THE RAOUL WALLENBERG INSTITUTE HUMAN RIGHTS LIBRARY

The Relationship between the International Criminal Court and National Jurisdictions

The Principle of Complementarity

By Jo Stigen

Martinus Nijhoff Publishers

The Relationship between the International Criminal Court and National Jurisdictions

The Raoul Wallenberg Institute Human Rights Library

VOLUME 34

The Relationship between the International Criminal Court and National Jurisdictions

The Principle of Complementarity

By
Jo Stigen

MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2008

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Stigen, Jo.
The relationship between the International Criminal Court and national jurisdictions : the principle of complementarity / by Jo Stigen.
p. cm. — (The Raoul Wallenberg Institute human rights library ; vol. 34)
Includes bibliographical references and index.
ISBN 978-90-04-16909-8 (hardback : alk. paper) 1. Criminal liability (International law) 2. Criminal procedure (International law) 3. Criminal jurisdiction. 4. International offenses. I. Title.

KZ6314.S75 2008
345'.05—dc22

2008023116

ISBN 978 90 04 16909 8

PRINTED IN THE NETHERLANDS

CONTENTS

ABBREVIATIONS ..... **ix**

PREFACE ..... **xi**

1. INTRODUCTION **1**
1.1. The establishment of a complementary international criminal court *1*
1.2. Possible relationships between international and national jurisdiction *4*
1.3. Why analyse the complementarity principle? *6*
1.4. The available sources of law *7*
1.5. The book's further structure *9*

2. WHY AND WHERE SHOULD INTERNATIONAL CRIMES BE PROSECUTED? **11**
2.1. Introduction *11*
2.2. The purposes of the Rome Statute *11*
2.3. The purposes of the complementarity principle *15*
2.4. Comparing national and international criminal proceedings *20*

3. THE HISTORY OF THE COMPLEMENTARITY PRINCIPLE **31**
3.1. Introduction *31*
3.2. The political stakes involved and the changing times *32*
3.3. Early ILC discussions (1950-88) *35*
3.4. The establishment of the ad hoc tribunals (1993-94) *41*
3.5. The ILC discussions on an international criminal court (1990-94) *44*
3.6. The discussions in the Ad Hoc Committee (1995) *64*
3.7. The discussions in the Preparatory Committee (1996-98) *69*
3.8. The Rome Conference (1998) *80*

4. THE PROCEDURES OF THE COMPLEMENTARITY PRINCIPLE **87**
4.1. Introduction *87*
4.2. The trigger mechanisms *89*
4.3. The distinction between a "situation" and a "case" *91*
4.4. The decision whether to investigate *94*
4.5. The decision whether to prosecute *120*
4.6. Article 18: Preliminary rulings regarding admissibility *123*
4.7. Article 19: Challenges to the admissibility of a case *150*
4.8. Two particular procedural issues *178*

5. THE SCOPE OF ARTICLE 17 ..... **185**
5.1. The main rule: national proceedings prevail *185*
5.2. The "sufficient gravity" criterion *186*

5.3. The term "complementary" *187*
5.4. The term "a State which has jurisdiction" *190*
5.5. The terms "the case", "the person concerned" and "the same conduct" *197*
5.6. National inaction: automatic admissibility *199*
5.7. Relevant national proceedings *202*
5.8. General vs. specific information *212*

6. "GENUINE" NATIONAL PROCEEDINGS: RELATED CONCEPTS OF INTERNATIONAL LAW **215**
6.1. Introduction *215*
6.2. Process and not outcome *216*
6.3. Cultural differences and national margin *217*
6.4. A general standard *218*
6.5. Human rights standards *219*
6.6. The ICC's own proceedings as a standard *229*

7. THE APPLICABILITY OF THE ADMISSIBILITY CRITERIA IN THREE PARTICULAR SCENARIOS **231**
7.1. Introduction *231*
7.2. The admissibility criteria and internationalised courts *231*
7.3. The admissibility criteria and Security Council referrals *236*
7.4. The admissibility criteria and self-referrals *246*

8. UNWILLINGNESS **251**
8.1. The term "unwillingness" *251*
8.2. The attribution of the unwillingness to the state *253*
8.3. The factors in article 17(2) *256*
8.4. Legitimate reasons not to investigate, prosecute or convict *309*

9. INABILITY **313**
9.1. Introduction *313*
9.2. The factors in article 17(3) *313*
9.3. General or specific causes of a state's "inability" *328*

10. POSSIBLE LACUNAS IN THE ADMISSIBILITY CRITERIA **331**
10.1. Introduction *331*
10.2. Completed trials and inability *331*
10.3. The accused has abused the national process *332*

10.4. New significant evidence after a completed proceeding *333*
10.5. The convicted person is subsequently pardoned or paroled *334*
10.6. The state has characterised an ICC crime as an ordinary crime *335*
10.7. The case has implications for other cases before the ICC *337*

11. THE PROSECUTORIAL DISCRETION **339**
11.1. Introduction *339*
11.2. Some general aspects *340*
11.3. Prosecutorial discretion before other international and national jurisdictions *346*
11.4. The "interests of justice" criterion in article 53 – general analysis *353*
11.5. Factors listed in article 53 ..... *359*
11.6. Factors not listed in article 53 ..... *372*
11.7. Judicial control *403*
11.8. The need for a prosecutorial policy, transparency and guidelines *410*

12. COMPLEMENTARITY AND ALTERNATIVE NATIONAL MECHANISMS **417**
12.1. Introduction *417*
12.2. The transitional government's dilemma *420*
12.3. National amnesties and other states *423*
12.4. National amnesties and the Rome Statute *424*
12.5. Suggested factors for the "evaluation" of national amnesties *451*
12.6. Conclusive remarks *463*

13. CONCLUSIVE REMARKS **469**
13.1. Introduction *469*
13.2. Safeguarding state sovereignty *469*
13.3. Promoting national criminal proceedings *473*
13.4. Ensuring effective ICC interference *478*
13.5. Ensuring an appropriate selection of situations and cases *483*
13.6. Would a primary ICC have been preferable? *486*

INDEX **489**
BIBLIOGRAPHY **499**
SELECTED DOCUMENTS **515**
TABLE OF CASES **525**

ABBREVIATIONS

ACHR	American Convention on Human Rights
AfCHPR	African Charter on Human and Peoples' Rights
AfCmHPR	African Commission on Human and Peoples' Rights
ANC	African National Congress
ASP	Assembly of States Parties
CEH	Historical Clarification Commission (Guatemala)
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GATT	General Agreement on Tariffs and Trade
HRC	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEU	Information and Evidence Unit
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCCD	Jurisdiction Complementarity and Cooperation Division
JSMP	Judicial System Monitoring Programme
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGOs	non-governmental organisations
OTP	Office of the Prosecutor
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone
TRCs	truth and reconciliation commissions
UN	United Nations
UNSCR	United Nations Security Council Resolution
US	United States
WTO	World Trade Organization
YBILC	Yearbook of the International Law Commission

PREFACE

This book is an extensively revised version of my doctoral thesis at the University of Oslo which I defended in August 2006 for the Dr. Juris degree. My interest in international criminal law developed in the period from 1996 to 1998 when representing the Ministry of Justice of Norway I participated in the United Nations Preparatory Committee on the Establishment of an International Criminal Court (ICC) and in the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The creation of the ICC was an astonishing achievement. The principle of complementarity, the topic of this book, provides a framework as to when the ICC Prosecutor may and should interfere *vis-à-vis* national judicial systems. The principle acknowledges the primary right of states to prosecute while also recognising the need for international interference when states fail in this task. It leaves, however, complex questions unresolved. To mention a few: When is a national criminal proceeding really an attempt to shield the perpetrator? When can a national judicial system be described as unavailable? And when will an ICC prosecution serve the interests of justice? This book seeks to answer these and other related questions by interpreting the relevant provisions of the Rome Statute and discussing them in a broad context. The book also critically assesses policy considerations underlying the establishment of the ICC, including the implications of international criminal justice for achieving peace. It asks, *inter alia*, whether the ICC should set aside an amnesty which a national truth commission has granted in an attempt to achieve a peaceful transition from tyranny to democracy.

I am particularly indebted to my supervisor Professor Geir Ulfstein at the Department of Public and International Law, Oslo, and my co-supervisor Professor Andreas Zimmermann, Director of the *Walther-Schücking-Institut für Internationales Recht*, University of Kiel. Without Geir's solid knowledge of international law and methodology and Andreas' invaluable experience in international criminal law, the book would have been far less comprehensive. I thank them both warmly. The responsibility for any inaccuracies and unsound judgments remains, of course, fully mine.

I thank my friends and colleagues for all their support and fruitful discussions. You are simply too many to mention individually. I cannot, however, fail to thank Morten Bergsmo at the International Peace Research Institute (PRIO), Oslo, for immensely inspiring discussions. I thank the Department of Public and International Law, Oslo, for giving me the opportunity to do my research there. It is a privilege to work with such nice colleagues and such an excellent library. Further, I am greatly indebted to Julie Wille, my linguistic consultant during the work on my doctoral thesis. Also, I thank the patient and extremely helpful staff at the Raoul Wallenberg Institute, in particular Carin Laurin.

I dedicate the book to my mother, Lise, and my late father, Anfinn. They have always stimulated my sister and me intellectually. My father rushing up from the

dinner table to look up words in the dictionary was a ritual. My mother is a well of wisdom and to have discussions with her is always immensely interesting. With their stimulation and inspiration, I just felt it natural to become an academic.

To my dear wife Elin: I love you so much not only for being so patient and supportive, but also for being the wonderful person you are. I admire your integrity, independence and sound judgment on important issues as well as your determination when you set goals for yourself. You are a tremendous wife and mother, balancing a career and a family. I wish for us to grow old together and watch our beautiful daughters Cornelia and Clara live good lives, hopefully in a less violent world. In the end what matters most to me is the happiness of you three.

Oslo, April 2008

Jo Stigen

1. INTRODUCTION

1.1. THE ESTABLISHMENT OF A COMPLEMENTARY INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC)[1] addresses a disturbing paradox: while states regularly prosecute ordinary crimes, such as theft and murder, they notoriously fail to prosecute mass atrocities. The states that should have reacted typically remain passive or conduct half-hearted or feeble criminal proceedings. The result is sweeping amnesties, *de jure* or *de facto*. The root of the problem is that the states concerned are either unwilling or unable to bring the perpetrators to justice. "Unwillingness" is typically the result of the fact that government officials or other powerful actors in the state are involved in the crimes. Criminal leaders grant themselves or their powerful allies amnesty, or a new democratic regime shies away from prosecuting the former regime in an attempt to ensure a non-violent transition of power. The situation in the former Yugoslavia following the ethnic cleansing in the early 1990s provides an ample example. Yugoslavia had the necessary legislation as well as a functioning police and judiciary, but the will to prosecute the guilty was lacking. "Inability" basically means that the state apparatus is too weak to bring the perpetrators to justice, typically as the result of a devastating conflict. The situation in Rwanda after the 1994 genocide is an example. Here, the Tutsi government was willing to prosecute the responsible, but the genocide had led to a collapse of the judiciary and the police force, rendering Rwanda unable to proceed adequately. Situations such as the two just described will lead to impunity unless the world community interferes. The remaining justice-vacuum may give rise to serious threats to peace and security, such as never-ending cycles of private revenge.[2]

Some treaties establish an obligation for states to ensure basic human rights of persons within their jurisdiction, *inter alia* by adequately investigating and prosecuting certain crimes.[3] When states fail to prosecute the perpetrators, they can sometimes be held responsible under such treaties. This measure has not, however, proved very effective.

---

[1] Hereinafter the ICC or the Court, established by the Rome Statute of the International Criminal Court (hereinafter the Rome Statute or the Statute) which entered into force 1 July 2002.

[2] The two said situations prompted the Security Council to establish the International Criminal Tribunal for the Former Yugoslavia (hereinafter the ICTY) and the International Criminal Tribunal for Rwanda (hereinafter the ICTR), see Security Council Resolutions 827 (1993) and 955 (1994).

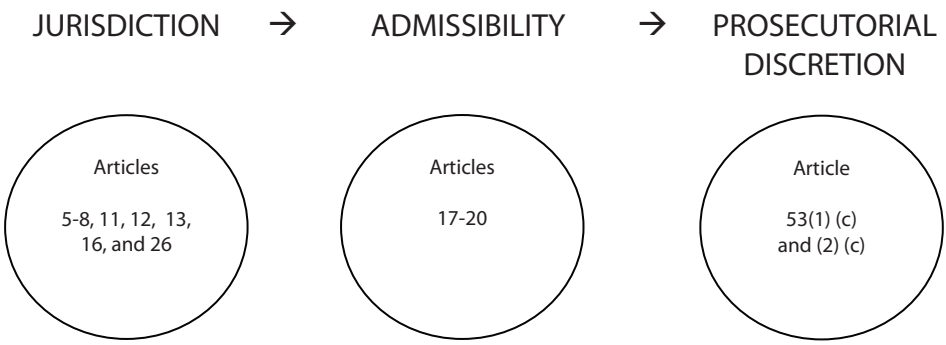
[3] *E.g.*, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

Enter the ICC, with jurisdiction over genocide, crimes against humanity and war crimes.[4] This Court shall not, however, replace national justice systems. States remain the primary enforcers of international criminal law, and the ICC is only a court of last resort established to complement national systems where they fail to conduct adequate investigations and prosecutions.

This book discusses two main questions: First, when has a state failed to conduct adequate criminal proceedings? And second, when, among all the instances of such failure, should the ICC, with its limited resources, interfere? The answer to both questions lies in the principle of complementarity which governs the ICC's exercise of jurisdiction. The essence of the principle is that the ICC shall only exercise jurisdiction over a case when no state proceeds genuinely with it *and* ICC interference in that particular case will serve the interests of justice. This sums up the two aspects of complementarity, which this book refers to as the tests of *admissibility* and *prosecutorial discretion*.

The two tests just described are the second and third of three tests that a case must pass before the ICC will actually handle it. The three tests are: the jurisdictional test, the admissibility test and the discretional test. The process that a case undergoes, from when the ICC Prosecutor starts looking at it until the Court finally handles it, can be illustrated graphically like this:

[4] Articles 5-8 of the Rome Statute. The ICC will also, according to article 5(2), have jurisdiction over the crime of aggression once it has been properly defined. These crimes are often referred to as "international crimes". In *United States v. Wilhelm List et al.* the US Military Tribunal defined an "international crime" as an act "universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances", *United Nations War Crimes Commission 1947-49*, Vol. VIII, Case No. 47, at 54.



The jurisdictional test requires that the alleged crime belong to one of the categories listed in article 5; the crime must have been committed after 1 July 2002;[5] the suspect must be over 18 years of age;[6] either the territorial state or the suspect's home state must have accepted the Court's jurisdiction;[7] and the Security Council must not have requested the ICC to defer.[8] As an additional requirement, the situation within which the alleged crime was committed must have been brought before the Court in one of the ways provided for, *i.e.* by a state party, by the Security Council or by the ICC Prosecutor on his or her own initiative with the Court's authorisation.[9] If any of these jurisdictional preconditions is not met, the ICC cannot deal with the case.

After the jurisdictional test comes the admissibility test.[10] While the jurisdictional test pertains to the *existence* of jurisdiction, the admissibility test pertains to the *exercise* of jurisdiction. According to articles 17 and 20 of the Rome Statute a national investigation and/or prosecution cannot be declared inadmissible before the ICC unless the state has demonstrated "unwillingness" or "inability" to proceed genuinely. When there is no national criminal proceeding, the case is automatically admissible.

---

[5] Rome Statute article 11.

[6] Article 26.

[7] Article 12 (absent a Security Council referral).

[8] Article 16.

[9] Articles 13-15. This requirement is not truly jurisdictional, but systemically it is best placed here.

[10] *The Oxford English Dictionary* defines "admissible" as "capable or worthy of being admitted to an office or relation". The inverse term "inadmissible" means "not to be admitted, entertained or allowed".

Once a case has passed the jurisdictional and admissibility tests, the third and final discretional test is applied. At this point, the ICC may deal with the case in question, but should it? Dealing with any admissible case would not only be an impossible task for a single court;[11] for reasons that will be explained in this book it would also be inappropriate. Article 53(1) (c) provides that a case will only be investigated when this serves the "interests of justice", and article 53(2) (c) requires that the Prosecutor upon a full investigation decide whether a prosecution will serve the "interests of justice". While the purpose of the admissibility test is to reveal instances of national impunity, the purpose of the discretional test is to determine whether ICC interference really is desirable.

It may be noted that most commentators do not treat the third discretional test as part of the complementarity principle, as this author does.[12] Indeed, throughout the ICC negotiations, the term "complementarity" was used in a narrower sense, exclusively referring to the admissibility test.[13] As a result, only article 17 on admissibility refers to preambular paragraph 10 and article 1, which are the only provisions that actually use the term (*i.e.* "complementary"). Nonetheless, this author deems it useful to treat the prosecutorial discretion as an integral part of the ICC's complementary regime. Only after the discretional test has been applied will the Court's complementary role *vis-à-vis* national jurisdictions have crystallised. If the ICC Prosecutor should decide not to interfere because it would not serve the interest of justice, national systems remain "un-complemented", regardless of their failure to proceed genuinely.[14] The question as to whether the term "complementarity" is construed broadly or narrowly is purely pedagogical and has no legal consequences; the two tests remain separate tests, irrespective of how the term "complementarity" is construed.

1.2. POSSIBLE RELATIONSHIPS BETWEEN INTERNATIONAL AND NATIONAL JURISDICTION

The relationship between an international criminal jurisdiction and national jurisdictions may take on different forms. Below, some parameters and possible

[11] The ICC has 18 judges.

[12] *E.g.* Holmes 1999.

[13] *Ibid*.

[14] It would even be possible to argue that the *jurisdictional test* forms part of the complementary regime as the ICC is authorised to complement national jurisdictions only with regard to a few selected crimes.

combinations of them will be suggested, and the suggested combinations will be linked to the different international criminal jurisdictions that exist or have existed.

First, an international jurisdiction may be either compulsory or optional. When the jurisdiction is compulsory (or inherent), it is binding *ipso facto* on all states parties. A compulsory international jurisdiction may also be binding without acceptance, such as when it is established by the victors of a war or by the Security Council. When the jurisdiction is optional, however, it will only be available as a facility to states parties on a case-by-case basis, depending on their *ad hoc* acceptance of the international jurisdiction. Alternatively, the jurisdiction may be mixed, so that the jurisdiction is compulsory over one or a few core crimes, while the jurisdiction over other crimes is optional.

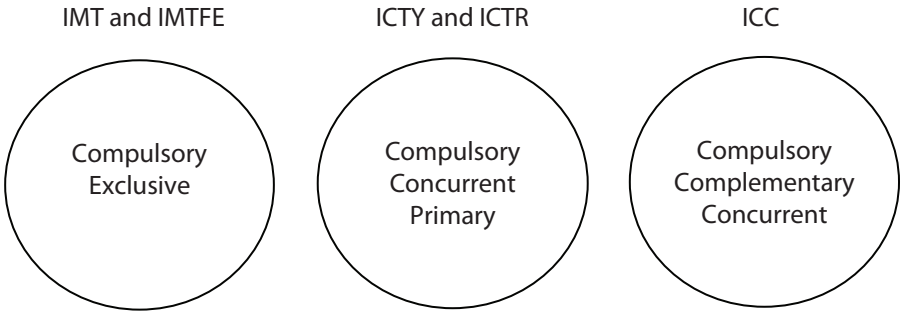
Second, an international jurisdiction may be exclusive or concurrent. When it is exclusive, states will not have jurisdiction over crimes that fall under the international court's jurisdiction. Thus, there is no collision of jurisdictions. When the international jurisdiction is concurrent with national jurisdictions, however, the international court and states have jurisdiction over the same crimes. An allocation mechanism is needed for determining which jurisdiction shall prevail in a given case.

Third, where the jurisdiction is concurrent, the international jurisdiction may be primary or complementary. When it is primary, it has general priority over national jurisdictions, irrespective of whether a state wishes and is able to exercise its jurisdiction. When it is complementary, it may interfere only when national jurisdiction is not exercised or when the exercise does not meet a certain standard as defined by the principle. Thus, states have priority, but it should be noted that primacy and complementarity are not opposite allocation formulas. When the international jurisdiction is complementary, this does not imply unfettered primacy for states. International complementarity entails a conditional national primacy in the sense that states have to meet certain criteria in order to pre-empt international jurisdiction. It should also be noted that the primacy of the two *ad hoc* Tribunals is not absolute either.[15]

Along these three parameters, the following historical development can be summarised: Traditionally, there was exclusive national jurisdiction, as no international jurisdiction existed. After the Second World War, the Nuremberg and Tokyo Tribunals represented the other extreme: compulsory exclusive international jurisdiction. The 1953 Committee envisaged an optional and concurrent international jurisdiction (although it was not recommended, see below). In 1993

[15] This is the case with the two *ad hoc* Tribunals, see ICTY article 10 and rule 9 and ICTR article 9 and rule 9.

and 1994, the ICTY and the ICTR were established as compulsory, concurrent and primary international jurisdictions. In 2002, the ICC was established as a compulsory,[16] concurrent[17] and complementary international jurisdiction. The jurisdiction and allocation mechanism of the five international criminal jurisdictions that have existed thus far can be illustrated like this:



1.3. WHY ANALYSE THE COMPLEMENTARITY PRINCIPLE?

Analysing the complementarity principle of the ICC has at least four merits: First, from a legal perspective, the complementarity principle defines the framework within which the Court's jurisdiction will be exercised. Understanding the principle is essential for states in order to prevent ICC interference, for the ICC Prosecutor in order to select the proper situations and cases and for the judges in order to make the proper allocations and authorisations once the principle is invoked or when the Court determines the allocation *ex officio*. Second, from a normative perspective, understanding the principle is a necessary basis of any recommendation to the Prosecutor and for any critical analysis of his or her policy. Any recommendation or criticism which does not fully appreciate the complementarity constraints will *a priori* be of little relevance. Third, from a political and philosophical perspective, the complementarity principle is the key to understanding why more than half of the world's states have accepted the jurisdiction of a court with authority to scrutinise their penal systems and prosecute their citizens when they fail to deliver justice. Fourth, from an international law perspective, analysing the principle of complementarity is interesting because the principle appears to be indicative of the

[16] Article 12(1) of the Rome Statute.

[17] The fact that the jurisdiction is concurrent is not expressly stated, but it is implied by several provisions, *inter alia* those pertaining to admissibility and preambular paragraph 6.

gradually decreasing role that sovereignty plays as an overriding principle in a time when the world community increasingly often faces regional and global challenges which call for innovative solutions.

The complementarity principle is complex and not so easy to become familiar with. The legal framework is fragmented, and the criteria are vague and sometimes call for subjective assessments. This book can scarcely purport to present *the correct* analysis in all respects. Not only is analysing the principle particularly challenging at present, as the ICC has yet to hand down a decision applying it; it should also be noted that once the Court begins to apply the principle, its interpretation and application might not be static. For instance, how the Court interprets and applies the "interests of justice" criterion might change with changing realities. While this might be frustrating to academic researchers, it ensures a dynamism which is one of the complementarity principle's greatest merits.

While the ICC's judicial chambers from time to time will be called upon to determine the interpretation and application of the complementarity principle, it will first of all be interpreted and applied by the ICC Prosecutor. It is therefore interesting to note the following remark by the Prosecutor:

> "Given the many implications of the principle of complementarity and the lack of court rulings, detailed, exhaustive guidelines for its operation will probably be developed over the years."[18]

Such exhaustive guidelines are still forthcoming. It is this book's aspiration and hope that it will serve as a valuable tool for the Office of the Prosecutor and for the Court at large.

1.4. THE AVAILABLE SOURCES OF LAW

Article 21 requires the Court to apply, as applicable, a list of sources in a hierarchical order: in the first place, (a) the Statute, Elements of Crimes and Rules of Procedure and Evidence; in the second place, (b) applicable treaties and the principles and rules of international law; and in the third place, (c) general principles of law from national laws of legal systems.[19] These three categories comprise a total of six sources

[18] *Paper on some policy issues before the Office of the Prosecutor*, Office of the Prosecutor, September 2003, p. 5 (available at http://www.icc-cpi.int/otp/otp_policy.html).

[19] It is not quite clear from the wording whether the list is exhaustive. The article provides that the Court "shall apply", and not "shall only apply" these sources. At the same time, the fact that the list is made hierarchical, and, in particular, the use of the term "failing that" in subparagraph (c), indicates exhaustiveness.

of law: (1) the Rome Statute, (2) the Elements of Crimes, (3) the Rules of Procedure and Evidence, (4) applicable treaties, (5) principles and rules of international law and (6) general principles derived from national laws, including, as appropriate, the laws of states that would normally exercise jurisdiction over the crime.[20] It should be noted that these are sources of law, and that the specific rules that the Court finally applies must be derived from these sources in accordance with valid interpretational principles. It may also be noted that sources (1) to (3) are internal sources, while (4) to (6) are external sources. Thus, the external sources are applicable only when the internal sources are not sufficiently enlightening. The list of external sources largely duplicates the list found in article 38 of the Statute of the International Court of Justice (ICJ), generally recognised as an authoritative and exhaustive listing of the sources of international law.

An important part of the following discussion will consist of linguistic analysis. Not only are the terms as such the primary source when a treaty text is interpreted;[21] linguistic analysis is also necessitated by the fact that relevant ICC jurisprudence is still lacking.

In contrast to ICJ article 38, article 21 of the Rome Statute fails to mention "judicial decisions" (other than those of the Court itself) and the "teachings of the most highly qualified publicists of the various nations".[22] It is nevertheless submitted that such decisions and teachings are relevant as interpretational factors, albeit not as direct sources of law, according to general interpretational principles.[23] Where the sources listed are not sufficiently enlightening, the Court will inevitably look to the decisions of other international courts applying similar rules. For example, jurisprudence from the ICTY and the ICTR regarding the application of these Tribunals' primacy as well as jurisprudence regarding the transfer of cases from the two Tribunals to national jurisdiction, so called *Rule 11bis*-cases, might be relevant.

Further, because the admissibility issue is all about assessing the adequacy of national criminal proceedings, it is impossible not to take into account the

---

[20] The latter reference might lead to discrimination between perpetrators from different legal systems, something which from the perpetrator's perspective might not appear all that unreasonable but rather coincides with the expected. It should be noted that the term "derived from" implies that national law cannot be applied directly. In the admissibility context, national law may have relevance for the determination as to whether a national proceeding is genuine and whether an ICC proceeding would serve the "interests of justice".

[21] Article 31 of the Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention).

[22] ICJ article 38(1) (d).

[23] *E.g.* article 31(3) of the Vienna Convention.

substantial body of jurisprudence from human rights organs evaluating national criminal proceedings (albeit from different perspectives). There are various human rights instruments that attach requirements to such proceedings. For instance, the Human Rights Committee (HRC), the European Court of Human Rights (ECtHR), the Inter-American Commission on Human Rights (IACmHR), the Inter-American Court of Human Rights (IACtHR) and the African Commission on Human and Peoples' Rights (AfCmHPR) have all dealt with issues such as unjustified delay and lack of independence and impartiality in national criminal proceedings, all key factors for the determination of the admissibility of a case before the ICC. Identifying the requirements established in human rights instruments and elaborated by the said human rights organs will facilitate the interpretation and application of the admissibility criteria. Therefore, selected jurisprudence of these organs will be frequently referred to.

1.5. THE BOOK'S FURTHER STRUCTURE

Chapter 2 discusses the purposes underlying the Rome Statute and the complementarity principle and compares national and international criminal proceedings in order to assess whether, and if so when, the one might be preferable to the other. Chapter 3 analyses the historical backdrop behind and the drafting history of the complementarity principle. In chapter 4, the procedures governing the complementarity principle are analysed. Chapter 5 presents the scope of article 17 on admissibility and describes the various national scenarios in which the ICC Prosecutor might interfere. Chapter 6 elaborates on the "genuinely" criterion which the Rome Statute attaches to national proceedings. It also describes other international law concepts which might facilitate the understanding of the Rome Statute's admissibility criteria. Chapter 7 discusses the applicability of the admissibility criteria in three particular situations: *vis-à-vis* internationalised courts, when the Security Council has triggered the ICC's jurisdiction and when a state has referred its own domestic situation to the ICC Prosecutor. Chapter 8 analyses the admissibility criterion of "unwillingness"; while chapter 9 analyses the criterion of "inability". In chapter 10, some possible lacunas in the ICC's admissibility regime are discussed. Chapter 11 discusses the ICC Prosecutor's discretion when he or she selects situations and cases for investigation and prosecution. Chapter 12 discusses whether the ICC Prosecutor may and should interfere with alternative national mechanisms, such as truth and reconciliation commissions. Finally, chapter 13 makes some concluding remarks and evaluates the complementarity principle.

2. WHY AND WHERE SHOULD INTERNATIONAL CRIMES BE PROSECUTED?

2.1. INTRODUCTION

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

Identifying the purposes of the Rome Statute (2.2) and the purposes of the complementarity principle (2.3) is essential: First, because the purposes may influence the interpretation and application of the Statute's provisions governing the complementarity principle.[24] Second, because understanding the purposes might clarify the role that the ICC should play and thus indicate how the authority to interfere should be used. Third, because the purposes must form the basis for any evaluation of the complementarity principle, to which extent does the principle promote these purposes?

In addition to exploring the underlying purposes, this chapter will also critically assess whether national prosecutions really are preferable to international prosecutions (2.4).

2.2. THE PURPOSES OF THE ROME STATUTE

2.2.1. Avoiding impunity

The most obvious purpose of the Rome Statute is expressly reflected in the Statute's Preamble.[25] Preambular paragraph 4 expresses determination to "put an end to impunity for the perpetrators of these crimes", and paragraph 5 affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished". The reference to "impunity" should be understood in light of article 17 on admissibility, which requires that states proceed "genuinely". Through genuine criminal proceedings impunity will, by definition, be avoided. The Statute is

[24] Article 31(1) of the Vienna Convention.

[25] The ECtHR has noted that "the Preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed", see *Golder v. The United Kingdom*, para. 34.

intended to promote genuine justice directly by allocating certain cases to it, and indirectly by encouraging genuine national criminal proceedings.

2.2.2. Preventing crimes and promoting reconciliation

Punishment clearly is no purpose in itself. It can only be justified to the extent that it promotes some legitimate underlying purpose which outweighs the pain inflicted on the wrongdoer. The most commonly cited purpose underlying criminal justice is crime prevention. Indeed, preambular paragraph 5 expresses determination to put an end to impunity and "thus to contribute to the prevention of such crimes". The preventive effect of combating impunity is, however, assumed without further analysis. The truth is that this effect of criminal justice is controversial and the support for it seems more based on logic than on convincing empirical studies. A thorough analysis of the preventive effect is far beyond the scope of this book, although certain aspects of it will be discussed in relation to the prosecutorial discretion. Simply to say that those who interpret and apply the Statute must adopt the assumption that criminal justice has a preventive effect would be an unfortunate simplification. Individual opinions as to the likelihood of such effect, and not least as to which perpetrators are most susceptible to it, are likely to influence the interpretation and application of the various provisions of the complementarity principle.

Another possible but controversial effect of criminal justice is that it promotes reconciliation. The Statute appears to build on the assumption that a society which has experienced massive human rights violations cannot reconcile unless the guilty are held accountable. The belief or disbelief in such effect in a given situation will have vast implications on the discretionary assessment as to where, *i.e.* in which conflict area, the ICC should exercise its jurisdiction.

2.2.3. Safeguarding peace and security and humanity's conscience

The question remains as to why it is considered so important to prevent international crimes that an international criminal court is established. Clearly, underlying the establishment, there must be concerns extending beyond those of the direct victims of the crimes. Preambular paragraph 3 recognises that international crimes "threaten the peace, security and well-being of the world". Indeed, this was the dominating reason why the Security Council established the two *ad hoc*

Tribunals.[26] As states and regions have become increasingly interconnected, there is an increased fear – and likelihood – that dangerous situations will spread across borders and between regions. In his report to the General Assembly in August 2005, the ICC Prosecutor described the Court alongside the *ad hoc* Tribunals and noted that "[t]hese institutions are also closely linked to efforts to establish and maintain international peace and security".[27]

Preambular paragraph 2 also notes that international crimes represent "unimaginable atrocities that deeply shock the conscience of humanity".[28] This will be particularly true if the surroundings, after the crimes are committed, feel that they could and should have prevented them. Criminal justice exercised *post facto* may relieve some of the bystanders' frustration. This was arguably also an important motivation behind the establishment of the ICTR. Morris explains how some Rwandans involved in the negotiations on the ICTR were convinced, and certainly to some extent rightfully so, that the motives for establishing the Tribunal were "to provide a fig-leaf-after-the-fact to cover the shameful failure of the international community to intervene in the genocide […]".[29] In determining the "interests of justice", the Prosecutor will probably have a view to international civil society's reaction to the crimes in the sense that, all other things being equal, the more shocked and the more shameful the surroundings are, the more reason there will be to interfere.

The above demonstrates that the purposes of establishing the ICC are both to avoid the crimes and to heal the damages that they cause, to promote peace and to restore peace once it is broken and to protect humanity's conscience and to restore it once it is disturbed. This is indicative of international criminal justice; it is simultaneously backward- and forward-looking, respectively *post facto* and *ante facto*.

---

[26] Such implications were also acknowledged by the ICTY Appeals Chamber in *Prosecutor v. Tadic*.

[27] *Report of the International Criminal Court for 2004*, 1 August 2005, A/60/177, p. 4 (available at http://www.icc-cpi.int/press/pressreleases/120.html).

[28] The notion of a "collective conscience of mankind" has been referred to since the Martens' clause was elaborated in the Preamble of the 1899 Hague Convention II.

[29] Morris 1996, p. 357.

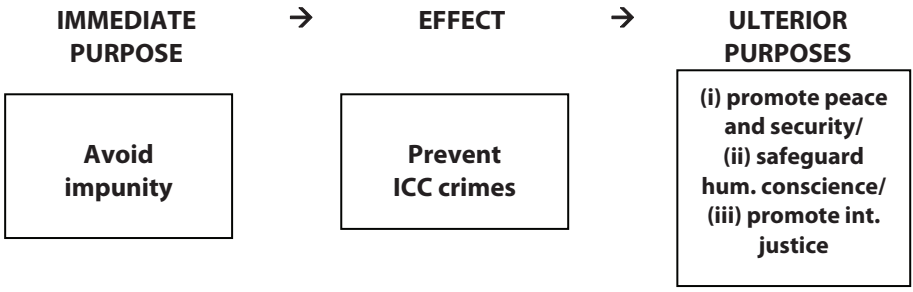
2.2.4. Promoting international justice

Preambular paragraph 11 confirms that the states parties are resolved to "guarantee lasting respect for and enforcement of international justice". The particular purpose of promoting international justice was confirmed by the ICC President in his speech to the General Assembly, as he remarked that "the Court is also envisaged to play a part in guaranteeing respect for and enforcement of international law".[30] It seems evident that when impunity prevails, the respect for the law will deteriorate. Yet, it might be equally fatal if criminal justice is exercised when this is not in the "interests of justice". Therefore, how ICC interference will influence people's respect for the law should be carefully assessed before the ICC's jurisdiction is exercised in a given situation.

Another aspect with implications to international law's esteem is the fact that the ICC will function as a model court developing international criminal law. This point is closely related to the enhancing effect that the existence of a complementary international jurisdiction will have on national criminal proceedings.

2.2.5. Bringing the underlying components together

The relationship between the Statute's immediate purpose, the effect of the exercise of jurisdiction and the ulterior purpose can be illustrated like this:



Acknowledging the Statute's ulterior purposes is essential to the interpretation and application of the Statute, not least with regard to the "interests of justice" criterion.

---

[30] *Address to the United Nations General Assembly by Philippe Kirsch, President of the International Criminal Court*, 8 November 2005, p. 3 (available at http://www.icc-cpi.int/presidency/presspeeches.html).

In fact, it is probably true to say that these ulterior purposes arguably sum up that discretional criterion.

2.3. THE PURPOSES OF THE COMPLEMENTARITY PRINCIPLE

2.3.1 Introduction

The purposes of the Statute can only be promoted within the framework of the complementarity principle governing the ICC's exercise of jurisdiction. Apparently, the purposes of the Statute and those of the complementarity principle are to some extent conflicting, meaning that the principle limits the ways in which the Statute's purposes can be achieved. At the same time, the complementarity principle must be interpreted in light of the Statute's purposes, so as to make the Statute effective, making the limiting effect lesser than it might appear at first sight.

2.3.2. Safeguarding state sovereignty

Kor notes that although an individual is the defendant in any criminal case, the emphasis of international criminal law "remains on the relations between States, the relations between international organizations and States, and the relations between tribunals and States".[31] At the heart of these considerations lies the concept of state sovereignty. A state's right to exercise criminal jurisdiction over all acts committed in its territory and elsewhere by its citizens is an undisputed part of its sovereignty. States have, however, different perceptions as to the character of this right: Some states hold that the right is more or less exclusive, while others argue that the right might be shared with others. Some states view sovereignty as a right pertaining only to the state, while others hold that it also pertains to the citizens and implies the right of an individual to resist prosecution outside his or her domestic forum.[32] The *jus de non evocando* principle reflects an ancient feudal right, deriving from a medieval principle that subjects of the crown had the right to enjoy the jurisdiction and protection of the crown to which they were loyal. As such, it is still present in several constitutions and an important concept of international law by which states sometimes refuse to extradite their citizens to another state. The principle has also been argued before the *ad hoc* Tribunals as they have asserted their primacy (see the references to *Prosecutor v. Tadic* in chapter 4). Further, states will have different types and varying degrees of interest in safeguarding sovereignty. Importantly, the

[31] Kor 2006, p. 55.

[32] To Americans, for instance, sovereignty devolves from the people, see Nill 1999, pp. 130-31.

likelihood that a state's citizens will commit ICC crimes varies considerable between states, and so they will view the ICC through very different glasses. To the Scandinavian states the ICC poses a much lesser potential threat than to states such as the United States, Russia and China. States such as the latter must cynically ask themselves whether an internal or international conflict in which they are or may become involved in may entail crimes such as those under the ICC's jurisdiction.

The establishment of the ICC challenges traditional views on state sovereignty. From the earliest proposals, it was clear that the Court could be created only once sovereignty concerns had been adequately addressed. The most important aspect of the process was, it is submitted, to establish an understanding that complementarity does not imply that sovereignty is outmoded or even eroded, but rather that it is redefined in a way still reflective of any legitimate idea of what sovereignty should imply. The concept of sovereignty is based on a presumption that a sovereign state has certain inviolable rights inherent to statehood and that it is formally the equal of all other states.[33] It connotes "international independence and the right and power of regulating internal affairs without foreign friction".[34] Sovereignty is, however, subject to recognised limitations imposed by international law. Therefore, according to the same source, "absolute sovereignty has never existed" and no state has "entire independence of others".[35] In 1992, the Secretary-General of the United Nations noted:

> "The United Nations is a gathering of sovereign States and what it can do depends on the common ground that they create between them. […] The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."[36]

While sovereignty might constitute an obstacle to an effective enforcement of international criminal law, the most important aim of sovereignty coincides with the

---

[33] *E.g.* article 2(1) of the UN Charter: "The Organization is based on the principle of the sovereign equality of all its Members."

[34] *Black's Law Dictionary*.

[35] *Ibid*.

[36] *An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping, Report of the United Nations Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, A/47/277 – S/24111, para. 17 (available at http://www.smallarmssurvey.org/source_documents/UN%20Documents/Other%20UN%20Documents/A_47/A_47_277.pdf).

main purpose of international criminal law, namely promoting peace and security and fostering respect for human rights. When sovereignty is properly exercised, *i.e.* when states avail themselves genuinely of their sovereign right to investigate and prosecute, international judicial intervention is both unnecessary and unjustified. A failed sovereignty, *i.e.* a weak or abused sovereignty, will threaten the same values.

While it is easy to argue normatively and convincingly as to why states should join the ICC, it is not so easy to explain why they actually do it. The Rome Statute imposes considerable constraints on the states parties' sovereignty: not only can the ICC potentially seize jurisdiction over a citizen; the crimes will typically involve the abuse of public authority; there is no immunity for prominent persons before the ICC;[37] the ICC Prosecutor may initiate an investigation *ex officio*;[38] interference will leave a stigma on the state concerned; and the ICC judges will be independent and are likely to develop the law through dynamic interpretations (subject of course to the legality principle as reflected in article 22(2)). The individualised benefits that states gain in return, outweighing the sovereignty costs, are not so easily spotted. The motivations of states for joining the ICC do not necessarily coincide with the purposes expressed in the Rome Statute, and analysing them in detail is beyond the scope of this book.[39]

The complementarity principle seeks to strike a proper balance between ensuring the effective prosecution of international crimes and safeguarding sovereignty. This is crucial, as the ICC, absent a Security Council referral, derives its jurisdiction from states' voluntary ratification of the Statute. States have to feel that

---

[37] Article 27 of the Rome Statute.

[38] *Ibid.,* articles 13(c) and 15.

[39] Briefly submitted, the two most important explanations as to why states ratify the Rome Statute are probably: 1) The ICC represents shared norms and identities. This might be referred to as a "constructivist explanation" according to which states' adherence to international treaties is reflective of the treaties' consistency with domestic values, see Frank 1988, p. 705. "[G]overnments promote norms abroad because they are consistent with universal ideas to which they adhere", see Moravcsik 2000, p. 224. This explanation would seem to apply well to solid democracies which perceive the likelihood that their citizens will commit ICC crimes in foreseeable future as negligible. To these states, which also will have well-functioning judiciaries, the complementarity principle represents an important safeguard. From this perspective, the ICC might somewhat bluntly be described as a "feel-good" project with minimal sovereignty costs. 2) States join the ICC in order to prevent a future non-democratic government from committing ICC crimes against its own citizens by raising the costs of committing them, see *e.g.* Mégret 2006. For a more detailed discussion as to why states have ratified the Rome Statute, see Stigen 2008.

they retain a reasonable degree of sovereign control as to how (*i.e.* where) cases are dealt with. A too strong international court would attract few states and would be as useless as a weak court which attracted many states.

The complementarity principle shall ensure that the ICC does not interfere when national judiciaries function adequately. To the extent that ICC interference would merely duplicate the efforts of a state, or only marginally increase the likelihood of successful prosecution, the expense, effort and possible offence to the state would not be justified.[40] This is why the principle grants priority to genuine national proceedings, and the threshold for interfering should not be too low. Arguably, national proceedings should also prevail as smoothly as possible, without being unduly delayed or otherwise compromised by the international involvement, and states should be given adequate opportunity to invoke the principle.

2.3.3. Enhancing national investigations and prosecutions

Letting genuine national proceedings prevail may enhance national proceedings by providing an incentive to act genuinely. Alongside the sovereignty argument, this is a fundamental reason why the ICC is complementary. The Preamble notes, albeit controversially, that exercising criminal jurisdiction over the crimes in question is a "duty of every State".[41] Enhancing national proceedings is *necessary* due too the fact that the ICC, a single court with only 18 judges, will have very limited capacity, and there is probably considerable reluctance within the donor community to raise the money needed for increasing that capacity. Besides, the Rome Statute appears to build on an assumption that prosecuting the crimes nationally is also *preferable*, regardless of sovereignty and capacity concerns.

The complementarity principle seeks to enhance national jurisdictions partly by stimulating and partly by applying pressure. Granting states a certain margin of appreciation as to how they carry out the responsibility might be a smart way of stimulating national proceedings. From a broader perspective, the existence of an international jurisdiction focusing on the responsibility of states might contribute to the gradual development of a legal culture where genuine national proceedings become the norm and not the exception.

---

[40] Bleich 1997, p. 240.

[41] Preambular paragraph 6.

2.3.4. Ensuring effective ICC interference

Equally important as ensuring that genuine national proceedings prevail, is it to ensure that international proceedings prevail when national proceedings are non-genuine. The complementarity principle must allow the ICC to interfere effectively when states fail. Otherwise, the result would not only be impunity in a given case; the Court would be perceived as less credible, and the enhancing effect on states and the preventive effect on individuals would be diminished. In order to ensure such effectiveness, instances of national failure must be detected, and the ICC Prosecutor must be allowed to obtain information from a variety of sources. As for the admissibility determination, the criteria must be sufficiently broad so as to satisfactorily cover instances of national incapacity and bad faith which might lead to impunity, with no lacunas allowing states to shield the perpetrator. Further, the procedures governing the invocation and determination of the admissibility question must be sufficiently effective so that the ICC proceedings are not compromised. Important issues are whether there should be time limits for making challenges, whether challenges should have suspensive effects and which entity should make the final determination. Also, there should be sufficiently strong provisions on state cooperation at every stage of the proceedings.

2.3.5. Ensuring an appropriate selection of cases

The complementarity principle should ensure that the ICC only deals with cases that truly deserve its attention. If the ICC Prosecutor were not allowed, and indeed instructed, to discretionally select the most important situations and cases, this would undermine the Court's legitimacy.

It might be argued that the ICC should be empowered to deal with any case of "sufficient importance", even where states were willing and able to proceed genuinely; *i.e.* that there might be other reasons than national failure as to why the ICC should interfere. For instance, a case might have particular symbolic value, it might have implications for other cases before the ICC or it might involve legal questions that are significant to the development of international criminal law. Such considerations do not, however, form part of the purposes underlying the complementarity principle.

2.4. COMPARING NATIONAL AND INTERNATIONAL CRIMINAL PROCEEDINGS

2.4.1. Introduction

As noted, the complementarity principle is not just based on sovereignty and capacity concerns; it is also based on the assumption that international crimes generally are best dealt with locally and in particular by the states directly affected. But is that assumption true? A discussion of the advantages and disadvantages of national and international criminal proceedings reveals both quantitative and, perhaps most interesting, qualitative differences between the two levels.[42] Merely suggesting that when the ICC steps in it does the same job *in lieu* of states is an unfortunate simplification. Understanding these qualitative differences might in fact facilitate the final discretion as to which cases should be selected for ICC proceedings. It might be possible to predict whether the advantages associated with international proceedings, to the extent that such advantages exist, are more or less present in a given situation. A comparison between the levels requires detachment from the traditional view that criminal proceedings most naturally "belong" at the national level. Arguments based solely on sovereignty concerns have little value for determining whether national jurisdictions really are better suited to deal with international crimes.

The assumption that national proceedings generally are preferable seems to be accepted by most commentators but not all. Few commentators extend the argumentation beyond simplistic references on the one hand to the proximity of the

[42] Some commentators envisage an important future role for internationalised courts, see *e.g.* Burke-White 2002, pp. 97 *et seq.* and Cassese 2004b, p. 6. Such courts might have some advantages over both national and international jurisdictions: 1. compared to truly international courts, they can operate closer to a conflict: they will involve local actors; and they might appear less estranged to the local population; 2. compared to national courts, they might be perceived as more independent and impartial and be more adequately resourced; 3. international involvement through the UN might give internationalised courts more credibility than any other type of jurisdiction, resulting in combined international credibility and domestic acceptability; and 4. on a practical level, such courts might have a better potential of strengthening national judiciaries as they work with them and not instead of them (see, however, *Paper on some policy issues*, *supra* note 18, p. 7, noting that the ICC might also assist national systems). Internationalised courts are also likely to be less expensive and quicker than international courts, see Benzing 2000, p. 410 and Linton 2001, p. 61. Such courts should, however, only be established when the national system demonstrates sufficient will and ability to perform the necessary cooperation. Internationalised courts may effectively complement the ICC as an alternative complement to national jurisdictions.

crime scene (favouring local trials), and on the other hand to considerations of independence and impartiality (favouring international trials). Not surprisingly, there is an overrepresentation among the advocates of international proceedings among those with personal experience from such proceedings. Former ICTY judge Cassese has noted:

> "It would seem that the Nuremberg model still has much merit. It is logical and consistent for very serious international crimes allegedly perpetrated by leaders to be adjudicated by an international court offering the advantages that will be outlined […]. Hence, international courts are by definition better suited to pronounce upon larger scale and very grave crimes allegedly perpetrated by political or military leaders. For such cases the rule of complementarity laid down in the Statute of Rome may appear to be questionable."[43]

It should be noted that the complementarity principle gives priority not just to the territorial state and the perpetrator's home state but also to any state with jurisdiction over a case.[44] The discussion below will therefore relate to states with different link to the crimes, including states with no particular link relying on the principle of universal jurisdiction.[45]

2.4.2. International proceedings vs. proceedings in the territorial state or the perpetrator's home state

The territorial state will almost invariably, due to the proximity to the crime, have the best access to testimonies and evidence. Further, local judiciaries may rely on an operative infrastructure ready to act and thus be able to conduct investigative steps quickly. An international court, however, is notoriously slow with frustratingly cumbersome procedures. It must enter into agreements with local institutions and key personnel, and the court's personnel must adapt to a legal system and an infrastructure which might be totally strange to them. As for the trial, the local advantages appear less obvious, although the proximity still represents a logistic advantage. It might, for instance, be easier to make victims and witnesses appear

---

[43] Cassese 2003, p. 354-55. Cassese continues: "Perhaps a better path for the future might lie in both enhancing the role of national courts for major cases of criminality, and, with regard to other cases, in combining the action of those courts with that not only of national courts but also of other bodies charged with "restorative justice", such as truth and reconciliation commissions."

[44] Article 17(1) of the Rome Statute.

[45] Articles 17(1) and 19(2). See the discussion of the criterion "a State which has jurisdiction" of article 17(1).

before a local court due to the lesser practical and psychological burden. The Hague may be far away; appearing before an international court might appear more frightening; and to the extent it duplicates a national proceeding the international proceeding will represent an additional burden. Further, local investigators will presumably have a better understanding of an underlying conflict and thus be better equipped to interpret and assess the credibility of the evidence. It is also conceivable that victims, witnesses and even the perpetrator will be more cooperative in a local setting; although the opposite might also be the case.

Some of the local advantages might be neutralised by a lack of impartiality. If the investigators or judges should sympathise with the perpetrators, this might create distrust among victims and witnesses and prevent them from cooperating. There is also a risk of intimidation, a problem which might be addressed by arranging venue changes within the same judicial system. When such problems materialise, the national proceedings might even be deemed non-genuine and be disqualified according to the complementarity principle.

International proceedings convey a strong message of universal condemnation of the crime and of sympathy with the victim. Territorial proceedings may, on their part, generate sound local debates as to the causes of an underlying conflict and how the conflict should be resolved. There is a local educational potential that international proceedings are less likely to have. Local proceedings may contribute to unifying groups involved in a political, ethnical, cultural or religious conflict.[46] In the long run, the society's successful transition to peace may even depend on such effect. Successful national proceedings may reinstate the rule of law and signal the condemnation of a violent regime. In brief, the proceedings may, if successful, strengthen a fragile democracy and its institutions. Conversely, international interference might be regarded as a manifestation of the state's insufficiency as a protector of human rights. Another possible local advantage is the democratic aspect of a people judging its own past.

International investigators and judges might bring with them their own *a priori* understanding of the events, different from the truth as it is perceived by the local parties. They might, inadvertently, only confirm the "international" understanding and not promote reconciliation. Koskenniemi notes that international crimes trials

> "necessarily involve an interpretation of the context which is precisely what is disputed in the individual actions that are the object of the trial. […] This is where a

[46] This point was highlighted by several commentators as an argument as to why former Iraqi President Saddam Hussein should be tried by an Iraqi court, see Howse 2005.

> trial becomes inevitably a history lesson, and the dispute at the heart of it a political debate about the plausibility of the historical 'interpretations'".[47]

One particularly important effect of local proceedings is their potential to contribute to the individualisation of guilt and prevent the stigma of collective guilt on a whole group of people. Such stigma may make it more difficult for the parties to reconcile. International prosecutions are perhaps more easily seen as "symbolic" and thus stigmatic on whole groups. Through a selective local process, where quite a few are still prosecuted, a record acceptable to the entire population might be created.[48] The capability of a local justice system to build common ground should not, however, be exaggerated, even when states proceed genuinely.

The perhaps most commonly cited argument against international interference is that it might accentuate a local conflict. The interference may make key actors shy away from peace negotiations. One might question, however, whether such effect really is specific to international proceedings, or whether it is a possible effect of any criminal proceeding. The argument is typically forwarded by a state which itself is reluctant to proceed. Where there is a security risk involved, there might in fact be arguments for both levels: while a local system might be better equipped to exercise sensitivity, the international system might stand a better chance of being perceived as neutral, and the security situation might be better taken care of.

An aspect which might give rise to criticism *vis-à-vis* international courts is that they have limited capacity, more so than national judiciaries, and can deal only with a very limited number of cases within a given situation. Moreover, the jurisdiction is limited in time,[49] and it is therefore possible that the international court may only interfere *vis-à-vis* some of the crimes committed within one conflict. This might, at least to local people not familiar with the court's jurisdictional regime, create a perception that international justice is selective or, at best, random.[50]

The perceived fairness of national proceedings is bound to vary. There is an apparent risk that domestic justice, and in particular that of the territorial state, will be perceived as biased, either overly protective or overly vindictive *vis-à-vis* the suspect. Cassese notes that "there may be a risk of 'witch hunting' or of using the

---

[47] Koskenniemi 2002, p. 16-17.

[48] *Ibid.,* p. 10.

[49] According to article 11 of the Statute, the ICC has jurisdiction only over crimes committed after 1 July 2002.

[50] The ICC Prosecutor must therefore strive to inform local people of the limits of the Court's jurisdiction.

criminal courts for settling political accounts".[51] As for international proceedings, these will generally be presumed to be fairer, although some possible problems will be noted below. Importantly, the fairness might be perceived as lesser in the perpetrator's home state and/or the state where the crimes occurred. When this is the case, it is particularly unfortunate as these states are where the positive effects of the international proceedings would have been most needed.

The advantage and even necessity of a broader understanding of an underlying conflict is particularly apparent when international crimes are prosecuted. Such crimes are typically the result of old and intense disputes, such as the right of one group to live in a country on the same terms as others. In order for an international trial to enjoy credibility, the various actors in the process must possess an adequate understanding of the conflict. It is therefore imperative that they study the underlying causes and mechanisms carefully beforehand, preferably by consulting local expertise. To some extent, this concern might be addressed through an adversarial procedure where the parties are allowed to present their views freely.

Professional skills are crucial to any criminal proceeding. Here, international proceedings will excel. Few, if any, national systems are able to compete with an international court when it comes to attracting legal expertise, although challenging national trials might also attract experts. Optimal skills are, however, not needed for the proceedings to hold a fairly good standard. Besides, only by trying and occasionally failing will national legal systems be allowed to develop.[52] All in all, however, the lack of domestic expertise remains a problem in such cases, and it is probably a reason why states do not proceed with a case, without the situation necessarily amounting to one of unwillingness or inability as required by the complementarity principle.

The need to establish a historical record is often noted as a key reason why international crimes must not go unpunished. Such record might help future generations understand how the crimes could ever be committed and perhaps enable them to prevent the crimes from occurring anew. The motive for establishing a record may, however, also be a less legitimate desire to justify the acts of one party to a conflict. Yet another, more legitimate, motive might be to shape or highlight certain aspects of a country's history. For instance, a purpose of the Israeli *Eichmann*

---

[51] Cassese 2003, p. 354. As an example, the Rwandan proceedings in the aftermath of the 1994 genocide seem to have generated gross violations of the suspects' rights, see Obote-Odora 1999, paras. 86 and 87.

[52] It might be questioned whether the try-and-fail perspective is acceptable when the crimes are so grave.

trial was to focus on the Holocaust, an aspect that had not been focused on by the International Military Tribunal (IMT), which instead focused on crimes against the peace. Another purpose of that trial may also have been to focus

> "away from [the] image of Jews as helpless victims driven like lambs to slaughter and to bring to light stories of Jewish resistance and heroism".[53]

An important point is that while local proceedings might at the outset ensure a better understanding of the underlying conflict, there is an increased risk that there will be such hidden agendas.[54] While perhaps legitimate as such, there is a risk that these types of agendas will prevent the truth from prevailing in a balanced manner.

As for the Nuremberg trial, it did not only fail to focus on the Holocaust; it delivered a partial truth in another, arguably even more disturbing, manner. It dealt exclusively with Axis crimes, while Allied crimes, such as the bombings of Bremen, Hiroshima and Nagasaki, remained unexposed. As for more "truly" international courts, such as the ICTY, the ICTR and, not least, the ICC, they do not have the same interests in shaping the truth. Yet they have not escaped all criticism in this regard at this point.

2.4.3. International proceedings vs. proceedings under the universality principle

As noted, the complementarity principle gives priority to any "state which has jurisdiction", including universal jurisdiction when provided for under international law. The exercise of universal jurisdiction is rarely an ideal solution, but it appears to be a necessary means to reduce the unavoidable impunity gap created by the failure of the states concerned combined with limited international capacity or lack of international jurisdiction. As such, universal jurisdiction is, alongside international prosecutions, yet another complement to national proceedings. Indeed, there are conventions making the right and duty to exercise universal jurisdiction subsidiary to the jurisdiction of the territorial state, just as the jurisdiction of the ICC.[55]

---

[53] Koskenniemi 2002, p. 22.

[54] Koskenniemi calls trials with such hidden agendas "political instruments to target former adversaries", see Koskenniemi 2002, p. 10.

[55] *E.g.* articles 49, 50, 129 and 146 respectively of the four Geneva Conventions establish a duty to prosecute, while at the same time providing that the custodial state may also, if it prefers, "hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case". Paragraph 3(c) of the *Kraków Resolution* proposes that the custodial state, before it exercises universal jurisdiction, "ask the

Many of the arguments against the exercise of universal jurisdiction are similar to those submitted against international proceedings. A third state's exercise of jurisdiction might suffer from ineffectiveness due to the remoteness to the crime; the legitimacy might be questioned (that might also be the case in the states directly affected); the local educational, preventive and reconciliatory effects might be limited; and the global effects might be reduced as well, compared to international proceedings, although any exercise of universal jurisdiction tends to attract considerable attention and the proceedings typically will be conducted in a transparent manner. At the same time, proceedings in a third state generally stands a better chance of being perceived as fair than proceedings in the states directly affected by the crime.

Prosecuting on basis of the universality principle might strain the relationship between states and create a security risk, possibly eliminating the security gain otherwise associated with the prosecution of international crimes. Exercising jurisdiction over foreigners is a delicate exercise which requires exceptional diplomatic skills. This is particularly true when the crime was committed or condoned by the foreign state's government officials. The International Law Commission (ILC) noted in its discussions on the ICC, comparing the usefulness of an ICC regime with that of universal jurisdiction, that

> "the principle of universal jurisdiction has major drawbacks. States are often placed under extreme duress, or even become victims of blackmail or violent crimes perpetrated by groups of terrorists or other criminals bent on blocking either the trial of an offender by the State concerned or extradition".[56]

When a state exercises universal jurisdiction, it acts as an agent of the international community basing its jurisdiction on widespread condemnation.[57] In this sense, the exercise has great symbolic value, albeit lesser than that associated with international prosecution. That the exercise of universal jurisdiction might prompt other states to

---

State where the crime was committed or [*sic*] the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unable or unwilling to so", see *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Institute of International Law, Kraków, 26 August 2005 (available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf). Some of the separate opinions in the ICJ's *Arrest Warrant of 11 April 2000* indicate that universal jurisdiction is preconditioned on the *presence of the suspect* in the territory and that it is always *subsidiary*, see ICJ Reports 2002, p. 18.

[56] *YBILC 1992, Vol. II*, A/CN.4/SER.A/1992/Add.1, p. 52, para 7.

[57] Clark 1990, p. 254.

prosecute, and probably even more so than will an international proceeding (but the very existence of an international jurisdiction might, as noted, provide a considerable incentive), is an advantage that should be noted.

2.4.4. Effects specific to international criminal proceedings

International criminal proceedings attract more international attention than any other proceedings. Their positive effects easily transcend the states or regions directly affected by the crimes. No doubt, the Nuremberg trial would have had a diminished impact if had it been conducted by a single state. This extended impact is a *raison d'être* of international proceedings. As for the victims, the fact that "their" crimes are dealt with at the international level might be perceived as a confirmation that the world community cares, thus accelerating their transformation from victims to individuals with regained self-dignity. International proceedings might promote more adequately than national proceedings structural changes within the state due to the international attention and pressure generated. The international proceedings might change the status of a conflict from "forgotten" to "highlighted", committing the international community and generating additional support to the victims, *e.g.* in the form of humanitarian aid.[58]

One might further argue that international jurisdictions, due to the judges' superior legal knowledge, are better suited to develop international criminal law. A centralised international jurisdiction will also produce a more consistent jurisprudence than will individual national judiciaries. The four international jurisdictions that have preceded the ICC have all handed down seminal judgements. Such jurisdictions will also call the crimes by their proper names, such as "genocide" and "torture", instead of labels such as "murder" and "bodily harm", thus more adequately promoting the development of international criminal law.

A danger which seems particularly relevant to international trials is the possibility for the accused to use the courtroom as an arena for submitting political propaganda. From the dock of an international court, the accused might seek, perhaps successfully in some people's eyes, to justify his or her acts. Such strategy may well work *vis-à-vis* fellow citizens who do not view the international trial as legitimate. A striking example of this is the manner in which ex-president Milosevic appeared before the ICTY, using rhetorically persuasive but legally irrelevant

[58] The ICC involvement in northern Uganda has, for instance, brought attention to a conflict which Jan Egeland, UN Under-Secretary General for Humanitarian Affairs, referred to as "one of the world's longest and most forgotten conflicts", Boustany 2004, p. A18.

arguments which nevertheless gave him the status of a martyr in the eyes of many Serbs. An inherent dilemma is that if the accused is not allowed to speak freely, the perception might be created that his or her rights are violated.

When international criminal law is enforced by different national systems, the inevitable result is that perpetrators who have violated the same international norms are punished differently. By contrast, if all international crimes were dealt with by the same international jurisdiction, this would ensure similar reactions to similar crimes. It might appear counter-intuitive to argue that similar acts do not have to be similarly punished; yet differing national reactions might reflect aspects of different cultures in which the crimes have been committed. Arguably, only by allowing such variation will each reaction adequately reflect the crimes' gravity. Thus, the argument might go that the desired effects of the proceedings depend on such variation. It should also be noted that international law does not require similar punishment across national systems.[59] It is perceived by many as a problem, however, that perpetrators typically are treated more leniently at the international level than nationally. When the most responsible are sentenced to 20 or 30 years in prison and less responsible are executed, this is a moral paradox. Yet from an international law perspective, this can, on balance, hardly be construed as a real disadvantage of international proceedings.

2.4.5. A tentative conclusion

Under the complementarity principle, the ICC will set aside a national proceeding only when it is non-genuine. That is not to say, however, that a genuine national proceeding always is "better" than an international proceeding. Whether national or international proceedings truly are preferable depends largely on the concrete situation and the desired effects of the prosecution. In the ICC negotiations some delegations stated that

> "instead of assuming *a priori* that certain categories of crimes were better suited for trial by an international criminal court, it would be preferable to determine the circumstances when trial by such a court was appropriate".[60]

All the complementarity principle does, however, is to highlight one situation, albeit the most important, namely where the national proceeding is non-genuine and

---

[59] Article 80 of the Statute reflects this, providing that the provisions on penalties "[do not affect] the application by States of penalties prescribed by their national law".

[60] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 1995, A/50/22, para. 92.

impunity otherwise will prevail. When the ICC is not authorised to interfere in other situations where it would have been preferable in the sense that it would best have promoted the purposes that criminal justice is intended to serve, this is primarily due to sovereignty concerns. This is true even if the ICC, for capacity reasons, would not have been able to interfere in more than a very limited number of cases anyway. The above described advantages and disadvantages should be kept in mind as they might be useful for the determination of which situations and cases, out of a number of situations and admissible cases, should eventually be selected for ICC interference according to the "interests of justice" criterion.

3. THE HISTORY OF THE COMPLEMENTARITY PRINCIPLE

3.1. INTRODUCTION

Adopting the Rome Statute with 120 votes in favour, 21 abstentions and only 7 negative votes was only possible after extensive discussions between international law experts as well as between governments. This chapter will give an insight in the discussions regarding the issue of admissibility and some key jurisdictional issues. According to the rules on treaty interpretation, preparatory work is a "supplementary means of interpretation" which can be resorted to in order to "confirm the meaning" rendered by a more basic interpretation or in order to "determine the meaning" when an ambiguous, obscure, absurd or unreasonable meaning otherwise is rendered.[61] The ICC negotiations produced a considerable amount of "preparatory work", including the reports and the Draft Statute of the International Law Commission; the papers, reports and drafts of the Ad Hoc Committee and the Preparatory Committee; as well as the documentation from the Rome Conference.

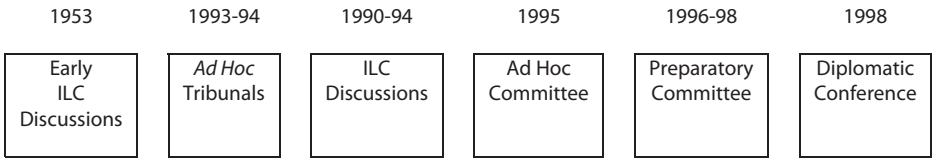
Referring to the preparatory work of the ICC is not unproblematic. First, there is no authorised collection of preparatory work, and there might be disagreement as to which documents actually qualify. Second, some of the documents reflect the ideas of a limited number of states. Third, an idea referred to in such documents may not always coincide with a state's final position. Fourth, interpreting the statements in such documents is complex, *inter alia*, because they are often not formulated with great precision. Fifth, not all states participated in the preparatory work, and very few participated in all parts of it.[62] Nevertheless, regardless of the formal interpretational value, the documentation provides a valuable basis for a deeper understanding of the development and nature of the complementarity principle.

The following historical survey will, in addition to the issue of admissibility, have particular focus on how the discussions on the critical issue of conferment (acceptance) of jurisdiction developed. It will also, more briefly, comment on the mechanisms for initiating proceedings and the relationship with the Security Council. After some introductory remarks on the political stakes that were involved in the negotiation (3.2), the survey is linked to what should be considered as key stages of the process leading to the establishment of the ICC, *i.e.* the early ILC discussions, including the report of the 1953 Committee on International Criminal Jurisdiction, the ILC discussions on state responsibility and the ILC discussions on a

[61] Articles 32 and 3(1) (a) and (b) of the Vienna Convention.

[62] Save perhaps for a handful of particularly well-staffed states such as France, the United Kingdom and the United States.

draft code of offences against the peace and security of mankind (3.3); the establishment in 1993 and 1994 of the two *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) (3.4); the ILC discussions on an international criminal court from 1990 to 1994 (3.5); the 1995 Ad Hoc Committee (3.6); the Preparatory Committee from 1996 to 1998 (3.7); and the 1998 Rome Conference (3.8).



3.2. THE POLITICAL STAKES INVOLVED AND THE CHANGING TIMES

The nature of an appropriate mechanism for allocating cases between the ICC and states was an essential issue in the discussions. With this issue pending, states were not able to fully foresee how the ICC would affect their sovereignty. States were reluctant to compromise on any issue "without having a clear sense of how the total picture would be".[63] In 1994, ILC member Crawford succinctly noted:

> "Law libraries throughout the world were full of schemes for an international criminal court, but none had proved acceptable, for reasons that hinged on the unwillingness of States to establish sweeping new procedures that might have unpredictable effects."[64]

The discussions on admissibility were complicated by the fact that the issue was intimately intertwined with other issues that all were, each in its own way, crucial to states seeking to retain some control over the ICC's activity *vis-à-vis* their citizens. First, there was the regime for state consent to the Court's jurisdiction. Should it be compulsory (only requiring a relevant state's ratification) or should it be optional (requiring the *ad hoc* acceptance in any given case of at least the suspect's home state)? The latter would put the suspect's home state in full control, whereas the former would make the Court far more potent. Second, should the ICC Prosecutor have *proprio motu* power to initiate criminal proceedings on his or her own initiative, or should a referral from a state party or the Security Council be required? And third, should the Security Council's authorisation be required whenever the ICC activity could potentially interfere with the Council's operations?

---

[63] Holmes 1999, p 43.

[64] *YBILC 1994, Vol. I*, A/CN.4/SER.A/1994, p. 7, para. 2.

The ICC regime can essentially be viewed as a two-track system: the first track constitutes cases referred to the Court by the Security Council; the second track constitutes cases referred by states parties or taken up *proprio motu* by the ICC Prosecutor.[65] A key issue was how strong or how weak the second track should be made (in particular that of an independent prosecutor, if that competence were to be included at all).

One state particularly keen on retaining a certain degree of control over the ICC activity was the United States. The American negotiators missed no opportunity to stress the problems that an ill-conceived ICC might create with regard to the global deployment of US forces. The problematic US positions on the key issues described above derive mainly from the insistence of the Pentagon on the ability to prevent the prosecution of American military personnel for actions undertaken in the course of such operations. Four months before the Rome Conference, American chief negotiator David Scheffer noted that "the stakes are very high" and that "an ill-conceived permanent court might create bad law, discourage effective national prosecutions, and create new divisions among States".[66] He pointed out that "[n]o other country shoulders the burden of international security as does the United States". He cited Security Council mandates, North Atlantic Treaty Organization (NATO) commitments, humanitarian objectives and the combat against terrorism and the proliferation or use of weapons of mass destruction. He added:

> "It is in our collective interests that the personnel of our militaries and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings. The permanent court must not be manipulated for political purposes to handcuff governments taking risks to promote international peace and security and to save human lives."[67]

As for the legal relationship between the ICC and the Security Council, Scheffer noted that "the importance of a positive role for the Security Council must not be overlooked in this debate; nor must the Council's responsibilities under the UN Charter be distorted with rhetoric about politicizing the ICC". He warned that if the negotiators failed to address the American concerns "we predict that effort will fail and the prospects for an early establishment of a permanent court will suffer".[68] As for the issue of state consent, Scheffer indicated the implications between it and the allocation mechanism:

---

[65] Scharf 1998.

[66] Scheffer 1998.

[67] *Ibid*.

[68] *Ibid*.

> "The issue of 'state consent' arises when an individual case against an individual suspect is being pursued by the Court's prosecutor. At that stage, are there any interested States which might have the right under the statute to block the Prosecutor from proceeding further against the suspect? This is an enormously important issue to some governments in the negotiations, and it is one which the International Law Commission recognized in its 1994 draft of the ICC statute.
>
> For years the United States has reserved on the issue of state consent. We have always argued that we need to examine where other elements of the statute – such as the role of the Security Council and the provisions on complementarity – settle before determining what, if any, state consent to individual cases is required. The robustness of the complementarity regime will have a strong impact on issues relating to state consent."[69]

As for the Prosecutor's competence, Scheffer noted that it would be important for the Prosecutor "to have some political clout behind him when he launches into his or her investigative duties. That political clout can be attained through the referral by the State Party or the Security Council. Without it, the prosecutor is essentially on his or her own and may well encounter great resistance from States".[70]

Having the US on board was clearly an important objective in the view of most states. Yet many states indicated during the negotiations that it was not worth the price of having to settle for a weak, arguably politicised body with little autonomy and less credibility.

Of course, among the sceptics were also notorious "rough states" which one would never expect to support the establishment of an international criminal court simply because they perceived the risk of their citizens committing the relevant crimes as too high. Among the "court-friendly states" were states such as Australia, Canada, Germany and the Nordic countries. Among them were, however, also states that had recently undergone transitions from authoritarian rule with an understanding as to how impunity tends to undermine political reform and the rule of law.[71]

From the first draft of an international criminal court published in 1953 until the Rome Statute was adopted in 1998, the envisaged relationship between the court and states underwent dramatic changes. As envisaged in 1953, the court would have jurisdiction over a given case only when the territorial state and the suspect's home state had accepted the jurisdiction on an *ad hoc* basis. Few, if any, believed that states would ever authorise the court to initiate criminal proceedings in any given case

---

[69] *Ibid.*

[70] *Ibid.*

[71] Stork 1998.

without the express consent from the states concerned. Over time, however, the opinion of international law experts and of states (arguably in that order) changed. According to the Rome Statute, states parties accept the ICC's jurisdiction once and for all by ratification.[72] This would not, however, have been acceptable to any state had it not been for the complementarity principle which gives states investigative and prosecutorial priority.

With regard to the allocation mechanism, detailed material and procedural questions had to be addressed, including: Should priority be given to the international court or to states? If states were given priority, should it be made dependent on a certain standard of the national proceedings? And according to which criteria should such standard be measured? Should the standard relate to both the will and the ability of states? How should the admissibility of a case be challenged? And who should have the final say regarding the admissibility?

It should be noted that with optional jurisdiction, the allocation mechanism would lose its significance as states would retain full control over the court's activity anyway. With compulsory jurisdiction, however, the allocation mechanism would, once an alleged crime was within the jurisdiction, settle a dispute between the court and states as to whether the court should interfere or not.

The instruments of earlier international tribunals offered no consistent guidance as to how the allocation mechanism should be constructed. They provided for different allocation mechanisms and they had all been too intrusive. The "over-effective" allocation had been possible because the tribunals had all been forced upon the states concerned. Looking all the way back to 1953, it is somewhat puzzling that the need to strike a sound balance between sovereignty concerns and effectiveness for a long time appears not to have been recognised. For decades, the two alternatives referred to were either an exclusive international jurisdiction or a purely optional jurisdiction. The first would be intrusive, the latter ineffective. Suggestions of a more balanced regime appeared at a relatively late stage.

3.3. EARLY ILC DISCUSSIONS (1950-88)

Early traces of a complementary allocation mechanism can be found in the 1943 Draft Convention for the Creation of an International Criminal Court. It proposed that

[72] Withdrawal is, however, possible, see article 127.

> "no case shall be brought before the Court when a domestic court of any one of the United Nations has jurisdiction and is in a position and willing to exercise such jurisdiction".[73]

The criterion "in a position and willing" shares important aspects with the Rome Statute's criteria "unwillingness" and "inability". The draft did not, however, expressly require that the national proceeding hold a certain standard. Strictly construed, any national proceeding would pre-empt international interference, irrespective of the proceeding's genuineness.

3.3.1 The 1953 Committee

In 1948, prompted by the brutalities of the Second World War, the United Nations General Assembly adopted a resolution that there would be "an increasing need of an international judicial organ for the trial of certain crimes under international law". It invited the ILC to

> "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions".[74]

In 1950, on recommendation from the ILC, the General Assembly established the Committee on International Criminal Jurisdiction.[75] The Committee, which consisted of 17 ILC members, formulated proposals regarding some of the important questions that the establishment of an international criminal court raised. These were submitted to all UN member states. Having received the comments and suggestions of governments and in pursuance of another General Assembly resolution,[76] the Committee (hereinafter referred to as the 1953 Committee) met on 27 July 1953 at the headquarters of the United Nations.[77] On 20 August, after 23

---

[73] *Report of the 1953 Committee on International Criminal Jurisdiction*, General Assembly Official Records, Ninth Session, Supplement No. 12, A/2645 (1954), draft article 3.

[74] General Assembly Resolution 260 B (III).

[75] General Assembly Resolution 489 (V).

[76] General Assembly Resolution 687 (VII).

[77] The 1953 Committee held 23 meetings and concluded its work on 20 August 1953. Parallel to this initiative, the first report on the proposed "Code of Offences against the Peace and Security of Mankind" was given. The latter report suggested that prosecution be left to states, but that a mandatory international court be set up for cases where there was "dispute" as to the prosecution, "in order to guarantee control over the functioning of the system". Further,

meetings, the Committee concluded that "as an ultimate objective an international criminal court would be desirable", but at the present time it would "do more harm than good [as the] rigid maintenance of criminal justice was likely to endanger the maintenance of peace".[78] The most progressive members argued in favour of establishing an international criminal jurisdiction "as far as present inter-State relations would permit". The report noted that

> "those members favoured the establishment of a court, the jurisdiction of which would depend on voluntary submission to that jurisdiction by the States willing so to submit".[79]

Thus, even the most progressive members wanted an optional international jurisdiction. The Committee was so concerned with preserving state sovereignty that it suggested that the constituent instrument (which they did not recommend was adopted) provide that "the jurisdiction of the court was not to be presumed".[80] It was stressed that

> "by conferring jurisdiction upon the court, a State was not bound to bring *specific cases* before the court. Such a State had the *right to do so*, but it might well choose to bring cases before its own national courts according to the laws determining national criminal jurisdiction". [81]

This regime would have been totally inadequate *vis-à-vis* unwilling states. Ratification would entail no commitment and entail no transfer of actual power to the international court. The 1953 Committee even proposed that consent be required both from the territorial state *and* the suspect's home state. This was considered as "an essential safeguard without which the statute was unlikely to be acceptable to states". As for the territorial state, it was noted that it "had a primary interest in the punishment of that crime, since it was that State's peace and order which had been violated".[82] It was only a modest suggestion of a stronger jurisdictional regime when the report noted that

---

article 6 of the Genocide Convention (1948) reflects the idea of an international criminal court.

[78] *Report of the 1953 Committee*, *supra* note 73, p. 3.

[79] *Ibid.*

[80] *Ibid.,* p. 8.

[81] *Ibid.*

[82] *Ibid.,* p. 15.

> "by special provision in the instrument conferring jurisdiction, the international criminal court could, if a state so desired, be given exclusive jurisdiction over a particular kind of crime".[83]

Again it was stressed that the "mere conferment of jurisdiction would not have this result".[84] There is little realism in suggesting that a state would *a priori* absolve itself of its entire criminal jurisdiction over a certain type of crime. Such exclusive jurisdiction would also, it should be noted, effectively prevent states from taking their share of cases.

The 1953 Committee further stressed that at the outset the international jurisdiction would not be exclusive but concurrent with national jurisdiction. The conferment of jurisdiction

> "did not affect the law of determining national criminal jurisdiction, and […] this national criminal jurisdiction still remained intact unless otherwise provided in instruments conferring jurisdiction".[85]

The report explained that the requirement of a case-by-case consent "had the purpose of *preventing conflicts* of jurisdiction between the international criminal court and national courts".[86] A pertinent remark would be that such conflicts of jurisdiction should be resolved rather than prevented altogether.

One possibly envisaged role for such a court could be that of an expert organ offering authoritative and consistent interpretation of international criminal law. Some support for this can be found in a discussion as to whether it would be preferable to limit the court's jurisdiction to crimes "which were defined in conventions". The Committee noted that

> "only this restriction could ensure that the court would serve its proper function of trying offences which *could not better be brought before national courts*".[87]

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

The Committee noted that "the moment had come for the General Assembly to decide what, if any, further steps should be taken toward the establishment of an

---

[83] *Ibid.,* p. 8.
[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid* (emphasis added).
[87] *Ibid.,* p. 9 (emphasis added).

international criminal court".[88] Having considered the report, the Assembly decided in 1954 that the attempt to establish an international criminal jurisdiction should be postponed until it had taken up the report of the special committee on the question of defining aggression and had taken up again the draft code of offences against the peace and security of mankind, to which the issue of a court was related.[89] A similar decision was taken at the Assembly's 12th session, in 1957, as the questions of defining aggression and the draft code of offences were postponed.[90]

The matter was again brought up in the General Assembly in 1968, but the Assembly's General Committee decided that it would not be desirable to consider the items "International criminal jurisdiction" and "Draft Code of Offences against the Peace and Security of Mankind" before it had completed the consideration of the question of defining aggression.[91] The issue was subsequently brought up in the General Assembly in 1974 when a draft definition of aggression was submitted to it. In allocating the item on the question of defining aggression to the Sixth Committee, the Assembly noted that it was considering whether it should take up again the question of a draft code as well as that of an international criminal jurisdiction.[92] This repeated reluctance to establish an international criminal jurisdiction is clearly best understood in the context of the Cold War between the world's superpowers.

3.3.2. Discussions on state responsibility

As international crimes often involve state officials and are committed within the state apparatus, individual and state responsibility could perhaps be considered as two sides of the same coin (but they really are two different coins). State responsibility had been on the ILC's list of topics for codification from 1949 until the draft articles of 2001 were completed. The ILC has, on several occasions, noted that individual criminal responsibility and state responsibility are two distinct concepts. The existence of one of them neither excludes nor implies the existence of the other. In a comment to its 1976 Draft Articles on State Responsibility, article 19 ("International crimes and international delicts"), the ILC noted:

---

[88] *Ibid.,* p. 15.

[89] General Assembly Resolution 898 (IX).

[90] General Assembly Resolution 1187 (XII).

[91] *Official Records of the General Assembly, Twenty-third Session* (1968), Annexes, vol. I (A/7250), agenda item 8, para. 10.

[92] *Official Records of the General Assembly, Twenty-ninth Session* (1974), Annexes (A/9890) agenda item 86, para. 2.

> "Punishment of those in charge of the State machinery who have started a war of aggression or organized an act of genocide does not *per se* release the State itself from its own international responsibility for such acts. Conversely, as far as the State is concerned, it is not necessarily true that any 'crime under international law' committed by one of its organs for which the perpetrator is held personally liable to punishment, despite his capacity as a State organ, must automatically be considered not only as an internationally wrongful act of the State concerned, but also as an act entailing a 'special form' of responsibility for that State."[93]

The ILC also noted the different nature of the two concepts and that suggestions that an international criminal court should be established to determine the "penal" responsibility of the state in each specific case "have thus remained a dead letter".[94] As for the possible obligation of states to punish the guilty individuals, the Commission has noted that this obligation "does not constitute the form of international responsibility specially applicable to a State committing an 'international crime' […]".[95] Otherwise, the ILC has avoided integrating the issue of individual criminal responsibility, and, *a forteriori*, a mechanism for implementing it, in its discussions on state responsibility.

3.3.3. Discussions on a draft code of offences against the peace and security of mankind

The question of establishing an international criminal court is also closely related to the work on a code of offences against the peace and security of mankind, the former being a possible mechanism for implementing the latter. These two concepts truly are two sides of one coin. In 1947, the General Assembly had requested the ILC to prepare a draft code of such offences.[96] The crimes dealt with were characterised as "crimes under international law, for which the responsible individuals shall be punishable".[97] The Commission did not discuss an international mechanism for imposing such punishment. It noted that pending the establishment of an international criminal court as a separate issue, the code might be applied by national courts.[98]

---

[93] *YBILC 1976, Vol. II*, A/CN.4/1976/Add.1, Part Two, p. 104, para. 21.
[94] *Ibid.,* p. 114, para. 44.
[95] *Ibid.,* p. 119, para. 59.
[96] General Assembly Resolution 177 (II).
[97] *YBILC 1951, Vol. II*, A/1858, para. 59, article 1.
[98] *Ibid.,* para. 52(d).

In 1954 the discussion on a draft code was postponed as the question of defining aggression was being discussed separately. The latter issue was also, however, postponed, and the ILC would take the discussions on a draft code up again only in 1982. During the 1983 discussions some members had expressed the view that a code unaccompanied by a competent jurisdiction would be ineffective. It became clear that the prevailing opinion was "that an international criminal jurisdiction would be necessary", and the Commission questioned whether it should "abide by its 1954 position or go further".[99] It accordingly invited the General Assembly to indicate (i) "whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals", and (ii) "whether such jurisdiction should also be competent with respect to States".[100] This invitation was repeated in 1986, and from 1986 to 1989 the General Assembly requested the Secretary-General to seek views of states as to how the code should be implemented.[101]

In 1988 the ILC adopted a draft article 4 regarding the *aut dedere aut punire* principle, which was supposed to be an important factor with regard to the implementation. The article provided that "this article [does] not prejudge the establishment and the jurisdiction of an international criminal court".[102] The work on such a court would two years later be taken up by the ILC in particularly devoted sessions (see below).

3.4. THE ESTABLISHMENT OF THE *AD HOC* TRIBUNALS (1993-94)

The ICTY and ICTR statutes were the first international instruments to expressly regulate the relationship between international and national criminal jurisdiction. The jurisdiction is concurrent with primacy for the Tribunals, provided certain criteria are met.[103] Where a national court has already tried the person concerned, the Tribunals may only try that person again if (a) the national trial characterised the international crime as an ordinary crime; (b) the national court was not impartial and independent; (c) the national trial was designed to shield the accused from international criminal responsibility; or (d) the case was otherwise not diligently

[99] *YBILC 1983, Vol. II*, A/CN.4/SER.A/1983/Add.1, Part Two, p. 16, para. 68.
[100] *Ibid.*, para. 69, (c) (i) and (ii).
[101] General Assembly Resolutions 41/75, 42/151 and 43/164.
[102] *YBILC 1988, Vol. II*, A/CN.4/SER.A/1988/Add.1, Part Two, p. 66 (article 4).
[103] ICTY article 9(1) and ICTR article 8(1) as well as ICTY article 9(2) and ICTR article 8(2).

prosecuted.[104] Where a case is being or has been investigated or the case is being prosecuted by a state, the criteria for the two Tribunals' interference differ slightly. The ICTY Prosecutor may, in addition to the *ne bis in idem* grounds,[105] seize jurisdiction when a case involves "significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal".[106] The ICTR Prosecutor may interfere on even more flexible grounds: (i) when the case is the subject of an investigation by the Prosecutor; or (ii) when the case should be subject to an investigation by the Prosecutor considering, *inter alia*, (a) the seriousness of the offence, (b) the status of the alleged crime at the time of the offence, (c) the general importance of the legal questions involved in the case.[107] Further, the ICTR may interfere (iii) when a case is the subject of an indictment in the Tribunal.[108]

This admissibility regime, which most properly can be described as a *modified primacy*, ensures a very effective international jurisdiction. The admissibility grounds do not only aim at avoiding impunity; they even allow the transfer of cases where this would be beneficial because of the factual or legal issues involved. This enables the Prosecutor to proceed with a wide range of cases.[109] Further, the Tribunals' jurisdiction is not dependent on state acceptance as they are established under Chapter VII of the UN Charter. The only objections to this came from the two states directly affected. The Federal Republic of Yugoslavia argued that war criminals should be prosecuted "under national laws […] in accordance with the principle of territorial jurisdiction".[110] It stated:

> "The ongoing drive to establish an international tribunal is politically motivated and without precedent in international legal practice, so much since members of the international community have not been able to agree on the establishment and statute of an international criminal court for decades. The proposed statute of the

[104] ICTY article 10(2) and ICTR article 9(2).
[105] ICTY rule 9 (i) to (iii).
[106] *Ibid.,* rule 9 (iv).
[107] ICTR rule 9 (i) and (ii).
[108] *Ibid.,* rule 9(iii).
[109] This rule is the one most frequently applied before the ICTY.
[110] *Letter dated 17 May 1993 from the Deputy Prime Minister and Minister for Foreign Affairs of the Federal Republic of Yugoslavia to the Secretary-General* (annexed to A/48/170 and S/25801), p. 2.

> international tribunal is inconsistent and replete with legal lacunae to the extent that makes it unacceptable to any State cherishing its sovereignty and dignity."[111]

The Rwandan government had initially requested the establishment of the Tribunal but ultimately objected to the wording of the statute. The fact that other sovereign states did not object to such far-reaching primacies is due to two factors: First, it was acknowledged that impunity in the two situations would have serious implications for the peace and stability in the respective regions, one of them close to the territories of permanent members of the Security Council. Second, most importantly, the jurisdictions were limited to two specific territories. The activities would be predictable and non-threatening to other states than those directly affected.

One important principled argument against international primacy is that it shifts the focus from the national to the international level. This may create the wrongful impression that the prosecution of international crimes primarily is considered an international task. It was therefore noteworthy when the United Nations Secretary-General in 1993 noted that

> "it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures".[112]

In 1997, ICTY Judge Antonio Cassese stated that

> "our Tribunal cannot act alone to bring to justice all those who may be responsible for atrocities in the former Yugoslavia. In this connection, I would like to call on national courts, and judges, to assist in this struggle against impunity by initiating their own prosecutions of persons on their territory who may have committed atrocities in the former Yugoslavia. […] The two approaches – international and national – should go hand-in-hand."[113]

The potential of the Tribunals' primacy was demonstrated in *Prosecutor v. Tadic*, where Germany was genuinely investigating Tadic when the ICTY requested his

---

[111] *Ibid.,* p. 3.

