Case No:IT-00-41-PT, Date:18/12/06, available on: http://www.icty.org/x/file/Outreach/11bisReports/11bis_ljubicic_progressreport_2nd.pdf
[375] IT-00-41-PT, 18/12/06, par. 5

Human Rights Committee agreed with the above argument recommending that, the BiH should examine the possible removal of the vague concept of public security or security of property from its Code of Criminal Procedure[376], b) public officials in the Detention Unit of the BiH State Court are able to listen to the telephone conversations between Ljubicić and his defense counsel. This tactic may violate the detainee's right of communication with his lawyer in confidentiality. Therefore, OSCE recommended that the State Court and the Detention Unit cooperate in order to ensure the respect for his fundamental right[377] pursuant to art. 6 (3)(c) ECHR, domestic law and UN Standard Minimum Rules for Treatment of Prisoners, c) differences in the procedural approach between ICTY and BiH authorities did not negatively affect his rights, d) OSCE's intention was to publish its report so as to cooperate with governmental authorities and judiciary, and support the implementation of its recommendations.[378] In his last report[379], the Prosecutor analyzed that the amended indictment included fewer charges than the original indictment, because the accused was sentenced to 10 years imprisonment for *War Crimes against civilians*, after the court had considered the plea agreement and mitigating circumstances[380], and that the convict was relieved to pay the costs of the proceedings by virtue of his difficult economic situation. Notably, domestic laws prohibit waiver of the right to an appeal a verdict imposing sentence of imprisonment. The defendant has already waived that right during the plea agreement phase as well as his right of presumption of innocence.[381]

Charge bargaining may be beneficial for defendant's position, namely he/she exempts from the stigma of being guilty for serious crimes such as genocide, as soon as he/she pleads guilty for lesser charges. It can also be useful for prosecutorial purposes. Yet, it is possible that historical record will be substantially tampered with untrue and incorrect data extrapolated from charge bargaining and that inter-state reconciliatory course may be in danger. When plea bargaining is utilized in common crimes like homicide, robbery e.t.c., it may be in line with restorative justice, because

[376] IT-00-41-PT, 18/12/06, pp 12
[377] IT-00-41-PT, 18/12/06, par. 6, 9
[378] IT-00-41-PT, 18/12/06, par. 10
[379] The Prosecutor v. Pasko Ljubicić, "Prosecutor's Final Progress Report", Case No IT-00-41-PT, p.4350, Date: 23/12/08, available on: http://www.icty.org/x/file/Outreach/11bisReports/11bis_ljubicic_progressreport_9th.pdf
[380] IT-00-41-PT, p.4350, 23/12/08, par.4, 5
[381] IT-00-41-PT, p.4350, 23/12/08, pp 12

victims are directly receiving damages from accused people, avoid lengthy proceedings and their number is limited. In international terms, though, plea bargaining cannot justly function, for crimes are widespread or systematic, victims are countless and the incited sorrow is generalized. The OSCE reiterated that, if this practice is going to be rendered common, the national prosecutors should comply with Criminal Codes Implementation Assessment Team's guidelines and art. 283 BiH CPC.[382]

In my point of view, this solution is in contrast with the *jus cogens* norm of prosecution of serious violations of IHL. This legal tool may prove major hazard for transitional justice in the future, since national prosecutors are obliged to accept accountability for less serious charges, while hundreds or thousands of victims had faced an altogether different reality in the previous years. Would it not be a degrading approach towards injured parties? Not to forget that, punitive damages claims for committed crimes would also lessen, for the gravity of crimes is directly linked to the level of damages.

To conclude, ICTY's mandate to transfer cases to national courts was quite ambitious and necessary for cases' closing. The International Residual Mechanism for Criminal Tribunals[383] is empowered to monitor transitional judicial fora and make recommendations to national judges. Nevertheless, implementing this strategy may prove a rather challenging process; on the one hand, fundamental rights of the accused and on the other hand, victims' right to fair trial must be domestically respected. *Ergo,* a quasi-judicial monitoring commission or the participation of international judges into the pre-trial and trial phases in domestic courts could obligate prosecutorial authorities and judiciary to conform with international and European standards.

[382] IT-00-41-PT, p.4350, 23/12/08, pp 12
[383] UNSC, S/RES/1966 (2010), available on: http://www.icty.org/x/file/About/Reports%20and%20Publicppions/ResidualMechanism/101222_sc_res1966_residualmechanism_en.pdf

6. In Re: The Republic of Macedonia

In this case the Prosecutor requested the TC to issue a formal request according to Rule 9(iii) and 10(A) of the RPEs to the F.Y.R.O.M. to defer five investigations and prosecutions of alleged crimes carried out in 2001 by the National Liberation Army (NLA) and the F.Y.R.O.M.'s forces in F.Y.R.O.M. (NLA forces attacked against the Albanian minority of F.Y.R.O.M.) to the jurisdiction of the Tribunal. The Prosecutor, acting in full discretion, requested that the competent authorities of the country defer all current and future investigations and prosecutions of the alleged crimes committed in the given context to the jurisdiction of the Tribunal. F.Y.R.O.M.'s Public Prosecutor General provided the Tribunal with the background information about the alleged crimes and proposed that three of the five cases should firstly be deferred to the jurisdiction of the Tribunal, namely the *"NLA leadership"* case, the *"Mavrovo Road Workers"* case and the *"Lipkovo Water Reserve"* case, without opposing to the deferral of the *"Neprosteno"* and the *"Ljuboten"* investigations. Then again, he dissented from the request on the deferral of all current and future investigations and proceedings. To better serve the purposes of the thesis the Deferral of the "*Mavrovo Road Workers*" case and the Deferral of *"all current and future investigations and proceedings"* will be viewed hereunder. All the other cases/investigations were eventually deferred to the Tribunal.[384]