[112] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, S/25704, para. 64 (available at http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm).

[113] *Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the General Assembly of the United Nations*, 4. November 1997, para. 6 (available at http://www.un.org/icty/pressreal/SPE971104e.htm).

surrender. The ICTY Appeals Chamber stressed the need for primacy and noted, perhaps not so fitting to the case at hand, that

> "when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes' [...], or proceedings being 'designed to shield the accused' [...], or cases not being diligently prosecuted […]. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute."[114]

The statement does not, however, seem to consider a complementary relationship as an option. Complementarity aims at remedying all these stratagems, save an "ordinary crimes" scenario which does not amount to inability or unwillingness. In *Tadic*, the judges apparently compared primacy with the opposite: an absolute (unconditional) national primacy.

The two *ad hoc* Tribunals clearly had an important impact on the process toward the establishment of a permanent ICC. As cases were handled in The Hague and Arusha, states gradually became accustomed to the idea that criminal law could be exercised at the international level, and it was demonstrated that international jurisdictions could play a meaningful role. Even in terms of the relationship between national and international jurisdiction the significance of the two regimes should not be underestimated. The exceptions to the Tribunals' primacy gave useful guidance as to how a complementary regime could be structured. At the same time, what was acceptable in a precisely defined situation with justice dispensed *post facto* was not necessarily acceptable on a global and permanent basis.

3.5. THE ILC DISCUSSIONS ON AN INTERNATIONAL CRIMINAL COURT (1990-94)

A study of the ILC discussions leading to the 1994 Draft Statute for an International Criminal Court (hereinafter referred to as the ILC Draft Statute)[115] sheds valuable light on how the complementarity principle and the jurisdictional regime developed and on the controversies involved. The fact that a pre-eminent international legal body such as the ILC would accept a complementarity allocation mechanism contributed strongly to the principle's acceptance in the Ad Hoc Committee and the

[114] *Prosecutor v. Tadic*, para. 58.

[115] *YBILC 1994, Vol. II*, A/CN.4/SER.A/1994/Add.1, Part Two.

Preparatory Committee where the principle was refined. The admissibility criteria proposed in the ILC Draft Statute are not significantly different from those adopted in Rome. Of particular importance was the ILC's reference to "ineffective" national proceedings, authorising the ICC to interfere not only *vis-à-vis* feeble judiciaries but also *vis-à-vis* states seeking to shield the perpetrator. At the same time, the envisaged jurisdictional regime was rather weak, with an opt-in regime dependent on an *ad hoc* acceptance in addition to ratification[116] (with a notable exception for genocide over which the ILC proposed inherent jurisdiction). Only a referral by the Security Council would bypass this requirement. On balance, however, the weak jurisdictional regime arguably made it possible for the ILC to propose an effective allocation mechanism.

3.5.1. The 1990 session: An optional court with a review function

In December 1989, the General Assembly noted the approach currently envisaged by the ILC regarding an international jurisdiction for the implementation of the draft code of crimes against the peace and security of mankind. The Commission was invited to

> "address the question of establishing an international criminal court […] with jurisdiction over persons alleged to have committed crimes which may be covered under such a code of crimes […] and to devote particular attention to that question in its report on that session".[117]

3.5.1.1. The relationship with national jurisdictions

In his eighth report to the ILC, the Special Rapporteur included a *questionnaire* which he called "Statute of an international criminal court", listing questions that the establishment of such a court would raise. He did not deal with the relationship with national jurisdictions in general terms, but one particular issue was the "authority of *res judicata* by a court of a State". Two alternatives were suggested: Version A simply provided that the court "cannot try and punish a crime on which a final judgement in criminal law has been handed down by the court of a state". Version B would allow the court to interfere *vis-à-vis* that state

---

[116] Such requirement of *ad hoc* acceptance would resemble the one provided for in ICJ article 36.

[117] General Assembly Resolution 44/39.

> "if the State in whose territory the crime was committed, or the State against which the crime was directed, or the State whose nationals were the victims, has grounds for believing that the judgment handed down by the State was not based on a proper appraisal of the law or the facts".[118]

The proposals have some flaws: They only refer to completed trials, not to ongoing proceedings and decisions not to prosecute; the criterion "proper appraisal of the law or the facts" is vague without more clarifying factors such as "unwillingness" or "inability"; strictly construed, the court could interfere even *vis-à-vis* a which state had misinterpreted the law or facts in good faith; the formulation "if the State [...] has grounds for believing" is unclear both as to the burden and the standard of proof; and the question as to who would have the final say in an admissibility dispute is not regulated. It was therefore apposite when one member noted that the Commission had to address more clearly a question which was

> "often raised but rarely elaborated on, namely the legal implications for State sovereignty of establishing an international criminal jurisdiction […]. [T]he extent to which national sovereignty was affected by the establishment of a court would very much depend on whether the court was intended to replace, compete with or complement national jurisdiction." [119]

As for cases under examination by a court of another state, the same member held that "States should wait until the national court had handed down a final judgment". This was considered important "because of the need to avoid not only conflicts of jurisdiction, but also political conflicts between states".[120] Another member asked whether a case would be referred to that court as a court of appeal on a point of fact or of law. Personally, he

> "would endorse the latter, as in the case of European Community law. For an international court to have total control over national courts would be a major infringement of national sovereignty and therefore unacceptable".[121]

If the court's competence were confined to questions of law that would merely let the court contribute to the streamlining of international criminal law. The proposal is indicative of some members' reluctance to address the main problem, namely inactivity or sham trials due to unwillingness. One member even noted that in order

---

[118] *YBILC 1990, Vol. II*, A/CN.4/SER.A/1990/Add.1, Part One, p. 38, para. 93 (Mr. Thiam).

[119] *YBILC 1990, Vol. I*, A/CN.4/SER.A/1990, pp. 31-32, para. 36 (Mr. Graefrath).

[120] *Ibid.,* p. 33, para. 46.

[121] *Ibid.,* p. 36, para. 72 (Mr. Bennouna). See also p. 35, para. 65 (Mr. Mahiou) and p. 49, para. 65 (Mr. Njenga).

to facilitate state acceptance, the court should, at least in the beginning, only be allowed to give legally binding opinions on questions of law at the request of a state party.[122] That would, however, rule out any international criminal proceeding. Another member countered, however, that justice could not be left to national courts when

> "serious crimes were committed by the State itself or, rather, by a ruling group. In such circumstances, the courts of the State in question would not be qualified to try those responsible unless there was a change of government and a return to the rule of law. The future international criminal court would therefore also have to establish the facts."[123]

Strictly construed, that would rule out *a priori* any competence of a state to judge its own leaders, something which clearly would have been unacceptable to states. The real meaning was perhaps less categorical as subsequent reference was made only to situations where a state wanted to bring the perpetrators to justice "but was not strong enough to do so". It would then, it was noted, not be possible to "dispense with investigating the facts of the case and merely confer powers of appeal or cassation upon the international criminal court".[124]

Yet another member noted that the line of demarcation between national and international jurisdiction had to be clearly marked and "in keeping with the interests of justice". The international court should have the authority to deal with a case which had already been dealt with by a state "if there were grounds to believe that a judgment of a national court violated international rules or was founded on an erroneous basis". The court should even have the authority to act as a court of first instance "[i]f the national courts refused to hear a case even though there were grounds for instituting proceedings. No human right would be violated as a result".[125] The reference to a "refusal" is progressive as it would cover "unwillingness".

A working group which was established proposed that a "re-examination by the international court" of national judgements could be contemplated "(a) if a State concerned has reason to believe that the decision was not based on a proper appraisal of the law or the facts; (b) if the national court erred by characterizing a

---

[122] *Ibid.,* p. 42, para. 40 (Mr. McCaffrey).

[123] *Ibid.,* p. 40, para. 28 (Mr. Tomuschat).

[124] *Ibid.*

[125] *Ibid.,* p. 60, para. 100 (Mr. Barsegov).

crime covered by the code as an ordinary crime; (c) in the case of an appeal by the convicted person".[126]

Alternatives (b) and (c) reflect two aspects which would not be covered by the Rome Statute. First, the idea that international crimes should be called by their proper names, clearly inspired by the Statutes of the two *ad hoc* Tribunals, and, second, the idea that the court should have a human rights role. It was further proposed that the decisions of the court have "precedence over the judgements of national courts".[127]

In its report to the General Assembly, the ILC summed up three possible relationships with national jurisdictions: (i) an *exclusive* international jurisdiction, (ii) a *concurrent* international jurisdiction, and (iii) an international jurisdiction with *review competence*. It was noted that a competence to provide *legal opinions* could complement any of the three.[128]

3.5.1.2. Conferment of jurisdiction

In the report, the ILC noted that with concurrent jurisdiction, the international would be optional: a state would be able to choose whether to institute an action before it. This would, it was admitted, detract from the advantages of uniform application. The report fails, however, to note the more serious consequence of an optional court: it would be powerless *vis-à-vis* deliberate obstructions of justice.

3.5.2. The 1991 session: Little progress

In November 1990, the General Assembly invited the ILC to "consider further […] the possibility of establishing an international criminal jurisdiction or other international criminal trial mechanism".[129]

---

[126] *Ibid.,* p. 324, para. 2.

[127] *Ibid.* Article 20(2) of the Rome Statute provides: "No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court."

[128] *YBILC 1990, Vol. II*, *supra* note 118, Part Two, p. 23, para. 130. It was suggested that binding opinions could be requested by national courts or advisory opinions requested by an organ of the UN. It was noted that the court could be entrusted with the task of harmonising the interpretation of international criminal law, leaving to national tribunals the function of deciding on its merits.

[129] General Assembly Resolution 45/41.

3.5.2.1. The relationship with national jurisdictions

In the discussions, one member noted the positive support in the Sixth Committee for the establishment of an international criminal court with a review function. That would avoid the surrender of national jurisdiction while ensuring impartiality and objectivity in the prosecution of international crimes. The court would "complement national jurisdiction", it was noted.[130] A review court "would also perform a preventive role inasmuch as it would act as an incentive to national courts to comply with international standards".[131] The member pointed to human rights courts and committees which "came into play only when domestic remedies had been exhausted [and there was] a final decision by the national courts".[132] He noted that "[i]f that was feasible with respect to torture or inhuman and degrading treatment, why should it not be possible in the case of the prosecution of war crimes and crime against humanity?"[133] The member fails, however, to explain how an optional court could provide any real incentive.

Another member noted that the simplest solution would be to vest the court with exclusive jurisdiction. That would "eliminate, or at least solve, the many complex problems that would lead to conflicts".[134] He pointed out, however, that a concurrent jurisdiction was a compromise solution and probably most acceptable in the eyes of states "as it would allow them to exercise their sovereignty in judicial matters, but it was more complex and delicate".[135]

One member argued that a review competence should be of a "recommendatory nature and should not have the effect of overriding the national criminal tribunal's final judgement".[136] Another member noted that only an exclusive international jurisdiction would prevent states from shielding criminals. It was not realistic that states, on the one hand,

> "would refuse to abandon their judicial sovereignty, preferring to preserve the right to try all crimes, including and especially the gravest, while being willing to confer such jurisdiction on a case-by-case basis as and when they wished".[137]

---

[130] *YBILC 1991, Vol. I*, A/CN.4/SER.A/1991, p. 11, para. 15 (Mr. Graefrath).
[131] *Ibid.,* para. 16.
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.,* p. 18, para. 32 (Mr. Mahiou).
[135] *Ibid.,* para. 34.
[136] *Ibid.,* p. 23, para. 24 (Mr. Ogiso).
[137] *Ibid.,* p. 30, para. 37 (Mr. Razafindralambo).

This would, he remarked, lead to "an international criminal court worthy of the name smacked of Utopia".[138] He also noted that "the principle of sovereignty had changed" and that it "did not seem consistent with current trends to invoke the concept of sovereignty to rule out exclusive jurisdiction".[139] This ignores, however, that a compulsory and complementary jurisdiction would remedy national inability and unwillingness, while allowing states to take their share of cases.

One member noted that national failure to proceed with a case should "automatically give rise to the jurisdiction of the international court".[140] It was also noted, more generally, that the perpetrator's home state and the victim state

> "might not always act with the necessary impartiality and objectivity. It therefore seemed preferable to have those crimes tried by the international criminal court rather than by national courts."[141]

The latter would cover two different scenarios: where the perpetrator is shielded and where his or her rights are violated. Finally, a member noted that the court should have exclusive jurisdiction over some crimes, such as the crime of genocide. For other crimes "it would be desirable to confer jurisdiction on the international criminal court only in those cases where national courts had stated they lacked jurisdiction".[142]

3.5.3. The 1992 session: The too progressive proposal

Having considered the ILC report, the General Assembly invited the Commission "to consider further and analyse the issues raised in its report […] in order to enable the General Assembly to provide guidance on the matter".[143]

3.5.3.1. General remarks

In his tenth report, the Special Rapporteur recalled that in 1953 members of the same Commission had been in favour of establishing an international criminal court (this was a dubious interpretation of the 1953 report). The Commission was naturally free to change its mind 40 years later, but, if it did so, it "would have to

---

[138] *Ibid.*
[139] *Ibid.,* para. 38.
[140] *Ibid.,* p. 39, para. 45 (Mr. Barsegov).
[141] *Ibid.,* p. 41, para. 3 (Mr. Rao).
[142] *Ibid.,* p. 47, para. 52 (Mr. Barsegov).
[143] General Assembly Resolution 46/54.

indicate the reasons why".[144] He personally felt that the developments in the international situation in no way justified such a reversal. The Commission had to "put an end to an outmoded discussion and press ahead".[145]

The Special Rapporteur noted the reservation that some states had raised in the Sixth Committee that the current system of international proceedings, based on universal jurisdiction, "has produced reasonably satisfactory results, and that the establishment of a court could restrict the scope of that rule and impede its application".[146] The Special Rapporteur noted for his part that "the principle of universal jurisdiction has major drawbacks" and that states applying it are "placed under extreme duress", such as threats or violence. Under such duress

> "the State concerned fails to extradite the accused, and if it decides to prosecute, the outcome of the trial may not be equitable; either because the defendant is acquitted or because the penalty imposed is completely farcical – a slap on the wrist that does not fit the crime. Because of the principle *non bis in idem* the accused cannot be prosecuted again."[147]

3.5.3.2. The relationship with national jurisdictions

The Special Rapporteur proposed that the court should not be competent to hear appeals against national decisions.[148] He noted that a few members of the Commission had wanted to give the court appeal jurisdiction, but this had been "vigorously opposed by others [as] allowing the court to review rulings of national courts would undermine the sovereignty of States".[149] At the same time, however, the Special Rapporteur proposed exclusive international jurisdiction (see below) so in reality there would be no competition between the two levels.

One member remarked that states "were not prepared to give up the exercise of their sovereignty and the international criminal court should only have subsidiary jurisdiction".[150] The competence to review decisions handed down by national courts or to hear appeals against them "should be ruled out and the bringing of an action before the court should not be made contingent on the exhaustion of

---

[144] *YBILC 1991, Vol. I*, *supra* note 130, p. 29. para. 20.
[145] *Ibid.*
[146] *YBILC 1992, Vol. II*, *supra* note 56, Part One, p. 52, para. 6.
[147] *Ibid.,* pp. 52-53, para. 7.
[148] *Ibid.*
[149] *Ibid.,* para. 9.
[150] *Ibid.,* p. 16, para. 17 (Mr. Vargas Carreño).

domestic remedies, for the two types of jurisdiction were completely different".[151] Thus, this suggestion would allow the court to interfere only *vis-à-vis* national inaction and not to remedy adequate national proceedings.

A subsequent working group recognised that "the normal and natural setting for criminal trials [had] always been the national criminal trial courts of States".[152] It added, however, that this "was not the only possible solution, and it [had] run into difficulties in certain special cases".[153] It had at times proved difficult to bring the offenders to justice, especially when members of governments had committed the crimes. Three situations were identified where an international trial system might prove useful: First, an international trial could be "the only forum that the relevant parties can agree on as appropriate for trial", for instance where "the State itself is alleged to have been implicated".[154] Second, the custodial state could be "under threat of […] acts of terrorism", or the judicial system of a small state could be "overwhelmed by the magnitude of a particular offence".[155] Third, a successor government could be "unwilling or unable" to try members of the former government. A state could then prefer an international trial "because of its greater legitimacy in the circumstances".[156] The working group noted that in some of these situations "there is *no effective prospect* of trial in any national court", and that in others "there may be perceived problems with the legitimacy or fairness of [a] trial".[157]

This statement does not address the problem of unwilling states adequately. It assumes, unrealistically, that a state could be unwilling but still view an international trial as preferable. Ironically, the report underscores this lack of realism when it notes that

> "the problem is not that national courts are working improperly or are misconstruing the provisions of international treaties or the meaning of general international law [but that they seem to deal ineffectively] with an important class of international crime, especially State-sponsored crime or crime which represents a fundamental challenge to the integrity of State structures".[158]

---

[151] *Ibid.*

[152] *YBILC 1992, Vol. II*, *supra* note 56, Part Two, p. 62, para. 25.

[153] *Ibid.,* para. 26.

[154] *Ibid.,* para. 28.

[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.*

[158] *Ibid.,* p. 64, para. 39.

The report suggested that the suspect's home state should only be able to prevent the court from exercising jurisdiction "if that State is prepared to prosecute the accused before its own courts".[159] The term "prepared to" is, however, vague. Apparently, it would not require genuine national proceedings.

The report lists several functions that an international criminal court could have in addition to a regular trial function: it court could (i) give advisory opinions to national jurisdictions on the understanding of international criminal law;[160] (ii) preliminarily qualify a state's conduct "as fitting a given international category […] after which the trial of individuals for their involvement in the activity could take place at national level";[161] (iii) provide a "system of international inquiry or fact-finding, in some way linked to the trial of the accused in a national court";[162] and (iv) provide an "official system of observing national trials".[163]

The list of possible functions is ambitious. To provide states with such monitoring, legal and fact-finding expertise would require a huge apparatus with enormous resources. At the same time, members still sought to confine the regular trial function in a way which would bar the court from interfering effectively *vis-à-vis* state-sponsored crimes.

3.5.3.3. Conferment of jurisdiction

In his report, the Special Rapporteur proposed that the international court be given "exclusive and compulsory jurisdiction" over genocide, systematic or mass violations of human rights, apartheid, illicit international trafficking in drugs and seizure of aircraft and kidnapping of diplomats or internationally protected persons.[164] He noted that he did not dare hope to have found a fully satisfactory solution and that the idea underlying his draft was one expressed at the last session, namely, "that certain crimes, such as genocide, were of such a nature that they could not but come within the exclusive jurisdiction of the court".[165]

One member remarked that the function envisaged was too ambitious. "[I]t would be necessary to abandon the outline that was taking shape, as well as dreams

---

[159] *Ibid.,* p. 67, para. 66.
[160] *Ibid.,* p. 70, para. 87. Reference was made to the EU system.
[161] *Ibid.,* para. 88.
[162] *Ibid.,* para. 91.
[163] *Ibid.*
[164] *YBILC 1992, Vol. I*, A/CN.4/SER.A/1992, pp. 3-4, para. 4.
[165] *Ibid.*

of establishing a permanent Nuremberg-type tribunal."[166] Another member noted that while it might be desirable to confer compulsory jurisdiction on the court, he "doubted whether it was feasible at the present time". He also noted that the court's jurisdiction "would be not only compulsory but exclusive, a limitation that made matters worse", and that the proposal, "which precluded appeals against decisions rendered by national courts, was open to criticism inasmuch as it deprived the court of an international *role*".[167]

The step from the optional concurrent jurisdiction envisaged in the ninth report to a compulsory exclusive jurisdiction envisaged in the tenth report (albeit not for war crimes) was too progressive. The report of the subsequent working group noted that most members considered the regime as too extensive.[168] The working group instead proposed a court which "would be essentially a facility for States parties to its statute [and] not have compulsory jurisdiction".[169] It was stressed that the court should not have exclusive jurisdiction. The majority did not envisage a full-time international court but an "established structure which could be called into operation when required".[170] This would "have the advantage of existing as a legal entity […] without having the disadvantage of being a costly body with a permanent staff which might not be called upon to act from one year to the next".[171] Clearly, the working group did not expect states to resort to the court very often.

3.5.3.4. Summing up

The 1992 session was marked by a very progressive report from the Special Rapporteur at the beginning of the session and a considerable step backwards in the subsequent discussions. A plausible explanation is, however, that even the more progressive members were convinced about the necessity of establishing a flexible facility for states. It was noted that "more far-ranging proposals may be made at a later stage, if and when a modest and flexible entity has been established and has proved its worth in practice".[172] In 1953, the view that it "was better to have no international criminal court than a second-rate one" had prevailed before the view

---

[166] *Ibid.,* p. 18, para. 35 (Mr. Pellet).
[167] *Ibid.,* pp. 20-21, para. 16 (Mr. Al-Baharna).
[168] *Ibid.,* p. 66, para. 55.
[169] *Ibid.,* para. 42.
[170] *Ibid.*
[171] *Ibid.*
[172] *YBILC 1992, Vol. I*, *supra* note 164, p. 64, para. 43.

that it "was better to create a court with imperfect powers and limited competence than to create none at all".[173] Now, almost 40 years later, the latter view prevailed.

The 1992 discussions reflect optimism in two ways: First, there was a positive general attitude toward the establishment of an international criminal court, although it was not envisaged as strong as some would have desired. Second, there appears to have been a feeling that if the court lived up to the expectations, sceptic states would be convinced. Some members probably saw it as their main task to ensure that diplomatic negotiations would be initiated.

3.5.3.5. State comments

Upon receipt of the report, the UN Secretary-General invited states to submit their comments.[174] These comments, although only nine, make interesting reading. Most of the commenting states, including Australia and the Nordic countries, favoured an optional jurisdiction. The Nordic countries noted:

> "The suggestion in the Working Group's report that by becoming a party to the Statute a State would only accept certain administrative obligations is endorsed. The States parties should accept the court's jurisdiction by making a declaration to this effect, analogous to acceptance of the compulsory jurisdiction of ICJ."[175]

A minority among the commenting states, including Bulgaria and Italy, were more open-minded towards a compulsory jurisdiction.[176]

3.5.4. The 1993 session: An opt in or an opt out court controlled by states

The General Assembly once again invited the Commission to continue its work, this time "with a view to drafting a statute on the basis of the report of the Working Group taking into account the views expressed in the Sixth Committee as well as any written comments received from States".[177]

3.5.4.1. Relationship with national jurisdictions

In his 11th report, the Special Rapporteur included a "draft statute for an international criminal court". As for the issue of admissibility, only the *ne bis in idem*

---

[173] *Report of the 1953 Committee*, *supra* note 73, p. 8.
[174] General Assembly Resolution 47/33.
[175] *YBILC 1993, Vol. II*, A/CN.4/SER.A/1993/Add.1, Part One, p 140, para.6.
[176] *Ibid.,* p. 135, para. 4 and p. 137, paras. 6 *et seq*.
[177] General Assembly Resolution 47/33.

scenario was regulated. A completed national trial would not bar international prosecution when "the act in question was characterized as an ordinary crime", and when "the proceedings in the [national] court were not impartial or independent or were designed to shield the accused from international criminal responsibility".[178] Some members, however, still "expressed strong reservations about allowing the Court to review the trial proceedings of national courts as an unacceptable encroachment on State sovereignty".[179]

3.5.4.2. Conferment of jurisdiction

The Special Rapporteur proposed that "[t]he jurisdiction of the Court shall not be presumed", and that the court would only have jurisdiction

> "provided that the State of which [the alleged perpetrator] is a national and the State in whose territory the crime is presumed to have been committed, have accepted its jurisdiction".[180]

The question as to how such acceptance would be given (compulsory or optional) was not regulated in the report. A subsequent working group presented a draft which proposed two essential jurisdictional features: First, as the general rule, the acceptance of jurisdiction by "any State which has jurisdiction under the relevant treaty" would suffice, seemingly giving the court a quasi-universal jurisdiction. There was, however, a catch: when the suspect was present in his or her home state or in the territorial state, that state would also have to accept the jurisdiction. Second, the draft proposed two conceptually different mechanisms for accepting the court's jurisdiction: (i) states parties would accept the court's jurisdiction by lodging a declaration to that effect, possibly limited to some crimes (an opt-in regime); or (ii) states parties would accept the court's jurisdiction unless a declaration to the opposite effect was lodged (an opt-out regime). The new draft was subject to little debate, and the ILC summarised:

> "Though the Commission was not able to consider the draft articles in detail at the current session, it felt that, in principle, the proposed draft articles provided a basis for consideration by the General Assembly at its forty-eight session."[181]

---

[178] Draft article 45(2) (a) and (b). This draft clearly was inspired by the ICTY Statute.

[179] *YBILC 1993, Vol. II*, *supra* note 175, Part Two, p. 121, comment (5) to draft article 45 (*ne bis in idem*).

[180] *Ibid.,* Part One, p. 115, para 32, draft article 5(1).

[181] *YBILC 1993, Vol. II*, *supra* note 175, Part Two, p. 20, para. 99.

3.5.5. The 1994 session: A modest jurisdiction with effective allocation

In December 1993, the General Assembly requested the ILC to continue its work as a matter of priority

> "with a view to elaborating a draft statute […] taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States".[182]

The 1994 discussions reflect the essential differences between the ILC members as to the proper role and jurisdiction of the ICC. Some held that that the 1993 draft "gave too much prominence to inter-State relations rather than a direct relationship between the individual and the international community".[183] Others noted the need to take into account current international realities, including the need to "ensure coordination with the existing system of national jurisdiction and international cooperation" and the need for "broad acceptance of the statute by States which might require limiting its scope".[184] The latter group also noted that "the political aspects of the topic required a realistic approach in which those were left to the decision of States".[185]

3.5.5.1. The relationship with national jurisdictions

There was disagreement as to whether the relationship with national jurisdictions was adequately and appropriately addressed in the 1993 draft. Some envisaged the court as "a *facility* for States that would supplement rather than supersede national jurisdiction".[186] Others envisaged it as "an *option* for prosecution when the States concerned were unwilling or unable to do so, subject to the necessary safeguards against misuse of the court for political purposes".[187]

One member asked whether the international court should not have the power to stay the proceedings on specified grounds such as "the existence of an adequate national tribunal with jurisdiction over the offence or the fact that the acts alleged

---

[182] General Assembly Resolution 48/31.
[183] *YBILC 1994, Vol. II*, *supra* note 115, Part Two, p. 21, para. 48.
[184] *Ibid*.
[185] *Ibid*.
[186] *Ibid.,* para. 50 (emphasis added).
[187] *Ibid*.

were not of sufficient gravity to warrant trial at the international level".[188] He fails, however, to indicate when a national tribunal would be "adequate".

Another member argued that the 1993 draft did not provide adequate protection for a state "which was investigating a situation but which had not yet made an accusation or taken the accused into custody".[189] He suggested that a state's provision to the Prosecutor of "information concerning such a situation" would be a valid basis for at least a "finite period of delay". [190] Yet another member countered that the court "must use sparingly the option of 'ceding' jurisdiction to national courts, whose earlier results might not always have been satisfactory".[191]

One member noted, not very progressively, that one way of building up the court would be to "give it *advisory jurisdiction* to enable it to help national courts interpret the treaties that provided for the punishment of international crimes".[192] Another member endorsed the proposal on *ne bis in idem*, but as the other provisions were formulated, the court "would actually serve as a higher court or a court of review for national courts, something that would have a significant impact on the traditional sovereignty of States".[193] He argued that in order to address sovereignty concerns "the international criminal court and national courts should be parallel and complementary to each other".[194] He fails, however, to elaborate further on the term "complementary".

One member noted that "the Working Group should try to introduce a system which was complementary to the criminal justice systems of States in areas where those systems were effective [*sic*]".[195] He was subsequently selected as the chair of the Working Group. When presenting the Group's report, he noted that "[t]here had been a strong internationalist school in the Working Group favouring a full-scale court with full-time judges and extensive, even exclusive jurisdiction, thus replacing some elements of national criminal justice systems".[196] Preambular paragraph 3 of the proposal read:

---

[188] *YBILC 1994, Vol. I*, *supra* note 64, p. 9, para. 9. 1 (Mr. Crawford).

[189] *Ibid.,* p. 27, para. 57 (Mr. Rosenstock).

[190] *Ibid.*

[191] *Ibid.,* p. 19, para. 27 (Mr. Bowett).

[192] *Ibid.,* p. 31, para. 13 (Mr. Carreño).

[193] *Ibid.,* p. 38, para. 10 (Mr. He).

[194] *Ibid.*

[195] *Ibid.,* p. 126, para. 2 (Mr. Crawford). This member clearly meant to use the term "ineffective" instead of "effective".

[196] *Ibid.,* p. 190, para. 58.

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

The Working Group had originally proposed the wording "in cases which those systems cannot resolve". One member had remarked, however, that those words "did not accurately reflect the concept of complementarity between the court and national criminal systems".[197] They might give the wrong impression that it was

> "a question either of cases which national systems did not have the *competence* to resolve, cases which could not be completed for some reason or cases in which domestic remedies had been exhausted".[198]

The proposed article on admissibility read:

> "Article 35
> Issues of admissibility
>
> The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this statute set out in the Preamble, that a case before it is inadmissible on the ground that the crime in question:
>
> 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;
>
> 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
>
> Is not of such gravity to justify further action by the Court."[199]

The proposed article on *ne bis in idem* read:

> "Article 42
> Non bis in idem
>
> 1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

---

[197] *Ibid.,* p. 195, para. 4 (Mr. Robinson).
[198] *Ibid.*
[199] *YBILC 1994, Vol. II*, *supra* note 115, p. 52.

> 2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:
>
> The acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or
>
> The Proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.
>
> 3. In considering the penalty to be imposed on a person convicted under this statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served."[200]

The chair of the Working Group noted that article 35, "as one of the most important new provisions, responded to the concern expressed by many States".[201] He explained that

> "emphasis was now placed on the functions of the court, which was intended (a) to exercise jurisdiction only over the most serious crimes of concern to the international community, and (b) to complement as far as possible national criminal justice systems in cases which they could not resolve. Article 35 provided for discretion not to exercise jurisdiction, taking those factors into account."[202]

One member noted that subparagraph (b) of article 35 provided that the court could decline to exercise its jurisdiction if the crime in question was under investigation by a state having jurisdiction over the crime. He further noted that it might happen that a state, especially a small state, might have investigated a crime and concluded

> "for one reason or another that it could not cope with the situation and that it would like to bring the case before the international criminal court. As article 35 was worded at present, a State could not do so."[203]

One of the Working Group's members noted that the arguments advanced against article 35 were hardly convincing. The article

> "had been drafted in response to serious concerns which had been expressed, and the provision was a very pragmatic one without which fewer States might accede to

---

[200] *Ibid.,* p. 57.

[201] *YBILC 1994, Vol. I*, *supra* note 64, p. 193, para. 73.

[202] *Ibid.,* p. 191, para. 60.

[203] *Ibid.,* p. 226, para. 39 (Mr. Robinson).

> the statute. In subparagraph (b) in particular, the conjunction 'and' made all the difference: the mere fact that a crime was being investigated did not bind the court in any way at all."[204]

One member remarked that, in his view, article 35 was inappropriate as no court could have discretionary powers except of its own internal functioning. Discretionary powers, as indicated by the term "may" in the proposed article 35, would mean that

> "no one would have a remedy against it, neither the accused nor even the State that brought a complaint against an individual and met with a judicial decision that the case could not be pleaded. The article was poorly worded and should be reformulated or deleted."[205]

The chair of the Working Group responded that article 35 should not be deleted or confined to a general clause because "the conclusion had been reached, after two years' work, that it was impossible to confine the court's jurisdiction merely by defining the crimes it would have to try".[206] He noted that "in article 35 the notion of admissibility had been introduced in place of the notion of the discretion of the court".[207]

Another member maintained that subparagraph (a) of article 35 should be deleted as it was ambiguous.[208] The Commission voted against that.[209] In its report to the General Assembly, the ILC noted that there were

> "different views as to whether [the court's] relationship to national courts was adequately addressed in the present draft. Some envisaged the court as a facility for States that would supplement rather than supersede national jurisdiction; others envisaged it as an option for prosecution when the States concerned were unwilling or unable to do so, subject to the necessary safeguards against misuse of the court for political purposes".[210]

It was also noted that there had been suggestions that the court should "have discretion to decline to exercise its jurisdiction if the case was not of sufficient

---

[204] *Ibid.,* p. 227, para. 48 (Mr. Rosenstock).
[205] *Ibid.,* p. 228, para. 63 (Mr. Thiam).
[206] *Ibid.,* p. 230, para. 91.
[207] *Ibid.,* p. 300, para. 49.
[208] *Ibid.,* para. 50 (Mr. Pellet).
[209] *Ibid.,* para. 53.
[210] *YBILC 1994, Vol. II*, *supra* note 115, Part Two, p. 21, para. 50.

gravity or could be adequately handled by a national court".[211] This way the court would not "encroach on the functions of national courts".[212] It was noted that the Commission had bore in mind that "the court's system should be conceived as complementary to national systems", as provided in proposed preambular paragraph 3.[213] In the commentary to this paragraph, the Commission noted that the court

> "is intended to operate in cases when there is no prospect of [the suspect] being duly tried in national courts. The emphasis is thus on the court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements."[214]

It was noted that "some members believed that the preamble should be an operative part of the Statute, given its importance".[215] Further, the Commission noted that

> "[t]he purposes set out in the preamble [referring to the unavailability and ineffectiveness of national trial procedures] are intended to assist in the interpretation and application of the statute, and in particular in the exercise of the power conferred by article 35".[216]

It is not perfectly clear what is meant by "the power conferred by article 35". One the one hand, the term "may" in article 35 might indicate that the court merely should have the possibility to defer. On the other hand, draft article 27(2) provides: "The Presidency shall examine the indictment" and determine "having regard, *inter alia*, to the matters referred to in article 35 [whether] the case should […] be heard by the Court."[217]

---

[211] *Ibid.,* p. 22, para. 50.

[212] *Ibid.*

[213] *Ibid.,* p. 26, para. 81.

[214] *Ibid.,* p. 27, commentary (1).

[215] *Ibid.,* p. 27, commentary (4) to the preamble.

[216] *Ibid.,* commentary (3).

[217] *Ibid.,* p. 47, subparagraph (b) of draft article 27(2). It should be noted that article 17(1) of the Rome Statute provides that the Court "shall determine that a case is inadmissible" in the listed situations. There is, however, no duty for the Court to examine the admissibility on its own motion, see article 19(1).

3.5.5.2. Conferment of jurisdiction

Draft article 21(1) (a) proposed that the court should have inherent jurisdiction in cases of genocide, meaning that states would accept the court's jurisdiction *ipso facto* by ratifying its constituent instrument. The jurisdiction over genocide would, according to draft article 25(1), only be contingent on the filing of a complaint by a state party. In any other case, a complaint had to be filed by a state party and the court's jurisdiction had, according to draft article 25(1) (b), to be accepted by the custodial state *and* the territorial state. If the custodial state had already granted extradition to another state, that state would also need to have accepted the jurisdiction. Otherwise, the Statute could override an operative extradition arrangement in relation to a particular accused.[218]

In the final 1994 draft, the Commission noted that "the prohibition of genocide is of such fundamental significance […] that the Court ought, exceptionally, to have inherent jurisdiction over it by virtue solely of the States participating in the Statute, without any further requirement of consent or acceptance by any particular State".[219] It was noted that this approach was powerfully reinforced by article VI of the Genocide Convention (1948) "which does not confer jurisdiction over genocide on other States on an *aut dedere aut judicare* basis, but expressly contemplates its conferral on an international criminal tribunal to be created":[220] The inherent jurisdiction of genocide was one of the most important achievements of the Statute, and it would also "serve as a litmus test of the acceptability to States of any idea of an *ipso jure* jurisdiction".[221]

For the other crimes, aggression, crimes against humanity, war crimes and some treaty crimes referred to in an annexed list to the draft, an additional *ad hoc* acceptance of jurisdiction would be needed. As for the states that would have to have accepted the jurisdiction, the Commission proposed, for other crimes than genocide, that such acceptance be required from the custodial state and the territorial state, with the notable absence of the acceptance of the suspect's home state.[222] The Commission noted that

> "[s]everal members of the Commission would have preferred [the article] to have required acceptance by the State of the [suspect's] nationality, as well as or instead of

---

[218] *Ibid.,* p. 42.
[219] *Ibid.,* p. 37 (7).
[220] *Ibid.*
[221] *YBILC 1994, Vol. I*, *supra* note 64, p. 192, para. 64 (Mr. Crawford).
[222] Draft article 21(1) (b).

> the State on whose territory the crime was committed. In their view the location of the crime could be fortuitous and might even be difficult to determine, whereas nationality represented a determinate and significant link for the purposes of allegiance and jurisdiction."[223]

3.6. THE DISCUSSIONS IN THE AD HOC COMMITTEE (1995)

3.6.1. The nature of the complementarity principle

The *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* noted that some states still wanted to vest the ICC with primacy, referring to the *ad hoc* Tribunals.[224] Most states acknowledged, however, the special circumstances that explained the *ad hoc* Tribunals' primacy. Few states would not accept a primary international jurisdiction which was permanent and quasi-global. Besides, states began to realise that a complementary allocation mechanism could, if properly framed, be as effective as primacy. The Committee therefore started its negotiations with a fairly widespread understanding that the ICC should complement national judiciaries and not replace them.[225]

There was, however, considerable disagreement as to the precise framework of the principle.[226] It was noted that the ILC had envisaged a very high threshold for interfering *vis-à-vis* states, implied by the reference in the Commission's commentary to "cases in which there was no prospect that alleged perpetrators […] would be duly tried in national courts".[227]

Several states held that the complementarity principle "should create a strong *presumption* in favour of national jurisdiction".[228] It was noted that such presumption "was justified by the advantages of national judicial systems".[229] It is not easy to see, though, whether this refers to the *criteria* for determining the admissibility, to the burden of proof or to the very priority as such. Some states suggested, however, more explicitly that the presumption in draft article 35 should be reversed so that decisions of acquittal or conviction by national courts or

---

[223] *YBILC 1994, Vol. II*, *supra* note 115, Part Two, p. 42 (comment 6).
[224] *Report of the Ad Hoc Committee*, *supra* note 60, para. 48.
[225] Holmes 1999, p. 44.
[226] *Report of the Ad Hoc Committee*, *supra* note 60, paras. 29-47.
[227] *Ibid.,* para. 42. These states thus seemed to stress the words "no prospect" more than "duly tried".
[228] *Ibid.,* para. 31.
[229] *Ibid*.

decisions by national prosecution authorities not to prosecute were respected "except where they were not well-founded",[230] a wording closer to the Rome Statute. As for the burden of proof, ILC draft article 35(a) required that a national decision not to proceed with a prosecution was "apparently well-founded".

Other states stressed that the ILC had not intended to "establish a hierarchy between the international criminal court and national courts", or to allow the international court to "pass judgement on the operation of national courts in general".[231] The truth in this depends on what is meant by the term "hierarchy". As envisaged by the ILC, national and international jurisdiction would be concurrent, neither excluding the other. National jurisdiction could, in one sense, be viewed as "superior" in the sense that it would have priority *vis-à-vis* the international court. The international court could, in another sense, be viewed as "superior" as it would have the authority to set aside inadequate national proceedings. Indeed, some states expressed concerns that article 42 on *ne bis in idem* "conferred upon the international criminal court a kind of supervisory role" *vis-à-vis* national courts.[232] Certain states noted that they had constitutional difficulties with this provision.[233]

3.6.2. Competing national requests and national amnesties

Some delegations had problems with the wording in ILC draft article 53(4) that a state party "shall, as far as possible give priority to a request [for surrender to the court] over requests for extradition from other States".[234] This provision was considered as inconsistent with the principle of complementarity. The concern overlooks, however, the fact that when the ICC would request the surrender of a person, the court would already have confirmed the indictment,[235] and interested states would have had the opportunity to challenge the admissibility.

The status of national amnesties was also debated. Some states wanted to regulate the issue and indicate "the circumstances in which the international criminal court might ignore, or intervene ahead of, a national amnesty".[236] This issue appeared at several stages during the entire negotiations. Some proposals were made,

---

[230] *Ibid.*

[231] *Ibid.,* para. 43.

[232] *Ibid.*

[233] *Ibid.,* para. 178.

[234] *Ibid.,* para. 44.

[235] Article 27(2) of the ILC Draft Statute. The procedure is upheld under the Rome Statute, under which the Pre-Trial Chamber must confirm the charges, see article 61.

[236] *Report of the Ad Hoc Committee*, *supra* note 60, para. 46.

but no express regulation was agreed upon. As explained elsewhere in this book, the Prosecutor will have the discretional authority to decide that proceeding with a given case will not serve the "interests of justice".

3.6.3. The placing of the principle

There was some disagreement in the Committee as to where the complementarity principle should be placed. The majority held that a reference in the Preamble was insufficient, "considering the importance of the matter". Therefore, "a definition or at least a mention of the principle should appear in an article of the statute, preferably in its opening part".[237] The intention was to "remove any doubt as to the importance of the principle in the application and interpretation of subsequent articles".[238] According to another view, the principle "could be elaborated in the preamble". Reference was made to article 31(1) and (2) of the Vienna Convention, according to which the preamble is considered part of the context in which a treaty shall be interpreted.[239] Article 35 of the ILC Draft Statute was finally agreed upon by a majority as the provision which should "give clear expression to" the principle of complementarity.[240] One point was probably to regulate all essential issues of jurisdiction, admissibility and prosecutorial discretion in the main body of the Statute.

3.6.4. Discretion or duty to defer

The term "may" in draft article 35 was probably a curiosity and not intended to leave the court with discretion as to whether it should defer to states once the criteria for deferral were fulfilled. In its commentary, the ILC had noted that the provision was meant to "ensure that the court only deals with cases in the circumstances outlined in the preamble, that is to say where it is really desirable to do so".[241] There was broad agreement in the Ad Hoc Committee that there should be no discretion "if the grounds for inadmissibility had been duly made out".[242] This was necessary to ensure that the court "would not interfere with the legitimate investigative activities of

---

[237] *Ibid.,* para. 36.
[238] *Ibid.*
[239] *Ibid.,* para. 37.
[240] *Ibid.,* para. 157.
[241] *YBILC 1994, Vol. II*, *supra* note 115, Part Two, p. 52, commentary (1).
[242] *Report of the Ad Hoc Committee*, *supra* note 60, para. 159.

national authorities or exercise jurisdiction when a State was willing and able to do so".[243]

3.6.5. The final say

A controversial point was whether the ICC or States should have the *final say* regarding the admissibility.[244] The United States remarked that it would only give the ICC the final say if the subjective admissibility criteria were narrowly understood.[245] This contentious question would not be agreed upon until the final hours of the Rome Conference.

3.6.6. Self-referrals

Some states suggested that a state should be allowed to voluntarily decide to relinquish its jurisdiction in favour of the international criminal court.[246] Others held that this would not be consistent with the principle of complementarity and stressed that "the international criminal court should in no way undermine the effectiveness of national justice systems and should only be resorted to in exceptional cases".[247]

3.6.7. The admissibility criteria

Several states felt that the terms "not available" and "ineffective" were too vague. In particular, the term "ineffective" was a source of concern, and states were uncertain as to the standard for determining this. It was noted that the principle of complementarity "needed to be much more fully developed than it was in the draft".[248] Some states stressed that the court should not be allowed to set aside a national proceeding simply because the national prosecutor had done a sloppy job. The test should reflect whether the state in question had acted in good faith. Some states noted that the criterion referring to a decision not to prosecute, which was "apparently not well-founded", gave rise to divergent interpretations. The United

---

[243] *Ibid.,* para. 109.

[244] *Ibid.,* paras. 48 and 49. See Bleich 1997, pp. 233-35.

[245] *Comments of United States to Ad Hoc Committee on the Establishment of an International Criminal Court*, discussion paper A/AC.244/1/Add.2 (1995).

[246] *Report of the Ad Hoc Committee*, *supra* note 60, para. 47.

[247] *Ibid.*

[248] *Ibid.,* para. 92.

States argued that the ICC should be barred from interfering when a state had a judicial system in active operation and investigated or prosecuted in good faith.[249] It was suggested that the criterion be amended to "had been duly investigated by a State and there was no reason to believe that the decision of that State not to prosecute was not well founded". This would obviate the need for criterion (a) in the proposed article 35, regarding cases that "had been duly investigated". Further, subparagraph (b), which referred to cases under investigation where there was "no reason for the court to take further action", should be revised.[250] The term "no reason" is, however, still vague compared with the factors listed in the Rome Statute's article 17(2) and (3), which describe more distinct scenarios. As for subparagraph (c), regarding the gravity of the crime, the question of "the entitlement of the accused to invoke [it]" was raised. Delegations also noted that grounds deriving from the *ne bis in idem* principle[251] and the rule of speciality[252] should be included in the grounds for inadmissibility in article 35.

Some states had problems with article 42(2) (a) authorising the ICC to set aside a national judgement if the crime had been characterised as an "ordinary crime".[253] This alternative was later omitted. Some states also considered the reference in subparagraph (b) to proceedings which "were not impartial or independent or were designed to shield the accused from international criminal responsibility" and to a cases which were "not diligently prosecuted" as too vague and subjective.[254] Other states proposed the insertion of additional grounds of inadmissibility such as the "acquittal after a properly brought case".[255] Some states called for a clarification of the term "interested State" in article 35, indicating which states would have the right to challenge the admissibility of a case.[256]

Some states noted that "instead of assuming a priori that certain categories of crimes were better suited for trial by an international criminal court, it would be preferable to determine the circumstances when trial by such a court was

---

[249] *Ibid.*

[250] *Ibid.*

[251] Article 42(2) of the ILC Draft Statute.

[252] *Ibid.,* article 55.

[253] *Report of the Ad Hoc Committee*, *supra* note 60, para. 179.

[254] *Ibid.,* para. 180. The term "*international* criminal responsibility" should be noted. In the Rome Statute, this is replaced by the broader term "criminal responsibility".

[255] *Ibid.,* para. 162.

[256] *Ibid.,* para. 160. Under the Rome Statute, these are the states purporting to deal or have dealt with a case, as well as the territorial state and the state of the perpetrator's nationality, see article 19(2) (b) and (c).

appropriate".[257] The Committee summed up that the complementarity principle was "an essential element in the establishment of an international criminal court" which was, however, "calling for further elaboration so that its implications for the substantive provisions of the draft Statute could be fully understood".[258]

3.6.8. Conferment of jurisdiction

The question of *inherent jurisdiction*, which the ILC had proposed for the crime of genocide, was the source of much controversy. Some states strongly opposed the idea of a partially inherent jurisdiction. Other states noted that "inherent jurisdiction could not be viewed as incompatible with State sovereignty since it would stem from an act of sovereignty, namely, acceptance of the Statute".[259] It was pointed out that inherent jurisdiction "did not mean *exclusive* jurisdiction" and that it "would not strip States parties of the power to exercise jurisdiction at the national level".[260] Rather, the question of *priority* of jurisdiction "would have to be resolved on the basis of the principle of complementarity".[261] Inherent jurisdiction only meant that the court would have jurisdiction over a type of crime, not that it could exercise it. The report succinctly noted that

> "the effect of the principle of complementarity could only be, at most, to defer the intervention of the court, whereas rejection of the inherent jurisdiction concept would result in the court's complete inability ab initio to be seized of a case".[262]

3.7. THE DISCUSSIONS IN THE PREPARATORY COMMITTEE (1996-98)

As the Preparatory Committee on the Establishment of an International Criminal Court opened its discussions in 1996, there was virtual consensus that "complementarity […] was to reflect the jurisdictional relationship between the International Criminal Court and national authorities, including national courts".[263] Only a few delegations still wanted a primary jurisdiction, most of them referring to

---

[257] *Ibid.,* para. 92.
[258] *Ibid.,* para. 29.
[259] *Ibid.,* para. 93
[260] *Ibid.,* para 91.
[261] *Ibid.*
[262] *Ibid.*
[263] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I*, 1996, A/51/22, para. 153.

the *ad hoc* Tribunals and how they "exercised inherent and primary jurisdiction over certain individual cases, with some deference to national justice systems as they currently existed".[264] This quasi-agreement was important. If primacy still had been an option, several states would have had difficulties in negotiating any of the jurisdictional issues, as the court would have been perceived as potentially more threatening.

As for the more detailed formulation of the complementarity principle, there were, however, still widely differing opinions as to "how, where, to what extent and with what emphasis complementarity should be reflected in the statute".[265] Many of the statements from states referred to below are indicative of the confusion as to what complementarity would actually entail. Nevertheless, specific problems would soon be singled out and certain views would begin to emerge.

3.7.1. The court's role

Some groups of states with more or less parallel views can be discerned. The statements of such groups will be referred to below, sometimes also illustrated by comments from particular states. The more "sovereignty-anxious" states pointed to the ILC's commentary to the Preamble that the "intention was for such a court to operate in cases where there was no prospect of persons who had been accused […] being duly tried in national courts".[266] It was noted that "it is not a question of the Court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having exceptional character." The exercise of police power and penal law was a prerogative of states under international law, and the court's jurisdiction should be viewed only as an exception to this prerogative. It was stressed that "the limited resources of the Court should not be exhausted by taking up the prosecution of cases which could easily and effectively be dealt with by national courts".[267]

---

[264] *Ibid.,* para. 158. A majority of the NGOs seemed to favour primacy, inspired by a speech before the Committee by then Chief Prosecutor of the *ad hoc* Tribunals, Louise Arbour, arguing that the Court would need primacy to be effective (on file with author).

[265] *Ibid.*

[266] *Ibid.,* para. 154.

[267] *Ibid.,* para. 155.

China noted that "the international court should be prohibited from taking precedence over national jurisdictions". [268] Israel called for a "redrafting of the draft statute text, which seemed to grant the international court the right to 'supervise' the proceedings of national courts".[269] Referring to the definition of complementarity in the Draft Statute, Egypt noted that

> "the lack of precision in that clause could give rise to conflicts potentially threatening to the court's authority. The statute should define a minimum standard of content required for the court to have jurisdiction."[270]

India noted that "the international court should neither be the 'first court of call' nor an appellate court. Recently established ad-hoc tribunals had been created following the complete collapse of national governance. The international court should not be used to override or erode national jurisdictions."[271]

Representing a more "court-friendly" view, other states noted that "while national authorities and courts had the primary responsibility for prosecuting the perpetrators [… ,] the Court was an indispensable asset in enhancing the prevention of impunity, which too often had been the reward for violators of human rights and humanitarian law".[272] The concern was raised that "complementarity should not be used to uphold the sanctity of national courts. Such an approach would shift the emphasis from what the Court could do to what the Court should not do."[273] Ireland noted that "in safeguarding the primacy of national jurisdictions, the international court should not be forced to 'bow' to national courts".[274] Finland called for a balanced approach to complementarity and that "[t]oo much emphasis on the

---

[268] *UN Press Release L/2773: Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions*, 2 April 1996 (available at http://www.un.org/News/Press/docs/1996/19960402.l2773.html).

[269] *UN Press Release L/2771: Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions*, 1 April 1996 (available at http://www.un.org/news/Press/docs/1996/19960401.l2771.html).

[270] *UN Press Release L/2772: Jurisdiction of Proposed International Criminal Court Discussed in Preparatory Committee on its Establishment*, 2 April 1996 (available at http://www.un.org/news/Press/docs/1996/19960402.l2772.html).

[271] *UN Press Release L/2773*, *supra* note 268.

[272] *Report of the Preparatory Committee*, *Vol. I*, *supra* note 263, para. 157.

[273] *Ibid.,* para. 158.

[274] *UN Press Release L/2771*, *supra* note 269.

safeguarding of national jurisdictions would render the court useless".[275] The representative of Italy noted that

> "[t]he court should not be reduced to a residual role. The statute should also include a clear definition of what is meant for a national jurisdiction to be unavailable or ineffective."[276]

Some delegations noted that "the establishment of the Court did not by any means diminish the responsibility of states to investigate vigorously and prosecute criminal cases".[277] Therefore, these states wanted the Preamble of the Statute "to reiterate the obligation of States in this respect".[278] Japan noted that the court "should not be a 'garbage can' into which national court systems could dump criminals that they should be punishing at the national level".[279] Others cautioned, however, that placing such a paragraph in the Preamble "might tilt the bias in favour of national jurisdiction in interpreting complementarity". According to these states, "the establishment of such a court was in itself a manifestation of States exercising their obligations to prosecute vigorously perpetrators of serious crimes".[280]

Highlighting the need for the court to consider cultural differences in the assessment of national proceedings, Tunisia noted that "the ad-hoc Tribunals for the Former Yugoslavia and for Rwanda seemed to be operating in competition with national courts", and the state "feared that national courts in developing countries might be overridden under the pretext that they could not adequately undertake prosecutions".[281]

The most fundamental issue regarding the allocation mechanism was whether it should let the court interfere only *vis-à-vis* incapacitated states ("unavailability" in the ILC draft) or also *vis-à-vis* states seeking to shield the perpetrator ("ineffectiveness"). Most states accepted the ILC's proposal that both be covered.[282] Some states noted, however, that "while the determination of 'availability' of national criminal systems was more factual, the determination of whether such a system was 'ineffective' was too subjective". Such a determination "would place the Court in the position of passing judgement on the penal system of a State", and that would

---

[275] *Ibid*.
[276] *Ibid*.
[277] *Report of the Preparatory Committee*, *Vol. I*, *supra* note 263, para. 156.
[278] *Ibid*.
[279] *UN Press Release L2773* (1996).
[280] *Report of the Preparatory Committee*, *Vol. I*, *supra* note 263, para. 156.
[281] *UN Press Release L/2773*, *supra* note 268.
[282] Holmes 1999, p. 47.

"impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court".[283] Despite such concerns, however, a consensus emerged that leaving out "unwillingness" would make it too easy for states to avoid ICC interference by conducting sham proceedings.[284]

3.7.2. The different types of national proceedings to be covered

It was noted that article 35 was too narrow, as it only covered cases that had been or were being *investigated*, and not cases that were being *prosecuted*, something which was covered by article 42 on *ne bis in idem*.[285] The omission was perceived as a major flaw as it might enable a state to shield a perpetrator by delaying a prosecution indefinitely. Some states, notably including South Africa, also suggested that "consideration should be given to how the complementarity regime would take account of national reconciliation initiatives entailing legitimate offers of amnesty or internationally structured peace processes".[286]

3.7.3. The admissibility criteria

In August 1997, to facilitate further negotiations, the coordinator of the informal consultations on admissibility focused on the issue of the admissibility criteria, preliminarily leaving aside the *ne bis in idem* issue and the procedures governing challenges to the admissibility.[287] A "rolling text" on admissibility was issued, with a text box at the top noting that the proposed text was "without prejudice to the views of any delegation", and that it did "not represent agreement on the eventual content or approach to be included in this article". Most states viewed this as a way to prevent concerned states from blocking a consensus. It was generally believed that the text box would finally disappear, which it did.[288] In addition, an "alternative solution" was included, pursuant to a last minute objection by Mexico, noting that

> "[a]n alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows: The Court has no

[283] *Report of the Preparatory Committee*, *Vol. I*, *supra* note 263, para. 161.
[284] Holmes 1999, p. 48.
[285] *Report of the Preparatory Committee*, *Vol. I*, *supra* note 263, para. 164.
[286] *Ibid.,* para. paragraph. 160.
[287] Holmes 1999, p. 45.
[288] *Ibid.,* p. 48.

jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."[289]

3.7.4. The "inability" criterion

The ILC draft was silent as to the meaning of "unavailability" in the Preamble. Article 35 was more specific than the Preamble, but it only addressed "ineffectiveness". The ILC had apparently been satisfied that the court could exercise jurisdiction when national systems failed to proceed.[290] Some states preferred the simple solution, that the court should have the authority to intervene in cases where a state, for some reason or another, did not exercise its jurisdiction. If the state should later decide to act, the court could return to the complementarity issue.[291] Other delegations felt, however, that this would give the court too broad discretion, and therefore they insisted on more detailed factors for determining "inability" expressly listed in the Statute. The eventual solution to this would be to let the Statute specify when a case would be inadmissible rather than when it would be admissible.

As a key factor for the determination of "inability", a reference to the "total or partial collapse" of a state's judicial system was proposed in August 1997. With the Rwandan situation present in mind, it was not so difficult to envisage a system's collapse. Some proposals were forwarded as to what would constitute a partial collapse, including references to the extent to which a state was exercising effective control over its territory, the existence of a functioning law enforcement mechanism and whether the state was able to obtain the accused or the necessary evidence.[292] Yet other criteria were suggested, such as the extent and scope of the crimes committed being such that it was evident that the national judiciary could not adequately address them, and whether the national proceedings were conducted independently and impartially. The latter criterion was, however, regarded by most states as relating more to "unwillingness" than to "inability".

It was ultimately decided that a further definition of "total or partial collapse" was unnecessary if there could be an agreement on an additional criterion referring instead to the effects of the collapse. The idea was that, in addition to the collapse itself, one of the additional criteria, referring to the relevant effect of the collapse,

---

[289] *Ibid.,* p. 46. See also Williams 1999, p. 388, para. 11.
[290] Holmes 1999, p. 44.
[291] *Ibid.,* p. 48.
[292] *Ibid.,* p. 49.

would have to be met before a state could be deemed "unable". A reference was proposed to the state being "unable to obtain the accused or the necessary evidence and testimony". Importantly, there would have to be causality between collapse and the state's inability to obtain the accused, *etc.* Some states were concerned that the wording would prevent the ICC from interfering where a state had collapsed but nevertheless was able to obtain the accused and *some* evidence. Therefore, the words "or otherwise unable to carry out its proceedings" were added.

3.7.5. The "unwillingness" criterion

France noted that the court "should be able to prosecute crimes only when it was clear that national courts would free the accused from international criminal responsibility or deliberately undertook a bad faith prosecution. The statute should clearly define which acts constituted such bad faith."[293] The United States said that an international criminal court "should be obliged to go through a 'checklist' of criteria to judge the efficacy of national courts".[294] Germany and Canada proposed that a case should be inadmissible if "the investigation or prosecution is being diligently undertaken", or if diligent investigation resulted in the decision not to proceed with a prosecution, based on "well-founded […] knowledge of all relevant facts".[295] Italy proposed, more concretely, that the ICC should be allowed to consider whether "there has been and continues to be unreasonable delay" in the proceedings, or the proceedings "were or are designed to shield the accused from international criminal responsibility" or "were or are [not] conducted with full respect for the fundamental rights of the accused, and […] the case was, or is, [not] diligently prosecuted".[296] Terms such as "apparently well-founded", "effectively" and "ineffective" all proved, however, unacceptable. The term "good faith" was not familiar to civil law states and therefore rejected.[297]

The easiest to agree upon was the additional criterion "for the purpose of shielding [the person concerned]".[298] There was general agreement that an obvious task for the ICC would be to interfere against deliberate attempts to circumvent justice. As the potential difficulties for the Prosecutor to demonstrate a state's

---

[293] *Ibid.*
[294] *Ibid.*
[295] On file with author.
[296] *Ibid.*
[297] Holmes 1999, p. 49.
[298] *Ibid.,* p. 50.

purpose were acknowledged, the alternative criterion "undue delay" was included and instead indirectly linked to the purpose by inserting the words "inconsistent with an intent to bring the person concerned to justice". As for the "not independently or impartially" criterion, an argument for including it was that the provision would cover situations where the state's intentions were good, but individuals manipulated the proceeding and caused a wrongful acquittal.[299] This author submits, however, that article 17 of the Rome Statute which refers to the lack of independence and impartiality does not cover criminal proceedings that are manipulated by actors not associated with the state when the state otherwise proceeds in good faith (this might instead amount to "inability").

3.7.6. The "genuinely" criterion

As for the term "genuinely" as a qualifier of the national proceedings, this proved uncontroversial. The coordinator noted that "some subjectivity had to be retained to give the Court latitude on which to base its decision of finding unwillingness".[300] Some states noted that they would prefer "ineffective", but some delegations vigorously objected to this because it gave the court an improper judgemental aspect. The term "genuinely" therefore prevailed as it "excluded elements of efficiency, while at the same time being more precise than 'sufficient' or 'reasonable grounds'".[301] No precedent in international law for the use of the term was quoted in the negotiations (and none seem to exist).[302]

3.7.7. Ne bis in idem

As for article 42 on *ne bis in idem*, some states had problems with the term "ordinary crime", which they argued was unclear and could create confusion. Other states felt it was necessary to address this situation which was covered by the Statutes of the two *ad hoc* Tribunals. The Netherlands noted:

> "A national court might wish to prosecute an act which would constitute murder at the national level, but genocide at the international level. Just because the person

[299] *Ibid.,* pp. 50-51.
[300] Holmes 1999, p. 49-50.
[301] Holmes 2002, p. 674; Holmes 1999, p. 50.
[302] Holmes 2002, p. 674; Benzing 2003, p. 604.

> had been properly convicted of murder, he should not be allowed to escape prosecution for genocide."[303]

It was suggested that a reference "to the effect that national proceedings did not take account of the international character and the grave nature of the act might be useful".[304] Some states felt, however, that "this wording would grant the Court an excessive right of control over national jurisdictions and would even undermine the principle of complementarity".[305] The court should not be an appellate court, it was noted.

An exception from the *ne bis in idem* rule was proposed for "cases where the sentence imposed by the national jurisdiction was manifestly inadequate for the offence".[306] A possible solution, it was noted, would be to give the court the authority to interfere when national courts had "manifestly intended to shield the accused from his/her international criminal responsibility".[307] Both this alternative, and the one regarding the "ordinary crime" characterisation, were eventually avoided. The *ne bis in idem* provision would instead focus on the intent behind and the character *of* the proceedings as such, *i.e.* a purpose of shielding and a lack of independence or impartiality.

Some states noted that the exceptions from the *ne bis in idem* rule should be extended beyond the trial to embrace parole, pardon, amnesty, *etc.*[308] Others noted that the *ne bis in idem* rule should be merged with the general provision on admissibility.[309] While the issue of post-conviction measures is not expressly reflected in the Rome Statute, the latter concern was addressed with the inclusion of article 17(1) (c) referring *to* article 20 on *ne bis in idem*.

3.7.8. The final say

A crucial question was who would have the final say in an admissibility determination: the ICC or the state? An external authority was never seriously envisaged. Most states shared the ILC's concern that an unwilling state could not be expected to assess the admissibility question objectively. On the other hand, giving

---

[303] *UN Press Release L/2773*, *supra* note 268.
[304] *Report of the Preparatory Committee*, *Vol. I*, *supra* note 263, para. 171.
[305] *Ibid.*, para. 172.
[306] *Ibid.*, para. 173.
[307] *Ibid.*
[308] *Ibid.*, para. 174.
[309] *Ibid.*

the court too much discretion in the admissibility question would create uncertainty among states as to when the ICC would interfere.[310] The prevailing view was therefore that it was necessary to give the court the final say, but that the criteria should be sufficiently precise so as to provide reasonable predictability. A remark by the United States was illustrative. It noted that it

> "should be up to the court itself to determine that conditions were satisfied so as not to trigger its involvement. However, states should determine the scope of those conditions and should incorporate them in the statute."[311]

3.7.9. The burden of proof

With regard to the burden of proof as to the admissibility criteria, the Netherlands noted that

> "the benefit of doubt should go to the international criminal court. The risk of impugning upon the prerogatives of national jurisdictions was far outweighed by the risk that perpetrators might go free when protected by national authorities."[312]

Some states noted that the burden on the Prosecutor to demonstrate national failure should not be too strict, or else the court might be paralysed. While attempts should be made to minimise the risk of the court dealing with a matter that could eventually be handled adequately at the national level, it was "still preferable to the risk of perpetrators of serious crimes being protected by sympathetic national judiciaries or authorities".[313] As will be explained below, the Rome Statute requires the Prosecutor to demonstrate on a preponderance of evidence that the state is or has been unwilling or unable to proceed genuinely. This burden can, this author will argue, be reversed if the state fails to provide sufficient information.

3.7.10. Preliminary rulings regarding admissibility

At the last session of the Preparatory Committee, the United States introduced an additional safeguard which would allow a state to invoke the admissibility criteria once the Prosecutor had determined to initiate an investigation *proprio motu* or pursuant to a state referral. This would be before an actual case had been singled out,

---

[310] Article 53 of the Rome Statute now leaves the ICC Prosecutor with a wide margin of discretion as to the final selection of situations and cases.

[311] *UN Press Release L/2771*, *supra* note 269.

[312] *Ibid.*

[313] *Report of the Preparatory Committee*, *Vol. I*, *supra* note 263, para. 157.

i.e. before a regular challenge to the admissibility could be made. Such a provision should ensure that states which might be conducting or have conducted relevant proceedings or have an interest in doing so were notified before the Prosecutor initiated an investigation. The Prosecutor would then be required to defer the investigation to that state, absent a preliminary decision of the Pre-Trial Chamber that the case in question was nevertheless admissible.

The ILC draft had provided for no other possibility than to launch a regular "challenge" to the admissibility once a case had been singled out after a full investigation.[314] Several states had concerns that such additional procedure would contribute to the overburdening of the ICC Prosecutor and the court as such. The United States argued that such early opportunity to raise the admissibility issue was necessary because "because even the initiation of an investigation might interfere with the exercise of national jurisdiction".[315] Such a safeguard was desired by states that did not consider the requirement of an authorisation by the Pre-Trial Chamber under article 15 as a sufficient constraint on the Prosecutor's *proprio motu* powers. It should also be noted that states under article 14 are authorised to refer situations in which "one or more crimes within the jurisdiction of the Court appear to have been committed", meaning that the Prosecutor might be asked to investigate crimes over which several other states might legitimately exercise jurisdiction.

3.7.11. Conferment of jurisdiction

This issue was still open, but most states signalled a preference for inherent jurisdiction not only for the crime of genocide as the ILC had proposed, but for genocide, crimes against humanity and war crimes.

---

[314] According to ILC draft article 34, the earliest stage at which "an interested State" could invoke the issue was after a full investigation, *YBILC 1994, Vol. II*, *supra* note 115, Part Two, p. 52. Some delegations expressed the view that "the [state] complaint should not automatically trigger the jurisdiction of the court without notice having been given to the States concerned and a determination having been made as to whether any State was willing and able to effectively investigate and prosecute the case", see *Report of the Ad Hoc Committee*, *supra* note 60, para. 112.

[315] This concern was actually raised by the United States as early as in the Ad Hoc Committee, see *Report of the Ad Hoc Committee*, *supra* note 60, para. 51. At that stage, however, no *proprio motu* power for the Prosecutor was envisaged and the concern was not considered that essential.

3.7.12. Summing up

The Preparatory Committee made important progress on the definition of the admissibility criteria. First of all, it expanded the *grounds* on which the ICC would be allowed to exercise its jurisdiction. It regulated the issue of good faith with formulations such as "shielding the person concerned" and "intent to bring the person concerned to justice". [316] With the admissibility criteria more or less in place before the beginning of the Rome Conference, states felt assured that the court would not replace national jurisdictions, but only complement them when absolutely required. This enabled states and coordinators to now focus on core jurisdictional issues.

3.8. THE ROME CONFERENCE (1998)

As the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court started 15 June 1998, most states viewed the admissibility criteria, as formulated in the report of the Preparatory Committee, as acceptable. The complementarity principle was now generally viewed as "the cornerstone to the successful adoption of the Statute".[317] The coordinator on the admissibility issue[318] explained how carefully the compromises on these provisions concerning admissibility and *ne bis in idem* had been crafted. He urged that although minor changes to clarify the texts could be considered, delegations ought not to reopen the provisions for substantial changes as the package would have folded.[319]

3.8.1. The admissibility criteria

Not all states were completely satisfied with the formulations of the complementarity principle, but most states recognised that better compromises would be difficult to find. A smaller number of states, including China, Egypt, Mexico, Indonesia, India,

---

[316] Williams 1999, p. 389, para. 15.

[317] *Ibid.,* p. 390, para. 16.

[318] This was, as in the Preparatory Committee, Mr. John T. Holmes of the Canadian delegation.

[319] Holmes 1999, p. 51. Amnesty International noted that "[a]ny attempt by a government to weaken Article 15 [now article 17] could endanger agreement on the rest of the consolidated text and cause the diplomatic conference to fail", *The International Criminal Court: Making the right choices – part V*, Amnesty International, 1998 (available at http://web.amnesty.org/library/index/engior400101998?open&of=eng-385).

Uruguay and Kenya, noted that the proposals did not fully meet their concerns and that the discussion should be reopened.[320] The debate also revealed continued reservations over a bracketed proposal in the Draft Statute, making a case admissible where the person concerned had been pardoned, paroled or released through an administrative procedure. According to this proposal

> "a person who has been tried by another court for conduct also proscribed under article 5 may be tried by the Court if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty".[321]

Some delegations argued, however, that such a function went beyond the purview of the court.[322] The proposal was therefore not further elaborated.

In an attempt to avoid extensive discussions, the coordinator had bilateral meetings with the states that had requested the discussions to be reopened.[323] These meetings revealed that two states were of the extreme view that any national process, including those undertaken in bad faith, should bar ICC interference.[324] The coordinator indicated that this view was shared by very few states. He then singled out three problems that had to be addressed: first, some delegations held that the current proposal gave the court too much discretion in determining unwillingness and that the criteria should be made more objective; second, the term "undue delay" was considered too low a threshold for determining unwillingness; and third, a "partial collapse" was considered insufficient for determining a state's inability.[325]

As for the first problem, the need for more objectivity, the coordinator suggested changing the least objective criterion which refers to a lack of impartiality or independence. The change was to add the phrase "in accordance with norms of due process recognized by international law".[326] The idea was that this was the natural place to introduce an objective criterion. As it turned out, several delegations

---

[320] Holmes 1999, p. 52.

[321] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II*, 1998, A/CONF.183/2/Add.1, p. 46 (proposed article 19). Fn. 42 [to article 15 (now article 17)] reads: "It was noted that article 15 should also address […] discontinuance of prosecutions and possibly also pardons and amnesties", *ibid.,* p. 41.

[322] Holmes 1999, p. 52.

[323] *Ibid*.

[324] *Ibid.,* pp. 52-53.

[325] *Ibid.,* p. 53.

[326] *Ibid*.

expressed their support for the inclusion of this criterion, but indicated that such a change still left other criteria relating to unwillingness less objective. To address this concern, the coordinator then suggested that the notion of due process be moved to the chapeau of the paragraph on unwillingness (now article 17(2)). This had the effect of adding an element of objectivity to all criteria on unwillingness. The suggestion was broadly acceptable and was included in the final package.[327]

The second problem, which concerned the nature of delays in the proceedings, was easier to resolve. Instead of "undue delay", the term "unjustified delay" was suggested. Several states found this term preferable as it would more expressly allow the state to explain the reasons for the delay, and this would mean that the court's determination of admissibility would be more informed.[328] It was noted that this threshold was higher and that the term "unjustified" could make it possible for states to delay the ICC proceedings, thereby obstructing the Prosecutor's action. It was nevertheless agreed upon.

As for the third problem, the "partial collapse" criterion, some states wanted to replace it with a narrower criterion. They argued that it was conceivable that a state could experience a partial collapse, for example in one region of the state, but still be able to undertake genuine proceedings. The argument, however, lacks logic: Whenever a state is able to proceed genuinely, and does so, ICC interference will be barred according to the complementarity principle. Nevertheless, the proposal to replace "partial" with "substantial" gained some support and was eventually agreed upon. This did raise some concerns as it seemed to raise the threshold for ICC intervention.[329]

Concerning the Preamble, paragraph 3 of the ILC Draft had emphasised that "such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective". According to a footnote attached to this paragraph, some states had suggested that the text be amended to: "Emphasizing further that such a court is complementary to national criminal jurisdictions." Now that article 15 (17) had elaborated on the issue of complementarity, the coordinator no longer deemed such a reference in the Preamble necessary.[330] The Drafting Committee at the Rome Conference suggested, however, that the principle, for the sake of clarity, be reflected in the Preamble as well as in the Statute's article 1 and included the present preambular paragraph 10.

---

[327] *Ibid.,* p. 54

[328] *Ibid.*

[329] Holmes 1999, p. 55.

[330] *Ibid.*

At the same time, the Drafting Committee included a reference in the final article 17: "Having regard to paragraph 10 of the Preamble and article 1."[331] These additional references only underscore the fundamental nature of the complementarity principle.

3.8.2. The final say

A crucial issue which was not clarified at the start of the Rome Statute was which entity should have the final say on the admissibility question. It was widely recognised that states should have the right to challenge the admissibility in a given case, and most states also considered that the court would have to have the final say. If states were to have it a state could decide unilaterally not to cooperate with the ICC by deeming its own actions sufficient. The final agreement to let the ICC have the final say was crucial, but it could hardly have been different.

3.8.3. The relationship with the Security Council

With regard to the ICC's relationship with the Security Council, most states supported a proposal introduced some time before the conference by Singapore that instead of requiring an authorisation from the Council (absent a Security Council referral) one ought to give the Council the competence to adopt a resolution under Chapter VII deferring a situation from the ICC. This way, the Security Council retained control, but one vote of a permanent member could no longer block ICC action. Instead, one permanent member, sympathetic to the ICC interference, could veto a resolution blocking an ICC proceeding.

The United States opposed the proposal, arguing that it would undermine the authority of the Security Council, but after the United Kingdom and France had accepted this solution and more generally had taken on a more positive attitude to the court, the US appeared somewhat isolated. In sharp contrast to the American view, the head of India's delegation asserted, in explaining its vote against the final Statute and referring to the Council's power to refer situations to the court, that "the Statute gives to the Security Council a role in terms that violate international law". He noted that "[t]he power to bind non-States Parties to any international treaty is not a power given to the Council by the Charter". He indicated that "some members of the Council do not plan to accede to the ICC, will not accept the obligations

[331] *Ibid.,* pp. 55-56.

imposed by the Statute, but want the privilege to refer cases to it".[332] With hindsight there is case to be made for that proposition. As for the power to block ICC proceedings, India noted that this was "in some ways even harder to understand or accept".[333] It is noteworthy that the strongest critics of the Security Council, such as India, Iraq and Libya, refused to support the treaty, while three of the five permanent members voted for it.[334] It may also be noted that when Israel signed the Statute, it noted:

> "At the 1998 Rome Conference, Israel expressed its deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political agenda of certain states. Israel warned that such an unfortunate practice might reflect on the intent to abuse the Statute as a political tool."[335]

3.8.4. Conferment of jurisdiction

Four options for such a regime were under consideration in Rome. First, a German proposal which would give the court inherent jurisdiction over all the crimes covered, requiring an additional consent only of non-parties to the court's Statute who had custody of an alleged offender or of relevant evidence. Second, there was the UK proposal which would give the ICC jurisdiction only where the home state of the suspect and the territorial state were parties to the Statute or had consented to jurisdiction. Third, there was the proposal of optional jurisdiction contained in the ILC Draft Statute. This would give the court jurisdiction over genocide without requiring any state's consent, but for other crimes it would require the consent of the state where the crime was committed, the suspect's home state and any state that had requested the suspect's extradition for the crime. Fourth, there was the US proposal under which the case-by-case consent regime of the ILC option would apply for all crimes, including genocide, unless the case was referred to the court by the Security Council.

It was, on the one hand, quite apparent that the German proposal was too progressive. On the other hand, not so many states supported the US proposal which would allow deliberate obstructions of justice even from states parties. The question

---

[332] *Explanation of Vote [of] Head of Delegation of India, on the Adoption of the Statute of the International Court*, 17 July 1998 (available at http://www.un.org/icc/speeches/717ind.htm).
[333] *Ibid*.
[334] Fowler 1998.
[335] *Declarations and Reservations to the Rome Statute* (available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp).

boiled down to whether the acceptance of jurisdiction should be required from both the suspect's home state and the territorial state, or whether the acceptance from either should suffice. In the end, the latter view prevailed, and this was the main reason given by the US for voting against the Rome Statute. The head of that delegation argued that this regime constituted "a form of jurisdiction over non-party states",[336] arguably an unreasonable claim as the authority of the territorial state to cede its jurisdiction over international crimes to an international court hardly can be disputed. Moreover, non-states parties have no obligations under the Statute. Interestingly, the claim echoes that of India, only with reference to a different aspect of the Statute.

3.8.5. Summing up

Looking at the four crucial issues presented in this survey's introduction, there is little doubt that the "court-friendly" states "won" the negotiations on most issues. First, the final Statute gives the court compulsory jurisdiction over all the crimes listed, requiring that either the suspect's home state or (not "and") the territorial state had ratified or accepted the jurisdiction on an *ad hoc* basis. Hence, a state cannot exempt its citizens from the ICC's jurisdiction by not ratifying the Rome Statute. Second, the ICC Prosecutor is given *proprio motu* powers, albeit with the requirement of the Pre-Trial Chamber's authorisation. Third, for the Security Council to block an investigation initiated *proprio motu* or following a state referral, the statute requires that none of the five permanent members veto and a total of nine members vote affirmatively.[337] Fourth, while the admissibility threshold is high, the criteria cover both inability and unwillingness, allowing international interference not only *vis-à-vis* feeble judiciaries, but also *vis-à-vis* states seeking to shield the

---

[336] *Prepared Statement of David J. Scheffer before the Senate Committee on Foreign Relations*, 23 July 1998 (available at http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind9807&L=twatch-l&D=1&F=P&O=D&P=53201).

[337] Article 16, referring to Chapter VII of the UN Charter, procedurally governed by article 27(3) of the Charter.

perpetrator. At the same time, the United States succeeded in introducing an additional proceeding: preliminary rulings regarding admissibility.

The United States' unique position rendered it uniquely vulnerable to the potential jurisdiction of an ICC. This was clearly recognised by most states, but they were less willing to make compromises than the US probably had expected. At the start of the negotiations in the Preparatory Committee, the American delegation seemed confident that it would manage to circumscribe the ICC's competence to a point that would address the American concerns. During the negotiations, however, in particular as the United Kingdom and France started to support the court's establishment and seemed less bent on securing their own particular interests, the US delegation found fewer allies.

4. THE PROCEDURES OF THE COMPLEMENTARITY PRINCIPLE

4.1. INTRODUCTION

4.1.1. General

Bringing criminals to justice before any court requires a complex body of procedural law. In addition to the procedures needed for conducting the trial as such, the Rome Statute contains procedures for raising, considering and determining the admissibility of cases as well as procedures for their final selection. The complementarity principle can only function as envisaged with detailed procedures in place. Collisions with national jurisdictions will force the ICC Prosecutor into disputes with states which will raise questions very different from those normally associated with criminal proceedings. Sophisticated forms of interaction between states and the Court, unprecedented in international criminal law and perhaps in any other field of international law, are required. The Rome Statute's procedural regime must address *inter alia* how the Prosecutor may detect national failure to proceed genuinely; how information may flow between the Prosecutor and states; at what stage, how and by whom the admissibility or the prosecutorial discretion may be challenged; and how and by whom disputes as to admissibility and prosecutorial discretion are to be settled.

Because the complementarity principle is a novelty in international law, the negotiations revealed widely differing opinions as to how the accompanying procedures ought to be formulated. Yet, a systematic list of concerns that the admissibility procedures would have to address was at no point officially tabled. Such a list might have facilitated the process. The negotiating states were divided into groups most of the time, and the information on the progress in other groups was not always adequate. Because the concerns were so intertwined, this sometimes resulted in exaggerated cautiousness. The procedural regime governing the complementarity principle is not easy to familiarise oneself with and contains several compromises. The regime should not, however, be judged by its lack of simplicity or even of consistency, but by the degree to which it actually reinforces the material aspects of complementarity.

The complementarity procedures represent a compromise between the need to ensure the ICC's effectiveness and the need to preserve state sovereignty. This dichotomy is even more apparent here than in the substantive provisions. Addressing two inherently conflicting concerns has resulted in a set of rules that is not always equally comprehensive.

4.1.2. Concerns regarding the ICC's efficiency

In order to avoid impunity, the following was essential: First, the ICC Prosecutor should be put on notice of instances of national failure to provide adequate justice. There should be a mechanism for requesting information from a state regarding its proceedings at any stage of the ICC proceedings. (Of course, during this process and not least before the ICC Prosecutor starts looking at a matter, non-governmental organisations [NGOs] will play an important role.) Second, the Prosecutor should, if the development so warrants, have the authority to review a previous decision to defer under articles 17 or 53, or to request a review of a court decision to that effect. Third, although the burden of proof as to the inadequacy of national proceedings should be with the Prosecutor, the burden of proof as to the very existence of national proceedings and the duty to produce evidence regarding their genuineness should rest with the state. Fourth, for the purpose of ensuring the integrity of subsequent ICC proceedings, there should be a mechanism for preserving evidence that may otherwise be lost while the admissibility determination is pending as the result of a challenge. For the same purpose, the procedures should be expeditious and flexible. Fifth, and finally, in the absence of an external review mechanism, the final say regarding the admissibility and the prosecutorial discretion selection should be with the ICC.

4.1.3. Concerns regarding state sovereignty

In order to preserve state sovereignty, and a *sine qua non* to the negotiating states, the procedural regime had to ensure that the Court defer to adequate national proceedings. The following was necessary: First, states which might be dealing, have dealt or intend to deal with a given case should be put on notice at an early stage when the Prosecutor intends to interfere. Second, states should be given ample opportunity to provide information on their proceedings and information relevant to the "interests of justice" criterion. Third, states should be allowed to commence criminal proceedings upon having been notified of the Prosecutor's intention to interfere. Fourth, there should be sufficient opportunity for states to challenge the admissibility and appeal admissibility decisions as well as decisions regarding the selection of cases. Fifth, there should be a mechanism for ensuring that the issues of admissibility and the selection of cases actually are considered before an ICC investigation commences, even if the complementarity principle is not formally invoked. Sixth, and finally, in order to minimise any compromising effect *vis-à-vis* national proceedings, the ICC Prosecutor should be obliged to suspend the

investigation when the principle of complementarity is invoked, subject only to limited exceptions aimed at ensuring the ICC proceedings' integrity.

In addition to the community interest in efficiency and the state interest in sovereignty, the procedural regime should also appropriately address the interest of the alleged perpetrator. There are sound reasons as to why the person concerned should have a standing in issues pertaining to the complementarity principle; the person should for instance be allowed to invoke that he or she has already been genuinely investigated or prosecuted at the national level.

4.1.4. The structure of this chapter

This chapter will comment on the different trigger mechanisms (4.2); the distinction between a "case" and a "situation" (4.3); the procedures pertaining to the Prosecutor's decision whether to investigate (4.4) and whether to prosecute (4.5); preliminary rulings regarding admissibility (4.6); and challenges to the admissibility (4.7). Eventually, the chapter will discuss two particular procedural issues (4.8).

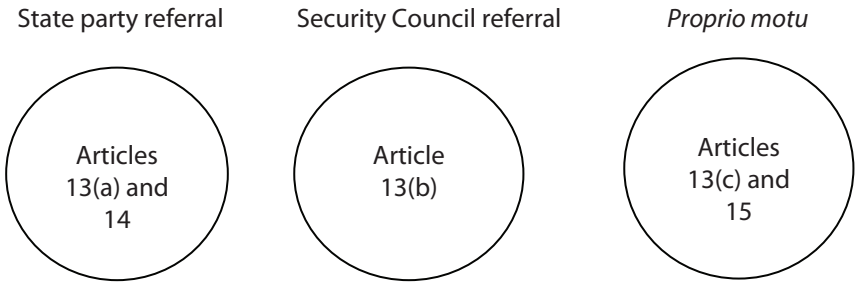
4.2. THE TRIGGER MECHANISMS

For a proper understanding of the complementarity procedures, it is necessary to understand the three different mechanisms by which the ICC Prosecutor may initiate an investigation: first, the Prosecutor may act upon a referral by a state party;[338] second, the Prosecutor may act upon a referral by the Security Council;[339] and third, he or she may act on his or her own motion (*proprio motu*) on the basis of information provided by any reliable source.[340] The three models and the respective provisions can be illustrated thus:

[338] Articles 13(a) and 14.

[339] Articles 13(b).

[340] Articles 13(c) and 15.



None of these mechanisms automatically triggers a regular investigation; this will only start when the Prosecutor finds that there is a "reasonable basis" to proceed.[341] In the *proprio motu* situations, the Prosecutor also needs an authorisation from the Pre-Trial Chamber applying the same standard.[342] The determination of such "reasonable basis" covers the issues of jurisdiction, admissibility and prosecutorial discretion (*i.e.* whether proceeding will serve the "interests of justice"). A notable difference between referrals and *proprio motu* proceedings is that upon receipt of a referral, the Prosecutor *shall* initiate an investigation unless he or she determines that there is no reasonable basis to proceed,[343] and the Pre-Trial Chamber may only review a decision not to proceed. By contrast, when the Prosecutor receives an external communication for the purpose of triggering his or her *proprio motu* powers, the situation is inversed: the Prosecutor *shall not seek* an authorisation *unless* he or she finds that there is a reasonable basis to proceed,[344] and if he or she so finds an authorisation from the Pre-Trial Chamber is required. Upon an investigation, regardless of how a case has been triggered, the Prosecutor may only proceed with a prosecution if he or she finds that there is a "sufficient basis" for it. This determination too involves a determination regarding jurisdiction, admissibility and the "interests of justice".[345] It may be noted that a decision to prosecute is only subject to limited review, regardless of the trigger mechanism. The Pre-Trial Chamber shall confirm the charges if it finds that there is "sufficient

[341] Article 53(1) for state and Security Council referrals, and article 15(3) for *proprio motu* investigations.
[342] Article 15(4) refers to the same "reasonable basis".
[343] Article 53(1).
[344] Article 15(3).
[345] Article 53(2).

evidence to establish substantial grounds to believe that the person committed each of the crimes charged".[346]

The Prosecutor may at any point of the proceedings, irrespective of the trigger mechanism, seek an admissibility ruling.[347] The Court may also determine the admissibility *ex officio*. Further, the person concerned, a state with jurisdiction and the states from which acceptance of jurisdiction is required under article 12, may, still irrespective of the trigger mechanism, challenge the admissibility under article 19.[348] Otherwise, the procedures may vary slightly, depending on the trigger mechanism. It should be noted that, absent a Security Council referral, a state with jurisdiction may request the ICC Prosecutor to defer under article 18 and thus provoke a preliminary ruling regarding admissibility.[349] When one adds that most of the decisions referred to above can be appealed, it becomes clear that the Rome Statute provides quite a few opportunities for the complementarity issues to be raised.

4.3. THE DISTINCTION BETWEEN A "SITUATION" AND A "CASE"

A brief introduction to the Statute's distinction between "situations" and "cases", and how this affects the complementarity principle, seems pertinent. The starting point is clear: the question of admissibility pertains to cases.[350] Yet in practical terms, the Prosecutor will start his or her activity by examining entire situations before individual cases are singled out. He or she will investigate the situation for the purpose of determining whether there seem to be cases within a given situation which fall within the Court's jurisdiction, which would be admissible and with which it would serve the "interests of justice" to proceed.[351]

The said distinction has the following historical explanation: in the negotiations, it was continuously discussed whether a state referral should be confined to "situations" or whether the states parties should be allowed to refer specific "cases" to the Prosecutor. One argument for confining this right to situations was that it would leave the Prosecutor with the discretion to decide which cases should actually be handled, ensuring the prosecutorial independence. Such discretion would

---

[346] Article 61(7).

[347] Article 19(1) and (3).

[348] Article 19(2).

[349] Article 18(2).

[350] Article 17(1), governing the admissibility of "a case" and "the case".

[351] Article 53(1). It should be noted that articles 13(a) and (b), 14 and 15(6) all refer to a "situation".

resemble that of the Prosecutors of the ICTY and the ICTR granted within the geographical and temporal framework of the Tribunals' jurisdiction.[352] An additional argument was that if states were authorised to refer cases against specific individuals, this could lead to more politicised referrals aimed at certain individuals. As for Security Council referrals, there was a similar discussion as to whether the Council should be authorised to refer "cases", "matters" or "situations" to the Prosecutor. Again, the argument regarding the Prosecutor's independence was successfully made. The Preparatory Committee would not let the Council refer cases, but instead some states favoured the term "matter", pointing to the need for some specificity in the Security Council referrals. The view eventually prevailed, however, that only by limiting the Council's authority to "situations" would the Prosecutor's and the Court's integrity be adequately ensured. Indeed, the Prosecutor's independence *vis-à-vis* the Council was considered as particularly important. In one sense, however, a state might in reality point to one specific incident: article 14(1) refers to "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed".

A point logically related to the distinction between a "situation" and a "case" and where the Statute is not perfectly clear is the following: by becoming a state party to the Rome Statute, a state accepts the ICC's jurisdiction "with respect to the crimes referred to in article 5",[353] whereas a non-state party may declare that it accepts the Court's exercise of jurisdiction "with respect to the crime in question".[354] These different wordings give rise to the speculation that a non-state party might accept the Court's jurisdiction with respect to a particular crime and arguably also with respect to crimes committed by one particular party to a conflict, so that other crimes committed within the same situation, for example by the state's own nationals or by state officials, would not be covered by the declaration. The wording might further be interpreted so as to allow a state to "opt-in" for one category of crime only, say the crime of genocide. Addressing this ambiguity, the Rules of Procedure and Evidence provide that the Registrar shall inform the concerned state that a declaration under article 12(3) "has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the

[352] According to article 18 of the ICTY Statute, the Prosecutor, within the mandate given by the Security Council, is to "initiate investigations [when he or she finds that] there is sufficient basis to proceed" (paragraph 1), and proceed with an indictment "upon a determination that a prima facie case exists" (paragraph 4).

[353] Article 12(1).

[354] Article 12(3).

situation".[355] This rule ensures that a non-state party cannot abuse the Court as a tool to pursue selected crimes or perpetrators.

The distinction between a "situation" and a "case" does not refer to any specific procedural step taken by the Prosecutor or the Court. According to articles 18 and 19, the distinction marks the default line as to when an admissibility challenge may be made under article 19. Article 19(1) refers to the point where the case is "brought before [the Court]." This suggests that the Prosecutor must have singled out a person or a limited number of persons whom he, based on the investigation of a situation, believes to have committed a specific crime. The reference to the case having been formally "brought before" the Court (here, the Pre-Trial Chamber) indicates, according to Hall, "some formal proceedings beyond the initiation of an investigation of a situation".[356] Indeed, a main purpose of the investigation of a situation is to identify cases. According to Hall, such formal proceedings "might include an application for a warrant under article 58".[357] The Pre-Trial Chamber has, in one of the Court's early decisions, confirmed this, noting that

> "challenges to the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2) (a) of the Statute may only be made by an accused person for whom a warrant of arrest or a summons to appear has been issued under article 58; that at this stage of the proceedings no warrant of arrest or summons to appear has been issued and thus no case has arisen; and that the *Ad hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19(2) (a) of the Statute".[358]

[355] Rule 44.

[356] Hall 1999, p. 20, para. 3.

[357] *Ibid.,* pp. 20-21, para. 3

[358] *Situation in Democratic Republic of Congo*, p. 4.

4.4. THE DECISION WHETHER TO INVESTIGATE

4.4.1. Introduction

Article 53 reads:

> "Article 53
> Initiation of an investigation[359]
>
> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
>
> (b) The case is or would be admissible under article 17; and
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
>
> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
>
> 2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
>
> (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
>
> (b) The case is inadmissible under article 17; or

[359] The title "Initiation of an investigation" is misleading as the article also authorises the Prosecutor's proceeding with a prosecution, see article 53(2).

> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
>
> the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
>
> 3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
>
> (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
>
> 4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information."

Article 53(1) provides that the Prosecutor may open an investigation only when there is a "reasonable basis" to proceed. For the purpose of determining whether such basis exists, the Prosecutor "shall consider" (a) whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"; (b) whether the case "is or would be admissible under article 17"; and (c) whether there are "nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". The paragraph does not refer to *proprio motu* investigations, and it might therefore be argued that it does not apply to such investigations. This will be explored below. Regardless of the conclusion on that point, however, *article 15(3)* also refers to a "reasonable basis" threshold for opening a *proprio motu* investigation, and rule 48 provides that the Prosecutor for that determination "shall consider the factors set out in article 53, paragraph 1 (a) to (c)".

The term "reasonable basis" is vague, just as similar tests applied by national prosecutors are. The Prosecutor is left with some measure of discretion; after all, he or she is the one who will have to carry out the investigation and eventually take the decision as to whether to prosecute. "Reasonable basis" requires, logically, less certainty than "sufficient basis" which is the threshold for prosecuting.[360] In

[360] Article 53(2).

principle a mere probability would arguably suffice. When the probability is just slightly higher than 50 per cent, it would, however, scarcely justify activating the investigative apparatus of the ICC, which is huge and has limited resources at its disposal. Because of this, and because the Prosecutor will be required to choose between an abundance of situations and cases, the actual threshold for interfering will certainly be higher. The Prosecutor will, arguably, initiate an investigation only when he or she is confident that the investigation will produce *prima facie* cases. This understanding would also seem to be consistent with subparagraph (c); it would scarcely serve the interests of justice to interfere unless the suspicion amounts to more than probability. In *proprio motu* situations, the Prosecutor must be mindful that he or she will also have to convince the judges of the Pre-Trial Chamber that the criteria in article 53(1) (a) to (c) are met before an investigation will be authorised.

The assessment of factors (a) to (c) is a continuous process. With regard to the issue of admissibility, the Prosecutor must be aware that the character of ongoing national proceedings might change and that new proceedings might be initiated. He or she must constantly assess whether the ICC proceeding serves the "interests of justice" given the current circumstances. In a report to the Security Council regarding the Darfur situation, the Prosecutor noted:

> "The admissibility assessment is an *on-going assessment* that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases are selected, the OTP [Office of the Prosecutor] will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions. […] In mid-June 2005, after the decision by the Prosecutor to start an investigation, the Government of Sudan provided the OTP with information relating to the establishment of a new specialized tribunal to deal with some individuals considered to have been responsible for crimes committed in Darfur. As part of the ongoing admissibility assessment the OTP will follow the work of the tribunal in order to determine whether it is investigating, or has investigated or prosecuted, the cases of relevance to the ICC, and whether any such proceedings meet the standard as defined by article 17 of the Rome Statute."[361]

With regard to the same situation and with reference to the "interests of justice" criterion, the Prosecutor further noted:

> "As required by the Statute, the Prosecutor has determined that, at the time of initiating the investigation, there were no substantial reasons to believe that the

[361] *Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593*, 29 June 2005, p. 4 (available at http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf).

> investigation would not serve the interests of justice. The OTP will monitor and remain sensitive to developments in this context."[362]

The following discussion will analyse how the Prosecutor must assess the issue of admissibility and that of the "interests of justice" as part of the "reasonable basis" test. It will also analyse when and how such decision is subject to authorisation, challenges and judicial or prosecutorial review. The discussion will refer respectively to *proprio motu* investigations and investigations following a state or Security Council referral.

4.4.2. Proprio motu *investigations*

Article 15 on the Prosecutor's opening of an investigation *proprio motu* reads:

> "Article 15
> Prosecutor
>
> 1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
>
> 2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
>
> 3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
>
> 4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
>
> 5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not

[362] *Ibid.,* pp. 4-5.

> preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
>
> 6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence."

The most conspicuous feature of article 15 is the early and compulsory judicial review by the Pre-Trial Chamber provided for in paragraph 4. The requirement of an authorisation was, by several states, considered as a necessary safeguard in order to ensure that the Prosecutor would not, when he or she proceeded *proprio motu*, act for political motives. States were not prepared to vest the ICC Prosecutor with the full-fledged independence that national prosecutors usually enjoy. Although not found in domestic criminal law, the requirement of such judicial authorisation is arguably justified by the Court's extraordinary jurisdictional reach. At the national level, criminal law knows judicial control only in the context of coercive investigative measures such as arrest, detention, search, seizure and surveillance. A judicial authorisation at such early stage of the proceedings is generally not required. Features such as the French *Chambre d'Accusation*, the German *Zwischenverfahren* and the American *Grand Jury* all exercise their authority after an investigation has been completed, to confirm the indictment or charges. It should be noted that before the ICTY and the ICTR there is judicial review only when an indictment is examined, before an arrest warrant can be issued. The Rome Statute's requirement of such authorisation before the Prosecutor may open an investigation on his or her own initiative is "the sobering reality of the Statute, in contrast to the picture which some have tried to paint of an ICC Prosecutor with powers so far-reaching as to constitute a liability to the efficacy of the court".[363]

4.4.2.1. Communications to the Prosecutor

According to article 15(1), the Prosecutor "may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court".[364] The term "may" indicates that the authority is discretional, in contrast to where the

[363] Bergsmo 1999b, p. 369, para 25.

[364] Article 13(c) referring to article 15. Such information is also referred to as "communications".

Prosecutor has received a referral and he or she "shall" investigate *unless* there is no reasonable basis to proceed.[365] The information might stem from all types of sources, including "States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that [the Prosecutor] deems appropriate",[366] possibly including sources such as newspapers and other media. This variety of sources gives the Court an edge that it otherwise would not have: it allows the Prosecutor to truly act "on behalf of the world community" rather than on behalf of a state party or the Security Council. With regard to the situation in Ituri (Democratic Republic of the Congo, DRC), the Prosecutor noted:

> "States, international organizations and non-governmental organizations have reported thousands of deaths by mass murder and summary execution in the DRC since 2002. The reports allege a pattern of rape torture, forced displacement and the illegal use of child soldiers."[367]

The term "investigation" in article 15(1) is misleading: a regular investigation requires authorisation from the Pre-Trial Chamber.[368] What the Prosecutor is allowed to do under article 15(1) is instead to start a preliminary examination of a situation. This is confirmed in article 15(6), referring to "the preliminary examination referred in paragraphs 1 and 2".

The Statute does not specify the possible content of the communications to the Prosecutor. In contrast to Security Council and state referrals, it would not be reasonable to "impose upon the senders of communications the burden of investigating for themselves or conducting an extensive inquiry for the purpose of sending detailed information to the Prosecutor".[369] If, on the other hand, the communication is too broad and unspecific, it "might be impossible for [the Prosecutor] to assess its value without launching a full investigation, something the Prosecutor is not allowed to do without authorisation from the Pre-Trial Chamber".[370] The purpose of a communication would be to enlighten the Prosecutor and either convince him or her that there is a "reasonable basis" to open an

---

[365] Article 53(1).

[366] Article 15(2).

[367] *The Office of the Prosecutor opens its first investigation*, Press Release, 23 June 2004 (available at http://www.icc-cpi.int/press/pressreleases/26.html).

[368] Article 15(3).

[369] *Referrals and Communications*, Annex to the "Paper on some policy issues before the Office of the Prosecutor", September 2003, para. I B (available at http://www.icc-cpi.int/otp/otp_docs.html).

[370] *Ibid*.

investigation (in which case the information needs to be extensive), or prompt a preliminary examination which might show that such basis exists (in which case the information needs not be equally extensive). It should be noted that with little information it might be difficult for the Prosecutor to determine whether a "reasonable basis" exists. According to article 42(1), the Office of the Prosecutor (OTP) is responsible for receiving referrals and "any substantiated information on crimes within the jurisdiction of the Court, for examining them". One understanding of this is that the Prosecutor is under no duty to examine communications that are not "substantiated", *i.e.* not sufficiently precise and/or reliable. It should be noted that the Prosecutor, for the purpose of further analysis, "may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate". The Prosecutor may also "receive written or oral testimony at the seat of the Court".[371] Concerning the sources' reliability, the Prosecutor is left with full discretion. As he or she will have to seek an authorisation by the Pre-Trial Chamber and have limited resources available, the Prosecutor must be expected to carefully assess all information that he or she obtains.

Concerning communications received regarding the situation in Ituri, DRC, the Prosecutor referred to this situation as "the most urgent situation to be followed". He announced that he would "closely follow" the situation and analyse the information available. He would request additional information concerning the occurrence of crimes and assess the ability of the DRC to deal with them.[372] As for relevant information already available, the Prosecutor noted:

> "The United Nations Security Council is following the situation in the [DRC] closely. It has sent four missions to the country, the last on 7–16 June 2003. According to the report of this last mission fighting continuous to affect the area, and impunity remains rampant in Ituri."[373]

The Prosecutor also referred to views expressed by the Under-Secretary-General for Peacekeeping Operations and the High Commissioner for Human Rights as well as a *national report*:

> "The United States Department of State's 2002 country report on the [DRC] confirms the difficulties of the national government to control the territory. It also

---

[371] Article 15(2).

[372] *Communications received by the Office of the Prosecutor of the ICC*, Press Release, 16 July 2003, at III (available at http://www.icc-cpi.int/press/pressreleases/67.html).

[373] *Ibid.,* at III c.

> described the inability of judicial and police authorities to investigate and prosecute the alleged crimes."[374]

In order for the Prosecutor to determine whether the state concerned is willing and able to conduct genuine proceedings as required by article 17, the state might agree to have external *observers* present in court rooms, *etc.* Neither the Statute nor the Rules expressly suggests this possibility, but as long as the state consents, there is nothing preventing it. Observation might be carried out by actors outside the ICC, such as the United Nations or NGOs. NGOs often organise observation teams that report to the international community. Such reports might be forwarded directly to the ICC Prosecutor, and this might clearly be very helpful. It is crucial that observers be allowed to operate freely with sufficient access to all sources of information. There is an inherent danger that, with a well-designed sham and limited access to information, an international observation team is being abused and ends up legitimising a non-genuine national proceeding. In its discussions, the ILC warned:

> "There are difficulties both in official international inquiries which parallel a national trial, and in the idea of a trial observer acting in an official international capacity. In particular, the level of international involvement may not be enough to provide full guarantees that the proceedings would be fairly conducted, but would tend to legitimize the proceedings anyway."[375]

In an annex to his policy paper, the Prosecutor notes that the Office will "generally seek to alert the relevant State of the possibility of taking action itself very early in the process" and in general "consult and seek additional information from the States that would normally exercise jurisdiction", unless there is reason to believe that such consultations could prejudice subsequent analysis or investigation.[376] From the words "very early in the process" and the reference only to "the relevant State", it seems that the Prosecutor here envisages an earlier and less formal procedure than the notification required under article 18(1). The latter provision instructs the Prosecutor to notify "all States Parties and those States which […] would normally exercise jurisdiction" once he or she has actually decided to open an investigation. The Prosecutor has established a Jurisdiction Complementarity and Cooperation Division (JCCD), which shall "contact the relevant State or States to alert them to the possibility of conducting domestic proceedings, to encourage and assist national proceedings where possible, and to verify that national proceedings are genuine".

---

[374] *Ibid.*

[375] *YBILC 1992, Vol. II*, *supra* note 56, Part Two, p. 70, para. 92.

[376] *Referrals and Communications*, *supra* note 369, para. I C.

Such dialogue with the state's officials might be useful and even necessary. In order not to compromise subsequent admissibility findings and in order to avoid that ICC officials in the end find themselves assessing "their own" proceedings, such dialogue and assistance must be conducted in a proper manner. For the same reason it is sensible that a *separate unit* for such interaction has been established.[377]

4.4.2.2. The Prosecutor's analysis of communications

According to article 15(2), the Prosecutor "shall analyse the seriousness of the information received". As noted above, rule 48 provides that the Prosecutor "shall consider the factors set out in article 53(1) (a) to (c)". This means that all three factors, or rather criteria, must be considered.[378] The Prosecutor cannot open an investigation unless all criteria are met. With regard to (a) and (b), the same would follow from the other provisions on jurisdiction and admissibility. The nature and thoroughness of the Prosecutor's examination, prompted by a communication, will arguably depend on the seriousness and credibility of the allegations at face value. The term "analyse" indicates that all information received must be given "sufficient attention by a qualified member of the OTP with a view to assessing [its] seriousness".[379] The Prosecutor must be confident that a decision to proceed or not to proceed is sufficiently informed and otherwise keeps with the Statute and the Rules. Because the determination involves difficult assessments, such as the genuineness of national proceedings and whether an ICC investigation will serve the "interests of justice", it might take a long time before the Prosecutor is able to conclude with sufficient certainty. The fact that the Prosecutor's activity at this preliminary stage seems to be confined to passively "seeking" and "receiving" information underscores this point. On might argue, however, that the power to take "investigative steps" is not exhaustively regulated in the Statute.[380] Interestingly, the Prosecutor has noted that he or she "is developing ways to investigate from the

---

[377] Kress 2004, p. 948. See also *Referrals and Communications*, *supra* note 369, para. I D.

[378] The term "criterion" seems to be more fitting than "factor".

[379] Bergsmo 1999b, p. 365, para. 13.

[380] Bergsmo and Pejic argue that the purpose of the provision "would be defeated if one adopted an unnecessarily restrictive interpretation […] suggesting that it is exclusive in its listing of investigative steps which the Prosecutor may take during the preliminary examination". They note that an initiation of an investigation based on insufficient information least of all is in the interest of sovereign states, and that it may lead to unnecessary embarrassment, Bergsmo 1999b, p. 367, para. 17.

outside".[381] Innovative procedures, which might not have to be formalised, could be developed in order for the Office to carry out its mandate *vis-à-vis* uncooperative states in ways that are still compatible with sovereignty.

According to the provisional regulations issued by the OTP,[382] communications as referred to in article 15(1) will undergo a three-phased procedure: The first phase is an initial review to identify those communications that manifestly do not provide any basis for further action. The second phase is a more detailed legal and factual analysis of significant communications carried out by the JCCD with the support of the Investigation Division, under supervision of the Executive Committee and the Prosecutor. The third phase includes advanced analysis and planning. In this latter phase, the determination as to whether there is a "reasonable basis" to initiate an investigation is made. Further, a joint team, including members of the Investigation Division, the Prosecution Division and the JCCD, will develop an investigation plan.[383]

---

[381] *Referrals and Communications*, *supra* note 369.

[382] *Referrals and Communications*, *supra* note 369, "Analysis of Referrals and Communications".

[383] In more detail, the procedures provided for in the provisional regulations are as follows: In *Analysis Phase I*, the Information and Evidence Unit (IEU) of the OTP will receive the communications and identify three groups among them: (a) those communications that "manifestly do not provide any basis for the Office of the Prosecutor to take further action"; (b) those communications that "appear to relate to a situation already under analysis, investigation or prosecution"; and (c) those communications "warranting further analysis in order to assess whether further action may be appropriate" (regulation 4.1). The JCCD shall review these identifications. Communications of group (b) shall be communicated to the relevant staff of the OTP (regulation 4.4). When the IEU-JCCD review identifies a communication as belonging to either group (a) or (c), the Prosecutor shall, taking into account possible comments from the Executive Committee, determine either (a) that the communication "does not provide any basis for the Office of the Prosecutor to take further action", or (b) that "further analysis is needed to evaluate the seriousness of the information in the communication". In the latter case, the communication proceeds to Analysis Phase II (regulation 4.5). In *Analysis Phase II*, the JCCD shall analyse the information with regard to issues of jurisdiction, admissibility, interests of justice and credibility and sufficiency of the information (regulation 5.1), with a view *inter alia* to (a) identifying "situations to be monitored on an ongoing basis"; (b) contacting the state or states that would normally exercise jurisdiction and "seek additional information about *inter alia* the existence and progress of national proceedings", unless there is reason to believe that "such consultations may prejudice the future conduct of an analysis or investigation"; (c) taking appropriate steps to "assess the progress of national proceedings relating to crimes within the jurisdiction of the

It should be noted that the OTP makes a distinction between the Prosecutor's contact with states established under article 18 regarding a preliminary admissibility ruling, and the contact with states that the Office may establish as part of the preliminary examination provided for in article 15(2) and rule 104(2).[384] While the purpose of both procedures *inter alia* is to determine whether relevant and genuine national proceedings exist, three differences should be noted: First, an additional purpose of the preliminary examination is to determine whether a crime under the Court's jurisdiction has been committed according to article 53(1) (a) and whether an investigation will serve the "interests of justice" according to article 53(1) (c). While the standard of proof regarding the admissibility under article 18 will be probability, the standard regarding the jurisdiction will be stricter. Second, the notification under article 18 is compulsory once the Prosecutor has decided to investigate ("shall notify"), whereas contacting states under article 15(2) is optional.

Court"; or (d) seeking "additional information as appropriate, and establish and maintain contacts with States and organizations for provision of information and cooperation" (regulation 5.3). The JCCD shall prepare reports and may make recommendations for considerations by the Executive Committee, including *inter alia* whether (a) there is "no reasonable basis for further analysis"; (b) "further analysis and monitoring [as provided for in Analysis Phase II] is required"; and (c) "advanced analysis [as provided for in Analysis Phase III] is warranted" (regulation 5.4). Taking into account the reports and recommendations submitted by the JCCD and the advice of the Executive Committee, the Prosecutor may determine either that "there is no reasonable basis for further analysis" (regulation 5.5); or that (a) "further analysis and monitoring [as provided for in Phase II] is required"; or (b) "advanced analysis [as provided for in Analysis Phase III] is warranted" (regulation 5.6). In *Analysis Phase III*, the Prosecutor may authorise his staff to (a) "seek additional information"; (b) "receive written or oral testimony at the seat of the Court"; (c) "assess the progress of national proceedings"; (d) "prepare reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under article 53"; (e) "prepare an investigation plan on the situation or the case(s)"; and (f) "take other appropriate measures to facilitate analysis and prepare for possible investigation" (regulation 6.1). If the Prosecutor directs the preparation of an investigation plan, the Executive Committee shall establish a "joint analysis team" (regulation 6.3). Taking into account any reports and recommendations submitted by the JCCD and the joint analysis team, as well as the advice of the Executive Committee, the Prosecutor may either determine that "there is not a reasonable basis to proceed with investigation" (regulation 6.5); or, if he or she finds that a "reasonable basis" exists, initiate an investigation. In *proprio motu* situations, such initiation necessitates an authorisation from the Pre-Trial Chamber under article 15(3) (regulation 6.6).

[384] Rule 104(2) provides *inter alia* that the Prosecutor may "seek additional information from States".

Thus, at the preliminary examination stage, the Prosecutor may be more selective and only consult those parties which he or she actually believes will provide him or her with adequate information. The Prosecutor may choose not to make such initial consultations when this could "prejudice the future conduct of an analysis or investigation", as provided in the Regulations.[385] This is also indicated by the reference in article 15(2) to "reliable sources that he or she deems appropriate". A duty to consult a given party might, however, follow implicitly from the Prosecutor's general duty to make a sufficiently informed decision under article 53(1). Third, a right of the state concerned to invoke the admissibility criteria is established only when the Prosecutor has decided to open an investigation and a notification under article 18(1) has been made.

4.4.2.3. The Prosecutor's request for authorisation

Article 15(3) provides that the Prosecutor, upon an analysis of the information's seriousness, shall determine whether there is a "reasonable basis to proceed with an investigation". If the Prosecutor finds that there is a "reasonable basis" according to article 53(1), he or she "shall submit to the Pre-Trial Chamber a request for authorisation of an investigation".[386] The term "shall" implies that such authorisation is mandatory.[387] The term further obliges the Prosecutor to apply for such authorisation once he or she has found that a "reasonable basis" exists. In reality, however, the Prosecutor retains discretion, as the "reasonable basis" test includes the highly discretional "interests of justice" criterion.

Together with the application for an authorisation, the Prosecutor shall submit to the Pre-Trial Chamber "any supporting material collected".[388] The term "supporting" could be interpreted to the effect that the Prosecutor must only submit material which supports his or her own findings. To withhold information which did not support the finding would, however, be inconsistent with fundamental principles of due process, illustrated by article 54(1) (a) according to which the Prosecutor shall "investigate incriminating and exonerating circumstances

[385] It should be noted that pursuant to article 18(1), the Prosecutor may "limit the scope of the information provided to States" where necessary to protect persons or ensure the proceeding's integrity.

[386] Article 15(3). Following a state or Security Council referral, authorisation is only required if the Prosecutor first defers under article 18(2) (only state referral), or if the admissibility is challenged under article 19 (both).

[387] Bergsmo 1999b, p. 368, para. 22.

[388] Article 15(3).

equally".[389] It is therefore submitted that all relevant material must be submitted. As a further guarantee that the Chamber's decision will be informed, "victims may make representations to the Pre-Trial Chamber".[390] This should be seen in conjunction with the requirement that the Prosecutor "shall inform victims" when he or she intends to seek the authorisation of an investigation.[391] Letting witnesses participate at this stage is appropriate for two reasons: First, witnesses should be given a role since an underlying purpose of the ICC proceedings is to mend the injustice they have experienced. Second, statements from victims may facilitate not only the pursuit of justice but also the admissibility and "interests of justice" determinations.

The right of victims to make representations also raises, however, two concerns: First, such participation might be counterproductive and considerably lengthen the process. Second, such testimonies might be very emotional and arguably represent "the antithesis of a process that rationally applies the legal norms of the Statute to protect the sovereign authority of states to exercise complementarity".[392] Rule 50 appears to address to some extent these concerns by merely instructing the Prosecutor to "inform victims", and otherwise provides for expeditious proceedings at the Court's discretion.

4.4.2.4. The Pre-Trial Chamber's authorisation

If the Pre-Trial Chamber considers that there is a "reasonable basis" to investigate, "it shall authorize the commencement of the investigation".[393] This is the decision which in fact starts the investigation, as opposed to the Prosecutor's decision to seek an authorisation. The reference as to whether the case "appears to fall within the jurisdiction of the Court" is superfluous as the jurisdictional preconditions are already included in the "reasonable basis" criterion. [394] The term "appears to" is,

---

[389] This provision pertains to the question of guilt and is therefore not directly applicable to the admissibility determination. It would, however, seem to apply to the determination of jurisdiction which includes a determination as to whether a crime is committed within the Court's jurisdiction, and which is part of the same "reasonable basis" test, see article 53(1).

[390] Article 15(3).

[391] Rule 50(1).

[392] Newton 2001, p. 61-62.

[393] Article 15(4).

[394] Arguably, its inclusion indicates that the requirement of jurisdiction generally is considered as more fundamental than that of admissibility. Another indication is the fact that article 19(1) provides that the Court "shall satisfy itself that it has jurisdiction in any case brought

however, interesting as it illustrates that the authorisation shall not include a full-fledged determination as to whether all jurisdictional criteria actually are met, but merely as to whether they appear *to* be met. The same is arguably true with regard to the other criteria. It should be noted that the Pre-Trial Chamber in the *proprio motu* situations shall assess all three criteria listed in article 53(1) (a) to (c), including the "interests of justice" criterion. As noted in the discussion on the Prosecutor's discretion, the Pre-Trial Chamber will be reluctant to set aside the Prosecutor's assessment regarding the "interests of justice" criterion due to its non-legal and policy-oriented character. As for the jurisdiction and admissibility, these issues are of a more legal character, and the Chamber will probably feel more competent to set aside the Prosecutor's findings at this point. The *prima facie* assessment does, however, involve particular considerations related to the principle of opportunity. Therefore, the Chamber might, in the end, leave the assessment regarding the required threshold for opening an investigation to the Prosecutor as long as the Chamber finds that a crime appears to have been committed. The authorisation will presumably and in reality take the form of a "quality check" where the essential is to determine whether the Prosecutor's decision is made in good faith and according to the applicable procedures. As noted in the historical survey, the mechanism was introduced as a precautionary measure to avoid abuse of the *proprio motu* power. It should therefore be expected that the review will be less strict than the confirmation of the charges.

It should also be noted that the Pre-Trial Chamber cannot dictate the Prosecutor as to how, when, where and with regard to which crimes an investigation is to be carried out. These decisions are the Prosecutor's prerogatives. The authorisation of an investigation is, on the other hand, "without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a [given] case".[395]

The procedures governing the Pre-Trial Chamber's determination under article 15(4) are few. Instead, rule 50(4) provides that the Chamber may decide on the procedure, provided it does not conflict with what is in fact regulated. According to the Rules, victims "may make representations in writing",[396] the Chamber may request additional information and hold a hearing "if it considers it appropriate"[397]

---

before it," whereas it "may, on its own motion, determine the admissibility of a case in accordance with article 17".

[395] Article 15(4).

[396] Rule 50(3).

[397] Rule 50(4).

and it may authorise "all or any part of the request of the Prosecutor".[398] A partial authorisation could for instance be warranted if the request included matters that fell outside the Court's jurisdiction or were, as it turned out, inadmissible.

Both the Statute and the Rules aim at ensuring victims a proper place in the proceedings. It is even envisaged that victims will seek to prompt *proprio motu* investigations. When the Prosecutor intends to seek authorisation, he or she shall inform victims whose identities are known, as long as this will not endanger the integrity of the proceedings or the life or well being of victims and witnesses.[399] The Pre-Trial Chamber shall also "give notice of the decision to victims who have made representations",[400] and the same procedures applies to a subsequent request by the Prosecutor.[401]

4.4.2.5. The Prosecutor's subsequent request

Where the Pre-Trial Chamber has refused to authorise an investigation, article 15(5) authorises the Prosecutor to make a *subsequent request* "based on new facts or evidence regarding the same situation". Without this possibility, it would be easy for a state to shield the person concerned from justice by not *completing* in a genuine manner a proceeding which at one point appeared to be genuine. It might also happen that a state's judicial system faces new problems in the course of the proceedings. Importantly, both new facts and new evidence might allow the Prosecutor to seek authorisation a second time. This means that it is not necessary for the Prosecutor to demonstrate that the facts have changed; it will suffice to demonstrate that facts were previously unknown to the Prosecutor. Such facts must relate to the criteria in article 53(1) (a) to (c) and they must have the potential of convincing the Pre-Trial Chamber that a "reasonable basis" now exists.[402] Rule 50(6) provides that the procedures referred to above apply here, too.

---

[398] Rule 50(5).

[399] Rule 50(1). Article 68 provides for the protection of victims and witnesses, and according to article 43(6), "[t]he Registrar shall set up a Victims and Witnesses Unit within the Registry".

[400] Rule 50(5).

[401] Rule 50(6).

[402] This provision has much in common with article 18(3), according to which the Prosecutor may review his decision to defer if there has been a "significant change of circumstances", as well as article 19(10), according to which the Prosecutor may request a review by the Court when "new facts have arisen".

4.4.2.6. Information to those who informed the Prosecutor

If the Prosecutor, upon a preliminary examination, finds that there is no "reasonable basis", article 15(6) provides that he or she "shall inform those who provided the information". Strictly construed, the provision would seem to cover both those who provided the communication as such under article 15(1) and those who provided additional information under 15(2). The context does not clarify the meaning. The underlying purpose seems, however, to be to keep the party that filed the actual communication informed as to whether the matter is being pursued. An additional purpose is arguably to prompt further information from any party which has thus far provided information. This is perhaps indicated by rule 49(2) instructing the Prosecutor to "advise of the possibility of submitting further information regarding the same situation in the light of new facts and evidence". The Prosecutor may always, however, seek such information under article 15(2) before he or she makes a new decision. It is therefore submitted that the duty under article 15(6) to inform pertains only to the party that filed the communication. There is, of course, nothing preventing the Prosecutor from notifying other parties simultaneously in the exact same manner.

The Prosecutor's notice shall be provided promptly and include the "reasons for his or her decision".[403] It shall be provided in a manner that "prevents any danger to the safety, well-being and privacy of those who provided information to him or her under article 15, paragraphs 1 and 2, or the integrity of investigations or proceedings". The notice may thus conceal the identity of any sources and/or the information that they have provided. It might also be necessary to conceal certain facts, such as the identity of alleged perpetrators or other persons involved in the crime, in order to avoid compromising the integrity of ongoing or subsequent proceedings at either level, for instance by alerting the suspect.

Article 53(1) instructs the Prosecutor to inform the Pre-Trial Chamber of a decision not to investigate if it "is based solely on subparagraph (c)", *i.e.* if he or she has concluded that an investigation will not serve the "interests of justice". The wording alone does not clarify whether this duty only exists when the Prosecutor has acted upon a state or Security Council referral, or whether it also exists when the decision is the result of a preliminary examination that is undertaken *proprio motu*. It may in fact be asked whether any part of article 53(1) applies to *proprio motu* decisions. The paragraph makes no express reference to neither of the trigger mechanism. It my be noted that paragraph 2 expressly refers to state and Security

[403] Rules 105(2) and 49(1).

Council referrals but not to *proprio motu* situations, yet it clearly applies to *any* decision not to prosecute, including *proprio motu* decisions (indeed, it is the *only* provision establishing a procedure for such decisions). The first part of paragraph 1 instructs the Prosecutor to evaluate "the information made available to him or her", without distinguishing between the sources, but here the special provisions in article 15 would regulate the Prosecutor's handling of private communications. Rule 48 provides, as noted above, that the factors mentioned in article 53(1) apply to *proprio motu* situations, and the rule may well have been adopted exactly in order to remove any doubt that paragraph 1 in its entirety applies regardless of trigger mechanism unless something else is expressly decided. Rule 105(2) provides that when the Prosecutor decides not to submit to the Pre-Trial Chamber a request for authorisation of an investigation, rule 49 applies. Systematically, this rule is placed in the context of article 53(1),[404] indicating more generally that paragraph 1 applies to *proprio motu* decisions. Yet, rule 105(4) only restates the unspecific provision in article 53(1) that when the Prosecutor decides not to investigate solely on the basis of the "interests of justice" criterion, he or she "shall inform in writing the Pre-Trial Chamber promptly after making that decision". The rule fails expressly to instruct the Prosecutor to do so also in the *proprio motu* situations.[405]

In order to determine whether this duty to inform the Pre-Trial Chamber applies when the Prosecutor has received no referral but considered the question *proprio motu*, regard must be had to the purpose behind such duty. If the purpose simply is to keep the Pre-Trial Chamber informed of the Prosecutor's activities and decisions, the duty should apply to any decision not to investigate, regardless of the trigger mechanism. It may be questioned, however, whether the Chamber really needs to be informed of all the Prosecutor's decisions, even when he or she has examined a matter *proprio motu*. Another, more plausible, purpose of the duty is to let the Chamber decide whether it will avail itself of its right under article 53(3) (b) to review *ex officio* a decision of the Prosecutor not to proceed (referring both to investigation and prosecution) that is based solely on the "interests of justice" criterion. It is for that purpose rule 105(5) provides that the notification "shall contain the conclusion of the Prosecutor and the reasons for the conclusion". In order to determine the scope of the duty in article 53(1) to inform the Chamber, it therefore seems pertinent to ask whether the Pre-Trial Chamber has the authority to review *ex officio* a decision not to investigate upon a *proprio motu* examination. If

[404] The heading of the relevant section of the Rules is "Decision of the Prosecutor regarding the initiation of an investigation under article 53, paragraphs 1 and 2."
[405] Rule 105(2) refers to rule 49, which in turn refers to article 15(6).

the Chamber does not have that authority, this strongly indicates that the Prosecutor does not have to inform the Chamber of such a decision. The scope of the Pre-Trial Chamber's authority to review a decision not to investigate is discussed in the following section.

4.4.2.7. The Pre-Trial Chamber's review of a decision not to investigate

Article 15 gives neither those who have submitted information to the Prosecutor under article 15(1) nor the Pre-Trial Chamber any right to request a review of a decision not to investigate *proprio motu*. By contrast, when the Prosecutor has considered a referral, article 53(3) (a) authorises the referring state or the Security Council, as applicable, to request a judicial review of a decision not to investigate (or, as applicable, not to prosecute). *Article 53(3) (b)* authorises the Pre-Trial Chamber to review *ex officio* a decision of the Prosecutor not to proceed if it is based solely on the "interests of justice" criterion in paragraphs 1 (c) or 2 (c), without expressly distinguishing between trigger mechanisms. When the Chamber conducts such review, "the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber". Thus, the Prosecutor may actually be *forced* to proceed, but can he or she be forced even when there has been no referral and the Prosecutor only has conducted a preliminary examination on his or her own initiative? Moreover, if article 53(3) (b) applies to article 15 investigations as well, it is unclear as to whether it applies both to decisions against investigation and decisions against prosecution, or only to the latter (that question will be discussed further below). The fact that article 15 does not authorise the Pre-Trial Chamber to review a negative decision upon a *proprio motu* examination even when it is based solely on the "interests of justice" criterion indicates that the Chamber has no such right. According to paragraph 4 of the same article, the Chamber may do the opposite: prevent the Prosecutor from opening an investigation by not authorising it. Otherwise, article 15 regulates in some detail the initiation of *proprio motu* investigations and provides, to some extent, the procedures also when the decision is negative, indicating that the Pre-Trial Chamber may not *ex officio* review and overturn a decision against investigation which is not prompted by a referral.

It should further be recalled that the *purpose* of introducing the Pre-Trial Chamber as an additional judicial organ was to avoid that the Prosecutor opened a case *proprio motu* for improper reasons. This was achieved by making a *proprio motu* investigation contingent on the Chamber's authorisation. Where, however, the Prosecutor has decided *not to prosecute*, the reason to control the Prosecutor is less apparent, even when the decision is based on the rather subjective "interests of

justice" criterion. In fact, giving the Pre-Trial Chamber also a positive control over *proprio motu* proceedings (*i.e.* the power to force proceedings) would significantly weaken the prosecutorial independence provided for in article 42(1), according to which the Office of the Prosecutor "shall act independently as a separate organ of the Court" and that a member of the Office "shall not seek or act on instructions from any external source". While it might be argued that the Pre-Trial Chamber is not to be considered as an "external source", it is submitted that any provision limiting the Prosecutor's personal independence should be narrowly construed. Indeed, the *proprio motu* power is, albeit subject to the need for an authorisation, a strong manifestation of the prosecutorial independence. It is therefore submitted that the authority of the Pre-Trial Chamber under article 53(3) (b) to force the Prosecutor to proceed when he or she has decided not to, based on the "interests of justice" criterion, does not apply to *proprio motu* situations. In such situations, the Pre-Trial Chamber's control is negative in the sense that the Chamber may only veto a proceeding.

Consequently, related to the discussed in the previous section, it is submitted that the Prosecutor's duty to inform the Pre-Trial Chamber of such decisions does not extend to the *proprio motu* situations.

4.4.2.8. Considering new facts or evidence

Where the Prosecutor has decided not to open a *proprio motu* investigation, article 15(6) authorises him or her to consider "further information submitted to him or her regarding the same situation in the light of new facts or evidence". As for the meaning of the term "new facts or evidence", reference is made to the discussion above regarding subsequent requests for authorisation under article 15(5). The facts must be relevant and the supporting evidence sufficiently strong to convince both the Prosecutor and Pre-Trial Chamber that a "reasonable basis" now exists.

4.4.3. Investigation following a state or Security Council referral

4.4.3.1. General

When a state party or the Security Council has referred a situation to the Prosecutor, the Prosecutor shall, according to article 53(1), initiate an investigation if he or she determines that there is a "reasonable basis". The Prosecutor must consider the factors (a) to (c), *i.e.* the issues of jurisdiction, admissibility and the "interests of justice", in light of the information made available to him or her. The initiation of an

investigation needs not be authorised by the Pre-Trial Chamber. The risk of prosecutorial abuse is no longer the dominating concern. Rather, the Prosecutor's subsequent examination may serve as a check filtering out politically motivated state referrals. There is no automatic judicial check by the Pre-Trial Chamber, save that of jurisdiction, which will be exercised when the Prosecutor seeks confirmation of the charges under article 61. The effective implementation of the complementarity principle (admissibility and prosecutorial discretion) therefore depends on the Prosecutor, unless (1) a party requests the Prosecutor to defer, challenges the admissibility or requests a review of a decision to proceed, or (2) the Court determines *ex officio* the admissibility or reviews the Prosecutor's decision to proceed.[406] Another essential difference from the *proprio motu* scenarios is that the main criterion for opening an investigation is reversed: upon a referral, the Prosecutor *shall* initiate an investigation unless he or she determines that there is no "reasonable basis", whereas in the *proprio motu* situations the Prosecutor *shall not* seek an authorisation to investigate *unless* he or she determines that there is a "reasonable basis".

When a situation has been referred to the Prosecutor, Analysis Phase I of the Provisional Regulations presented above is omitted. Only Analysis Phases II and III are applied before the Prosecutor determines whether there is a reasonable basis to investigate.[407]

4.4.3.2. The basis for the Prosecutor's analysis

Rule 104(1) provides that the Prosecutor, for the purpose of determining whether there is a "reasonable basis" to proceed under article 53(1), "shall, in evaluating the information made available to him or her, analyse the seriousness of the information received". In contrast to some of the private communications, state and Security Council referrals must be expected to contain detailed information relevant to the assessment of factors (a) to (c), including a description of the crimes and the circumstances under which they were committed, the existence of possible competing national proceedings and, when they exist, a characterisation of them, as well as arguments as to why ICC interference would serve the "interests of justice". When a state party refers a situation to the Prosecutor "for the purpose of determining whether one or more specific persons should be charged with the

[406] The relevant provisions which can lead to a judicial review of the complementarity criteria are articles 18(2), 19(1) and (2) and 53(3) (a) and (b). These provisions are discussed below.
[407] *Referrals and Communications*, *supra* note 369, regulations 6.5 and 6.6.

commission of such crimes",[408] article 14(2) provides that it shall, to the extent possible, "specify the relevant circumstances and be accompanied by such supporting documentation as is available to the state referring the situation". As for Security Council referrals, neither the Statute nor the Rules give any instructions as to their content (indeed, the Statute largely avoids regulating in any detail the Council's authority *vis-à-vis* the ICC).

When the Security Council's referred the Darfur situation to the ICC Prosecutor, it "[took] note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur".[409] As evidenced by the development leading to that referral, such reports might contain quite detailed information and provide some pressure on the Council to make a referral. Such commissions may well be allowed to move more freely in the territory of an "unwilling" state than the ICC Prosecutor will once he or she has decided to open an investigation. In the case of the Darfur Commission, the Sudanese government sought to provide just enough information to make it appear as though it was cooperating. The government did not, for instance, allow the commission to investigate the sites of mass graves or carry out all the interviews that it had hoped.[410]

Just as with private communications, the Prosecutor may, upon the receipt of a referral, for the purpose of analysing the seriousness of the information received, "seek additional information from states, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources that he or she deems appropriate", and "receive written or oral testimony at the seat of the Court".[411] Upon a Security Council referral, the Prosecutor may, due to the resolution's binding effect under the United Nations Charter,[412] at least in theory, expect the full cooperation of the states involved in the conflict.[413] The procedure set out in rule 47, applicable to testimonies received pursuant to article 15(2), shall apply also to testimonies when a situation is referred. Following the Ugandan self-referral, the Prosecutor announced that he would "work with Ugandan authorities, other States and international organisations in gathering the necessary information to

---

[408] Article 14(1).

[409] Security Council Resolution 1593 (2005).

[410] *ICC to Probe Darfur Killings*.

[411] Rule 104(2).

[412] Articles 25 and 103 of the UN Charter.

[413] According to Security Council Resolution 1593, "the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court […]".

make this [admissibility] determination".[414] The same will be possible with regard to the "interests of justice" determination, to the extent that the Prosecutor lacks relevant information. In response to the Security Council referral of the Darfur situation, the Prosecutor noted:

> "Before starting an investigation, I am required under the Statute to assess factors including crimes and admissibility. I look forward to cooperation from relevant parties to collect this information."[415]

Here, the Prosecutor could also rely on statements from the United Nations Special Rapporteur for Human Rights in Sudan, who has noted that

> "Sudan arbitrarily arrests and tortures civilians and has failed to try those responsible for crimes committed during a two and a half year revolt in its Darfur region, […] [and that] there was a culture of impunity for those who raped women, especially in Darfur, and that the government's excuses for inaction were not acceptable. […] [Further,] a special national court for war crimes in Darfur had tackled too few cases and had not dealt with crimes committed during the conflict, focusing rather on random looting incidents. The government says the national court will be a substitute for the International Criminal Court (ICC) which is investigating alleged war crimes in Darfur. But investigators have yet to be granted permission to visit Sudan."[416]

Additional information might be gathered, *inter alia*, by interviewing people. In the same report, the Prosecutor noted that for the purpose of analysing the admissibility of cases, "the Office has also interviewed more than a dozen individuals".[417] Just as in the *proprio motu* situations, the Prosecutor may be selective, subject to the general duty to make a sufficiently informed decision. The Prosecutor may only seek additional information from "reliable sources that he or she deems appropriate".[418]

---

[414] *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*, Press Release, 29 January 2004 (available at http://www.icc-cpi.int/press/pressreleases/16.html).

[415] *Security Council refers situation in Darfur to ICC Prosecutor*, Press Release, 1 April 2005 (available at http://www.icc-cpi.int/press/pressreleases/98.html).

[416] *Sudan not trying Darfur war crimes: UN official*, Reuters, 23 October 2005, quoting Sima Samar, UN Special Rapporteur for Human Rights in Sudan (available at http://darfurdaily.blogspot.com/2005/10/sudan-not-trying-darfur-war-crimes-un.html).

[417] *Report to the Security Council Pursuant to UNSCR 1593*, *supra* note 361, p. 4.

[418] Rule 104(2).

4.4.3.3. Notification of the Prosecutor's decision not to investigate

If the Prosecutor decides not to open an investigation, the Statute itself does not instruct the Prosecutor to inform the relevant state party or the Security Council. Rule 105(1) provides, however, that the Prosecutor "shall promptly inform in writing" the state or, as applicable, the Security Council of the decision against investigation. The Prosecutor must then have regard to article 68(1), which provides that the Court "shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".[419]

As for the Pre-Trial Chamber, the Prosecutor is under no general duty to inform the Chamber of a decision not to investigate following a referral. If, however, the Prosecutor has based his or her decision solely on the "interests of justice" criterion, he or she "shall inform the Pre-Trial Chamber". The same is provided in rule 105(4), which adds that the notice shall be prompt, and in writing.[420] This is not to say, of course, that the Court will not *de facto* stay informed of any decision not to proceed upon a referral.

4.4.3.4. The Pre-Trial Chamber's review of a decision not to investigate

According to article 53(3) (a), the Pre-Trial Chamber may, upon a request from the referring state or, as applicable, the Security Council, review a decision of the Prosecutor not to proceed. In addition, according to article 53(3) (b), the Chamber may, on its own initiative, review a decision not to proceed when it is based solely on the "interests of justice" criterion. A request for review under subparagraph (a) shall be made in writing "within 90 days following the notification" and be "supported with reasons".[421] As for the basis for the review, the Chamber may, according to rule 107(2), request the Prosecutor to "transmit the information or documents in his or her possession, or summaries thereof, that the Chamber deems necessary for the

---

[419] Rule 105(3).

[420] Here, no explicit restrictions with regard to the safety, well-being, *etc.* of victims and witnesses are provided for. More general precautionary instructions regarding the ICC's proceedings are, however, given in article 68, which *inter alia* provides that the Court "shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." The term "Court" includes, according to article 34, the OTP as well as the Pre-Trial Chamber.

[421] Rule 107(1).

conduct of the review".[422] According to rule 107(4), it may also seek further observations from the state or the Security Council. Rule 107(3) instructs the Pre-Trial Chamber to observe the rights of the parties involved and protect them as enshrined in articles 54 and 68. The Chamber must also ensure confidentiality and protection of national security information according to articles 72 and 73.

Having reviewed the Prosecutor's decision not to investigate, the Chamber may, according to article 53(3) (a), "request the Prosecutor to reconsider that decision". Such a request to the Prosecutor would, it is submitted, be based on one of the following: the Chamber finds, in contrast to the Prosecutor, that all the criteria in article 53(1) (a) to (c) are met; the Chamber finds that the Prosecutor's decision has been made in a unsatisfactory manner; or the Chamber finds that the Prosecutor's decision has not been sufficiently informed. The decision of the Pre-Trial Chamber must be "concurred in by a majority" and shall "contain reasons". When an issue of jurisdiction or admissibility is raised, rule 107(5) refers to rule 59. Rule 59(1) provides that the Registrar shall inform those who have referred a situation pursuant to article 13, and the "victims who have already communicated with the Court in relation to that case or their legal representative". This will ensure that the matters are sufficiently explored. According to rule 59(2), such information shall be given with due regard to confidentiality, protection of persons and the preservation of evidence.

Linguistically, the term "request to reconsider" indicates that the Prosecutor may uphold his or her decision not to investigate (this is not indicated by the term "request", which entails a duty,[423] but by the term "reconsider"). While the term "reconsider" at times, arguably, may imply a duty to "reverse", the most natural understanding is just to "make a new assessment".[424] The latter interpretation is supported *e contrario* by the fact that article 53(3) (b), in contrast to (a), expressly authorises the Pre-Trial Chamber to force the Prosecutor to investigate (see below). Further, it is supported by rule 108(2), which provides that the Prosecutor "shall reconsider [the] decision as soon as possible", indicating that there will in fact be a

[422] Despite the wording "that the Chamber deems necessary", it is submitted that the Prosecutor must submit all relevant information that the Camber will need to conduct a meaningful review even if the Chamber fails to specify all the elements.

[423] For instance, the use of the term "request" in article 18(2) means, as concluded above, that the Prosecutor *shall* defer to genuine national proceedings. Further, articles 87 *et seq.* refer to "requests" from the Court, with which states parties, according to article 86, "shall […] cooperate fully".

[424] *The Oxford English Dictionary*.

true *process of reconsideration* and not just a mechanical reversal. The interpretation is finally supported by rule 108(3) which provides that "[o]nce the Prosecutor has *taken a final decision*", he or she shall notify the Pre-Trial Chamber in writing, and the notification "shall contain the conclusion of the Prosecutor and the reason for the conclusion". The Prosecutor's reconsideration will be made in light of the new information submitted by the state or the Security Council. In addition, the Pre-Trial Chamber will have "reviewed" the decision, and the Prosecutor must take into account any views expressed by Chamber.

According to article 53(3) (b), the Pre-Trial Chamber may, on its own initiative, review a decision not to investigate when it is based solely on the "interests of justice" criterion.[425] Rule 109 provides the procedure for this review.[426] Such a decision not to investigate "shall be effective only if confirmed by the Pre-Trial Chamber",[427] and rule 110 provides that "[w]hen the Pre-Trial Chamber does not confirm the decision by the Prosecutor referred to in sub-rule 1, he or she shall proceed with the investigation or prosecution".[428] This means that the Pre-Trial Chamber may effectively *force* the Prosecutor to investigate. Whether the Pre-Trial Chamber will refuse to confirm the Prosecutor's decision depends on whether the Chamber finds that all the criteria (a) to (c) are fulfilled or not. Rule 110(a) provides that the decision must be concurred by a majority of the judges. The decision must also contain its reasons and be communicated to "all those who participated in the review", including, as applicable, the state or the Security Council.

The Pre-Trial Chamber's authority in these situations to force the Prosecutor to investigate is not unproblematic. First, when the Prosecutor has considered that an investigation would not serve the "interests of justice", the whole-heartedness with which a subsequent proceeding will be carried out can be questioned. Second, forcing the Prosecutor to proceed against his or her professional judgement might

---

[425] Where the decision is based on this discretionary criterion, the jurisdictional and admissibility criteria will always have been met, due to the wording in factor (c) that there are "*nonetheless* substantial reasons to believe that an investigation would not serve the interests of justice" (emphasis added). The term "solely" in article 53(3) (b) is therefore, in reality, redundant.

[426] Rule 109(1) requires *inter alia* that the review be conducted within 180 days. The Chamber shall also invite the Prosecutor (paragraph 1) and the state or Security Council which requested a review (paragraph 2), to submit observations.

[427] According to rule 110(1), a decision by the Pre-Trial Chamber to confirm or not to confirm the Prosecutor's decision not to prosecute "must be concurred in by a majority of its judges and shall contain reasons".

[428] Rule 110(2).

strain the relationship between the Prosecutor and, in extreme cases, the Court and even prompt his or her resignation. In that respect, it may be noted that, according to article 42(6), the Presidency "may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case". Further, article 42(7) provides that "[n]either the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground". The latter provision will not be applicable, however, unless some concrete irregularity exists. Despite the concerns above, the Statute has taken the stance that the Court, as opposed to the Prosecutor, shall have the final say regarding the "interests of justice" criterion when a situation has been referred to the Prosecutor. Reference is, however, made to the comments elsewhere in this book regarding the Chambers expected reluctance to set aside the Prosecutor's assessment regarding this discretional criterion.

It should be noted that while the Pre-Trial Chamber has the authority to review a decision of the Prosecutor not to investigate, and subsequently to block the decision when it is based on the "interests of justice" criterion, a decision against investigation does not have to be confirmed. This means that if the Chamber refrains from reviewing the decision, it is automatically valid.

4.4.3.5. The Prosecutor's own review of a decision not to investigate

Article 53(4) provides that the Prosecutor at any time may reconsider his or her own decision not to open an investigation. Such reconsideration must be "based on new facts or information". The term "new facts" refers to facts that have occurred after the first decision, whereas the term "new information" may refer to facts that have occurred before the decision, but only later have come to the Prosecutor's knowledge. The facts or information must be relevant and convince the Prosecutor that a "reasonable basis" now exists. There is no requirement as to the importance of the new facts or information as long as they tip the decision in favour of proceeding.

4.4.3.6. Other checks on the Prosecutor's decision

In addition to the Pre-Trial Chamber's authority to review, a decision of the Prosecutor to proceed may effectively be set aside by the Security Council according to article 16, according to which the Council may block ICC proceedings for renewable periods of 12 months. It is also possible that the Assembly of states parties may exercise some *de facto* control over the Prosecutor's decisions through the

Assembly's disciplining and removing authority,[429] its electing authority[430] or its authority to consider and decide the Court's budget (including allocations).[431]

4.5. THE DECISION WHETHER TO PROSECUTE

4.5.1. Introduction

According to article 53(2), the Prosecutor must determine that a "sufficient basis" exists before he or she decides to prosecute. The determination involves an assessment of the following three factors: (a) there must be a "sufficient legal [and] factual basis to seek a warrant or summons under article 58"; (b) the case must be "admissible under article 17"; and (c) prosecuting must be in "the interests of justice". There is no longer any distinction with regard to the trigger mechanism, and the Prosecutor's decision will exclusively pertain to *cases*, not to situations.

4.5.2. The "sufficient basis" threshold

Linguistically, the term "sufficient basis" is not very enlightening. Logically, the standard must be stricter than the "reasonable basis" standard required for opening an investigation under article 53(1). An investigation has now been carried out and the question is whether, in light of what the investigation has revealed, a prosecution is warranted. As noted, the Prosecutor will not, as the rule, prosecute unless he or she feels confident that he or she will win. Thus, the threshold as to the issue of guilt must arguably be close to that of "beyond reasonable doubt" which the Prosecutor will have to demonstrate in the trial.[432] By contrast, the threshold with regard to the admissibility and the "interests of justice" issues should be probability, as that is the threshold reflected in articles 17 and 53(2) (c) respectively. It should also be noted

[429] Articles 46(1), 46(2)(b) and 47.

[430] Article 42(4).

[431] Articles 36, 42 and 112.

[432] Article 66(3). Arguably, this threshold is relative, in the sense that the more serious the crime the less "certainty" is required; the person has for instance allegedly played a key role in a particularly grave crime. The same might also be true if the case for some other reason is considered particularly important, involves particular legal questions or has particularly vast implications for other cases. The Prosecutor must, however, always find that he or she is safely within the "sufficient basis" threshold.

that the two latter issues, which in principle are no less fundamental than that of guilt, will be settled before the real trial commences.[433]

4.5.3. The basis for the Prosecutor's decision

The *basis* for the Prosecutor's decision will be all relevant information revealed by the *investigation*. According to article 54(1), the Prosecutor must have investigated "all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute", and he or she must have investigated "incriminating and exonerating circumstances equally". In addition to the usual type of evidence relevant to a criminal trial, the Prosecutor must have collected sufficient evidence to make an informed decision regarding the complementarity issues of admissibility and the "interests of justice", such as information regarding a state's judicial system and whether there are genuine national proceedings, information regarding the state's security situation and information indicating the interests of victims. As for jurisdictional evidence, it must cover all subjective and objective requirements for convicting the accused under the Statute, and the Prosecutor must determine whether it will be allowed in a trial. Concerning the sources of information, reference is made to the discussion above. As for the various means of obtaining information, reference is in made to articles 54(3), 56(1) and 57(3), which allow the Prosecutor to undertake a variety of measures.

4.5.4. The Pre-Trial Chamber's review of a decision to prosecute

The Statute does not require the Pre-Trial Chamber's authorisation of a decision to prosecute as such. In practical terms, however, the Pre-Trial Chamber will review the decision when the Prosecutor seeks an arrest warrant under article 58(1). Then, the Chamber must be convinced that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". Further, under article 61, the Pre-Trial Chamber must hold a hearing for the purpose of determining whether the charges should be confirmed. Here, the Pre-Trial Chamber shall, on the basis of the hearing, "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".[434] As to the admissibility, the Court may on its own motion determine the

---

[433] Exceptionally, a state may invoke the admissibility criteria even after a trial has started, see article 19(4).

[434] Article 61(7). Detailed provisions on the procedure to be followed at the confirmation hearing are given in article 61 and rules 121 to 126.

admissibility of a case under article 19(1), and states and the person concerned may invoke the admissibility under article 19(2) (at this stage it will be too late to request a preliminary ruling regarding admissibility under article 18). With regard to the "interests of justice" criterion, the Court cannot, in the context of a prosecution, set aside a determination of the Prosecutor that it has been met; it can only set aside a determination that it has not been met. Thus, where the Prosecutor has decided to prosecute, the Pre-Trial Chamber *must* assess the jurisdiction; it *may* assess the admissibility; and it *may not* assess the "interests of justice" criterion.

4.5.5. The notification of a decision not to prosecute

According to article 53(2), the Prosecutor shall inform not only the referring state or, as applicable, the Security Council, but also the Pre-Trial Chamber of any decision against prosecution, irrespective of the trigger mechanism and irrespective of which of the three criteria (a) to (c) has been decisive. The respective party shall be informed of the Prosecutor's "conclusion and the reasons for the conclusion". According to rule 106(1), the notification shall be made "promptly and in writing", and rule 106(2) provides that when the Prosecutor states the reasons of the conclusion, he or she must have regard to article 68(1) on the protection of victims and witnesses.

4.5.6. The review of a decision not to prosecute

Just as with decisions not to investigate, the referring state or the Security Council may, under article 53(3) (a), request the Pre-Trial Chamber to review the Prosecutor's decision *not to prosecute*. Under article 53(3) (b), the Chamber may on its own initiative review a decision not to prosecute when it is based solely on the "interests of justice" criterion in article 53(2) (c). Thus, although article 53(2) instructs the Prosecutor to inform the Pre-Trial Chamber of any decision not to prosecute, regardless of the reason, the Chamber may only, absent a request under (a), review a decision against prosecution if it is based on the "interests of justice" criterion. In the latter situation, the Chamber may, just as with an investigation, force the Prosecutor to prosecute.

Again, as with investigations, the question may be raised as to whether the authority to force the Prosecutor also applies to the *proprio motu* situations. The wording of article 53(3), which applies both to investigations and prosecutions, does not distinguish between trigger mechanisms. It was nevertheless concluded above that the Chamber may not force the Prosecutor to investigate *proprio motu*. This was

based largely on the fact that article 15, which in some detail regulates the initiation of *proprio motu* investigation, fails to authorise the Pre-Trial Chamber to force an investigation; it only authorises the Chamber to bar it. This point is, however, no longer relevant as the decision as to whether to prosecute is exclusively regulated in article 53. Further, the Prosecutor will now have triggered the ICC investigative apparatus and invested considerable human and financial resources. It is therefore submitted that the Chamber's authority under article 53(3) (b) to force a prosecution where the Prosecutor has based a decision not to prosecute solely on the "interests of justice" criterion also applies to the *proprio motu* situations. The authority of the Pre-Trial Chamber thus exists irrespective of the trigger mechanism; is optional (the Chamber "may" force an investigation); and is limited to cases where the "interests of justice" criterion has been decisive. The authority under article 53(3) (b) is further limited to that of forcing, as opposed to barring, a prosecution. That being said, it is stressed that the Chamber exercises a broader control when it is called upon to issue an arrest warrant and when it, before a trial starts, is called upon to confirm the charges.

As for the applicable procedures, reference is made to the discussion above on the procedures for reviewing a decision not to investigate.

4.6. ARTICLE 18: PRELIMINARY RULINGS REGARDING ADMISSIBILITY

4.6.1. Introduction

Article 18 reads:

> "Article 18
> Preliminary rulings regarding admissibility
>
> 1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
>
> 2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its

> jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.
>
> 3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
>
> 4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.
>
> 5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.
>
> 6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.
>
> 7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances."

As noted above, before the Prosecutor decides to investigate, he or she will have assessed the admissibility as part of the "reasonable basis" determination according to article 15(3) and/or article 53(1). In order to make a sufficiently informed determination on the admissibility, the Prosecutor must have explored whether there are states which seem to be exercising jurisdiction over the crimes concerned. In the *proprio motu* situations, the Pre-Trial Chamber will have, under article 15(4), assessed the same question as part of the required authorisation. Article 18 adds yet another layer of admissibility assessment. An additional purpose of article 18 is that it will serve "as a cue for [a concerned state] to elect whether to exercise its

jurisdictional rights".[435] In addition, while the article primarily aims at addressing sovereignty concerns, a Pre-Trial Chamber ruling which confirms the admissibility might render the Prosecutor less exposed to criticism.[436]

While article 18 arguably addresses legitimate concerns, it nevertheless compromises the need for expeditious procedures. It will delay the opening of an investigation whenever it is invoked, at a time when the Prosecutor will already have determined that the criteria for investigating are met. The provision invites unwilling states to delay the proceedings in an attempt to circumvent justice. At the same time, although the Prosecutor will have carried out a careful analysis, there might be genuine national proceedings that he or she is not aware of, or there might be states willing to proceed genuinely once they are notified.

4.6.2. The scope of article 18

It is not perfectly clear from the wording whether states have a right to seek a preliminary admissibility ruling under article 18 only when the Prosecutor acts *proprio motu* or pursuant to a state referral, or whether the state has such a right also when the Prosecutor acts pursuant to a Security Council referral.[437] The fact that article 18(1) fails to instruct the Prosecutor to notify states of his or her decision to investigate when there is a Security Council referral indicates that the right to seek such ruling then is precluded. Another plausible explanation why the Prosecutor does not have to inform states when there is a Security Council referral might be, however, the publicity that a Security Council referral automatically will enjoy.[438] Then again, article 18(2) lets a state request a deferral "[w]ithin one month *of* receipt of that notification", indicating that the right only exists when there has been such notification, and not when there is a Security Council referral. Paragraph 2 does not, however, expressly distinguish between trigger mechanisms. The wording in article 18 is therefore unclear as to the scope of the right to seek a preliminary ruling.

As for the object and purpose of the article 18, it should be noted that article 18 was introduced first of all as a safeguard in *proprio motu* situations and, it seems, to a lesser extent in cases of state referral. Such a safeguard seems to be least required

---

[435] Newton 2001, p. 55.

[436] In the *proprio motu* situations, the ruling will only duplicate the admissibility part of the authorisation.

[437] It will be concluded below that the admissibility criteria apply when there is a Security Council referral.

[438] It should be noted, however, that a Security Council referral does not automatically lead to investigation.

when the Security Council has made a referral. The perhaps strongest argument, however, for exempting Security Council referrals from the scope of article 18 is that the delay it causes would be particularly unfortunate in such situations due to the implications for peace and security. On balance, therefore, the correct interpretation seems to be that article 18 in its entirety does not apply when the Security Council has referred a situation to the Prosecutor.[439]

4.6.3. The Prosecutor's notification

According to article 18(1), the Prosecutor shall, when he or she intends to initiate an investigation, "notify all States Parties and those States which […] would normally exercise jurisdiction". The reference to "an investigation" indicates that the Prosecutor does not have to notify states when he or she initiates a preliminary examination (above also referred to as "analysis").[440] As to the required content of the notification, the wording does not provide much guidance. Clearly, it must reflect the decision to investigate a certain situation, but this would hardly be sufficient for the purpose of article 18.[441] During the negotiations on the Rules, adopted in 2000, the United States argued that states under article 18(1) should be informed of the suspect's identity in order to determine whether relevant national proceedings existed. A rule was therefore proposed instructing the Prosecutor to specify the crimes and reveal the suspect's identity if an individual had been singled out. Several delegations argued, however, that the proposal ran counter to the already existing text in article 18(1), which allowed the Prosecutor to "limit the scope of the information provided to States". It was argued that a rule as suggested by the United States would unduly impede the ICC proceedings.[442] Rule 52(1) therefore provides that the notification shall "contain information about the acts that may constitute crimes referred to in article 5, relevant for the purpose of article 18, paragraph 2", but it starts with the words "[s]ubject to the limitations provided for in article 18, paragraph 1". Because article 18(2) only refers to "criminal acts […] which

[439] Most, but not all, commentators conclude similarly, see Benzing 2003, p. 625; and Holmes 2002, p. 683.

[440] The Prosecutor has, thus far, nevertheless, kept the public informed of his steps even at such early stages.

[441] In fact, the mere decision to investigate a situation also appears to be covered by a general duty of the Prosecutor to inform the public, see *e.g. Prosecutor of the International Criminal Court opens an investigation into Northern Uganda*, Press Release, 29 July 2004 (available at http://www.icc-cpi.int/press/pressreleases/33.html).

[442] Holmes 2001, p. 339.

relate to the information provided in the notification", rule 52(1) does not require a great measure of specificity. It suffices to identify the respective *crimes*. To the extent possible, the Prosecutor should refer to specific incidents and their time and place, such as a massacre of civilians in a certain place on a certain day. This will enable states to determine whether there are competing proceedings. It should be noted that before an investigation has been conducted, the Prosecutor will scarcely have sufficient basis for identifying the names of suspects anyway, and to reveal a list of suspects at such a premature stage would appear irresponsible.

The Prosecutor cannot be required to reveal more information than he or she actually possesses. At the same time, it is not inconceivable that the Prosecutor would determine that there is a "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"[443] before he or she actually has substantial and consistent information on specific crimes. Indeed, the reports from a conflict might be inconsistent or incomplete. There might be clear indications that crimes within the Court's jurisdiction have been committed, and the initial purpose of the investigation would then be to clarify which crimes have actually been committed. The Prosecutor may discretionally choose to give more information to some states than others, provided that all states receive the required minimum information.

If a state deems the notification inadequate for the purpose of determining whether competing national proceedings exist, it may "request additional information from the Prosecutor".[444] Such request is, however, limited to information that may "assist [the state] in the application of article 18, paragraph 2". It is thus not a question of what the state wants to know but rather what it needs to know. The state's request for additional information "shall not affect the one-month time limit provided for in article 18, paragraph 2",[445] and it "shall be responded to by the Prosecutor on an expedited basis".[446] The latter will be in the interest not only of the Prosecutor but also of the state as the one-month time limit in article 18(2) will be running.

---

[443] Article 53(1) (a).

[444] Rule 52(2).

[445] *Ibid*.

[446] *Ibid*.

4.6.4. The states that the Prosecutor shall notify

The instruction to notify "all States Parties and those States which […] would normally exercise jurisdiction over the crimes concerned" raises the question as to whether this might include non-states parties. One possible interpretation is that the Prosecutor must notify all states parties and in particular those states parties which would normally exercise jurisdiction.[447] Another interpretation is that the Prosecutor must notify all states parties and the non-states parties which would normally exercise jurisdiction. In support of the former interpretation, one could point to the wording in article 18(5) which provides that "States Parties shall respond to such requests without undue delay". The failure to mention non-states parties here could arguably indicate that they are not to be notified under article 18(1) either.[448] This interpretation renders, however, the addition "and those States …" in article 18(1) redundant as it would have sufficed to say "all States Parties". Arguably, it should be assumed that the addition adds substance to the provision; that it broadens the scope of the duty to notify. The assumption is strengthened by the use of the term "and" rather than "including" in article 18(1). It would also make much sense to notify selected non-states parties as, according to articles 17 and 19, the admissibility of a case might be challenged by any "State which has jurisdiction over a case", possibly including non-states parties, "on the ground that it is investigating or prosecuting the case or has investigated or prosecuted".[449] It is therefore submitted that the Prosecutor must notify all states parties and those non-states parties that would normally exercise jurisdiction.

It is not quite clear which states might be the states "which would normally exercise jurisdiction". The fact that a given state according to international law has jurisdiction over the crime in question will scarcely suffice; it would then be possible to argue that all states would have jurisdiction according to the universality principle, at least with regard to some of the crimes.[450] The point is rather to decide which states are actually likely to deal with the cases. It is submitted that in order for this to be likely, there must exist some *link* between the state and the crime making

---

[447] Ntanda Nsereko 1999, p. 399, para. 9.

[448] Article 18(5) could, however, not include non-states parties, as it establishes an *obligation*, whereas article 18(1) establishes a right.

[449] Article 19(2) (b).

[450] It is submitted that this is the case for war crimes that constitute grave breaches of the Geneva Conventions and torture as a crime against humanity, see the discussion on the term "State with jurisdiction" in article 17.

the state what one might call an "interested State". Such link would include territoriality and the nationality of the perpetrator and of the victim. It may be noted that absent a Security Council referral either the territorial state or the state of the perpetrator's nationality will have to have ratified the Statute or lodged an *ad hoc* acceptance of the Court's jurisdiction in order for the Prosecutor to proceed.[451] Further, the Prosecutor must probably have notified the custodial state, even though that state might not have any link to the crime as such. Although the issue of jurisdiction for the custodial state might be controversial, that state will be in a splendid position to exercise jurisdiction, and that alone would appear to make a notification imperative.[452] The Statute should arguably encourage the custodial state to proceed, *inter alia*, by granting it the right to seek a preliminary ruling. The additional wording "according to the information available" raises the question as to whether the relevant information must already be in the Prosecutor's possession or whether the Prosecutor is required to make inquiries in order to identify the states concerned. Benzing argues, sensibly it seems, that the Prosecutor must make a "reasonable effort to determine" whether the required link exists, and that the effort should be "less onerous than to require the Prosecutor to establish whether a State has provided for universal jurisdiction" in its legislation.[453] The Prosecutor should, at this point, exclusively be concerned with questions of international law and not have to analyse national law. It may be noted that he or she already will have assessed the admissibility as part of the determination to open an investigation under article 15(3) or article 53(1). A part of that assessment might of course be the study of a state's internal jurisdictional regime when competing proceedings purportedly exist.

Apart from states parties and other states that would normally exercise jurisdiction, other non-states parties might be or have been investigating. Alternatively, a non-state party might be interested in proceeding under the universality principle. If the Prosecutor is informed of this, he or she should notify such states as well. The term "would normally exercise jurisdiction" should not be interpreted in an unnecessarily strict fashion so as not to cover a state that would not normally exercise jurisdiction but nevertheless does so. Should the Prosecutor fail to

[451] Article 12(1) and (2).

[452] The ICC Prosecutor might contest the jurisdiction of the custodial state not on the ground that the proceeding was non-genuine, but on the ground that the state lacked jurisdiction.

[453] Benzing 2003, p. 623.

notify a relevant state, he or she only risks that this state later challenges the admissibility.[454]

In his policy paper, the ICC Prosecutor seems to envisage an informal and pragmatic *consultation process* between the Prosecutor and interested states:

> "The exercise of the Prosecutor's functions under article 18 of notifying States of future investigations will alert States with jurisdiction to the possibility of taking action themselves. In a case where multiple States have jurisdiction over the crime in question the Prosecutor *should consult with* those States best able to exercise jurisdiction […] with a view to ensuring that jurisdiction is taken by the State best able to do so."[455]

4.6.5. Notification on a confidential or limited basis

There is a risk that the suspect, once he or she becomes aware of the Prosecutor's intention to investigate, will try to escape, seek to remove or destroy evidence and/or intimidate witnesses. In order to prevent such obstruction of justice, the Prosecutor may "notify such States concerned on a confidential basis", and "where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, limit the scope of the information provided to States".[456]

Rule 52 provides that the Prosecutor, "subject to the limitations provided for in article 18, paragraph 1", must give "information about the acts that may constitute crimes referred to in article 5". It is submitted that article 18(1) authorises the Prosecutor to provide states with differentiated information, indicated by the words "where the Prosecutor believes it is necessary".

It can be argued that the discretional wording in article 18(1) and rule 52 would make it possible for the Prosecutor to hold back more information than the situation actually requires. Holmes notes, however, that it is "highly unlikely that a Prosecutor will misuse these provisions" as it is in his or her interest to "alert States to an impending investigation so that jurisdiction and admissibility issues can be resolved at the earliest stage, rather than to find out later, after much effort and expense, that

---

[454] Under article 19(2) (b), the admissibility may be challenged by *any* "State which has jurisdiction over a case" on the grounds listed in article 17, not only by states that "would normally exercise jurisdiction".

[455] *Paper on some policy issues*, *supra* note 18, p. 5.

[456] Article 18(1).

the investigation fails the complementarity test".[457] Holmes further notes that "the Court may not react favourably to the Prosecutor's request for an authorization if it becomes clear that he or she has not provided the adequate information to States without valid reasons for withholding such information".[458] The Prosecutor should always advise states to handle the information received with confidentiality so as to avoid jeopardising the Court's proceedings or endangering lives. When the Prosecutor no longer believes that the withheld information is dangerous, he or she must, arguably, reveal it.[459]

4.6.6. The state's request for deferral

Article 18(2) provides that a state within one month of receipt of the notification

> "may inform the Prosecutor that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States".

Based on this, the state may request the Prosecutor to "defer to the State's investigation of those persons". The reference to investigations clearly does not imply that a state cannot invoke the fact that it is or has been prosecuting, in which case the state also "has investigated". In order to avoid ICC interference, the state's submission must not merely be that it is dealing or has dealt with the case in question, but that it is doing or has done so genuinely, as required by article 17. In addition to information relating to specific cases, rule 51 provides that a state "may choose to bring [information] to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". Article 18(2) fails to refer to such additional information, but it is submitted that such information may follow the request.[460] The question as to which weight should be placed upon such general information remains, however, highly discretional.

At this stage, when article 18 is invoked, the Prosecutor will rarely have singled out individual cases, and the pertinent question will rather be whether the ICC should deal with a given situation at all, *i.e.* whether there appear to be (sufficiently

---

[457] Holmes 2001, p. 340.

[458] *Ibid*.

[459] Ntanda Nsereko 1999, p. 400.

[460] The provision of such general information was not envisaged when the Rome Statute was adopted.

many) cases within a given situation that the ICC may and should handle. If very few cases appear to be admissible, it might not serve "the interests of justice" to interfere in the situation at all, unless these are particularly important cases, *e.g.* against the most responsible. The state will, for its part, identify cases that it is dealing or has dealt with and argue that they are inadmissible. To the extent that the Prosecutor signals his or her interest in cases that the state has not handled, the state might be prepared to deal with those cases as well. This might result in a continuous dialogue where the ICC and the state discuss where cases are to be handled.

The brief time limit for states to respond to the notification is due to the Prosecutor's need to proceed swiftly in order to secure evidence and prevent attempts to thwart justice. One month appears to be adequate time for determining whether there are relevant national proceedings; after all, it will be the state's own proceedings, and bringing clarity in the matter should not take much time. The term "upon receipt" raises the question as to whether only states which have actually received a notification may request deferral, or whether *any state* may do so. Limiting such right to states that have been notified appears to be overly formalistic, and it would not be in line with the purpose of the complementarity principle. According to article 19, any state may challenge the admissibility on the same ground, and there is no reason why a state should not be allowed to make a request under article 18 simply because it was not notified. With a right to request deferral also for states that have not been notified it is not quite clear, however, which time limit should apply. It is submitted that the state must have a one-month time limit from the acquirement of knowledge, provided that individual cases have not yet been singled out, in which case the state instead must contest the admissibility through a regular challenge.

The requirement that the state must be or have been investigating its nationals or others "within its jurisdiction" could be interpreted two ways: either it could simply mean that the state must have jurisdiction over the crime, or it could refer to the person's presence in the state's territory. The term "jurisdiction" is sometimes used in a territorial sense, especially when it refers to a person, such as when one says that a person "enters into a State's jurisdiction". The use of the preposition "within" rather than the preposition "under" might indicate a territorial meaning. Further, several articles, including article 17, refer to "*crimes* within the jurisdiction" as opposed to "persons within the jurisdiction".[461] This could also indicate a territorial meaning. In practical terms, it could make sense to require the person's presence as this would be likely to have implications for the proceeding's

[461] *E.g.* articles 5 and 53(1) (a).

genuineness. On the other hand, the French text, however, uses the term "*sous sa juridiction*", which means "under it jurisdiction", and thus does not seem to imply the person's presence. Further, the fact that the term "territory" is used in several articles of the Statute but not here[462] indicates that "jurisdiction" does not refer to the territory. Most importantly, however, the person's presence in the territory is not an admissibility criterion in article 17.[463] It is therefore submitted that any state which has jurisdiction over the crime may request deferral under article 18(2); this would correspond to the term "state which has jurisdiction" in articles 17(1) and 19(2) (b). As for the understanding of the term, reference is made to the detailed discussion below of the term as it appears in article 17.[464]

The reference to investigations of the state's "nationals or others within its jurisdiction" could further be interpreted to the effect that the state must have singled out a suspect in order to request deferral. While the wording might indicate this, it would make little sense. There is no reason why more should be required here than under article 17, where an individual does not have singled out before there is a prosecution.[465] It is submitted that it suffices that the state purports that it is or has been investigating the crime in question genuinely.[466]

According to rule 53, the state shall "provide information concerning its investigation, taking into account article 18, paragraph 2". This indicates that the state must provide sufficient information for the Prosecutor to determine whether he or she shall defer or seek an authorisation as provided for in paragraph 2, and, when the Prosecutor seeks an authorisation, for the Chamber to determine whether to authorise an investigation or not. If the state does not provide sufficient information, the proceeding's genuineness cannot be assessed properly. A state party will scarcely have the right to withhold that much information; it is difficult to see how providing sufficient information to demonstrate that a proceeding is genuine would "prejudice [a state's] national security interests", according to article 72(5). Failure to inform the Prosecutor sufficiently might indicate that the state is not proceeding genuinely and might lead to a reversal of the burden in that respect (see below).

---

[462] *E.g.* article 12, paragraph 2 (a).

[463] The presence or absence may, however, be indirectly relevant to the proceeding's genuineness.

[464] *Ibid.*

[465] *Ibid.*

[466] Holmes 2001, p. 340 concludes similarly.

In order for a request for deferral under article 18(2) to succeed, the state must have started an investigation when it makes the request, *i.e.* no later that one month from the time it was notified or otherwise acquired knowledge of the Prosecutor's intention to investigate. If the state initiates an investigation at a later stage, the admissibility may instead be *challenged* under article 19, so long as an ICC trial has not commenced, and a challenge is not precluded under articles 18(7) or 19(5) (see below). Nothing in the Statute prevents, however, the Prosecutor from giving the state additional time to decide whether to proceed, and then defer once an investigation is initiated. If, for instance, there seems to be a good chance that the state will start an investigation, but there is an ongoing political debate in the state or other obstacles which probably will be overcome, awaiting a clarification might be the wisest course of action.

Although article 18 deals exclusively with admissibility, it is not inconceivable that a state, when it responds to the Prosecutor's notification, seizes the opportunity also to argue that the Court lacks jurisdiction and/or that an investigation will not serve the "interests of justice". This should not be viewed as a regular challenge to the jurisdiction under article 19 as the Prosecutor will not have singled out an individual case yet. The Prosecutor, therefore, needs not respond to such additional arguments at this stage,[467] but neither can he, it is submitted, disregard such claims (or rather the facts purportedly supporting them) as he or she remains under a duty to continuously assess the jurisdiction and the "interests of justice" criterion. If at any time the Prosecutor finds that one of the criteria for proceeding is not met, he or she shall abort the proceeding.

4.6.7. The Prosecutor's deferral

Having received the State's request for deferral, the Prosecutor must decide whether to defer or proceed with the case(s) in question. Article 18 does not expressly list the criteria for the decision, but rule 55(2) provides that the Pre-Trial Chamber "shall consider the factors in article 17".[468] This is obvious since the Chamber's eventual ruling will be on the admissibility. If the Prosecutor finds that the state is conducting or has conducted a genuine proceeding, he or she shall defer. The term "request" implies that the state claims its right under the complementarity principle to be

[467] As for the "interests of justice" criterion, only a state which has referred the situation, may invoke it.

[468] Rule 55(2). The wording in article 53(1) that the "case is or would be admissible" is also relevant.

given jurisdictional priority.[469] If, however, the Prosecutor finds that a sufficient number of admissible cases within the situation remain, he or she shall seek an authorisation.

The threshold to be applied is probability as this is the threshold enshrined in article 17. Because the Prosecutor must either defer or seek an authorisation, any request by a state which purports to be proceeding or have proceeded genuinely with a case will force the Prosecutor to stay the proceeding for some time. If the request is not substantiated at all, however, the Pre-Trial Chamber will be able to authorise an investigation quickly and the Prosecutor should be able to resume his or her activity without much delay. He or she will, however, be prevented from pursuing regular investigative steps until he or she receives an authorisation from the Pre-Trial Chamber under article 18(2), absent an exceptional authorisation under article 18(6).

4.6.8. The Prosecutor's application for authorisation

If the Prosecutor finds that the purported proceedings are either non-existent or non-genuine, he or she shall submit an application to the Pre-Trial Chamber together with "the information provided by the state under Rule 53". The application "shall be in writing and contain the basis for the application".[470] Merely submitting the information that the state has provided is hardly enough as this will only be a part of the basis for his or her finding. The Prosecutor must submit additional relevant information on which he or she has based the finding, as well as his or her analysis. During the negotiations, France proposed that the term "reason" be used instead of "basis". The former term was, however, considered more subjective than the latter, and that is why the latter was preferred.[471] It is submitted, however, that the Prosecutor must provide the Chamber with both objective facts and subjective assessments (the French proposal would have better reflected this). The Prosecutor shall further "inform [the concerned] State in writing when he or she makes an application to the Pre-Trial Chamber", and he or she must "include in the notice a summary of the basis of the application".[472] As indicated by the term "summary", the Prosecutor need not reveal all his or her subjective assessments *vis-à-vis* the state.

---

[469] Ntanda Nsereko 1999, page 401.
[470] Rule 54(1).
[471] Holmes 2001, p. 341.
[472] Rule 54(2).

France and the United States both tabled proposals that would have offered states a more active role in the proceedings under article 18. The French proposal envisaged a dispute between the state and the Prosecutor, which the Pre-Trial Chamber would resolve, whereas the American proposal would allow the state to submit *views* on the Prosecutor's application and give the state some time to do so. These proposals were, however, considered as running counter to the need for an expeditious process. At the same time, the legitimate need for the state to submit information seems adequately addressed in the proposal that finally prevailed.

4.6.9. The Pre-Trial Chamber's ruling

According to rule 55(2), the Pre Trial Chamber "shall consider the factors in article 17 in deciding whether to authorise an investigation".[473] It should be noted that in *proprio motu* situations, the Pre-Trial Chamber will already have authorised the investigation under article 15(4). Yet, the Chamber must now assess the admissibility again, this time taking into account the information provided by the state under article 18(2). The Statute is silent on the procedure for the Chamber's ruling, and rule 55(1) allows the Pre-Trial Chamber to "decide on the procedure to be followed" and authorises it to "take appropriate measures for the proper conduct of the proceeding". The Chamber may *inter alia* hold a hearing, but a reason as to why the Pre-Trial Chamber would choose not to hold such hearing could be to avoid an unfortunate delay. Generally, if the application is accompanied by sufficient information, a hearing should be avoided. While the Appeals Chamber may hear an appeal "on an expedited basis",[474] there is no such provision regarding the Pre-Trial Chamber's ruling. The Chamber is merely instructed to "examine the Prosecutor's application and any observations submitted by a state that requested a deferral in accordance with article 18, paragraph 2".[475] The tension between sovereignty concerns and the need for expeditious proceedings is evident.

One might ask whether the term "any observations" is limited to the information that the state already has submitted to the Prosecutor, or whether the state is allowed to submit additional information to the Pre-Trial Chamber. On the one hand, the reference to the request arguably points to the information contained

[473] Neither article 18 nor the Rules *expressly limit* the grounds relevant to the Pre-Trial Chamber's ruling to those listed in article 17. In contrast, article 19(2) appears to do so. It is nevertheless submitted that that limitation also exists under article 18.

[474] Article 18(4).

[475] Rule 55(2).

therein. On the other hand, it might be argued that the term "submitted" indicates that the state may now submit additional information. The term "any observation" arguably also supports a broad interpretation. Due to the need to ensure an expeditious proceeding and the fact that the state has already had ample time to prepare its case, it is submitted, however, that the state may not submit additional information with the Prosecutor's application, and the Chamber will rule on the matter on the same basis as the Prosecutor. That is, of course, unless there is a hearing or the Chamber requests more information. Additional information may also be submitted together with a subsequent appeal.

The Pre-Trial Chamber is to determine whether the case(s) referred to in the state's request "is or would be admissible under article 17".[476] Although it was the state that invoked article 18, the burden of proof as to a proceeding's genuineness is on the Prosecutor. It could be argued that because the Chamber's ruling is preliminary and made at an early stage, the standard of proof that the Prosecutor must satisfy should be lower than at a later stage, and that a mere doubt as to the national proceeding's genuineness should suffice. It is submitted, however, that this would be inconsistent with the wording "is or would be admissible" in article 53(1) (b). As for the existence of the proceeding, the state must demonstrate this. In practical terms it will be virtually impossible for the Prosecutor to demonstrate the non-existence of a national proceeding, especially given the fact that a full investigation cannot be initiated yet. If the state does not convince the Chamber that a national proceeding exists, the Chamber should assume it does not, and the case will be admissible. The state's failure to provide the Prosecutor and the Chamber with relevant information to determine a proceeding's genuineness might lead to a shift of the burden. The Prosecutor should, however, first request additional information from the state under rule 53. Alternatively, the state's failure to provide sufficient information might indicate the proceeding's non-genuineness.

The American proposal which led to the adoption of article 18 required a supermajority or unanimous decision in the Pre-Trial Chamber before an investigation was authorised.[477] As the article now reads, the general provision in article 57(2) (a) provides that "[o]rders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges". According to rule 55(3), "the decision and the basis for the decision of the Pre-Trial Chamber shall be communicated as soon as possible

---

[476] Article 53(1) (b).

[477] *Statement of the US delegation, Article 11bis – Preliminary Rulings Regarding Admissibility*, 3 April 1998, A/AC.249/1998/WG.3/DP.2.

to the Prosecutor and to the state that requested a deferral of an investigation". The state will need to be informed of the decision's basis in order to decide whether to appeal an authorisation.