6.1. The "*Mavrovo Road Workers*" case

On 07.08.2001 on the highway under construction in the area of the village Grupcin five workers were abducted by NLA members, whereupon they were beaten and abused for several hours. Two of the 23 suspects under national investigation have been identified and arrested. The F.Y.R.O.M. abided by Rule 8 of the Rules provided constant information about the prosecutorial activities to the Prosecutor, who later after further investigations, extrapolated inability to indict the two suspects in detention.[385]

The TC ruled in favour of the national prosecutorial rights by limiting the so-

[384] Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, Trial Chamber I, Case No: IT-02-55-MISC.6, Date: 4 October 2002, available on: http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp37-e/misc.htm
[385] IT-02-55-MISC.6

called ‘blocking effect’ by a ‘specific procedural mechanism’ deferring the case to the competence of the Tribunal, in light of the agreement between the parties. It also allowed the national prosecutor to continue the investigations for the two suspects and invited both the Prosecutor and the national Prosecutor, alternatively or co-operatively […] to apply for a new hearing before the Chamber within a period of 9 months from the day this decision was rendered.

6.2. The Deferral of *“all current and future investigations and proceedings”*: During the Oral hearing the Prosecutor amended her petition requesting that the TC enters a clause in its Decision which would oblige the judges of the F.Y.R.O.M. to inform the Prosecutor about findings in their future investigations and especially the national prosecutor to conform with any declaration of primacy by the Prosecutor in the absence of a formal request for deferral to the jurisdiction of the Tribunal by a Chamber. Nevertheless, the TC emphasized that such a long-term deferral would induce an ‘intense frustrating effect’ and severely cumber domestic courts with the initiation of every investigation or prosecution concerning these groups of alleged perpetrators. The TC concluded that the principle of concurrent jurisdiction and of primacy of the Tribunal over national courts as envisaged in the Statute do not imply the prevention of exercise of domestic jurisdiction. ICTR/ICTY should promote the exercise of domestic jurisdiction and the implementation of the relevant national laws. The TC rejected the proposed clause mentioning that since the mandate of the ICTY is to focus on “high perpetrators only”, it is not justifiable to request the deferral of all current and future investigations and prosecutions to the competence of the Tribunal, despite their possible gravity or the criminal responsibility of alleged perpetrators. Finally, if this clause was accepted, it would infringe upon the TC’s authority to request for the deferral of the cases by permitting the Prosecutor to exercise this power.[386]

In conclusion, the principle of primacy, relented in favour of national jurisdiction and rules of co-operation between the Tribunal and the domestic judiciary for the above investigations/cases were prescribed. At this early stage, the ICTY had already determined that a fair balance should be preserved between primacy and state

[386] IT-02-55-MISC.6

sovereignty/capacity. Plus, the TC reflected the 'soft mirror thesis'.

7. The Prosecutor v. Alfred Musema

Case Summary

Alfred Musema, acting as a preponderant, allegedly committed serious violations of IHL, namely serial murder of a large number of civilians, within the massacres that occurred in Rwanda from April to July 1994. Due to his position as the Director of the tea factory in Gisovu (Prefecture of Kibuye) he was allegedly exercising *de facto* control over his employees giving instructions to murder Tutsis and had directed the attacks. He was ultimately arrested by Swiss military authorities, even though he sought to be granted asylum status there, and was kept in custody for genocide and crimes against humanity.[387] On 12.03.1996 ICTY requested from Swiss authorities to relinquish jurisdiction in its favour. The Swiss Federal Court accepted this request and transferred him to the United Nations' prison complex in Arusha, Tanzania. On 27.01.2000, the AC declared him ultimately guilty of genocide and extermination as a crime against humanity.[388]

Prosecutor requested the TC issued the deferral of Alfred Musema's case in accordance with Rule 9 (iii) and 10 of the Rules which was investigated by Swiss authorities and that Swiss authorities provide the Prosecutor with all the relevant information of the ongoing criminal procedure (e.g. copies of records, orders and judgments e.t.c.). The Prosecutor undertook investigations in the Prefecture of Kibuye, in the territory of which the suspect had been acting, so Swiss authorities might have been able to provide critical information of significant importance to the OTP. He also accentuated that, if Switzerland does not discontinue its investigations, which resemble to his, perplexities and complications might occur.[389] He insisted that the Tribunal is the most appropriate institution to rule on this case because of the