4.6.10. Appeal of the Pre-Trial Chamber's ruling

The state concerned, as well as the Prosecutor, may appeal the Pre-Trial Chamber's ruling to the Appeals Chamber "in accordance with article 82".[478] The time limit for such appeal is five days from the date upon which the appealing party was notified of the decision.[479] The Registrar shall give notice of the appeal to all parties who participated in the proceedings before the Pre-Trial Chamber, unless they have already been notified.[480] The appeal proceedings shall be in writing, "unless the Appeals Chamber decides to convene a hearing".[481] The appeal "may be heard on an expedited basis",[482] and it "shall be heard as expeditiously as possible".[483] This means that if no party requests otherwise, and if the Appeals Chamber does not decide otherwise on its own motion, the proceedings will be in writing and expeditious. Neither the Statute nor the Rules explain what is meant by "expedited basis", but it arguably involves "skipping some procedural steps [or] giving priority to the appeal over all other work before the Appeals Chamber",[484] or both. The point must be whether the Appeals Chamber feels it has a sufficient basis to decide on the appeal.

An appeal has no suspensive effect "unless the Appeals Chamber so orders, upon request".[485] According to rule 156(5), the appealing party "may request that the appeal have suspensive effect in accordance with article 82, paragraph 3". The question of a suspensive effect clearly pertains to the ICC proceeding, and not to the national proceeding, meaning that if the Pre-Trial Chamber has not authorised the ICC investigation and the Prosecutor appeals, the national proceeding cannot be suspended. If the Appeals Chamber does not decide to suspend the ICC proceeding, the Prosecutor may proceed with a full investigation. In order to obtain a suspensive effect, the state must demonstrate that there are sufficient reasons to suspend the

[478] Article 18(4). Despite the broad term "either party" in article 82(1), there is no doubt that the right to appeal under article 18(4) applies only to the Prosecutor and the state concerned.
[479] Rule 154(1).
[480] Rule 156(2).
[481] Rule 156(3).
[482] Article 18(4).
[483] Rule 156(4).
[484] Ntanda Nsereko 1999, p. 401, para 22.
[485] Article 82(3).

ICC proceeding. Without particular indications that the appealed ruling is incorrect, the Appeals Chamber will hardly order a suspensive effect due to the general necessity of preserving the ICC investigation and the fact that Pre-Trial Chamber has already found that the case is admissible.

It might be questioned whether the state may submit additional information to the Appeals Chamber when the Pre-Trial Chamber's ruling is appealed. Neither the Statute nor the Rules answer that question expressly. Article 83(3) provides that "the Appeals Chamber shall have all the powers of the Trial Chamber", and applied to the present context it indicates that the Appeals Chamber may hear all evidence that it is offered. Above, it was concluded that rule 55(2) does not authorise a state to submit additional information to the Pre-Trial Chamber. It is submitted, however, that the state may submit additional information to the Appeals Chamber. In contrast to the submission of the matter from the Prosecutor to the Pre-Trial Chamber, the appeal involves a new procedural step taken by the state. There seems to be nothing preventing the state with its appeal to submit its arguments *and* any additional information that the state might possess and deem relevant. Additional information might indeed be prompted by conclusions in the Pre-Trial Chamber's ruling. Allowing such additional information will only promote the purpose of the complementarity principle, as long as the proceeding is not unduly delayed. The possibility for the Appeals Chamber to decide on the matter expeditiously in writing and to refrain from giving the appeal a suspensive effect will ensure the ICC proceeding's integrity.

According to article 83(4), the Appeals Chamber's decision "shall be taken by a majority of the judges and shall be delivered in open court". The Chamber shall further "state the reasons on which it is based", and when not unanimous the judgement shall "contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law". As for the outcome of the appeal, the Appeals Chamber may "confirm, reverse or amend the decision appealed".[486] Hence, if the decision of the Pre-Trial Chamber refers to more than one case, the result might be that the decision is reversed with regard to some cases and confirmed with regard to others.

4.6.11. The Prosecutor's own review

According to article 18(3), the Prosecutor's deferral to national investigations may be reviewed by the Prosecutor "six months after the date of deferral" or at any time

[486] Rule 158(1).

when there has been a "significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation". This provision applies both when the Prosecutor has deferred without a ruling by the Court, and when the Prosecutor has deferred in accordance with such ruling. The United States' original proposal would only allow the Prosecutor to review a deferral after a period of 6 months (alternatively even 12 months) and no review based on a change of circumstances was proposed. This part of the proposal met considerable opposition from states which argued that it was crucial to the proper functioning of the complementarity principle that the Prosecutor be allowed to review the deferral as soon as there was a significant change of circumstances.

Article 18(3) underscores the obvious that the national proceedings must be genuine until a final acquittal or conviction is handed down, or the case is closed for reasons recognised by the admissibility criteria. The fact that the Prosecutor at one point has deferred to the national proceeding does not give the state *carte blanche* to proceed in a non-genuine manner thereafter. The Prosecutor's flexibility to conduct a review periodically or as soon as there has been a significant change is particularly important since a deferral might relate to more than one case. A state might proceed genuinely with most cases within a situation, but perhaps not all. It is crucial that the Prosecutor is not barred from carrying out his or her mandate where a situation is being investigated and prosecuted selectively or arbitrarily at the national level.[487] The provision must be read in conjunction with the authority of the Prosecutor under article 18(5) to request that the state periodically inform him or her of its investigations and any subsequent prosecutions.

As for the six months-alternative, the "date of deferral" would be the date upon which the Prosecutor actually deferred to the national proceedings, and not when his or her decision came to the state's knowledge. If the deferral followed the Pre-Trial Chamber's or the Appeals Chamber's refusal to authorise an investigation, the relevant date would be the date of that decision. A period of six months should provide sufficient time for evaluating the progress of the national proceeding. If there are no signs of irregularities after six months, it seems unlikely that the Prosecutor will want to undertake a review, although he or she may do so. The possibility of a review must be open to the Prosecutor, even if more than six months has elapsed and even if there is no "significant change of circumstances".

---

[487] An example would be a case of genocide where the state chooses only to investigate and prosecute the persons immediately responsible for the crimes, but not the persons responsible for engineering the policy behind in a manner punishable under article 25; or a case of war crimes where the state only pursues crimes committed by one party to the conflict.

Relevant "circumstances" would be the same circumstances that would be relevant under articles 17 and 20, *i.e.* all circumstances that would shed light on the state's willingness and ability to proceed genuinely. The prosecutor must look for signs such as lack of progress, or other indications that the state seeks to shield the person concerned. As for the requirement of a "significant change" of circumstances, this will clearly cover actual changes in the way the state conducts its proceedings. Whether it also covers circumstances that were present when the Prosecutor deferred, but have come to his or her *knowledge* only at a later stage, is less clear from the wording. The French wording "*il se sera produit un changement notable*" suggests that new facts *must* have occurred, as distinct from *appeared*. Likewise, the Spanish version reads "*se haya producido un cambio significativo*". The Russian text does not, just as the English text, include any verb but merely refers to a "*susjestvennoe izmenenie obstojatelstv*" (a significant change of circumstances). At the same time, the discovery of previously unknown facts may, arguably, in itself be viewed as a "change of circumstances", and the interpretational problem is thus not avoided altogether. Contextually, one might argue that not including newly discovered facts is supported by the fact that article 18(7), regulating a state's possibility of making a subsequent challenge, refers to "additional significant facts *or* significant change of circumstances", indicating that a "change of circumstances" only covers actual changes, whereas "additional significant facts" covers newly discovered facts. As for the underlying purpose, not letting the provision cover newly discovered facts would seriously undermine the complementarity principle. Moreover, there seems to be no legitimate reason to protect a state which has concealed facts indicating that its proceedings were non-genuine. Indeed, this would only confirm the state's non-genuine behaviour. It is therefore submitted that article 18(3) not only covers factual changes but also newly discovered information regarding previously existing facts.

As for the required significance of the change of circumstances, the Prosecutor has considerable discretion. The logical implication is clear: the change must have the potential of convincing the Court that the state is unwilling or unable to proceed genuinely. It might be asked whether stronger indication is required now than at an earlier stage as the Prosecutor has already deferred. It is submitted, however, that the standard remains the same.

The wording "shall be open to review by the Prosecutor" indicates that the Prosecutor has a right but not a duty to review the deferral when there has been a significant change. It is submitted, however, that if the Prosecutor finds that there has been a significant change *and* the jurisdictional and discretional criteria still are

met, *i.e.* if all the criteria in article 53(1) (a) to (c) are met, he or she has a duty to review the deferral. This seems to follow from articles 15(3) and 53(1) which provide that when the Prosecutor concludes that there is a "reasonable basis" to proceed with an investigation, he or she "shall" proceed. The case might be, however, that the Prosecutor no longer finds that an investigation would serve the "interests of justice", for instance due to other matters that are now considered as more urgent. The Prosecutor might even have opened other investigations, leaving him or her effectively unable to proceed with the first matter.

If the Prosecutor decides to reverse his or her own deferral, he or she must, according to rule 56(1), "apply to the Pre-Trial Chamber for authorization". The state's objection made under article 18(2) must be presumed to remain, absent clear indications to the contrary effect (in which case authorisation no longer is needed). The Prosecutor's application must be in writing and "shall contain the basis for the application",[488] and any periodic information provided by the state under article 18(5) shall be communicated to the Pre-Trial Chamber.[489] The same proceedings apply as where the Prosecutor has filed an application under article 18(2).[490]

As for the "significant" standard, it seems unlikely that the Pre-Trial Chamber would reject an application for review on the basis that the change in itself was not deemed significant, as long as the state's proceeding on a whole now appeared to be non-genuine. Indeed, the term "significant" arguably refers to the change's potential of reversing the conclusion. If there previously were doubt as to the proceeding's genuineness, even a minor change might be "significant". It should also be noted that the Prosecutor may avoid the criterion altogether, by simply awaiting the elapse of the six-month time limit when nothing will prevent him or her from reviewing the deferral. There is no mechanism for states to challenge the Prosecutor's decision to review the deferral.

4.6.12. The Prosecutor's request for periodic information

Having deferred to an ongoing national proceeding, the Prosecutor may, according to article 18(5), "request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions". This authority should be seen in light of the Prosecutor's authority to review the deferral. The fact that the Prosecutor or the Pre-Trial Chamber has deemed the national

[488] Rule 56(1).
[489] Rule 56(2).
[490] Rule 56(3).

proceeding genuine is no guarantee that it actually is and will remain genuine. It might be a well-designed sham, or the state's willingness or ability might change due to a political shift or problems pertaining to the judiciary.

Neither the Statute nor the Rules provide for any procedure regarding such request for periodic information. Arguably, the request must be in writing as any other communication between the Prosecutor and states. Further, the Prosecutor must satisfactorily identify the national investigation(s) or prosecution(s) that the request concerns. As to the term "periodically", it is submitted that every six months would be a reasonable interval in light of the Prosecutor's authority to review his or her decision after such a period.

States parties shall respond to such requests "without undue delay".[491] This standard is arguably stricter than the "unjustified delay" referred to in article 17(2)(b). While the latter standard envisages a contradictory process where the state is allowed to justify a delay, the standard in 18(5) refers to the time that, objectively, is needed to produce the requested information. If a state party fails to respond within due time, a reasonable inference might, under the circumstances, be made that the state is not proceeding genuinely. Such failure could be a ground for the Prosecutor to review the deferral and seek the Pre-Trial Chamber's authorisation to commence an investigation.[492]

The duty to inform the Prosecutor upon request must be seen in light of the idea that a state which investigates or prosecutes a crime within the ICC's jurisdiction "does so as agent and on behalf of the entire international community".[493] It should be noted, however, that there is no general duty for states to report on the progress absent a request under article 18(5).[494] The possibility of requesting periodic information enables the Prosecutor to give the state the "benefit of the doubt" and await the progress of the national proceeding, instead of disqualifying the proceeding forthwith. Such flexibility promotes the purpose behind the complementarity principle.

The regulation that only states parties are obliged to respond to such requests is given; the Rome Statute cannot create obligations for non-states parties.[495] It should be noted, however, that in the paragraph's first part the term "the State" is used,

---

[491] Article 18(5).

[492] Ntanda Nsereko 1999, p. 403, para. 24.

[493] *Ibid*. Ntanda Nsereko refers to *The Attorney General of Israel v. Eichmann*, p. 304; and *Demjanjuk v. Petrovsky*, p. 582.

[494] A similar request might be made under article 19(11).

[495] Vienna Convention article 34.

whereas in the latter part the term "States Parties" is used. Even a non-state party might be requested to submit periodic information, but if it fails to respond, this is no breach of duty, although it might be indicative of the national proceeding's non-genuineness.

4.6.13. Extraordinary authorisation to preserve evidence

Despite the one-month time limit that states have for responding to the Prosecutor's notification and despite other provisions in article 18 aimed at ensuring expediency, there is a risk that an unfortunate delay be created. There is a continuous risk that perpetrators abscond and that evidence is destroyed or lost, in particular where the custodial or territorial state is unwilling or unable to proceed genuinely. A state which seeks to shield a perpetrator might wait a full month before it requests deferral in bad faith. It might further provide the Prosecutor with insufficient or unclear information, forcing him or her to request additional information.[496] Where the state is unable, the ICC proceeding might be compromised as time passes. In order to minimise such risks, article 18(6) authorises the Prosecutor, on an exceptional basis, to seek authority from the Pre-Trial Chamber to pursue necessary investigative steps "for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available".[497] This provision generated considerable discussion during the negotiations. Some states argued that such investigative steps would unduly infringe on state sovereignty.[498] Most states felt, however, that some safety mechanism was called for, and the solution agreed on was to give the Prosecutor a possibility to act *before* a preliminary ruling had been handed down.[499]

It might be argued that the wording "on an exceptional basis" indicates that it will be particularly difficult for the Prosecutor to obtain such authorisation. It is submitted, however, that the term "exceptional" simply refers to the fact that the authorisation will be given at a time when the investigation is suspended and any

[496] It should be noted that the Prosecutor, to some extent, could limit the danger of *intentional* obstruction by limiting the scope of the information provided to states, as provided for in article 18(1).

[497] Article 18(6).

[498] Holmes 1999, p. 70.

[499] The US delegation stated in the introduction of its initial proposal that it understood the concerns raised that no procedure should be adopted that would encourage the destruction of evidence or permit a state to thwart the pursuit of justice, but did not suggest any possibility of requesting measures as finally provided for in paragraph 6 (on file with author).

investigative step will be exceptional. Indeed, the Prosecutor has no regular, as opposed to exceptional, authority to pursue such steps when the Pre-Trial Chamber's decision is pending or when the Prosecutor has deferred the investigation; this is the essence of any deferral.

The reference to "important evidence" is vague. Arguably, any evidence without which there will be no *prima facie* case would be "important". This is not to say, however, that only evidence that is *sine qua non* for a successful prosecution will be relevant. Indeed, it will be difficult to assess with any reasonable measure of certainty the importance of evidence which is not yet obtained. The fact that the Prosecutor deems the evidence as important should therefore, it is submitted, create a presumption that it is important. Relevant evidence might include eyewitness testimonies, bodies, murder weapons and key documents. The evidence might be either inculpatory or exonerating as the Prosecutor shall "investigate incriminating and exonerating circumstances equally".[500] The most likely is, however, that it is inculpatory evidence which the state might fail to secure or be inclined to destroy. Further, article 18(6) not only covers evidence related to the question of a person's guilt or innocence; it may cover any information relevant for the determination of the state's willingness and ability to proceed genuinely, including information on its handling of the case in question as well as general information on the adequacy of the state's judicial system.

As for the first alternative that there is a "unique opportunity" to obtain the evidence, the term "unique" has two slightly different meanings. First, quantitatively, it might mean "of which there is only one; single; sole". Second, qualitatively, it might mean "superior to or different from all others"; or "unparalleled, unrivalled". The former would require that the opportunity now open was the only opportunity to obtain the evidence. That would, however, leave the other criterion of subsequent unavailability redundant. The latter understanding adds something to the other criterion of subsequent unavailability as the situation might be that the evidence later will be more difficult to obtain, but not completely unavailable. It is submitted that this understanding is correct. The fact that the evidence will be slightly more difficult to obtain at a later stage than at present will, however, hardly justify the exceptional step.

The second alternative that the evidence "may not be subsequently available" is easier to interpret and apply. A possible reason as to why the evidence subsequently would not be available might be that the suspect, his or her accomplices or an unwilling state will seek to obstruct justice. If a state is unable, disturbances such as

[500] Article 54(1) (a).

hostilities might result in the destruction of evidence and uprooting of witnesses.[501] As for the risk of subsequent unavailability, not just *any* risk will justify extraordinary investigative steps. There must be a "significant risk", *i.e.* a certain likelihood that the evidence will not be subsequently available. The term "may", it is submitted, does not influence this threshold, and it could have been omitted without altering the meaning.

The difference between the two alternative criteria is subtle but significant. It is submitted that the accumulation of a better opportunity (which is not unique) to obtain the evidence *and* a certain risk (which is not significant) that the evidence may become subsequently unavailable together might suffice if pursuing the step on balance appears reasonable. It is also submitted that article 18(6) must be understood in a relative manner. The graver the crime, the more important the evidence, and the less intrusive the investigative step, the less unique the opportunity needs to be and the lesser the risk of subsequent unavailability needs to be. The Pre-Trial Chamber's decision will be highly discretional, due to the vagueness of the criteria, and based on an overall assessment. The decisive will be whether the steps applied for, on balance, seem justified. The Prosecutor's application "shall be considered *ex parte* and in camera", and the Pre-Trial Chamber shall rule "on an expedited basis".[502] Such secrecy and expeditiousness is reasonable in light of the purpose to preserve the integrity of a subsequent ICC investigation.

If the Pre-Trial Chamber finds that there is a "significant risk" that evidence will become unavailable unless the Court obtains it as soon as possible, this might be an indication that the state is "unwilling" or "unable" to proceed genuinely, as a crucial part of a national investigation is to secure relevant evidence. The Pre-Trial Chamber might thus in reality and to some extent be anticipating a later ruling on admissibility when it authorises the investigative step.

The fact that the term "pursue" is used does not indicate that the Prosecutor *ipso facto* is authorised to actually conduct the step in a sovereign state's territory. The state has a right not only to be informed, but also to be in control of any investigative step carried out in its territory.[503] An authorisation must, however, be understood as

---

[501] Ntanda Nsereko 1999, p. 404, para. 25.

[502] Rule 57.

[503] There is one exception to this: according to article 57(3) (d), the Pre-Trial Chamber may authorise the Prosecutor to "take specific investigative steps within the territory of a State Party without having secured the cooperation of that State" if the state is "clearly unable to execute a request for cooperation due to the unavailability of any authority or any component

obliging states to cooperate with the Prosecutor in the pursuance of the step. A failure to cooperate will, provided the step as such otherwise is in conformity with the Statute, constitute a breach of the general obligation under article 86 to "cooperate fully with the Court in its investigation".

On paper, article 18(6) appears to strengthen the Court's efficiency considerably. It might reasonably be questioned, however, whether it will be sufficient whenever the Prosecutor is faced with a state "bent on shunning international jurisdiction and therefore unwilling to cooperate in the search for and collection of evidence, or even willing to destroy such evidence to evade justice".[504] The lack of efficient enforcement mechanisms might render the possibility to pursue exceptional investigative steps useless in practice.

4.6.14. Subsequent challenge under article 19

Article 18(7) provides that a state which has "challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances". Most of the (relatively few) commentators who have expressed their view as to how article 18(7) is to be understood seem to conclude that a state's right to make a challenge under article 19 is limited once a state has requested deferral under article 18(2).[505] To this author, however, it is not perfectly clear what the wording "challenged a ruling of the Pre-Trial Chamber" means. The meaning would have been clearer if article 18(7) had used the term "requested" (as it appears in paragraph 2) or "appealed" (as it appears in paragraph 4) instead of "challenged" (which does not appear elsewhere in the article). With the term "challenged" it is less clear whether the state must have "appeal[ed] to the Appeals Chamber against a ruling by the Pre-Trial Chamber", according to article 18(4), or if it suffices that the state has requested the Prosecutor's deferral, as provided for in article 18(2). The first meaning would correspond with the most common meaning of the term "challenge", which is to "call in question, dispute".[506] According to this meaning, to "challenge a ruling by the Pre-Trial Chamber" would then mean to call into question

---

of its judicial system competent to execute the request for cooperation". The states parties agree to such authority by ratifying the Statute.

[504] Cassese 1999, p. 159.

[505] *E.g.* Ntanda Nsereko 1999, p. 404, para. 27. In fact, few commentators really discuss the problem.

[506] *The Oxford English Dictionary*.

a ruling which already exists, *i.e.* to bring the ruling to the Appeals Chamber. The second meaning would correspond with a different, less common, meaning of the term "challenge": to "demand as a right, claim for; invite".[507] According to that meaning, to challenge a ruling would then mean to seek a ruling in the first place, according to article 18(2). The fact that the state under article 18(2) only "requests" the Prosecutor to defer to the state's investigation supports the first understanding: the state does not actually seek a ruling; such ruling is only necessary if the Prosecutor is reluctant to defer (indeed, it is the Prosecutor who actually seeks the ruling when he or she applies for an authorisation from the Pre-Trial Chamber). Further, the term "preliminary ruling" supports the first interpretation, in the sense that a final ruling on the admissibility will follow a challenge under article 19. The ruling would not be "preliminary" if it automatically prevented the state from subsequently making a challenge under article 19. (Letting an appeal of the ruling have that effect makes, however, would not contradict the term "preliminary".) Moreover, as for the understanding of the term "challenged" as used in article 18(7), it should be noted that the term "challenge" as it is used in article 19 corresponds to the first of the two meanings referred to above (*i.e.* "to dispute"). Moreover, the purpose behind article 18 was, as noted in the historical survey, to insert an additional safeguard for states at an early point of the ICC proceedings. If the right to make a subsequent challenge under article 19 would not be intact once a preliminary ruling was obtained, then the remedy in article 18 would scarcely represent an additional safeguard to article 19. The only effect would be to allow states to invoke inadmissibility at an earlier stage, before cases had been singled out. On the other hand, however, the specific purpose of article 18(7) is to limit the right of states to raise the admissibility question again, and the limitation will be less significant if the term "challenged a ruling" is interpreted as "appealed a ruling". It may also be noted, as ensuring the integrity of the ICC proceeding is a purpose of article 18(7), that an appeal under article 18(4) may be handled expeditiously, while the Prosecutor's assessment and the Pre-Trial Chamber's ruling under article 18(2) will be more time-consuming. It would therefore be in line with the purpose of article 18(7) to interpret the term "challenged a ruling" as "seek a ruling".

On balance, it is submitted that article 18(7) means that the right of a state to make a subsequent admissibility challenge under article 19 is limited only if the state has appealed a ruling by the Pre-Trial Chamber under article 18(4). If the state has merely availed itself of its right to request the Prosecutor's deferral under article 18(2), the right provided for in article 19 remains intact. This understanding is first

[507] *Ibid.*

of all based on the fact that the purpose of inserting an additional safeguard would be defeated if a mere request would have such limiting effect. The understanding is also, as noted, in line the most natural understanding of the term "challenge".[508]

As for the possibility of making a subsequent challenge, article 18(7) uses the wording "may challenge […] on the grounds …", and not "may challenge […] *only* on the grounds". Nevertheless, there is no doubt that the latter is what is meant: the state may not invoke article 19 unless additional significant facts or a significant change of circumstances exist.

The provision refers to a subsequent challenge to the admissibility of "a case". Yet, it is obvious that the limited possibility of making a challenge only applies to the particular case which was dealt with in the ruling appealed under article 18(4). Thus, a state which has challenged a ruling under article 18 with regard to case A may later challenge the admissibility of case B under article 19, unrestricted by article 18(7). The Prosecutor and the Court may, however, build on parts of the reasoning in the first ruling. The state seems perhaps to be shielding a whole group of perpetrators or the judicial system is generally unable to carry out genuine proceedings.

According to article 18(7), one of two alternative criteria must exist: The criterion "additional significant facts" seems unlikely to be invoked by a state. It will be difficult for the state to argue that it was not previously aware of existing facts that supported its claim that the proceeding be genuine. The criterion "significant change of circumstance", which covers actual changes, is more likely to be invoked. Relevant changes might be the transition from a suppressive regime to democracy, the cessation of hostilities or the strengthening of the judicial system. Again, the term "significant" does not refer to the absolute significance but to the relative significance, in the sense that the change must have the potential of convincing the Prosecutor (and, as applicable, the Court) that the case is now inadmissible. Where the Appeals Chamber under article 18(4) first has concluded that the state is unwilling, it will probably be difficult for the state to convince the Court otherwise unless there is a change of regime. A subsequent challenge from a (previously) unable state will probably be met with less scepticism.

During the negotiations on the Rules, France proposed a rule that would allow states to challenge the admissibility at any stage of *proprio motu* proceedings.[509] The

---

[508] A Google search on the internet reveals that the term "to challenge a ruling" or "to challenge a decision" almost exclusively is used when an already existing ruling/decision is contested. For instance, in *A (FC) and others (FC) v. Secretary of State for the Home Department*, the House of Lords starts by noting that "[t]he nine appellants before the House challenge a decision of the Court of Appeal […]".

proposal would authorise the Pre-Trial Chamber to invite, on its own motion or at the request of the Prosecutor, states to make a challenge. Further, the Prosecutor would be given the authority to seek a ruling on jurisdiction or admissibility under article 15. The proposal was rejected as it would have created yet another layer to the complementarity regime which was not envisaged in the Statute. It would have hampered a proceeding in its crucial opening phase, and states agreed that the Pre-trial Chamber's authorisation under article 15 should only represent an oversight and not a full-fledged challenge.[510] Reference is made to article 15(4), which provides that the Pre-Trial Chamber's determination regarding admissibility at this stage is "without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility".

4.7. ARTICLE 19: CHALLENGES TO THE ADMISSIBILITY OF A CASE

4.7.1. Introduction

Article 19 reads:

> "Article 19
> Challenges to the jurisdiction of the Court or the admissibility of a case
>
> 1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
>
> 2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
>
> (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article
> (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
> (c) A State from which acceptance of jurisdiction is required under article 12.
>
> 3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

---

[509] Holmes 2001, p. 328.
[510] *Ibid.,* p. 328-29.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an

> investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place."

Originally envisaged as the only mechanism for invoking inadmissibility, article 19 establishes a right for certain states and individuals to challenge the admissibility of a case. It should be noted that the Prosecutor may seek an admissibility ruling from the Court, and that the Court has a duty to determine the jurisdiction *ex officio* and a right to determine the admissibility *ex officio*. At this stage, an individual case will have been singled out, and just as with article 18 the purpose of the article is to ensure that the ICC does not handle a case which is being or has been genuinely dealt with by a state with jurisdiction. Article 19 applies irrespective of the trigger mechanism.

4.7.2. The Court's determination of the admissibility on its own motion

Article 19(1) provides that the Court "may, on its own motion, determine the admissibility of a case". The term "may" implies that the Court is under no obligation to determine the admissibility unless another party has raised the issue.[511] The Court's main watchdog of the complementarity principle, including the issue of admissibility, is the Prosecutor. As noted, the Prosecutor must always determine the admissibility before he or she opens an investigation, and he or she must do so again before proceeding with a prosecution. The Court as such is also under a duty to assess the admissibility in the following three respects: First, in *proprio motu* cases, the Pre-Trial Chamber must assess the admissibility as part of the authorisation under article 15(4). Second, article 20(3) provides that "[n]o person who has been

[511] In *Prosecutor v. Tadic*, the ICTY's Appeals Chamber noted that the power of a court to determine its own competence (apparently including the question of admissibility) "is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific instrument defining its jurisdiction, the first obligation of the court – as of any other judicial body – is to ascertain its own competence", para. 18. In the absence of an express limitation, an international court "can and indeed has to exercise" this power, see para. 19. Thus, the provision in article 19(1) that the Court "shall satisfy itself" that it has jurisdiction was not strictly necessary. As for the notion that the Court "may, on its own motion" determine the admissibility of a case, it might thus be invoked that a failure of the Court to assess the admissibility is in violation of international law, at least where there was reason to do so.

tried by another court […] shall be tried by the Court with respect to the same conduct" unless one of the criteria mentioned in (a) and (b) is met, implying that the Court cannot prosecute such a person irrespective of whether the existence of a previous trial is invoked or not. The reason for this would appear to be that the *ne bis in idem* principle constitutes a fundamental human right, although it does not, in principle, apply between different judicial systems. Third, one might argue that the Court may not proceed with a case if it has reason to believe that an inadmissibility ground exists. Arguably, the Court cannot disregard paragraph 10 of the Preamble and articles 1 and 17, which all directly or indirectly instruct the Court not to deal with inadmissible cases. It is therefore submitted that the Court must be in "good faith" as to the existence of circumstances that would make a given case inadmissible. Thus, while it has no duty on its own motion to determine the admissibility, it cannot remain passive faced with sufficiently clear indications that a case would be inadmissible.

4.7.3. The right of the person concerned to challenge the admissibility

The admissibility criteria reflect the primary right of states to investigate and prosecute, thereby preventing ICC interference when the proceedings are genuine. The criteria do not reflect a right of the suspect to be investigated and prosecuted by his or her domestic judiciary. Nevertheless, the individual concerned has the right under article 19(2) (a) to challenge the admissibility of his or her case.

The question as to whether an accused under international law may invoke that a criminal proceeding of a foreign or international court violates the sovereign right of a concerned state (typically his or her home state) has long been surrounded with some controversy. Article 19(2) (a) is therefore an important provision which highlights the individual's right to challenge the admissibility in absence of a challenge from the state concerned. The traditional understanding has been that an individual, not being a state, lacks the necessary *standing* in such matters. To challenge the admissibility has been regarded as an exclusive right of the state concerned. In *Israel v. Eichmann*, the District Court of Jerusalem noted: "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State."[512] This understanding has been upheld in a line of national cases. In *United States v. Noriega*, it was noted: "As a general principle of international law, individuals have no standing to challenge violations of

[512] *The Attorney General of Israel v. Eichmann*, para 44.

international treaties in the absence of a protest by the sovereign involved."[513] In *Prosecutor v. Tadic*, the question was for the first time considered by an international tribunal. Tadic argued that the primacy of the *ad hoc* Tribunal constituted "an infringement upon the sovereignty of the States directly affected".[514] The Trial Chamber rejected the plea, noting:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State."[515]

The Appeals Chamber, however, disagreed with the Trial Chamber. After having referred *inter alia* to *Eichmann* and *Noriega*, the Chamber noted:

> "Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights."[516]

The Appeals Chamber found that the traditional doctrine adhered to by the Trial Chamber was not reconcilable with the principle governing the ICTY that the accused was entitled to a "full defence". Therefore, the accused could not

> "be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of state sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which the Chamber feels it is its duty to refute and lay to rest."[517]

The right of the individual under the Rome Statute's article 19(2) (a) is in keeping with this statement.

Two types of person may challenge the admissibility under article 19; an "accused" and a "person for whom a warrant of arrest or a summons to appear has

---

[513] *United States v. Noriega*, para. 1533.

[514] These were Bosnia-Herzegovina and the Federal Republic of Germany.

[515] *Prosecutor v. Tadic*, para 55.

[516] *Ibid.*

[517] *Ibid.*

been issued under article 58". As for the reference to the "accused", most national penal systems (at least those of common and civil law) use the two terms "suspect" and "accused", referring to two different *stages* of the proceedings. In these systems, the person's rights become more substantial as his or her status changes from a suspect to an accused. Neither the Statute nor the Rules use the term "suspect", but instead terms such as "a person"[518] or "the person charged" are used.[519] Both the Statute and the Rules use the term "accused" on several occasions, but the term is not defined. As for the ICTY and the ICTR, their respective Rules of Procedure and Evidence define an accused as "[a] person against whom an indictment has been submitted in accordance with Rule 47".[520] It might therefore be submitted that a person acquires status as "accused", for the purpose of article 19(2) (a), when the "document containing the charges" *is* submitted to the Pre-Trial Chamber for confirmation under article 61(3) (a), rather than when the charges *are* confirmed under article 61(7) (a).[521] This interpretation is, however, problematic as article 61(1) and (2) still use the term "person charged" with regard to the time between the submission of the charges to the Pre-Trial Chamber and their confirmation, whereas the term "accused" only appears in article 61(9), from the moment that the charges are confirmed.[522] It therefore seems that the person, unlike before the *ad hoc* Tribunals, acquires status as "accused" under the Rome Statute only when the charges are confirmed.

As for the person's presence or absence before the Court, article 61(2) authorises the Pre-Trial Chamber to, upon request by the Prosecutor or on its own motion and given specific criteria are met, hold a hearing to confirm the charges in the absence of the person charged.[523] Thus, it would seem irrelevant to a person's status as "accused" and the corresponding right to make a challenge under article 19(2) (a) whether the person actually is present at the Court. Yet the Rules provide that a

---

[518] *E.g.* article 55 on rights of "persons" during an investigation.

[519] *E.g.* article 61(1) on the right of the "person charged" to be present during the hearing regarding the confirmation of the charges.

[520] Rule 2 of the respective Rules of Procedure and Evidence.

[521] This is submitted by Hall 1999, p. 409-10, para. 9.

[522] Curiously, paragraphs 3 though 6, which deal with the hearing proceedings, use the neutral term "person" instead of the term "person charged" which would have been more consistent.

[523] Rules 125 and 126 (on the decision to hold a confirmation hearing and the procedures for it, in the absence of the person concerned). Curiously, rule 126(3) uses the term "person charged" where the charges have been confirmed but the person "is subsequently arrested", although the person does not have the right to seek a review of the confirmation hearing. The correct term here would be "the accused" as used in article 61(9).

person subject to an arrest warrant or a summons to appear under article 58 shall enjoy the rights set forth in article 67, "promptly upon arriving at the Court", subject to the provisions of articles 60 and 61.[524] This could be understood as to imply that the person is not an "accused" unless he or she actually appears before the Pre-Trial Chamber. It is submitted, however, that rule 121(1), on proceedings before the confirmation hearing, only makes the rights of the accused listed in article 67 conditional on the appearance before the Court. The right to challenge the jurisdiction or admissibility, according to article 19(2) (a), as well as other rights not listed in article 67, are not regulated by rule 121. These rights will therefore apply once the charges are confirmed, irrespective of where the person is. The person will then be an "accused" until he or she is acquitted or convicted.

As for the second alternative, a "person for whom a warrant of arrest or a summons to appear has been issued under article 58", it is necessary to look at the criteria for such a warrant. These criteria are: (a) there must be "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court"; and (b) "the arrest of the person appears necessary".[525] The person may consequently be entitled to challenge the admissibility (and the jurisdiction) before the charges have been confirmed and the person has acquired status as "accused", provided an arrest warrant has been issued. The Pre-Trial Chamber has noted in a case regarding an admissibility challenge

> "that at this stage of the proceedings no warrant of arrest or summons to appear has been issued and thus no case has arisen; and that the *Ad hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19(2) (a) of the Statute".[526]

It should be noted that the Rome Statute allows the person concerned to raise the admissibility question before a national court when it is based on the *ne bis in idem* principle in article 20(3).[527] Article 89(2) provides:

> "Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the

[524] Rule 121(1).

[525] Article 58(1) (a) and (b).

[526] *Situation in Democratic Republic of Congo* (before the Pre-Trial Chamber), p. 4.

[527] It may also be noted that article 20(2) provides that a national court cannot try a person who has already been convicted or acquitted by the ICC.

> requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility."

Thus, the domestic court may receive the challenge, consult with the ICC, and postpone the surrender while the ICC makes its decision. The admissibility decision as such remains with the ICC, and another solution would seriously undermine the complementarity principle. It is noteworthy, however, that this provision enables a state to delay in bad faith its execution of the Court's request. Therefore, it increases the risk that the ICC investigation will be compromised. Offering a possible way of minimising such damage by accelerating the ICC ruling, rule 181 provides that when such challenge is brought before a national court, "the Chamber dealing with the case, if the admissibility ruling is still pending, shall take steps to obtain from the requested State all the relevant information about the *ne bis in idem* challenge brought by the person".

4.7.4. The authority of states to challenge the admissibility

4.7.4.1. A state which has jurisdiction over a case

According to article 19(2) (b), the admissibility of a case may be challenged by "a State which has jurisdiction over a case". During the negotiations, several states were reluctant to allow any state "with jurisdiction" to challenge the admissibility as this might open the possibility for abuse. Instead, it was held that the right should be limited to "interested States", as the ILC had suggested. The United States favoured a regime under which the state of nationality of the victim or of the accused be deemed a "more interested State" than the territorial or custodial state. The legal consequences of such distinction were, however, unclear.[528] As for the fear of abuse, it is not very conceivable that other states than interested states would want to abuse the process. The state most likely to abuse its right to make a challenge would be the suspect's home state, and the right of that state to challenge the admissibility was never in dispute.

The right to make a challenge under article 19 is not confined to states parties. Some states argued in favour of such confinement as it would have encouraged ratifications.[529] Nevertheless, as article 17(1) refers to genuine criminal proceedings undertaken by any state with jurisdiction as an inadmissibility ground, it would be

---

[528] Bleich 1997, p. 234.

[529] It could also have had the opposite effect, as the Statute as a whole might have appeared less acceptable.

illogical and undermining the principle's purpose not to allow non-state parties to make a challenge as well. As noted, the Prosecutor must, under article 18(1), notify not only states parties but also all states which would normally exercise jurisdiction.[530]

As for the understanding of the term "state which has jurisdiction", reference is made to the discussion below on the admissibility criteria listed in article 17. The decisive is whether the rules of international law governing the criminal jurisdiction of states give the state jurisdiction over the crime in question.[531]

If a state without jurisdiction makes a challenge, the Court may dismiss the challenge without having to determine neither the existence nor the genuineness of the claimed proceedings. Such lack of jurisdiction will not, however, *a priori* affect the individual's right to make a challenge under subparagraph (a). The inevitable result will, however, be that the case is deemed inadmissible as it will fail to satisfy the admissibility criteria in article 17.

4.7.4.2. States from which acceptance of jurisdiction is required

In addition to the states just referred to, a challenge under article 19 may, according to article 19(2) (c), be made by a "State from which acceptance of jurisdiction is required under article 12".[532] A pertinent question is whether this alternative applies generally or only in cases where such acceptance of jurisdiction actually is required, *i.e.* when there is no Security Council referral.[533] It is submitted that article 19(2) (c) also applies when there is a Security Council referral due to the obvious and legitimate interest these states might have in making a challenge, irrespective of the trigger mechanism. (It should also be noted that this author concludes, in the discussion of the admissibility criteria, that the criteria apply irrespective of the trigger mechanism.) Another pertinent question is whether subparagraph (c) of article 19(2) implies that an article 12 state may make a challenge without claiming itself to be or have been proceeding. In contrast to subparagraph (b), subparagraph (c) does not use the wording "on the ground that it is investigating or prosecuting the case or has investigated or prosecuted". Clearly, a challenge to the admissibility

[530] According to Vienna Convention article 36(1), it is unproblematic to grant third states rights in a Statute.

[531] For a different understanding, Hall notes that "it is likely that paragraph (2) meant only to include those States which have provided their own courts with jurisdiction under national law over the case […]", see Hall 1999, p. 410, para. 11.

[532] Article 19(2) (c).

[533] Article 12(2) refers to article 13(a) and (c).

must be based on the claim that a state with jurisdiction has conducted relevant proceedings, but it is submitted that an article 12 state may invoke the complementarity principle on behalf of another state or, for that matter, on behalf of the individual who might be its citizen. Otherwise, article 19(2) (c) would have been redundant: subparagraph (b) would have included the territorial state and the suspect's home state when they purported to be or have been proceeding with the case, as they invariably would have jurisdiction according to the uncontroversial principles of territoriality and nationality.

Article 12(2) (b) requires the acceptance of "[t]he State of which the person *accused* of the crime is a national". It might thus be questioned whether that state has to await the person's acquired status as accused before it can challenge the admissibility. This appears to be incorrect. Generally, a case may be challenged under article 19 before the charges are confirmed as long as the proceeding has evolved from a "situation" to a "case". It should then suffice that the person has been singled out as a "suspect", a term admittedly not used in the Statute.

4.7.5. The content of the challenge

Rule 58(1) provides that a request or application made under article 19 "shall be in writing and contain the basis for it". It is not perfectly clear from the wording whether this requirement is less, equally or more strict than the corresponding requirement when a state requests deferral under article 18. According to rule 53(1), a request under article 18(2) shall be "in writing and provide information concerning [the state's] investigation, taking into account article 18, paragraph 2". It might be argued that "the basis for it" is a lesser requirement than "information concerning [*etc.*]". Due to the reference in rule 53 to the Prosecutor's assessment whether to defer, and the fact that the Prosecutor will need to assess the same question under article 19, it is submitted that the scope and required level of detail must be the same. Yet, where another party than the state concerned makes the challenge, a high level of detail cannot be expected. There is no provision in the Statute or the Rules expressly requiring that a state which has made a challenge subsequently provide the Prosecutor with further information on its proceedings. This might be a flaw as the burden of proof with regard to the admissibility criteria rests with the Prosecutor. It should be noted that the Court may rely on article 93, according to which states parties "shall […] comply with requests by the Court to provide […] assistance in relation to investigations or prosecutions", including "[t]he provision of records and documents, including official records and

documents",[534] and "[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".[535] These two provisions will apply as soon as an ICC investigation is opened.[536] It should also be noted that, according to article 19(11), the Prosecutor "may request that the relevant State make available to the Prosecutor information on the proceedings", once he or she has deferred to a state (see below).

It is possible that rule 58 will be interpreted so as to require detailed and specific information, despite the loose wording. The requirement should also be seen in conjunction with the duty of the Registrar to inform the relevant parties of the request or application and the grounds on which the challenge is raised.[537] If the information provided by the state nevertheless is insufficient to make an informed admissibility determination, this might be viewed as an indication of unwillingness or inability, or, as noted, lead to a reversal of the burden.

4.7.6. The procedures to be followed

As for the procedures to be followed for the Court's admissibility determination, article 19 provides no guidance. Rule 58(2) provides, however, that the Court "shall decide on the procedure to be followed" and that it "may take appropriate measures for the proper conduct of the proceedings". It further provides that the Court "may hold a hearing", but the procedure is otherwise at the Court's discretion. This flexibility allows the Court to deal efficiently with the matters, having due regard to the interests involved, including security concerns and ensuring the integrity of the ICC proceeding. As an illustration of an effective procedure, the Court is authorised to "join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay".[538] Uniting the proceedings can be cost and time effective, and it is difficult to see how it would cause an "undue delay". The confirmation hearing will be delayed, but as long as the net result is time saved, the delay will scarcely be "undue". Such efficiency would be in the interests of all parties involved.

---

[534] Article 93(1) (i)

[535] Article 93(1) (l).

[536] Article 93(1) instructs states to "provide the following assistance in relation to investigations or prosecutions".

[537] Rule 59(2).

[538] Rule 58(2).

The Court is instructed to "hear and decide on the challenge or question [regarding jurisdiction or admissibility] first".[539] This is natural as jurisdiction must exist and the case must be admissible before the person's guilt or innocence can be determined. Further, the Court "shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility".[540] This is the only possible order because if the Court lacks jurisdiction, the admissibility question becomes moot, *i.e.* the admissibility question only arises when the ICC has jurisdiction.

According to rule 58(3), the Court shall, upon receiving a request or application, "transmit [it] to the Prosecutor and to the person [concerned]". These parties may "submit written observations to the request or application within a period of time determined by the chamber".[541] This rule is reflective of the fact that the Prosecutor and the accused will play main roles in the adversarial proceeding that will follow; they should both be provided with the most accurate and prompt information on the development of the case at all stages.

4.7.7. The Prosecutor may seek a ruling

Under article 19(3), the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. Because paragraph 2 authorises several parties to make a challenge, there is a noticeable risk that some parties will make challenges against better knowledge in an attempt to delay the Court's proceeding. Article 19 seeks to minimise this risk in two significant ways: in addition to the possibility for the Prosecutor under article 19(8) to seek authority from the Court to take preventive steps, the Prosecutor may seek to avoid subsequent challenges by seeking a ruling. Although such a ruling will not have a preclusive effect on subsequent challenges, it is, as a practical matter, likely to have a preventive effect. Such ruling will probably limit the scope of subsequent challenges to newly discovered information or significantly changed circumstances. It might be argued that the Prosecutor has the right to invite the Court to consolidate challenges by requiring that all challenges regarding a particular case be submitted by a given date and considered together before a trial starts. Such procedure could be combined

---

[539] *Ibid.*

[540] Rule 58(4).

[541] Such transmission to the person concerned makes sense only when he or she has not made the challenge himself.

with the ruling that the Prosecutor may seek under article 19(3) and would effectively minimise the risk of delays.

If the Prosecutor were allowed to seek a ruling regarding an entire situation, this would significantly have facilitated his or her work. He or she would then have been able to allocate resources in the most efficient way, without having to occupy himself or herself with subsequent challenges regarding individual cases.[542] Paragraph 3 does not expressly exclude this possibility as it only refers to "a question of jurisdiction or admissibility". It has therefore been argued that it would apply even to entire situations.[543] Against that submission, it should be noted that the heading of article 19 refers to the admissibility of "a case", and one would therefore assume that the whole article only applies to cases, as distinct from situations. This understanding is supported by rule 58 which refers to the procedures for dealing with "a challenge or question concerning [the] jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3". The issuance of a notification under article 18(1) followed by the absence of requests for deferral will represent a good indication that no competing national proceedings exist within that situation, although the notification has no preclusive effect.

4.7.8. Submission of observations

According to article 19(3), those who have referred a situation to the Prosecutor pursuant to article 13, as well as victims, may submit their observations to the Court. This shall ensure that the Court receives all relevant information, but an impetus is also to ensure the victim's right to be heard at all stages of the proceedings.[544] The right to submit observations is placed in the provision which allows the Prosecutor to seek a ruling, but it does not apply only to this situation. This is confirmed by rule 59(1) which provides that the right to submit observations applies with regard to "any question or challenge of jurisdiction or admissibility which has arisen pursuant

---

[542] Hall 1999, p. 411, para. 13.

[543] *Ibid*.

[544] *Ibid*. Hall refers to Principle A 6 (b) of the *UN Basic Principles on the Independence of the Judiciary*, adopted at the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August to 6 September 1985, endorsed by General Assembly resolutions 40/32 and 40/146 (available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm). This principle states that "the views and concerns of victims" should "be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system".

to article 19, paragraphs 1, 2 and 3". The provision should arguably be interpreted antithetically, to the effect that there is no such right under article 18.[545]

Curiously, the state which purportedly is or has been investigating or prosecuting is not expressly mentioned in article 19(3). Neither does rule 58 or 59, which list the parties that are to be notified of a challenge and that may submit observations and make representations, list this state. Of course, said state will usually have made the challenge, but when it has not, preventing it from submitting relevant observations would seem highly unreasonable and cannot be the intention. The state should be allowed to provide the Court with information on its proceedings.[546] Without such information, the Court can hardly make an informed admissibility ruling.

Likely to encourage the submission of observations to the Court, rule 59(1) provides that the Registrar shall inform "[t]hose who have referred a situation pursuant to article 14" as well as "[t]he victims who have already communicated with the Court in relation to the case or their legal representatives". The Registrar shall provide these parties with a "summary of the grounds" for the challenge.[547] The provision aims at ensuring that the Court receives only relevant information, and it will probably make going through the submissions from these parties less burdensome. As noted above, the submission of observations to the Court from various parties can represent a considerable burden. It may also be challenging to retain full impartiality if the Court hears emotional statements from victims.

As to the manner in which observations should be submitted, the parties "may make representation in writing".[548] Unlike the challenge as such,[549] however, the observations need not be written. Further, at the hearing which the Court may hold,[550] witnesses should be allowed to submit oral statements if they have difficulties expressing themselves in writing.

---

[545] For a different interpretation, see Hall 1999, p. 412, para. 14.

[546] Rule 51 only provides that the state in question "may choose to bring to the attention of the Court [information] showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct".

[547] Rule 59(2).

[548] Rule 59(3)

[549] Rule 58(1).

[550] Rule 58(2).

4.7.9. Limitations of the right to challenge the admissibility

4.7.9.1. Only once and prior to the trial

Article 19(4) provides that a challenge to the admissibility (or jurisdiction) may be made only once and it must be made "prior to or at the commencement of the trial". This limitation shall reduce the risk of excessive delays. According to article 19(7), a challenge to the admissibility suspends the Prosecutor's investigation, and if the number of challenges from the same party were not limited, a state or an individual who wanted to obstruct justice could have launched successive challenges. Most probably the Court could have ruled subsequent challenges from the same party inadmissible according to the *res judicata* principle, but even such a ruling would occupy some time, and the party could always claim that there had been significant changes since the last time.

The Court might wish to proceed as rationally as possible and hear all challenges from different parties at the same time, instead of hearing them subsequently. It might be argued that as a result of the Court's inherent power to control its own proceedings, it has a right to request the parties to submit challenges within a given time although this is not provided for in the Statute. This would have prevented the investigation from being continuously delayed by successive challenges from different parties.[551] In the negotiations, a group of states tabled a proposal for a rule allowing the Court's prompting of challenges and restricting the possibility for the parties to make challenges at a later stage. Holmes explains, however:

> "Neither articles 18 nor 19 required States to make challenges at any point, other than the general obligation in article 19, paragraph 5, to make challenges at the earliest opportunity. There could be a number of genuine reasons for a State to wait before it made a challenge and, therefore, a rule requiring challenges to be made at a certain point was both legally and practically flawed. As well, the statute did not provide for the concept of *in limine* decisions. The Court is bound to consider any challenge thoroughly and to decide on the basis of the information provided."[552]

Fernández de Gurmendi and Friman also note, referring to the negotiations on the admissibility:

> "The most contentious question was whether the Court, for the purpose of efficiency, could prompt all those who are eligible to submit a challenge to do so at once and at the same time. No such mechanism could be developed, however, due

[551] Such a possibility is suggested by Hall 1999, p. 412, para. 15.
[552] Holmes 2001, pp. 345-46.

> to the fact that the Statute only allows very few specific limitations to the right to make a challenge […]."[553]

Rule 58(2) provides that the respective Chamber "may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay".[554] This makes it possible to join challenges from different parties, and the Chamber may perhaps request, or at least encourage, parties to submit challenges within the commencement of the confirmation hearing, irrespective of the time limit in article 19(4). Such a request would, however, hardly have a preclusive effect allowing the Court to reject subsequent challenges. A general preclusive effect is, however, found in article 19(5), which provides that a state "shall make a challenge at the earliest opportunity" (see below).

Even if a state has already made a challenge or has not made a challenge before the trial starts, the Court may, under article 19(4), "[i]n exceptional circumstances […] grant leave for a challenge to be brought more than once and at a time later than the commencement of the trial". According to article 19(1), the Court "shall satisfy itself that it has jurisdiction", and that it therefore has a duty to halt the trial proceedings once it becomes aware that it may lack jurisdiction. A challenge to the jurisdiction which at face value has some merit will arguably have to be considered. As for the admissibility, a challenge after the commencement of the trial "may be based only on article 17, paragraph 1 (c) [*ne bis in idem*]". This is reasonable, as that admissibility ground has significant human rights implications. An ongoing national prosecution is difficult to imagine at this stage, at least a genuine one, as the suspect will be brought before the Court (it would have to be *in absentia*). An ongoing or completed investigation is, however, perhaps conceivable, but such proceeding – even if it were genuine – would still not stop the ICC proceeding at this stage. This is reasonable, as the full preparation of a trial before the ICC is an immense operation involving considerable resources. Further, an allocation of the case back to the national level at this point would represent a considerable risk that a trial at the national level would be compromised, regardless of the state's willingness to proceed genuinely.

4.7.9.2. Challenge at the earliest opportunity

Article 19(5) provides that a state referred to in paragraph 2 (b) "shall make a challenge at the earliest opportunity". Again, the purpose is to minimise the

---

[553] Fernández de Gurmendi 2000, p. 426.

[554] Rule 58(2).

possibility of delays. The criterion "earliest opportunity" might be interpreted as referring to the time when the state should have known that the ICC proceeding was interfering with its own proceeding, or as referring to the time when the state actually knew this. As for the former interpretation, it is arguably "possible" to make a challenge once the relevant information is available. That interpretation seems, however, to be too strict as long as the state proceeds in good faith. A state which in good faith is unaware of the possible conflict of jurisdiction, should retain the right to invoke complementarity, even if it "should have been" aware. Not allowing such challenge would hardly have any preventive effect, whereas allowing it would promote the purpose of the complementarity principle, namely to avoid international duplication of genuine national proceedings. It should be noted that most states will either have been notified under article 18(1) or by a Security Council referral. As the time limit for requesting deferral under article 18 is one month, it is submitted that the time limit under article 19(5) should be one month from the date that the party acquired the knowledge.

As for the consequence of an untimely challenge, the Statute does not expressly provide a preclusive effect. A footnote in the Preparatory Committee's draft noted that "[t]he question arises as to what consequences, if any, should flow from the failure of a State to make a timely challenge",[555] but this was never settled. For the provision to have any significance, however, the Court must have the authority to reject an untimely challenge.[556] As noted, however, if the Court upon a preliminary examination of the challenge realises that a given case is inadmissible, it cannot disregard this. The same is true *vis-à-vis* the Prosecutor if he or she has not yet proceeded with a prosecution; he or she must continuously assess the admissibility until the start of the trial, arguably requiring him or her to take note even of the information offered in an untimely fashion. The Prosecutor can do this, however, without applying the procedures of timely challenges.

If a state remains passive for some time with regard to the issue of admissibility, it might be argued that it will have waived its right to invoke inadmissibility. It is submitted, however, that passivity should not *per se* be viewed as a waiver as long as the time limits provided in the Statute are observed. In the absence of an express statement from the state that it is in fact waiving its right under the complementarity principle, such interpretation therefore seems improper.

---

[555] *Report of the Preparatory Committee, Vol. II*, *supra* note 321, p. 44, fn. 54.

[556] As suggested above, not considering a challenge is more problematic with regard to the question of jurisdiction.

4.7.10. The recipient of the challenge

Article 19(6) regulates which organ shall be the recipient of a challenge at the respective stages of the proceedings. Prior to the confirmation of the charges, challenges shall be referred to the Pre-Trial Chamber, and once the charges are confirmed, challenges shall be referred to the Trial Chamber. This division is logical; after the Pre-Trial Chamber has confirmed the charges, a trial will commence before the Trial Chamber. Where a challenge is made after the confirmation of the charges but before the constitution or designation of a Trial Chamber, the Rules provide that the challenge "shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with Rule 130".[557] If a challenge is made at the commencement of the trial or later, with the leave of the Court, it "shall be dealt with by the Presiding Judge and the Trial Chamber".[558]

4.7.11. Appeal of a decision on admissibility

Article 19(6) provides that decisions regarding jurisdiction or admissibility "may be appealed to the Appeals Chamber in accordance with article 82". According to the latter provision "either party may appeal" such decision.[559] The term "either party" is not defined in the Statute or in the Rules, but it is submitted that it must include the parties involved in the challenge, *i.e.* the Prosecutor, the person concerned and the state which made the challenge, as applicable.[560]

While the original challenge, according to article 19(7), has a suspensive effect on the investigation, article 82(3) provides that an appeal "shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request". This means that once the Pre-Trial Chamber or, as applicable, the Trial Chamber has decided that a case is within the Court's jurisdiction and is admissible, the Prosecutor may resume the investigation while an appeal is pending, as long as the Appeals Chamber

---

[557] Rule 60.

[558] Rule 133.

[559] Article 82(1).

[560] Rule 108 of the Rules and Procedure of the ICTY allows states "directly affected" to appeal an interlocutory decision of the Tribunal. In *Prosecutor v. Blaskic* (29 July 1997), the Appeals Chamber explained that the rule was adopted on 24 July 1997 "to fill a perceived lacuna in the Statute and Rules, namely that a State whose interests were intimately affected by a decision of the Trial Chamber could not request the decision be submitted to appellate review", see para. 8.

has not ordered a suspensive effect. As noted above in conjunction with article 18, it is difficult to see what would prompt the Appeals Chamber to give an appeal a suspensive effect, given the fact that a judicial chamber already will have ruled the case admissible. Instead, the need for the Prosecutor to secure evidence as quickly as possible should be prioritised. A suspensive order is particularly unlikely if the state has been deemed *unwilling* to proceed genuinely, as that increases the risk of deliberate obstruction, unless the state in the meantime has experienced a change of regime. Under article 82(3), suspensive effect may be given "in accordance with the Rules of Procedure and Evidence". Relevant criteria or procedures for ordering such effect are, however, not found in the Rules. Presumably, a request for suspensive effect must accompany the appeal, and the Appeals Chamber must decide on an expedited basis whether to order suspension of the Prosecutor's activities. It is submitted that the mere request will not have a suspensive effect.

According to article 83(4), the judgement of the Appeals Chamber shall be taken "by a majority of the judges" and be "delivered in open court". Further, the judgment shall "state the reasons on which it is based", and when there is no unanimity, it shall contain "the views of the majority and the minority". A judge "may deliver a separate or dissenting opinion on a question of law".

An essential feature of the admissibility procedures is that there is no external appeal or review mechanism once the Appeals Chamber has decided on the admissibility. Underlying the challenge procedures in article 19, and also implicit in the wording "the Court shall determine" in article 17, is the fundamental principle that the Court is the final arbiter. If a state is of the opinion that a case is not admissible, it may request deferral under article 18 and/or make a challenge under article 19, and if the Court upholds the Prosecutor's determination, the state may appeal. Once the Appeals Chamber has deemed a case admissible, the state must respect that decision, and if it is a state party it must comply with the Court's subsequent request for cooperation. A state party cannot refuse to cooperate with the Court on the ground that it disagrees as to whether the admissibility criteria are met.[561] The above is confirmed by article 119(1) which provides that "[a]ny dispute

[561] Article 86, on the general obligation to cooperate, provides that states parties "shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". Article 87(7) provides that if a state refuses to cooperate, "thereby preventing the Court from exercising its functions and powers," the Court may make a finding to that effect and "refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council".

concerning the judicial functions of the Court shall be settled by the decision of the Court". While there might be some disagreement as to what types of questions are "concerning the judicial functions of the Court", it is submitted that the question of admissibility falls squarely within this term.[562]

4.7.12. Suspension of the Prosecutor's investigation

Article 19(7) provides that once the admissibility has been challenged, the Prosecutor's investigation is suspended "until such time as the Court makes a determination in accordance with article 17". Combined with the provision in article 82(3) that an appeal "shall not of itself have suspensive effect unless the Appeals Chamber so orders", this signifies that the Prosecutor may resume his or her proceeding as soon as the Pre-Trial Chamber or the Trial Chamber has ruled on the question in the first instance. It may be noted that according to a proposed article in the Preparatory Committee's draft, any challenge to the jurisdiction or admissibility would suspend the Prosecutor's investigation or bar its initiation until the Court had handed down a final ruling.[563] This would mean that the Prosecutor's activities in the case of an appeal would be suspended until the Appeals Chamber had ruled on the matter. Another important difference from the original proposal is that only challenges made by states, not those made by individuals, will have a suspensive effect.[564] This appears to be sensible since the complementarity principle primarily is concerned with the right of states to take priority.

4.7.13. Pursuing necessary investigative steps and completing pending steps

Article 19(8) aims at counterbalancing the suspensive effect of an admissibility challenge. Where an investigation presents a "unique opportunity", the Prosecutor

---

[562] In terms of subsequent interpretations of the law, the decision may also have some precedence effect. Article 21(2) provides that "[t]he Court may apply principles and rules as interpreted in its previous decisions".

[563] Draft article 54(3) in the *Report of the Preparatory Committee*, *Vol. II*, *supra* note 321, provided: "The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged under article 15 within one month of notification under article 54, paragraph 2 (a) until the final ruling of the Court."

[564] A challenge to the jurisdiction is not given a suspensive effect. An ICC investigation which duplicates a genuine national proceeding is arguably more intrusive on state sovereignty than an investigation without a valid jurisdictional basis. The former might also compromise the national proceedings.

may, despite the suspensive effect of a challenge, seek authorisation from the Court to (a) pursue "necessary investigative steps" as described in article 18(6); (b) complete a "statement or testimony" or the "collection and examination of evidence", which was begun before the challenge; and (c) prevent the "absconding of persons" sought arrested. The provision does not distinguish between challenges to the jurisdiction and challenges to the admissibility. Since challenges to the jurisdiction do not suspend the investigation, however, paragraph 8 only seems relevant *vis-à-vis* challenges to the admissibility. Hall argues that the list may not be exhaustive, and that the Prosecutor may have an *inherent power* to seek authorisation to pursue *other measures* that *he or she* deems necessary.[565] It is difficult, however, to imagine a situation where the steps expressly provided for would not be sufficient. Article 19(8) covers steps *vis-à-vis* the suspect, witnesses and "necessary investigative steps for the purpose of preserving evidence", as covered in article 18(6). If the Prosecutor fails to convince the Chamber that an investigative step falls within the provision, that will imply that it is unnecessary and the suspension should be respected. The right that the Prosecutor has under *article 56(1)* to inform the Pre-Trial Chamber of measures that he or she deems necessary, is not affected by article 19(8). The two provisions have different scopes: under article 56(1), the Pre-Trial Chamber lets another party than the Prosecutor carry out the step, while under article 19(8), the Prosecutor is responsible for carrying out the step.[566]

Since the Prosecutor has no right to pursue the measures *unless* the Court authorises them, the relevant Chamber must determine whether the criteria in article 19(8) are met. The Court must determine, unbound by the Prosecutor's finding, whether an investigative step is "necessary", whether a step was "begun prior to the making of the challenge" or whether a step is required to "prevent the absconding of persons". The Prosecutor must *demonstrate* on a preponderance of the evidence that these criteria are met. There is no criterion as to *when* the Prosecutor may seek such authority from the Court. The provision only states that an admissibility ruling by the Court must be *pending*. The Rules provide that "[w]hen the Prosecutor makes application to the competent Chamber in the

---

[565] Hall 1999, p. 415, para. 24.

[566] In *Situation in the Democratic Republic of Congo*, the Pre-Trial Chamber authorised the Prosecutor to request a Dutch forensic institute to perform forensic examinations of some items that would not be available at subsequent stages of the proceedings. The Chamber noted *inter alia* that the Office of the Prosecutor "will not be involved in the examinations".

circumstances provided for in article 19, paragraph 8, rule 57 shall apply".[567] This rule provides that the application "shall be considered ex parte and in camera", and that the Pre-Trial Chamber "shall rule on the application on an expedited basis". This makes sense as some of the measures provided for in article 19(8) will, by their nature, need to be carried out quickly in order to be effective.

4.7.13.1. Necessary investigative steps

According to article 19(8) (a), the Prosecutor may seek authority to pursue "necessary investigative steps of the kind referred to in article 18, paragraph 6". The latter provision refers to the preservation of evidence where there is a "unique opportunity to obtain important evidence", or where there is a "significant risk that such evidence may not be subsequently available". As for the interpretation of these criteria, reference is made to the discussion above regarding that provision. Both articles 18(6) and 19(8) use the term "necessary investigative steps", but while article 18(6) only applies "on an exceptional basis", article 19(8) contains no such limitation. Indeed, article 19(8) makes no reference to the circumstances under which the steps may be authorised, it is only required that they be "necessary". The different wording indicates that it will be easier for the Prosecutor to seek measures under article 19(8), than under article 18(6). This appears to be sensible, as the procedure for dealing with a challenge under article 19 is more time-consuming, increasing the potential damage.

The use of the wording "of the kind referred to in article 18, paragraph 6" rather than "the investigative steps referred to in article 18, paragraph 6" arguably indicates that the provision is not limited to those steps actually mentioned in article 18(6). Article 18(6) does not, however, actually list *kinds* of investigative steps, but rather *purposes* for which the steps may be taken. Article 19(8) therefore appears to allow the Prosecutor to seek authority to pursue any investigative step that will serve the purposes listed in article 18(6), as deemed necessary. The purposes in article 18(6) are broadly formulated, making the scope of article 19(8) equally broad. In practical terms it will cover any step deemed necessary for the preservation of the investigation, probably including any step listed in article 54 on the duties and powers of the Prosecutor with respect to investigations.[568]

As for the kind of evidence that the Prosecutor may obtain according to this provision, this will, as under article 18(6), include evidence pertaining to the alleged

[567] Rule 61.

[568] Hall 1999, p. 415, para. 25.

perpetrator's guilt or innocence, evidence relevant to the admissibility determination and evidence relevant to the "interests of justice" determination, as long as the evidence is "necessary".

4.7.13.2. Statements or testimonies and steps already begun

Syntactically, the criterion that the steps be "already begun" seems to relate only to the "collection and examination of evidence" and not to "taking statements or testimonies". That understanding is also logical as the taking of a statement or testimony is less time-consuming than the collection and examination of evidence, and therefore not so likely to be "already begun", *i.e.* still ongoing. The collection and examination of evidence are, however, more likely to be ongoing when a challenge is made. The same is indicated by the difference between the terms "taking" (statements or testimonies) and "completing" (steps already begun). Consequently, the Prosecutor may seek authorisation for the taking of statements or testimonies even if they were not begun prior to the challenge. A general definition of "a witness" would be "one who gives evidence in relation to matters or fact under inquiry",[569] whereas at the *trial stage*, a witness would be defined as "one who is called to testify before a court".[570] At the investigative stage, the term "witness" cannot be limited to persons whose statements later will actually be heard in the courtroom as there will still be uncertainty as to whether there will be a trial at all and only concrete consultations will clarify whether the person's presence will be needed in a trial. The term should therefore, for the purpose of article 19(8) (b), be understood as a person who there is reason to believe can give information relevant to the investigation. This will include a person whose testimony might *lead to* other more essential witnesses. It may be noted that the Statute uses the term "witnesses" both at the investigative stage and at the trial stage. According to Hall, the term "witness" should be construed so as to include "anyone who *might* be called to testify during the pre-trial proceedings or at trial, even if the Prosecutor does not call them".[571] It would thus suffice that the Prosecutor believes that the person might have information that will promote the investigation.

According to Hall, the term "completion of collection and examination of evidence" should be given a broad reading, in order to minimise the potentially harmful effect of a disruption of the investigation. He argues, for instance, that if the

[569] *The Oxford English Dictionary*.
[570] *Black's Law Dictionary*.
[571] Hall, p. 416, para. 26.

Prosecutor has been able to excavate one among several gravesites relating to a single massacre, he or she "should be able to complete the excavation of all the gravesites where victims of that massacre might be located and to conduct forensic examinations of all the bodies".[572] Concerning the exhumation of gravesites that are located in the same area and relate to the same incident, this seems to be the correct interpretation. If one or more of the gravesites have been relocated to another area, however, it is submitted that it would not be covered.[573] The reason for the distinction lies in the purpose behind the provision: when an investigative operation has been initiated, it would be a senseless waste of valuable resources not to allow the operation to be completed right away, and a postponement might jeopardise the completion of that operation. When an investigative team is established at a site and is investigating there, it would be unfortunate not to let that work be completed. If, however, continuing the work means moving an investigative team to a different place, it seems more sensible not to allow this as long as the investigation is suspended. From the view of the state, which after all claims to be conducting or have conducted genuine proceedings regarding the case in question, it would appear intrusive if the investigators not only were allowed to finish up their work in one place, but also were allowed to establish an investigative team in a new place. There would then be little reality in the suspension provided for in article 19(7). It should be noted that subparagraph (a) of article 19(8) still might be invoked with regard to steps that have not begun, if it is a "necessary investigative step".

Sometimes it might be difficult to determine whether a process of collecting or examining evidence has begun prior to the challenge. If, for instance, the Prosecutor has requested a state's assistance in "the exhumation and examination of grave sites" in accordance with articles 93(1) (g) and 87, it is submitted that the exhumation and examination will be covered, provided that the Prosecutor has requested the state in the manner prescribed. Otherwise, there is a danger that the state will seek to compromise a subsequent exhumation by removing dead bodies while the challenge is being dealt with.

---

[572] *Ibid*.

[573] Such relocation is sometimes arranged in order to make investigations more difficult. If bodies in the meantime have started to decompose, bones will be spread and identification will be more difficult.

4.7.13.3. Preventing the absconding of persons

"To abscond" means "to hide, conceal, or absent oneself clandestinely, with the intent to avoid legal process".[574] It is also defined as "[t]o go in a clandestine manner out of the jurisdiction of the courts […] in order to avoid their process".[575] Thus, the provision seems to cover both *fleeing* and *hiding* for the purpose of avoiding arrest and prosecution. When there is a sufficient risk that the person thus will escape justice, this can be prevented under article 19(8) (c) as a measure for ensuring the effectuation of an arrest warrant.

The person in question must be the subject of an arrest warrant under article 58. This means that a person for whom merely a summons to appear is issued is not covered. This distinction might actually motivate the Prosecutor to request the Pre-Trial Chamber's issuance of an arrest warrant, even where a summons would otherwise be adequate, in order to ensure that he or she will be able to take effective measures during a suspension of the investigation.[576] In order for the Prosecutor to request an arrest warrant, there must, however, be "reasonable grounds" to believe that the person has committed a crime within the jurisdiction of the Court, and the arrest of the person must appear "necessary to secure the person's appearance at trial".[577] The latter criterion is, interestingly, closely related to the "absconding" criterion. This raises the question as to whether the Prosecutor, as the investigation is suspended and as he or she finds that the person might "abscond", may issue an arrest warrant and then resort to article 19(8) (c). It is submitted that this is not possible. Issuing an arrest warrant does not seem to be allowed while the investigation is suspended. The wording "has already requested a warrant" also seems to require that the warrant be issued before the suspension. A challenge to the admissibility does not, however, as noted below, affect the validity of a warrant that already has been made, and it could therefore be executed without resorting to article 19(8) (c).

Among the measures that the Prosecutor may seek authorisation to pursue in order to prevent the person's absconding, an arrest appears to be the most logical one. Other measures might also, however, be adequate, including the confiscation of passports and the freezing of bank accounts. Here, as always, the least intrusive measure which is deemed sufficient must be sought. Alternative (c) provides that the

---

[574] *Black's Law Dictionary*.
[575] *Ibid*.
[576] Hall, p. 416, para. 27.
[577] Article 58(1) (a) and (b).

absconding must be prevented "[i]n cooperation with the relevant States". It was not strictly necessary to say this as the Court *always* must obtain the cooperation of the concerned state before it carries out any investigative measure in the territory, *a forteriori* when it involves the use of force.[578]

4.7.14. Previous orders and requests are not affected

Introduced at the Rome Conference, article 19(9) provides that "[t]he making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge". This provision limits the possibility of a state to impede the investigation and prosecution by making a challenge. In fact, it might prevent a state from challenging the admissibility upon the receipt of an arrest warrant, knowing that the warrant will remain unaffected by a challenge. The order or warrant remains valid until the Court decides that the case is inadmissible.

4.7.15. The Prosecutor's request for review

Article 19(10), which also was introduced in Rome, provides that the Prosecutor

> "may submit a request for a review of a decision [regarding admissibility] when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17".

The reference to "new facts" means that the Prosecutor may not request a review arguing that the interpretation of the law has been incorrect. Once the Court is considering the request, however, it is not inconceivable that the law will be interpreted differently than the first time. Neither is there anything preventing the Prosecutor from stating a new opinion on the law as long as the request is based on new facts which negate the basis of the previous decision.

As for the requirement that new facts "have arisen", it might be asked whether the facts must have occurred after the case was found inadmissible, or whether it suffices that the facts are discovered thereafter. The language is ambiguous, but there is, logically, little doubt that previously existing facts which have come to the Prosecutor's knowledge only after the decision was made are covered. The French wording "*des faits nouvellement apparus*" supports this understanding, as does the even more explicit Russian wording "*otkrylisj novye obstojatelstva*" (new facts were

[578] *E.g.* article 89(1).

discovered).[579] One might ask why in the English version reference is not explicitly made to new evidence that "has been discovered", such as in article 84(1) on the revision of a conviction or sentence. The explanation is probably trivial: different groups were negotiating the two texts and, in the end, there was insufficient time to check for inconsistencies.

The criterion that the facts must "negate the basis" on which inadmissibility was previously determined means that the facts must be relevant in light of article 17 and sufficient to convince the Court that the previous decisions should be reversed. The facts thus must pertain, directly or indirectly, to the national proceedings. There are no clear indications as to how and through which sources such facts may come to the Prosecutor's knowledge. Arguably, he or she may seek and receive relevant information from sources of the type mentioned in rule 104(2), including any reliable source that he or she deems appropriate.

As for the procedure to be followed under article 19(10), rule 62(1) instructs the Prosecutor to make the request to the Chamber which made the latest ruling on admissibility, and provides that "[t]he provisions of rules 58, 59 and 61 shall be applicable". This means *inter alia* that the request shall be in writing and contain the basis for it.[580] Further, the Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may also hold a hearing, and it may "join the challenge or question to a confirmation or a trial proceeding", as long as this does not cause undue delay and the Chamber hears and decides on the request first.[581]

Rule 62(2) provides that states which have made a challenge under article 19(2) shall be notified of the Prosecutor's request for review and be "given a time limit within which to make representations". The provision fails to refer to other parties, such as the person concerned and witnesses. Rule 62(1) provides, however, that "rules 58, 59 and 61 shall be applicable". According to rule 58(3), a person referred to in article 19(2), who has been surrendered or has appeared voluntarily before the Court, may "submit written observations to the request or application". Further, according to rule 59(1), the Registrar shall inform those who have referred a situation pursuant to article 13, as well as victims "who have already communicated with the Court" in relation to that case, or their legal representatives. The victims shall be provided with "a summary of the grounds" and "may make representation in writing to the competent Chamber". These rules are directly applicable when the

[579] *Oxford Russian Dictionary*.
[580] Rule 58(1).
[581] Rule 58(2).

state's challenge is made, but it seems sensible that rule 62(1) gives these parties the right to also be informed of the Prosecutor's request for review. The need to be equally informed of both events appears evident.

Rule 61 provides that rule 57 applies, and that the Prosecutor's request "shall be considered ex parte and in camera" and the relevant Chamber shall rule on the request "on an expedited basis".

4.7.16. The Prosecutor's request for periodic information

Article 19(11) provides that the Prosecutor upon deferral may request that the relevant state "make available to the Prosecutor information on the proceedings". In order for the principle of complementarity to work as envisaged, it does not suffice that the Prosecutor or the Court at a given time is satisfied that the national proceedings are being carried out genuinely. The proceedings must remain genuine throughout. When a proceeding is ongoing, any admissibility determination will only be a more or less certain prediction. Curiously, there is no provision corresponding to the one in article 18(5) that states Parties shall respond to such requests without undue delay. This is insignificant as the general provision in article 86 that states parties shall "cooperate fully with the Court" applies nonetheless. Although not expressly provided, article 86 also requires that the state cooperate without undue delay, so as not to compromise the Prosecutor's proceeding or make the obligation illusory.

When the Prosecutor requests periodic information, this will not only provide him or her with the opportunity to supervise the national proceeding; it will also serve as an incentive for national authorities to complete the proceeding in a genuine manner. Without the possibility to stay informed on the progress of the proceeding, the Prosecutor might also have been more reluctant to interfere before the state had handed down a final judgement, and the whole proceeding could be scrutinised. Further, the possibility of requesting periodic information also encourages the Prosecutor, once a state has challenged the admissibility, to give the state the benefit of the doubt as he or she will be able to monitor the proceedings and request a review under article 19(10) if the state fails to proceed genuinely.

As for the type of information that a state must make available under this provision, the purpose of the information is to enable the Prosecutor to determine whether the proceedings are concluded in a genuine manner as required by article 17. This means that all information relevant to article 17 may be covered. Linguistically, the term "make available" is peculiar as it indicates something less than "periodically inform", which is the term used in article 18(6). While

"informing" implies that the state has actively to provide the Prosecutor with information, "making available" would seem to imply passively letting the Prosecutor obtain the information. A linguistic approach does not, however, seem fully adequate here. The Prosecutor is dependent on the state's actual submission of the information, and the state is in the best position to judge which information is relevant. Passively allowing the Prosecutor to search for the information would be highly inadequate. The provision must therefore be understood as authorising the Prosecutor to instruct the state to actively gather and submit information relevant to the admissibility determination. This is also information which the Prosecutor could have requested under part 9 during an investigation, but since the investigation is suspended, that part is not applicable.

A state may request that the relevant information be confidential. This provision should be seen in conjunction with the more general provision in article 72 on protection of national security information.

If a state fails to comply with the Prosecutor's request for information, this can be viewed as an indication, under the circumstances justifying a presumption, that the state is unwilling or unable to proceed genuinely. Without the information, the Court will hardly be able to make an informed determination. Further, if a state party fails to comply with a request under article 19(11), article 87(7) on non-compliance will apply. Article 19(11) also provides the obvious that if the Prosecutor subsequently decides to proceed with an investigation, he or she shall notify the state to which he or she previously deferred.

It is submitted that the Prosecutor, under article 19(11) just as under article 18(6), may request information on national proceedings even from a non-state party. Such a state will not, however, be obliged to cooperate, let alone to surrender the person concerned to the Court, should the case be deemed admissible. In this respect, it should be noted that, under article 87(5) (a), the Court may "invite any State not party" to provide assistance under part 9 on international cooperation and judicial assistance, on the basis of an *ad hoc* arrangement, an agreement with such state or any other appropriate basis.

4.8. TWO PARTICULAR PROCEDURAL ISSUES

4.8.1. The burden and standard of proof

Whenever the question of admissibility is raised, the burden of proof rests with the Prosecutor, who must demonstrate on a preponderance of the evidence that the

admissibility criteria in article 17 are met.[582] This does not follow from the fact that a case at the outset is "inadmissible" when a state is dealing with it, but from the fact that the case is inadmissible "unless" the state is or was unwilling or unable to proceed genuinely.[583] During the negotiations some states considered it inappropriate in a state's challenge, based on the sufficiency of national proceedings, to require the Prosecutor to demonstrate its insufficiency. It might be argued that a state which challenges the admissibility has chosen to invoke its prior right to proceed, and that it therefore would have been "proper to require that the State demonstrate that it has made the decision in good faith, and not simply as a means of depriving the ICC of jurisdiction".[584] An additional argument is that politically it might be perceived as offensive to require the ICC to present affirmative evidence impugning the willingness or ability of a state's judicial system. It might be argued that as a matter of respect to the state, it would have been more appropriate "to deny a State jurisdiction on the basis of a failure to satisfy the burden of proof as opposed to an affirmative conclusion that the system is inadequate".[585] Such considerations did not, however, prevail.

While the Prosecutor has the burden to demonstrate the proceeding's inadequacy, articles 17 to 19 indicate, as noted, that the state bears the burden of proof as to the proceedings' existence, *i.e.* that the state in fact is proceeding with the case in question, as well as to whether the state has jurisdiction over the case. This is indicated by the fact that these requirements are not contained in the phrase commencing with the word "unless".[586] Under the circumstances, it might be difficult for the Prosecutor to obtain necessary information to determine the adequacy or inadequacy of the national proceeding. Unwilling or unable states cannot be expected to cooperate efficiently, and the state will have the best access to information on its own proceedings. During the negotiations, some states therefore argued that the state should be obliged to produce the necessary information on the steps it had taken in order to satisfy the Court that the "unwillingness" or "inability"

---

[582] As noted, a case which is being or has been investigated or prosecuted by a state with jurisdiction is, according to article 17(1), inadmissible *unless* the admissibility criteria are met.

[583] For a different view, Hall suggests that "[g]iven that under Article 53(1) (b) the Prosecutor will, after a preliminary examination have determined that the case is admissible before opening an investigation, as will have the Court when the Prosecutor is acting under Article 15, the presumption in an Article 18(2) challenge must be that the case is admissible", see Hall 2003, p. 29.

[584] Bleich 1997, p. 242.

[585] *Ibid*.

[586] Benzing 2003, p. 629.

exceptions did not apply, but no provision to that effect was adopted. States parties must, however, according to article 86, comply fully with the Court's requests, including requests for such information once an ICC investigation is initiated.

It remains to be seen whether, on a practical level, the burden of proof will impose a prohibitively onerous burden on the Prosecutor. In reality, the question of which party bears the burden will probably be less crucial than it would seem on paper. The Court must be expected to, after having heard all the evidence, simply decide whether, on balance, it seems probable or not that the state in question lacks the will or ability to proceed genuinely. Arguably, the complete failure of the state to produce the requested information on its proceeding, apart from the unsubstantiated claim that there is a genuine proceeding, might under the circumstances justify the inference that there is no such proceeding. This would seem particularly warranted in the ICC's investigative phase, where such failure would constitute a breach of the *duty* to cooperate under Chapter 9 of the Statute. In *Velásquez Rodríguez v. Honduras*, the Inter-American Commission noted with regard to the state's failure to address the complainant's submission that the local remedies were ineffective:

> "The Commission's requests for information were ignored to the point that the Commission had to presume […] that the allegations were true."[587]

It might also be questioned whether it is correct to place *any* burden of proof on the individual when an individual has challenged the admissibility as article 66(2) provides that "[t]he onus is on the Prosecutor to prove the guilt of the accused". This provision refers, however, expressly to the question of guilt and not to that of admissibility.

As for the standard of proof, the admissibility determination is not a part of what must be proven "beyond reasonable doubt" under article 66(3).[588] Besides, the standard with regard to the admissibility is logically lower than a *prima facie* determination.[589] According to article 17, the probability that the national proceeding is non-genuine suffices: the case is inadmissible "unless" one of the admissibility criteria is met, and, conversely, it is admissible if one or more of the criteria are met. There is nothing in the Statute or the Rules indicating a higher

[587] *Velásquez Rodríguez v. Honduras*, para. 180.

[588] This provision pertains only to the question of guilt.

[589] Articles 53(2) (a) and 58(1) (a).

standard than probability.[590] If it is more probable than not that the national proceeding is non-genuine, the case will be admissible.[591] It might be argued that the admissibility determination should reflect due respect for the national priority underlying the complementarity principle. Yet, that argument has relevance only with regard to the admissibility threshold as such, *i.e.* the "genuinely" standard, and not to the burden of proof. Thus, the Prosecutor must demonstrate, on a preponderance of evidence, a probability that the national proceeding does not meet the "genuinely" standard (which is a minimum standard). This conclusion seems to be supported by the following statement of the IACmHR regarding the "unwarranted delay" exception from the requirement that local remedies be exhausted:

> "[T]he invocation of the exceptions to the rule on exhaustion of domestic remedies set forth in the American Convention [on Human Rights] is closely linked to the finding of possible violations of rights enshrined in the Convention, such as effective judicial protection. Article 46(2) of the American Convention, however, is independent of other substantive provisions of that instrument. The issue of whether the exceptions to the rule requiring exhaustion of domestic remedies are also a function of violations of the American Convention in the instant case, must be examined separately, during the merits phase of the case. This is because standards for assessing those exceptions are different from those used when assessing possible violations of Articles 8 and 25 of the American Convention."[592]

This statement indicates that while the standard used when state responsibility is assessed is more than probability (but also less than "beyond reasonable doubt"), the standard with regard to the inadequacy of the local proceedings is probability.

As for the standard of proof at the ICC's pre-investigative stage versus at the post-investigative stage, it is arguably somewhat lower at the former. This is indicated by the "reasonable basis" threshold required for initiating an investigation

---

[590] Curiously, Benzing 2003, p. 629 argues, referring to Kaul 1997, that "the negotiating history evidences that the judges will have to be convinced 'beyond reasonable doubt', given that it proved impossible during the negotiations to incorporate a proposal to let reasonable doubt as to the genuineness of a State's efforts to prosecute suffice". This appears to be a misunderstanding; Kaul refers to the impossibility of including "reasonable *grounds*" as a *criterion* for interfering, see Kaul 1997, p. 172.

[591] The same conclusion is reached in Agirre *et al.*, noting: "As the issue in complementarity is one of admissibility before a particular forum, rather than the objective and subjective elements of a particular crime, the appropriate burden is the simple balance of probabilities, rather than any higher standard such as 'proof beyond a reasonable doubt'", p. 16, para. 52.

[592] *Jose Ruben Rivera v. El Salvador*, para. 33.

and the "sufficient basis" threshold required for proceeding with a prosecution. Further, as for the admissibility, article 53(1) (b) concerning the investigation uses the wording "would be admissible", whereas article 53(2) (b) concerning the prosecution uses wording "is admissible", although the wording in the former article is not "could be admissible", something which would have made the difference between the thresholds very clear. Curiously, the Prosecutor conveyed a slight confusion when he stated:

> "In light of the complementarity regime and article 53(1) (b) of the Statute, the Prosecutor is required to consider whether there *could be cases that would be admissible* within the situation in Darfur since 1 July 2002."[593]

Arguably, the threshold at the investigative stage is whether there "*are* cases that would be admissible". Indeed, in the report just referred to, the Prosecutor concluded that "in light of the information reviewed, the Prosecutor determined […] the existence of sufficient information to believe that there *are cases that would be admissible* […]".[594] This is perhaps an indication that the "could be" threshold will not be applied after all. While probability would suffice, the Prosecutor may, however, choose to target the clearest cases of failure, as indicated by his statement that he, as a general rule, will interfere "only where there is a clear case of failure to act by the State or States concerned".[595]

4.8.2. The Court as the final arbiter

The single most important feature of the procedural regime regarding complementarity is probably the fact that the final decision as to whether a case is admissible or not lies with the Court. States parties must comply with the Court's admissibility ruling and cooperate with the Court's requests according to article 86. There is no external review mechanism available once the Court has ruled in the last instance. The ICC is master of its own Statute. Article 17 provides that "the Court shall determine that a case is inadmissible […]"; articles 18 and 19 do not provide for any external review. Article 119(1) on settlement of disputes leaves the final authority to settle "any dispute concerning the judicial functions of the Court" with the Court (this provision covers issues of admissibility and prosecutorial

---

[593] *Report to the Security Council Pursuant to UNSCR 1593*, *supra* note 361, p. 3 (emphasis added).
[594] *Ibid.*, p. 4.
[595] *Paper on some policy issues*, *supra* note 18, p. 2.

discretion).[596] It could hardly have been different: states that are unwilling or unable to conduct genuine proceedings could not themselves be entrusted with the authority to determine the genuineness of their own proceedings. When Australia ratified the Rome Statute, it declared that

> "no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes. For this purpose, the procedure under Australian law implementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender."[597]

Such statements have little value. Article 120 of the Statute provides that "[n]o reservations may be made to this Statute", and the Vienna Convention provides that "[a] party may not invoke the provisions of its internal law as justification of its failure to perform a treaty".[598] Thus, Australia will, as a state party to the Rome Statute, have to respect the Court's final admissibility determination and surrender the person concerned upon request, regardless of whether the Australian Attorney-General issues the said certificate.

The fact that there is no external review makes it all the more important that the judges and the Prosecutor are independent and impartial and selected according to adequate criteria and procedures. Some of the negotiating states were afraid that the Prosecutor and the judges, in their eagerness to carry out their ambitious missions, would regard the constraints dictated by the complementarity principle as "an overly restrictive manifestation of arcane sovereignty principles".[599] States such as the Unites States, China and Japan have expressed concerns regarding the fact that the

---

[596] Pellet notes that article 119(1) applies, noting that "[a]rticles 17 to 19 clearly entrust the ICC with deciding on the admissibility of a case […]", see Pellet 2002b, p. 1843.

[597] *Declarations and Reservations to the Rome Statute*, *supra* note 335.

[598] Article 27 of the Vienna Convention .

[599] Newton 2001, p. 68.

ICC finally determines whether a case is admissible.[600] China has, for example, been reluctant to give the ICC the authority to decide the issues of jurisdiction and admissibility, arguing that the decision should be left with domestic courts or possibly with the Security Council.[601] The United States did not in principle object to giving the ICC the authority to decide its own jurisdiction, but it would endorse this power only if challenges to the jurisdiction and admissibility were available at all stages, and the ICC had limited discretion to proceed despite a state's objection.[602] Some of the expressed concerns probably did not reflect the view that conferring the final determination to the Court was improper as such, but rather a lack of confidence in the Court as a truly independent organ.

[600] Bleich, 1997, p. 233 *et seq*.
[601] This was for instance the opinion of China in the Sixth Committee (30 October 1995), see Bleich 1997, p. 234, fn. 5.
[602] *Comments of United States to Ad Hoc Committee*, *supra* note 245, at 10.

5. THE SCOPE OF ARTICLE 17

5.1. THE MAIN RULE: NATIONAL PROCEEDINGS PREVAIL

Article 17 of the Rome Statute lists three scenarios in which a case is inadmissible before the ICC due to the existence of national proceedings. The first paragraph of the article reads:

> "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:
>
> the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> the case has been investigated by a State which has jurisdiction over it, and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> the person concerned has already been tried for the conduct, unless the trial was for the purpose of shielding the person concerned from criminal responsibility or otherwise was not conducted independently or impartially."

From this, the following can be concluded (assuming that the ICC has jurisdiction and the case is of sufficient gravity): 1) a case which is not being and has not been investigated or prosecuted by a state with jurisdiction is always admissible; 2) a case that is being or has been investigated or prosecuted by a state with jurisdiction is inadmissible unless one or more of the exceptions apply; and 3) when such proceeding exists, the case is presumed inadmissible but is admissible if the state is or has been unwilling or unable to proceed genuinely.[603]

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

This chapter will first comment on the "sufficient gravity" criterion (5.2). Then it will analyse the terms "complementary" (5.3), "a State which has jurisdiction" (5.4)

[603] Note that articles 17(1) (c) and 20 on *ne bis in idem* only refer to the state's unwillingness.

and "the case" (5.5). Further, it will comment on the issue of national inaction (5.6), before the various stages of a national criminal proceeding are commented on (5.7). Lastly, some remarks will be made as to the relevance of general, as opposed to specific, information regarding a state's judicial system and its handling of cases (5.8).

5.2. THE "SUFFICIENT GRAVITY" CRITERION

In addition to the above, article 17(1) (d) makes a case inadmissible when "the case is not of sufficient gravity to justify further action by the Court". Although technically an admissibility criterion, this criterion is of a very different character than criteria (a) to (c) as it does not presuppose the existence of national proceedings.[604] Further, (d) is not truly an allocation criterion as the result might be that the case is dealt with at neither level.

The criterion was first proposed in the ILC Draft Statute, and it survived the later negotiations, although it was noted on several occasions that the criterion should not be included as an admissibility criterion. A footnote attached to article 15(1) (d) (now article 17(1) (d)) in the Preparatory Committee's proposal read: "Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted."[605] The fact that the gravity was retained in article 17 underscores the idea that the ICC shall only deal with the gravest crimes of all. The Prosecutor has noted:

> "Crimes within our jurisdiction are by definition grave crimes of international concern. But gravity in our Statute is not only a characteristic of the crime, but also an admissibility factor, which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world."[606]

The appropriateness of letting the perpetrator invoke this criterion may of course be questioned. Nevertheless, according to article 19(2) (a), he or she enjoys that right as opposed to the state which does not enjoy such right under subparagraph (b). The fact that the state may only challenge the admissibility "on the ground that it is

---

[604] It could, however, regulate the situation where a state was, for instance, shielding a person according to article 17(1) (a), but the case nevertheless was not of sufficient gravity according to article 17(1) (d).

[605] *Report of the Preparatory Committee, Vol. II*, *supra* note 321, p. 41, fn. 44.

[606] *Informal meeting of Legal Advisors of Ministries of Foreign Affairs*, Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, 24 October 2005, pp. 8-9 (available at http://www.icc-cpi.int/otp/otp_events.html).

investigating or prosecuting the case or has investigated or prosecuted", underscores the fact that article 17(1) (d) conceptually stands apart from criteria (a) to (c).[607]

It should be noted that the gravity is also, arguably more importantly, referred to in various provisions circumscribing the ICC's jurisdiction ensuring that the Court will only deal with crimes that truly are of a concern to the world community.[608] Moreover, the gravity arguably is an important (arguably the most important) factor for the Prosecutor's determination as to whether, once a case is within the jurisdiction and admissible, proceeding with it will serve the "interests of justice" as part of the determination as to whether there is a "reasonable basis" to open an investigation and whether, upon investigation, there is a "sufficient basis" to proceed with a prosecution.[609] This book will discuss the gravity factor in detail in the latter context, as an essential part of the prosecutorial discretion. Therefore, and for the other reasons just outlined, the "gravity" factor will not be treated in detail in the present context.

5.3. THE TERM "COMPLEMENTARY"

Article 17 begins with the words "Having regard to paragraph 10 of the Preamble and article 1". These two provisions provide that the ICC "shall be complementary to national criminal jurisdictions". Before interpreting the criteria listed in article 17, it should be determined whether the term "complementary" itself has any bearing on the interpretation or whether it is neutral. The term is not defined in the Rome Statute; article 17 merely provides a *recipe* for the effectuation of the ICC's complementary nature; it explains the meaning of complementarity in practical terms, related to admissibility (article 53 explains how the ICC eventually shall complement national jurisdictions once the prosecutorial discretion has been exercised).

The term "complementarity" was introduced in the ILC discussions. In later negotiations states frequently discussed "the principle of complementarity",

---

[607] Similarly, article 18(2) on the right of states to seek a preliminary ruling on the admissibility only refers to the situation where a state "is or has been investigating" the case. Interestingly, however, article 19(2) (a) and (c) provide that challenges to the admissibility of a case may be made by the person concerned or a state referred to in article 12, "on the grounds referred to in article 17", arguably including the "gravity" criterion.

[608] Paragraph 4 of the Preamble and articles 1 and 5 refer to "the most serious crimes" of concern to the international community. Article 8 refers to war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."

[609] Article 53(1) (c) and (2) (c).

referring to "the entirety of norms governing the complementary relationship between the ICC and national jurisdictions".[610] It was noted that the term complementarity "was not an established legal principle".[611] The term (which is not the one actually used in the Statute) means "a complementary relationship".[612] A search on the Internet reveals that the term is frequently used in physics referring to wave and particle theories,[613] but rarely in other contexts, save in connection with the ICC. The adjective "complementary" (the term actually used in the Statute) is more common.[614] It means "forming a complement, completing, perfecting".[615] When one thing is complementary to another, the former is "completing [the latter's] deficiencies".[616] The noun "complement" means "that which completes or makes perfect"; "something which, when added, completes or makes up a whole; each of two parts which mutually complete each other, or supply each other's deficiencies".[617] The verb "to complement" means "to complete or perfect, to supply what is wanting".[618] These definitions reflect the underlying idea: the Court shall step in when national jurisdictions have deficiencies; when something is wanting on the national level. With the ICC complementing national deficiency, the two systems create a perfect whole in which perpetrators are brought to justice.

The term "complementary" refers to a *quantitative* aspect (making up a whole), and a *qualitative* aspect (completing deficiencies). In an ideal world, the ICC would complement national jurisdictions in both ways by adjudicating all cases where states failed (quantitatively) and by providing genuine justice every time it interfered (qualitatively). Given the vast number of crimes that will fall under the Court's jurisdiction, the notorious failure of states to deal genuinely with them, and the Court's limited capacity, the Court can, however, truly complement national jurisdictions only in the qualitative sense in given cases. The quantitative

---

[610] Benzing 2003, p. 592.

[611] *UN Press Release L/2772*, *supra* note 270, noted by the New Zealand delegation.

[612] *The Oxford English Dictionary*.

[613] Curiously, physicians also frequently refer to something *they* call the "principle of complementarity".

[614] The exact term "complementarity" is not used in the Statute.

[615] *The Oxford English Dictionary*.

[616] *Ibid*.

[617] *Ibid*.

[618] *Ibid*.

complement will be modest.[619] As we shall see, the ICC will provide genuine justice only when it is most needed, leaving an impunity gap where justice is dispensed at neither level. In order to do the complementarity principle justice, however, it should be noted that the mere possibility of ICC interference will provide an enhancing effect *vis-à-vis* national judiciary, sometimes obviating the need for interference.

The French and the Spanish equivalents to "complementary" are "*complémentaire*" and "*complementaria*", both apparently fully synonymous with the English.[620] The Russian term is "*dopolnjaet*", the present tense of the verb "*dopolnitj*" which means "to complete, supplement, make up, fill up, add to, complement".[621] The root of the verb is the adjective "*polnyj*", which means "full, complete, entire, total, absolute", as in "*polnaja luna*" (full moon).[622] The Russian term seems, linguistically, to refer more to the quantitative aspect (the filling up of something) than to the qualitative aspect (the completion of deficiencies). This should not, however, be viewed as to indicate that the Russian text does not reflect the qualitative aspect. The rest of the Russian text in article 17 clearly shows that it does.[623] As for the Chinese and Arabic terms, it may be noted that all comments that this author has read by English-writing Chinese or Arab-speaking scholars have used the English term without reservation.

In everyday usage, one would typically say that two things complement *each other*. In an ICC context, however, it makes most sense to say that the ICC complements national jurisdictions, and not *vice versa*. Paragraph 10 of the Preamble and article 1 provide that *the ICC* "shall be complementary to national criminal jurisdictions", not that the two shall complement each other. The ICC is intended fill the gap left by inactive, unwilling or unable states, whereas national jurisdictions will not fill any gap left by the ICC, at least not in the sense that they will compensate any ICC deficiency (neither can the ICC proceedings reasonably be

---

[619] The ICC Prosecutor has estimated that the ICC, with its current resources, has "the capacity to take only two or three situations each year", see *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, *supra* note 606, p. 9.

[620] *Le Nouveau Petit Robert* and *Collins Spanish Dictionary*.

[621] *New Complete Russian-English Dictionary*.

[622] *Ibid*.

[623] See the discussion of article 17(2) and (3) below.

expected to suffer from deficiencies of the kind described in article 17).[624] Moreover, national jurisdictions will, according to article 20(2), never have the authority to investigate or prosecute a case that has already been tried by the ICC, even if the ICC proceeding should be defective.[625] This is not to say, however, that the complementarity principle does not rely heavily upon national jurisdictions; they will still provide the backbone of the enforcement of international criminal law.

A linguistic/contextual analysis does not clarify which cases will be admissible and which cases will not. It merely shows that the ICC shall interfere when national criminal proceedings are either non-existent or deficient. In order to determine when a criminal proceeding is deficient, it is necessary to look at certain requirements that are attached to such proceedings. The requirements are indicated by the terms "genuinely", "unwillingness" and "inability", as well as the factors listed in article 17(2) and (3). As just seen, one definition of "complementary" refers to perfection. It should be noted, however, that perfect national proceedings are not required under the Rome Statute. The complementarity principle establishes a *minimum standard* which national criminal proceedings must meet in order to pre-empt ICC interference. The ICC will only interfere *vis-à-vis* an existing national proceeding when its standard is below this threshold.

5.4. THE TERM "A STATE WHICH HAS JURISDICTION"

According to article 17(1), ICC interference can only be pre-empted by "a State which has jurisdiction over it".[626] It is submitted that the term "jurisdiction" refers to jurisdiction under international law and not to jurisdiction under national law, although the latter typically will be required by national law.[627] As for the former,

---

[624] One might say, however, that when the ICC steps in to remedy national inability, but the state shares the burden by handling the less important crimes, the national jurisdiction actually fills the gap which otherwise would have been left by the ICC.

[625] Article 20(2) contains one of the Rome Statute's few actual duties: "No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court."

[626] Further, only a "State which has jurisdiction" may *challenge* the admissibility under article 19(2) (b).

[627] For a different view, see Hall 1999, p. 410, para. 11: "Since all States under international law may exercise jurisdiction over the crimes within the Court's jurisdiction, it is likely that paragraph 2(b) meant only to include those States which had provided their own courts with jurisdiction under national law over the case under the relevant principle of jurisdiction,

international law makes investigation and prosecution contingent on jurisdiction under international law, and the ICC therefore cannot defer to a state lacking such jurisdiction.[628] As for national jurisdiction, *i.e.* national penal legislation enabling national courts to avail themselves jurisdiction which they have under international law, this is not required by international law. States may, as far as international law is concerned, base their prosecution of international crimes directly on international law.[629] By illustration, a prosecution of genocide in the suspect's home state without a national genocide provision might violate internal law, but as long as international law gives that state jurisdiction over such crime, the trial does not violate international law. The lack of national jurisdiction might nevertheless become relevant if it results in a non-genuine proceeding reflecting the state's "unwillingness" or "inability". In the latter situation, the state would be considered a "state with jurisdiction" (according to the nationality principle), but the case would be admissible under article 17(1) due to the proceeding's non-genuineness. If the lack of national jurisdiction results in a non-proceeding, the case is automatically admissible.

As for the question as to which states have jurisdiction over the ICC crimes, it should first be decided whether a state must identify a positive rule under international law allowing the jurisdiction, or whether it suffices that the jurisdiction is not expressly prohibited by international law. This author submits that the former starting point is correct: a positive rule is needed.[630] The dynamic reference to "a State which has jurisdiction" lets the ICC decide the scope of a state's jurisdiction on a case-by-case basis, allowing the Court to adjust to a dynamic development of international law. Conversely, it is not inconceivable that the ICC, as it begins to produce findings regarding states' jurisdiction, will influence the development in this field of international law.

---

whether based on territory, the protective principle, the nationality of the suspect or the victim or universality."

[628] The requirement of jurisdiction is reflected *inter alia* in article 14(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR), according to which everyone shall be entitled to a fair and public hearing "by a *competent*, independent and impartial tribunal established by law".

[629] Some states relied upon this when they prosecuted war criminals after the Second World War without having provided for relevant *internal* legislation, see *e.g.* the trial of *Karl-Hans Hermann Klinge* (Norway).

[630] It is submitted that this is compatible with the ICJ's *SS Lotus*, pp. 3 *et seq.*, which is sometimes understood to the opposite effect.

There is no general treaty governing states' criminal jurisdiction, and the Rome Statute does not seek to validate or rank jurisdictional bases.[631] Neither is the content of international customary law fully settled. Some principles have, however, crystallised. The 1935 Harvard Research Draft Convention lists five jurisdictional bases: the principles of territoriality (the state where the crime was committed), nationality (the perpetrator's home state), passive nationality (the victim's home state), protection (states threatened by the crime) and universality (any state).[632] While many commentators claim that the ICC crimes are all subject to universal jurisdiction, there is still much controversy regarding the scope of such jurisdiction. Importantly, it is has not yet been clarified by the ICJ.[633] Some judgements from the two *ad hoc* Tribunals indicate that the crimes in question are subject to universal jurisdiction,[634] but defining the scope of national criminal jurisdiction is not within these Tribunals' mandate. As for special conventions, the Genocide Convention (1948) does not appear to establish universal jurisdiction over genocide,[635] whereas the Geneva Conventions (1949) (with Additional Protocol No. 1 (1977)) and the Convention against Torture (1984) appear to establish such jurisdiction among the states parties.[636] As for crimes against humanity, no relevant convention exists. As for customary law, national legislation and jurisprudence exercising universal jurisdiction can be found in increasing numbers, but there still does not seem to exist a sufficient basis for concluding that states have a customary right to exercise universal jurisdiction over the ICC crimes,[637] except perhaps for war crimes.[638]

---

[631] Subparagraphs (b) and (c) of article 19(2) presuppose the existence of other jurisdictional bases than that of the territorial state and the state of the perpetrator's nationality. In addition to "[a] State from which acceptance of jurisdiction is required under article 12 (b) [referring to those two states]" reference is made to a "State which has jurisdiction over a case", indicating that those two states are not the only ones with jurisdiction.

[632] *Harvard Research in International Law 1935*, pp. 435 *et seq*.

[633] The ICJ failed to address the issue in *Arrest Warrant of 11 April 2000*.

[634] *Prosecutor v. Furundzija*, para. 156; *Prosecutor v. Tadic*, para. 62; and *Prosecutor v. Bagaragaza*, Trial Chamber, para. 13 (upheld by the Appeals Chamber).

[635] Article 6 only refers to the territorial state and an envisaged international jurisdiction.

[636] Articles 49, 50, 129 and 146 of the Geneva Conventions 1-4, Additional Protocol No. 1, and articles 7(1) and 5 of the Convention Against Torture.

[637] *E.g. The Attorney General of Israel v. Eichmann* (p. 304) and *Demjanjuk v. Petrovsky* (p. 582). A survey conducted by Amnesty International indicates that universal jurisdiction has been applied in cases in Australia, Belgium, Canada, France, Germany and Switzerland, see *Universal Jurisdiction: The duty of states to enact and enforce legislation*, Amnesty

Accordingly, states parties to the Geneva Conventions, Additional Protocol No. 1 and the Convention against Torture may exercise universal jurisdiction over the respective crimes *vis-à-vis* other states parties. Further, arguably, states may exercise universal jurisdiction over grave breaches of the Geneva Conventions. Otherwise, states must base their jurisdiction on one or more of the other jurisdictional bases listed above (among which the principle of passive nationality admittedly appears to be more controversial than the others). Having said this, it remains to be seen whether the ICC will interpret international law as critically as this author or whether the findings of the *ad hoc* Tribunals are indicative of a more progressive attitude among international criminal law judges.

As to the exercise of universal jurisdiction, when such is allowed, it has been suggested that international law requires that the alleged perpetrator be present in the territory of the state exercising jurisdiction.[639] Such requirement would, if it exists, pertain to the exercise and not to the existence of jurisdiction. Thus, a state which has jurisdiction according to the universality principle will still be a state "which has jurisdiction", even if the perpetrator is outside its territory. The suspect's continued absence will, however, be a relevant circumstance for the determination of the national proceeding's genuineness (in particular for the state's ability to "obtain the accused").[640]

Another possible requirement pertaining to the exercise of universal jurisdiction is that the state in question first requests states that would normally exercise jurisdiction as to whether they wish to proceed.[641] Again, the requirement, if it exists, pertains to the exercise and not the existence of jurisdiction, and the question remains whether the state is willing and able to proceed genuinely. It should be noted that both this requirement and (even more often) a presence requirement is

---

International, 2001 (available at http://web.amnesty.org/pages/legal_memorandum). See also judgment and separate opinions in the ICJ's *Arrest Warrant of 11 April 2000*.

[638] The most essential provisions of the Geneva Conventions are widely held to reflect international custom.

[639] In the ICJ's *Arrest Warrant of 11 April 2000*, Guillaume notes in his separate opinion that "at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims are and irrespective of the place where the offender is to be found", see para. 15. For the opposite view, see separate opinion of Judge Higgins *et al.*, paras. 53-59.

[640] Article 17(3) of the Rome Statute refers to whether the state is "unable to obtain the accused" as one of the factors for the "inability" determination.

[641] *Arrest Warrant of 11 April 2000*, separate opinion of Judge Higgins *et al.*, para. 59.

reflected in the legislation of many states, with a similar potential effect regarding the proceeding's genuineness.

If the state lacks jurisdiction, the case is admissible *ipso facto* under article 17 *vis-à-vis* that state, irrespective of whether an existing proceeding otherwise is genuine. If the state has completed a "trial" without jurisdiction, there is no true *ne bis in idem* situation (as regulated by article 20) as the "trial" will be void and effectively a non-trial. If the ICC subsequently tries the same person for the same conduct, that person will not be tried *de novo*, but for the first time by a competent court.

Whether the ICC will ever interfere *vis-à-vis* an otherwise genuine "conviction" on the ground that the state lacks jurisdiction is an open question.[642] If the ICC should interfere, the point will not be to remedy the violation of that person's right to be judged by a competent court,[643] but to ensure that impunity does not prevail as a result of a subsequent invalidation of the conviction due to the lack of jurisdiction. If the person concerned has already spent time in detention before, under or following the void national trial, the question arises as to whether this time should be deducted by the ICC. Article 78(2) provides that the Court "may deduct any time otherwise spent in detention in connection with conduct underlying the crime". There is no express requirement that the imprisonment must have been pursuant to a valid judgement, and it is submitted that the time should be deducted.[644] The net result might, however, be that an ICC proceeding no longer will serve the "interests of justice" according to article 53. If the person was acquitted in a void trial the case will be admissible, but if the trial was otherwise genuine, the prosecutor would have to study the national judgment carefully as it might indicate the person's innocence.

In the context of national jurisdiction over the ICC crimes it seems pertinent to discuss a particular problem. Which role may the ICC, first of all the Prosecutor, play when more than one state has jurisdiction and wants to proceed with a case? Is the Prosecutor able to somehow channel the case from one state to another which seems more suited to deal with it? The Office of the Prosecutor has noted:

> "Close co-operation between the Office of the Prosecutor and all parties concerned will be needed to determine which forum may be *the most appropriate* to take

[642] The question would be subject to the Prosecutor's discretion under article 53(1) (c) and (2) (c).

[643] *E.g.* ICCPR article 14.

[644] Such interpretation is supported by article 21(3) which provides that any application and interpretation of the ICC law "must be consistent with internationally recognised human rights".

> jurisdiction in certain cases, in particular where there are many States with concurrent jurisdiction, and where the Prosecutor is already investigating certain cases within a given situation."[645]

The Office has further noted:

> "In a case where multiple States have jurisdiction over the crime in question the Prosecutor should consult with those States best able to exercise jurisdiction with a view to ensuring that jurisdiction is taken by the State best able to do so."[646]

The statements seem to raise two problems: First, can the ICC Prosecutor dictate the transfer of a person from the willing and able state A to state B which is the state best qualified to proceed? Second, if state A is unwilling or unable, does the Prosecutor have the authority to request the surrender of a person from state A to the ICC in order to subsequently transfer him or her to the willing and able state B?

As for the first question, looking at the statements of the Prosecutor, the Prosecutor fails to suggest whether it would be possible to dictate the transfer of a person from the willing state A to state B which is considered the most appropriate forum. Arguably, statements such as "[c]lose co-operation […] will be needed" and "the Prosecutor should consult with those States" merely suggest consultations. Indeed, if the custodial state is willing and able, that state cannot, under the Rome Statute, be forced to surrender the person to the ICC as the case will not be admissible. Even less can the state be dictated to extradite to another state; there is not even a procedure for that in the Statute. Just as the Prosecutor cannot interfere *vis-à-vis* a willing and able state on the grounds that the ICC would have done the job better, the transfer to a state that would do the job better cannot be dictated.

As for the second question, whether the ICC might transfer a person to a third state, which may or may not be a state party, once he or she is in the ICC's custody, this is more complex. Such arrangement is not expressly provided for in the Statute. Article 102 (a) defines "surrender" as the "delivering up of a person "by a State to the Court", and subparagraph (b) defines "extradition" as the delivering up of a person "by one State to another as provided by treaty, convention or national legislation". As for the transfer of a person from the ICC to a state, this is contemplated in another situation under article 103 which provides that a sentence of imprisonment "shall be served in a State designated by the Court".[647] Further, the Court may, under article 104(1), at any time decide to "transfer a sentenced person to a prison of

---

[645] *Ibid.,* p. 2.

[646] *Ibid.,* p. 5.

[647] How such transfer is to be *arranged* is not regulated.

another State". Following the completion of a sentence, a person may also, under article 107(1), be "transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her".[648] A transfer from the ICC back to the state of origin or another state with jurisdiction is, however, contemplated in article 19(4) which provides that a state may challenge the admissibility "prior to or at the commencement of the trial" and in "exceptional circumstances" even later. A successful challenge may thus result in the person's transfer from the ICC to a willing and able state with jurisdiction.

Thus, before a trial is initiated at the ICC, any state with jurisdiction may challenge the admissibility with a view to take over the case. If the Prosecutor at an earlier point has notified states of his decision to investigate,[649] the question can be raised, however, as to whether this right might be precluded. Article 19(5) provides that the state "shall make a challenge at the earliest opportunity". Reference is made to the discussion of this provision in the chapter on the complementarity procedures which concludes that the ICC Prosecutor cannot disregard a genuine national proceeding even if he or she has been informed of it by means of an untimely challenge.

The above does not, however, mean that the ICC Prosecutor is authorised to request the surrender of a suspect from state A *for the purpose of* subsequently surrendering him or her to state B. The only purpose for which the ICC can request surrender is the subsequent prosecution before the ICC. The fact that, as noted above, the eventual result of the surrender to the ICC may nevertheless be that the suspect is surrendered to a third state which is willing and able to proceed genuinely does not change that. Another interpretation would effectively circumvent a state's right under international law not to extradite unless it has a duty to do so *vis-à-vis* that state. It would represent a mechanism which was never contemplated under the Rome Statute.[650]

---

[648] For the sake of completeness, a person may also, according to article 107(3), be extradited or otherwise surrendered from the state where the punishment is enforced to a state "which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence". Article 108(1) provides that such a person cannot be extradited to a third state "for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement".

[649] Article 18(1) and (2).

[650] In this context it may also be noted that article 90 regulates the situation where the custodial state (a state party) receives competing requests from the ICC Prosecutor and another state for respectively the surrender and extradition of the same person. Article 90(1)

5.5. THE TERMS "THE CASE", "THE PERSON CONCERNED" AND "THE SAME CONDUCT"

Article 17(1) (a) refers to ongoing investigations and prosecutions of "the case"; subparagraph (b) refers to completed investigations of "the case" and decisions not to prosecute "the person concerned"; and subparagraph (c) refers to "the person concerned" and "conduct which is the subject of the complaint", whereas article 20(3) refers to a "person who has been tried" and "the same conduct". Thus, an ongoing investigation or prosecution must pertain to the same case, whereas a decision not to prosecute and a completed must pertain both to the same case *and* the same person.

The fact that the admissibility ground pertaining to ongoing proceedings only refers to "the case" implies that a proceeding against *another person* for the same conduct will lead to inadmissibility provided the proceeding is genuine. The ICC Prosecutor will then have to await the outcome of the national proceeding and then determine whether to proceed against the other person (if the ICC Prosecutor still believes the other person is guilty) or indeed against the same person (if the national proceeding is deemed non-genuine). The priority given to a national ongoing and genuine national proceeding against another person for the same conduct appears reasonable for the following reasons: First, it would run counter to the purpose of the complementarity principle if the ICC interference were to compromise a genuine national effort (the evidence and witnesses in the two proceedings would probably be overlapping). Second, the fact that a state is genuinely proceeding against another might indicate that the ICC Prosecutor is targeting the wrong person.[651] It would be highly unfortunate if the huge ICC apparatus were to be activated against a person who eventually turned out to be innocent. Third, if a genuine national proceeding ends with acquittal, the state should then be allowed to proceed against the other person. Indeed, the efficient communication between the ICC Prosecutor and the

---

provides that where the requested state is a state party, it shall give priority to the ICC when the Court finds that the case is admissible even after the possible investigation or prosecution of the case in question in the requesting state has been taken into account. Article 90(4) provides that if the requesting state is not a state party, priority shall be given to the ICC, unless the requested state is under an international obligation to extradite the suspect to that state.

[651] It should be noted that if the state *deliberately* targets the wrong person for the same conduct in an attempt to shield the real perpetrator, the proceeding will fail the complementarity test, see below.

state might lead to the state's early closing of an ongoing proceeding and the opening of a new.

It may at times be debatable whether the case or the conduct is the same. The terms "conduct which is the subject of the complaint" and "the same conduct" helpfully link the question to the *facts* as opposed to the *law*. This distinction appears to be equally applicable *vis-à-vis* ongoing proceedings and completed investigations, although the vaguer term "the case" is used here. Thus, if a state investigates or prosecutes (or has investigated or prosecuted) as murder a conduct which, in the ICC Prosecutor's view, amounts to genocide, articles 17 and 20 still apply. The point is whether the actual killing is the same. If the failure to characterise the killing as "genocide" indicates the state's unwillingness or inability to proceed genuinely, the case will be admissible.

In order to determine whether the national proceeding pertains to the same case as the ICC Prosecutor considers dealing with, the national description of the *actus reus* should be compared with that on which the ICC Prosecutor bases his involvement. Such comparison presupposes that the Prosecutor have available adequate information regarding the national proceeding.[652] The issue is whether the conducts described at the two levels are essentially the same with regard to time, place and alleged behaviour. Some discrepancy might, however, only indicate the state's unwillingness or inability to proceed genuinely, such as when factual elements are missing in the national description (*e.g.* acts are omitted or the person's role is played down).

The above appears to be relevant only if the state truly is investigating or prosecuting the same case. It should be noted that several cases might arise from one incident in the sense that more than one person might be held criminally responsible for the same incident. Then the guilt of one person does not exclude the guilt of the other; the two proceedings are not mutually exclusive. When this is the case, the admissibility must be assessed in relation to every given suspect. By way of illustration, if there is an incident of a gravity comparable to that of the *Srebrenica* incident, an ICC prosecution of the likes of Mladic or Karadzic would not be inadmissible just because a state was proceeding against lower ranked personnel

[652] For that purpose rule 53(1) provides that when a state requests deferral under article 18(2) on preliminary rulings regarding admissibility, the request "[shall be] in writing and provide information concerning [the state's] investigation". Further, rule 58(1) provides that when a state challenges the admissibility under article 19, the request or application "shall be in writing and contain the basis for it".

regarding the same incident. In such situations, there would seem to be as many cases as there are suspects.

If a state is investigating or prosecuting the same person for a different crime, article 89(4) provides that "the requested State, after making its decision to grant the request [for surrender], shall consult with the Court". The state may postpone the execution of the request "for a period agreed upon with the Court" if the immediate execution of a request "would interfere with an ongoing investigation or prosecution".[653] Such postponement shall be no longer than is "necessary to complete the relevant investigation or prosecution in the requested State", and the state must first consider whether the assistance "might be immediately provided subject to certain conditions".[654] Thus, a national proceeding will not bar ICC action; it may only lead to a postponed surrender. If the Court finds that the national proceeding is genuine as such but is conducted for the purpose of shielding the person from criminal responsibility for a graver crime, it is submitted that the Court may disregard the state's request for postponement. The term "for a period agreed upon with the Court" indicates some discretion and arguably allows the Court not to grant any postponement where the state effectively seeks to obstruct justice.

At the time of the admissibility determination, the ICC Prosecutor may or may not have singled out an individual case. Yet, the state's information on its proceedings must, for the purpose of the admissibility determination, be case specific (although the state may provide general information under rule 51). Only specified cases can be declared inadmissible.

5.6. NATIONAL INACTION: AUTOMATIC ADMISSIBILITY

The most straightforward scenario is where no state has investigated a given case; then the case is automatically admissible (provided it is of sufficient gravity).[655] In his report to the Security Council regarding the Darfur situation, the ICC Prosecutor concluded that "there are cases that would be admissible [for the purpose of article 53(1) (b)] in relation to the Darfur situation". He noted:

---

[653] Article 94(1).

[654] *Ibid*.

[655] It was, however, highly misleading when Uruguay in 2003 communicated the following statement to the UN Secretary-General: "It is noted for all necessary effects that the Rome Statute has unequivocally preserved the normal functioning of national jurisdictions and that the jurisdiction of the International Criminal Court is exercised *only in the absence of the exercise of national jurisdiction*" (emphasis added), see *Declarations and Reservations to the Rome Statute*, *supra* note 335.

> "It is important to emphasise that this decision does not represent a determination on the Sudanese legal system, but is essentially a result of the absence of criminal proceedings relating to the cases on which the OTP is likely to focus."[656]

The reason why national inaction leads to admissibility is evident: if the ICC Prosecutor suspects that a crime within the ICC's jurisdiction has been committed and there is no investigation, there is a danger that impunity prevails. The reason for the inaction might be unwillingness or inability to proceed genuinely, but a state may also have legitimate reasons. The decision not to proceed may or may not be a decision against criminal proceedings as such. It is not a decision against criminal proceedings as such if the state fails to proceed due to the geopolitical aspects involved, such as a threat to the peace or the potential straining of inter-state relationships. Inaction might even reflect a preference for proceedings in another state or before the ICC. The Office of the Prosecutor has noted:

> "Groups bitterly divided by conflict might oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial."[657]

Further, the state's inaction might be based on practical considerations, such as difficulties in obtaining the suspect or establishing a *prima facie* case due to the remoteness to the scene of the crime or to victims. No prosecutor will initiate an investigation if he or she realises that he or she will not be able to conduct it genuinely. Another practical obstacle might be the custodial state's unwillingness to extradite the suspect. The ICC Prosecutor has noted:

> "There might also be cases where a third State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum."[658]

The territorial state might recognise that the ICC, or another state, for various reasons is in a better position to investigate and prosecute. As noted by the Prosecutor:

> "There might be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes might

---

[656] *Report to the Security Council Pursuant to UNSCR 1593*, *supra* note 361, p. 4.
[657] *Paper on some policy issues*, *supra* note 18, p. 5.
[658] *Ibid.,* p. 5.

> agree that a consensual division of labour is the most logical and effective approach."[659]

Whether the cause of the inaction is "unwillingness", "inability" or neither might be interesting, and it may certainly be relevant to the discretional "interests of justice" determination under article 53. For the purpose of determining the admissibility, however, it is irrelevant. It is therefore misleading when some commentators note that the ICC may exercise jurisdiction over a case only when states are unwilling or unable to act genuinely.[660] The fact that inaction makes a case admissible *ipso facto* has a practical implication: the potentially time-consuming admissibility determination is avoided. This does not mean, however, that the reason why the state has not proceeded will not be of interest. It might be highly relevant for the decision as to whether proceeding with a given case will serve the "interests of justice". If the state has legitimate reasons for not proceeding, these might be relevant before the ICC as well.

The failure to proceed should be "attributed" only to states with a particular incentive to act. This would typically include the territorial state, the suspect's home state and, arguably, the custodial state. These are the states that "would normally exercise jurisdiction".[661] The question as to which state inaction is "attributed" appears to have few legal implications, but there will often be a considerable stigma involved which should be properly placed.

It should be noted that after the ICC Prosecutor has decided to proceed due to national inaction but before the ICC trial starts, any state with jurisdiction may initiate an investigation and then invoke the admissibility criteria according to article 19(2) (b).[662]

5.6.1. Statements that an investigation is underway

Hall argues that "the concept of 'unjustified delay in the proceedings' must necessarily include the complete absence of criminal proceedings and official statements that an investigation was underway, without any further evidence of such an investigation".[663] The correct must be that both alternatives technically be viewed as inaction until there actually is an investigation. Before this, article 17(2) (b) does

---

[659] *Ibid*. The term "incapacitated" appears to indicate an "inability" scenario.

[660] *E.g.* Deller 2003, p. xxxi.

[661] See the reference in article 18(1) to states that "would normally exercise jurisdiction".

[662] Article 19(4).

[663] Hall 2003, p. 16.

not apply. In practical terms, however, the Prosecutor must assess whether it seems likely that a genuine national investigation will be opened within reasonable time. If that is the case, he or she should not open an investigation even though the case would be admissible as he or she would only risk having to defer later. As long as the state purports, however, to be investigating, article 17 must be applied according to the state's allegations.

5.7. RELEVANT NATIONAL PROCEEDINGS

As just noted, article 17 of the Rome Statute applies only when one of the listed proceedings exists. In the following, the different stages at which the ICC will have to assess the state's will and ability to proceed genuinely will be outlined (without actually discussing actual circumstances which might indicate that the national proceeding is non-genuine).

5.7.1. Ongoing investigations

According to article 17(1) (a), first alternative, a case is inadmissible if a state with jurisdiction is investigating the case in question, unless the state concerned is "unwilling or unable genuinely to carry out the investigation".[664] The inadmissibility ground is obvious: when a case is being genuinely investigated by the state, there is no need for the international community to interfere. If the investigation remains genuine throughout, it will, by definition, ensure that impunity does not prevail. The inadmissibility ground also reflects a general reluctance to adjudicate a matter that is already being adjudicated elsewhere. Whether there is an actual duty to respect ongoing proceedings in other judicial systems depends upon the existence of international obligations to that effect, of which article 17(1) (a) is an example. This inadmissibility ground is conceptually related to the *ne bis in idem* principle, motivated both by sovereignty concerns and concerns for the suspect's integrity.

There is a risk that the ICC Prosecutor might have erred in his or her assessment of the national investigation or that a genuine proceeding later becomes non-genuine. Therefore, and in order to make it easier for the Prosecutor to defer, the Statute authorises the Prosecutor to "request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions".[665] Based on such information, the Prosecutor may review

[664] Article 17(1) (a).
[665] Article 18(5).

the deferral when there has been a "significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation".[666]

5.7.1.1. The term "investigation"

For the inadmissibility ground to apply there must be an "investigation"; not any national examination of a case will be relevant. The term "investigation" means "the making of a search or inquiry; systematic examination; careful and minute research",[667] indicating that there must be an examination of some detail reflecting a sufficient measure of thoroughness. Otherwise it will be considered as inaction. The examination does not, however, have to be genuine in order to qualify as an "investigation". The inadmissibility criterion that an investigation be carried out "genuinely" presupposes the existence of non-genuine investigations (which will lead to admissibility). When a national investigation is non-genuine, article 17 applies and the investigation fails the test.

The Rome Statute introduces, for the ICC, a pre-investigative stage at which the Prosecutor evaluates and analyses the information available before he or she determines whether to initiate a full investigation. This stage is referred to as the "preliminary examination".[668] A similar distinction is not made with regard to national systems. Either, the national inquiry is thorough enough to be called an investigation, or it constitutes inaction.

In order to make article 17 applicable, it does not suffice that the "investigation" seeks to establish the facts. The proceeding must be carried out with a view to prosecuting a suspect when warranted. This follows from linguistic definitions, from widespread and consistent national practice, as well as from the context of article 17 which clearly presupposes that the investigation results in a decision to prosecute or not to prosecute.[669]

5.7.2. Decisions against prosecution

According to article 17(1) (b), a national decision not to prosecute makes a case inadmissible "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute". The rationale for this inadmissibility ground is this: if the state has genuinely decided not to prosecute, there is no need for the

---

[666] Article 18(3).

[667] *The Oxford English Dictionary*.

[668] The term "preliminary examination" is used in article 15(6).

[669] Article 17(1) (b).

international community to interfere. A national prosecutor might have legitimate grounds for a non-prosecution: first, from a basic prosecutorial perspective, the national investigation may have failed to establish a *prima facie* case; second, although there is sufficient evidence and from a discretional perspective, a prosecution might not be considered to serve the "public interests" as defined by the state; and third, a decision not to prosecute might reflect a preference for prosecution elsewhere.[670] While such grounds might be legitimate from a national perspective, they will not all necessarily have to be respected by the ICC in the sense that the case is found inadmissible. All three situations will be discussed below in the context of the "unwillingness" criterion.

The difference between formal decisions based on an investigation and mere *de facto* decision not to proceed, *i.e.* inaction, is significant: Where the state has investigated, the case is presumed inadmissible. When there is inaction, the case is admissible *ipso facto*. In order for a national decision against prosecution to bar ICC interference, the decision further has to pertain to the case with which the ICC Prosecutor considers proceeding. Reference is made to the discussion above on this point.

The wording "genuinely to prosecute" is somewhat peculiar. Syntactically, it seems to refer to a non-genuine prosecution rather than a non-genuine decision not to prosecute. A more suitable wording would have been "to make a genuine decision", alternatively "genuinely to proceed" or simply "to prosecute". The wording "genuinely to proceed" might have been preferable as it would expressly have included situations where the decision as to whether to prosecute as such was genuine but the preceding investigation was non-genuine. In such situations, the national prosecutor might have no choice but to decide against prosecution as no *prima facie* case has been established. Once the investigation has been completed, article 17(1) (a) no longer applies, leaving only subparagraph (b) applicable. Read in context, the meaning is clear: the question is whether the national proceeding so far, including the completed investigation and the decision not to prosecute, has been genuine. In the following, only the specific decision against prosecution will be discussed. As for the genuineness of the preceding investigation, reference is made to the discussion above.

Hall notes that the term "national decision" could include an amnesty "that precluded a judicial determination of guilt or innocence, the emergence of the truth or full reparations to victims or their families".[671] The adoption of amnesty will not,

[670] These issues are similar to the ones that the ICC Prosecutor must consider under article 53.
[671] Hall 2003, p. 16.

however, be a decision against prosecution unless there has been an investigation as referred to in article 17(1) (b). Hall also argues that the term "national decision" could include failing to "define the crimes in the Rome Statute as crimes under national law" and operating with "principles of criminal responsibility and defences that are inconsistent with international law".[672] It is submitted that such legal shortcomings are not in themselves prosecutorial decisions as referred to in article 17(1) (b). Instead, such shortcomings might be indications of unwillingness (or inability) where they render a criminal proceeding non-genuine, a possibility that Hall notes.

If the decision against prosecution is non-genuine, the prior investigation will often have been non-genuine, but not necessarily. The situation might have been that a genuine investigation has revealed that the perpetrator is a state official, and the executive branch might *then* have instructed the prosecutor not to prosecute.

5.7.3. Ongoing prosecutions

According to article 17(1) (a), second alternative, an ongoing national prosecution bars ICC interference unless the state is unwilling or unable to prosecute genuinely. When there is a genuine national prosecution, impunity will not prevail. Just as with ongoing investigations, the inadmissibility ground reflects a general reluctance to interfere in a matter that is being adjudicated elsewhere due to sovereignty and fair trial concerns. A reason why a state seeking to shield the perpetrator would opt for a sham trial instead of inaction might be internal or external pressure. The purpose would be to create the false impression that the perpetrator is being brought to justice.[673]

The term "prosecution" means "to follow up, pursue; to persevere or persist in, follow out, go on with (some action, undertaking, or purpose) with a view to completing or attaining it".[674] In a legal context, "prosecution" means "a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime".[675] A prosecution starts when the case is transferred to the court, *i.e.* when the responsibility for the case and the competence to decide on its progress is transferred to a judge.

---

[672] Hall 2003, p. 16.

[673] Bertodano 2004, p. 94.

[674] *The Oxford English Dictionary*.

[675] *Black's Law Dictionary*.

According to the definition referring to "a competent tribunal", it might be argued that a national "prosecution" must take place before a regular criminal court. It is, however, submitted that the realities and not the formalities must be decisive. The essential is whether criminal law is applied by an organ with a law-based authority to mete out punishment, including administrative sanctions as "punishment" for the purpose of the *ne bis in idem* principle. It may also be noted that the ECtHR has defined a "tribunal" (which for the present purpose would correspond to the term "court") simply as a body which exercises judicial functions established by law to "determine matters within its competence on the basis of rules of law following proceedings conducted in a prescribed manner".[676] The most interesting part of that definition appears to be that the judicial function must be established by law, something which would rule out *ad hoc* arrangements that are not legally based.

There is little doubt that a prosecution before a court martial or another kind of military tribunal will pre-empt ICC interference unless the prosecution is non-genuine, something which the use of a court martial might, however, sometimes indicate.

5.7.4. Completed trials

According to articles 17(1) (c) and 20(3), a case is inadmissible if the same person has already been tried nationally for the same conduct, unless the trial was "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court" or otherwise "not conducted independently or impartially in accordance with the norms of due process recognized by international law" in a manner which was "inconsistent with an intent to bring the person concerned to justice".[677] Again, if the proceeding is genuine, the perpetrator has, by definition, been brought to justice even if some acquittals inevitably will be materially wrong.

---

[676] *Sramek v. Austria*, para. 36.

[677] It may be noted that the wording of article 17(1) (c) does not differentiate between a previous trial before a national court and a trial before the ICC (or any other court). Further, article 20(1) prevents a person from being tried twice for the same conduct before the ICC, whereas article 20(2) prevents a national retrial of a person tried before the ICC. The two latter situations are not aspects of the complementarity principle, but rather special versions of the *ne bis in idem* principle.

5.7.4.1. The *ne bis in idem* principle and the ICC

This inadmissibility ground reflects a fundamental rule of law known to most legal systems. The principles of "double jeopardy" and "*ne bis in idem*" differ as to their scope and application. In some systems, typically but not exclusively Anglo-American, the principle of "double jeopardy" means that an acquittal on the facts is immediately final and therefore cannot be appealed.[678] In most continental European states, however, the state may, within a limited period of time, appeal an acquittal not only on the law but also on the facts. The concept is usually held to apply within the same legal system and not between different legal systems. The *ne bis in idem* principle protects an individual from repeated prosecution or punishment for the same conduct. The rule enjoys customary status in international law and is reflected *inter alia* in International Covenant on Civil and Political Rights (ICCPR) article 14(7). The principle is held to apply only within a given legal system.[679] Thus, the ILC has declared that there is no obligation under international law to recognise a criminal judgment handed down by a foreign court.[680] The HRC has noted that article 14(7)

> "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States [but] only with regard to an offence adjudicated in a given State".[681]

The customary rule will not as such apply to international courts *vis-à-vis* national jurisdictions absent a specific provision to that effect (an international court would in principle not have to respect even genuine national judgements). The ICC is, conceptually, an integral system, separate and independent from national legal

---

[678] When Malta ratified the Rome Statute, it declared that according to the Maltese Constitution no person who has already been convicted or acquitted for an offence can be retried for the same offence "save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he or she shows that he or she has been pardoned for that offence. It is presumed that under the general principles of law a trial as described in paragraphs 3(a) and (b) of Article 20 of the Statute would be considered a nullity and would not be taken into account in the application of the above constitutional rule. However, this matter has never been the subject of any judgment before the Maltese courts," see *Declarations and Reservations to the Rome Statute*, *supra* note 335.

[679] Article 14(7) reads: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of *each country*" (emphasis added).

[680] *Report of the International Law Commission on its forty-eighth session* (1996), A/51/10.

[681] *A.P. v. Italy*, para. 7.3.

systems, but states have voluntarily established the ICC to complement their jurisdictions. Therefore, the ICC must, in this context, be viewed as a *prolongation* of the states parties' jurisdictions. This is an important reason why the *ne bis in idem* principle has been adopted.

Beyond sovereignty concerns, the inadmissibility ground shall prevent the harassment of the accused and preserve the gained relief for all parties after the national closure. It is unthinkable that the Rome Statute, which is intended to reflect a high fair trial standard and *de facto* functions as a model for national penal regimes, should not be governed by the *ne bis in idem* principle. The inevitable consequence, that a guilty person sometimes will escape punishment because the national court erred on fact or law, is an acceptable price for promoting the said purposes, even when the crimes in question are extremely grave.

Where a national trial is completed, international interference will appear more intrusive, from the person's perspective, than interfering at an earlier stage. His or her expectation that the matter is finally settled appears, however, to be illegitimate if the accused has been part of or is aware of the circumstances that made the trial a sham. If the person were not aware of the sham, which is an unlikely scenario, the expectation will appear legitimate. It might nevertheless be argued that protecting a perpetrator of gross human rights violations on the grounds that he or she has been acquitted in a state-directed sham would fly in the face of justice.

The *ne bis in idem* principle shall also prevent a state's excessive use of judicial power against individuals because

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity".[682]

This does not, however, apply well in an ICC context due to the fair trial guarantees provided for in the Rome Statute.

Further, the principle shall preserve the gained relief for all parties after the closure of a case. This argument has some relevance here, even where an acquittal is the product of a sham. At the same time, it is exactly the consequences of a wrongful acquittal that the ICC is established to remedy. A sham will hardly promote true relief; the truth will hardly be totally suppressed. It should also be noted that, as a safety mechanism, the ICC Prosecutor might discretionally decide under article 53(1) (c) not to revisit a national sham due to the negative effect this would have. If,

---

[682] *Green v. United States*, pp. 187-188.

for instance, a long time has passed and the victims have reconciled with the crime and the perpetrators, justice might be better served by deferring even to a defective national proceeding.[683]

Lastly, the *ne bis in idem* principle reflects a general need to promote confidence in the finality of verdicts. Where a state has conducted a sham, however, the argument is hardly relevant. Underlying the establishment of the ICC is an assumption that the parties involved will neither have peace in their minds nor confidence in the law unless the perpetrator is brought to justice. To the extent that a sham has generated false confidence in the system, it should be corrected. A new trial will, in the long run, re-establish local public confidence in the law, to the extent that this is possible at all when law is enforced internationally.

5.7.4.2. Fundamentally defective proceedings

In its general comment to article 14(7), the HRC has noted that the reopening of criminal proceedings which were "justified by exceptional circumstances" did not infringe upon the *ne bis in idem* principle. The Committee noted:

> "It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7."[684]

The Committee distinguishes between "resumption" of criminal proceedings, which is permitted by article 14(7), and "retrial", which is expressly forbidden. To "resume" means, in this context, to revisit a fundamentally defective proceeding, whereas to "retry" means to expose the accused to a new trial where there has been no fundamental defect. The revisiting of a fundamentally defective criminal proceeding does not violate article 14(7).[685] The International Law Commission noted in its preparatory work that where a national trial has not been independent and impartial, or where it has been designed to shield the accused from international criminal responsibility,

---

[683] It may be noted, however, that article 29 provides that ICC crimes shall not be subject to limitation.

[684] *HRC General Comment 13 (1984)*, para. 19.

[685] It may be noted that article 4(2) of Protocol No. 7 to the ECHR expressly establishes an exception where there has been a "fundamental defect in the previous proceedings, which could affect the outcome of the case".

> "the international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process".[686]

The exceptions provided for in article 20(3) all reflect fundamental defects. They roughly duplicate the factors in article 17(2) for the determination of "unwillingness" regarding ongoing investigations and prosecutions and decisions against prosecution; the only difference being that the "unjustified delay" factor is omitted as the trial now is completed.

It should be noted that the "inability" criterion is not reflected in the context of completed national trials. Further, a mistrial caused by the manipulation of the trial by the accused is not, as we shall see, reflected. Moreover, it should be noted that pardons and paroles do not constitute inadmissibility grounds, even when they are non-genuine, unless they reflect the state's unwillingness to proceed genuinely at the time when the original proceeding was still being conducted. Finally, some states allow a retrial where significant new evidence is discovered even though there were no irregularities in the proceeding. Here, an international retrial would appear less justified, and the option is precluded.

5.7.4.3. Negative effects of a retrial on victims and witnesses

Even though reopening a sham at the outset may appear just, correcting the national non-genuineness may come at a price. A retrial will represent an additional burden on victims and witnesses who have already have been interviewed and testified. Appearing before a court a second time or even a third time (depending on whether there has been a local appeal) will almost certainly represent a considerable burden and may cause serious emotional traumas. Appearing before the ICC also means a new risk that they will be harassed, *etc*.

5.7.4.4. Completed national trial against another person

As noted above, a completed national trial of another person than the one the ICC Prosecutor intends to proceed against will not lead to inadmissibility. From the perspective of the individuals involved, this is reasonable. The wrongfully convicted

---

[686] *Report of the International Law Commission on its forty-eighth session*, *supra* note 680, p. 67.

B may only be helped by a retrial of person B before the ICC,[687] and A should not be allowed to invoke the fact that B has already been tried.

5.7.4.5. Other completed national proceedings than regular trials

Articles 17(1) (c) and 20(3) both use the term "tried", and the latter also uses the term "by another court", indicating that the national proceeding must be a regular trial and that an *administrative decision* to "acquit" or "convict" will not pre-empt ICC interference. Reference is made to the discussion above regarding ongoing prosecutions. Again, the reality must be decisive: is criminal law applied and is punishment an option?

If other proceedings than ordinary trials are assessed, the requirement that the proceedings be genuine ensures that only the proceedings worthy of respecting are respected. It is not inconceivable that an administrative "acquittal" effectively will qualify as a genuine decision not to prosecute or even a trial. Proceedings before truth and reconciliation commissions and similar mechanisms where criminal law is not applied (*i.e.* punishment is no option) will not, however, have pre-emptive effect when criminal law is not applied and punishment is not an option (this issue is discussed in more detail in a separate chapter). When such mechanisms do not lead to inadmissibility, a safety net is provided by the authority of the Prosecutor under article 53 discretionally to decide not to interfere when it will not serve the "interests of justice". Neither will an *a priori* approval of the crimes pre-empt ICC interference. Such approval would not relate to "the person concerned" or "the conduct" and even less qualify as a "trial". Moreover, the ICC crimes arguably all enjoy *jus cogens* status under international law, and no state can declare them lawful or otherwise tolerate their commission.

It has been suggested that the requirement that the person concerned be "tried", and not more specifically "convicted or acquitted", indicates that a termination of a national trial that is neither an acquittal nor a conviction may still bar ICC proceedings.[688] The following is submitted: First, for there to be a "trial" the aim of the proceeding must be to either acquit or convict. Second, if the trial is terminated before the person has been acquitted or convicted, he or she has not yet been "tried"; we are outside the scope of article 20(3) and the case is automatically admissible. This appears to be the correct interpretation of the term read in context and in light

[687] There is, however, no obligation under the Statute for the state concerned to respect an ICC conviction in the sense that it subsequently acquits person A.
[688] Benzing 2003, p. 618.

of the underlying purpose. If the decision to terminate effectively is an acquittal (or possibly a decision not to prosecute after all), then article 20(3) (alternatively article 17(1) (b)) would apply, and an adequate decision will pre-empt ICC interference.

5.8. GENERAL VS. SPECIFIC INFORMATION

The admissibility test applies to individual cases; the issue is whether a state is or has been dealing genuinely with a given case. Yet, the Prosecutor must, before opening an investigation into a situation, determine whether there seem to be cases within that situation that "would be admissible".[689] At this stage, the Prosecutor will scarcely have singled out individual cases, but rather "incidents" comprising cases, and the determination under article 53(1) (b) is therefore *de facto* a preliminary and wide admissibility determination (not to be confused with the concept of "preliminary ruling regarding admissibility" under article 19). Once the Prosecutor has decided to open an investigation, the Prosecutor may receive specific information under articles 18(2) or 19(2). Before that, general information on the credibility of a state's judicial system will be essential. Such information might stem from the state concerned, other states, individuals, NGOs and various written sources such as archives or statistics. The information might be gathered by the ICC Prosecutor or, as the case was prior to the Darfur referral, by a special UN inquiry commission.[690]

In a report to the Security Council on the Darfur situation, the ICC Prosecutor explained his decision to open an investigation, noting that the Office of the Prosecutor

> "for the purpose of analysing the admissibility of cases […] has studied the Sudanese institutions, laws and procedures. In this context, the Government of Sudan has provided information relating to the Sudanese system, the administration of criminal justice in various parts of Darfur, traditional systems for alternative dispute resolution, and has furnished copies of materials relevant to the report of the National Commission of Inquiry."[691]

Such general information on a state's judiciary and its activity might facilitate the regular admissibility determination with regard to individual cases. Such information might, under the circumstances, be the only credible information on

---

[689] Article 53(1) (b).

[690] According to rule 104(2), the Prosecutor may seek "additional information from States, organs of the United Nations, intergovernmental non-governmental organizations, or other reliable sources".

[691] *Report of the Prosecutor of the ICC to the UN Security Council*, *supra* note 656, p. 3.

which the Prosecutor can base his determination, such as when a state does not provide sufficient and credible information regarding the case in question. It will, probably more often than not, be difficult to obtain satisfactory information regarding specific cases from a state that is unwilling or unable to proceed genuinely. Moreover, when article 17(2) (c) refers to unjustified delays and independence and impartiality as relevant factors for the "unwillingness" determination, general information might enable the Prosecutor to make a reasonable inference as to the handling of a given case. As for the state's "inability", article 17(3) makes reference to the legal system as such, also inviting general considerations.

It may also be noted that when a state purports to be dealing genuinely with a case, it may, under rule 51, provide information indicating that it generally "meet[s] internationally recognised norms and standards for the independent and impartial prosecution of similar conduct", although the provision of such information does not automatically lead to inadmissibility. Conversely, the fact that a judicial system more generally appears to be inadequate will not in and of itself warrant an individual admissibility finding, unless the information actually reveals that the state is unwilling or unable to deal with the given case (which it would when the information is that the state fails to deal with *any case* within a given situation).[692] Otherwise, inference from general information must be carefully made. Even when there is a general unwillingness or inability to deal with cases, the state may proceed with a given case.

[692] Indeed, articles 17 and 20 both refer to the investigation and prosecution of a given case.

6. "GENUINE" NATIONAL PROCEEDINGS: RELATED CONCEPTS OF INTERNATIONAL LAW

6.1. INTRODUCTION

Understanding what it means to conduct criminal proceedings "genuinely" is crucial both to states and the ICC. From a state perspective, only genuine national proceedings will pre-empt ICC interference; the state must perform at or above this threshold. From an ICC perspective, the Court is only authorised to set aside national proceedings when they are non-genuine; it must look for proceedings below this threshold. The term represents a requirement to states' exercise of jurisdiction and a limit to the ICC's exercise of jurisdiction. The need for such a qualifier is obvious: only a genuine proceeding will bring the perpetrator to justice, and, when a national proceeding exists, non-genuineness will lead to impunity and thus justify international interference.[693] If any national proceeding were to pre-empt ICC interference, states could too easily circumvent justice by conducting shams; if the ICC were authorised to interfere *vis-à-vis* any national proceeding, sovereignty would have been unduly impaired.

The term "genuinely" is common in everyday usage but a novelty as an international standard to criminal proceedings. It derives from "genuine", which means "having the character or origin represented"; "real, true"; "not counterfeit, unfeigned";[694] "properly so called"; or "sincere".[695] It may also be defined as "truly what [it] purport[s] to be".[696] Looking at these definitions, two distinct aspects can be discerned: one objective and one subjective. Objectively, the proceedings must *be* what they are claimed to be. Subjectively, they must be sincere. The French term "*véritablement à bien*" appears to be synonymous with the English.[697] In Spanish, however, two different terms are used referring respectively to unwillingness and inability: "*no esté dispuesto a llevar a cabo*" and "*no pueda realmente hacerlo*".[698] This does not seem to affect the meaning, though. The Russian term "*dolznym obrazom*" (duly; owing; properly)[699] derives from the noun "*dolg*", which means "duty; debt".[700]

---

[693] In the discussion on lacunas in the admissibility regime it will be noted, however, that there might be shortcomings in a national proceedings which do not make the proceeding "non-genuine" as defined in the Rome Statute, but which nevertheless results in impunity (such as when an able state proceeds in good faith, but the suspect escapes justice by abusing the process).

[694] Interestingly, the term "feigned" is explained as "being a sham".

[695] *The Oxford English Dictionary*.

[696] *Black's Law Dictionary*.

[697] *Le Nouveau Petit Robert*.

[698] *Collins Spanish Dictionary*.

[699] *The Oxford Russian Dictionary*.

It focuses more on the objective, on how the state *ought to* proceed, as a matter of duty, and not so much on the subjective sincerity. Contextually, however, when linked to "unwillingness" and "inability", it is clear that both the subjective and the objective aspects are covered here as well.

The fact that the term "genuinely" is both objective and subjective means that a national proceeding undergoes a double test. A national proceeding which possesses the objective characteristics of such proceedings will still not pre-empt ICC interference if it was carried out with wrong intentions and this has materialised in the result. Conversely, a proceeding carried out with the best intentions will still fail if the proceeding does not meet the objective standard attached to such proceedings.

The remainder of this chapter will highlight the fact that the admissibility criteria focus on the national process and not the outcome of it (6.2); it will comment on the significance of cultural differences between legal systems (6.3); and it will be shown that the point of the "genuinely" standard is to establish a general standard against which national proceedings can be measured (6.4). Then four existing standards which international law attaches to national criminal proceedings are discussed in order to determine their relevance to the admissibility determination before the ICC. These concepts are: the principle of due process, the obligation to ensure basic human rights, the right to an effective remedy and (the exceptions to) the requirement that domestic remedies be exhausted before a case against a state is adjudicated before an international court (6.5). Finally, the chapter asks whether the standard of the ICC's own proceedings will influence the interpretation of the "genuinely" standard (6.6).

6.2. PROCESS AND NOT OUTCOME

The use of the adverb "genuinely", referring to the way proceedings are carried out, underscores the fact that the focus is on the proceeding as such and not the material outcome, although certain outcomes might effectively be required, such as when article 17(3) refers to the inability to "obtain the accused or necessary evidence and testimony".[701] Genuine criminal proceedings will, by definition, produce acceptable,

---

[700] *Ibid.*

[701] Some observers have erroneously suggested that the term "genuinely" does not refer to the verb "to carry out", but to the words "unwilling or unable" (*i.e.* "genuinely unwilling" or "genuinely unable"). The reference in article 17(1) subparagraph (b) to the "unwillingness or inability of the State *genuinely to prosecute*" clearly indicates, however, that "genuinely" refers to the verb. Besides, the meaning of the French "*n'ait pas la volonté ou soit dans l'incapacité de mener véritablement à bien l'enquête ou les pursuits*" is unquestionable.

although inevitably at times materially "incorrect", findings. The admissibility of a case does not depend upon the findings' material correctness; correcting mistakes of law and fact made in otherwise genuine proceedings is a task for national appeal and review courts. A lenient penalty or an acquittal which seems to be at odds with the facts may be indicative of the proceeding's non-genuineness, but it will not in and of itself make a case admissible before the ICC. As a starting point, it seems fair to suggest that the following three aspects must be present in order to make a criminal proceeding genuine: there must exist an adequate legal and institutional framework; the truth as to the alleged crime must be sought; and substantial and procedural law must be interpreted and applied independently and impartially and with the sufficient skills. As for the proceedings' "outcome", one might say that a state should prosecute and eventually convict when objectively warranted.

6.3. CULTURAL DIFFERENCES AND NATIONAL MARGIN

An essential underpinning of the complementarity principle is the acknowledgement that states will carry out their criminal proceedings differently, especially when different legal cultures are compared. The only commonalities which, one might say intuitively, would seem to be required are the intent to bring the suspect to justice and the carrying out of some steps in order to realise the intent. If one of these characterisations is lacking, the "proceeding" can hardly be called a proceeding for the purpose of the complementarity principle. Reference is made to the discussion below regarding the various stages of national proceedings.

Apart from these two commonalities, the way states carry out their criminal proceedings will differ, sometimes dramatically so. The ICC procedure itself represents a blend of legal traditions characterised by conceptual differences, first of all between civil law and common law. It is therefore a matter of necessity when the complementarity principle grants states generous latitude as to how they carry out their criminal proceedings.[702] This is also the only purposeful, bearing in mind that the purpose is no more (and no less) than to ensure that perpetrators of the ICC crimes are brought to justice. The term "genuinely" should therefore not be narrowly construed, and the ICC will only interfere when there are clear signs that the state is trying to shield the perpetrator or the state is incapable of carrying out essential investigative steps and not simply because a proceeding stands out as conceptually different from more "sophisticated" proceedings. The ICC Prosecutor has noted:

[702] Schense 2003, p. 245.

> "In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions and cultures."[703]

6.4. A GENERAL STANDARD

The term, "genuinely" as such is neutral; it conveys a concrete meaning only when it is attributed to an object. The "true character" and the "right intentions" must relate to something, in the present context to a national criminal proceeding. Therefore, the true character of and the sincere intentions behind such proceedings must be identified. Only then can a general standard be established against which a given proceeding can be measured. Although it may not be pronounced as such, the ICC judges will have to apply such a standard in order to determine whether a given proceeding meets the admissibility requirements. A national criminal proceeding will be non-genuine when it deviates sufficiently from this standard.

The fact that article 17(2) and (3) elaborate on the terms "unwillingness" and "inability" compensates to some extent for the fact that the term "genuinely" is not expressly defined. Not only do these two paragraphs explain in more detail the meaning of "unwillingness" and "inability"; they also clarify the meaning of the term "genuinely".[704] Paragraph 2 (a) to (c) identify the subjective aspect of the "genuinely" criterion, *i.e.* the proper intentions behind criminal proceedings. The purpose of the proceeding must be to "bring the person concerned to justice" and not to "[shield] the person concerned from criminal responsibility".[705] Even more specifically, there must be no "unjustified delay",[706] and the proceedings must be conducted "independently" and "impartially".[707] Paragraph 3 identifies the objective aspect of "genuinely", the objective characteristics that must be present. The state must be able to "obtain the accused or the necessary evidence and testimony" and to otherwise "carry out its proceedings".[708] In order to truly constitute "inability", however, the shortcomings must be the result of a "total or substantial collapse of [the] national judicial system" or its "unavailability". The two paragraphs will be discussed in more detail below when the terms "unwillingness" and "inability" are analysed.

---

[703] *Paper on some policy issues*, *supra* note 18, p. 5.

[704] Indeed, with the introduction of these factors, the term "genuinely" is almost rendered redundant.

[705] Article 17(2) (a).

[706] *Ibid.,* subparagraph (b).

[707] *Ibid.,* subparagraph (c).

[708] Article 17(3).

Even when supplied by the "unwillingness" and "inability" criteria, the standard reflected in the term "genuinely" remains vaguely framed in the Statute. It is not possible, and arguably not even desirable, to regulate extensively and expressly in the Statute the requirements to be attached to national proceedings. It is therefore necessary to seek guidance outside the Statute. It is submitted that the Statute's express regulation has to be supplied by internationally recognised principles of criminal justice establishing requirements to national proceedings.

6.5. HUMAN RIGHTS STANDARDS

6.5.1. Introduction

There is ample jurisprudence of human rights organs which might shed light on the understanding of the admissibility criteria, including the requirement that the national proceedings be genuine. Originally, the ILC did not propose the term "genuinely" but the terms "[not] available" and "[in]effective",[709] both well-known terms from a part of human rights law dealing with the adequacy of national proceedings. It is of course possible to argue that the subsequent substitution by the terms "unwillingness" and "inability" makes human rights jurisprudence less relevant. Indeed, a few months before the Rome Conference, Human Rights Watch noted that the departure from the "ineffective" standard

> "significantly raises the threshold for the exercise of jurisdiction by the ICC from the standard contained in the original ILC Draft Statute […]. Unavailability and ineffectiveness are established standards used by human rights bodies to monitor whether domestic remedies have been exhausted as required for the exercise of jurisdiction of these bodies. The criterion of 'ineffectiveness' and 'unavailability' provide not only an established but also an objective standard by which to assess the investigation or prosecution, rather than the more subjective criterion of 'unwillingness' or 'inability'."[710]

There are, however, no clear indications that it was the intention of the negotiators to raise the threshold. As a matter not only of law but also of common sense, unavailable or ineffective national proceeding, to which resorting is a futile activity, can hardly be considered as genuine. The relevance of such human rights jurisprudence to the interpretation and application of the admissibility criteria should therefore not be doubted. As noted, its relevance is also supported by the

[709] Preambular paragraph 3 of the ILC Draft Statute.
[710] Duffy 1998, p. 71.

requirement in the Rome Statute that the law must be interpreted and applied in a way which is "consistent with internationally recognized human rights".[711] Moreover, regardless of the theoretical relevance, studying human rights jurisprudence will facilitate the understanding of the numerous ways in which national jurisdictions might fail to investigate and prosecute crimes adequately.

Resorting to related fields of human rights law is further supported by the reference in article 17(2) to the "principles of due process recognized by international law", by the reference in article 21(1) (b) on applicable law to "the principles and rules of international law" and by the reference in article 21(3) to "internationally recognized human rights". It is further supported by the general international law principle that a treaty "is not to be read in clinical isolation from public international law".[712] More generally, Hall notes:

> "It will also be important for the Prosecutor to monitor developments in treaty bodies […] concerning a wide range of issues […], since their interpretation in these matters is almost certain to have a strong impact on the views of the Chambers of the Court."[713]

Below, four different human rights concepts will be mentioned: (a) the principle of due process; (b) the obligation of states to secure everyone within their jurisdiction of basic human rights; (c) the right to an effective remedy; and (d) the requirement that effective and available local remedies have been exhausted before a case is brought before an international organ. The four concepts all somehow reflect expectations that international law attaches to national criminal proceedings.

When the jurisprudence of human rights organs is considered, it is important, however, to bear in mind that these organs deal with the adequacy of national criminal proceedings from different perspectives, and none of them from exactly the same perspective as the complementarity principle. Therefore, one should resort to this jurisprudence with some caution.

---

[711] Article 21(3).

[712] *United States - Standards for Reformulated and Conventional Gasoline*, para. 17. The Appellate Body noted that General Agreement on Tariffs and Trad (GATT)/World Trade Organization (WTO) law must be considered as part of international law.

[713] Hall 1999, p. 129.

6.5.2. The principle of due process

Various human rights bodies provide for the suspect's right to a due process.[714] Here, the issue is not whether a suspect has been shielded but, on the contrary, whether his or her right to due process has been violated. The reference to "principles of due process as recognized by international law" in article 17(2) is arguably included with this principle in mind.[715] There is therefore a case to be made for the suggestion that the requirements in subparagraphs (b) that there be no "unjustified delay" in the national proceedings and in (c) that they be "conducted independently or impartially" mirror this part of human rights law. Several other passages in the Statute (referred to elsewhere in this book) make it sufficiently clear, however, that the purpose of the complementarity principle (and the main purpose of the Rome Statute) is to prevent impunity and not to secure the suspect's fair trial.[716] The ICC shall interfere when the suspect is treated too leniently, not when he or she is treated too strictly. While ensuring due process is paramount once the ICC actually proceeds with a case,[717] interfering *vis-à-vis* unfair national proceedings is not a task for the ICC, even if the state's violation of the suspect's rights is manifest. Unfair convictions must be brought before relevant human rights bodies, and the ICC is not a human rights court. This is true despite the provision in article 21 (3) providing that the interpretation and application must be consistent with human rights. Indeed, a pertinent question is why the world community would be so particularly concerned with protecting the rights of the perpetrators of international crimes that it would establish a special court to ensure them.[718]

As noted in the discussion on the admissibility procedures, a state with jurisdiction may challenge the admissibility even after the person concerned has appeared before the ICC, as long as an ICC trial has not started.[719] This raises the

---

[714] *E.g.* ICCPR article 14, the American Convention on Human Rights article 8, and ECHR article 6. The principle is customary law.

[715] Holmes 1999, p. 54.

[716] There are indications, however, that some states contemplated a role for the Court as a protector of the suspect's rights. For instance, when the term "ineffectiveness" was replaced by the term "inability", it was noted that the latter term just as the former comprised various situations "including […] instances in which procedures did not guarantee full respect for the rights of the accused […]", see Politi 1997, p. 143.

[717] *E.g.* articles 55, 66 and 67.

[718] A probable *effect* of the Rome Statute is, however, that national proceedings generally will become fairer as the focus on them is intensified and the ICC gains status as a model court.

[719] Article 19(4).

delicate question as to whether the ICC, upon the state's successful challenge, will have to transfer the suspect to that state if it is likely to violate the person's right to due process and/or subject him or her to capital punishment. Rule 185(1) provides that

> "where a person surrendered to the Court is released from the custody of the Court because […] the case is inadmissible under article 17, paragraph 1 (b), (c) or (d) [completed national proceeding or insufficient gravity], […] the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State. […]."

Paragraph 2 provides that

> "[w]here the Court has determined that the case is inadmissible under article 17, paragraph 1 (a) [ongoing national proceeding], the Court shall make arrangements, as appropriate, for the transfer of the person to a State whose investigation or prosecution has formed the basis of the successful challenge to admissibility, unless the State that originally surrendered the person requests his or her return".

Where the suspect risks being executed in the requesting state, the picture is complex. Several states have, under national and/or international law, undertaken an obligation not to extradite a person to another state when this means that the person might be executed. There is no corresponding provision in the Rome Statute. Indeed, article 80 of the Rome Statute provides that "the application by States of penalties prescribed by their national law" shall not be affected, with clear address to capital punishment provided for by some states. It is, nevertheless, difficult to envisage the ICC transferring a person with the knowledge that the person risks being executed in the receiving state. A strong case can be made for the submission that the terms "as it considers appropriate" in paragraph 1 and "as appropriate" in paragraph 2 allow the ICC to decide against transfer when there is a certain risk that the person concerned subsequently will be executed. Such interpretation of the terms would be in line with article 21(3) which provides that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights".

Despite the fact that the ICC is no human rights court and that the forum state's violation of due process rules to the detriment of the suspect is irrelevant for the admissibility determination as such, international jurisprudence interpreting and applying these rules will provide valuable information as to the requirements that

international law attaches to criminal trials with regard to their speedy progress and independent and impartial character. To the extent that objective parameters are established, these should form part of the backdrop of the admissibility assessment before the ICC. It should also be noted that an undue process against an innocent person might imply that the state is effectively shielding the real perpetrator. While an ongoing proceeding against another person for the same conduct at the outset will bar ICC interference (see below), a non-genuine proceeding reflecting the state's purpose of shielding the real perpetrator will not, according to article 17(1) (a), bar interference. In such situations, the due process jurisprudence will be relevant even in a more direct sense. It should further be noted that once the national proceeding against another person is completed, neither article 17(1) (b) nor (c) apply and the case is automatically admissible (see below).

6.5.3. The obligation to ensure basic human rights

According to human rights instruments, states are obliged to secure for everyone within their jurisdiction a specified set of basic human rights. For example, the European Convention on Human Rights provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."[720]

Among the rights dealt with in the relevant section of the Convention are, *inter alia*, the right to life,[721] the right not to be tortured,[722] the right to liberty and security[723] and the right not to be discriminated on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[724] These rights are related to the ICC crimes in the sense that a violation of the former might constitute a commission of the latter. The jurisprudence of human rights organs demonstrates that an important part of the obligations of states to secure the rights is to conduct adequate investigations and prosecutions. The ECtHR has noted:

> "The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the]

[720] Article 1.
[721] Article 2.
[722] Article 3.
[723] Article 5.
[724] Article 14.

> Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances."[725]

The obligation to offer adequate proceedings has much in common with the requirement that the complementarity principle attaches to national criminal proceedings. The jurisprudence regarding this obligation might therefore shed light on the understanding as to when states should be considered unable or unwilling to proceed genuinely.

6.5.4. The right to an effective remedy

Another group of cases before human rights organs which has much in common with the admissibility assessment under the Rome Statute are cases regarding the right of a victim of human rights violations to an available and effective remedy offered by the domestic judiciary.[726] The right to an effective remedy aims, just as the Rome Statute and the complementarity principle, at protecting basic human rights by ensuring that the perpetrator is adequately investigated and prosecuted (thereby providing a deterrent). At the same time it should be noted, however, that the effective remedy principle might be adhered to by the provision of other accountability mechanisms than criminal proceedings, as long as the mechanism is deemed adequate. The admissibility criteria, however, only refer to criminal proceedings (the existence of alternative mechanisms may be considered as part of the prosecutorial discretion, see below). The relevance of the jurisprudence of human rights organs scrutinising national criminal proceedings is, however, apparent. Such cases might shed valuable light on how states sometimes seek to shield the perpetrator by not initiating or conducting non-genuine criminal proceedings or are unable to conduct genuine proceedings. The effective remedy

---

[725] *Jordan v. United Kingdom*, para. 105.

[726] *E.g.* ICCPR article 2(3), ECHR article 13, ACHR article 25 (it may also be noted that under article 1(1) of the ACHR, the states parties "undertake to respect the rights and freedoms recognized herein and to *ensure* to all persons subject to their jurisdiction the *free and full exercise* of those rights and freedoms"), article 6 of the Convention on the Elimination of Racial Discrimination (1965), article 14 of the Convention Against Torture. See also article 8 of the Universal Declaration of Human Right (1948).

doctrine requires that the national proceedings be effective and available. The relevance to the admissibility determination under the Rome Statute is amply indicated by the statement of the IACtHR that article 1 of the American Convention on Human Rights (ACHR), regarding the ensurance of the free and full exercise of rights, places upon a state party

> "a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a *serious investigation* of violations committed within its jurisdiction, to identify those responsible, to *impose the appropriate punishment* and to ensure the victim adequate compensation".[727]

The relevance is also supported by the ICC Prosecutor's statement in his policy paper that

> "the principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and adhere to international standards".[728]

There are fundamental differences between the two concepts: First, the effective remedy doctrine deals with the rights of the victim *vis-à-vis* the state, whereas the complementarity principle regulates the relationship between the ICC and states. Yet the material question is the same: has the state dealt adequately with the crime? Second, providing an effective remedy is a duty imposed on states, whereas the Rome Statute establishes no such duty (only a duty to cooperate with the ICC *inter alia* by surrendering a person on request). Nevertheless, or rather therefore, it can be argued that because international law obliges states to provide an effective remedy, nothing less can be considered "genuine" and pre-empt ICC interference. This submission appears to be supported by a General Comment on article 2 of the ICCPR on the right to an effective remedy by the HRC:

> "While article 2 is couched in terms of the obligations of States Parties towards individuals as the right-holder under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that 'rules concerning the basic rights of the human person' are erga omnes obligations […] that, as indicated in the fourth pre-ambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms, and that the contractual dimension of any treaty involves any other State Party to a treaty being

---

[727] *Velásquez Rodríguez v. Honduras*, para. 174 (emphasis added).

[728] *Paper on some policy issues*, *supra* note 18, p. 5.

> obligated to every other State Party to comply with its undertaking under the treaty."[729]

This statement strengthens the relevance to the interpretation and application of the admissibility criteria. Again, the references in articles 21(1) (b) and 17(2) to principles of international law and in article 21(3) to internationally recognised human rights should be noted.

6.5.5. The principle of exhaustion of local remedies

International organs may, as a general principle of international law, exercise their jurisdiction only when "available and effective domestic remedies" have been exhausted.[730] The complainant must first seek justice at the national level by exhausting adequate legal proceedings. Quite similar to the idea underlying the complementarity principle, the exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".[731] If national authorities have not dealt with a case, that case is precluded from international adjudication unless the complainant demonstrates that the local remedies are unavailable or ineffective.

Such *conditional national primacy* is actually a form of complementarity fundamental to any international human rights jurisdiction. Respect for human rights is promoted "in the form of a convention reinforcing or *complementing* the protection provided by the domestic law".[732] Just as under the Rome Statute, cases are allocated between national and international jurisdiction based on an assessment of the national proceeding's adequacy. Just like the complementarity principle, the principle of exhaustion of local remedies is based on the premise that bringing the perpetrators to justice is the primary responsibility of states, and that states should first be given a chance to solve the matter before they, or, in an ICC context, their citizens, are brought before an international court. A notable similarity is the effect that when national proceedings are inadequate, they lose their relevance. According to the local remedies doctrine, they no longer need to be exhausted; according to the Rome Statute's complementarity principle, they no longer bar ICC interference.

---

[729] *HRC General Comment 31 (2004)*, para 2.

[730] ICCPR article 41(1) (c), ECHR article 26, ACHR article 46(2), AfCHPR article 50.

[731] *Interhandel Case*, p. 27. See also *Report of the International Law Commission on its fifty-eight session* (2006), A/61/10, p. 71, para. 1.

[732] Preambular paragraph 2 of the ACHR.

Thus, the HRC has stated that, for the purpose of the principle of exhaustion, "domestic remedies must be both effective and available";[733] the ECtHR has stated that "[t]he only remedies which [must be] be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient […]";[734] and the IACtHR has noted that the principle refers "not only to the formal existence of such remedies, but also to their adequacy and effectiveness".[735]

In the context of the issue of diplomatic protection, the ILC has discussed the appropriate standard for assessing the effectiveness of local remedies; should the rule on exhaustion of local remedies be dispensed with when local remedies are "obviously futile", "offer no reasonable prospect of success" or "provide no reasonable possibility of effective redress"? The Commission has found that the first is too high a threshold, while the third is too generous to the claimant. The Commission has thus promoted the second alternative of "no reasonable prospect of success".[736] While this arguably appears to be a slightly lower threshold for interfering than the one established by the Rome Statute's complementarity principle, the following discussions will demonstrate that, for practical purposes, the actual questions that are raised are very similar and are treated very similarly. With regard to diplomatic protection, the ILC has noted that local remedies need not be exhausted

> "where the local court has no jurisdiction over the dispute in question; […] the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the [injured]; the local courts have no competence to grant an appropriate and adequate remedy […]; or the respondent State does not have an adequate system of judicial protection".[737]

This competence of an international court to decide on the issue of the effectiveness of domestic judicial remedies appears to be easily justified. In a general discussion regarding the rule of exhaustion of local remedies, Amerasinghe has noted:

> "Looking to reason and good sense, it would seem that this is a matter of law and fact which the tribunal must ordinarily investigate and decide on the evidence before it. To determine the effect of the remedy an estimate of probabilities has to be

---

[733] *Lynden Champagnie et al. v. Jamaica*, para. 5.1.

[734] *Civet v. France*, para. 41.

[735] *Manuel Aguirre Roca et al. v. Peru*, para. 29.

[736] *Report of the International Law Commission on its fifty-eight session*, *supra* note 731, pp. 77-78, paras. 2-3.

[737] *Ibid.,* pp. 93-94, paragraph (3).

> made and there is no reason why a tribunal should not be competent to make such an estimate."[738]

The following differences between the exhaustion of local remedies rule and the complementarity principle should be noted: First, under the first concept, existing national proceedings never bar international jurisdiction, even if they are adequate. A human rights court has a regular review function which the ICC, as a truly subsidiary and complementary court, does not have. Second, the rule of exhaustion relates to cases where a state allegedly has violated an individual's right, whereas the admissibility test pertains to criminal cases against individuals who may or may not have acted through the state apparatus. Third, when the adequacy of national proceedings is assessed according to the local remedies doctrine, the proceedings in question will not have been exhausted; either they have not been initiated or they have been significantly delayed. If they have been exhausted, there is no admissibility problem, and their adequacy as such will not be assessed. Consequently, the human rights organ must, to a large extent, base its findings on an assessment of the general unavailability or ineffectiveness of remedies in the state concerned. This situation resembles the one that the ICC faces where the state fails to provide reliable and sufficient information on its proceedings;[739] otherwise the ICC will scrutinise concrete proceedings.

While the technicalities of the two concepts differ, their purposes are closely related, and so are the actual assessments. For instance, where a case is delayed, the state will, with regard to the local remedies rule, argue that the case is still pending and therefore inadmissible. The international court may nevertheless determine that the remedy is not "available and effective" due to the lack of progress, quite similar to the issue of "unwillingness" and whether there has been an "unjustified delay".[740]

Both concepts strike a balance between sovereignty and the effective protection of human rights. The following is illustrative: after the 1994 genocide, the ability of the Rwandan judiciary was so poor that it both a) justified international judicial intervention[741] and b) allowed courts to let Rwandan victims seek justice outside Rwanda without first having to exhaust local remedies.[742] The latter was demonstrated when an American district court concluded that the exhaustion of

---

[738] Amerasinghe 1963, p. 1307.

[739] The implication of such failure is discussed below.

[740] Article 17(2) (b).

[741] Security Council Resolution 955 (1994).

[742] *Mushikiwabo and others v. Barayagwiza*, p. 460.

local remedies rule could be dispensed with because the Rwandan judicial system was "virtually inoperative".

It should also be noted that the connection between the concept of exhaustion of local remedies and the right to an effective remedy (as discussed above) is apparent. In *Barcelona Traction, Light and Power Company Ltd*, regarding denial of justice, the ICJ joined the objection of exhaustion of local remedies to the merits of the case, noting that

> "this is not a case where the allegation of failure to exhaust local remedies stands out as a clear-cut issue of a preliminary character that can be determined on its own. It is inextricably interwoven with the issues of denial of justice which constitute the major part of the merits. The objection of the Respondent that local remedies were not exhausted is met al1 along the line by the Applicant's contention that it was, *inter alia*, precisely in the attempt to exhaust local remedies that the alleged denials of justice were suffered."[743]

6.6. THE ICC'S OWN PROCEEDINGS AS A STANDARD

One might argue that the ICC's own procedural framework and proceedings should set the standard. As noted, however, the Statute represents a blend of different legal systems and therefore does not seem to be an easily applicable yardstick. Moreover, and more importantly, the quality of the ICC proceedings will by far exceed that of most national proceedings in terms of thoroughness and available resources. The ICC standard cannot reasonably be expected to be matched by national systems, and it is *a forteriori* not a suitable minimum standard. In light of the underlying purposes there is no need to establish a very strict standard (*i.e.* a low threshold for ICC interference).

Nevertheless, there is little doubt the ICC proceedings will provide inspiration to many states as to how they ideally should carry out criminal proceedings. The Rome Statute's procedural regime is reflective of the states parties' idea of optimal criminal proceedings.

---

[743] *Barcelona Traction, Light and Power Company Ltd*, p. 46.

7. THE APPLICABILITY OF THE ADMISSIBILITY CRITERIA IN THREE PARTICULAR SCENARIOS

7.1. INTRODUCTION

In the previous chapters it has repeatedly been noted that the admissibility criteria apply *vis-à-vis* national jurisdictions (provided the ICC has jurisdiction over the crimes in question). This chapter will discuss the applicability of the admissibility criteria in three particular scenarios: *vis-à-vis* a category of courts which is neither national nor international, namely internationalised courts (7.2); *vis-à-vis* national jurisdictions when a situation has been referred to the ICC Prosecutor by the Security Council (7.3); and *vis-à-vis* the jurisdiction of a state which has referred its own domestic situation to the ICC Prosecutor, *i.e.* which has made a "self-referral" (7.4).

7.2. THE ADMISSIBILITY CRITERIA AND INTERNATIONALISED COURTS

During the last decade, so-called internationalised courts[744] have been established for Kosovo, East Timor, Sierra Leone and Cambodia. Such courts are established and operated with a limited degree of international participation, making them neither truly national nor truly international. Internationalised courts (sometimes called "hybrid", "mixed" or "semi-international" courts) might be considered especially appropriate when the state concerned will not or cannot deal adequately with the situation on its own, and a) the ICC lacks jurisdiction or capacity to deal with the situation; b) the ICC is seized with the situation, but only targets the most responsible; and/or c) a joint effort is believed to promote institution-building and a positive development in the state concerned.

7.2.1. The applicability of the admissibility criteria

As of today, there are no internationalised courts with jurisdiction overlapping that of the ICC. As it happens, the ones currently existing are all established to deal with crimes committed before 1 July 2002, the date of the entry into force of the ICC,

[744] Such courts are also referred to as hybrid, mixed or semi-international courts. As of November 2005, there are the "Regulation 64" Panels in the Courts of Kosovo, the Serious Crimes Panels in the District Court of Dili (East Timor), the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. Accordingly, there are today *four different types* of jurisdictions with the authority to deal with international crimes, the jurisdiction of which might collide: national jurisdictions, internationalised jurisdictions, the *ad hoc* Tribunals and the ICC.

effectively avoiding any jurisdictional conflict.[745] It is not inconceivable, however, that a conflict between the ICC and an internationalised jurisdiction will occur in the future. As the ICC's jurisdiction expands and the time aspect becomes irrelevant, the chances of an overlap will increase. There might be a role for both in the same situation if the ICC targets top-level perpetrators, allowing an internationalised court to deal with the lower-ranked. Pocar suggests that

> "the only way to ensure that domestic courts can prosecute the crimes that would not be reserved to the ICC, appears to be the establishment of courts with international participation".[746]

This model would indeed appear to be an efficient way to ensure the cooperation of the state concerned. Such arrangement will also most likely be perceived as less stigmatic than when the ICC takes over completely.

When overlapping jurisdiction occurs, this will necessitate an allocation of cases between the ICC and the internationalised jurisdiction to the extent that the ICC would want to deal with a case that has previously been dealt with by the internationalised court. The section below will therefore discuss whether the admissibility criteria would apply. If they apply, this means that the ICC will have to defer to genuine internationalised proceedings. If they do not apply, the ICC will, when there is a competing internationalised proceeding, be authorised to exercise its jurisdiction unrestricted by article 17.

Just as between international and national jurisdictions, there is no customary rule in international law regulating the allocation of cases between international and internationalised jurisdictions. The relationship may, in the future, be expressly regulated in the constituent instrument of the internationalised court, but once a case is brought before the ICC, the ICC will have to determine the admissibility on the basis of the Rome Statute as its primary source of law.[747] It should be noted that a collision could effectively be avoided by the adoption of a Security Council resolution requesting the ICC to defer according to article 16. This is conceivable if the United Nations has been involved in the establishment of the internationalised court. Otherwise, the Court must interpret article 17 in order to decide whether it applies.