[387] Prosecutor v Alfred Musema, Decision on the Formal Request for Deferral Presented by the Prosecutor, ICTR-96-5-D, 12 March 1996, available on: http://www.worldcourts.com/ictr/eng/decisions/1996.03.12_Prosecutor_v_Musema.pdf, par. 4

[388] TRIAL International, Profile: "Alfred Musema" 31.05.2016, Last modified: 08.06.2016, available on: https://trialinternational.org/latest-post/alfred-musema/

[389] ICTR-96-5-D, paras: 2,3,5

seriousness of the factual charges and the emerging legal questions. For instance, Swiss criminal law did not embody genocide, crimes against humanity or other relative provisions to them, so Musema was merely arraigned on charges of serious violations of the Geneva Conventions and of the Additional Protocols. Therefore, his prosecution conducted on behalf of ICTR would be barred because of the *ne bis in idem* principle. Plus, repeated testimonies in parallel examinations carried out both by the ICTR and the state can eliminate their credibility, pose threat to the witnesses' safety, and cause them deep emotional pain. In the end, Switzerland was willing to co-operate with the Tribunal, whereupon it allowed his transfer to Arusha and withdrew from the case's investigation.[390]

Contrary to the complementarity principle, this judgement raises primacy issues: a) having rejected the charges as deficient based on the Geneva Conventions and Additional Protocols, Judges pronounced the prevalence of prosecution of international crimes as they were stipulated in 1996, adopting in this way the 'hard mirror' thesis and keeping a strict stance on the matter b) the view that evidentiary material might be corrupted solely due to double investigation and not by reason of the inability or deficiency of the State is rather wide and ambiguous, c) human rights of victims are considered, while the Tribunal assesses its primary jurisdiction. This fold of primacy equals to the interests of justice and victims' interests included in the concept of complementarity, as well, d) the determination of the possible rising of confusion owing to parallel examinations might be valid, if the decision's reasoning was more extensive on this issue. Most importantly, this decision seems to be the reverse side of the SSC requirement. Unlike complementarity and SSC, the similarities between national and international proceedings act as deterrent for domestic prosecution, in light of the primacy principle.

The Gacaca Courts

The President of the Republic of Rwanda in 1998 initiated a debate on the possible establishment of traditional courts to assist the ordinary Rwandan judicial system and the ICTR. As a result, the Organic Law of 26.01.2001 was introduced, which envisaged the founding of the Gacaca Courts. More than 1.2 million cases

[390] ICTR-96-5-D, paras 11-15

brought before these courts included the low and middle-level perpetrators of the genocide, apart from the inciters, who should have been tried before ordinary courts. The courts comprised of elected popular assemblies of non-professional judges, courts which, together with informal procedure, raised plenty of issues with respect to fair trial rights. If the suspect regretted for his/her actions and sought reconciliation with the community, this behavior was thought to be a mitigating factor, when the judges ruled on the sentence. Likewise, in some cases if accused people confessed their crimes, showed remorse and asked for forgiveness in front of their community, they were released. On 04.05.2012 the Gacaca courts' activities were officially terminated.[391] In its recent judgement, *Rwanda v. Nteziryaro and ors*, the Divisional Court of England refused to extradite to Rwanda five purported génocidaires, since some of the indictees have already received no fair trials in the Gacaca courts and there was the risk that they would serve unjust sentences (art. 6 ECHR- conviction without sufficient evidence, judiciary's strict control and direction by the Ministry, mandatory appointment of inexperienced attorneys). The Divisional Court was not satisfied that the Gacaca judgements could be annulled, too.[392]

The idea of regional courts supporting the domestic courts and the international tribunals/courts in their tasks has already been discussed in the chapter of regional complementarity.

[391] Outreach Programme on the Rwanda Genocide and the United Nations, Background Information on the Justice and Reconciliation Process in Rwanda, available on:
http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml
TRIAL International, Profile: "*Alfred Musema*"

[392] Emilie Pottle, "*Extradition: English Court refuses to extradite alleged génocidaires to Rwanda–will a domestic prosecution follow?"*, EJIL: Talk!, 2 October 2017, available at: https://www.ejiltalk.org/extradition-the-divisional-court-has-refused-to-extradite-alleged-genocidaires-to-rwanda-will-a-domestic-prosecution-follow/, In the High court of Justice Queen's Bench Division Administrative Court, the Government of Rwanda v. (1) Emmanuel Nteziryayo (2) Vincent Brown (Aka bajinya) (3) Charles Munyaneza (4) Celestin Mutabaruka (5) Celestin Ugirashebuja, Case Nos: CO/311/2016, CO/312/2016, CO/313/2016, CO/314/2016, CO/315/2016, Date: 28/07/2017, available at:https://www.judiciary.gov.uk/wp-content/uploads/2017/07/rwanda-v-nteziryayo-and-others-judgment-20170728.pdf

8. The Prosecutor v. Radio Television Libre des Mille Collines SARL, (Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze)