---

[745] According to article 11, the ICC has jurisdiction only with respect to crimes committed after this date.

[746] Pocar 2004, p. 308. Other reasons could be that the ICC lacks jurisdiction, or that establishing an internationalised jurisdiction would promote a positive development of the state's judicial system.

[747] Article 21(1) (a).

As previously noted, article 17 refers to preambular paragraph 10 and article 1 which provide that the ICC "shall be complementary to national criminal jurisdictions". Further, article 17 refers in subparagraph 1(a) and (b) to investigations and prosecutions by "a State",[748] to a "national decision"[749] and to a "national judicial system".[750] As for the *ne bis in idem* principle, there is no similar reference to the national level; articles 17(1) (c) and 20 refer to situations where a person "has already been tried" and "has been tried by another court", indicating that the principle applies regardless of the level at which the earlier proceeding was conducted. Such interpretation would be consistent with the object and purpose of the Statute as the application of the admissibility criteria would give the same guarantee against impunity *vis-à-vis* internationalised proceeding as they will *vis-à-vis* national proceedings. It would also appear to be the interpretation most consistent with internationally recognised human rights, as required by article 21(3).[751] A strict application of the admissibility criteria, however, excluding internationalised proceedings from the complementarity principle would be largely inconsistent with the object and purpose. Internationalised jurisdictions are established for the same purpose as the ICC: to remedy inadequate national proceedings. It should also be noted that if the ICC were allowed to interfere *vis-à-vis* an internationalised jurisdiction in an unrestricted manner, an extra incentive for the latter to proceed genuinely would be lost.

Yet a narrow construction of the terms "State" and "national" would seem to leave no room for internationalised proceedings. Contextually, however, the fact that the admissibility provisions do not expressly refer to internationalised proceedings does not warrant an *e contrario* inference as no such alternative existed at the time when the Rome Statute was adopted. The question is rather whether internationalised proceedings, in light of interpretational factors other than the strict wording, should be considered as "national" for the purpose of article 17(1) (a) and (b) or whether they fall outside the scope. In other words, are the terms "State" and "national" to be construed as "State and State only" and "exclusively national"? Neither the legality principle nor sovereignty concerns dictate a very strict interpretation of these terms. Letting them cover internationalised proceedings would only mean that the ICC would have to defer to such proceedings when they

[748] Paragraph 1(a) and (b).

[749] Paragraph (2) (a).

[750] Paragraph 3.

[751] According to this provision, the interpretation and application of the applicable law "must be consistent with international recognized human rights".

were genuine, a favourable result both for the individual and the state. It should be noted that since the drafters of the Rome Statute knew only national and international jurisdictions, the term "national" seems to have been used *as opposed to* "international". Thus, one can argue that the term "national" means "not international". That does not, however, solve the problem; the question remains as to whether internationalised proceedings should be properly categorised as "national" or "international" for the purpose of the admissibility provisions. Arguably, the term "State" implies that there must be some degree of national involvement in the establishment and/or operation of the internationalised jurisdiction.

The suffix "-ise" means "act like", "in the way of", "after the method of",[752] suggesting that an international*ised* jurisdiction still is essentially national, *i.e.* a national jurisdiction with international elements rather than the contrary. While the term "internationalised" is not an official term, it seems to be the term preferred by most scholars and arguably indicates how such jurisdictions generally are perceived. It should also be noted that other terms used, such as "hybrid", "mixed" or "semi-international", all imply that the courts are at least *partially national*, which the current ones indeed are.

The above is not fully clarifying, and it seems that the question as to whether internationalised courts are to be considered as national or international for the purpose of articles 17 and 20 ultimately must depend on to which extent the jurisdiction is established and operated on the national or international level. Relevant factors here are whether the majority of the judges are national or international; whether the court is funded by the state or by the international community; whether the court is, at least partially, established on a national initiative; and whether the State is involved in the Court's operation.[753] Where the jurisdiction physically is seated would also be relevant, although there might be valid reasons as to why a partially national jurisdiction would be seated outside the State's territory.[754]

It may happen, as the case is with the Special Court for Sierra Leone (SCSL), that the agreement setting up the Court provides that the Court is not to be a part of the national judicial system,[755] and the Court may itself make a legal finding that it is in

---

[752] *The Oxford English Dictionary*.

[753] Benzing 2004, pp. 412-13.

[754] A war could, for instance, necessitate the establishment of an *exile* court.

[755] *E.g.* section 11(2) of the Special Court Agreement Ratification Act 2002 which provides: "The Special Court shall not form part of the Judiciary of Sierra Leone."

fact international.[756] In the case of the SCSL, however, the label "international" was clearly used for the purpose of effectively excluding the defence of immunity for foreign state officials which international law establishes before national courts.[757] The finding should not be given implications beyond its purpose.

The Rome Statute's Preamble recalls that it is the "duty of every State to exercise *its criminal jurisdiction*" over those responsible for international crimes.[758] It might accordingly be argued that a state must apply its own judicial system, and that an internationalised proceeding therefore should never pre-empt the ICC's jurisdiction. Reference is, however, made to the discussion above regarding the common purpose of the ICC and internationalised courts. When a state takes part in an internationalised effort, the state does exercise its jurisdiction, only jointly with the international community. It would be senseless for the international community instead to insist that the state, which typically will be incapacitated, proceed on its own as such proceedings would most probably be inadequate due to the state's acknowledged problems.

In light of the above, it is submitted that the admissibility criteria in article 17(1)(a) and (b) apply *mutatis mutandis* to internationalised proceedings provided there is sufficient national involvement in the total effort. Even a minor involvement would arguably suffice. It should, for instance, not be required that the court be nationally funded or that a majority of the judges be national.[759] Neither should the state's involvement in the setting-up of the court be required as long as it is involved in its operation.[760]

7.2.2. Adjusting to the characteristics of internationalised proceedings

Internationalised criminal proceedings are generally not very likely to be non-genuine. It is, however, conceivable, especially if a majority of the judges are national, as is the case in Cambodia.[761] In such situations, the international community should be aware of the danger that its involvement in the jurisdiction might not sufficiently improve the proceedings but only tend to legitimise them.

---

[756] In *Prosecutor v. Charles Ghankay Taylor*, the SCSL noted that it is not part of the judicial system of Sierra Leone, and that its "constitutive instruments contain […] indicia so numerous to enumerate to justify" that it is an international criminal court, see paras. 37-42.

[757] Benzing 2004, pp. 412-413.

[758] Preambular paragraph 6 (emphasis added).

[759] Indeed, a common international demand is that the majority of judges be international.

[760] Benzing 2004, p. 412.

[761] *Ibid.,* p. 413.

As for the authority to challenge the admissibility when the ICC Prosecutor has decided to interfere *vis-à-vis* an internationalised proceeding, it may be noted that both the individual and the state concerned have the right to make a challenge under article 19(2) (a) and (b) respectively. There is, however, no such right for the international community, *e.g.* the United Nations, even if it has participated in the proceeding. However, there will surely be a dialogue between the ICC Prosecutor and the international entity involved, where views as to the admissibility may be exchanged and discussed.

It should also be noted that should the admissibility criteria not apply, the ICC Prosecutor will still have the option to discretionally decide not to interfere. Where there has been a genuine internationalised proceeding, the case for such discretional deferral will be particularly strong.

7.3. THE ADMISSIBILITY CRITERIA AND SECURITY COUNCIL REFERRALS

7.3.1. Remarks on the relationship between the ICC and the Security Council

The crimes under the ICC's jurisdiction "threaten the peace, security and well-being of the world".[762] The prevention and punishment of the crimes shall *inter alia* contribute to the maintenance and restoration of international peace and security. The Court is envisaged to play a part in guaranteeing respect for and enforcement of international justice.[763] The ICC President has noted that the Rome Statute expresses purposes

> "which overlap with the goals of the UN. [...] To achieve our collective aims, our institutions must work together. […] Cooperation is important because the Court and the UN are part of an interdependent system of international law and justice."[764]

Accordingly, the Court will *de facto* be operating in the Security Council's "domain", even though the two institutions will not necessarily be involved in the same situations. The Security Council's establishment of the two *ad hoc* Tribunals underscores the importance of criminal justice as a component of peace building and illustrates the common purpose of the two institutions. The fact that the Rome Statute gives the Security Council authority to suspend ICC proceedings for periods

---

[762] Preambular paragraph 3.

[763] Preambular paragraph 11.

[764] *Address to the United Nations General Assembly*, *supra* note 30, pp. 3-4.

of 12 months[765] constitutes recognition of the Council's superior responsibility for maintaining and restoring peace and security.

Several commentators believe that Security Council referrals[766] will be the Court's most important trigger mechanism.[767] At the same time, the Security Council has the power to create new *ad hoc* tribunals. Arbour and Bergsmo have noted:

> "The Security Council's power to conduct international judicial intervention derives from the Charter and is unaffected by the ICC Statute. Legally speaking the Council can establish further *ad hoc* Tribunals if it is of the view that the efficacy of its judicial intervention so requires. […]."[768]

Preambular paragraph 7 reaffirms "the Purposes and Principles of the Charter of the United Nations", and the Statute seeks in no way to circumscribe the power of the Security Council to create *ad hoc* tribunals. Indeed, the Statute could not have set aside or amended any power that the Security Council has under the Charter.[769]

Two essential effects of a Security Council referral are that it dispenses the requirement of jurisdictional acceptance under article 12,[770] and that it increases the likelihood that the Court's requests will be enforced.[771] In addition, it must be asked

---

[765] Article 16.

[766] Article 13 (b).

[767] Wilmshurst has, for instance, noted that "in practice the referral of situations by the Council may be of crucial importance to the early success of the Court", see Wilmshurst 2001, pp. 39-40.

[768] Arbour 1999, pp. 139-40. See also Bergsmo 1998, pp. 125-26.

[769] Instead, the Rome Statute *gives* the Security Council powers, namely the power to refer situations to the Court under article 13(b), and the power to block the Court's proceedings under article 16. The Statute also gives the Council a potential role in cases of non-cooperation of states parties (article 87(7)) and of non-states parties which have entered into arrangements or agreements with the Court (article 87(5)).

[770] Article 12(2) only refers to *proprio motu* proceedings and proceedings pursuant to state referrals.

[771] Article 87(5) and (7). Nonetheless, the ICC personnel in Sudan have faced huge problems trying to carry out their mandates, despite the fact that the Darfur situation was referred to the ICC by the Security Council. After the ICC issued its first arrest warrants regarding the Darfur situation in May 2007, Sudan has (as of November 2007) failed to arrest and surrender the persons concerned. Ahmed Haroun, the Minister for Humanitarian Affairs, has retained his position and, ironically, been appointed as head of a committee investigating human rights complaints in Darfur. The ICC Prosecutor has signalled that he wants the Council to force

whether the admissibility criteria will still apply, or whether such referral effectively vests the ICC with primacy *vis-à-vis* national jurisdictions. Three questions will be addressed below: first, do the admissibility criteria generally apply when there is a Security Council referral; second, if there is such general applicability, can the Security Council nevertheless vest the ICC with primacy; and third, what implications will an admissibility finding in the Security Council have on the ICC's own finding?

7.3.2. The general applicability upon a Security Council referral

There is no express regulation in the Rome Statute as to whether the admissibility criteria apply when there is a Security Council referral. Article 17 does not distinguish between triggering mechanisms, and the context of article 17 does not indicate that the criteria should not apply when there is such referral. Article 17(1) refers to preambular paragraph 10 and article 1, which both, in general terms, provide that the Court "shall be complementary to national criminal jurisdictions". The general wording and the prominent placing of the complementarity principle indicate that the admissibility criteria apply equally, regardless of the triggering mechanism. This is arguably underscored by the fact that article 12(2), on the preconditions to the exercise of jurisdiction, does distinguish between triggering mechanisms.

Article 18 on preliminary rulings regarding admissibility refers to state referrals and *proprio motu* investigations, but fails to mention Security Council referrals. This only means, however, that the right of states to seek a preliminary ruling is removed when the Prosecutor acts upon a referral from the Council. Thus, the article does not indicate that the admissibility criteria do not apply to Security Council referrals. Indeed, the fact that article 18 makes an exception for Security Council referrals, while articles 17 and 19 (see below) fail to make that exception, indicates *e contrario* that the criteria apply equally to such referrals.

Article 19 on challenges to the admissibility, like article 17, does not distinguish between triggering mechanisms. Paragraph 1 provides in general terms that the Court may, on its own motion, determine the admissibility of "a case" in accordance with article 17, and paragraph 2 provides that the admissibility may be challenged by "[a] State which has jurisdiction over *a case*". Further, rule 59(1) (a) on the participation in proceedings regarding the admissibility instructs the Court in case

---

Sudan into cooperating with the Court and his intention to forward an official request to this effect, see Ali 2007.

of a challenge to inform "*[t]hose* who have referred a situation pursuant to article 13". If this did not include the Security Council, the rule should arguably have referred to "*the State*" instead of "those" as only a state and the Council may refer situations.[772]

Article 53 instructs the Prosecutor to determine *inter alia* the admissibility of a case before he or she proceeds with it.[773] This article expressly applies both to state referrals and Security Council referrals.[774] When the Council has referred a situation, it has *inter alia* the right to be informed of and to request a review of the Prosecutor's decision not to proceed under article 53, including a negative admissibility finding.[775]

The submission that the admissibility criteria apply when there is a Security Council referral is also supported by the fact that it was never suggested in the discussions of the ILC, the Ad Hoc Committee or the Preparatory Committee that the criteria should not apply.

In light of the purposes of the complementarity principle and the Rome Statute, there is no reason why the admissibility criteria should not apply in situations referred by the Security Council. The sovereign right of states to prosecute should be respected by the Security Council, and the ICC's resource constraints make deferring to genuine national proceedings sensible, irrespective of the triggering mechanism.

Having received the Security Council referral of the Darfur situation, the ICC Prosecutor announced that before starting an investigation he was "required under the Statute to assess factors including crimes *and admissibility*".[776] Prior to that referral, the International Commission of Inquiry on Darfur had elaborated on the admissibility question in its report to the Council.[777] The Council took note of the

---

[772] Thus, rules 105(1) and 106(1) refer to "the State or States that referred a situation under article 14."

[773] Here, the admissibility question forms a part of the "reasonable basis" requirement for opening an investigation under article 53(1), and of the "sufficient basis" requirement for proceeding with a prosecution under article 53(2).

[774] According to article 15(3) and rule 48, article 53 also applies indirectly to *proprio motu* proceedings.

[775] Article 51(1) (b). See also articles 53(2) and 53(3) (a) as well as rules 105(1) and 106(1).

[776] *Security Council refers situation in Darfur to ICC Prosecutor*, *supra* note 415.

[777] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (pursuant to UNSCR 1564 of 18 September 2004), Geneva, 25 January 2005, paras. 586-87 (available at www.un.org/News/dh/sudan/com_inq_darfur.pdf).

Commission's report and did not comment specifically on the applicability of the admissibility criteria.[778]

In light of the above, it is concluded that the admissibility criteria apply in cases of Security Council referrals.[779] Arsanjani concludes similarly. She notes, however:

> "The result may not be fully consistent with the original intention of empowering the Security Council with the right of referral which was to avoid the creation of *ad hoc* tribunals. One of the reasons for this oversight [that articles 17 and 90 ("Competing Requests") do not give the ICC priority in the case of Security Council referrals] may have been the fact that the texts of articles 17 and 90 were negotiated at the Rome Conference before the question of jurisdiction was finally settled."[780]

The fact of the matter remains, however, that letting the admissibility criteria apply also when there is a Security Council referral is not detrimental to the Statute's object and purpose and neither is it to the Council's mandate.

7.3.3. Can the Security Council nevertheless vest the ICC with primacy?

Even though the admissibility criteria at the outset apply, it may be argued that the Council has the power expressly to set aside the criteria and vest the Court with primacy. Arbour and Bergsmo has noted, as quoted above, that the Council must be expected, in order to make the Court more efficient, "[to]give [the ICC] primacy *vis-à-vis* the relevant national judicial systems when it makes a referral as an enforcement action under Chapter VII", and that

> "[t]he Charter itself, in particular article 103, facilitates a constructive partnership between the Security Council and the ICC".[781]

This raises two separate issues: first, will such altering of the allocation mechanism bind states; and second, will it bind the ICC? While the Rome Statute provides that a Security Council referral does not *ipso facto* do away with complementarity, it does not expressly regulate whether complementarity may be replaced by primacy. That question must arguably be determined on a broader basis than a mere reference to the express provisions of the Rome Statute. While article 21(1) (a) lists the Statute as the Court's primary source of law, preambular paragraph 7 reaffirms "the Purposes and Principles of the Charter of the United Nations". The Court will therefore need

---

[778] Security Council Resolution 1593 (2005).

[779] Agirre *et al.* 2003, p. 21; Cassese 2003, p. 353; and Condorelli 2002, pp. 637-38.

[780] Arsanjani 1999a, p. 70.

[781] Arbour 1999, pp. 139-40.

to address the binding effect on states and the ICC of a resolution purporting to vest the ICC with primacy, having regard to general rules of international law relating to such issues. This also appears to follow from article 21(2) (b) which refers to "the principles and rules of international law" as a relevant source.

As to whether such a resolution would bind states to accept primacy,[782] the answer appears to be simple: article 25 of the Charter provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter", and article 103 provides that if any other international agreement were to impose conflicting obligations on the members, "their obligations under the present Charter shall prevail".[783] It may also be argued that because the Council has the power to establish *ad hoc* tribunals with primary jurisdiction, it must *a maiore ad minus* have the power to vest an existing complementary court with primacy.[784] Newton has noted that

> "a Chapter VII referral would override a State's inherent national authority to insist on using its own judicial process. […] While the Rome Statute ostensibly preserves a state's authority to implement complementarity following a Security Council referral, the obligation of all states to 'accept and carry out the decisions of the Security Council' effectively nullifies the right of complementarity. Furthermore, all members of the United Nations are obliged to comply with orders of the Security Council, even if the Rome Statute or any other international agreement would impose conflicting obligations."[785]

He concludes that "[a] Security Council referral, therefore, has the practical effect of creating jurisdictional primacy for the ICC similar to that enjoyed by the ICTY and ICTR".[786] This presupposes, however, that the Security Council expressly decides to vest the ICC with primacy, and even then it remains doubtful. Must the Court observe "obligations" flowing from other sources than the Rome Statute, in this case from the UN Charter? And which will prevail when such obligations collide with

---

[782] These will be not only states parties to the Rome Statute, but also non-states parties, see article 12(2). It is generally assumed that a referral under article 13(b) will be made a resolution, although this is not expressly provided in the Statute (this was the procedure when the Council referred the Darfur situation).

[783] *Lockerbie Case*, para. 39. Of course, the complementarity principle would, at least at the outset, more accurately be described as a right and not as a "conflicting obligation" of states.

[784] The fact that the Security Council did not vest the ICC with primacy when it referred the Darfur situation to the Prosecutor does not necessarily imply that it could not have.

[785] Newton 2001, pp. 49-50.

[786] *Ibid*.

those flowing from the Rome Statute? Since the Statute only provides for a complementary jurisdiction, one may argue that the Court is not free to apply a primacy "authorised" by the Security Council. The complementarity principle is a core principle of the Statute, and the Statute instructs the Court, including the Prosecutor, to adhere to it. It can be argued that not being a member of the United Nations, the ICC will not be bound by a resolution in other ways provided for in the Statute.[787] The Charter does not provide, neither expressly or implicitly, for any general binding effect of Security Council resolutions on international organisations. Neither is any binding effect provided for in the Rome Statute, save that of requests under article 16.[788] Arguably, states cannot effectively circumvent a binding resolution by establishing an organisation that they decide shall not be bound by the resolution and, it may further be argued, the Council may instruct an international organisation when required in order to prevent states from effectively circumventing a resolution. Such circumvention is not, however, at issue here. The ICC already exists as a complementary jurisdiction, and it does not make sense to say that states, when they established the ICC, sought to circumvent any duty imposed by the Council. This would be true even if the Statute expressly instructed the Court not to, under any circumstances, alter the allocation mechanism. The Security Council is, on its part, in any case not prevented from establishing a new *ad hoc* tribunal with primacy, effectively preventing states from cooperating with the ICC with respect to the relevant situation.

Based on the above it is submitted that the Security Council cannot instruct the ICC to exercise primacy. If the Security Council wishes to make use of the ICC, it must accept the complementarity principle in the sense that it cannot force the ICC to exercise primacy.[789] Another question is, however, whether the Council nevertheless may authorise the ICC to exercise primacy, leaving to the Court the decision whether to exercise it. As noted, states will be bound by the resolution; so the question is simply whether the ICC is in a position to accept the primacy

---

[787] Arsanjani 1999b, p. 28, fn. 14, noting that article 25 of the Charter only refers to "[t]he Members of the United Nations". See also Benzing 2003, pp. 626-27.

[788] One might, of course, question whether the states which created the Court, all being members of the UN, really wanted to create a court which would not be bound by Security Council decisions.

[789] It may be noted that the requirement of jurisdictional acceptance in article 12 is a fundamental principle which may be dispensed with by the Security Council, but this is expressly provided for in article 12(2).

"offered" by the Council.[790] Again, the answer is in all probability "no" due to the express complementarity instructions in the Rome Statute.

The conclusion should be put in the following perspective: Under article 53(1), the decision whether to investigate remains the Prosecutor's, irrespective of the triggering mechanism, only subject to a limited review by the Court. Consequently, the Council could never dictate any actual exercise of jurisdiction anyway. It should also be noted that the Security Council still will be able to influence the allocation of cases in a given situation. If it instructs states to give priority to the ICC, they must decline to investigate or prosecute cases within that situation, at least those cases that the Prosecutor otherwise would want to handle.[791] This avoids, effectively, any competing national proceedings, save already completed trials. It may be noted that the right for the suspect to challenge the admissibility under article 19(2) (a) still probably would be intact, regardless of the resolution.[792]

The above gives rise to yet another question: if the Security Council makes a referral to the ICC noting that the jurisdiction shall be primary, may the Court exercise jurisdiction over the situation in a complementary way, or must the referral be considered as conditional upon the Court's acceptance of the primacy (to which, according to the conclusion above, it is not entitled)? The answer depends on how the resolution is interpreted. The ICC must determine whether the primacy clause should be viewed as an attempt to authorise the ICC to exercise primacy or as a precondition to the very referral. There will scarcely be reason to claim the latter, unless expressly noted; the main point of a referral will be that the perpetrators be brought to justice, irrespective of the level at which it happens. The scenario appears to be rather hypothetical as a referral almost inevitably will follow extensive discussions between the ICC Prosecutor and the Council as to the possible modalities of an ICC involvement.

It seems unlikely that the Security Council would want to alter the allocation mechanism at all, although the admissibility procedures can hamper the Court's work. When the Security Council refers a situation to the ICC, it will be because the states concerned fail to handle the crimes genuinely. Complementarity will

---

[790] While most commentators argue that the Security Council either has the power to dictate the ICC to exercise primacy or that it may not alter the allocation mechanism, this "offer" would represent a third understanding.

[791] A Security Council resolution instructing states to give the ICC priority can scarcely be interpreted so as to instruct states to refrain from handling any cases within the situation, thereby allowing impunity to prevail, see Agirre *et al.* 1999, p. 22.

[792] *Ibid*.

effectively address that problem. Philips notes that an *a priori* determination by the Security Council as to how cases should be allocated

> "remains problematic [as] this inquiry would be conducted only once, with no articulated standards, not subject to review, by a select body […], as opposed to a delegated organ of the Court that is authorized, *sua ponte*, as well as upon application, to re-visit this question throughout the life of a case".[793]

The purposes of both the Rome Statute and the UN Charter will be equally well served when the admissibility criteria apply.[794] Indeed, the primacy of the *ad hoc* Tribunals is considerably modified by the respective Rules of Procedure and Evidence, making the difference from complementarity less dramatic. It should also be noted that the Security Council did not seek to vest the ICC with primacy when it referred the Darfur situation to the Prosecutor.[795]

Further, and this point should not be underestimated, complementarity is widely considered as a cornerstone of the Rome Statute. The principle represents the chief argument as to why sovereignty-anxious states should not hesitate to ratify the Statute. For that reason alone it would be highly inappropriate for the Security Council to seek to turn the ICC into a primary jurisdiction. It would undermine the support for the ICC that is presently being built.

7.3.4. The significance of the Security Council's conclusions regarding admissibility

It is conceivable that in a referral the Security Council will indicate the view that a state is either unwilling or unable to deal genuinely with the crimes in question. Indeed, such unwillingness or inability should be considered a *conditio sine qua non* for such referral. Whether the Council will address the admissibility question in a referral is less obvious. It has already been noted that the Security Council, when it referred the Darfur situation to the ICC Prosecutor, referred to Sudan's unwillingness to proceed genuinely. The Darfur Report, on which the referral was factually based, concluded equally.

The Rome Statute does not, however, envisage a competence for the Security Council to determine the admissibility with binding effect on the Court. Far from it,

---

[793] Philips 1999, p. 66.

[794] It may be noted, though, that in a given situation, where a state already *has demonstrated* failure, the enhancing effect, which is one of complementarity's important aspects, will no longer be effective.

[795] Security Council Resolution 1593 (2005).

articles 17, 19, 53 and 119 envisage *the Court* as the final arbiter in the admissibility determination. Further, article 53(3) (a) provides that the Security Council may request the Pre-Trial Chamber to review a decision of the Prosecutor not to proceed, *inter alia* due to a negative admissibility finding.. This strongly suggests that the Council cannot dictate the admissibility finding.

Despite the Court's prerogative to decide on the admissibility, the Court should and almost certainly will carefully consider any opinion of the Security Council on the matter. The relevance of the Council's view is suggested by rule 107(1), which provides that a request by the Security Council for a review under article 53(3) (a) of a decision not to proceed shall "be supported with reasons", and rule 107(4) provides that the Pre-Trial Chamber may seek "further observations" from the Security Council. This implies that the Court will have to take the Council's views, including that on admissibility, into due account. The formal and factual authority of the Security Council in matters regarding the maintenance and restoration of peace and security is indisputable. The ICC should therefore place considerable weight on any finding of the Council, although an admissibility finding admittedly will be of a different character than the ones the Council typically makes.

The following should be noted: First, where the Security Council bases its referral on a report by an international commission of inquiry, such as in the Darfur situation, this adds authority to the Council's findings, including an admissibility finding. Such commissions will be non-political and particularly qualified for assessing factors relevant to the admissibility determination.[796] Second, as time passes after the adoption of the resolution, the state's willingness or ability to proceed genuinely may change. As long as an ICC trial has not commenced, the state may, with pre-emptive effect, initiate genuine proceedings.[797] Third, and importantly, the ICC's final admissibility findings will relate to individual cases, while the Security Council's findings will relate to the entire situations. Findings regarding an entire situation will become less relevant as more specific information is obtained.

---

[796] *E.g.* the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, *supra* note 777, assesses the legal basis under the Rome Statute for opening an investigation, including the adequacy of the Sudanese judicial system and the existence of relevant proceedings, see paras. 565 *et seq*.

[797] Article 19(4).

7.4. THE ADMISSIBILITY CRITERIA AND SELF-REFERRALS

7.4.1. General remarks on self-referrals

The first two situations where the ICC Prosecutor opened investigations were subject to so-called "self-referrals" made under articles 13(a) and 14 of the Rome Statute.[798] They were referred by the territorial states, and the crimes had allegedly been committed by the states' citizens.[799] Both referrals were made after what can best be described as mild pressure from the ICC Prosecutor. In an address to the Second Assembly of States Parties, the Prosecutor referred to the situation in the Democratic Republic of Congo, noting:

> "I stand ready to seek authorisation from a Pre-Trial Chamber to start an investigation under my *proprio motu* powers. Our role could be facilitated by a referral or active support from the DRC. The Court and the territorial State may agree that a consensual division of labour could be an effective approach." [800]

Such a method of bringing a situation before the Court was not expressly envisaged in the Rome Statute and scarcely envisaged at all during the negotiations. The possibility is, however, indicated in an expert paper provided for the Office of the Prosecutor some time before the referrals:

> "There may also be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction, in order to facilitate admissibility before the ICC. […] [T]he ICC and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach."[801]

The ICC Prosecutor has later suggested the same possibility, while also noting:

---

[798] This term appears to have been introduced by Kress, see Kress 2004, pp. 944 *et seq*.

[799] In December 2003, the President of Uganda referred the situation in northern Uganda to the ICC Prosecutor, see *President of Uganda refers situation concerning the LRA to the ICC*, *supra* note 414. In March 2004, the DRC referred the situation in that country, see *Prosecutor receives referral of the situation in the Democratic Republic of Congo*, Press Release, 19 April 2004 (available at http://www.icc-cpi.int/press/pressreleases/19.html). In January 2005, the Central African Republic made a similar referral, see *Prosecutor receives referral concerning Central African Republic*, Press Release, 7 January 2005 (available at http://www.icc-cpi.int/press/pressreleases/87.html).

[800] *Report of the Prosecutor of the ICC to the Second Assembly of States Parties*, 8 September 2003 (available at http://www.icc-cpi.int/otp/otp_events.html).

[801] Agirre *et al.* 2003, p. 19, para. 61.

> "It should […] be recalled that 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."[802]

The question can be raised as to how the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", as referred to in the Preamble, can be reconciled with self-referrals. Kress notes that

> "it would be too rigorous a reading of the words 'exercise its criminal jurisdiction' […] to construe them to mean 'investigate, prosecute and, eventually, punish at the national level'. In light of the overarching goal of the ICC Statute to end impunity, the territorial State should not be prevented from choosing a second option against impunity, namely to refer a situation to the ICC with a view to international investigation."[803]

It may be noted, for the sake of comparison, that states may under international law waive the requirement that local remedies be exhausted before international tribunals. The IACtHR has noted:

> "Under generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly."[804]

A self-referral has the potential of altering the adversarial relationship between the ICC Prosecutor and the state concerned envisaged in articles 17-20, and instead paving the way for a consensual relationship.[805] It is nevertheless conceivable that the state is or has been investigating or prosecuting one or more cases within the referred situation. This raises two questions: first, do the admissibility criteria still apply; and second, does the state retain the right to invoke the criteria according to the procedures in articles 18 and 19?

---

[802] *Paper on some policy issues*, *supra* note 18, p. 5.

[803] Kress 2004, pp. 945-46. See also Agirre *et al.* 2003, noting that the duty under preambular paragraph 6 "should be read in a manner consistent with the customary obligation to *aut dedere aut judicare*", p. 19, fn. 24.

[804] *Cesar Chaparro Nivia and Vladimir Hincapie Galeano v. Colombia*, paragraph. 20.

[805] Kress 2004, pp. 944-45.

7.4.2. The applicability of the admissibility criteria

As noted, the Rome Statute does not envisage self-referrals, and consequently it does not seek to regulate the implications for the admissibility of such referrals. Article 17 does not distinguish between various forms of referrals. Paragraph 1 simply provides that "the Court shall determine that a case is inadmissible" in the described situations. Neither does article 53 indicate that the admissibility criteria should not apply when there is a self-referral. Letting the admissibility criteria apply would be fully consistent with the Statute's purpose, which is to ensure that the perpetrators are brought to justice.[806] Based on this, it is submitted that they do apply, meaning that the ICC Prosecutor must determine whether the self-referring state is proceeding or has been proceeding genuinely with a given case before he or she decides to proceed.[807] The Court as such will also have the authority, under article 19(1), to determine the admissibility on its own motion. The fact that the state may have waived its right to invoke the admissibility provisions does not alter this. The complementarity principle is not merely based on considerations of state sovereignty, but also on considerations of appropriateness, pragmatism and even of human rights *vis-à-vis* the alleged perpetrator.

7.4.3. Has the self-referring state waived its right to challenge the admissibility?

It should be noted that if the state simply abstains from proceeding, the cases concerned will automatically be admissible. It should further be noted that a waiver by the state concerned would not prevent other states from initiating criminal proceedings and invoking the admissibility criteria as long as an ICC trial has not started.[808]

Generally, international law recognises the right of states to waive their rights either expressly or by implication.[809] There is no provision in the Rome Statute

---

[806] The discussion has certain commonalities with that above as to whether the admissibility criteria apply when there is a Security Council referral and *vis-à-vis* internationalised jurisdictions.

[807] In addition, according to article 17(1) (d), he or she has to determine whether a case is of "sufficient gravity".

[808] Kress 2004, p. 946, fn. 17; Benzing 2003, p. 631.

[809] Rousseau 1970, pp. 428 *et seq.*, as referred to by Benzing 2003, p. 630.

expressly allowing such waiver,[810] but there is no express prohibition either. It is therefore submitted that the general rule prevails: the state may waive its right to challenge the admissibility expressly or by implication. An express waiver can be made in the referral or at the request of the Prosecutor, as the case arguably was with Uganda and the DRC. Such waiver would facilitate and accelerate the Prosecutor's pre-trial activity. It might also be argued that when a state refers its domestic situation to the Court, this implies a waiver of the state's right to invoke the admissibility criteria under articles 18 and 19.

An additional question is whether a self-referral, regardless of whether it is viewed as the state's express or implicit waiver of its right to invoke the admissibility criteria, represents an automatic waiver. This depends on an interpretation of the Rome Statute and the referral.[811] Article 18(2) gives "a State" the right to request the Prosecutor to defer on the grounds that it is or has been investigating a crime "within its jurisdiction". This wording would, linguistically, cover the "self-referring" state. Further, according to article 19(2) (b) and (c), the self-referring state would be a "State which has jurisdiction over a case"[812] as well as a "State from which acceptance of jurisdiction is required under article 12". The only provisions expressly leading to a state's loss of its rights under article 18 and 19 relate to the state's passivity as such.[813] It should also be noted that the Statute envisages a role for the referring state that is opposite of the one discussed here. Thus, "those who have made the referral" may make submissions against an admissibility challenge.[814] The Statute presupposes that the referring state will share the view of the Prosecutor.

Viewing a self-referral as an automatic waiver would be inconsistent with the purpose of the Rome Statute for the following five reasons: First, although it might accelerate the work of the Prosecutor, preventing the state from invoking the

---

[810] It may be observed that note 53 to the draft forwarded to the Rome Conference stated that the proposed text was "without prejudice to the question whether complementarity-related admissibility requirement of this article may be waived by the State or States concerned", see *Report of the Preparatory Committee, Vol. II*, *supra* note 321, footnote to article 15 (now article 17).

[811] There might *e.g.* be elements in the referral indicating that the state has waived its rights.

[812] Article 19(2) (b).

[813] Article 18(2): "Within one month of receipt of [the Prosecutor's notification]"; article 19(4): "prior to or at the commencement of the trial"; and article 19(5): "at the earliest opportunity". It is also possible that the Court may require that all challenges be submitted within a given time and considered together before a trial starts.

[814] Article 19(3) provides that "those who have referred the situation under article 13 […] may also submit observations to the Court [regarding the admissibility question]".

inadmissibility criteria in good faith would only increase the risk that the ICC duplicate genuine national proceedings. Second, the admissibility criteria address not only the sovereignty concerns of states but also the concerns of the world community and the individual. Although the right of the person concerned to challenge the admissibility would remain unaffected by a waiver, and although the Prosecutor remains under an obligation to always consider the admissibility, the state should retain the competence to challenge it, absent an express waiver. This would best safeguard the legitimate interests of all parties. Third, if the self-referring state wishes to waive its right to challenge the admissibility, it may do so expressly, even at the request of the Prosecutor. It therefore seems illogical to interpret a referral as implying an *ipso facto* waiver, absent clear indications to that effect. Fourth, if self-referrals are to represent consensual approaches, as envisaged by the ICC Prosecutor, a state which wishes to challenge the admissibility of a given case should not be met with the argument that it has waived its right *ipso facto* when it made the referral. Fifth, if self-referrals were viewed as automatic waivers, it might discourage states from making them. As such referrals appear to be a welcome development promoting cooperation, this would be unfortunate.

Based on the above, it is submitted that a state which refers its domestic situation to the ICC Prosecutor retains the right to challenge the admissibility of any case within that situation.[815]

[815] It is also submitted that the state may *initiate* criminal proceedings with pre-emptive effect after it has made the referral.

8. UNWILLINGNESS

8.1. THE TERM "UNWILLINGNESS"

The first of the two admissibility criteria in article 17 of the Rome Statute is the state's "unwillingness" to proceed genuinely. The term "unwillingness" is not defined, but some factors as to its application are listed. These factors will be presented below. Linguistically, the term means "not intending, purposing, or desiring (to do a particular thing)".[816] The French "*manque de volonté*",[817] the Spanish "*no esté dispuesto*"[818] and the Russian "*nezelanie*" (lack of wish)[819] convey the same meaning as the English term. Unwillingness presupposes a conscious decision: the state must have consciously decided not to proceed genuinely; otherwise there is no issue of will. In contrast to the objective "inability" criterion, this is a subjective criterion (although the true subject is not always so easy to identify). The term "unwillingness" has no specific *quantitative value* attached to it: different degrees of unwillingness can be envisaged, from insufficient zealousness to a firm determination to shield. Not all degrees will qualify for the purpose of article 17. In everyday usage, an "unwilling" person does not necessarily seek to do achieve the opposite of what he or she is unwilling to do. In the present context, in light of the factors listed in article 17(2), it is clear, however, that the issue is not whether the state has demonstrated a lack of interest but whether it has actively sought to obstruct justice. It may be noted that a less qualified "disinterest" typically will result in an inaction scenario which automatically will make a case admissible. An essential point in the present context is that the unwilling state nevertheless proceeds, thereby effectively conducting a sham.

Being unwilling does not necessarily imply that the actor is motivated by self-interest in the form of a concrete gain, although such gain frequently will be present, such as where the crime is state-sponsored. The criterion would also cover situations where the state seeks to shield the perpetrator for motives that are not so obviously unacceptable. The state might reasonably fear that a genuine prosecution will cause instability, or it gives in to pressure (the latter could alternatively amount to "inability"). Forgoing criminal justice in order to maintain peace might, under the circumstances, be morally justified.[820] As so often in law, however, the underlying

---

[816] *The Oxford English Dictionary*.

[817] *Le Noveau Petit Robert*.

[818] *Collins Spanish Dictionary*.

[819] *The Oxford Russian Dictionary*.

[820] The Prosecutor might therefore find that proceeding with a case is not appropriate according to article 53(1) (c). Where the state has "shielded" the person for such reason, the case will thus be admissible, but the state's decision will also be evaluated in light of the "interests of justice" criterion.

motive is irrelevant. The state might have preferred, under other circumstances, to bring the person to justice, but as long as there is a conscious determination to shield the perpetrator, the situation amounts to unwillingness. The point is not to pass moral judgements, but to set aside non-genuine proceedings.

Demonstrating a subjective will or lack of it by means of direct evidence is inherently difficult. It suffices to think of the difficulties prosecutors face proving criminal intent. It is no easier to enter into a state's mind than it is to enter into a perpetrator's mind. In fact, a state has no "mind", and the reference to the state's unwillingness is an abstraction. Any "will" or "intention" of a state will be the will or intention of individuals representing the state, with whom the state can be identified. A state's unwillingness will almost invariably have to be inferred from objective irregularities in its proceeding. The point must be identified at which the deviation from a genuine proceeding justifies the inference that the state is "unwilling". In a remark concerning the situation in Colombia, Dicker (Human Rights Watch) noted that

> "we have not yet found the smoking gun memorandum whereby the Attorney General says, We will dismiss all cases against alleged paramilitary offenders, but we have consistently found objective conduct by members of that office that certainly suggest, if not allow, a reasonable inference of unwillingness".[821]

Because the purpose of the complementarity principle is so complex – it is at the same time to safeguard sovereignty and to ensure an effective enforcement of international criminal law – it is possible to argue for both an expensive and a restrictive reading of "unwillingness" (and of "inability"). Hall (Amnesty International) argues that both criteria should be given an expansive reading so that the Court will preserve the *potential power* to act in a broad range of situations, thus strengthening the preventive effect. As many potential perpetrators as possible

> "should understand […] that they risk prosecution and conviction by the Court, as well as by national authorities, even if current resource constraints limit the risk in practice given contemporary level of crime".[822]

In order to compensate for such expansive reading, Hall suggests that the discretional "interests of justice" criterion be applied to adjust the caseload to the limited resources.[823] There are other compelling arguments, however, against an

---

[821] *First Public Hearing of the Office of the Prosecutor*, 17-18 June 2003, Session one, p. 2 (available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph1.html).

[822] Hall 2003, p. 15.

[823] Article 53(1) (c) and (2) (c) of the Rome Statute.

expansive reading of the admissibility criteria. It would hardly promote the underlying purposes, and the ICC should confine its activity to clear cases of national failure which truly represent a culture of impunity. If the admissibility criteria were to authorise the ICC to deal with less clear cases, this could be perceived as a threat to sovereignty and ultimately undermine the legitimacy of the entire ICC regime. Having said that, the admissibility criteria should be sufficiently broadly construed so as to cover cases of failure where interference appears to be justified. There is hardly any need for an expansive reading as a plain reading suggests that the criteria are broad, allowing for a variety of considerations. It should also be noted that the ICC Prosecutor's statement that he, as a general rule, will undertake investigations "only when there is a clear case of failure to act by the State or States concerned" does not reflect an expansive reading.[824]

The remainder of this chapter will discuss when the "unwillingness" can be attributed to the state concerned (8.2); analyse the factors listed in article 17(2) of the Rome Statute for the determination of unwillingness (8.3); and finally the chapter will explore some legitimate reasons for a state not to investigate, prosecute or convict (8.4).

8.2. THE ATTRIBUTION OF THE UNWILLINGNESS TO THE STATE

In order for the "unwillingness" criterion to apply, the proceeding must reflect the unwillingness of *the state*. With regard to national ongoing investigations and prosecutions as well as completed investigations, this follows explicitly from subparagraphs (a) and (b) of article 17(1) which refer to cases where "the State is unwilling" and to "the unwillingness […] of the State". Articles 17(1) (c) and 20(3) regulating national completed trials are less explicit. These provisions refer to proceedings which "[w]ere conducted for the purpose of shielding the person concerned" or "were not conducted independently or impartially". The reference to a purpose and also to inconsistency with "an intent to bring the person concerned to justice" makes it clear, however, that the issue is still the state's intentions behind the proceeding.

It does not suffice that certain organs or individuals somehow involved in or otherwise influencing the proceedings have acted with a purpose of shielding the person concerned, *etc.* The unwillingness, *i.e.* the purpose of shielding, *etc.*, must be attributed to the state. Being an abstract entity, however, a state cannot as such actually lack will to do something (indeed, it cannot actually do or mean anything at

[824] *Paper on some policy issues*, *supra* note 18, p. 2.

all). Being unwilling and acting for a purpose presupposes conscious determinations in the minds of human beings.[825] These states of mind must be formed in the minds of individuals and, under the circumstances, be attributable to the state. This raises the question as to which organs or individuals can be associated with the state so that their acts and states of mind can be attributed to the state for the purpose of determining whether it is willing to proceed genuinely with a case.

The issue as to when a conduct is attributable to a state has been extensively discussed in another field, namely that of state responsibility. Article 4 of the ILC's draft articles on state responsibility provides:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ or the central government or a territorial unit of the State."[826]

In its commentary to this draft, the ILC notes that "[t]he attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality".[827]

In another field, namely that of treaty law, certain persons are authorised to enter into commitments on behalf of the state. According to article 7 of the Vienna Convention, heads of state, heads of government and ministers for foreign affairs may perform all acts relating to the conclusion of a treaty without having to produce full powers.[828] In its commentary to the draft on state responsibility, the ILC notes that "[s]uch rules have nothing to do with attribution for the purposes of state responsibility". The same clearly goes for the purposes of a state's unwillingness to proceed genuinely according to the complementarity principle. Instead, it must be determined which organs and, as part of them, which individuals who can behave in

---

[825] For instance, the *Oxford English Dictionary* defines the term "purpose" as "that which one sets before oneself as a thing to be done or attained".

[826] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, UN doc. UNGAR 56/83 (available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf). In *Difference Relating to Immunity from Legal process of a Special Rapporteur of the Commission on Human Rights*, para. 62, the ICJ also conformed that this rule is of a customary character.

[827] *Commentary to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, International Law Commission, UN doc. A/56/10, art 4 (http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

[828] Vienna Convention article 7(2) (a).

a way so that the conduct is attributed to the state in the sense that it reflects the state's unwillingness. Here, the said reference to state organs appears to be useful. It should, however, be noted that this is not to say that the rules for determining state responsibility and that for determining a state's unwillingness are equal in this respect. One thing is for the state to be held responsible for the act of individuals; being assimilated with a subjective will of an individual is quite another. There are valid reasons why a state should be held responsible even for an act carried out by an individuals as long as the act was carried out during the exercise of official authority. Saying that the state has proceeded for a certain purpose and that it has demonstrated lack of will, however, makes sense only when the act has been performed at a certain level within a branch of government.

The will of the state can be expressed by any of the branches of government, typically three: the executive, legislative and the adjudicative branch. As noted by the Permanent Court of International Justice:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws […] express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."[829]

A state may organise its powers as it wishes, and in that respect the internal law and practice of each state are of prime importance. As to the level within these branches at which the unwillingness must be demonstrated in order for the unwillingness to be attributed to the state, there appear to be no clear rules under international law. As noted, the rules for determining the scope of state responsibility appear to have a wider scope, covering any official within a state organ as long as the conduct was carried out in an official capacity, hence the wording "whatever position it holds in the organization of the State" in article 4 of the draft quoted above.[830]

Summing up, not only the conduct of the head of state, the prime minister and the foreign minister can be attributable to the state for the purpose of demonstrating its unwillingness genuinely to investigate or prosecute. It is suggested, however, that the conduct must be reflective of the unwillingness of one of the state's branches of power as such, *i.e.* the executive, the legislature or the judiciary. This will mean that a conduct carried out by a single police official or a single judge will not alone suffice if it does not reflect the policy of one of the branches (but the conduct might entail state responsibility). The judge's conduct must reflect the unwillingness of one of the branches of power. He or she might, for instance, be corrupted by the executive. If

---

[829] *Certain German Interests in Polish Upper Silesia*, p. 19.

[830] See also *Currie Case*, p. 24.

individuals sufficiently high up in the hierarchy share or are aware of a purpose of shielding (and do nothing to prevent a sham), it is submitted that the sham can be "attributed" to the state. Indeed, the fact that the purpose has in fact been achieved might in itself indicate that the purpose has been part of the policy of the respective branch. There would appear to be no clear-cut rules as to the amount of individuals or their level in the state organisation required in order to attribute a conduct to the state for the present purpose.

In a society torn by civil war, an often-seen situation is that one branch (typically, the judiciary) wants to hold the perpetrators accountable, while another branch (typically, the executive) is unwilling. Where there is a sham in such a situation, this clearly reflects the state's unwillingness. Moreover, military or security forces not effectively controlled by the executive might be involved in the crime and seek to prevent the executive and the judiciary from bringing them to justice. Alternatively, a new democratic government might want to proceed genuinely, but powerful actors loyal to the former regime might make it impossible to conduct effective criminal proceedings. Such circumstances are instead reflective of the state's "inability" to proceed genuinely.

8.3. THE FACTORS IN ARTICLE 17(2)

8.3.1. General remarks

Article 17(2) lists three factors for the determination of "unwillingness":

> "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."

As noted in the historical survey, these factors were introduced to address a concern that the term "unwillingness" was so vague and subjective that it would leave too

much discretion with the Court. In order to avoid arbitrary determinations and add some objectivity, states decided to include factors (a) to (c) as well as the term "having regard to the principles of due process recognized by international law".[831]Among the three factors, factor (a) stands apart as the one reflecting the essential meaning of "unwillingness". Factors (b) and (c) are included in order to enable the Court to point to objective irregularities without actually having to demonstrate that the state proceeded for the purpose of shielding. In reality, (b) and (c) are indications of a purpose of shielding, only elevated to separate factors which alone may lead to a finding of "unwillingness". It should be noted that the requirement in (b) and (c) that the irregularities be "inconsistent with an intent to bring the person concerned to justice" retains an element of subjectivity which makes the difference from the "shielding" in factor (a) subtle.

8.3.2. Is the list exhaustive or illustrative?

It must first be determined whether the list in article 17(2) is exhaustive or whether the Court may consider factors not expressly listed. In contrast to article 17(1) which clearly is exhaustive, the relevant wording in article 17(2) is not clear.[832] The lack of a clarifying term such as "*inter alia*" or "including but not limited to", as found for example in articles 90(6) and 97 of the Statute, might indicate that the list in 17(2) is exhaustive. The term "one or more" might indicate the same, although the point might also be that the existence of one factor suffices. The term "in order to determine", as opposed to *e.g.* "for the determination of", might also indicate exhaustiveness. The term "shall", however, appears merely to indicate that all factors must be considered, and there could still be other relevant but not mandatory factors. The fact that the term "consider" is vague compared to *e.g.* "determine" is scarcely significant with regard to the question as to whether the list is exhaustive or not.[833]

---

[831] This term was originally proposed only for the "not independently or impartially" factor, but in the end it was placed in the very *chapeau* of paragraph 2. The idea was to add this element of objectivity to all the factors pertaining to "unwillingness", see Holmes 1999, p. 54.

[832] Hall 2003, p. 16.

[833] Robinson 2003, p. 500; Benzing 2003, p. 606. The term "consider" is also used in article 53(1) regarding the three criteria for opening an investigation: jurisdiction, admissibility and the "interests of justice". There is no doubt that the latter list is exhaustive, see the discussion on the complementarity procedures.

As for the underlying purpose, one could argue that allowing other factors to be considered would make the Court more effective.[834] It is submitted, however, that it would not as the factors expressly listed already allow a broad range of considerations. Factor (a) is especially broad, and considerations not covered by (b) or (c) might still be relevant as indications of a purpose of shielding the person concerned. Besides, as noted, the purpose is not just to ensure the effective enforcement of international criminal law, but also to safeguard sovereignty. Reference is also made to the discussion above as to whether the "unwillingness" criterion should be given an expansive reading.

An exhaustive reading of the list is further supported by the preparatory work. As noted, when factors (a) to (c) were introduced, an expressed purpose was to limit the discretion and make the test more objective, implying that the intention was to make an exhaustive list. Moreover, since the "unwillingness" criterion represents an *exception* to the general rule that national proceedings will prevail, an exhaustive reading is in keeping with the interpretational principle that an exception to a general rule should be narrowly construed. It is therefore submitted that the list in article 17(2) is exhaustive.[835]

8.3.3. The consequence of the factors' existence

Next, the consequence of the existence of one or more of the factors must be clarified. Again, the wording is not perfectly clear. The words "In order to determine unwillingness […] the Court shall consider" seems to indicate that the state is not automatically to be classified as "unwilling". The point is arguably to avoid an unnecessarily rigid admissibility determination which would be in neither party's interest. The reading most in line with the wording and the purpose therefore appears to be that the existence of one or more factors is a *necessary but not sufficient* precondition to a finding of "unwillingness". While it is difficult to imagine a "purpose of shielding" without "unwillingness", it is conceivable that there might be an "unjustified delay" or proceedings "not […] conducted independently or impartially" without the state being "unwilling", although the criterion "inconsistent with an intent to bring the person concerned to justice" brings (b) and (c) close to a "purpose of shielding".

---

[834] Dicker argues that the list is illustrative and that the point was to provide "an objective set of criteria to better gauge 'unwillingness' as it arises in the real world", *First Public Hearing of the Office of the Prosecutor*, Session one, *supra* note 821, p. 3.

[835] For the same conclusion, see Benzing 2003, p. 606.

8.3.4. Factor (a): Shielding the person concerned

Factor (a), reproduced in article 20(3) (a) in the context of completed trials, reflects the core of the "unwillingness" criterion. Labelling it a factor for the determination of "unwillingness" is an understatement: seeking to shield the perpetrator amounts to unwillingness. As noted, the qualitative difference between factors (b) and (c) and proceeding for the purpose of shielding is subtle. It is submitted that although shielding certainly is a qualified degree of "unwillingness" as the latter is understood in everyday usage, nothing less than a purpose of shielding is actually required for a state to be classified as unwilling. By this is meant that when the ICC Prosecutor invokes factors (b) and (c) it will be he or she that finds that the state is in fact seeking to shield the perpetrator. The important difference is, however, that (b) and (c) due to their less explicit language are easier to demonstrate. A specific purpose of listing "unjustified delay" as a separate factor is arguably to send a very clear signal to states in this respect. That criminal proceedings are notoriously slow is well-known.

Why then would a state bent at shielding the perpetrator conduct a sham instead of just remaining passive? A plausible reason would be that with increased attention from an increasingly powerful international community, states find it difficult to remain passive. Victims, human rights organisations as well as other states may apply considerable pressure. Moreover, with the inception of the ICC, a new incentive to conduct shams has been created. Paradoxically, the establishment of the ICC will probably lead to more shams which in turn will be more difficult to identify than inaction.

Being a subjective factor, and just as with the "unwillingness" criterion itself, a purpose of shielding the perpetrator is difficult to prove by means of direct evidence. It will typically have to be inferred from objective circumstances, and there is hardly any limitation as to which circumstances might be considered. A person can be shielded by numerous means, and exhaustively listing them all would be impossible. Instead, this dynamic factor gives the Court a certain measure of discretion. There is, however, nothing vague about the term "shielding".

8.3.4.1. "Shielding"

The term "shielding" means "protecting somebody".[836] Linguistically, it does not presuppose a bad motive, but in the present context the meaning is clearly negative:

---

[836] *The Oxford English Dictionary*. An even more telling meaning is "to protect by authority or influence".

it means protecting the perpetrator against due criminal responsibility. A person is not shielded, for the purpose of article 17, if he or she avoids prosecution due to his or her inferiority, insanity or for another legitimate reason. An actual belief that the person concerned is innocent will, however, hardly justify conducting a non-genuine proceeding, but it will justify a prosecutorial decision not to proceed or an acquittal. The shielding may be *total*, where the state decides not to prosecute or acquits a person, or the shielding may be *partial*, where the result is an inferior penalty. Where an ICC crime is prosecuted as an ordinary crime, despite the existence of a more fitting provision in the state's legislation, this may amount to shielding. The ICC Prosecutor is, however, likely aware of the fact that prosecuting an international crime (*e.g.* genocide) as an ordinary crime (*e.g.* murder) might, under the circumstances, be sensible in order to ensure a conviction as proving genocide is more difficult.[837] The essential is: has the state acted with the right intentions?

There must be *causality* between the state's purpose and the inadequate procedural step. This is indicated by the words "resulted from" in article 17(1) (b) and "for the purpose of" in factor (a). The unwillingness must make the proceeding non-genuine or at least have the possibility of doing that. If the executive branch, separated from the judiciary, wants to shield the perpetrator but is unable to influence the judiciary, the judiciary's proceedings will not be affected and remain genuine.

8.3.4.2. "Criminal responsibility"

This term does not indicate criminal responsibility at any particular level, national or international. The ILC draft referred to the shielding from "international criminal responsibility" (as do the Statutes and Rules of the two *ad hoc* Tribunals).[838] The wording was, however, changed in order to make clear that the issue is not whether the state seeks to avoid international interference, but rather whether it seeks to shield the perpetrator from criminal responsibility at any level. Seeking ICC interference is not necessarily wrong: an essential purpose of the complementarity principle is that it will prompt genuine national criminal proceedings aimed at preventing international interference. The ICC Prosecutor should be aware,

---

[837] In particular, it is difficult to prove the required "intent to destroy, in whole or in part" a particular group, see *e.g.* article 6 of the Rome Statute.

[838] Article 42(2) (b) of the ILC Draft Statute; *YBILC 1994, Vol. II*, *supra* note 115, Part Two, p. 57. See also ICTY article 10(2) (b) and rule 9(2); ICTR article 9(2) (b) and rule 9(2).

however, that when the only incentive is to avoid interference, there is increased likelihood that the proceeding will be non-genuine.

8.3.4.3. "The person concerned"

Subparagraph (a) refers to *the person concerned*, but the state may or may not have singled out an individual yet. A sham investigation motivated by a fear that somebody within the state apparatus might be involved in the crime, even where there is some uncertainty as to who the perpetrator might actually be, would still fall squarely within the ambit of (a). The person might be shielded in two very different ways. It might proceed non-genuinely against the assumed perpetrator, or it might deliberately proceed against an innocent person as a cover-up. As indicated, the state does not, however, have to proceed against the right person as long as it proceeds in good faith (it reasonably believes that it is proceeding against the perpetrator). Where a state has completed a criminal proceeding regarding the same conduct but against another person than the ICC Prosecutor wishes to target, the ICC case is automatically admissible (see above).[839]

8.3.4.4. Demonstrating the purpose

Demonstrating a purpose of shielding will be more challenging to the Prosecutor than to demonstrate the objective factors listed in (b) and (c). Indeed, it may turn out to be just as difficult as proving a perpetrator's *mens rea*, although with the notable difference that the standard of proof is probability and not "beyond reasonable doubt". Unlike a physical thing or a conduct, the purpose behind a conduct cannot be observed. It can, exceptionally, be proven by direct evidence, for instance in the form of written instructions to the police or the judiciary to ignore evidence or to reach certain conclusions. Such documents, if they exist, will be difficult for the ICC Prosecutor to obtain unless there is a new democratic government (but then that government might instead conduct genuine proceedings itself, thus obviating interference in the first place). As for testimonial evidence, state officials might admit that they acted according to illegitimate instructions.

It is also conceivable that victims and witnesses who have been pressured to make false statements in the proceedings are willing to testify.[840] Otherwise, there might be persuasive reasons why persons who have participated in a sham would not

[839] See the discussion above on the reference to "the case" in article 17(1).

[840] According to article 15(2) and rule 104(2), the Prosecutor may consult any "reliable" source.

want to testify: fear of being punished for having given false testimonies or of reprisals. The ICC might even prosecute such participation as a participation in the main crime. For example, a military commander's failure to "submit the matter to the competent authorities for investigation and prosecution" will, under the circumstances, entail criminal responsibility.[841]

In most cases the purpose will have to be inferred from circumstantial evidence. Relevant indications will be unjustified objective irregularities in the proceedings, such as those referred to in article 17(2) (b) and (c). Unwilling states might direct sophisticated shams and invest considerable resources in attempts to conceal the purpose of shielding. With the ICC in existence they will probably get better at it, and it will often be difficult to reveal the irregularities that invariably will be present when a state shields the perpetrator.

A purpose of shielding might exist from the beginning of the proceeding, or it may develop during the proceeding. An investigation which is genuine from the start might, for instance, at one point reveal that state officials have been involved in the crime, and this might trigger a purpose of shielding. Alternatively, there might be a change of political regime in the course of the proceedings. A genuine proceeding might be followed by a non-genuine decision against prosecution. Or a decision to prosecute might be followed up by a non-genuine prosecution. A purpose of shielding which is there from the beginning may also materialise at various stages of the proceedings: during the investigation, when a decision against prosecution is made; during the trial, when a judgement is handed down; or when a punishment is enforced.[842]

8.3.4.5. Indications of a purpose of shielding

The section below discusses several indications as to a state's purpose of shielding the person concerned. It is stressed that they are merely that: indications. Any inference that a national proceeding is non-genuine must be reasonably made. When assessing national efforts to deal with past atrocities, the ICC must have due regard to legitimate difficulties that states face. As for the "unwillingness" criterion, nothing more than a good faith effort is required. Irregularities such as those discussed below may or may not indicate a lack of good faith. When mass killings, torture and other gross human rights violations have been committed, scientific

[841] Article 28(a) (ii).

[842] These situations will be dealt with systematically below.

evidence, such as medical reports, *etc.*, will often be lacking;[843] bodies might be buried in secret places; and witnesses might be reluctant to testify or difficult to locate as they are uprooted or they might die. Particularly complex legal issues, such as that of genocidal intent and command responsibility, require evidence that often might be unavailable. The seriousness of international crimes dictates a serious national effort, but at the same time their complexity might justify a state's failure to conduct effective proceedings.

i. None or few successful investigations and prosecution; One-sidedness

If the state has conducted conspicuously few investigations of a certain type of crimes or against a particular group of persons, if there has been a pattern of decisions not to prosecute upon investigation or if few trials have produced convictions, this might indicate that the state seeks to shield the perpetrators. In the Darfur Report, the Commission noted:

> "Of the few cases where complaints were made, most of the cases were not properly pursued. […] The reality is that, despite the magnitude of the crisis and its immense impact on the civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted or even simply disciplined in the context of the current crisis." [844]

Where there is a discrepancy between the number of complaints and (successful) prosecutions, the ICC Prosecutor should seek an explanation from the state. If the state fails to offer satisfactory explanation, it might be reasonable to infer the state's unwillingness.

Prosecutions might be one-sided in the sense the state avoids prosecuting one of the parties to a conflict, or there is a failure to prosecute persons higher up in the hierarchy. A state might, for instance, prosecute those who carried out a killing campaign while failing to prosecute those who incited or ordered the campaign. A focus downward instead of upward does not reflect the characteristics of international crimes and the need to target the most responsible.

If there is a pattern of refusals to extradite suspects to states seeking to pursue the crimes, this might also indicate a purpose of shielding certain persons. An unusually broad interpretation of legal exceptions to an extradition duty might also

---

[843] A notable exception is the investigation of the Nazi commanders, where a vast amount of detailed documents had been produced and archived. Such meticulous record keeping is, however, uncommon.

[844] *Report of the International Commission of Inquiry on Darfur*, *supra* note 777, para. 586.

be relevant. General exceptions regarding own nationals are, however, still common. A refusal might not in and of itself imply unwillingness, but if the state fails to deal with the matter itself, it might be an indication.

Related to states' failure to proceed, authoritarian regimes often censor information that might undermine their power. This might include the state's establishment of an incorrect historical record denying the crimes. Such denial might be indicative also of the state's proneness to conduct shams.

ii. Shared purpose between the state and the suspect

An important factor that the ICC Prosecutor must look for is whether there are shared purposes between the state and the suspect. Such shared purposes might include political objectives of the state authorities or a dominant political party, territorial goals or the subjugation of a group.[845] Indications might be official statements from the government or a political party that it supports the acts in question or condemns the acts of the party to which the victim belongs. Further indications might be awards, sanctions or financial support to one party to a conflict.[846]

iii. National action prompted by the ICC Prosecutor's activity

The state might have initiated an investigation only upon notice from the ICC Prosecutor that he or she intends to investigate.[847] As noted, the Statute allows such late action,[848] and a previously unwilling state might, and this is an intended function of the complementarity principle, now decide to proceed genuinely. The fact that the state's motive for acting genuinely is merely to pre-empt ICC proceedings is irrelevant as long as the proceedings are otherwise genuine.

When prior inaction is transformed into action only upon a notice from the Prosecutor, the risk that the initiated investigation is not going to be genuine would appear to be increased. Therefore, the Prosecutor should be particularly aware in such scenarios. In response to the Darfur Report, the Sudanese government established a special war crimes tribunal to deal with the Darfur situation. This prompted the comment by the Sudanese organisation Justice and Equality

[845] Agirre *et al.* 2003, p. 29.

[846] *Ibid.,* p. 30.

[847] Article 18(1).

[848] Article 18(2). This is also supported by the basic idea behind principle of complementarity that national investigation and prosecution generally is preferable.

Movement that "[t]he Sudanese judicial system is not qualified to carry out this sort of trials".[849] Further, Amnesty International noted that Sudanese courts lacked credibility unless Sudan carried out "serious reforms ensuring independence of the judiciary".[850]

The Indonesian prosecutions in Jakarta of persons suspected of having committed atrocities in East Timor in 1999 have, by several commentators, been held to be shams.[851] Here, Indonesia agreed to try its own political and military leaders only after strong international pressure had been applied.

iv. Reluctance to cooperate with the ICC Prosecutor

If the state concerned is reluctant to cooperate with the ICC Prosecutor, this might indicate that the state seeks to conceal something. The state is for instance reluctant to provide the Prosecutor with information regarding an ongoing or completed investigation or prosecution. If the refusal is complete, it might even justify a reversal of the burden of proof as to the proceeding's genuineness.

v. Inadequate legislation

If a state has not ensured legislation enabling it to deal with international crimes, this might indicate that the state is unwilling to deal with a certain type of crimes.[852] Before concluding that Sudan was unwilling and unable to proceed genuinely, the Darfur Report noted that

> "the Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts".[853]

Another indication might be the existence of procedural requirements effectively preventing victims and witnesses from triggering criminal proceedings. The Darfur Report noted that procedural hurdles, such as the requirement of a medical examination for victims of rape, "limited the victims' access to justice".[854] The

---

[849] *Sudanese Darfur crimes court starts work, rebels cry foul*, Sudan Tribune, 14 June 2005 (available at http://www.sudantribune.com/spip.php?article10139).

[850] *Ibid.*

[851] These cases are commented upon below.

[852] As noted, this may also amount to "inability".

[853] *Report of the International Commission of Inquiry on Darfur*, *supra* note 777, para. 586.

[854] *Ibid.,* para. 587.

Report noted that a Ministry of Justice Decree relaxing the requirement was "not known to most law enforcement agencies in Darfur".[855]

Amnesty decrees might prevent the arrest, investigation and/or prosecution of certain individuals or groups. Historically, such mechanisms have typically been implemented as means to shield certain groups from criminal responsibility. They have seldom served a legitimate purpose. Where amnesty decrees are not general but issued for a given situation, the indication of a purpose of shielding is particularly strong.

vi. Limited access to the justice system

The ICC Prosecutor should also assess whether the state has provided easy access to police and judicial authorities for filing complaints. Particularly difficult access might be reflective of a purpose of shielding. The procedures should be available and comprehensive for all who might want to file complaints. The Darfur Report noted that Sudan's "procedural hurdles limited the victims' access to justice, such as the requirement of medical examination for victims of rape".[856] Another related problem might be lack of legal aid enabling the public to address the system properly. The HRC has noted that "in the absence of legal aid, a constitutional motion did not constitute an available remedy".[857]

The Inter-American Commission on Human Rights has expressed the following concern about the availability of the judicial system in Ecuador:

> "Access to judicial recourse is restricted to many individuals. The law requires that all claimants before the courts be represented by counsel; pro se litigation is not permitted. […] In certain zones of the country, particularly in rural areas, the inability to access judicial protection is a consequence of the insufficiency or lack of needed services and facilities. The Commission visited a community where the nearest court of any type was a nine hour drive away. The distribution and maintenance of facilities is, of course, intimately linked to the question of resources, as are many other obstacles confronting the judiciary. Judicial officials indicated to the Commission, for example, that they lacked even the rudimentary computerization to track the criminal case load. Any commitment to achieving a resolution of the current situation will require a consensus among the branches of Government as to the priority to be accorded to the administration of justice, and a

---

[855] *Ibid.* The report adds: "The Rape Commissions established by the Ministry of Justice have been ineffective in investigating this crime."

[856] *Ibid.*, para. 587.

[857] *Dwayne Hylton v. Jamaica*, para. 6.2.

> correlative commitment of additional and sustained resources. While there has been recognition in some sectors of Government that this is in fact a critical situation, budget allocations continue at reduced rather than increased levels."[858]

In most legal systems, it is a duty for the investigative authorities not only to follow up complaints, but also to initiate proceedings *ex officio* when warranted, which it regularly will be when very serious crimes appear to have been committed. The IACtHR has noted:

> "The Government often resorted to asking relatives of the victims to present conclusive proof of their allegations even though those allegations, because they involved crimes against the person, should have been investigated on the Government's own initiative in fulfillment of the State's duty to ensure public order. This is especially true when the allegations refer to a practice carried out within the Armed Forces, which, because of its nature, is not subject to private investigations."[859]

Similarly, the ECtHR has noted that

> "whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedure."[860]

At times, the police might even seek to dissuade persons from filing complaints by offering various kinds of "compensations", or by threatening. One commentator has described how the family of a disappeared person in Punjab told that "in exchange for dropping their case, the police promised to return the property that had been seized with their brother's disappearance".[861] Claims from victims that they do not want a case to be prosecuted should be treated to with caution as they might be forced or result from fear of reprisals or uncertainty as to what a trial might entail.

vii. Inadequate allocation of resources

A state's failure to allocate resources to investigations and prosecutions might be indicative of a purpose of shielding the subjects to the proceedings (note that a general shortage of resources might instead indicate inability). The state must

---

[858] *Report on the Situation of Human Rights in Ecuador*, Chapter 3.
[859] *Velázquez Rodríguez v. Honduras*, para. 180.
[860] *Jordan v. United Kingdom*, para. 105.
[861] Kaur 2002, p. 282.

allocate to the proceedings sufficient economical resources, competent personnel and the facilities and time necessary for the personnel to carry out their work in a satisfactory manner. The state's total effort must reflect the intent, *i.e.* sufficient commitment, to bring the persons concerned to justice. Importantly, the particular challenges that the investigation and prosecution of international crimes pose necessitate the appointment of personnel with the necessary skills and knowledge of international criminal law. States should therefore train special investigators, prosecutors and judges for the task.[862] Ideally, states should also elaborate special guidelines for the proper investigation of the ICC crimes.

On balance, there must be sufficient coherence between the national system's general *capabilities* and its actual *performance*. International crimes must be prioritised, and a general lack of resources will therefore not automatically justify a state's failure to carry out the proceedings in an inadequate manner. If the resources are inadequate, more resources must be allocated. The investigation and prosecution of international crimes require exceptional skills in both general international law and international criminal law and often necessitates complex interaction with other jurisdictions. Not all states will possess the required skills, and if a state fail to seek or declines to accept assistance offered by the international community, this might also be indicative of the state's unwillingness.

viii. Access and security of investigators, etc.

The ICC Prosecutor should also assess whether a state's procedural framework grants investigators unrestricted and safe access to all evidence, including witnesses and the scene of the crime. By illustration, the Chilean Truth and Reconciliation Commission, not in fact a criminal investigative body, was massively criticised because it was barred from interviewing members of the security forces. If the state in principle provides access but not sufficient security for key actors in the process, including investigators, victims and witnesses, these persons might effectively be excluded from the process or parts of it. Colombia, currently the only state in its region with a recognised armed conflict, seems, for instance, to fail in providing elementary security to judges, prosecutors and witnesses of crimes involving the

[862] The need to educate specialists is mentioned in many UN instruments, for example the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by A/RES/40/34, 29 November 2985 (available at http://www.unodc.org/pdf/compendium/compendium_2006_part_03_02.pdf).

military, paramilitary groups, drug traffickers or guerrillas.[863] Providing security means not only avoiding that actors are intimidated, but also reacting when such intimidation occurs. With regard to a situation in Guatemala, the HRC has noted that

> "the Committee is deeply concerned about reports of lynchings of members of the judiciary in breach of articles 6 and 7 of the Covenant and about the apparent delay by the State party in reacting to such incidents. The State party has the obligation to ensure the full protection of all authorities, especially their security during the exercise of their judicial functions."[864]

ix. Intimidation of actors in the proceedings

A well-known method of shielding a perpetrator is to intimidate or threaten to intimidate investigators, judges or witnesses. Commenting upon the situation in Rwanda, the Committee for the Elimination of Racial Discrimination noted that it was

> "concerned by reports of the intimidation of judicial authorities seeking to investigate and address human rights violations committed since 1994 against ethnic Hutus".[865]

A successful investigation requires that victims and witnesses be allowed to approach the investigators freely, giving their testimonies without fear. If these actors are intimidated or fear reprisals, they might choose not to appear before the investigators or, if they do, withhold essential information or change previous statements. The Darfur Report noted that witnesses "feared reprisals if they resorted to the national justice system" and that "few victims lodged official complaints regarding crimes committed against them or their families due to a lack of confidence in the justice system".[866] In the East Timor Report, Amnesty International and the Judicial System Monitoring Programme (JSMP) reported:

---

[863] Popkin 2002, p. 103.

[864] *Concluding observations of the Human Rights Committee 19 September 2003 (Guatemala)*, para. 16.

[865] *Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination (Rwanda)*, para. 18.

[866] *Report of the International Commission of Inquiry on Darfur*, *supra* note 777, paras. 586 and 587.

> "Victims and witnesses summoned to testify at the trials were not provided with adequate protection. Several witnesses from East Timor refused to appear before the court because they were not confident that their security could be guaranteed."[867]

In the Croatian *Lora Prison* cases in 2002, eight former military police officers were accused of having committed war crimes in the prison. The accused were low in rank, but it was believed that the criminal responsibility for the crimes extended to former political and military Croatian leaders. Amnesty International reported:

> "Reports of continuing intimidation and harassment of victims and witnesses at the trial […] raise serious concerns about the ability of Croatia to fulfil its obligations under international law to bring to justice those responsible for the worst possible crimes. […] [M]ost of the 14 prosecution witnesses heard by the court have retracted the detailed statements they made during the criminal investigation into human rights violations in Lora prison. […] Some witnesses have stated publicly that they retracted their statements after receiving continuous threats since investigative proceedings opened in September 2001. A key prosecution witness, a former military police officer, who repeatedly spoke out publicly about the human rights abuses in the prison, has reportedly been subjected to such serious threats to himself and his family that he has gone into hiding."[868]

Such intimidations and harassments may or may not form part of a state policy, but the state has an objective duty to prevent them. Absolute security is difficult for the state to guarantee. The question is whether the state does its best to protect the parties involved in the proceedings. If the failure to prevent the intimidation cannot be attributed to the state's unwillingness, it might instead amount to inability.

x. Inappropriate assignment of the case

Where more than one court has jurisdiction over a case, decisions concerning which court should hear the case should be made by the judiciary and be based on objective factors. The assignment of cases to judges within a given court should be an internal matter of judicial administration.[869] A subtle way of shielding the perpetrator is to assign the case to inexperienced investigators, prosecutors and/or judges. This strategy might be difficult to reveal, as the participants in the judicial process might

---

[867] *Ibid.*

[868] *Croatia: Victims and witnesses in war crimes trials must be adequately protected*, Amnesty International, Press Release, 20 June 2002 (available at http://web.amnesty.org/library/Index/ENGEUR640022002?open&of=ENG-HRV).

[869] *UN Basic Principles on the Independence of the Judiciary*, *supra* note 544, principle 14.

be acting in good faith but still be bound to fail due to their inexperience. Although no alarming factor in itself, appointing a particularly skilled defence could increase the effect of an unskilled prosecutor. Where the discrepancy between the parties is conspicuous, the indication of unwillingness will be stronger. As an illustration, Amnesty International and the Judicial System Monitor Program (JSMP) reported that the East Timor proceedings in Jakarta lacked credibility noting:

> "A lack of experience among key officials, including judges and prosecutors, was reflected in sloppily drafted indictments and questions and cross-examinations which failed to address the evidence effectively."[870]

xi. Special judicial organs

If powers are allocated from the civil judiciary to special jurisdictional organs, such as military investigative commissions and military tribunals (special tribunals), this might imply that the law no longer is independently applied. Referring to the situation in Colombia, the HRC has noted with concern that

> "the concept of service-related acts has been broadened by the Higher Adjudication Council to enable the transfer from civilian jurisdiction to military tribunals of many cases involving human rights violations by military and security forces. This reinforces the institutionalization of impunity in Colombia since the independence and impartiality of those tribunals are doubtful."[871]

Instead of professional lawyers, special tribunals are typically composed of government officials, militias, reservists and other supporters of the ruling political party; *i.e.* persons who will often lack the required integrity. Fundamental rights, such as the right to appeal and the right to see all the evidence, are sometimes removed. Instead summary administrative checks are exercised, often based on biased opinions. A problem with such proceedings is also that there typically will be an increased risk of decision makers being instructed by the executive or military leaders (see the discussion regarding lacking independence below). In addition, the process is typically held *in camera*, away from external observers. When the latter is

---

[870] *Indonesia: East Timor trials deliver neither truth nor justice*, Amnesty international Press Release15 August 2002 (available at http://www.amnesty.org/en/alfresco_asset/59d187b8-a438-11dc-bac9-0158df32ab50/asa211212002en.html).

[871] *Concluding observations of the Human Rights Committee 19 September 2003 (Colombia)*, para. 18.

the case, general information regarding the adequacy of a state's proceedings will have added relevance.

The IACmHR has noted with concern that cases sometimes are allocated from the ordinary judiciary to special tribunals where the proceedings are not public and other due process guarantees are lacking. In a report regarding the situation in Ecuador, the Commission noted that such transfer to special courts often happened where the suspects were military personnel but the allegations, typically of human rights violations, were such that the cases properly belonged in ordinary courts. The Commission noted:

> "Individuals seeking judicial recourse against a member of the security forces of the State may be impeded by the misuse of tribunals of special jurisdiction. The exercise of such jurisdiction on the part of police and military courts is not limited to cases involving conduct in the line of duty of the members of those institutions. Police and military defendants are frequently tried in special courts in relation to charges concerning common crimes. The Commission was told that these processes are not made public, hearings before these instances are closed, and the results are not easily accessible."[872]

The Commission noted that there was strong suspicion that the proceedings against police and military defendants were not independent and impartial:

> "Moreover, a number of NGOs indicated concern over the reluctance of these instances to issue sentences against their own members. In fact, a November 1995 accounting from the Subsecretary of the Police to the President of the Human Rights Commission of the Congress of actions within the jurisdiction of the police courts indicated that almost none had resulted in the issuance of a sentence. Of the 4,568 cases initiated since 1985, only 46 had resulted in provisional sentences, and only 5 had resulted in final sentences. The majority remained in process or had been archived. More than 50 had been declared prescribed."[873]

In accordance with the terms of the American Convention and its jurisprudence on this issue, the Commission recommends that the State take the internal measures necessary to limit the application of the special jurisdiction of police and military tribunals to those crimes of a specific police or military nature, and to ensure that all cases of human rights violations are submitted to the ordinary courts."

Where special tribunals apply material or procedural rules that are more lenient than the ordinary this strongly indicates a purpose of shielding. As these tribunals are not part of the ordinary judiciary, there is an increased chance that the executive

---

[872] *Report on the Situation of Human Rights in Ecuador*, Chapter 3.
[873] *Ibid*.

unduly influences their personnel. A crucial question is whether the judges are answerable to superiors in their performance of the administration of justice. Again, the point is whether a deviation truly reflects the state's bad faith, and this is not always easy to determine. In response to the alleged mistreatment of Iraqi prisoners by US personnel in the Abu Grahib prison, a military tribunal, applying more lenient procedures than the normal, was set up to prosecute some of the suspects. This prompted some comment to remark that the use of a military tribunal reflected a purpose of shield the perpetrators, including the more responsible superiors. On the other hand, some countered that more lenient procedures *vis-à-vis* some perpetrators might be justified by an underlying purpose of strengthening the cases against superiors. At this point there might be differences between legal cultures: some accept lenient justice in return for cooperation, and some do not. The ICC Prosecutor must have due regard to such differences when he or she assesses the admissibility as the point is to determine the underlying intentions.

Instead of special tribunals, a state might establish special enquiry commissions or quasi-legal "tribunals" or truth and reconciliation commissions, possibly in combination. The allocation of cases to such organs might, depending on their legal regime, mandate and powers, suffer shortcomings such as those referred to above. Truth and reconciliation commissions are discussed in a separate chapter.

xii. Insufficient thoroughness of the proceedings

The ICC Prosecutor must assess whether the national proceeding is conducted with sufficient thoroughness. In so doing, it must be borne in mind that the complementarity principle grants states a generous margin of appreciation not only as to how they carry out the investigation, but also as to the thoroughness. Not any lack of thoroughness will indicate a purpose of shielding the perpetrator. What is required is that the effort reflects the state's intent to bring the perpetrator to justice. The fact that the investigators merely are doing a sloppy job will not, for instance, indicate unwillingness. This was stressed by several states during the negotiations. An investigation which is only superficial will, however, less likely be considered as genuine. Regard must be had to the fact that investigating international crimes is inherently complex. In *Velásquez Rodríguez v. Honduras* the IACtHR noted:

> "In certain circumstances, it might be *difficult* to investigate acts that violate an individual's rights. [The investigation] must be undertaken in a *serious manner* and not as a mere formality preordained to be ineffective."[874]

As will be discussed below, an "unjustified delay" in the proceedings might indicate a state's unwillingness. It should also be noted, however, that the converse situation also might be relevant. The prosecution of international crimes, with their immense complexity, requires solid preparation where all parties involved should be given adequate time. A particularly speedy investigation or prosecution may result in a poorly prepared case or an erroneous verdict. The reason for an uncharacteristic speediness might be a state's wish to whitewash the crimes as quickly as possible.[875] A lack of persistency and a premature conclusion of the investigation might also be a relevant indication. The persistency must be compared with that demonstrated by the state in comparable cases. In *Velásquez Rodríguez v. Honduras* the IACtHR noted that

> "[t]he duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared".[876]

xiii. Failure to take essential investigative steps; Other deviations from the normal

Where essential investigative steps are not taken, this might indicate unwillingness. Such failure may include the failure to search for and when possibe apprehend the suspect (as for the collection of evidence see below). Failing or waiting too long before circulating an arrest warrant, requesting extradition, confiscating passport or money or otherwise preventing the suspect's absconding will be relevant indications of unwillingness. Further, the suspect must be duly confronted with the allegations once apprehended.

Failure to execute technical steps, such as the exhumations and examinations of dead bodies, the visiting of the crime scene and medical examination of alleged victims, might also be indicative of a purpose of shielding. If the investigators do not conduct such steps in due time, this will be relevant, even when the steps are carried out later, as it generally will become increasingly difficult to register and secure technical evidence and witness testimonies. If the investigators completely fail to interview witnesses, this will strongly indicate unwillingness.

---

[874] *Velásquez Rodríguez v. Honduras*, para. 177.
[875] Agirre *et al.* 2003, p. 30.
[876] *Velásquez Rodríguez v. Honduras*, para. 181.

If the investigation otherwise *deviates from the norm*, this might be a sign of bad faith. Deviations which favour the suspect might include offering the suspect excessive information; committing procedural "mistakes" which render evidence useless, such as failing to present a search warrant or failing to inform the suspect of his or her rights; giving persons who might be inclined to tamper with evidence access to the scene of the crime or essential exhibits; and assigning the investigation to persons who are hostile to the suspect in order to establish a mistrial.

A state's unwillingness to conduct a genuine trial might be indicated by irregular conduct by the prosecutor, the defence, the judges and jurors as well as by the executive's undue interference. In adversarial common law systems where judges play a less active role, the effort of the prosecutor is crucial for a successful prosecution. In inquisitorial *civil law* systems where judges play a more active role, the Prosecutor's effort will be somewhat less crucial. Judges with the authority to decide on both procedural and material matters will have the power to shield the accused from criminal responsibility. As noted, in order to truly indicate "unwillingness", as referred to in article 17, irregularities must reflect the state's policy; otherwise it might instead amount to inability.[877]

xiv. Inadequate collection and use of evidence

If the investigators gather insufficient or irrelevant evidence, this might indicate a purpose of shielding the person concerned. If the ICC Prosecutor finds there is essential evidence which the authorities knew existed but failed to collect, the indication is strong. The ECtHR has noted:

> "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."[878]

---

[877] Agirre *et al.*, p. 14, para. 45.

[878] *Jordan v. United Kingdom*, para. 107.

An investigation might also be one-sided in two senses: a state might investigate only the crimes committed by one party, or it might ignore inculpatory evidence when it investigates the other party. Such ignorance seems to have been at issue when the Darfur Report noted:

> "While the report of the National Commission of Inquiry established by President acknowledged some wrong-doings on the part of the Government, most of the report is devoted to *justifying and rationalizing* the actions taken by the Government in relation to the conflict."[879]

The investigation of international crimes will often involve witnesses from foreign states, such as personnel from peacekeeping forces, humanitarian personnel, media personnel, officials from human rights organisations or other international experts or observers. If the investigating state fails to seek information from such sources, this is a relevant indication.

Further, an investigation might be one-sided in two senses: a state might investigate only the crimes committed by one party, or it might ignore inculpatory evidence when it investigates the other party. Such ignorance seems to have been at issue when the Darfur Report noted:

> "While the report of the National Commission of Inquiry established by President acknowledged some wrong-doings on the part of the Government, most of the report is devoted to *justifying and rationalizing* the actions taken by the Government in relation to the conflict."[880]

For an investigation to be effective the state not only needs to obtain the necessary evidence, it must also preserve it and make adequate use of it. If crucial evidence is lost or destroyed, or erroneously deemed irrelevant, this might indicate bad faith. Crucial evidence can be rendered useless in sophisticated ways. It is, for instance, difficult to determine the genuineness of a state's finding that a witness is not credible. The fact that detailed reports regarding the state's investigation often are difficult to obtain makes it difficult to assess the genuineness of such findings. A successful subsequent prosecution will, however, depend heavily upon how the evidence is weighed at the conclusion of the investigation. This will also affect the prosecutorial decision which might be made by others than the investigators.

---

[879] *Report of the International Commission of Inquiry on Darfur*, *supra* note 777, para. 587 (emphasis added).

[880] *Ibid.*, para. 587 (emphasis added).

Generally, if inculpatory evidence is downplayed or exculpatory evidence exaggerated (or even fabricated), these are relevant indications.[881]

Another indication is when a decision not to prosecute is made prematurely, before all available evidence is collected and properly examined. For instance, a commentator has noted that the decision of an Indonesian prosecutor not to indict an Indonesian lieutenant who allegedly had shot down a Dutch journalist in September 1999 was highly dubious as the authorities declined to interview reported eyewitnesses to the shooting.[882]

Once there is a prosecution, the accused cannot be convicted unless sufficient evidence is presented. Failure to present sufficient evidence where it exists is a strong indication of a purpose of shielding. For the admissibility determination the evidence presented at trial should therefore be compared with the evidence documented by other reliable sources, including NGOs and national as well as international inquiry commissions. In the East Timor Report, Amnesty International and JSMP concluded:

> "Key evidence regarding the direct involvement of the Indonesian security forces in committing serious crimes was not presented to the court. Such evidence has been well attested in expert investigations including by Indonesia's own Commission of Inquiry on Human Rights Violations in East Timor […], the United Nations (UN) International Commission of Inquiry and in investigations carried out by the UN Serious Crimes Unit in East Timor."[883]

xv. A decision against prosecution seems unwarranted

The ICC Prosecutor should look for national outcomes which appear to be at odds with the facts that he or she has available. Nevertheless, while it might be tempting, there are compelling arguments against an automatic inference of non-genuineness where the ICC Prosecutor finds that the suspect is guilty beyond reasonable doubt. The national prosecutor and the ICC Prosecutor might not base their decisions on exactly the same facts. Where the national prosecutor failed to establish important facts but this was not the result of unwillingness or inability, the ICC Prosecutor has no authority to interfere. If, however, new evidence has appeared which seems to warrant a re-opening and the national prosecutor decides not to reopen the case

---

[881] Agirre *et al.* 2003, p. 31.

[882] Murphy 2002.

[883] *Indonesia: East Timor trials deliver neither truth nor justice*, *supra* note 870.

despite the possibility to do so, this might be indicative of the state's unwillingness to bring the person to justice.

The fact that the ICC Prosecutor is convinced that he or she would have done a better job and ensured a conviction is not sufficient ground for interfering. In brief, the ICC is no regular review court. It should also be noted that the ICC prosecutor, when the admissibility determination is made, typically will not, as opposed to the national prosecutor, have conducted a full investigation. Moreover, even if the same facts have been established at both levels, there might be genuine prosecutorial disagreement as to whether a *prima facie* case has been established. The ICC Prosecutor is not intended to second-guess this discretional national decision either.