Case Summary

F. Nahimana was an assistant lecturer of history at the National University of Rwanda. In 1992 together with others he set up the *Comité d'Initiative* with the purpose of founding the RTLM and participated in Mouvement Révolutionnaire National pour le Développement party. J-B. Barayagwiza was a trainee lawyer and a founding member of CDR. He also joined in the Comité d'Initiative and was Director of Political Affairs in the Ministry of Foreign Affairs. H. Ngeze, a journalist, was a founding member of the CDR party. The AC found the accused accountable for conspiracy to commit genocide, direct and public incitement to commit genocide, and extermination pursuant to art 6(1) and (3), art 2(3)(b), and art 3(b) of the Statute, since they launched broadcasts on the Radio collectively and systematically communicating messages of ethnic hatred and directly inciting violence against the Tutsi population. Therefore, the RTLM was also known as "Radio Machete". Life imprisonment was imposed to all of them, but due to Barayagwiza's deprivation of rights, his sentence reduced to thirty five years imprisonment. [393]

In this case, Belgium, which instituted investigations against Radio Television Libre des Mille Collines SARL as well as all people associated with RTLM, was requested to defer its competence to the Tribunal with regards to all investigations and all criminal proceedings (e.g. to provide to the Tribunal with all the collected evidence, court's records e.t.c.) related to the activities of the above. The Prosecutor stated that he was already conducting investigations on RTLM broadcasts, management, financing, journalists and broadcasters, and on alleged serious violations of IHL and that parallel criminal procedures could further perplex the case. He repeated the above argumentation on serious inconvenience to obtain evidence

[393] The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze, Trial Chamber m Case No: ICTR-99-52-T (2003), paras: 951-744-752, 777,967,973,1031-1054,1074, the Annex I http://www.worldcourts.com/ictr/eng/decisions/2003.12.03_Prosecutor_v_Nahimana.pdf#search=%22rtlm%22, Sophia Kagan, Commentary on: "The "Media case" before the Rwanda Tribunal: The Nahimana et al Appeals Judgement" , The Hague Justice Portal, 24.04.2008, available on: http://www.haguejusticeportal.net/index.php?id=9166,

owing to the parallel proceedings. Neither the Belgian Criminal Law (as is the Swiss paradigm) included provisions relative to genocide and crimes against humanity. The TC tersely accepted the request and obliged Belgium to defer the case to ICTR without elaborating why it embraced the Prosecutor's point of view. [394]

9. The Prosecutor v. Théoneste Bagosora

Théoneste Bagosora was Second in Command of the *École Superieure Militaire* in Kigali, Commander of the military camp in Kanombe and Director of the Cabinet of the Ministry of Defense, a position he continued to hold during the events of April 1994, though he had already retired in September 1993. He was one of the closest associates of President Habyarimana. His command responsibility relates to the massacres following the attack on the presidential plane on 6 April 1994, as he exercised *de facto* control of the army and the country. He was investigated and charged by the Belgian authorities for serious violations of the Geneva Convention of 12 August 1949 and of the Additional Protocols. The Prosecutor reiterated all his argumentation initially tabled in *Prosecutor v. Musema* and the Tribunal, without specifying the reasoning, and replied affirmatively to the Prosecutor's Request for Deferral, whereupon Belgium deferred the case in favour of the ICTR. The Prosecutor charged him along with other individuals with genocide, extermination and persecution, murder, rape, other inhumane acts as crimes against humanity and war crimes, based on direct or superior responsibility, and with outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II for crimes committed in Rwanda in 1994. He was finally sentenced to 35 years of imprisonment.[395]

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[394] Prosecutor v. Radio Television Libre des Mille Collines SARL, Decision of the Trial Chamber on the Application by the Prosecutor for a formal Request for deferral to the competence of the International Criminal Tribunal For Rwanda in the matter of Radio Television Libre Des Mille Collines SARL (pursuant to Rules 9 and 10 of the RPEs), Case No:ICTR-96-6-D, Date:12 Mar 1996, available on: http://www.worldcourts.com/ictr/eng/decisions/1996.03.12_Prosecutor_v_RTLM.pdf

[395] Prosecutor v. Théoneste Bagosora, "Decision on the Application by the Prosecutor for a Formal Request for Deferral", Case No: ICTR-96-7-D, Date: 17 May 1996, available on: http://www.worldcourts.com/ictr/eng/decisions/1996.05.17_Prosecutor_v_Bagosora_1.pdf:,The Prosecutor v. Théoneste Bagosora Gratien Kabiligi Aloys Ntabakuze Anatole Nsengiyumva, "Judgement and Sentence", Trial Chamber I, Case No. ICTR-98-41-T, Date:18 December 2008, paras: 44-53, 2258, 2285-2293, available on: http://www.refworld.org/cases,ICTR,494fb4ff2.html
Théoneste Bagosora, Anatole Nsengiyumva v. The Prosecutor, Appeal Chamber, Case No: ICTR-98-41-A, Date: 14 December 2011, paras.3-8, 742, available on:

10. The Prosecutor v. Michel Bagaragaza

Michel Bagaragaza was accused of genocide, conspiracy to genocide and, alternatively with complicity to genocide, for he supplied *Interahamwe* (a hutu paramilitary organization*)* with fuel, transport, and money. He confessed to committing some of those crimes and he was bound himself to assist the Tribunal in administering justice. The agreement between the Prosecutor and Bagaragaza included the obligation of the former to refrain from prosecution, while he should request the latter's transfer to Norway which claimed to have jurisdiction over the crimes. The TC III did not respond positively to the request of Prosecutor to refer the case to Norwegian jurisdiction, so he lodged an appeal.[396]

The TC held and the AC affirmed that Norway could not exercise jurisdiction over the case (Rule 11*bis*), for the crime of homicide with which Bagaragaza was charged domestically did not require proof of genocidal intent, a necessary element of the crime of genocide.[397] Nevertheless, it is important to mention the argumentation unfolded by the Prosecutor and Norway for the purpose of this thesis.

Rule 11 *bis* sets the fair trial rights and the non-imposition of the death penalty as preconditions in order for a state with jurisdiction over the case to be assessed as the proper for referral. Furthermore, the AC examined whether the state, which had claimed to be competent, had proper legislation that criminalized the alleged conduct of the accused and provided a sufficient penalty mechanism.[398]

The Prosecutor argued that crimes within Norwegian criminal law could differ from the crimes stipulated in ICTRSt, because Rule 11 *bis* reads that a 'case' and not just a crime could be transferred to a national jurisdiction. A 'case' is a broader term, relating to the criminal conduct or behavior of the accused, contrary to legal requirements of the criminal conduct charged. Rule 11*bis* should be flexibly interpreted, since only a limited number of states specifically penalize genocide and are willing to exercise universal jurisdiction.[399]

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http://www.worldcourts.com/ictr/eng/decisions/2011.12.14_Bagosora_v_Prosecutor.pdf

[396]The Prosecutor v. Michel Bagaragaza, Appeals Chamber, Case No. ICTR-05-86-AR11*bis*, Date: 30 August 2006, paras. 1-7, available on: http://www.worldcourts.com/ictr/eng/decisions/2006.08.30_Prosecutor_v_Bagaragaza.pd

[397] ICTR-05-86-AR11*bis*, par. 15

[398] ICTR-05-86-AR11*bis*, par.9

[399] ICTR-05-86-AR11*bis*, par.11

As a consequence, Norway satisfied the conditions for transfer, according to the Prosecutor. Claiming *rationae materiae* jurisdiction over the alleged genocidal acts, Norway provided the AC with relevant information on its legislative framework pertinent to international law. It also asserted that, insofar as it had ratified the 1948 Genocide Convention, the Parliament considered it unnecessary to introduce domestic laws pertaining to genocidal acts. Homicide and bodily harm would be adequately to cover the Bagaragaza's case and at the same time genocidal intent could be used as aggravating circumstances. The Prosecutor added that the maximum possible penalty of 21 years' imprisonment under national criminal code would be an adequate penalty for the accused.[400] This argument relates to the 'sentence-based theory of complementarity', and contributes, without being the exclusive factor, to the referral of the case to national jurisdiction.

Despite the Prosecutor's and Norway's meaningful argumentation, the AC narrowly interpreted art.8 ICTRSt, holding that domestic authorities have concurrent jurisdiction with the Tribunal to prosecute 'serious violations of IHL'. Therefore, a state, to which a case was referred, must charge and convict only international crimes listed in its Statute. Moreover, the AC highlighted that prosecution for ordinary crimes does not capture either the gravity of genocide or the different protected legal values between homicide and genocide. The former's penalization protects individual lives, while the latter's penalization protects specifically defined groups.[401]

The AC adopted the 'hard mirror thesis', by not admitting the sound arguments of Norway. This decision implied a very strict form of primacy, which is inconsistent with the genuine intent and efforts of Norway to fairly try the accused. Nonetheless, the argumentation raised by the above parties in the trial is still meaningful

11. Prosecutor v. Joseph Kanyabashi

Joseph Kanyabashi was Governor of Ngoma commune in Rwanda and was charged with genocide, crimes against humanity and war crimes.

The Defence contented that the establishment of the Tribunal entrenches upon the principle of *jus de non evocando*, so the risk of impartial justice inheres in the

[400] ICTR-05-86-AR11*bis*, paras.12-14
[401] ICTR-05-86-AR11*bis*, paras. 16-17

politically founded *ad hoc* criminal tribunals. The TC replied that, by no means is the Tribunal constituted with the purpose of depriving certain criminal offenders of fair and impartial justice for political reasons. The offenders are not prosecuted for political crimes before prejudiced arbitrators, too. The TC reiterated the prevalence of primacy principle, which lies in art. 9 and 28 ICTRSt, in Chapter VII UN Charter and inheres in the *ne bis in idem* principle. Thus, Rwanda is obliged to conform itself with the mandate of ICTR which does not violates the principle of *jus de non evocando.*
In the second instance, the AC partly accepted the Appellant's contentions a lack of jurisdiction of the re-composed Trial Chamber and ordered that the case be remitted to Trial Chamber I.[402]