Plea bargains with persons suspected of having committed ICC crimes, removing the option of prosecution, might indicate a purpose of shielding the perpetrator concerned. Such deals might, however, also under the circumstances be legitimate, such as when they enable the state to prosecute more responsible persons. Reference is made to the comments regarding such deals in the discussion above on the "genuinely" criterion.

xvi. Inappropriate place of the trial

The choice of the region in which to hold the trial might be important. If the trial is conducted in a region which is friendly toward the accused, this might influence the judges and jurors appointed, thereby favouring the accused. In a report regarding criminal trials conducted in Croatia**,** Amnesty International noted that

> "the public prosecutor today filed a motion to the Supreme Court for the case to be transferred to another court, as the Split County Court could not be considered to be impartial in this case due to the incessant pressure by supporters of the defendants. The trial has been postponed until further notice. […] In December 2001 further concerns arose over undue interference in the judicial proceedings when the Split-Dalmatia County Prefect visited the suspects in prison and subsequently made statements to the media implying they were innocent."[884]

With regard to the Indonesian Jakarta trials, Judicial System Monitoring Programme reported that witnesses

> "found it difficult to testify freely with shouting and agitating observers, while outside the court there are groups who always stage demonstrations against them.

---

[884] *Croatia: Victims and witnesses in war crimes trials must be adequately protected*, *supra* note 868.

> […] Such a condition can be categorized as a form of pressure, and the bailiff should have been instructed to provide order in the process."[885]

Such hostile surroundings might seriously reduce the chances of a successful trial, irrespective of the good faith of those directly involved in the trial. The presiding judge might, if not already biased, be reluctant to render an unpopular conviction. In addition, difficulties in establishing sufficient facts due to disturbing surroundings will most probably benefit the perpetrator due to the *in dubio pro reo* principle.

xvii. Inadequate indictment

Another way of shielding the accused is to issue an inadequate indictment. As for the factual description, the indictment might, for instance, refer to fewer killings than the real number or the indictment might fail to mention important facts such as the civilian status of victims. An inadequate description of the perpetrator's role in the crime might also be relevant. The conduct might be described as failure to control subordinates, while in reality the person ordered the commission of the crimes. Another factual circumstance essential to international crimes which might not be mentioned is the context in which the crimes were committed. Relevant contexts might be an armed conflict, a widespread or systematic attack or pursuant to a state policy to destroy a protected group. Such context is what distinguishes international crimes from ordinary crimes, and failure to reflect it might, under the circumstances, be viewed as an attempt to shield the perpetrator. In the East Timor Report, Amnesty International and the JSMP noted:

> "The indictments presented a version of events which did not reflect the widespread and systematic nature of the crimes which took place in East Timor in 1999 and failed to address the role of the Indonesian security forces in setting up and supporting militia in East Timor."[886]

Where the international label (*e.g.* genocide) is not applied, the indictment and judgement should mention the relevant facts that make the crime international. It does not suffice only to mention those facts that are strictly necessary to achieve a conviction for the lesser crime (*e.g.* murder). All relevant elements should be mentioned, even though not strictly necessary in order to convict because such elements might be highly relevant to the determination of the penalty. In light of the

---

[885] *Ad hoc human right court for East Timor is below standard*, The Institute for Policy Research and Advocacy, 2002 (available at http://www.elsam.or.id/txt/english/publications/progrep4_eng2.htm).

[886] *Indonesia: East Timor trials deliver neither truth nor justice*, *supra* note 870.

suspect's due process rights, however, the facts mentioned in the judgement must have been proven during the trial. If entire incidents have been disregarded in an otherwise genuine proceeding, this will automatically lead to the admissibility of cases corresponding to the incident not covered, as the result of inaction.

As for the characterisation of the conduct, the Rome Statute establishes no duty to use the "international" labels genocide, crimes against humanity and war crimes. Yet if the elements that make the conduct fall under the Statute are not mentioned, this might indicate a purpose of shielding. With such inadequate indictment, the perpetrator will hardly be held responsible in an adequate manner. Where a state fails to apply an existing national provision on genocide, *etc.*, this might still be justified by reference to the difficulty of successfully prosecuting international crimes. Proving the genocidal "intent to destroy" is, for instance, extremely difficult.[887] As long as the national prosecutor indicted for a lesser crime because the prosecutor *reasonably* feared that he or she would not manage to ensure a conviction of a graver crime, the purpose is not to shield the perpetrator, rather the opposite. One might disagree with the choice, but that is another matter. It may be noted that the wording "shielding the person concerned from criminal responsibility *for crimes within the jurisdiction of the Court referred to in article 5*" could be understood to the effect that the international labels should be used, but it is submitted that the above reflects the correct understanding.

Another sophisticated way of shielding the person concerned is the converse: to issue an indictment that aims too high, so that the accused is acquitted due to lack of sufficient evidence, for instance by charging a person with genocide when the better prosecutorial choice would have been to charge for crimes against humanity.

An attempt to play down the role of state officials in the crime will strongly indicate a purpose of depriving the crimes of their character as policy-oriented and of shielding these officials. With regard to the Jakarta trials, the International Crisis Group reported:

> "Both prosecution and defence portray the events of 1999 from a civil conflict involving two violent East Timorese fractions in which Indonesian security forces were concerned and sometimes helpless bystanders. The evidence that this was not the case is overwhelming. […] If the judges acquit the defendants, international outrage is a certainty. But even if they convict, the gravity of what occurred in East

[887] Zimmermann 2003, p. 179 *et seq*. In fact, *Prosecutor v. Akayesu* (ICTR, 1998) was the first case where an individual was convicted of genocide. The difficulty of prosecuting genocide lies first of all in proving the specific genocidal intent to destroy a group of people.

> Timor will remain hidden, and the concept of crimes against humanity will be trivialized."[888]

The findings in the Jakarta trials strongly contrast the findings of the Special Panels in Dili that

> "beyond reasonable doubt […] there was an extensive attack by pro-autonomy armed groups supported by the Indonesian authorities targeting civilian population in the area, namely those linked with political movements for the self-determination of East Timor".[889]

Failure to describe the situation adequately combined with systematic misinformation might create a popular view that the state has acted legitimately. In the situation described, the intention of Indonesian authorities was probably to create the view that a majority of the East Timorese wanted integration with Indonesia, and that the United Nations ballot, which indicated another result, was manipulated.[890] Consequently, the intention was to justify the military actions that subsequently took place.[891]

If the national prosecutor seeks an inferior penalty to what would normally be imposed for similar crimes in the same judicial system this will also be relevant. In some systems the prosecution is allowed to enter into deals with the accused during the trial. Charges may be dropped and lesser punishments may be offered in return for cooperation. Such deals are controversial, but they are not prohibited under international law. The question remains whether the agreement is made in good faith. If the state has agreed to drop charges or has settled for a minor punishment when it did not seem to be justified, this indicates a purpose of shielding.

xviii. Anonymous judges or witnesses

Using anonymous judges can be legitimate. For instance, faceless judges have been allowed in Columbian trials against drug traffickers due to the extraordinary security risk involved. Failure to grant such anonymity might, under the circumstances, in fact indicate unwillingness if such arrangements are allowed in comparable cases. A more common indication of unwillingness, however, is the converse situation where

---

[888] *Indonesia: Implications of the East Timor Trials*, International Crisis Group, 8 May 2002, pp. 12-13 (available at http://se2.isn.ch/serviceengine/FileContent?serviceID=10&fileid=62B701FD-5B10-FC39-8715-14057C59549D&lng=en).

[889] *Prosecutor v. Joni Marquez et al.*, para. 686.

[890] Moore 2002.

[891] Bertodano 2004, p. 94.

a system uses anonymous judges. Such anonymity might make it easier for a judge to shield the perpetrator as there is less chance that he or she will be held responsible for his or her impartiality afterwards.

Granting witnesses anonymity might also be fully legitimate and even necessary in order to ensure that they appear before the court. Some systems do not allow such anonymity, however, as it is considered in violation of due process guarantees. Where such anonymity normally would be granted, a failure to grant it might indicate a purpose of shielding. The state might, however, alternatively offer a witness protection programme. If defence witnesses are offered such arrangement but prosecution witnesses are not, this will strengthen the indication of unwillingness. Indeed, prosecution witnesses are usually the ones who are protected.

xix. Irregular trial proceedings

If the officials involved proceed in a way which deviates from internationally recognised standards in a manner favourable to the suspect, this might indicate a purpose of shielding. Reference is made to the discussion of factors (b) and (c) below. Such deviations might be dubious rulings allowing inculpatory evidence or not allowing exculpatory evidence. Again, it is important to be mindful of differences between various systems, *e.g.* between common and civil law.[892] If the judge does not let prosecution witnesses make full statements or allows them to be intimidated, these are relevant indications. If the judge fails to maintain order in court, he or she fails for instance to remove threatening persons, this is also relevant. With regard to the *Lora Prison* cases, Amnesty International reported:

> "Neither the presiding judge nor the court police appear to have made any serious attempts to maintain order in the court, where an estimated 80-strong group of supporters of the accused continuously disrupt proceedings. The authorities need to consider the special protection needs of victims and witnesses who might be re-traumatized by this combination of events."[893]

If the judge's instructions to the jury or lay judges as to how the law and facts are to be understood are misleading, this might also indicate a state's purpose of shielding.

Further, if there has been irregular contact between the prosecution and the defence, or if there has been improper contact between one party and the judge, this

---

[892] For instance, common law systems have stricter rules for allowing evidence than those of civil law.

[893] *Croatia: Victims and witnesses in war crimes trials must be adequately protected*, *supra* note 868.

might indicate unwillingness. The indication would be particularly strong in adversarial systems where there is a strong tradition for separating the two parties.

If the participation of defence witnesses is facilitated by refund of expenses and various kinds of protection, while the participation of the prosecution's witnesses is not, or if there is a pressure on defence witnesses to appear while there is no similar pressure on prosecution witnesses, this might further be a relevant indication.

A sophisticated way of shielding the person concerned is to make deliberate procedural mistakes so as to allow for a mistrial where the accused effectively is acquitted. Such "mistakes" could for instance entail collecting evidence or arresting the accused in violation of his or her rights, storing the evidence in an insecure way where it could be tampered with or letting the crime be statute-barred during the course of the proceeding.

xx. Political interference

The government might interfere in ongoing criminal proceedings in ways that effectively shield the perpetrator, *inter alia*, by imposing jurisdictional restrictions, introducing extraordinary trial procedures or by proclaiming changes in the substantial criminal provisions. The East Timor Report noted:

> "In addition to procedural failures the two organizations have been concerned by the succession of decisions by the Indonesian authorities which undermined at an early stage the prospect of a credible or effective justice process. Such obstacles included a decision by President Megawati Sukarnoputri to *limit the jurisdiction* of the court such that it can only hear a handful out of the many hundreds of cases of serious crimes that were committed in East Timor during 1999."[894]

xxi. Lack of transparency; Abuse of media

The single most important factor for a genuine proceeding is perhaps transparency. The more transparent a system is the less corrupt will it be. When combined with democracy, transparency is an effective means for ensuring genuine criminal proceedings. The ICC Prosecutor should therefore assess whether a state's system is sufficiently transparent. When the system is not, this is not only indicative of irregularities; it will also be more difficult for the Prosecutor to obtaining credible and sufficient information on a given national proceeding.

---

[894] *Indonesia: East Timor trials deliver neither truth nor justice*, *supra* note 870 (emphasis added).

Decisions not to prosecute alleged crimes should be registered by the state for the purpose of possible review. Such registration should include a description of the proceedings, the facts established and the reasons for the decision against prosecution. Failure to make such registration might indicate unwillingness. Further, if evidence is destroyed sooner than what is usual, this is a relevant indication. The state might also claim that it has not registered the proceedings, when it in fact has, in an attempt to conceal irregularities.

If a trial is conducted behind closed doors, this might indicate that the state is concealing something. A state must, however, be allowed to close a case due to a limited number of privacy and security reasons.

It has become increasingly common for human rights organisations, such as Amnesty International, Human Rights Watch and Judicial System Monitor Programme, to monitor trials of persons accused of having committed international crimes. This monitoring represents an important objective check on national proceedings. Such observations are usually reflected in *ad hoc* reports, some of which are referred to in the present discussion, or in annual reports of the organisations. Such reports can be very helpful to the ICC Prosecutor as he or she assesses the proceedings' genuineness.[895] They make it increasingly difficult for states to shield the perpetrators, and failure to allow observers might be indicative of such a purpose. Arguably, a presumption of such a purpose might, under the circumstances, be justified. On some occasions, observers have experienced various forms of intimidation aimed at keeping them away. From the *Lora Prison* cases, Amnesty International reported how

> "members of local human rights organizations and journalists monitoring the trial have reportedly also been intimidated. One human rights activist, who was verbally abused and menaced by supporters of the accused, was apparently only able to leave the building under the protection of Organization for Security and Co-operation in Europe representatives."[896]

As part of the effort to make their legal systems more credible, several Latin American states have moved away from a written, inquisitive process to an oral, adversarial and more accessible process. Before these changes, the inquisitorial procedures in these systems were often "unclear [as to] who was actually making

---

[895] Article 15 (1) and (2) of the Rome Statute, which refer to "information from […] non-governmental organizations, or other reliable sources that he or she deems appropriate", would include such reports.

[896] *Croatia: Victims and witnesses in war crimes trials must be adequately protected*, *supra* note 868.

decisions and on what basis".[897] Now, procedures are increasingly public, with the parties present and with all evidence presented before the judge, thus limiting opportunities for corruption and the delegation of judicial functions.[898]

Occasionally, states abuse their judicial systems to silence local media and other actors. In Sudan, in 2005, the Sudanese security forces prompted a court ruling which closed down the independent *Khartoum Monitor* newspaper. The newspaper had printed a critical editorial regarding the killing of war-displaced persons by police forces.[899] Also in Sudan, two staff members of the medical aid agency *Medicins Sans Frontieres*, who had spoken of crimes, were charged with "publishing false information" and "crimes against the state".[900] In a comment on this, the Director of Amnesty International's Africa Programme noted:

> "What we have here is a court system that is willing to silence newspapers and aid workers who are attempting to speak the truth about human rights violations in Sudan. How can we trust that same system to bring to trial those accused of these violations?"[901]

In authoritarian regimes, the executive branch often controls the media.[902] If the media is being used to generate support for one party to a conflict and hostility toward the other, this may indeed indicate that the state is shielding the perpetrator. If media coverage is instructed to favour the accused, this might influence judges and jurors, unless they are being isolated during the trial.

xxii. Inadequate outcome of the trial

An obvious way of shielding a perpetrator in a trial is to acquit erroneously or to impose an inadequate sentence. During the negotiations, several states and independent commentators wanted to include a provision authorising the ICC to interfere when the national court had imposed a trivial sentence that was not commensurate or grossly disproportionate with the gravity of the crime committed. It was argued that in such situations it should not be necessary to demonstrate a purpose of shielding or even that there had been a lack of independence or

---

[897] Popkin 2002, p. 124.

[898] *Ibid.*, p. 125.

[899] *Sudan Court for crimes in Darfur lacks credibility*, Amnesty International, 15 June 2005 (available at http://www.scoop.co.nz/stories/WO0506/S00215.htm).

[900] *Ibid.*

[901] *Ibid.*

[902] As an illustration, see He 2004, p. 11.

impartiality.[903] This criterion was not included, but as a factor for the admissibility determination an inadequate outcome remains important. It must *inter alia* be determined whether the law and/or facts have been wrongly interpreted or applied, including whether the facts established are irreconcilable with the evidence presented during the trial and whether the accused has erroneously been deemed inferior or unfit to stand trial.[904]

Further, an inadequate sentence might mean that the person concerned is partly shielded from responsibility. There is no doubt that the term "shielding" covers such partial shielding: according to article 78(2), the Court "may deduct any time otherwise spent in detention in connection with conduct underlying the crime". It must be determined whether the deviation from the adequate is sufficient so as to truly indicate a purpose of shielding; the penalty imposed must be compared to the level of punishment in the respective legal system, as the Rome Statute is not intended to assimilate national reactions. This is expressly provided in article 80.[905] In the Jakarta trials, 12 out of 18 indictees were acquitted and the remaining 6 received conspicuously lenient penalties compared to the gravity of the crimes and the Indonesian level of punishment.[906] If the determination of the punishment is reasoned, the reasoning must reflect a correlation among the evidence, the arguments and the legal basis.[907]

---

[903] Arguably, there should be a possibility to interfere where states routinely impose disproportionate sentences in certain types of cases, for instance cases regarding sexual violence.

[904] The proposal first tabled at the Rome Conference would have allowed a retrial where the national ruling had "failed to take account of all facts contained in the submission or the proceedings were conducted in the State concerned by evading the rule of international law for the manifest purpose of relieving the persons concerned or criminal responsibility", see *Report on the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, A/AC.249/1998/L.13, p. 47 (draft article 13[42] on *ne bis in idem*). The wording "failed to take account of all facts" would have made it easier for the ICC to seize jurisdiction over a case. On the other hand, when that alternative was finally removed, the term "manifest purpose" was replaced by the less strict "purpose".

[905] Article 80 provides: "Nothing in this Part [on penalties] affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties described in this part".

[906] For instance, in Jakarta the penalties imposed on those found guilty of having participated in the 1999 killings in East Timor have varied from three to ten years. Before the Special Panels in East Timor, the penalties for similar crimes have varied up to 33 years.

[907] Popkin 2002, p. 118.

If an appeal or retrial of a national acquittal is denied before the national courts, this too might indicate that there is no intent to bring the person concerned to justice.[908] If a national conviction is reopened, this might also be relevant. Below, it will be argued that a subsequent pardon given by a new government hardly will be relevant, but a reopening should arguably be viewed differently. When article 17(1)(c) uses the terms "has already been tried" and article 20(3) uses the term "has been tried by another court", the relevant trial would appear to be the last and final trial. If, on balance, the opening of a retrial raises serious doubts about the total proceeding's genuineness, it will be relevant. Demonstrating the perpetrator's guilt a second time, after a long time has passed, might be difficult, even if the second trial as such is conducted genuinely (*i.e.* the prosecutor and judge are acting in good faith). Conversely, failure to reopen an acquittal due to the discovery of new evidence, where such reopening is allowed,[909] might indicate that the acquittal was not in fact handed down in good faith.

xxiii. Inadequate enforcement of sentence

The perpetrator is not brought to justice unless an imposed sentence is genuinely enforced. A pardon shortly after the conviction, an early probation, a particularly lenient enforcement regime, a decision that the perpetrator is not fit to be in jail or an indefinite postponement of the enforcement can render a penalty meaningless, unless of course the respective decision is based on legitimate considerations. Due to the gravity of the ICC crimes, their enforcement must be prioritised. Yet, measures such as those just mentioned are not as such covered by the admissibility criteria. Instead, they might indicate a purpose of shielding which existed no later than when the judgment was handed down. If a new non-democratic regime for instance grants pardon to a person genuinely convicted by the previous regime, this might violate international law, but it is irrelevant to the admissibility determination. Where the government is still the same, however, the pardon might indicate a purpose of shielding. It should be noted that pardon and similar measures might be justified

[908] AfCmHPR has, in *Amnesty International and others v. Sudan*, noted that an effective appeal "is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice", see para. 37.

[909] Article 4(2) of Protocol No. 7 to the ECHR which provides that the *ne bis in idem* principle in article 14(7) of the ECHR shall not prevent the reopening of a case "if there is evidence of new or newly discovered facts […] which could affect the outcome of the case".

when an important part of the penalty is served and the perpetrator has behaved well, or when the society's level of penalties has changed or there has been a general change of attitudes *vis-à-vis* the crimes and the context in which they were committed. The concept of pardon is known to most legal systems, including that of the ICC.[910]

In this context it may be noted that article 110(2) of the Rome Statute provides that "[t]he Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person". Article 110(4) provides that the Court may reduce a sentence as a result of (a) the

> "early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions", (b) the "voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases [and in] locating assets subject to orders of fine, forfeiture or reparation which might be used for the benefit of victims", or (c) "other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence".

8.3.5. Factor (b): Unjustified delay

Delaying an investigation or a trial can be an effective way of shielding the perpetrator from criminal responsibility.[911] If the proceeding is delayed indefinitely, the suspect will never be brought to justice. A delay can make it gradually more difficult to proceed with a prosecution as witnesses become reluctant or unavailable, memory fades or becomes distorted or other evidence is destroyed or disappears. Generally, courts will be reluctant to hear old testimonies which might compromise the suspect's right to a fair trial.[912] A subtler motive for delaying the proceedings might be to cause a mistrial so that the suspect cannot be convicted. It should also be noted that, conversely, where a proceeding is particularly swift, this might also indicate unwillingness. The latter would, however, not be covered by factor (b) but be an indication under (a).

---

[910] Article 110(3) and (4) of the Rome Statute.

[911] This "unjustified delay" factor is not duplicated in article 20(3) as there no longer will be any delay when the trial is completed. A previous delay may, however, still indicate a "purpose of shielding".

[912] In many systems, international crimes are not, however, subject to statutes of limitation, and they may be tried decades after their commission.

Both slow progress and a full stop in the proceedings might constitute a delay. The fact that there is some minor progress, as opposed to a full stop, should not preclude the finding of a delay. Yet it will arguably be easiest for the ICC Prosecutor to apply the factor when there is a stop according to a decision to postpone or suspend the proceedings. Indeed, even a very slow progress does not necessarily constitute a delay. Investigating and prosecuting international crimes are time-consuming activities. "Delay" must therefore be understood relatively, measured against the reasonable progress of comparable cases in the same system or, sometimes better, in other national systems. Where the system is generally slow, slow progress in a given case should arguably not be considered a delay. It may also be noted that an international prosecutor's characterisation of national proceedings as delayed will readily appear ironic as international criminal proceedings are notoriously slow.

Where a state purports to be investigating or prosecuting, but fails even to demonstrate the proceeding's existence, Hall argues that this might be viewed as a "delay".[913] It should be noted, however, that factor (b) *presupposes* that a national proceeding exists. Therefore, the Prosecutor must first be satisfied that there is a proceeding. If not, the case is automatically admissible due to national inaction (it falls outside the scope of article 17).

8.3.5.1. The term "unjustified"

As noted in the historical survey, the term "undue delay" was originally proposed, but some states viewed it as too strict. States should be allowed to explain the reasons for the delay and have a dialogue with the ICC Prosecutor, they argued.[914] Others noted, however, that the term "unjustified" invited unwilling states to forward justifications, further delaying the proceedings at both levels.

Where the state offers justification for a delay, the delay becomes irrelevant. The justification must, however, not only be credible; it must also be legitimate, hence the term "justified". Justifiable circumstances might be unexpected obstacles, particularly uncooperative witnesses, illness, external disturbances, *etc.* The circumstance might be case specific or affect the entire judiciary. Because the final word is with the Court, the question is whether the ICC judges, on a preponderance

[913] Hall 2003, p. 16.

[914] Against this, it might be argued that it is inconceivable that the Prosecutor would interfere on the basis of information that there had been a delay without first giving the state the possibility to justify the delay.

of the evidence, are convinced that the delay is not the result of the state's unwillingness. It should be noted that investigating and prosecuting international crimes is inherently time consuming, not least due to the right of the accused to adequate time and facilities to prepare the defence. Thus, delays caused by a state's effort to comply with such due process requirements will not be "unjustified".[915] Faced with the allegation before human rights bodies that criminal proceedings have been unduly delayed, some states have pointed to the lack of adequate funding for the administration of criminal justice. In a human rights context, HRC has deemed this ground as irrelevant. In a case regarding Bolivia, the Committee noted that "the lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the state party does not justify unreasonable delays in the adjudication of criminal cases".[916] This statement is in line with a more general rule that such internal obstacles do not constitute valid excuses for the non-compliance with an international obligation.[917] In an ICC context, however, the issue remains whether the unjustified delay really is incompatible with an intention of bringing the suspect to justice. Then, a reference to economical obstacles, *etc.* might offer an alternative explanation for the delay which excludes unwillingness as a likely explanation.

Indeed, the words "inconsistent with an intent to bring the person concerned to justice" indicate that a delay might be unjustified but still not inconsistent with an intent to bring the person concerned to justice. If, for instance, an incompetent judiciary causes the delay while all actors act *bona fide*, the delay would scarcely be justified, but it would not be inconsistent with an intent of the state to bring the perpetrator to justice either. The term "inconsistent" should be understood subjectively and not objectively. The difference between proceeding for a "purpose of shielding" in factor (a) and conducting a proceeding that is "inconsistent with an intent to bring the person concerned to justice" is subtle. Technically, factor (a) requires the *existence of bad faith*, whereas (b) and (c) require *lack of good faith*. For all practical purposes, however, the difference is insignificant: all three factors are relevant only to the extent that they indicate the state's unwillingness, and therefore a delay is only relevant if it indicates bad faith.

In the negotiations, some states suggested that an "unjustified delay" could be relevant for the determination of "unwillingness" even where the state had acted in good faith. It was referred to situations where the state's intentions were good, but

---

[915] Benzing 2003, p. 611.

[916] *Fillastre, Bizouarn v. Bolivia*, para. 6.5.

[917] *E.g.* article 27 of the Vienna Convention on the Law of Treaties which makes domestic legal obstacles irrelevant as excuses for the non-compliance with treaty obligations.

individuals or organisations not representing the state manipulated the proceeding. As noted in the historical survey, Canada and Australia stated that the ICC should be allowed to intervene "when national courts were unwilling or unable to act *or* had acted in bad faith",[918] indicating that unwillingness should also cover some forms of good faith. The formulation seems, however, erroneously to expand the scope of the "unwillingness" criterion to non-state actors. Indeed, France remarked in the same discussion that what should be covered by the "unwillingness" criterion were situations where the state "*deliberately* undertook a bad faith [investigation or] prosecution".[919]

8.3.5.2. The right to be tried without undue delay

Human rights law requires that criminal proceedings are sufficiently speedy. According to article 14(3) (c) of the ICCPR, article 21(4) (c) of the ICTY Statute, article 20(4) (c) of the ICTR Statute and article 67(1) (c) of the Rome Statute, every person facing a criminal charge shall have the right to be tried "without undue delay". Similarly, article 7(1) (d) of the African Convention on Human and Peoples' Rights (AfCHPR), article 8(1) of the ACHR and article 6(1) of the European Convention on Human Rights (ECHR) require that trials be conducted "within a reasonable time". The meaning of the terms "without undue delay" and "within a reasonable time" appears for all practical purposes to be the same.[920] The HRC has stated that the right to be tried without undue delay is a guarantee that

> "relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."[921]

The purpose of the human rights rule is to ensure that the fate of the accused is determined without undue delay. This differs from that of article 17(2) (b) of the Rome Statute which is to ensure that the perpetrator is brought to justice. Here, the underlying purpose is not so much to ensure that the perpetrator is brought to

---

[918] *UN Press Release L/2773*, *supra*, note 268.

[919] *Ibid.* (emphasis added).

[920] *E.g. Fair Trials Manual*, Amnesty International USA (available at http://www.amnestyusa.org/International_Justice/Fair_Trials_Manual/page.do?id=1104744&n1=3&n2=35&n3=843).

[921] *HRC General Comment 13 (1984)*.

justice promptly as it is to ensure that the person is actually brought to justice. A delay might indicate that the state intends never to bring him or her to justice. Despite these important differences between the concepts, there are valid reasons why the human rights rule and its jurisprudence would be relevant for the interpretation of the term "unjustified delay" in the Rome Statute. The instruction in the Rome Statute that the consideration be made "having regard to the principles of due process recognized by international law" implies this. Moreover, in lack of detailed regulation of the issue in the Statute, a general standard must be applied, and the human rights rule no doubt establishes an authoritative and widely applicable standard in this respect. It represents a fundamental obligation, and the HRC has noted that "the rights set forth in the [ICCPR] constitute minimum standards which all States parties have agreed to observe".[922] It is submitted that if a national proceeding lasts longer, *i.e.* is unduly delayed, the state concerned will, in order to avoid ICC interference, have to convince the Court that it was nevertheless willing to proceed genuinely.

A study of the jurisprudence of human rights organs shows that there is no one-size-fits-all answer as to when too long time has elapsed in a national criminal proceeding. The organs take into account the individual circumstances of the case, including national legislation, the legal and factual complexity of the case, the availability of evidence and the conduct of the accused, witnesses and other actors involved. Regard is had to the criteria laid down in the organs' own case law.[923] The HRC has noted that the rule reflects an unconditional obligation: a state's "difficult economic situation" is, for instance, not a valid excuse (whereas it might be in an assessment of a state's willingness to proceed genuinely under the complementarity principle).[924] Because the relevant circumstances will vary, so will the amount of time allowed. Trials lasting as long as ten years have been deemed reasonable, while trials lasting less than one year have been found to be unreasonably delayed. In a case where a murder suspect in Panama was held without bail for more than three and a half years before his acquittal, the HRC found that the delay between indictment and trial "cannot be explained exclusively by a complex factual situation and protracted investigations".[925] In another case, the IACtHR found, having considered national legislation, the complexity of the case and the conduct of the proceedings and of the

[922] *Lubuto v. Zambia*, para. 7.3.
[923] *E.g. Kemmache v. France*, para. 60.
[924] *Lubuto v. Zambia*, p. 14, para. 7.3.
[925] *Del Cid Gómez v. Panama*, at 46.

authorities, that a period of 50 months to complete proceedings greatly exceeded the requirement of article 8(1) of the ACHR.[926]

Factors that will be of particular relevance when crimes of extraordinary magnitude are investigated and prosecuted are the serious nature of the offence, the number of charges against the suspect and the nature of the investigation and prosecution required. The ECtHR has noted, in general terms, that it "is not unaware of the difficulties which sometimes delay the hearing of cases by national courts and which are due to a variety of factors".[927] The same court has also, however, unequivocally noted that it "is for the Contracting States to organize their legal systems in such a way that their courts can meet" the requirement as to speediness.[928] Yet, when international crimes are investigated and prosecuted, more delays must be accepted than when the state deals with ordinary crimes. It is in principle for the state concerned to show that the complexity of a case is such as to justify the delay;[929] a mere affirmation that the delay was not excessive is not sufficient.[930]

Another relevant factor when the length of a proceeding is assessed is the number of people allegedly involved in the crime and the number of witnesses. In a case involving 723 accused and 607 criminal offences, the ECtHR held that a proceeding at the first instance of eight and a half years was reasonable, while subsequent delays, including a three-year period for the Martial Law Court to issue written reasons for its judgment, and appeals in two courts which lasted more than six years, exceeded a reasonable time.[931]

Yet another relevant factor is the conduct of the suspect. Delays caused by the suspect's attempt to abscond or his or her failure to cooperate are generally not attributed to the authorities. In addition, when delays are the result of applications by the suspect considered unnecessary and offering no chance of success from the outset, this has generally been viewed as deliberate obstruction by the suspect and irrelevant *vis-à-vis* the state. Such delays might, however, be considered differently when the suspect and the state seem to act with a common purpose of obstructing justice.

---

[926] *Suárez Rosero v. Ecuador*, para. 73.
[927] *Moreira de Azevedo v. Portugal*, para. 74.
[928] *Mansur v. Turkey*, para. 68.
[929] *Fillastre v. Bolivia*, para. 6.6.
[930] *Walker and Richards v. Jamaica*, para. 8.2.
[931] *Mitap and Müftüolu v. Turkey*, para. 36.

The obligation to proceed without undue delay exists regardless of the failure of the victim or his or her relatives to contribute to the proceedings. The ECtHR has for instance noted that the authorities "cannot leave it to the initiative of the next-of-kin […] to take responsibility for the conduct of any investigative procedure".[932] The state may not argue that domestic law leaves the initiative to the parties, who are expected to carry out procedural steps in a manner and within a time prescribed. The ECtHR has held that such law does not "dispense the courts from ensuring compliance with Article 6 as to the 'reasonable time' requirement".[933] The national judge has an obligation to intervene when necessary to expedite proceedings so as not to jeopardize the "effectiveness and credibility" of the administration of justice.

In one case, the ECtHR found that there was an unreasonable delay of the proceedings contrary to article 6 where, contrary to national law, the courts had held only an average of one hearing per month, and where they waited for almost six months before acquitting the applicants on the basis of newly repealed articles of the criminal code which had constituted part of the basis of the criminal charges against them. The total proceedings lasted a little less than four years and eight months.[934] In another case, the ECtHR considered that a lapse of 15 months between the filing of an appeal and its transfer to the registry of the relevant court of appeal was unreasonable, where the authorities offered no satisfactory explanation.[935]

The following report of the IACmHR on the human rights situation in Ecuador aptly illustrates the complexity of the issue of delays in domestic justice systems. After having noted how delays impair the rights of suspects, *inter alia* due to unjustifiably prolonged preventive detentions,[936] the Commission noted how delays also impair the rights of victims:

> "Such delay is also a terrible injustice for those victimized by crimes who seek to have the wrong against them adjudicated, and the perpetrator held responsible. The Commission is currently processing several cases where family members whose loved ones were murdered some years ago have sought unsuccessfully to bring the state agents allegedly responsible to justice. […]
>
> In extreme cases, delay may result in a form of legally sanctioned impunity for the perpetrators of violations. The Commission has received several reports of instances where it is alleged that state agents murdered individuals, but because the ten year

[932] *Jordan v. United Kingdom*, para. 105.
[933] *Dika v. The Former Yugoslav Republic of Macedonia*, para. 58
[934] *Yagci and Sargin v. Turkey*, paras. 66-70.
[935] *Bunkate v. The Netherlands*, paragraph. 25 *et seq*.
[936] Articles 25(1) and 8(1) of the ACHR.

> statute of limitations for homicide had expired prior to the conclusion of the prosecution of the case, any judicial determination of the charge was precluded. The Commission is currently processing a case which concerns a claim brought against a member of the National Police for allegedly having brutally beaten a minor child in 1989. The claim was initiated in 1990, and processed by the Second Court of the First District of the National Police. The agent was eventually dismissed from the corps, due to a number of outstanding claims against him, but the judicial action was declared prescribed in 1995."[937]

In the same report, the Commission also noted some of the causes of delays in criminal proceedings:

> "In discussions with judges in the system, the Commission was told that in some cases delay is the result of certain pressures. High-ranking Government officials referred to problems that have been caused with respect to the increasing number of cases related to drug-trafficking. One well known jurist indicated that judges processing charges concerning drugs may be visited by representatives of defendants who offer either bribes or threats or both. In such cases, he said, judges may be reluctant to issue any decision at all. Charges of widespread corruption in the system concern both judges and lawyers. The creation of the Judicial Council through the 1992 constitutional reforms was intended to centralize and strengthen disciplinary controls over judges."[938]

The latter statement illustrates the close relationship between factor (b) of unjustified delay and factor (c) of criminal proceedings that are not conducted independently and impartially.

8.3.5.3. Unjustified delay as an exception to the rule of "exhaustion of local remedies"

There is an exception to the rule of exhaustion of local remedies when there has been a certain delay. In the context of diplomatic protection, the ILC has noted:

> "That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts, human rights instruments and practice, judicial decisions and scholarly opinion."[939]

---

[937] *Report on the Situation of Human Rights in Ecuador*, Chapter 3.

[938] *Ibid.*

[939] *Draft Articles on Diplomatic Protection with commentaries*, pp. 79-80, para. (5).

The Commission has proposed that this exception be codified in the context of diplomatic protection. It has noted that it is "aware of the difficulty attached to giving an objective meaning to 'undue delay', or to attempting to prescribe a fixed time limit within which local remedies are to be implemented" and that "[e]ach case must be judged on its own facts".[940] The 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law proposed that "[l]ocal remedies shall be considered as not available […] [i]f only excessively slow remedies are available or justice is unreasonably delayed".[941] In her report *The Exhaustion of Local Remedies*, Kokott considers "unreasonably prolonged proceedings" an exception to the local remedies rule but does not suggest a separate provision on that exception.[942]

The ACHR provides that local remedies do not have to be exhausted when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies".[943] There is a similar rule in the ICCPR article 41(c).

In a case before the IACmHR, a complaint had been filed in 1997 alleging that Mexico was responsible for the unlawful detention, torture and extra-judicial execution of a Mexican citizen. The petitioners claimed that an "unwarranted delay has been shown that relieves them from having to wait upon the conclusion of the inquiries launched in Mexico".[944] Mexico alleged that the investigation "began immediately after the events occurred and that the authorities have pursued the case diligently".[945] The petitioners, for their part, contend that the investigation "was neither prompt nor effective, and single out a number of problems and delays in conducting elementary procedures, such as a reconstruction of the events and the inspection of the crime scene".[946] The commission noted:

> "[A]lmost 5 years have passed since Celerino Jiménez Almaraz's violent death was confirmed. During that time, a preliminary inquiry was undertaken as a result of which criminal proceedings were instituted against Mr. Lucio Esteban Vásquez Ramírez, alleged to be responsible for the events. The suspect was arrested on October 3, 2001. According to the information available to the Commission, the

[940] *Ibid*.

[941] *Draft Convention on the International responsibility of States for Injuries to Aliens*, article 19(2).

[942] Kokott 2000, pp. 623-24.

[943] Article 46(2) (c).

[944] *Maria Ramirez and Celerino Almaraz v. Mexico*, para. 16. See also the *Las Palmeras Case*, paragraph. 38.

[945] *Ibid.*, para. 18.

[946] *Ibid*.

> criminal case against that person has not concluded and the facts denounced have not been fully solved."[947]

Based on these findings, the Commission found, for admissibility purposes, that there had been "an unwarranted delay in the Mexican jurisdictional organs' decision regarding the facts denounced", and it consequently allowed the exception set forth in article 46(2) (c).[948]

In another case regarding the disappearance of 25 and the killing of 5 Colombian citizens allegedly carried out by paramilitary groups acting with the acquiescence and involvement of agents of the Colombian government, the Commission concluded with regard to the rule of exhaustion of local remedies:

> "The Commission notes that according to the information supplied by both parties, five years have passed since the events occurred, and the preliminary inquiry ended with issuance of arrest warrants for three persons. However, as the petitioners have stated and as the State has acknowledged, the only accused person being held is in custody for the alleged commission of events unrelated to the present matter. The other arrest warrants have not been carried out, despite the amount of time that has passed since the close of the investigation. This suggests delay. As a general rule, a criminal investigation must be carried out within a reasonable time, so as to protect the victims' interests, preserve the evidence and even safeguard the rights of any person who might become a suspect in the investigation. As the Inter-American Court has observed, while every criminal investigation must fulfill a set of legal requirements, the rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective."[949]

This case aptly reflects the concrete and complex assessment that is made when the effect of excessive delays in domestic proceedings on the exhaustion of local remedies requirement is determined. It is submitted that assessments regarding the admissibility factor of "unjustified delay" under article 17(2) (b) of the Rome Statute will be very similar to this.

In yet another case before the IACmHR, a citizen of Panama had disappeared at the hands of the National Guard more than 30 years ago. His family had spent these years with no knowledge of his whereabouts. The Commission noted:

> "In examining the parties' positions, the [Inter-American Court of Human Rights] notes that Mr. Portugal disappeared 30 years ago and that a *continuous situation*

---

[947] *Ibid.*, para. 19.

[948] *Ibid.*, para. 22.

[949] *Jose Milton Canñas Cano et al. v. Colombia*, para. 30.

> persists even to this day, as there has been no definitive judgment naming those responsible for these acts or identifying and establishing the whereabouts of the remains. […] [B]ased on the principle of the continuity of the State, international liability exists irrespective of changes in government. […] That being so, Panama is subject to international liability for violations of human rights committed by any government, be it a past government or the current government, regardless of whether that regime is *de jure* or *de facto*. The Commission therefore considers that, *prima facie,* there has been an unwarranted delay in prosecuting the criminal case that is investigating the facts. As this is the circumstance provided for in Article 46(2) (c) of the Convention, the petitioners are exempt from the rule requiring exhaustion of local remedies."[950]

While there is no doubt that a period of 30 years without a satisfactory conclusion constitutes an unreasonable delay in any context, the interesting point in this case is that delays under different regimes are cumulated. It is submitted that the same applies in an ICC context.

In the last case that will be referred to at this point, a Salvadoran child had disappeared in 1983, allegedly at the hands of the Salvadoran Army. The child's mother filed a complaint in 1996, 13 years later. El Salvador argued that "an investigation launched years after the fact cannot be completed as swiftly as need be, as the passage of time takes its toll on both the investigation and the evidence", and, viewed in that light, that the long time which now had passed without a conclusion of the case did not constitute an "unwarranted" delay.[951] The IACmHR noted:

> "In this case, members of the Salvadoran Army are allegedly responsible for the forced disappearance of a child, against the backdrop of the full-blown internal armed conflict being waged in El Salvador at that time. That era was characterized by systematic human rights violations and impunity, in part due to the dysfunctional Salvadoran judicial system. Given the particular circumstances of this case and the context in which the alleged facts occurred, the Commission considers that at the time of the alleged events no case could have been filed. Hence, exhaustion of domestic remedies was and is not required. […] Even now, on the date of the adoption of this report, the remedies under domestic law are still not functioning as effectively as they should to investigate a case of forced disappearance. Indeed, almost nine years have past since the Salvadoran judicial authorities first looked into this case, in response to a criminal complaint filed by

[950] *Heliodoro Portugal v. Panama*, para. 24.
[951] Para. 19.

> the child's mother on November 15, 1996. Yet as of the date of this report, they have not yet definitively established how the events transpired."[952]

The Commission concluded, with regard to the admissibility, that "given the time that has passed since the original events occurred […] or since the dates on which the judicial authorities took cognizance of the case […], one can make the case that an unwarranted delay has occurred that exempts the petitioners from the requirement to exhaust domestic remedies".[953]

8.3.6. Factor (c): Lack of independence or impartiality

Article 17(2) (c) lists the fact that the proceedings "were not or are not being conducted independently or impartially" as a factor for the "unwillingness" determination. This mirrors a fundamental right (arguably more fundamental than the right to be tried without undue delay) for the accused to be tried by an independent and impartial tribunal as reflected in all universal and regional human rights instruments.[954] It may be noted that the latter rule will be binding even on countries that have not ratified or acceded to the relevant human rights instruments as the rule clearly is a rule of customary international law and would also constitute a general principle of law. When the suspect is subjected to independent and impartial proceedings, he or she is per definition brought to justice. This is a necessary and sufficient precondition. Conversely, when the suspect is shielded from criminal responsibility, this is because the law is not being applied independent and impartially. As for the relationship between the two concepts, impartiality may or may not be the result of lacking independence. Independence implies freedom to follow the law and brings with it the responsibility to be impartial, but it is no guarantee of it.[955] The terms "independently" and "impartially" are not defined in the Rome Statute.[956]

---

[952] *Ibid.,* paras. 26 and 27.

[953] *Ibid.,* para. 31.

[954] ICCPR article 14(1), AfCHPR articles 7(1) and 26, ACHR article 8(1) and ECHR article 6(1).

[955] Principle 14 of the *UN Basic Principles on the Independence of the Judiciary*, *supra* note 544. Article 6 provides: "The principle of independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

[956] As for the ICC's own proceedings, however, article 40(1) provides that the ICC judges be "independent in the performance of their functions", article 54(1) that the Prosecutor "shall investigate incriminating and exonerating circumstances equally", article 67(1) that the

The assessment of independence and impartiality in the proceedings cannot be confined to the courts and judges. The investigation and prosecution (*i.e.* the tasks of the prosecutor) must also be carried out independently and impartially in order to bring the perpetrator to justice. Investigators and prosecutors need to be independent and impartial, at least when the domestic legal system requires this. It is therefore puzzling that rule 51 only refers to a state's right to provide information as to whether "its *courts* meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". Here, it should have been "investigative and prosecutorial organs and courts" instead of just "courts". Despite the wording, the Court should therefore admit and, to the extent reasonable, study information concerning the whole proceedings, provided it is submitted in good faith and not in an attempt to overburden or misinform the Court.[957] Such information – both general and specific – might be relevant for the "unwillingness" determination regardless of the state's active provision of it.

8.3.6.1. Independence

"Independence" means "the fact of not depending on another; exemption from external control or support; freedom from subjection, or from the influence of others; individual liberty of thought or action".[958] The Canadian Supreme Court has aptly noted that "independence" as a concept "connotes not only a state of mind but also a status or relationship to others – particularly to the executive branch of government – that rests on objective conditions or guarantees".[959]

The perhaps most obvious form of independence is the judiciary's institutional independence from the two other branches of state power: the executive and legislative branch.[960] According to Kaufman, independence in criminal law means "the preservation of separate official institutions that can investigate, prosecute and

---

accused "shall be entitled to […] a fair hearing conducted impartially" and article 41(2) (a) that a judge "shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground". The Statute does not elaborate these requirements.

[957] In support of this, article 17(2) (c) of the Rome Statute only refers to "the proceedings".

[958] *The Oxford English Dictionary*.

[959] *Valiente v. The Queen*, p. 2.

[960] The term "undue" is important as one branch cannot enjoy a total exemption from external control. Instead, there should be sound and legitimate mechanisms allowing the necessary control. Most modern democracies let the judiciary review the legality of the executive's decisions. Similar control *vis-à-vis* the judiciary is, however, less common. Judicial decisions are usually reviewed only within the judiciary.

adjudicate cases with impartiality".[961] Courts must decide matters before them on basis of the facts and in accordance with the law, without improper influence from the government or elsewhere. For instance, there were valid reasons to be sceptical to any criminal proceeding in some Latin American authoritarian countries in the 20th century. Here,

> "executive domination remained the rule; the judiciary was a subsidiary branch, often under the overt control of the executive branch and charged with ensuring that nothing would disturb those with political or economic power".[962]

In Guatemala, the Historical Clarification Commission (CEH) ascribed many of the shortcomings of the justice system to a lack of judicial independence:

> "The CEH concludes that, by tolerating or participating directly in impunity, which concealed the most fundamental violation of human rights, the judiciary became functionally inoperative with respect to its role of protecting the individual from the State, and is lost all credibility as guarantor of an effective legal system. This allowed impunity to become one of the most important mechanisms for generating and maintaining a climate of terror."[963]

As noted, lack of independence also represents an exception from the rule of exhaustion of local remedies. The leading authority in support of this is the *Robert E. Brown claim*, where the president of the South African Republic, Paul Kruger, had dismissed the chief justice for finding in favour of Brown's claims to certain mining rights, and both the president and the legislature of the Republic had denounced the decision of the chief justice. In these circumstances Brown was advised by his counsel that it was pointless to proceed with his claim for damages as the reconstituted High Court was clearly hostile to him. The tribunal that heard the international claim rejected the argument that Brown had failed to exhaust local remedies, holding that "the futility of further proceedings had been fully demonstrated, and that the advice of his counsel was amply justified". It was not necessary, said the tribunal, to exhaust justice "when there is no justice to exhaust".[964]

---

[961] Kaufman 1980, p. 688. Also, article 1 of the *UN Basic Principles of the Independence of the Judiciary*, *supra* note 544, provides: "It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

[962] Popkin 2002, p. 100.

[963] Tomuschat *et al*. 1999, para. 56.

[964] *Robert E. Brown (United States) v. Great Britain*, p. 129. See also *American Journal of International Law 19* (1925), p. 193.

Courts must be adequately resourced; they must have sufficient powers *vis-à-vis* political organs; and they must have the authority and power to ensure that judgements are enforced and, importantly, that political actors comply with their decisions. A court must also enjoy "exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law",[965] and the assignment of cases to judges within a court "is an internal matter of judicial administration".[966]

Institutional independence is not enough to ensure freedom for judges to decide according to the law; there must also be personal independence. Judges must not fear reprisals; they must act and decide *sine spe ac metu* (without fear and hope). While they are not free to decide matters according to their personal preferences (this is a matter of impartiality), judges are free (and have a duty) to decide cases according to the law free from undue external influence. This is of course particularly crucial with regard to the prosecution of international crimes where the stakes involved typically will be high and involve persons with considerable power and potential influence.

Personal independence means that a judge, in deciding a case, should not fear that the decision may result in criticism, reprisals or loss of tenure, *etc.* A fundamental factor is how judges are selected and appointed.[967] The criteria and procedures must be depoliticised as politically-selected judges can bring with them undue loyalty to the executive. It is illustrative that several Latin American states today have established "judicial councils", charged with recruiting and selecting personnel to the judiciary. Such councils typically have members from all three branches, and sometimes academics are included in order to further strengthen the council's credibility.[968] If judicial officials are not selected according to merit-based criteria (ability, integrity and experience), or if the selecting procedures are not

---

[965] For instance, the Council of Europe recommends to its member states that "no organ other than the courts themselves should decide on its own competence as defined by law", see *Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to member states on independence, efficiency and role of judges*, adopted 13 October 1994, Principle I.2.a.iii (available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(94)12.asp). The same principle is reflected in article 36(6) of the ICJ Statute and article 32(2) in the ECHR with respect to the respective Courts.

[966] Principle 14 of the *UN Basic Principles of the Independence of the Judiciary*, *supra* note 544.

[967] *Ibid*. Principle 10.

[968] *Ibid*. Principle 10 provides that any method of judicial selection "shall safeguard against judicial appointments for improper motives".

transparent, this might indicate (or result in) lack of independence. The HRC has, referring to the situation in Sudan, expressed concern that

> "the judiciary is not truly independent, that many judges have not been selected primarily on the basis of their legal qualifications [and] that judges can be subject to pressure through a supervisory authority dominated by the Government".

Therefore, the Committee recommended that "measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges".[969] With regard to Bolivia, the HRC has recommended that

> "the independence of the judiciary be ensured and a law regulating it be enacted [and that] the nomination of judges should be based on their competence and not their political affiliation".[970]

With regard to the judicial system of Zambia, the Committee has expressed concern that

> "the proposals made by the Constitutional Review Committee in regard to appointment of judges of the Supreme Court by the President after their retirement and the removal of Supreme Court judges by the President, subject only to ratification by the National Assembly without any safeguard or inquiry by an independent judicial tribunal, are incompatible with the independence of the judiciary and run counter to article 14 of the Covenant".[971]

Another factor which the ICC might take into account for the purpose of determining whether national proceedings are independent is the judges' security of tenure. With uncertain tenure, judges will, in principle, be more vulnerable to inappropriate influence.[972] Tenures vary from short terms to life tenure. Generally, short terms, and especially those that coincide with presidential periods, will not promote independence and impartiality.[973] In Guatemala, the UN Special Rapporteur noted that five-year terms did not provide sufficient security of tenure and that it "may be in violation of […] principle 12 of the United National Basic Principles on the Independence of the Judiciary". He recommended that the terms

---

[969] *Concluding observations of the Human Rights Committee 19 November 1997 (Sudan)*, para. 21.

[970] *Concluding observations of the Human Rights Committee 1 May 1997 (Bolivia)*, para. 34.

[971] *Concluding observations of the Human Rights Committee 3 April 1996 (Zambia)*, para. 16.

[972] Mullerat 2002, 4.5.2.

[973] Principles 11 and 12 of the *UN Basic Principles of the Independence of the Judiciary*, *supra* note 544.

be expanded to ten years.[974] With regard to Peru, the HRC has noted with concern that

> "judges retire at the end of seven years and require recertification for reappointment, a practice which tends to affect the independence of the judiciary by denying security of tenure".[975]

The Committee therefore recommended that "the requirement for judges to be recertified be reviewed and replaced by a system of secure tenure and independent judicial supervision".[976]

With regard to the situation in Ecuador, the IACmHR has noted:

> "Questions have been raised about the periods of appointment for judges, as well as about their security of tenure. Supreme Court judges are appointed by the Congress, after the selection of an equal number by each branch of Government. The judges serve staggered 6 year terms, and may be reelected. Judges will be appointed to the new Constitutional Court by the Congress after the selection of candidates by each Government branch as well as some private sector interests. These judges serve four year terms and may also be reelected. In light of the need for judicial impartiality and independence in decision-making, the brevity of these terms has been identified within the judiciary as a source of concern."[977]

The ECtHR has noted, with regard to the situation in Kyrgystan, that

> "the applicable attestation procedure for judges, the requirement of re-evaluation every seven years, the low level of salaries and the uncertain tenure of judges may encourage corruption and bribery".[978]

Further, real and full independence requires that judges cannot be dismissed without due process. Promotion and disciplinary mechanisms which can be accorded or imposed *vis-à-vis* judges for political reasons might influence the judiciary's independence. Disciplinary bodies might promote and be a check on the independence and impartiality, but if they are not themselves credible, they might promote the opposite.[979]

---

[974] *Report on the mission to Guatemala*, para. 60.

[975] *Concluding observations of the Human Rights Committee 18 November 1996 (Peru)*, para. 352.

[976] *Ibid.,* para. 364.

[977] *Report on the Situation of Human Rights in Ecuador*, Chapter 3.

[978] *Concluding Observations of the Human Rights Committee 24 July 2002 (Kyrgyzstan)*, para. 15.

[979] Principle 18 of the *UN Basic Principles of the Independence of the Judiciary*, *supra* note 544.

The IACmHR has criticised the situation in Ecuador noting that "[c]oncerns expressed about the system for removing judges focussed on the procedural inconsistency and lack of transparency of the process".[980]

The ICC should also be mindful that some forms of lacking independence are more subtle than others. For instance, formal independence might be worth little if the judiciary does not enjoy *economic* independence, both individual and collective. States must not only provide adequate resources to the judiciary as such; the judges must also feel economically secure. Today, some Latin American states constitutionally guarantee their judiciaries a percentage of the national budget (typically around two percent) in order to secure this.[981] Another relevant factor is whether judicial officials may receive money, gifts or be offered other advantages from politicians, economic elites or other powerful actors.

As for the individual assignment of cases, this should be an internal matter of judicial administration, and the political administration should not be able to assign cases to "loyal" judges. Importantly, the allocation of cases to special tribunals with procedures significantly deviating from the normal might indicate that tribunal's lack of independence.

States organise their legal systems differently, and the relationship between the branches of government may differ. In some systems, the executive instead of neutral councils appoints judges, and a judge may even hold a post in the executive branch while he or she functions as a judge. The ICC will have to recognise such differences and instead look for deviations from the regular practice within each system.

8.3.6.2. Impartiality

The term "impartial" means "not favouring one party or side more than another"; "unprejudiced, unbiased, fair, just, equitable".[982] Judges in criminal proceedings must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of any one of the parties irrespective of their relation with the authorities or with a particular political, religious or ethnic group. Facts must be established according to the evidence and be judged according to the

---

[980] *Report on the Situation of Human Rights in Ecuador*, Chapter 3.
[981] Popkin 2002, p. 121.
[982] *The Oxford English Dictionary*.

law.[983] This requires that police, investigators and judges have no personal interest in the case, or at least that they manage to detach from such interests. The HRC has noted that the notion of "impartiality" "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".[984]

Impartiality does not, however, imply that perpetrators are met with moral neutrality. Criminal law is not neutral; it expresses a public condemnation which is executed when courts apply the law. One might say that because law reflects a society's values and priority among them, it is crucial that those who apply the law manage to detach from personal views.

As any decision is taken in the individual's mind before it is formulated, the question of impartiality is subjective. It is not for anybody else with certainty to say what has prompted the decision. That there might be objective circumstances suggesting that the person was not impartial is another matter. Ideally, actors within the judicial system should not only subjectively decide matters impartially; the decisions should also be *perceived* as that as otherwise the system's credibility will be undermined. The ECtHR had this in mind when it noted that a tribunal "must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect".[985] For the purpose of the admissibility determination before the ICC, however, only the existence of independence or impartiality is relevant, as reflected by the words "were not or are not being". The purpose of the ICC is to combat impunity, not to ensure public confidence in national legal systems.

Just as an "unjustified delay", lack of independence or impartiality is only relevant if it is "inconsistent with an intent to bring the person concerned to justice". Reference is made to the comments above regarding this criterion.

Lack of independence or impartiality might sometimes be demonstrated by direct evidence, but must otherwise, be inferred. The ECtHR has noted that

---

[983] Principle 2 of the *UN Basic Principles of the Independence of the Judiciary*, *supra* note 544, provides that any decision shall be made "on the basis of facts and in accordance with law". As for the ICC, article 54(1) (a) provides that the Prosecutor shall "investigate incriminating and exonerating circumstances equally"; article 64(2) provides that the trial shall be "fair and expeditious and […] conducted with full respect for the rights of the accused". Further, article 67(1) provides that the accused shall be entitled to "a fair hearing conducted impartially, and […] in full equality".

[984] *Views of the Human Rights Committee under article 5, paragraph 4, 5 November 1992*, para. 7.2.

[985] *Findlay v. The United Kingdom*, para. 73.

"impartiality is presumed unless there is evidence to the contrary". The ICC Prosecutor will need to demonstrate, on a preponderance of the evidence, that the proceedings in question are not conducted independently and impartially.

Although hardly decisive, the HRC has noted that the question as to whether domestic rules on impartiality have been respected will be relevant when the same issue is brought before a human rights organ:

> "Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14 [of the ICCPR]."[986]

The establishment of military courts or other special tribunals often gives rise to allegations of lacking impartiality. In that context, the HRC has noted:

> "The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."[987]

In one case the AfCmHPR assessed the composition of tribunals established according to the Civil Disturbances Act. The tribunals consisted of one judge and four members of the armed forces, and the Commission remarked that they were "composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbance Act". Therefore, the tribunals were held to lack the necessary independence and impartiality and found to violate article 7(1) of the AfCHPR.[988]

If special tribunals are used for adjudicating cases that fall under the jurisdiction of and should have been dealt with by ordinary civilian courts, this might indicate

---

[986] *Views of the Human Rights Committee under article 5, paragraph 4, 5 November 1992*, para. 7.2.

[987] *HRC General Comment 13 (1984)*, para. 4.

[988] *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, para. 14.

that the proceedings are not conducted impartially. With regard to the establishment and practice of military courts in Guatemala the HRC noted:

> "The wide jurisdiction of the military courts to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations […]."[989]

Another aspect which might indicate a lack of impartiality is the use of anonymous judges. When judges are anonymous, they will not so easily be held responsible for their decisions, and this might make it easier to base them on extralegal considerations. In one case, the HRC noted that a Peruvian special tribunal with "faceless" judges was not in conformity with article 14 of the ICCPR because it

> "fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant […] since the tribunal, being established ad hoc, may comprise serving members of the armed forces".[990]

8.3.6.3. Independence and impartiality of investigators and prosecutors

In order for a perpetrator to be brought to justice, it is crucial that both inculpatory and exculpatory evidence be collected. In particular, a failure to collect inculpatory evidence might indicate independence or impartiality and might be relevant for the purpose of determining the states willingness to bring the perpetrator to justice.

At times, inquiry commissions and investigation boards are set up to address human rights violations including alleged abuse committed by the police or security forces. Just as with special courts, such entities often lack independence and impartiality. If the persons involved in the investigation are themselves suspected of having been involved in the alleged crimes, this should disqualify the investigation. In *Velásquez Rodríguez v. Honduras* the IACtHR noted:

> "The offer of an investigation in accord with [the Resolution] of the Commission resulted in an investigation by the Armed Forces, the same body accused of direct responsibility for the disappearances. This raises grave questions regarding the seriousness of the investigation."[991]

---

[989] *Concluding observations of the Human Rights Committee 27 August 2001 (Guatemala)*, para. 20.

[990] *Views of the Human Rights Committee under article 5, paragraph 4, 9 January 1998*, para. 8.8.

[991] *Velásquez Rodríguez v. Honduras*, para. 180.

Even if the investigators at the outset have no interest in the outcome of the investigation, they might be corrupted during the proceedings. When international crimes are committed, powerful actors are often implicated and the stakes are high, including the preservation of power. This significantly increases the risk of corruption.

The above is also true with regard to prosecutors who should not proceed against better knowledge. If a national prosecutor decides not to prosecute or settles for an acquittal where there seems to be sufficient evidence to achieve a conviction, this might indicate the prosecutor's lack of independence and impartiality, and thus possibly the state's unwillingness. In some justice systems prosecutors are not supposed to be fully impartial, typically in adversarial common law systems. However, where the prosecutor is granted independence under the constitution but there has been political interference, this might indicate the state's unwillingness. Even in states where political interference is allowed, the ICC Prosecutor should also be aware of the risk that extralegal considerations have played a part and that political power has been abused for improper purposes, *i.e.* in order to shield the perpetrator from criminal responsibility.

Relevant circumstances might include: how are investigators, police and prosecutors selected and appointed; how are they trained; how are their working conditions and security of tenure; do they enjoy freedom of expression and association; do they enjoy discretionary powers; is there any undue influence exercised from the executive or the suspects; and according to what kind of rules can they be held responsible for their decisions?

8.4. LEGITIMATE REASONS NOT TO INVESTIGATE, PROSECUTE OR CONVICT

When assessing the genuineness of national criminal proceedings, it is important to remember that there are several legitimate reasons as to why a prosecutor would not want to prosecute or why a court would acquit the person, even if the ICC Prosecutor believes that person to be guilty. Legitimate decisions not to proceed or to acquit will bar ICC interference also where the ICC Prosecutor disagrees with the national decision. Some of these reasons will be briefly explored below.

8.4.1. No prima facie *case has been established*

While a reasonable suspicion that a crime has been committed will warrant the opening of an investigation, a prosecutor will not prosecute unless there at least is a

fair chance of achieving a conviction.[992] Reference is made to the comments above regarding national decisions against prosecution which appear to be at odds with the facts. The ICC Prosecutor is not in a position to correct either errors in law or errors in fact that were made in good faith.

8.4.2. Prosecution is not deemed to be in the "public interest"

Even if the national prosecutor has found that there is a *prima facie* case, he or she might for some reason find a prosecution to be inappropriate. Just as the ICC Prosecutor is guided by the question of whether to proceed with a case will serve the "interests of justice", the national prosecutor will typically only prosecute when this is in "public interest". The prosecutors might and probably will, however, base their assessments on different sets of values. The national prosecutor might primarily address the concerns of the state, whereas the ICC Prosecutor represents the interests of the world community as reflected in the Rome Statute. It is not inconceivable that proceeding with a given case would serve the "interests of justice" from an international perspective but not from a national perspective. When the Prosecutor assesses the genuineness of the national decision, however, he or she should apply the national "guidelines", provided they appear legitimate. If the policy does not reflect a will to prosecute those who bear the greatest responsibility, this might indicate a purpose of shielding those who "should have been" prosecuted. This factor is particularly relevant where the persons not prosecuted are linked to the state apparatus. States must, however, be given a margin of appreciation, and the issue is whether the selection appears to have been made in good faith, and that deliberate obstructions of justice are avoided. The point is not to assimilate national and international prosecutorial policies. Thus, the ICC Prosecutor shall not second guess the national decision, but only assess whether it was made in good faith. The Prosecutor must strive to detach from his or her own discretional decision under article 53(1) (c) or (2) (c), which he or she at this point, in reality, already will have made, to proceed with the case in question.

8.4.3. Decision against prosecution is the result of legitimate prioritisations

Clearly, international crimes must be prioritised. Paradoxically, however, the sheer number of persons involved in the commission of international crimes justifies a

[992] As for the ICC Prosecutor, he must observe the "sufficient basis" criterion in article 53(2). The difference between this threshold and "reasonable basis" in article 53(1) indicates that the latter threshold is lower.

decision not to prosecute all guilty persons; in this respect there is room for national prioritisations. As long as the selection is made independently and impartially according to acceptable criteria, national decisions not to prosecute should be respected. Which criteria such selection should be based on are discussed in a separate chapter on prosecutorial discretion.

8.4.4. The suspect or accused is deemed inferior, etc.

A valid reason not to prosecute or to acquit might be that the suspect is too young or too old, or that he or she is mentally or physically unfit. There is, however, a tendency to downplay such factors when international crimes have been committed.[993] A decision not to prosecute on such grounds should therefore be scrutinised carefully. The possibility should also be noted that states might let corrupt medical experts declare persons mentally or physically unfit.

8.4.5. The accused is not found guilty beyond reasonable doubt

National judges or jurors might have assessed the evidence differently than the ICC Prosecutor. This does not in and of itself warrant a finding that the case is admissible. If cases were to be automatically allowed before the ICC on the grounds that the suspect was "guilty beyond reasonable doubt", this would not only give the ICC an unintended review function; it would potentially compromise the suspect's right to be presumed innocent in a subsequent ICC trial.[994] Instead, the admissibility finding must be based on an assessment of the state's total effort where the discrepancy between the evidence and the outcome might be an indication but never is a sufficient criterion. The decisive will be whether the acquittal was handed down *bona fide* under due process.

8.4.6. National preference for prosecution elsewhere

A national decision not to prosecute may reflect a preference for prosecution in another state or before the ICC. It is submitted that such decisions are outside the scope of article 17 as it is not a decision against prosecution as such. Indeed, the

---

[993] Consider, for instance, the efforts to prosecute former Chilean President Pinochet.

[994] Agirre *et al.* 2003, p. 14. Article 66(1) provides: "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law." It should be noted that the Pre-Trial Chamber, and not the Trial Chamber, as the main rule deals with the admissibility issue.

decision reflects the opinion that the person should be prosecuted, only not by that state. It is submitted that article 17(1) (b), read in its context, only regulates decisions reflecting the view that that the person should not be prosecuted before any court. If a decision aimed at enabling prosecution elsewhere were to make a case inadmissible, states might feel compelled to prosecute in order not to pre-empt an ICC proceeding. Therefore, a decision against prosecution in the state concerned but not against prosecution as such should be treated as national inaction. Two scenarios may then follow: First, if no other state with jurisdiction initiates criminal proceedings, the case will be admissible before the ICC. Second, if another state with jurisdiction signals its intention to proceed genuinely with the case, the ICC must stand back unless that state is deemed unwilling or unable.

8.4.7. National decision not to prosecute reflects inter-state comity

The situation appears to be more complex if the state has decided not to prosecute because the investigation revealed that none of its nationals were involved and/or in order to avoid friction with another state. Such a decision reflects neither a purpose of shielding nor the collapse or unavailability of the judicial system. Nevertheless, it should not bar the ICC from proceeding. The term "decided not to prosecute" should be interpreted as to cover only decisions against prosecution as such. The situation just described is not one where the state wants prosecution to be avoided altogether. The state is not prepared to conduct the prosecution and would prefer that another state did it. Such decision not to prosecute therefore falls outside the scope of article 17. Indeed, the references in article 17(2) to a purpose of shielding, unjustified delays, the lack of independence and impartiality and inconsistency with an intent to bring the person concerned to justice strongly indicate that what article 17 aims at are decisions against prosecution as such. Interpreting article 17(1) (b) so as to make inadmissible decisions against prosecution that result from lacking interest or state comity would be largely inconsistent with the Statute's purpose. Here, ICC interference will both promote justice and duly respect state sovereignty (provided of course that no other state proceeds genuinely with the case, something that will make the case inadmissible).

9. INABILITY

9.1. INTRODUCTION

Even if a state is willing to bring the perpetrator to justice and in good faith conducts a criminal proceeding, the state might be incapacitated or for other reasons lack the ability to proceed in an adequate manner. The other of the two admissibility criteria where a state has proceeded with a case is the state's "inability" to proceed genuinely. The term "inability" is not defined in the Rome Statute, but article 17(3) provides some clarifying factors that shall be considered for the determination. Linguistically, "inability" means "the condition of being unable"; "want of ability, physical, mental, or moral"; and "lack of power, capacity, or means".[995] The French "*incapacité*",[996] the Spanish "*no pueda*" (cannot) and "*incapacidad*" (incapacity)[997] and the Russian "*ne sposobno*" (unable) and "*nesposobnostj*" (inability)[998] appear to be synonymous with the English term, although the references to "capacity" in French and Spanish arguably point slightly more to shortcomings *within* the judicial system as such affecting its capacity as opposed to inability caused by *external* disturbances or *legal obstacles* (which, as we shall see, nevertheless appear to be covered).

Clearly, the most common consequence of a judicial system's inability is inaction. An unable state will typically lack the ability even to initiate proceedings, or the state remains passive as it acknowledges that any effort will be futile. The admissibility question only arises, however, when a state is conducting or has conducted criminal proceedings but proves unable to do so genuinely. It should be noted that if a state proceeds knowing that it will not manage to carry the proceedings out genuinely, the state might be unable and unwilling at the same time.

The remainder of this chapter will discuss the factors listed in article 17(3) of the Rome Statute for the determination of "inability" (9.2) as well as some general or specific circumstances which might indicate a state's "inability" (9.3).

9.2. THE FACTORS IN ARTICLE 17(3)

Paragraph 3 of article 17 reads:

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

---

[995] *The Oxford English Dictionary*.
[996] *Le Noveau Petit Robert*.
[997] *Collins Spanish Dictionary*.
[998] *Oxford Russian Dictionary*.

For reasons similar to those presented above regarding article 17(2), it is submitted that the list of factors for the determination of "inability" in article 17(3) is exhaustive. The paragraph lists two alternative causes of inability, and two alternative meanings of being unable. As for the causes, the state must experience either a "total or partial collapse" of the national judicial system *or* the same system's "unavailability". As for the meaning of being unable, the state must be "unable to obtain the accused or the necessary evidence and testimony", or "otherwise unable to carry out the proceedings". Thus, for "inability" to exist under article 17, one of the two causes must exist, *and* one of the two effects must exist. Further, as implied by the term "due to", there must be causality between the cause and the effect.

As noted, the factors listed in article 17(2) explain what it means to be "unwilling" without actually narrowing the scope of the "unwillingness" criterion as such. By contrast, the factors in article 17(3) significantly narrow the scope of the "inability" criterion. Linguistically, "inability" is a broad term which simply refers to the state of being unable, without requiring any particular reason. With no further limitation in the Statute, the term would therefore have covered any case of inability, regardless of the cause. That would have been unacceptable to states, and this is why article 17(3) effectively limits the scope of the "inability" criterion by giving relevance only to a few types of inability, *i.e.* only inability specifically caused by the legal system's "total collapse", "substantial collapse" or "unavailability". Thus, not just any actual inability is relevant. The interpretation of these three alternative causes of inability is therefore crucial for determining the scope and application of the "inability" criterion.

9.2.1. Total collapse

This is a high threshold, but its significance is limited due to the alternative "substantial collapse". Even though the term "total" should hardly be understood literally, in the sense that all components of the system need to be paralysed, the term implies a most dramatic situation: as to *the parts affected* by the collapse, the problem must be over-arching and not just local. The term "total" means "pertaining, or relating to the whole of something; comprising a whole".[999] As to the impact of the collapse, the basic functions of the judicial system must arguably be paralysed as "total" also implies "complete in extent or degree; absolute, utter;

[999] *The Oxford English Dictionary*. As noted in the historical survey, an earlier draft of the Preparatory Committee used the term "total or partial collapse", indicating (the obvious) that "total" is more than "partial".

involving all resources".[1000] As to the duration of the collapse, it could arguably be temporary, albeit not too brief, although linguistic definitions do not expressly regulate the time aspect. Total collapses of legal systems will be few and far between. The situation in Rwanda after the genocide in 1994 and probably in a very few African states today would amount to such collapses. Two years after the 1994 Rwandan genocide, the High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda noted that "Rwanda was left after the genocide with few judicial officials alive and a substantially destroyed judicial system".[1001] Despite the use of the term "substantially destroyed", there is no doubt that this situation amounted to a total collapse.[1002]

9.2.2. Substantial collapse

Because "substantial collapse" is listed in addition to "total collapse", it must be a collapse that is not total but severe enough to be called substantial. The term "substantial" means "that is, constitutes, or involves an essential part, point, or feature; essential, material".[1003] As to the parts affected, the term "essential" in the linguistic definition indicates that the collapse might affect only a part of the system, as opposed to the whole, as long as this part is essential. Thus, the term "substantial collapse" would arguably cover a collapse affecting the legal system in a region if that region represents an essential part of the whole judicial system. As noted, the term "partial" was originally proposed by the ILC but replaced by "substantial" at the Rome Conference. The argument was that a state might experience a collapse in one

---

[1000] *The Oxford English Dictionary*.

[1001] *Human rights field operation in Rwanda*, Report of the United Nations High Commissioner for Human Rights, 19 February 1998, E/CN.4/1998/61, para. 26 (available at http://daccess-ods.un.org/TMP/2201788.html). Also, an American district court held in a case that the local remedies rule could be dispensed with as "the Rwandan judicial system [was] virtually inoperative and [would] not be able to deal with civil claims in the near future", see *Mushikiwabo and others v. Barayagwiza*, p. 460.

[1002] It has been reported that after the genocide, "Rwanda had only 16 lawyers in private practice for the whole country", see statement of Pierre Emmanuel Ubalijoro (Rwanda) in *Appointment of Special Representative on Impact of Armed Conflict; Would be Recommendation of Draft Approved by Third Committee*, 22 November 1996, Press Release GA/SHC/3401 (available at http://www.un.org/News/Press/docs/1996/19961122.gash 3401.html).

[1003] *The Oxford English Dictionary*.

region while still being able to undertake genuine proceedings.[1004] The argument is flawed as a state which actually manages to proceed genuinely with a case in one region cannot be deemed unable under article 17(1) to deal with that case because of a collapse in another region. The fact that a vast majority of states favoured the term "partial" is noteworthy, and supports the understanding that a "substantial collapse" may indeed be local or partial if it sufficiently affects the proceedings in question. In such a situation, however, the state might be able to remedy the situation by "shifting resources or transferring the trial to other [intact] venues".[1005]

As for the impact and duration of the collapse, it must be great and long enough to justify the use of the term "substantial". As article 17(3) is worded, the fact that the state is unable to "obtain the accused", *etc.* does not in and of itself imply that there is a substantial collapse (nor that the system is unavailable). A state's inability to carry out its proceedings adequately might, however, indicate a substantial collapse and in its turn inability for the purpose of the admissibility determination.

The term "substantial collapse" should be understood as implying that the system is sufficiently damaged so as to render it useless for the relevant purpose. Taking into account the complexity of investigating and prosecuting crimes, and in particular international crimes, even a minor damage as such might render the system useless. In that sense, the point is the impact rather than the "size" of the collapse, and a not so great but an irreparable damage might render the system useless, just as a fine-tuned clock can be rendered useless by a minor mechanical fault.[1006] The difference between this and "unavailability" might, however, at times be subtle.

9.2.3. Unavailability

The third alternative cause for inability is broad. Linguistically, the term "unavailability" has three related but distinct aspects: First, the term may refer to the non-existence of something, indicated by the definitions of "available" as "obtainable; within one's reach".[1007] Second, the term may refer to the non-accessibility of something irrespective of its existence, indicated by the definition

[1004] Holmes 2002, p. 677.
[1005] *Ibid*.
[1006] Where the proceedings are computerised, the latter example might not be so far-fetched, and a data virus making sufficient damage could be relevant.
[1007] *The Oxford English Dictionary*.

"accessible; at one's disposal".[1008] Third, it may refer to the non-usefulness of a remedy irrespective of its existence and accessibility, indicated by the definition "capable of producing a desired result; of avail, effectual, efficacious".[1009] All three meanings will be discussed below.

The Spanish text uses the words "*al hecho de que carece*", referring to the verb "*carecer*" which means "to lack, be in need of, be without, want for".[1010] The French text refers to "*l'indisponibilité de celui-ci*", referring to something that cannot be used.[1011] The Russian text uses the term "*otsutstvie*", which means "absence", "privation" and "default".[1012] While these terms arguably point slightly more toward non-existence and somewhat less toward non-usefulness, it is submitted that the English term most accurately captures the true meaning of the criterion. Read in context, the term "unavailability" can scarcely be understood as referring to the non-existence of the judicial system. After all, article 17 only applies when the national system is or has been applied, so the problem must be that the system is somehow defective or inadequate, that it is not accessible or not capable of producing the desired result. The fact that "unavailability" is included alongside "total or substantial collapse" indicates that the former adds something to the latter. It thus appears to cover situations where a legal system has not collapsed (*i.e.* it still exists) but is inadequate (not accessible or not useful) for the purpose of dealing genuinely with a given case. Also contextually, it should be noted that the Statute also uses the term "unavailable" and "unavailability" in articles 18(6), 56(1) and 88. In the two former articles, the term refers to whether evidence exists and can be obtained. Article 88 refers, more interestingly, to the availability of procedures under national law. According to this provision, states parties "shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part 9 of the Statute]". It is submitted that this requires not only that relevant legislation exists, but also that there are no impediments to its application, and that it is capable of producing adequate results. Thus, this supports the suggestion that the term connotes such a broader meaning in article 17 as well.

In light of the object and purpose of the Rome Statute, the "unavailability" criterion should arguably be construed sufficiently broadly so as to reduce the number of situations where the ICC must defer to national proceedings despite the

---

[1008] *Ibid.*

[1009] *Ibid.*

[1010] *Collins Spanish Dictionary.*

[1011] *Le Noveau Petit Robert.*

[1012] *New Complete Russian-English Dictionary.*

state's actual inability to carry out its proceedings in a meaningful manner. Deferral in such situations would effectively mean that impunity would prevail as a result of the national system's inadequacy, exactly what the Rome Statute aims at avoiding. It should also be noted that the finding of "inability" is less stigmatic for the state than a finding of "unwillingness", something which arguably justifies a broader reading of the former criterion than of the latter.

Finally, and importantly, a broad reading, including the non-accessibility of the judicial system, is supported by the jurisprudence of various international human rights organs in the context of the rule of exhaustion of local remedies. According to what is often referred to as the "futility test", the HRC has noted that "domestic remedies must be both effective and available", otherwise they need not be exhausted;[1013] the ECtHR has noted that the only remedies that must be exhausted are "those that relate to the breaches alleged and at the same time are available and sufficient";[1014] and the AfCmHPR has stated that "the [remedies] must be available, effective and sufficient".[1015] The terms "effective", "available" and "sufficient" seem to overlap considerably. These organs have given the term "available" a very broad meaning,[1016] referring not only to the existence of a judicial system, but also to its accessibility and its capability of producing adequate results.

Summing up, while a bare reference to a "total or substantial collapse" of the judicial system would have narrowed the scope of the "inability" criterion significantly, the "unavailability" criterion ensures that a spectrum of causes for inability is retained. It is suggested that four factors may lead to a judicial system's classification as "unavailable": (i) inadequate legal provisions; (ii) legal obstacles to the use of the system; (iii) factual obstacles to the use of the system; and (iv) the system's incapability of producing the desired result. If one or more of these factors exist, a case will be admissible provided that the problem renders the state unable to obtain the accused or the necessary evidence or otherwise carry out the proceedings genuinely. Below, some jurisprudence regarding the admissibility before human rights organs according to the "exhaustion of remedies" rule will be referred to.

[1013] *Champagnie et al. v. Jamaica*, para. 5.1.

[1014] *Van Oosterwijck v. Belgium*, para. 27.

[1015] *Dawda Jawara v. The Gambia*, para. 31. The term "sufficient" does, in the opinion of this author, seem superfluous next to "available" and "effective".

[1016] Indeed, due to the jurisprudence pertaining to the term "available", several observers argued, during the ICC negotiations, that the term as included in the ILC draft was preferable to "inability".

These cases provide useful illustrations as to when national judicial systems might be deemed "unavailable".

9.2.3.1. Adequate legal provisions must exist

The IACtHR has stated that local remedies need not be exhausted if the necessary legislation is not established.[1017] The AfCmHPR has noted:

> "The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness."[1018]

It is submitted that "necessary legislation" must exist for a national proceeding to be "genuine" under the Rome Statute's complementarity principle. The requirement of applicable legal provisions, including the non-existence of excessive defences or insanity grounds, is logical. If the conduct is not criminalised, the state will effectively, according to domestic law, be unable to bring the perpetrator to justice (although international law, as noted, does not make the prosecution of international crimes dependent on the existence of internal legislation).

"Necessary legislation" is one thing; it might be argued that the reasoning should be taken a step further. The question might be raised as to whether the non-existence of "tailor made" penal provisions, such as "genocide", *etc.*, will imply "unavailability". States that have neither incorporated nor transformed penal provisions from the Rome Statute or special conventions such as the Genocide Convention or the Geneva Conventions must rely on their ordinary penal provisions. Some of these provisions might still be heavily inspired by the Rome Statute or the special conventions. Yet other states might be left with applying "ordinary" criminal provisions.

In their process of adopting such provisions, many states have expressed that doing so is a complementarity requirement amounting to an outright obligation flowing from the Rome Statute.[1019] Other states, however, have stressed that the

---

[1017] *Durand and Ugarte v. Peru*, para. 31 a.

[1018] *Dawda Jawara v. The Gambia*, para. 35.

[1019] For instance, in the Dutch Explanatory Memorandum on the substantive implementing legislation (Wet Internationale Misdrijven, Kamerstukken II 2001/02, 28 337, no. 3, MvT) it is noted: "Although not expressly provided for in the Statute, the majority of states – including the Kingdom – were always of the opinion that the principle of complementarity entails that states parties to the Statute are obliged to criminalise the crimes that are subject to the International Criminal Court's jurisdiction in their national laws and furthermore to establish extra-territorial, universal jurisdiction which enables their national criminal courts to

Statute does not create any obligation on states parties to alter their penal provisions.[1020] The latter states might still, however, consider adopting such provisions necessary in order to accommodate the complementarity "requirements", *i.e.* in order to enable themselves to pre-empt ICC interference.[1021] The Darfur Commission concluded that "the Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity", without really concluding as to the exact meaning of that statement or as to the consequences.[1022] Academic writers have expressed different views as to whether states have to have specialised provisions such as "genocide", *etc.*, although most seem to hold that this is not required.[1023]

One thing seems to be perfectly clear: by ratifying the Rome Statute, states do not accept any obligation to adopt penal provisions similar to those found in the

---

adjudicate these crimes even if they have been committed abroad by a foreign national", translation from Dutch in Kleffner 2003, p. 91.

[1020] For instance, Spain has noted that "strictky speaking, the statute does not include any obligation on the part of the states parties to incorporate those criminal provisions into their internal law, as they only concern the scope and exercise of the jurisdiction of the Court", see 2001 Progress Report of Spain in *The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court*, CE doc. Consult/ICC (2001), Strasbourg, 9 August 2001. Conversely, the Rapporteur of the Commission des Lois noted, in the French Assemblée Nationale regarding the proposed legislation on the cooperation with the ICC: "*Le Statut ne fait certes pas obligation aux Etats parties d'harmoniser leur définition des crimes relevant de la compétence de la Cour avec celle du Statut. Mais le principe même de complémentarité, disposition-clé du Statut, exige cette harmonisation*" (*Session ordinaire de* 2001-2002 - 61*ème jour de séance*, 136*ème séance*).

[1021] For instance, in Norway, commenting on the adoption of specialised provisions on the ICC crimes, the Penal Code Commission noted: "To the Commission, the fact that by adopting specialised prohibitions covering articles 6, 7 and 8 of the Rome Statute, Norway avoids questions as to its will or ability to prosecute such crimes", see Norwegian Official Report (NOU) 2002:4, p. 276. In the Australian parliamentary debate it was noted that "it is important that Australia enact laws specifically covering all of the crimes in the International Criminal Court statute so we can take full advantage of the principle and the protection of complementarity", see Official Hansard 2002 (9), House of Representatives, 25 June 2002, p. 4369. Similar statements have been given *inter alia* in Canada (2000), United Kingdom (2001) and Germany (2002).

[1022] *Report of the International Commission of Inquiry on Darfur*, *supra* note 777, para. 451.

[1023] *E.g.* Robinson 2002, pp. 1849 *et seq*., arguing that there is no obligation to copy the penal provisions in the Rome Statute. For the opposite view, that there is such a duty, see *e.g.* Roscini 2007, pp. 493 *et seq*.

Statute.[1024] As to such legislation as an implicit admissibility criterion, one should note the failure to formulate a specific "ordinary crimes" criterion in the Rome Statute similar to the one found in the ICTY and ICTR Statutes, according to which the Tribunals may interfere when the state had characterised the crime as an ordinary crime. This indicates that applying "ordinary" provisions might be acceptable. Holmes explains that many of the negotiating states disagreed with the necessity to try the crimes *qua* international crimes.[1025]

Based on these facts, it is submitted that investigating and prosecuting crimes under the ICC's jurisdiction as ordinary crimes is acceptable under the complementarity principle as long as the provisions render the state able genuinely to bring the perpetrator to justice. All judicial systems have provisions covering the basic aspects of the ICC crimes, such as killing and molesting, and the commission of such crimes will invariably be subject to severe penalties. An investigation or prosecution according to such provisions, which sufficiently reflects the gravity of the crime, will therefore probably be acceptable.[1026] Sometimes, however, such ordinary provisions will not enable a court to adequately reflect the gravity of the crime.[1027] Further, some of the ICC crimes are very specialised and might not have corresponding provisions at all in ordinary criminal law, such as the prohibition of "imposing measures intended to prevent births".[1028] The decisive is probably whether the national provisions enable the state to try the perpetrator for a conduct which adequately covers the aspects which, under the Rome Statute, make the conduct an ICC crime. Thus, when the various factual aspects of the crime are described and punishment is meted out, the crime should not be treated as an ordinary crime, even if the label as such is ordinary. The description of the crimes should still reflect its extraordinary nature, *i.e.* its extreme gravity.

9.2.3.2. Legal obstacles must not exist

Further, even if a state has criminalised a conduct as such, other legal provisions such as statutes of limitation, or provisions granting immunity or amnesty might

[1024] The only legislation that a state party undertakes to adopt are provisions which criminalise offences against the ICC's administration of justice, see article 70(4) (a), and such legislation which is necessary for "all forms of cooperation" with the Court, see article 88.
[1025] Holmes 1999, pp. 57-58. See also Tallgren 1999, p. 29; Newton, 2001, p. 71.
[1026] Zimmermann 1998, p. 221.
[1027] For instance, it might be argued that an ordinary provision on "murder" cannot reflect the seriousness of "genocide", including the intent to destroy, in whole or in part, a certain group.
[1028] Article 6(d) of the Rome Statute.

effectively bar the exercise of jurisdiction. Such legal obstacles might, it is submitted, result in the "unavailability" of the national judicial system for the purpose of article 17(3). When such legal obstacles prevent an investigation from being initiated, there will be an inaction scenario, and the case will automatically be admissible. It should further be noted that legal obstacles, and in particular effective ouster clauses, might also indicate "unwillingness".

If the law cannot be applied due to prescription, immunity or amnesty, it is not "at disposal", as one of the definitions quoted above reads, for the purpose of dealing with that particular crime.[1029] In this context, "unavailability" means that although relevant law exists, it cannot be applied. Such interpretation is supported by contextual arguments referred to above and appears necessary if an effective ICC jurisdiction is to be ensured. As for the purpose of safeguarding sovereignty, all states have to do is to ensure that such obstacles do not exist, and, moreover, the validity under international law of such obstacles might be questionable. If a state party chooses not remove such obstacle, it continues for instance to grant its own president full immunity, it knowingly runs the risk of having to surrender that person to the Court. Likewise, if the state lets statutes of limitation apply to international crimes, it accepts at the same time that it might be required to surrender a perpetrator to the ICC.

The inclusion of legal obstacles as a form of "unavailability" is further supported by various human rights organs' use of the term "available". The AfCmHPR has, for instance, noted that where the competence of ordinary courts has been ousted by the establishment of special tribunals or decrees whose validity cannot (internally) be challenged or questioned, local remedies will be considered as not available. The Commission defined such ouster clauses as provisions that "prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals".[1030]

Many commentators, but far from all, support such interpretation of "unavailability". Cassese notes, for instance, that article 17(3) should cover

> "cases where the national court is unable to try a person not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments,

[1029] It should also be noted that the French term "*indisponible*", as referred to in article 17(3) ("*indisponibilité*"), is explained as "*don't la loi ne permet pas de disposer*", indicating the existence of a legal obstacle.

[1030] *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, para. 9.