12. The Prosecutor v. Jean Uwinkindi[403]

Jean Uwinkindi, a former pastor of the Kayenzi Pentecostal Church in Nyamata Sector, Kigali-Rural Prefecture, was charged with genocide and extermination as a crime against humanity before the ICTR. The accused was arrested in Uganda on 30.06.2010 and was transferred to ICTR on 02.07.2010. According to the chapeau of Rule 11*bis* of ICTR on 28.06.2011 the Referral Chamber ordered his case to be referred for trial before the High Court of the Republic of Rwanda.[404] The indictee attempted in vain to revoke the referral order and filed a motion of appeal on seven grounds, which ultimately was dismissed.[405] All grounds of appeal were related to the accused's rights while in custody, the breach of *ne bis in idem* principle, *res judicata* principle, deprivation of a proper judicial remedy e.t.c. The AC had to examine if the accused would receive a fair trial. The wording of art. 5(2) Statute provides the MICT with primacy over national courts. Its existential purpose is to

[402] Prosecutor v. Joseph Kanyabashi, "Decision on the Defence Motion on Jurisdiction", Trial-Chamber II, Case No: ICTR-96-15-T, Date: 18 June 1997, paras: 30-32, available on: http://www.worldcourts.com/ictr/eng/decisions/1997.06.18_Prosecutor_v_Kanyabashi.pdf, Joseph Kanyabashi v. The Prosecutor, "Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I", Case No: ICTR-96-15-A, Date: 3 June 1999, paras: 38-46, available at:http://www.worldcourts.com/ictr/eng/decisions/1999.06.03_Kanyabashi_v_Prosecutor_2.pdf
Antonio Cassese, Quido Acquaviva, Mary Fan, Alex Whiting,*"International Criminal Law: Cases and Commentary"*, Oxford University Press, (2011), pp.525-534
[403] Prosecutor v. Jean Uwinkindi , Decision on an Appeal concerning a request for revocppion of a referral, Case No: MICT-12-25-AR14.1, Date: 4 October 2016, available on: http://cld.unmict.org/assets/filings/16-10-04-MICT-AC-Uwinkindi-Decision-on-Revocation-of-Referral.pdf
[404] MICT-12-25-AR14.1, paras. 2,3
[405] MICT-12-25-AR14.1, paras. 4,5

determine primarily whether the conditions for a fair trial in the domestic jurisdiction are absent.[406] The International Crimes Chamber of the High Court delivered a fair trial to the indictee as reported by the ACHPR. [407]

13. The Prosecutor v. Elizaphan Ntakirutimana *et al.*

The ICTR Prosecutor in 1996 had requested from U.S.A the deferral of Elizaphan Ntakirutimana's case, who was Rwandan Hutu, former pastor, and resident of Texas. A U.S. magistrate then handled the request during a formal hearing. According to national law, the deferral of a case could be possible on condition that there was sufficient evidence proving the validity of charges and that the purported offences would be crimes under U.S. law. The magistrate held that the case's adjudication by a foreign tribunal would be detrimental to the protected human rights and refused to allow the indictee's extradition, arguing that there was no extradition treaty between the involved states, as laid down by U.S. law and that there was lack evidentiary material indicating his criminal accountability.[408] That magistrate, by authoritatively applying domestic law, totally overpassed biding international law and UNSC's resolutions. The U.S. Government then hastened to proclaim that they were going to appeal the decision. The accused ultimately transferred to Arusha on 24.03.2000 after three years of procedures on extradition.[409]

14. The Prosecutor v. Miroslav Deronjić

Miroslav Deronjić played an essential role in the commission of persecution as a crime against humanity against Bosnian Muslims in the village of Glovora BiH (killings and destruction of properties). He was sentenced to ten years imprisonment. He filed a motion of appeal against the decision, on four grounds, which was

[406] MICT-12-25-AR14.1, par. 12

[407] The 11th, 12th and 13th periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples' Rights & the initial report on the implementation status of the Protocol to the African Charter on Human and People's Rights and the Rights of Women in Africa (Maputo Protocol), period covered by the Report: 2009 – 2016, paras.90-92, available at: http://www.achpr.org/files/sessions/60th/state-reports/11th-16th-2009-2016/rwanda_11th_3th_periodic_report_eng.pdf

[408] Ibid, Bartram S. Brownt, pp. 411-412

[409] United Nations Mechanism for International Criminal Tribunal, *"Pastor Ntakirutimana transferred to the Tribunal's custody"*, Press release, 25 March 2000, available at: http://unictr.unmict.org/en/news/pastor-ntakirutimana-transferred-tribunal%E2%80%99s-custody

ultimately dismissed.[410]

The appellant argued that the TC in breach of customary law determined that the principle of *lex mitior* was not applicable to that particular case and, consequently, the AC should take into account the more lenient domestic law relating to the sentencing. Against the backdrop of concurrent jurisdiction, *lex mitior* should be applied by the ICTY, as it comprises a part of international customary law in a plethora of legal systems.[411] Highlighting its primacy over national courts, the AC rejected this ground of appeal reasoning that the applicable law in ICTY was not national law, so *lex mitior* could be applied only if the Tribunal itself was bound by that individual law.[412]

15. The Prosecutor v. Bernard Ntuyahaga[413]

Bernard Ntuyahaga was charged with the killings of the former President of Rwanda and ten UNAMIR Belgian soldiers. The Prosecutor requested the withdrawal of the indictment so as to subserve the exercise of concurrent jurisdiction on behalf of Tanzanian courts, while the Kingdom of Belgium filed an amicus curiae brief. The TC I held that the Tribunal's activities were complementary to the national prosecutorial activities and that there must be mutual cooperation between the Tribunal and the states. Generally, the Tribunal did not have exclusive jurisdiction over the alleged crimes. Nonetheless, where the Tribunal *first* establishes prosecution against certain individuals, it exercises primary jurisdiction over the cases. It also pointed out that states should be encouraged to exercise universal jurisdiction, but it dismissed the request for various procedural reasons, one of which was that, the Rule 11 *bis* was not included into the ICTR RPEs at the time of the issuance of the decision.

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[410] "The Prosecutor v. Miroslav Deronjić", International Crimes Database, available at: http://www.internationalcrimesdatabase.org/Case/1227

[411] Prosecutor v. Miroslav Deronjić, "Judgement on Sentencing Appeal", Case No: IT-02-61-A, Date: 20 July 2005, paras: 93-96, available at: http://www.icty.org/x/cases/deronjic/acjug/en/der-aj050720.pdf

[412] Ibid, IT-02-61-A, paras: 97-99

[413] The Prosecutor v. Bernard Ntuyahaga, "Decision on the Prosecutor's Motion to withdraw the Indictment", Case No: ICTR-98-40-T, Date: 18 March 1999, available at: http://www.worldcourts.com/ictr/eng/decisions/1999.03.18_Prosecutor_v_Ntuyahaga.pdf

16. The *Karamira* case

Froduald Karamira, a former Tutsi, who converted to Hutu, was Vice-President of the Rwandan Republican Democratic Movement. On 23.10.1994, he gave a hate speech against Tutsis, and calling Hutus to "take the necessary measures", he incited the commission of genocide via RTLM on a daily basis and from then on assisted Hutu extremists. He was arrested by Indian authorities in 1996 upon which he was extradited to Rwanda.[414] During his transfer, while in Ethiopia, Karamira attempted to flee, and the ICTR requested that the authorities detain him on behalf of the Tribunal. The case was left pending, while the Rwandan Minister of Foreign Affairs and the ICTR's Prosecutor were participating in a donor round table in Geneva. Among other matters, they also discussed the Karamira case. The Minister developed several arguments such as that Rwanda had invested a large sum on the accused's extradition and trial and Karamira should be tried by Rwandan courts on grounds of social justice. The following day, the ICTR's Prosecutor revoked his request concerning Karamira.[415] On 14.02.1997, he was sentenced to capital punishment for the crimes of genocide, murder, conspiracy, non-assistance to people in danger and on 24.04.1998 he was executed by firing squad in Kigali.[416]

17. Case of *Jorgić v. Germany*

Nicola Jorgić, a national of BiH, of Serb origin, resided in Germany from 1969 to 1992, whereupon he returned to his birth place, Doboj. In 1995, he was arrested by German authorities on suspicion of committing genocide against Muslim populace of three villages during the ethnic cleansing, which took place in that region, from May at least until September 1992. He was convicted by Düsseldorf Court of Appeal, on 11 counts of genocide, murder of 22 people, dangerous assault and deprivation of liberty and sentenced to life imprisonment. This decision was upheld

[414] TRIAL International, Profile, "Froduald Karamira", 31.05.2016 (Last modified: 08.06.2016), available at: https://trialinternational.org/latest-post/froduald-karamira/

[415] Madeline H. Morris, *"The Trials of Concurrent Jurisdiction: the case of Rwanda",* Duke Journal of Comparative & International Law, Vol.7:349, (1997), 349-374, footnote 91, p.365, available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1003&context=djcil, for the decision see footnote no. 72

[416] Jane Standley, *"From butchery to executions in Rwanda",* Report, BBC News, 27 April 1998, available at: http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/84120.stm

by the Federal Court of Justice and the Federal Constitutional Court.[417] German judges, applying art. 6(1) of the (National) Criminal Code and Article VI of the Genocide Convention (1948) and art. 9 ICTYSt, exercised universal jurisdiction, reasoning that, since Germany participated with its military and humanitarian missions in the conflict of BiH and the accused was resided in Germany for 23 years, Gemany's claim to prosecute and try Jorgić was legitimate. Jorgić complaint before the ECtHR that the Germany did not have *rationae materiae* jurisdiction over him, for his was not a German national and the alleged crimes took place in another country than Germany (art.5(1)(a) and 6 (1) ECHR). Therefore, according to his allegations, the competent court to adjudicate his case was either BiH courts or the ICTY. [418] The ECtHR reiterated important cases on universal jurisdiction like Eichman, Demjanjuk and Pinochet, and Tadić (in which particular relevance of universality was highlighted) and reasoned that neither the ICTY nor BiH's courts requested his extradition, so Germany, pursuant to the universal jurisdiction, *jus cogens* and art. 9 ICTYSt-concurrent jurisdiction, possessed the authority to initiate criminal proceedings against him.[419] The applicant's second ground concerned the *nullum crimen nulla poena sine lege* principle art. 7(1) ECHR, namely he complained that German court interpreted too broadly the crime of genocide, which had no basis in national or international criminal law. The Court, by founding no violations of the accused's rights, dismissed all the complaints.[420] In this case, the absence of an international request for extradition of the accused favoured national courts in the dispensation of justice. The ICTY did not intervene in this case, so it implicitly welcomed the ECtHR and national courts' decisions.

18. The *Prosecutor v. Djajić,* Supreme Court of Bavaria

Having abetted murders of fourteen Muslim civilians and attempted murder of one, Djajić was sentenced to five years of imprisonment by the Supreme Court of Bavaria. The offences were committed in 22.06.1992 near the village of Trnovaca in BiH, where Serbs sought to create a Serbian corridor to the Mediterranean Sea. The

[417] Case of *Jorgić v. Germany*, European Court of Human Rights, Application no. 74613/01, 12/10/2007, paras. 1-37, 49-52, available at: http://www.legal-tools.org/doc/812753/pdf/
[418] Ibid, Application no. 74613/01, paras.55-59
[419] Ibid, Application no. 74613/01, paras.66-87
[420] Ibid, Application no. 74613/01, paras.89-116

accused was domiciled in Germany, afterwards. The ICTY Prosecutor did not issue an extradition request to the authorities handling the case. The Supreme Court exercised jurisdiction on the basis of the Fourth Geneva Convention of August 12, 1949 and the first Protocol Additional of December 12, 1977 reasoning that the armed conflict in the region was international in character and universality could be applied (Serb force was an 'outside' force). Nonetheless, the Court failed to prove the indictee's genocidal *mens rea*.[421]

Concluding remarks

In this thesis the components of complementarity were analyzed in detail, and special emphasis was put on the SSC requirement which should be either moderated or withdrawn, on the grounds that it privileges the ICC by putting a high threshold to states to initiate proceedings against a specific conduct. Conversely, the ICC's prosecutor could exploit his/her discretion to elaborate charges/conduct with the intention of rendering a case admissible. The national sentences for ordinary crimes could be a factor in the assessment of cases' admissibility before the Court. The important distinction between the complementarity in the 'situation phase' and in the 'case phase' was drawn, as well.

The proactive complementarity strategy is the most effective among the other strategies which, in my opinion, do not properly serve the goals of the Rome Statute, for they are either ill-founded or hyper-formalistic or unspecific, when it comes to their application. States should be urged to sign and ratify the Statute and integrate it in their national legal systems or harmonize their legislation with the international norms and laws, while the ICC should contribute legal and material resources to states-parties which are in transition.

The issue of self-referrals was addressed and I came to the conclusion that self-referrals encompass an indirect (self) admission of the state's 'unwillingness' or voluntary inactivity *ab initio*. For example, in *Lubanga*, DRC's authorities had already instituted proceedings against the indictee for grave charges, when the

[421] Christoph J. M. Safferling, *"Public Prosecutor v. Djajic. No. 20/96",* The American Journal of International Law, Vol. 92, No. 3 (Jul., 1998), 528-532, http://www.jstor.org/stable/2997926

Government issued a state referral to the OTP, rendering the case admissible because the national prosecutor did not include the recruiting of child soldiers in arrest warrant. Therefore, the ICC Prosecutor should be particularly cautious and relatively flexible in his/her assessment of 'genuineness' of national prosecution for ordinary crimes.

The Islamic world has a tendency towards doubting the ICC's legitimacy and integrity, having the view that the judiciary and the Prosecutor in collaboration with the UNSC consist modern colonization powers. The claim to adopt Shari'ah within the legal framework the ICC has no basis in law and in the Rome Statute's preparatory work, since the delegates themselves realized that only one legal framework could provide the Rome Regime of Justice with cohesion and legality. Otherwise, a flurry of admissibility challenges, based on the entitlement to benefit from Shari'ah laws, could cause a lot of headaches to the ICC's judges.

The ICC should acknowledge the value of ICTR/ICTY jurisprudence. In Karamira, Ntuyahaga, In Re: The Republic of Macedonia, Pasko Ljubicić the Tribunals tend to a special type of complementarity, by admitting national courts' concurrent jurisdiction or simply permitting national prosecutors to commence proceedings for various reasons. In *Djajić and Jorjić* the ICTY implicitly accepted the legitimacy of universal jurisdiction, and the complementary nature of its concurrent jurisdiction, that allows states, which first were engaged in the adjudication of certain cases, to continue with the completion of national processes. The rest of the above case law is useful for the characteristic argumentation of all parties relating to the primary jurisdiction of national courts. For instance, if there is a national law that advantages the position of the accused, the Chambers should assess this factor, when deciding on the admissibility. Moreover, the ICC's judges should avoid advancing arguments in favour of a strict perception of prosecution for exclusively international crimes. The Completion strategy offers to complementarity that frequent reports of the ongoing national proceedings could also be employed, when the ICC holds cases inadmissible with the intention of providing a constant cooperation between the Court and the state in question.

Finally, the ICTY/ICTR's Judges and Prosecutors accepted that the notion of primacy should serve complementarity, (especially through the implementation of

Rule 11 *bis* RPEs), so that the two concepts can harmoniously regulate international criminal justice.

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