> such as an amnesty law, or a statute of limitations, making it impossible for the national judge to commence proceedings against the suspect or the accused".[1031]

9.2.3.3. Factual obstacles must not exist

Factual obstacles to the exercise of jurisdiction can be internal or external. Internal obstacles can be factual deficiencies within the judiciary that do not amount to a "substantial collapse" but nevertheless render the state "unable to carry out its proceedings". An interpretation of "unavailability" which includes such *internal* factual obstacles would, however, make the limiting effect of the term "substantial collapse" (which also deals with major internal deficiencies) illusory. Contextually, therefore, such interpretation does not seem warranted. The "substantial collapse" threshold indicates that states did not want a *malfunction* in the judicial system which did not amount to a "substantial collapse" to be relevant, even if it made the state "unable to carry out its proceedings". Therefore, it is submitted that "unavailability" cover factual obstacles only insofar as they are *external* to, *i.e.* caused from outside, the judiciary.

The IACtHR has stated that the local remedies need not be exhausted if "the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them".[1032] That reference seems to refer both to legal and factual obstacles. It also illustrates that while an obstacle might be of a general character, it might also prevent only *specific persons* from seeking a remedy. Regarding the Darfur Situation, the ICC Prosecutor has noted:

> "The office has also […] sought information on national proceedings that may have been undertaken in relation to crimes within the jurisdiction of the Court allegedly committed in Darfur, including mechanisms provided to allow individuals to report crimes and have access to justice."[1033]

It may also be noted that the ILC has in the context of diplomatic protection and the exhaustion of local remedies rule proposed that local remedies need not be exhausted when "[t]he injured person is manifestly precluded from pursuing local remedies".[1034]

It is again stressed that the application of article 17(3) presupposes that a criminal proceeding is being or has been conducted. If no proceeding is initiated,

---

[1031] Cassese 2003, p. 352.

[1032] *Durand and Ugarte v. Peru*, para. 31 a.

[1033] *Report of the Prosecutor of the ICC to the UN Security Council*, *supra* note 656, p. 4.

[1034] *Draft Articles on Diplomatic Protection with commentaries*, p. 77, draft article 15(d).

something which often will be the result of legal or actual obstacles, the case will automatically be admissible as a matter of inaction.

9.2.3.4. The system must be able to produce the desired result

It is submitted that, according to the "unavailability" criterion, legal mechanisms for dealing with the crimes must not only exist; they must also be capable of producing the desired result. Otherwise they cannot provide genuine justice. This understanding is supported by the fact that article 17(3) refers to whether the state, as a result of the collapse or unavailability of the judicial system, "is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings". Thus, the fact that the effect (the inability to proceed as required) exists will indicate that the cause (the collapse or unavailability) exists. The IACtHR has noted that criminal proceedings must not be "preordained to be ineffective".[1035]

9.2.4. The national judicial system

Because article 17(3) refers to the unavailability of a state's "national judicial system", it is possible to argue that the entire system as such must be unavailable in order for the factor to exist, and that it would not suffice if the system merely is unavailable for the purpose of proceeding with the case in question. As indicated above, however, it is submitted that such narrow interpretation is not warranted. Four arguments against it can be identified: First, the admissibility criteria pertain ultimately to the handling of individual cases and not to the general activities of judicial systems. Second, if unavailability of the entire judicial system were required, the "unavailability" criterion would add little to the "total or substantial collapse" criterion as a legal system which as a whole is unavailable will usually have substantially collapsed. Third, the object and purpose of the Statute strongly supports the broader interpretation: when the issue is impunity it is the availability of the legal system *in casu*, *i.e.* in every given case, that matters. Fourth, support for the broader interpretation can be found in human rights jurisprudence on the availability of local remedies. For instance, the AfCmHPR has noted that according to the rule of exhaustion, "a remedy is considered available only if the applicant can make use of it *in the circumstance of his case*".[1036]

[1035] *Velásquez Rodríguez v. Honduras*, para. 177.

[1036] *Dawda Jawara v. The Gambia*, para. 33 (emphasis added).

9.2.5. Summing up

Summing up, the "unavailability" criterion allows the Court to consider a relatively broad spectrum of reasons as to why a given case has not been dealt with satisfactorily. Logically, the criterion covers other types of situations than under the "total or substantial collapse" criterion as otherwise the former would be superfluous. In fact, "not available" was the sole objective criterion proposed in the 1994 ILC draft (the subjective criterion was "ineffective"), indicating that the term was considered broad. Thus, the "unavailable" criterion would arguably have sufficed, in the sense that, linguistically, when a system has experienced a "total or substantial collapse" it will also be "unavailable". Indeed, the availability of the system appears to be what it boils down to when a system's ability to carry out genuine proceedings is assessed. The introduction of the "total or substantial collapse" factor does, however, narrow the scope of the inability criterion, but only in the sense that "minor" collapses (which otherwise would have been covered by "unavailability") are not to be considered.

The current ICC Prosecutor appears, some would perhaps argue, thus far to apply a narrower interpretation than the one described above. He has stated that article 17(3) on "inability"

> "was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court".[1037]

The statement makes no reference to the "unavailability" criterion at all, and it does not expressly state that the situations described are the only ones where "inability" might exist. Indeed, the statement is hardly intended to be a very specific interpretational statement, and it should not be assumed that the Prosecutor intended to fix the scope of such an essential criterion. Neither would an interpretational statement of one ICC Prosecutor bind future prosecutors, let alone the Court's chambers. Further, while one might have wished that the Prosecutor had suggested a less cautious approach, the possibility should not be excluded that the Prosecutor has weighed his words carefully so as not to worry sovereignty-anxious states.

[1037] *Paper on some policy issues*, *supra* note 18, p. 4.

9.2.6. Inability to obtain the accused or necessary evidence

As noted, the problems described above are only relevant to the extent that they actually render the state unable genuinely to carry out its proceedings. For the purpose of determining whether the state in fact is rendered genuinely unable, article 17(3) lists certain steps that are crucial to a successful investigation and prosecution, namely obtaining the accused and the necessary evidence and testimony. In addition, the more general notion "otherwise carry out its proceedings" is included. The factor "obtain the accused" appears to be unproblematic apart from the fact that the term "the accused" is used. Obtaining the person must mean to make the person appear before the investigators or the court voluntarily or arresting the person and bringing him or her before the respective authorities. The term "the accused" is unfortunate as it may create confusion as to whether a failure to obtain a person who merely has the status of a suspect would not suffice. Clearly, this is not the intention, and the criterion should not be interpreted to that effect. A person will be an "accused" only when the state has decided to prosecute him or her. Because article 17(3) applies to all the stages of the proceedings referred to in article 17(1), including situations where no indictment has been issued, the term "accused" must effectively be construed as "the person concerned", "the alleged perpetrator" or "the suspect".

As for the "necessary evidence and testimony" criterion, the term "necessary" indicates that the factor deals with the obtaining of sufficient evidence and testimony to conduct a genuine criminal proceeding according to the allegations. Other evidence can scarcely be referred to as "necessary", even if it might be important in other ways, for example in the sense that it would shed light on the causes of the crimes. While establishing a correct and complete historical record might be, and arguably should be, the aim of any criminal proceeding, this is not a part of the impunity issue which is the focus of the admissibility determination. Therefore, evidence which is not strictly needed in order to reach sufficiently qualified decisions should not be considered as "necessary". Thus, the ICC Prosecutor should focus on the qualitative and quantitative adequacy of the evidence that the state actually obtains rather than on the relevance of the evidence that the state is unable to obtain.

In order to count as evidence as referred to in article 17(3), the evidence must exist and be possible to obtain; only then will failure to obtain it truly indicate inability to obtain it as referred to in article 17(1). The point is whether the state would have obtained the evidence but for the collapse or the unavailability. There is a requirement of causality between the problem and the failure. The causality requirement should arguably not be too strict, however, and some doubt as to whether the state would have failed to obtain the evidence also without the collapse

or unavailability should not bar the Prosecutor from concluding that the state is unable. In the absence of other indications in the Statute, probability that the state would have managed to obtain the evidence (or the person) should suffice.

If a state is willing to investigate genuinely but fails to obtain the alleged perpetrator due to the systems total or substantial collapse or unavailability, then the case will, according to article 17(1) and (3), be admissible before the ICC. The person will, however, have to be arrested before he or she can be surrendered to the ICC. If he or she is arrested in the same state pursuant to an ICC arrest warrant, the question arises as to whether the state now instead may proceed with the case. The answer is clearly yes since the collapse or unavailability does not make the state unable to carry out the remaining proceedings in a genuine manner. Under the complementarity principle, according to article 19(4), the admissibility of a case can be challenged *vis-à-vis* the ICC at any time "prior to or at the commencement of the [ICC] trial" and exceptionally even later. When the inability no longer exists, the case will become inadmissible.

9.2.7. Other inability to carry out the proceedings

Even if a state manages to arrest the suspect and collect the necessary evidence, it still might be unable to proceed genuinely. The state might, for instance, be unable to interrogate the alleged perpetrator or examine and analyse the evidence properly. Further, the state might be unable to prosecute genuinely. The alternative "otherwise unable to carry out its proceedings" is therefore an important addition. Even if the term "carry out its proceedings" is used here, without the qualifier "genuinely", the decisive is clearly whether the state is able to carry out the proceedings genuinely as this is what is required under article 17(1). It may be noted that Colombia, when it ratified the Statute, noted:

> "Concerning article 17(3), Colombia declares that the use of the word 'otherwise' with respect to the determination of the State's ability to investigate or prosecute a case refers to the obvious absence of objective conditions necessary to conduct the trial."[1038]

If what Colombia is saying is that the threshold is higher than implied by the term "genuinely", this is clearly wrong. The point is merely that the collapse or unavailability might cause other problems than those expressly mentioned (failure to obtain the accused or the necessary evidence and testimony). The issue remains

[1038] *Declarations and Reservations to the Rome Statute*, *supra* note 335.

whether the state, due to the problems caused by the collapse or unavailability, is unable to carry out the proceedings genuinely.

The fact that the term "unable" is used here, on the "effect side", illustrates, as noted, that article 17 will not cover all instances of inability, but only inability caused by a "total or substantial collapse" or "unavailability" of the legal system. The point is apparently to avoid ICC interference when the national legal system is unable to carry out its proceedings genuinely due to some minor problems. This is a concession to state sovereignty which arguably weakens the admissibility regime as it will let impunity prevail.

It might be argued that the fact that a state is unable to carry out its proceedings genuinely should establish a presumption that the state is "unable" for the purpose of article 17(1), *i.e.* that the system has collapsed or is unavailable. It is submitted, however, that the provision establishes no such presumption; the Prosecutor still has to demonstrate on a preponderance of the evidence that the system has either totally or substantially collapsed or that it is unavailable. The state's inability to carry out steps according to article 17(3) will, however, be indicative of the state's "inability".

9.3. GENERAL OR SPECIFIC CAUSES OF A STATE'S "INABILITY"

9.3.1. Causes of the judicial system's total or substantial collapse

The transition from an authoritarian regime to a democratically elected government is rarely made without considerable resistance, often amounting to a civil war. After years of suppression, the legal system will typically be weakened, and a new government might have to cope with immense problems. The judicial system will typically have a tradition of serving the elites and being financed by corruption. It will take time to change such attitudes, and it might be necessary to recruit new officials. Officials who have been accustomed to receiving bribes might perceive changes as unwelcome, and they might be inclined to accept bribes from a new elite. The problem might not be the corruption as such but the difficulties in finding sufficiently many officials that are not corrupted. A description of such problems was given by the HRC, noting that the Cambodian justice system

> "remains weak owing to the killing or expulsion of professionally trained lawyers during the conflict, the lack of training and resources for the new judiciary and their susceptibility to bribery and political pressure".[1039]

[1039] *Concluding observations of the Human Rights Committee 27 July 1999 (Cambodia)*, para. 8 a.

A civil war might have destroyed the infrastructure, killed key personnel and otherwise paralysed the legal system. Under a repressive regime, the police force will typically have been strong, but it will have promoted illegitimate interests instead of the rule of law. The destruction of the judiciary might even have been the specific purpose of a repressive regime. In extreme situations, the number of judicial officials alive might be so low that this fact alone is enough to conclude that the system has totally collapsed. During the 1994 Rwandan genocide, for instance, most of the lawyers within the state apparatus were killed, and this clearly rendered Rwanda unable to deal genuinely with the genocide. It should be noted that such situations most typically will result in inaction, obviating the need for the ICC Prosecutor to demonstrate "inability" as the case automatically will be admissible.

Other relevant factual circumstances rendering a state unable might be threats by armed groups uncontrolled by the government, including but not limited to terrorists. If the state is reluctant to apply the law due to threats this is not, however, inability but possibly unwillingness. The Darfur Report concluded that "many feared reprisals if they resorted to the national justice system",[1040] and the Commission seemed to view this as unwillingness and inability simultaneously.

9.3.2. Causes of the judicial system's unavailability

As explained above, the existence of legal obstacles to criminal proceedings, such as inadequate proscriptions, amnesty laws, immunities or statutes of limitation, might render a legal system "unavailable". The Darfur Report noted that the Sudanese criminal laws "do not adequately proscribe war crimes and crimes against humanity" and that the Criminal Procedure Code contained provisions which prevented the effective prosecution of such crimes.[1041] The Special Commission's conclusion was that Sudan was unable to deal genuinely with the crimes. Some years earlier, the AfCmHPR had concluded:

> "The seriousness of the human rights situation in Sudan and the great numbers of people involved render such remedies unavailable in fact, or, in the words of the Charter, their procedure would probably be 'unduly prolonged'."[1042]

This statement indicates that the sheer magnitude of the crimes might effectively render the judicial system unavailable as a result of its inadequacy. The AfCmHPR has, in a case regarding the rule of prior exhaustion, noted:

[1040] *Report of the International Commission of Inquiry on Darfur*, *supra* note 777, para. 586.
[1041] *Ibid*. para. 451.
[1042] *Amnesty International and others v. Sudan*, para. 39.

> "The gravity of the human rights situation in Mauritania and the great number of victims involved render the channels of remedy unavailable in practical terms […]."[1043]

Further, lack of necessary personnel, adequate infrastructure, buildings and other facilities crucial to the investigation may also amount to the system's unavailability rendering a criminal proceeding non-genuine, such as when the investigators do not have the means to inspect the scene of the crime or to seek out witnesses. Likewise, if the state does not allocate the necessary police, detention facilities and investigative personnel, or necessary investigative facilities such as laboratories and medical expertise, these will be relevant factors.

While failure to prosecute due to a total or substantial collapse or the unavailability of the national judicial system will not pass the admissibility test, normal capacity constraints might *justify* decisions not to prosecute the less responsible. It may be noted that the UN guidelines for prosecutors provides that "States should fully explore the possibility of adopting diversion schemes [in order to] alleviate excessive court loads".[1044]

[1043] *Malawi African Association and others v. Mauritania*, para. 85.

[1044] Article 18 of the *UN Guidelines on the Role of Prosecutors*, eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August - 7 September 1990, A/CONF.144/28/Rev.1 (available at http://www.ohchr.org/english/law/prosecutors.htm).

10. POSSIBLE LACUNAS IN THE ADMISSIBILITY CRITERIA

10.1. INTRODUCTION

Based on the preceding analysis of the admissibility criteria, six possible lacunas can be discerned, four of which might lead to partial or complete impunity. The six situations are: first, where a trial has been completed with proper intentions but resulted in a wrongful acquittal due to the state's inability to proceed adequately (10.2); second, where the accused has abused a national process which was otherwise adequately conducted (10.3); third, where the accused has been acquitted in a genuine trial but new significant evidence subsequently appears which would have secured a conviction (10.4); fourth, where a convicted person is subsequently pardoned or paroled by the state (10.5); fifth, where the state has conducted a genuine trial as such but failed to characterise the crime as international (10.6); and sixth, where the national proceeding is or has been genuine, but it would, due to the case's implication for other cases before the ICC, have been desirable to bring it before the ICC (10.7).

10.2. COMPLETED TRIALS AND INABILITY

Article 20(3), dealing with completed national trials, only renders admissible a case where the state has been unwilling, *i.e.* where it has proceeded for the purpose for shielding the person concerned or where the trial has not been independent and impartial. The provision fails to address the situation where the accused has been acquitted due to the state's inability to prosecute genuinely. The reasoning has probably been that once the state has completed a trial, it has demonstrated sufficient ability. Yet, the ability to complete a trial is one thing; the ability to complete it genuinely another. The state might, for instance, have been unable to "obtain the necessary evidence" due to problems described in article 17(3), *i.e.* collapse or unavailability. The case will still be inadmissible unless the ICC concludes that the "trial" does not qualify as a trial due to the inability, bringing the matter outside the scope of article 20(3) in the first place. A problem with that, however, is that article 17(1) (a), which refers to the state's inability in the context of an ongoing trial (*i.e.* "prosecution"), does not disqualify the trial as such but merely characterises it as non-genuine. Thus, a trial as described above can scarcely be considered a non-trial, although a "trial" might exceptionally be a non-trial. Thus, while the trial is still ongoing, the case might be deemed admissible, but once the trial is completed, the trial bars ICC interference. The result is at odds with the Statute's purpose.

One might argue that where an unable state has conducted a trial, it indicates that the state is also unwilling. Such inference may or may not, depending on the circumstances, be reasonable. When the state has started a trial with the right intentions, but as it turns out it is unable, it might be difficult, perhaps impossible, for the state under the domestic legislation to call off the trial without acquitting the accused.[1045] It is submitted that the failure of article 20(3) to refer to the state's inability in the context of a completed trial is a flaw.

10.3. THE ACCUSED HAS ABUSED THE NATIONAL PROCESS

Article 20(3) also fails to cover the situation where the state has demonstrated willingness to proceed genuinely, but the accused has escaped justice by abusing the process, *e.g.* by bribing or intimidating witnesses, tampering with evidence, *etc*. Here the state will not have proceeded "for the purpose of shielding the accused". The same is implied by the term "inconsistent with an intent to bring the person to justice", which seems exclusively to refer to the intent of the state. While such abuse probably will constitute an offence in all national justice systems, not all domestic legislations list this as a ground for revisiting an acquittal. The *ne bis in idem* principle might entitle the acquitted person to rely on the acquittal even when it was the result of such abuse. One such a situation is described by a New Zealand court. Here the person concerned had escaped conviction for murder by committing conspiracy to pervert the course of justice. He could later only be prosecuted for the conspiracy. The High Court remarked that the

> "maximum sentence [for the conspiracy] is an encouragement to offenders like you to commit the type of conspiracy you committed. The law does not permit you to be retried for the murder you committed as you were acquitted of it because of your conspiracy. You escape the sentence of life imprisonment that should be the minimum you receive. Instead you receive a much lesser sentence."[1046]

[1045] When the prosecution is unable to establish evidence beyond reasonable doubt as to the guilt of the accused, the accused will be acquitted, unless the court avoids handing down a verdict altogether. The national prosecutor might feel compelled to seek an acquittal, due to the right of the accused to be tried "within a reasonable time", see *e.g.* article 6(1) of the ECHR, or due to the provision in 6(1) that the person shall be presumed innocent until proved guilty according to law", *ibid.,* article 6(2).

[1046] *R. v. Moore*. The accused could apply for release on parole after only two years and four months, whereas murder carried a minimum non-parole period of ten years. New Zealand has

While the domestic result appears unreasonable, it might be argued that the international community should accept such a form of impunity. Caused by the individual and not the state, it is not the result of a state policy to shield perpetrators; it is not reflective of a culture of impunity, although to the victim the difference might be subtle. Neither is it a result of the system's malfunction. Even with the authority to interfere in such cases, the ICC Prosecutor would scarcely have prioritised them.[1047] The ICC Prosecutor should hardly be concerned with perpetrators who, despite the genuine efforts of states, manage to escape justice due to their "cleverness". Interfering would also effectively amount to a "duty" for states to provide for national retrial in such situations, something which international law does not provide for. Including such an admissibility criterion would have altered the nature of the Court and made it more of a regular "review" court. The failure to provide for this exception should not be considered a flaw.

Where, however, internal law does allow a retrial of such cases, a failure to retry might indicate the state's determination to shield the perpetrator. In that situation, it could be argued that the case is still ongoing and that a decision not to retry amounts to a decision "not to prosecute the person concerned" as referred to in article 17(1)(b). Such interpretation would be in line with the Statute's purposes. It would, however, seem to stretch the wording too far.

10.4. NEW SIGNIFICANT EVIDENCE AFTER A COMPLETED PROCEEDING

Article 20(3) does not allow a retrial before the ICC where new significant evidence has been discovered after a national acquittal. It should be noted that few national systems allow for retrial in such situations.[1048] The Rome Statute's solution therefore appears to reflect a fairly widespread view that such cases should not be revisited. Indeed, the core of the *ne bis in idem* principle is that once acquitted the person should be allowed to live in peace, even if it turns out that the acquittal was materially wrong.

---

since then changed its legislation, and a person can now be retried on the grounds that he or she has perverted the course of justice.

[1047] Arguably, this might have been different if the person was responsible for a particularly serious crime within a situation in which the Prosecutor was already involved.

[1048] By contrast, many states allow for a retrial where the accused has been convicted and new significant evidence indicating the person's *innocence* is discovered.

10.5. THE CONVICTED PERSON IS SUBSEQUENTLY PARDONED OR PAROLED

Article 20(3) does not automatically make a case admissible where a convicted person subsequently is pardoned or paroled, even if this effectively reduces the punishment to a totally inadequate response. As noted in the analysis of the admissibility criteria, the pardon might, under the circumstances, indicate that the previous trial was conducted for the purpose of shielding the perpetrator. When this is the case, the case may be declared admissible under articles 17(1) (c) and 20(3). The Rome Statute does not in establish any time limit for interfering when the national trial was a sham.

Where the pardon or parole is given by a new regime, it is, however, difficult to make the inference that the trial was a sham. If the previous regime has proceeded in good faith, the scenario appears to fall outside the scope of any admissibility ground. In an attempt to compensate for this, some commentators have argued that pardoning international crimes is not allowed under international law because it runs counter to a customary obligation on states to prosecute or extradite as it properly should be understood, and therefore such decisions should be considered nullities that do not bind the ICC.[1049] The argument is not convincing. It fails to recognise that it is not the pardon which would pre-empt ICC interference; it is the previous genuine trial. And that trial does not become a nullity as the convicted person is subsequently pardoned. Besides, the duty to prosecute is controversial, although it is reflected in the Rome Statute's Preamble.[1050] Nor is it so certain that such duty, if it exists, implies a duty not subsequently to pardon. Indeed, pardon is generally regarded as a legitimate measure, and it is provided for in most systems. Evans notes that it appears unlikely that the United States would have been seen to have failed in a customary duty to prosecute Lt. Calley for the war crimes committed in My Lai just because he was pardoned shortly after the conviction.[1051]

As a solution as to how a subsequent pardon might be covered by the admissibility criteria, it has been suggested that the decision to pardon should be considered a "decision" as referred to in article 17(2) (a). While the administrative decision to pardon might, under the circumstances, be viewed as an illegitimate attempt to shield the person, the suggestion fails to take account of the fact that the term "decision" in article 17(2) (a) appears to refer to the similar term in article

[1049] *E.g.* Dugard 2002a, p. 693 *et seq*.
[1050] Preambular paragraph 6.
[1051] Evans 2005, p. 7.

17(1) (b), *i.e.* a decision "not to prosecute".[1052] Thus, article 17(2) (a) does not seem to apply to subsequent pardons or paroles.

The failure to include the subsequent pardons and paroles as admissibility grounds was intended. As noted in the historical survey, the Preparatory Committee did consider the matter,[1053] and some delegations argued that such a function "went beyond the purview of the Court".[1054] It was simply impossible to gain sufficient support for such an admissibility ground. Including it by referring to duties of international law outside the Statute would therefore not be to interpret the Statute in good faith.[1055] Whether the failure to include it should be viewed as a lacuna ultimately depends on each commentator's view as to what the proper purview of an international criminal court should be. To this author it would seem that the need to gain sufficient support among states reasonably prevailed before idealism.

10.6. THE STATE HAS CHARACTERISED AN ICC CRIME AS AN ORDINARY CRIME

Both the ICTY and the ICTR Statutes allow the retrial of a person who has already been tried by a national court if "the act for which he or she was tried was characterized as an ordinary crime".[1056] In *Tadic*, the Appeals Chamber noted "the perennial danger of international crimes being characterised as 'ordinary crimes'".[1057] The UN Secretary-General has correctly noted that the respective provisions apply where "the characterization of the act by the national courts did not correspond to its characterization under the Tribunal Statute". The Rome Statute does not, however, provide for this exception from the *ne bis in idem* principle. The ILC in fact proposed such a rule noting that the term "ordinary crime" referred to the situation

> "where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in [the Statute]".[1058]

In the negotiations, the "ordinary crime" criterion was proposed but rejected as it met too much resistance. States also rejected a proposal making a case admissible

---

[1052] Reference is made to the analyses of the two respective provisions above.

[1053] *Report of the Preparatory Committee, Vol. II*, *supra* note 321, p. 41, fn. 42.

[1054] Holmes 1999, p. 52.

[1055] Vienna Convention article 31(1).

[1056] ICTY article 10(2) (a) and ICTR article 9(2) (a).

[1057] *Prosecutor v. Tadic*, para. 58.

[1058] *YBILC 1994, Vol. II*, *supra* note 115, Part Two, p. 58.

where the national proceeding did not take or had not taken account of the international character and the grave nature of the act. The complementarity principle does not require that states apply the ICC labels "genocide", "crime against humanity", *etc*. When preambular paragraph 4 affirms that the crimes under the Court's jurisdiction "must not go unpunished", it does not imply that the crimes must be punished as labelled in the Statute, but rather that the underlying conduct must be adequately punished. The same appears to be implied by the term "same conduct" in articles 17(1) (c) and 20(3). If national legislation effectively fails to criminalise conduct which constitutes an ICC crime, the case in question will automatically be admissible as no existing national proceedings will deal with the conduct in question.

As noted, if the state has specialised provisions, failure to apply them might, under the circumstances, justify the inference that the purpose of the proceeding is or was to shield the perpetrator. This might be the case if the application of the ordinary provision leads to a totally inadequate punishment. The situation might also, as noted, exceptionally and depending on the circumstances, amount to the state's "inability" to proceed genuinely.

The failure to include this admissibility ground is an important deviation from the admissibility regime of the *ad hoc* Tribunals. It might be argued that in the interests of justice the crimes within the ICC's jurisdiction always should be characterised properly, and that the imposition of a punishment which as such is adequate does not alter that. Therefore, the argument might go, ensuring proper characterisation should be a concern of the Rome Statute. The argument is not without merit. For instance, the label "torture" (a crime against humanity) has very different connotations than the far more trivial "bodily harm", which fails to reflect the egregious nature of the former, including the fact that the victim is "in the custody or under the control of the accused".[1059]

It should be noted that most states, once they have become parties to the Rome Statute, sooner or later tend to adopt penal provisions similar to those found in the Rome Statute. The fact that many states do so some time after they have ratified indicates that states do not consider failure to have and apply them to be an automatic admissibility ground. Instead, such legislation probably reflects a desire to be on the safe side or just to have such provisions irrespective of what the Rome Statute may or may not dictate.

[1059] Article 7(2) (e) of the Rome Statute.

Because the purpose of the Rome Statute is to avoid impunity, it is submitted that the failure of the admissibility regime to include failure to apply tailor made provisions as an automatic admissibility ground is no lacuna.

10.7. THE CASE HAS IMPLICATIONS FOR OTHER CASES BEFORE THE ICC

According to the Rules of Procedure and Evidence of the ICTY and the ICTR, the Prosecutors of these Tribunals may request the respective Trial Chamber to authorise a national deferral to the Tribunal where it appears that

> "what is in issue is closely related to, or otherwise involves, significant factual or legal questions which might have implications for investigations or prosecutions before the Tribunal".[1060]

The purpose of such provision is to ensure the transfer to the Tribunals of cases where the factual or legal issues involved are of what might be referred to as "prosecutorial interest". There is no corresponding provision in the Rome Statute. This is not to say that such an admissibility ground would not have been desirable from the Prosecutor's perspective. Such transfers could, obviously, have promoted a certain strategy or facilitated the investigation and prosecution of other cases.[1061] Indeed, the lack of this possibility might effectively force the Prosecutor's to drop other cases that were otherwise admissible. At this point, however, sovereignty concerns have prevailed over concerns regarding the Court's effectiveness; *cf.* the necessary dichotomy between the two as previously described. It should be noted that such an admissibility ground would not have been based on the state's handling of the case, not even on its characterisation of the case, but merely on the relationship of the case with other cases. It would therefore have been difficult to justify in light of the Statute's purpose, even though the facilitation of other cases in itself would promote the purposes. The lack of such admissibility should not be considered a lacuna.

[1060] ICTY rule 9(iii); and ICTR rule 9(iii).

[1061] *E.g. Prosecutor v. Tadic*.

11. THE PROSECUTORIAL DISCRETION

11.1. INTRODUCTION

Simplistic conceptions of what complementary entails and statements such as "the ICC will step in when national jurisdictions fail" might create the unrealistic expectation that the Court will actually fill the impunity gap left by national jurisdictions. In reality, the ICC's concrete achievements, in terms of cases actually dealt with, will be severely limited as a result of the ICC's limited capacity.[1062] Even if a crime within the Court's jurisdiction has not been genuinely dealt with by any state, it is statistically highly unlikely that the ICC will handle that particular crime. In fact, it is quite conceivable that many states will count on this limited capacity and thus simply continue to let the crimes go unpunished, ignoring the ICC. This problem appears often to be underestimated.

As a necessary consequence of the ICC's inadequacy to deal with all the crimes, article 53(1) (c) and (2) (c) provide that the ICC Prosecutor only shall proceed when this serves the "interests of justice". This discretion, which is required once a case has been deemed admissible, must be exercised very selectively. It was therefore somewhat puzzling when the Prosecutor has noted that "it is clear that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice".[1063] What the Prosecutor meant, however, was probably that the cases where such interest is conspicuously absent will not reach a stage where it is necessary to declare that. While this certainly will be the rule with regard to the selection of cases, it will not be the rule with regard to the selection of entire situations among those that are referred to the Prosecutor. Here, the Prosecutor will have to justify every decision not to get involved in a situation.

As to the complexity of interpreting and applying the "interests of justice" criterion, the Prosecutor has noted:

> "The issue of the interests of justice, as it appears in Article 53 of the Rome Statute, represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance on what the content of the idea is. The phrase 'in the interests of justice' appears in several places in the ICC Statute and Rules of Procedure and Evidence but it is never

---

[1062] The ICC Prosecutor has estimated that over a period of three years the ICC will be able to "complete two expeditious trials" and "conduct four to six investigations", see *Report on Prosecutorial Strategy*, Office of the Prosecutor, 14 September 2006, pp. 6-7 (available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html).

[1063] Policy Paper on the Interests of Justice, Office of the Prosecutor, September 2007, p. 1 (available at http://www.icc-cpi.int/otp/otp_docs.html).

> defined. Thorough reviews of the preparatory work on the Treaty also offer no significant elucidation."[1064]

The framework for the discretion provided for in article 53 enables the Prosecutor to conduct what the Office of the Prosecutor has referred to as "focused investigations and prosecutions".[1065] This chapter will first introduce some general aspects of the prosecutorial discretion under the Rome Statute (11.2). It will then describe the prosecutorial discretion before other international and national jurisdictions (11.3). Thereafter, it provides a general analysis of the term "interests of justice" as it appears in article 53 (11.4); discusses the specific factors listed in article 53 for the determination of the "interests of justice" criterion (11.5); and presents and discusses some factors that are not listed in article 53 but still might be relevant to the "interests of justice" determination (11.6). After this, the chapter discusses how the prosecutorial discretion can be judicially controlled under the Rome Statute and in light of the general principles of legality and equality before the law (11.7). Finally, the chapter elaborates on the need for a prosecutorial policy, transparency and guidelines (11.8).

11.2. SOME GENERAL ASPECTS

Article 53, which regulates the initiation of investigations and prosecutions,[1066] reads:

> "Article 53
> Initiation of an investigation
>
> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
> […]
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

[1064] *Ibid.*

[1065] *Report on Prosecutorial Strategy*, *supra* note 1062, p. 5.

[1066] The heading "Initiation of an investigation" is misleading as article 53 regulates both the initiation of an investigation (paragraph 1) and the decision whether to prosecute (paragraph 2).

> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
>
> 2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
>
> […]
>
> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
>
> the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion."

When the Prosecutor determines not to interfere because it would not serve the "interests of justice", national jurisdictions remain unfettered *despite* their unwillingness or inability to proceed genuinely. The impunity gap that is created, or rather remains, is unavoidable and must be tolerated – but not condoned – by the international community. Guided by the "interests of justice" criterion, the ICC will contribute by interfering in situations and cases that for some legitimate reason should be prioritised. This means that the term "served" inevitably will have to be understood as "best served". Intuitively, essential factors would appear to be the gravity of the crime, the chances of a successful proceeding and the impact of the proceeding on core values that the Rome Statute shall promote, such as peace and security. Because the ICC operates at the international level with a severely limited capacity, the discretional considerations are more complex and of a different nature than at the national level. Like the national discretion, however, the discretion of the ICC Prosecutor must not be arbitrary; it must be exercised within the legal framework provided by the Rome Statute. This chapter will analyse this framework. It will also explore the possibilities of judicial review of the Prosecutor's discretion.

Not even within each situation in which the Court actually interferes will the Court be able to deal with more than a fraction of the crimes. This is the inevitable result of the following factors: first, while it can be hoped that the ICC will have some preventive effect, the total number of crimes committed should not be expected to be much smaller in the future, and it will certainly by far exceed the ICC's capacity; second, as the number of states parties to the Rome Statute increases,

more crimes will fall under the Court's jurisdiction;[1067] third, some states will remain unwilling or unable to deal genuinely with crimes committed in their territories or elsewhere by their citizens; fourth, the Court's scope is significantly broadened by the ICC Prosecutor's authority to initiate investigations *proprio motu* (on his or her own initiative), meaning that he or she can act independently of states and the Security Council and may rely on information from any source; and fifth, while the ICC's capacity might be increased over time, it will certainly remain utterly inadequate compared to the number of crimes.[1068]

The ICC Prosecutor will apply the "interests of justice" criterion in article 53 at two very different stages of the ICC proceedings: first, when he or she selects a situation for investigation, and second, when he or she singles out an individual for prosecution. This chapter will demonstrate that the selection of situations will involve the most complex political and security-oriented assessment. The selection of individuals for prosecution will be more straightforward, resembling more that which is exercised by national prosecutors, primarily based on considerations such as the crime's gravity, the perpetrator's role in the crime and the individual's guilt.

11.2.1. The Prosecutor "shall" proceed when the criteria are fulfilled

According to article 53(1), the Prosecutor "shall" initiate an investigation when he or she has determined that there is a "reasonable basis" to proceed. The term "shall" indicates a duty to proceed, and this would seem to conflict with the very notion of prosecutorial discretion. The truth is, however, that the "duty" to investigate (and/or prosecute) occurs only when all three criteria listed are fulfilled, the third being the Prosecutor's discretional finding that pursuing a matter will serve the "interests of justice". Having said that, the Prosecutor's discretion is to some extent circumscribed by the power of the Pre-Trial Chamber to *review* a decision not to proceed solely based on the "interests of justice" criterion when there has been a Security Council referral.[1069]

[1067] In its first year of existence, the Office of the Prosecutor received 499 communications concerning possible cases from 66 different states, see *Prosecutor will Comment on Communications Received*, *supra* note 372, p. 1.

[1068] The Court has 18 judges. By comparison, the ICTY can, with 16 judges, conduct half a dozen trials simultaneously, see Pocar 2004, p. 308.

[1069] Article 53(3).

11.2.2. Absolute and relative appropriateness

Prosecutorial discretion may be absolute or relative. In *absolute* terms, a justice system should only sanction moral wrongs or conduct where a sanction will have a positive effect. Sanctions must be imposed only when it appears just. In *relative* terms, a justice system must allocate its limited resources in the way which best serves the interests of justice. Among matters that all deserve justice, the most demanding ones must be prioritised. It is submitted that the "interests of justice" criterion in article 53 of the Rome Statute should be understood in both senses. The ICC Prosecutor must first filter out situations and cases that do not deserve to be dealt with at all (in an absolute sense), and then he or she must prioritise the most important among the remaining situations and cases (in a relative sense). Faced with arguments for and against proceeding, the Prosecutor must determine each argument's absolute relevance and relative weight, *inter alia* distinguishing between short-term and long-term effects of ICC interference.

11.2.3. Who exercises the discretion?

While some form of prosecutorial discretion is a necessary part of any international prosecutorial mechanism, it is not given that an independent Prosecutor should exercise it. The discretion to select cases could, alternatively, have been left with a judicial or political entity within or outside the ICC, such as the Pre-Trial Chamber or the Security Council. The task of the Prosecutor would then have been limited to investigating and prosecuting.[1070] Alternatively, only states parties could have been empowered to bring cases before the Court, subject only to the Prosecutor's *approval*, or, conversely, any exercise of jurisdiction could have been made dependent on the *ad hoc* acceptance from the states concerned.

Giving the Prosecutor the authority to select situations and cases was an important policy choice. This policy is reflected not only in articles 15 and 53, but also in article 42(1) on the Prosecutor's independence.[1071] If the selection had been left with a *political organ*, the Court would scarcely have been perceived as

[1070] While the necessity of independence from political authorities is indisputable once a criminal proceeding has started, the necessity of such independence in the selection of cases is arguably not equally obvious.

[1071] Article 42(1) provides that the Office of the Prosecutor "shall act independently as a separate organ of the Court", and that a member of the Office "shall not seek or act on instructions from any external source".

independent and impartial.[1072] As the prosecutorial discretion is formulated, however, neither states parties nor the Security Council can instruct the Prosecutor to investigate or prosecute.[1073] The Prosecutor might, however, be forced to proceed by the Pre-Trial Chamber, according to article 53(3), although this is not very likely to happen. Instead, the independent role of the Prosecutor envisaged in article 42(1) and the "prosecutorial" character of the "interests of justice" criterion indicate that the Pre-Trial Chamber should be hesitant to set aside a decision of the Prosecutor not to proceed. The Pre-Trial Chamber will have to do so, however, if it finds that the Prosecutor has disregarded the legal framework of article 53, or that the decision not to proceed violates principles of fair administration of justice or otherwise amounts to abuse of power.

It should be noted that under article 61 the Pre-Trial Chamber must "confirm the charges on which the Prosecutor intends to seek trial". This means that the Pre-Trial Chamber might effectively prevent the Prosecutor from prosecuting by not confirming the charges. In addition, the Prosecutor needs an authorisation before he or she may open an investigation *proprio motu*.[1074]

11.2.4. The interests of justice

The "interests of justice" criterion makes it imperative to determine what "justice" means, and for whom and how it is to be served. There seem to be no objectively "correct" answers, and this chapter will demonstrate that the vagueness of the

---

[1072] The reasons for not requiring authorisation by a *special chamber* of any proceeding are not equally obvious.

[1073] It might be argued, however, that the Assembly of States Parties (ASP) *de facto* can control the Prosecutor's activities. According to article 112, the ASP shall "[p]rovide management oversight to […] the Prosecutor" and "[c]onsider and decide the budget for the Court". It might be argued that the ASP has the possibility to allocate resources to certain proceedings or, more generally, that the ASP, as the Court's constituents, must have the authority to control the Court's activities. It is submitted, however, that such control cannot be exercised. It would be inconsistent with article 42(1), which grants the Office of the Prosecutor independence from any "external source". The term "external" must be interpreted so as to cover any source outside that Office. To give the ASP such control would also be inconsistent with article 42(2), which gives the Prosecutor "full authority over the management and administration of the Office, including the staff, facilities and other resources thereof". It is therefore submitted that the ASP may not exercise such control.

[1074] All the procedures regarding referrals, the opening of investigation, authorisation, *etc.* are presented in detail in the chapter on the procedures of the complementarity principle.

criterion leaves considerable room in the determination for personal views on broad questions such as the appropriate role of justice and the ICC's role. Due to this, the Prosecutor will have to navigate under considerable pressure, and he or she is bound to face criticism no matter how he or she selects cases. The pressure and criticism will come from actors with strong views, such as NGOs and various legal commentators, who will offer their expertise. Moreover, victims and their relatives will demand that "their" situations and cases be handled. A less prevalent, but not less real, pressure will come from sovereignty-worried states. The actors will seek both to prevent the Prosecutor from acting and to prompt his or her action,[1075] and their voices will be amplified by massive media coverage, although not all situations will be equally attractive to the media. The first three years of the Court's activity have revealed that states sometimes are willing to refer their domestic situations to the Court in so-called "self-referrals". Then the pressure to proceed might be considerable. At the same time, the Prosecutor will be called to distribute justice in an even manner, reflecting a certain geographical, political and social balance. If the Prosecutor should, for instance, continue to focus on underdeveloped African countries, he or she runs the risk of being accused of pursuing a "neo-colonialist" approach avoiding situations in the North.[1076] Similarly, if the Prosecutor should target only *unable* states, he or she might be perceived as weak. At the same time, if the Prosecutor starts to target *unwilling* states in the North, he or she might also experience considerable failure.

11.2.5. Burden sharing

The ICC Prosecutor should encourage states and the international community to deal with the cases that the ICC will not have the capacity to deal with within a situation in which the ICC operates. The Prosecutor has noted:

> "If the ICC has successfully prosecuted the leaders of a State or organisation, the situation in the country concerned might then be such as to inspire confidence in the national jurisdiction. The reinvigorated national authorities might now be able to deal with the other cases. In other instances, the international community might

[1075] Although not specifically directed against the ICC Prosecutor, the United States has demonstrated a strong determination to avoid the investigation of its officials involved in peacekeeping operations.
[1076] Hall 2003, p. 12.

> be ready to combine national and international efforts to ensure that the perpetrators or [sic] serious international crimes are brought to justice."[1077]

While the ICC Prosecutor might have found that investigating or prosecuting a case before the ICC would not serve the "interests of justice", this does not necessarily imply that to proceed would not be desirable before another judicial system than the ICC. It may only mean that *the ICC* should not deal with the case, perhaps due to its limited resources and the fact that there are more pressing cases. The impunity gap left is created by states and remains their responsibility.

11.3. PROSECUTORIAL DISCRETION BEFORE OTHER INTERNATIONAL AND NATIONAL JURISDICTIONS

11.3.1. Prosecutorial discretion before other international jurisdictions

Prior to the establishment of the ICC, the selection of situations and cases before international criminal jurisdictions had been *highly political* and *not very transparent*. Article 14(1) of the Nuremberg Charter provided for a Committee for the Investigation and Prosecution of Major War Criminals, to which

> "[e]ach Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals".[1078]

While the actual investigation was carried out within the purview of separate authorities of each of the four Allied Powers, *inter alia* by the respective national contingents of the occupation armies which conducted searches for evidence and analysis of the elements discovered,[1079] the Committee should collectively

> "agree on a plan of the individual work of each of the Chief Prosecutors,[1080] [...] settle the final designation of submitted therewith".[1081]

Article 14(3) provided that the Committee "shall act in the above matters by a majority of vote".

The Chief Prosecutor of the International Military Tribunal for the Far East (IMTFE) had the title "Chief of Counsel", and article 8(a) of the Tokyo Charter provided that he or she be appointed by the Supreme Commander for the Allied

---

[1077] *Paper on some policy issues*, *supra* note 18, p. 7.

[1078] The signatories were France, the Soviet Union, the United Kingdom and the United States.

[1079] Zappalà 2003, p. 31.

[1080] Article 14(2) (a) of the Nuremberg Charter.

[1081] *Ibid.*, subparagraph (c).

Power. Article 8(b) provided that "[a]ny United Nation with which Japan had been at war may appoint an Associate Counsel to assist the Chief of Counsel". Such Associate Counsels were appointed by each of the ten other Allies who were at war with Japan.[1082] Article 8(a) of the Tokyo Charter provided that the Associate Counsel was formally under the authority of the Chief Counsel who was "responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal".

The selection of cases for prosecution before the IMT and the IMTFE was far more politicised than before the subsequent international tribunals. Neither of the two Charters provided for any institutional independence of the Prosecutors from their governments. Instead, the Prosecutors acted in the name of their states. For instance, the IMT Chief Prosecutor was formally answerable to President Truman, although he is said to have been free to make his own decisions in practice.[1083] The British Chief Prosecutor was the British Attorney General. Each of the four Prosecutors had their own staff and resources, provided by their governments.[1084]

Considering the large number of persons who had committed crimes within the Tribunals' jurisdiction and reasonably could have been labelled as "major war criminals", the final 24 (IMT) and 28 (IMTFE) defendants were singled out after a highly selective process. The Charters failed to list specific criteria for the selection, other than the notion of "major war criminals" in the IMT Charter. The final lists of defendants and the judgements indicated that the gravity of the crime, the perpetrator's role in the crime as well as his or her military rank or government position were important factors. The selection probably corresponded well with the factors in article 53 of the Rome Statute governing the selection before the ICC. Nevertheless, the political character of the two Tribunals and the lack of clear-cut criteria have prompted criticism. With hindsight, the IMT Chief Prosecutor has noted:

> "All in all, the task of selecting defendants was hastily and negligently discharged, mainly because no guiding principles of selection had been agreed on."[1085]

[1082] The 11 Allied nations involved in the trials were Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the United Kingdom, the United States and the Soviet Union.

[1083] Taylor 1992, pp. 215-16.

[1084] *Ibid.,* at p. 213. Taylor notes that the American delegation was over twice the size of the combined British and French prosecution staffs and more than twice the size of the Soviet delegation.

[1085] Taylor 1992, p. 90.

Once the Tribunals' Chief Prosecutors and Chief of Counsel had filed an indictment, the two Charters required no confirmation by the respective Tribunals. The French Chief Prosecutor even filed a memorandum noting that the IMT had no power to reject the Chief Prosecutors' designation of Alfried Krupp von Bohlen und Halbach as a major war criminal, as the designation "has been made as the last resort, under Article 14 b of the Charter".[1086]

In contrast to the IMT and the IMTFE, the prosecutorial offices of the ICTY and the ICTR are independent organs.[1087] According to article 16(2) of the ICTY Statute, the Prosecutor "shall act independently as a separate organ of the International Tribunal [and] not seek or receive instructions from any Government or from any source". The two Statutes grant the Prosecutors full discretion in the determination as to whether to initiate an investigation,[1088] and they are under no instruction either from the judges or from the Security Council which created the Tribunals. Of course, the mandates given by the Security Council effectively limit the temporal and geographical scope of the exercise of jurisdiction. Indeed, the Security Council has determined *a priori* that investigating within these two situations is appropriate, and this explains why the more detailed discretion is so broad. In order to initiate an investigation, article 18(1) of the ICTY Statute requires a "sufficient basis", but it does not define the criterion. The article provides that the Prosecutor

> "shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed."

The ICTY and the ICTR Prosecutors are under no duty to initiate an investigation upon receipt of a complaint.[1089] In her Kosovo Report, the ICTY Prosecutor noted, however:

> "Since the International Tribunal has jurisdiction over all potential war crimes in the former Yugoslavia, the former and current Prosecutors considered that it was

[1086] Memorandum of the French Prosecution on the Order of the Tribunal Rejecting the Motion to Amend the Indictment, 20 November 1945, *Trial of the Major War Criminals*.
[1087] ICTY article 11 and ICTR article 10.
[1088] ICTY articles 16 and 18 and ICTR articles 15 and 17.
[1089] Also ICTR article 17(1).

> their obligation and responsibility, as independent Prosecutors, to assess the complaints and allegations."[1090]

According to article 18(4) of the ICTY Statute, the Prosecutor shall if he or she determines that there is a "sufficient basis" to proceed with a prosecution transmit the indictment to a judge of the Trial Chamber. Rule 47(E) provides that the Prosecutor must be satisfied that there are "reasonable grounds for believing" that a suspect has committed a crime within the jurisdiction of the Tribunal.[1091] The judge shall, according to article 19(1) and rule 47(E), confirm the indictment or a part of it "if satisfied that a *prima facie* case has been established by the Prosecutor". In the contrary situation, he or she shall dismiss the indictment. The ICTR regime is essentially the same.[1092]

Due to the *ad hoc* Tribunals' limited capacity, some discretion beyond the *prima facie* assessment must be exercised. Although there is no reference to the "interests of justice" in the Statutes, the appropriateness of proceeding must be considered according to some prosecutorial policy. Former Prosecutor Louise Arbour has noted that

> "domestic prosecution is never really seriously called upon to be selective in the prosecution of serious crimes. In the ICTR, the prosecutor has to be highly selective before committing resources to investigate and prosecute."[1093]

While the Statutes *ex facie* seem to establish mandatory prosecution of cases where there is "sufficient basis", the Prosecutor is, in reality, under no duty to proceed with a case whenever there is such a basis. The Prosecutor of the *ad hoc* Tribunals has handled a limited number of the cases falling under the Tribunals' jurisdictions, primarily targeting persons suspected of being most responsible for the gravest

---

[1090] In this case the Prosecutor found "following a full consideration of her team's assessment, that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign. Although some mistakes were made by NATO, the Prosecutor is satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign", see *Prosecutor's Report on the NATO Bombing Campaign*, 13 June 2000, PR/P.I.S.510-e (available at http://www.un.org/icty/pressreal/p510-e.htm).

[1091] Rule 47(B) of the ICTY Rules of Procedure and Evidence.

[1092] ICTR article 18(1).

[1093] Arbour 1997, p. 534. Former ICTY Prosecutor Goldstone has noted that he was conducting "the most important criminal investigations ever conducted in history" and that "the number of potential suspects is considerable, witnesses number into tens of thousands and victims into millions", see Goldstone 1992, p. 291.

crimes. The judges have, for their part, found that the Statutes authorise them to exercise a limited review of the prosecutorial discretion, *inter alia* with reference to the principle of "equality before the law", which arguably is applicable to all administration of justice (see below). The *ad hoc* Tribunals have, however, in practice, little authority to review a decision of the Prosecutor not to prosecute a *prima facie* case.

As for the discretional criteria, it should be noted that in Resolution 1534 (2004), the Security Council has requested the ICTY and the ICTR

> "in reviewing and confirming any new indictments to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant tribunal […]".[1094]

In response to Resolution 1534, the President of the ICTR adopted a "Completion Strategy", stating:

> "In determining which individuals should be subject to trial before the International Criminal Tribunal for Rwanda, the Prosecutor will be guided by the need to focus on those who are alleged to have been on positions of leadership and those who, according to the Prosecutor, bear the greatest responsibility for genocide. […] The criteria taken to be taken into consideration when making this determination are as follows:
>
> - the alleged status and extent of participation of the individual during the genocide
> - the alleged connection and individual may have with other cases
> - the need to cover the major geographical areas of Rwanda in which the crimes were allegedly committed
> - the availability of evidence with regard to the individual concerned
> - the concrete possibility of arresting the individual concerned
> - the availability of investigative material for transmission to a State for national prosecution."[1095]

These criteria will be referred to when the prosecutorial discretion under the Rome Statute is analysed. In order to ensure the effective implementation of said Resolution, the ICTY has also introduced a new review mechanism in its Rules of Procedure and Evidence according to which the Tribunal's Bureau shall

---

[1094] Security Council Resolution 1534 (2004), para. 5.

[1095] *Completion Strategy of the International Criminal Tribunal for Rwanda*, annex to letter of 30 April 2004 from the President of the ICTR to the Security Council, S/2004/431.

> "determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal".[1096]

11.3.2. Prosecutorial discretion before national jurisdictions

In principle, it would be desirable for a state to exercise its jurisdiction over all crimes within its jurisdiction. Failure to do so might be viewed so as to indicate the state's inability or unwillingness to control its territory. From a national perspective, it might be viewed as a breach of the state's "contractual duty" implicit in the constitution to protect the citizens. From an international perspective, the state also risks violating the duty under international law to provide an "effective remedy". Beyond legal considerations, the state also has a moral incentive to vindicate the victims' suffering, to prevent the commission of new crimes and to support the conscience of humankind. As for the crimes under the ICC's jurisdiction, it will only exceptionally not be in the "interests of justice" or in the "public interest", as the national terms typically are, to investigate and prosecute a *prima facie* case.

National prosecutors are typically, but not invariably, independent from the political part of the executive branch in the sense that they cannot be politically instructed as to whether to prosecute or not. Instead, prosecutors are bound by the law, which grants them a varying degree of discretion. At this point, civil law and common law systems tend to differ. In civil law systems, prosecutors are typically under a legal duty to prosecute provided there is sufficient evidence;[1097] there is, formally, no discretion. In Germany, where the duty to prosecute is based on the *Legalitätsprinzip*, failure to prosecute a *prima facie* constitutes a criminal offence.[1098] In common law systems, such as that of the United States, there is room for some discretion. Here, prosecutors may typically decide not to prosecute when this will not serve the "public interest" or the "interests of justice". In this respect, the ICC system resembles the latter. Of course, common and civil law are, in reality, less different than they would appear at first sight. The discretion of common law systems is modified by the fact that the prosecutor has to state the reasons for his or

---

[1096] ICTY rule 28 of the Rules of Procedure and Evidence.

[1097] Ntanda Nsereko 2005, p. 127.

[1098] Section 152(2) of the German Code of Criminal Procedure provides: "Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications" (as translated in Nsereko 2005, p. 127, fn. 8).

her decision not to proceed with a case, and that decision is typically subject to judicial review. As for the mandatory prosecution of civil law systems, this is typically modified by exceptions listed in the law. These exceptions allow the prosecutor not to proceed in the same type of cases where a common law prosecutor would have found that proceeding would not serve the "public interest", *etc*. Thus, flexibility is achieved in both systems, only by different techniques. Ultimately, the difference lies in the point of departure: mandatory civil law systems will prosecute *unless* some legal exception is found; discretionary common law systems will prosecute *when* it is appropriate. Actual differences between systems will be the result of a different prioritising rather than of differences in the legal framework.

Some national systems appear to give the prosecutor absolute power, in the sense that the decision whether or not to investigate or prosecute is impossible to review or overturn, also if the decision is manifestly wrong or, even worse, made in bad faith.[1099] For instance, article 120(7) of the Ugandan Constitution provides:

> "In the exercise of the functions conferred on him or her by this article, the Director of Public Prosecutions shall not be subject to the direction and control of any person or authority."[1100]

At the same time, however, the Ugandan Director of Public Prosecution is instructed, in carrying out his or her duties, to have regard to "the public interest, the interest of the administration of justice and the need to prevent abuse of legal process".[1101] According to this doctrine, decisions that are manifestly made in bad faith may be set aside. In some states, limits on the prosecutorial discretion arise from a principle applying to the exercise of administrative discretion in general. According to that doctrine, any discretion must be exercised in good faith and in an equal manner for the purpose for which it was conferred, and not for some ulterior, extraneous or improper motive.[1102] Such doctrine can, for instance, be found in some common law countries and in Scandinavian countries. The doctrine has gradually developed through jurisprudence, and the judiciary has simply claimed the right to control the administrative discretion. In some systems, the doctrine even enjoys

---

[1099] In *R. v. Sikumba* the South African judge noted: "The Prosecutor, as the representative of the Solicitor-General, is the *dominus litis*. It is within his powers to withdraw the charge at any stage of the proceedings and no court can prevent him, just as no court can force him to prosecute." The quote is found in Ntanda Nsereko 2005, p. 129, fn. 19.

[1100] Article 120(6) of the Constitution of the Republic of Uganda.

[1101] *Ibid.,* article 120(5).

[1102] *R. v. Inland Revenue Commissioners, ex parte Mead and Cook*. See also *Prosecutor v. Delalic et al*., para. 606.

constitutional status. Below, it will be argued that a similar right to control the Prosecutor's activity is implicitly granted to the Pre-Trial Chamber under the Rome Statute.

11.4. THE "INTERESTS OF JUSTICE" CRITERION IN ARTICLE 53 – GENERAL ANALYSIS

11.4.1. The ordinary meaning of the term

In order to determine when proceeding with a case will serve the "interests of justice", it is necessary first to determine the meaning of the term "justice". According to *Webster's Dictionary of the English Language*, the term refers to the "behaviour to oneself or to another which is strictly in accord with currently accepted ethical or legal norm". This author submits that the term has a narrow as well as a broad meaning, and that the difference between the two meanings lies in the level of the guiding norm. "Justice" may refer either to a narrow idea of equity or to a broader idea of absolute righteousness as the "accepted ethical or legal norm". Usually, pursuing broad and narrow justice will not dictate different courses of action. In the present context, however, the particular implications of prosecuting international crimes might imply essential differences between the two concepts of justice. Basically, a broad understanding of the term "justice", as it appears in article 53, will allow a broader range of factors to be considered for the determination as to whether to proceed with a given situation or case.

In the *narrow sense*, according to *The Oxford English Dictionary*, "justice" means "equity",[1103] referring to what is "equitable" or "fair" considering the circumstances applicable between the parties involved in some form of exchange. The guiding norm is that a party should be rendered what is "just", *i.e.* "deserved; merited".[1104] This meaning may also be referred to as the commutative meaning, where the aim is to (re)establish a *balance* between two parties. Justice in a narrow sense is applied regularly in all areas of life where persons interact; *i.e.* it is not only limited to criminal justice. When a right has been violated, "justice" in a narrow sense means "vindication of right".[1105] Criminal justice focuses on the respective *parties* to a crime and assumes that equity, *i.e.* balancing evils, is the ethically best result. The graver the crime, the greater is the victim's need for vindication, and the more the

[1103] *The Oxford English Dictionary*.
[1104] *Ibid*.
[1105] *Ibid*.

perpetrator is to blame, the more he or she deserves to be punished.[1106] Justice does not, however, have to be retributive as the one dispensed in penal systems; it may also be restorative. Both types of justice are, conceptually, narrow in the sense that they aim at re-establishing the balance between the perpetrator and the victim, by punishing the perpetrator or compensating the victim.

In a *broad sense*, "justice" means "conformity (of an action or thing) to moral right, or to reason, truth or fact".[1107] The aim is no longer equity but to choose the right course of action from a broader perspective. Justice in a broad sense, as a guiding principle for responding to a crime, will require that all circumstances be considered. One has to consider not only how the response affects the parties directly involved in the matter, but how it affects all parties who will be somehow affected by the course of action. In a broad sense, "justice" refers to what is right without implying any specific guiding norm (such as equity). Kelsen adopts a broad understanding of "justice" when he notes that "justice" "regulates the behaviour of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it".[1108] Broad is also Bentham's definition of "justice" as "the greatest possible happiness of the greatest possible number of individuals".[1109] These definitions reflect a utilitarian assessment; in a given situation, "justice" may or may not be, or coincide with, equity. In this sense, "justice" should not be a fixed formula but adapt to each situation, the parties involved and their perceptions. When broad justice is the aim, narrow justice, *i.e.* equity, might have to be "sacrificed" as other aspects are deemed more important according to legitimate criteria as deemed by a competent person weighing all relevant factors in good faith. The latter is well reflected by the definition of "just" in *The Oxford English Dictionary* as "having reasonable or adequate grounds; well founded". Similarly, "justice" may also be defined as "integrity; rectitude".[1110] In the present context, broad justice would mean selecting situations and targeting individuals focusing beyond the interests of the perpetrator and the victim, considering all legitimate interests that might be affected.

[1106] The term "justice" is sometimes defined simply as "the administration of law", see *The Oxford English Dictionary*. Such a use is arguably based on an assumption that the *impartial application of law* always is just. Article 53 appears, however, to go beyond that assumption as it acknowledges that the mechanical application of the law will not always serve the "interests of justice".

[1107] *The Oxford English Dictionary*.

[1108] Kelsen 1960, p. 2.

[1109] *Ibid.,* p. 3, where Kelsen refers to Jeremy Bentham.

[1110] *The Oxford English Dictionary*.

In the field of international crimes, the selection is particularly challenging because the crimes have so many, often conflicting, implications.

It is submitted that narrow and broad "justice" do not need to conflict. When it has no decisive negative effects, pursuing narrow justice will be "just" in both senses of the term. That is why dispensing narrow criminal justice almost invariably is the preferred response to crimes. When, however, other interests that are deemed more important are at stake, as the case might exceptionally be when international crimes are committed, broad justice should prevail. Thus, while standing firm by principles of equity and narrow justice is necessary, one should not adhere rigidly to the principles and rigidly punish the guilty irrespective of the consequences, however grave they might be. Indeed, this is why the term "interests of justice" should be considered a key term in the Rome Statute. Kaplow and Shawell make an illustrative remark in their study of what criteria should guide social decision-making:

> "Most individuals – including many of the philosophers we have queried – would not readily endorse a principle of fairness if doing so implies (as it does) that it may be deemed socially good to make everyone worse off. It is, after all, difficult to understand the point of a notion of fairness if every person to whom one presumably seeks to be fair may be made worse off as a result."[1111]

11.4.2. The other official languages

While the Spanish term "*interés de la justicia*"[1112] and the French term "*intérêts de la justice*"[1113] appear to be fully synonymous with the English term "interests of justice", the Russian term "*interesy pravosudia*" appears to be narrower. This term derives from the term "*pravosudie*" which usually is defined narrowly as "court of law" or "administration of justice" (the term "*sud*", which the term partly derives from, means "court").[1114] Based on this difference, one could argue that the narrow meaning (*i.e.* "equity") should prevail as this is the only common meaning between the languages. According to the Vienna Convention, however, "the meaning which best reconciles the texts, *having regard to the object and purpose* of the treaty, shall be adopted".[1115] This favours the broad interpretation.

[1111] Kaplow 2002, pp. xviii-xix.
[1112] *Collins Spanish Dictionary*.
[1113] *Le Nouveau Petit Robert*.
[1114] *The Oxford Russian Dictionary*.
[1115] Vienna Convention article 33(4).

11.4.3. The term's context

Placed in the statute of a *criminal court*, the term "justice" would most intuitively be associated with narrow criminal justice. Indeed, the Preamble affirms that the crimes within the Court's jurisdiction "must not go unpunished" and that "their effective prosecution must be ensured";[1116] it expresses a determination to "put an end to impunity for the perpetrators";[1117] it recalls that it is the "duty of every State to exercise its criminal jurisdiction over those responsible".[1118] The Preamble refers, however, to other essential interests as well, such as the conscience of humanity, peace and security and the well being of the world.[1119]

The term "justice" also appears in articles 17(2) and 20(3) regarding admissibility. In the phrase "bring the person concerned to justice", criminal justice is clearly what is meant. Article 53, however, assumes that criminal proceedings, under the circumstances, *might not be* in the "interests of justice". The point here is that considerations related to a different concept of "justice" may trump considerations of narrow criminal justice.

Further, the exact term "interests of justice" appears in three other places in the Statute. In articles 61(2), 65(4) and 67(1) (d), the meaning of justice appears to be even narrower, referring to the good administration of criminal justice.[1120] In article 65(4), the meaning is broader, implying that the purpose of a trial extends beyond bringing the perpetrator to justice to promoting the victims' interest in acquiring full knowledge of the events.[1121]

[1116] Preambular paragraph 4.

[1117] Preambular paragraph 5.

[1118] *Ibid.,* paragraph 6.

[1119] *Ibid.,* paragraphs 2 and 3.

[1120] Article 61(2) provides that the Pre-Trial Chamber, in some situations, may hold a confirmation hearing in the absence of the person charged, and that the person then "shall be represented by counsel where the Pre-Trial Chamber determines that it is in *the interests of justice*". Article 65(4) provides that the Pre-Trial Chamber, despite an admission of guilt, may order "a more a more complete presentation of the facts of the case [as] required in *the interests of justice*, in particular the interests of the victims". Article 67(19 (d) provides that the accused in the determination of any charge has a "right and to have legal assistance assigned by the Court in any case where *the interests of justice* so require".

[1121] Article 65(4) provides that where the accused has made an admission of guilt pursuant to article 64(8) (a), the Trial Chamber may still determine that a more complete presentation of the facts of the case "is required in the interests of justice, in particular the interests of the victims".

When preambular paragraph 11 refers to "lasting respect for and the enforcement of *international justice*", criminal justice appears to be what is meant, but it indicates at the same time that specific international interests might conflict with narrow criminal justice.

11.4.4. The holders of the "interests of justice"

In light of the above, it is pertinent to determine with regard to whom "justice" is to be served. Both subparagraphs (1) (c) and (2) (c) of article 53 refer to the interests of victims, and the latter also refers to the perpetrator's role and blameworthiness. These two parties are not, however, the only parties who will be affected by the ICC's activity. While the ICC will be acting *in lieu* of the states which would normally exercise jurisdiction, that that is not to say that it will be acting on their behalf. Neither will it, at least not only, be acting on behalf of the victims. Instead, the Court will be acting on behalf of the world community as represented by the states parties, its constituents. The ICC is a manifestation of the idea that "all peoples are united by common bonds";[1122] that international crimes "shock the conscience of humanity";[1123] that the crimes "threaten the peace, security and well being of the world";[1124] and that they are of "concern to the international community as a whole".[1125] The ICTY's Trial Chamber has noted that "crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated".[1126] Therefore, the prosecutorial discretion must be guided by the interests of the international community, the most important being peace, security and the conscience of humanity. Brubacher notes:

> "The Prosecutor of the ICC represents the accusations and interests of the entire international community and must therefore *weigh the interests of the parties to the case with those of the international community* […]. [It is] within this view that the criteria for public policy interests, as expressed in Article 53, must be identified and interpreted." [1127]

In addition to the concerns of the world community as such, the exercise of discretion must also address the need to ensure the Court's credibility, the need for

---

[1122] Preambular paragraph 1.
[1123] Preambular paragraph 2.
[1124] Preambular paragraph 3.
[1125] Preambular paragraphs 4 and 9, and articles 1 and 5.
[1126] *Prosecutor v. Erdemovic*, Sentencing Judgment of the Trial Chamber, para. 28.
[1127] Brubacher 2004, p. 80.

successful proceedings and the need to establish a meaningful role for the Court. Arguably, the "interests of justice" criterion also connotes that the ICC should not be used in a way that would put justice, and thus the ICC, into disrepute. Thus, fundamental principles of law must be observed, including the principles of legality and equality before the law. Such principles might function as important correctives to the broader interests referred to above.

11.4.5. The need for a broad discretion

While a mechanical exercise of prosecutorial discretion aimed at selecting the crimes most deserving of criminal justice from a narrow perspective of equity might suffice at the national level, it would be highly inadequate, even dangerous, at the international level. The Prosecutor should, for instance, have the authority to determine that, in exceptional circumstances, a non-prosecutorial mechanism providing alternative forms of justice is a better alternative due to the implications for peace and security. The Prosecutor should not be prevented from considering such effects. With a broad interpretation of the "interests of justice" criterion, the ICC will be able to send clearer and more nuanced messages as to how states should perform in a spectre of situations.

It should be noted that the Office of the Prosecutor seems to suggest a narrower interpretation of the term "justice" than the present author. The Offices notes:

> "The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the object and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security."[1128]

11.4.6. Consistency with human rights as provided in article 21(3)

It might be argued that a broad interpretation of "justice" would not be "consistent with internationally recognized human rights", as required in article 21(3) on the interpretation and application of the ICC law. Certain human right instruments, such as the Genocide Convention and the Geneva Conventions, stress the importance of investigating and prosecuting international crimes, apparently without exceptions. Yet, while a main purpose of establishing the ICC is to enforce the law reflected in such conventions, it is senseless to pursue criminal justice regardless of the consequences. Indeed, states may also, exceptionally, be excused

[1128] *Policy Paper on the Interests of Justice*, *supra* note 1063, p. 8.

from fulfilling obligations under international law when a "grave and imminent peril" exists.[1129] Besides, the most fundamental of all human rights is arguably the right to life,[1130] and the enforcement of criminal justice should therefore not be required when, for instance, it would cause the deaths of thousands.

Summing up, the term "interests of justice" must be interpreted and applied broadly. This, combined with necessary concessions to the Security Council, will provide for the flexibility and discretion required for adapting to a rapidly developing picture of international criminal law and for manoeuvring in political waters. The following paradox should be noted: the graver the crime, the stronger the victim's desire and need for vindication. At the same time, the reasons not to pursue criminal justice might also be stronger. As noted by one commentator, the selection of situations and cases can be expected to cause particular headaches for the ICC Prosecutor and "well illustrates both the limits of what the law can accomplish and the movement against impunity".[1131] While a broad spectrum of factors might be relevant, the Prosecutor is not authorised to select situations and cases for investigation and prosecution in an unrestricted manner. Any interpretation and application of the relevant criteria must be consistent with the ordinary meaning of the terms in light of their context and purpose.

11.5. FACTORS LISTED IN ARTICLE 53

11.5.1. Is the list in article 53 exhaustive or illustrative?

The wording in article 53(2) (c), "all the circumstances, including", illustrates that the list in article 53(2) (c) is not exhaustive but merely illustrative. As for article 53(1) (c), the list is not expressly either exhaustive or illustrative. An exhaustive reading of the latter provision would effectively limit the meaning that could be read into the term "justice", precluding a variety of factors otherwise relevant to a broad concept of justice. According to article 53(1) (c), the Prosecutor "shall consider" whether investigating would not serve the interests of justice "taking into account" the factors listed. The factors are therefore compulsory, in the sense that they must be considered. The wording in article 53(1) (c) does not provide much guidance as to whether other factors than those listed may be considered. Contextually, one

---

[1129] *Gabcíkovo-Nagymaros Project*, para. 51; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 140.

[1130] This is a right that said instruments protect in the first place.

[1131] Cameron 2004, p. 89.

might argue that because article 53(2) (c) is expressly illustrative, the list in paragraph (1) (c) should *e contrario* be viewed as exhaustive. Such interpretation would, however, be detrimental to the underlying object and purpose for the following reasons:

First, an exhausting reading and, consequently, a narrow construction of "justice" would not reflect that the ICC is intended to deal with "the most serious crimes of concern to the international community as a whole".[1132] Second, it would be inappropriate to force an international prosecutor to open an investigation which he or she actually believed would be detrimental to the "interests of justice" in a broad sense. Due to the serious implications of a decision to open an investigation, it would also be irresponsible. Third, it would be senseless to deem a factor as irrelevant under paragraph 1 while the same factor would be allowed for the decision regarding prosecution under article 53(2) (c), as the list there is only illustrative. The Prosecutor should be allowed as early as possible to consider all factors that sooner or later will be relevant,[1133] such as the role of the alleged perpetrator to the extent that it is known to the Prosecutor at this early stage.[1134] That would allow for a sound allocation of the resources from the start. It is, accordingly, submitted that the list in article 53(1) (c) is not exhaustive. Below, factors that this author deems relevant will be discussed, starting with those explicitly mentioned.

11.5.2. The gravity of the crime

Paragraph 4 of the Preamble affirms that "the most serious crimes of concern to the international community as a whole" must not go unpunished; preambular paragraph 9 expresses determination to establish a court with jurisdiction over "the most serious crimes of concern to the international community as a whole"; article 1 provides that the Court shall have jurisdiction over persons for "the most serious crimes of international concern";[1135] article 5 provides that the jurisdiction of the

---

[1132] Preambular paragraphs 4 and 9 and articles 1 and 5.

[1133] The reason why the factors "age or infirmity of the alleged perpetrator" and "his or her role in the alleged crime" are listed in article 53(2) (c) but not in article 53(1) (c) is that before an investigation has been carried out, the perpetrator's identity will scarcely be known, at least not with sufficient certainty. When an investigation is initiated, single cases will most probably not yet have been singled out.

[1134] The Office of the Prosecutor has stated that "[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission", see *Paper on some policy issues*, *supra* note 18, p. 7.

[1135] Also preambular paragraph 9.

Court shall be limited to "the most serious crimes of concern to the international community as a whole"; and article 8(1) provides that the Court shall have jurisdiction over war crimes, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". Lack of "sufficient gravity" is further an inadmissibility ground under article 17(1) (d). All these provisions evidence that the ICC is established to deal with the most serious crimes. Article 53 gives the "gravity of the crime" relevance beyond the admissibility determination. The ICC Prosecutor has noted:

> "Among the most important of these criteria [in article 53] is gravity. We are currently in the process of referring our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed – as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killings have been the predominant crime. We will also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crime is another important factor."[1136]

The ICC Prosecutor has noted that the Office of the Prosecutor "[has] adopted a policy of focusing the efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes".[1137] In this context, the Prosecutor refers to "the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes" as relevant factors for determining the gravity.[1138]

The Prosecutor made clear reference to the gravity of the crimes when he described the situation in Uganda after having opened an investigation there:

> "The situation involves allegations of large-scale crimes against civilians, including summary executions, torture and mutilation, child sexual abuse, rape, forcible displacement, and looting and destruction of civilian property."[1139]

Regarding the situation in the DRC, the Prosecutor noted:

[1136] *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, *supra* note 606, p. 6. See also *Policy Paper on the Interests of Justice*, *supra* note 1063, p. 4-5.

[1137] *Report on Prosecutorial Strategy*, *supra* note 1062, p. 5.

[1138] *Ibid*.

[1139] *Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps*, 12 February 2004, p. 4 (available at http://www.icc-cpi.int/otp/otp_events.html).

> "Ituri remains a priority for my office. Two weeks ago, more than one hundred people were reportedly killed in Gobu. The crimes are ongoing. We cannot allow the situation to continue unchecked." [1140]

These statements illustrate how the gravity almost "compels" the Prosecutor to interfere when the other preconditions to the exercise of jurisdiction are met, subject only to considerations of capacity, security and *Realpolitik*. All other factors being equal, the ICC should handle the gravest crimes that states fail to handle. The continuing relevance of the gravity, with regard to situations as well as cases, is well illustrated by a comment made by the Prosecutor regarding his activities in the DRC:

> "[F]irst, we confirmed that the North Eastern region of DRC (including Ituri) was the area with the gravest crimes within our temporal jurisdiction; second, we identified the most serious incidents; and third, we traced the responsibilities back to the persons most responsible."[1141]

The gravity is an uncontroversial factor for selecting cases; it corresponds to the concerns of all parties. For the *victims*, graver crimes increase the cry for retribution, redress and other forms of vindication. These crimes also create the greatest risk of private revenge. As for the conscience of humankind, the gravest crimes are the most disturbing (provided there is effective media coverage), and they might entail a popular demand that they be prosecuted.[1142] As for international peace and security, the gravest crimes will pose the greatest threat. Targeting the gravest crimes also means adopting the legacy of previous international jurisdictions, although the *ad hoc* Tribunals in their early years were effectively forced to prosecute less grave incidents due to the limited number of perpetrators eligible for prosecution at that time.

As for the more precise meaning of the term "gravity," several factors might be relevant. Some illustrative remarks made by the ICC Prosecutor have already been referred to. Relevant factors include the number of victims; the fact that the victims belong to particularly vulnerable groups (*e.g.* civilians or children); the fact that the crime caused death or extreme pain; the fact that the crime was carried out in a particularly brutal manner; and the fact that the crime was committed as part of a concerted plan. Some guidance can be found in rule 145(1) (c) on the determination of a sentence. This provision instructs the Court to consider "the extent of the damage caused, in particular the harm caused to the victims and their families; the

---

[1140] *The Office of the Prosecutor opens its first investigation*, *supra* note 367.

[1141] *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, *supra* note 606, p. 7.

[1142] General public outrage was important when the ICTY and ICTR were established.

nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person". As aggravating circumstances, rule 145(2) (b) lists *inter alia* abuse of power or official capacity; commission of the crime where the victim is particularly defenceless; commission of the crime with particular cruelty or where there were multiple victims; and commission of the crime for any motive involving discrimination. All these factors would be covered by the "gravity of the crime" factor, although there is some overlap with this factor and the perpetrator's "role in the alleged crime". Indeed, it might be argued that the "gravity of the crime" factor indicates that the most responsible should be targeted. The ICC Prosecutor has noted that "[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission".[1143]

11.5.3. The interests of victims

Apart from the perpetrator whose liberty is at stake, the most obvious interest affected by the Prosecutor's decision is that of the victim. Investigating and prosecuting will almost invariably be in his or her interest, but to a varying degree, depending on factors such as the gravity of the crime, the blameworthiness of the perpetrator, the time passed since the commission of the crime, and the availability of alternative mechanisms which can provide accountability and/or compensation.

Despite the factor's relevance at face value, its decisiveness to the Prosecutor's selection is not obvious. Then again, the interests of victims will often coincide with other factors which might be deemed more important, such as the gravity of the crime and the interests of the international community. There is reason to believe that the Prosecutor, when different interests accumulate, will frequently refer to the victims' interests regardless of their weight. As the ICC Prosecutor issued his first arrest warrants in Uganda, he noted:

> "In all our work we are guided by the interests of the victims and we will always be respectful of local traditions. My team made over twenty missions to Uganda to listen to the concerns of local community leaders, including religious and traditional

[1143] *Paper on some policy issues*, *supra* note 18, p. 7. See also *e.g.* Morris 1996, p. 13.

> leaders, local government officials, Members of Parliament and local and international non-governmental organisations."[1144]

In order to establish the interests of victims, it is necessary to consult various sources, not confined to the victims themselves, who might have qualified opinions. The Prosecutor has noted that

> "[i]t may be important to seek the views of respected intermediaries and representatives, or those who may be able to provide a comprehensive overview of a complex situation. This may include local leaders (religious, political, tribal), other states, local and international intergovernmental and nongovernmental organizations. Victims, their representatives and other intermediaries are encouraged to be proactive in providing the Office with their views."[1145]

As an example of this, the Office has explained that it has "conducted more than 25 missions to Uganda for the purpose of listening to the concerns of victims and representative of local communities".[1146] In its strategic report, the Office of the Prosecutor noted that it aims at "continuously improving the way in which the Office interacts with victims and addresses their interests".[1147]

It should be noted that the "interests of victims" technically is listed in article 53 as a possible reason *not to* investigate or prosecute. Indeed, the reason why proceeding would not be in the victims' interests could be that it would endanger their lives. Yet, the ICC Prosecutor will most probably only refer to the interests of victims when he or she actually proceeds. A statement that criminal justice would not serve the interests of victims is likely to be controversial and prompt considerable criticism. The Prosecutor has, however, noted the need to be "respectful of possibly divergent views" and that the "interests of victims" criterion "includes the victims' interest in seeing justice done, but also includes other essential interests such as their protection".[1148]

[1144] *Statement by the Chief Prosecutor on the Uganda Arrest Warrant*, 14 October 2005, p. 6 (available at http://www.icc-cpi.int/press/pressreleases/114.html). Here, the situation was that many of the victims were *opposed* to ICC interference, fearing that it would accentuate the conflict.

[1145] *Policy Paper on the Interests of Justice*, *supra* note 1063, p. 6.

[1146] *Ibid*.

[1147] *Report on Prosecutorial Strategy*, *supra* note 1062, p. 8.

[1148] *Ibid.*, p. 5.

11.5.3.1. The existence of alternative compensation or accountability mechanisms

If some compensation has already been given to the victim, especially when by the perpetrator, the victims' interests in an ICC proceeding will be lesser. This is especially true when the compensation has been given in conjunction with an alternative accountability mechanism, such as a truth and reconciliation commission, where the victim's suffering and the perpetrator's responsibility have been acknowledged.

11.5.3.2. Cultural differences

The argument is frequently forwarded that the form of justice that the ICC can offer has no place in certain cultures. Following the Prosecutor's opening of investigations on the African continent, some commentators argued that criminal justice conflicts with traditional "African justice". Christian Aid's representative in Uganda has argued:

> "The people of the North would prefer restorative justice. That is rooted in their culture and they would argue that the ICC have no grounding with what is going on in the region if it thinks the answer is to pull out a whole lot of rebels."[1149]

The argument does not, however, appear to be sufficiently supported by empirical evidence. Following a visit with leaders from northern Uganda urging him to halt the investigations in the interests of peace, the ICC Prosecutor noted that he was "mindful of traditional justice and reconciliation processes and sensitive to the leaders' efforts to promote dialogue between different actors in order to achieve peace".[1150] Yet the Minister for the Rehabilitation of Northern Uganda noted that the delegation's statements went against the official Ugandan position:

> "The government position is very clear. We wanted these people prosecuted and I think that is the appropriate position that I also support."[1151]

Polls in the DRC have shown that the population, on balance, supports the principles of justice administered by a court of law.[1152] Those who refer to different

---

[1149] Volqvartz 2005.

[1150] *Statements by ICC Chief Prosecutor and the visiting Delegation of Acholi leaders from northern Uganda*, 18 March 2005 (available at http://www.icc-cpi.int/press/pressreleases/96.html).

[1151] *Uganda: Acholi leaders in The Hague to meet ICC over LRA probe*, interview with United Nations Integrated Regional Information Network, 16 March 2005 (available at http://www.irinnews.org/report.aspx?reportid=53434).

cultural perceptions of justice are quite often themselves removed from the conflicts in question, belonging themselves to the Western legal culture that they question. The vague notion of "African justice" appears to need further study and clarification, for example by conducting more on-site interviews with victims. When applying the Rome Statute, the ICC Prosecutor should, it is submitted, proceed with the assumption that the ICC represents a universally recognised type of justice. In this connection, it may also be noted that several African states are parties to the Rome Statute. All this is not to say, however, that the victims want criminal justice at any price (see below regarding the implications for peace and security).

Arguably, article 53 instructs the Prosecutor to consider statements by the victims that ICC interference would go against their wishes. Such statements must, however, be considered with caution. Statements against prosecution do not necessarily mean that the victims do not wish to see the perpetrators brought to justice; they might reflect short-term fears of the consequences and ignorance of the long-term consequences. While it is absolutely imperative to consider the former, the ICC Prosecutor must arguably focus on the long-term effects. Further, a reason why a local population would object to ICC interference might be the fact that they view the interference as an undue impingement on the state's sovereignty, perhaps in line with a state apparatus which has demonstrated unwillingness to proceed genuinely. It should be kept in mind that when the "interests of justice" is determined, the state will have failed the admissibility test in article 17 and national proceedings are no alternative.

11.5.3.3. Victims' interests vs. international community interests

In line with what has been indicated above, there appears to be a gap between the view of the Congolese population and that of foreign observers as to the appropriateness of initiating investigations in the DRC. During peace negotiations, it was international, primarily Western, circles that wanted to pursue criminal justice. In September 2003, in a speech to the United Nations General Assembly, President Kabila expressed faith in the establishment of a special criminal tribunal for the DRC, reportedly backed by various political factions.[1153] Eventually, he referred the Ituri situation to the ICC Prosecutor. This prompted Belgian Vice-Prime Minister and Minister of Foreign Affairs Louis Michel's remark:

[1152] *E.g.* Shattuck 2003, p. 14; Álvarez 2003, p. 10¸ Kambale 2004.

[1153] Kambale 2003.

> "*Oui, c'est une très belle idée. Mais qu'est-ce qui est le plus urgent ? Construire un État pour donner un avenir aux populations ou faire la chasse aux criminels ? On ne peut pas toujours faire les deux. Si cela risque de faire imploser le processus en cours, je dis non.*"[1154]

The apparently different popular opinions in Uganda and the DRC are indicative of complex dilemmas to which there might not be one correct answer. One should, for instance, not conclude that the expressed Congolese opinion fails to appreciate the fact criminal justice might jeopardise a peace process. Rather, the choice may be rooted in an understanding that a more permanent peace cannot be achieved before the persons most responsible for the atrocities in Ituri are brought to justice.

11.5.4. The age of the alleged perpetrator

This factor can be interpreted in two opposite ways: the alleged perpetrator might be too old or he or she might be too young. Article 26 prevents the Court from exercising jurisdiction over persons who were under 18 years of age when they allegedly committed the crime, but one might still argue that a 30-year-old person is more responsible than one who is 18.

While many states consider advanced age a relevant factor with regard to ordinary crimes, the factor seems less important *vis-à-vis* perpetrators of international crimes. The national prosecutions of *Barbie*, *Papon*, *Preibke*, *Sawoniuk*, and *Touvier* are illustrative of this. In March 2004, 95-year-old former Waffen SS officer Johannes Karl Schiffmann, accused of having participated in a massacre of civilians in Castelfranco, Italy, died from natural causes on the very first day of his trial in Italy. The efforts to bring General Pinochet to justice within and outside Chile should also be noted. It seems that if the crime is grave enough, there is no defendant too old. The factor appears to be secondary to that of the crime's gravity. The interests in prosecuting international crimes appear to transcend the interests of the parties directly involved in the crime. An important ground for proceeding despite advanced age might be the insistence on making an historic record, thereby ensuring a collective memory of shocking events. Apparently, the world community is not willing to let such events disappear into oblivion with the perpetrator's death. Indeed, as the suspect gets older, the efforts to prosecute him or her are often intensified. The ICC Prosecutor is, however, faced with a very different situation from that of the Nazi hunters who still into the 21st century continued to pursue very old crimes and thus very old perpetrators.

[1154] *L'Afrique est une tache sur la conscience occidentale.*

International trials are characterised by an extreme length and put an extreme psychological and physical strain on the accused. The likelihood is therefore greater that the accused will die during the process, the fate of ex-president Slobodan Milosevic during his trial at the ICTY providing a recent example. Such deaths are very unfortunate: not only are limited resources wasted, but the perpetrators might end up as martyrs. And should a very old accused survive the trial, it still might not look so suitable from a human rights perspective.[1155] Transmitted pictures of a weak and old accused before the international machinery might even generate unfortunate pity and sympathy. As long as there are a large number of perpetrators, the Prosecutor should at the outset avoid selecting very old persons, unless the crime is extremely grave or the person is particularly responsible.

11.5.5. The infirmity of the perpetrator

Article 64(8) of the Rome Statute provides that when the Trial Chamber at the commencement of the trial reads the charges to the accused, the Chamber "shall satisfy itself that the accused understands the nature of the charges." Rule 135(1) further provides for a "medical, psychiatric or psychological examination of the accused" for the purpose of "discharging its obligations under article 64, paragraph 8 (a)" or for "any other reasons, or at the request of a party". Rule 135(4) further provides that "[w]here the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned" and that "[w]hen the Trial Chamber is satisfied that the accused has become fit to stand trial, it shall proceed in accordance with rule 132". Logically, article 53 must refer to a degree of infirmity which is not sufficient to constitute a full defence as prosecuting then would not be allowed in the first place. As a matter of discretion, the Prosecutor is allowed also to consider lesser forms of infirmity. It should also be noted that if the person is unfit to stand trial, proceeding could constitute a violation of that person's right under the ICCPR.[1156]

The factor addresses not only a right of the accused; it also ensures the integrity of the proceedings. If the perpetrator is infirm, there is a risk that justice will be brought into disrepute; that some could come to pity the accused even if he or she is found guilty; and that the crimes appear less grave than they actually are.

[1155] The Prosecutor has noted that "international justice may not be served by the prosecution of a terminally ill defendant", see *Policy Paper on the Interests of Justice*, *supra* note 1063, p. 7.
[1156] ICCPR article 14(1) (note that the ICC will not be directly bound by this Convention).

11.5.6. The perpetrator's role in the alleged crime

International crimes are almost invariably committed within a system of atrocities where intellectual authors make the plans; leaders order or incite the commission of the crimes; and lower ranked persons carry the plans out. Under the Rome Statute, all these modes of participation can be punished,[1157] but they will not attract the Prosecutor's attention equally. International criminal jurisdictions have, from the Nuremberg and Tokyo Tribunals - via the *ad hoc* Tribunals[1158] - to the ICC, focused on the most responsible persons. The ICC Prosecutor has stated:

> "The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as leaders of the State or organisation allegedly responsible for those crimes."[1159]

The Prosecutor confirmed this policy when he introduced a "policy of targeted prosecution, focusing on those who bear the greatest responsibility",[1160] and when he noted that "[o]ne of the most important elements […] is to focus investigative and prosecutorial efforts on those who bear the greatest responsibility for the most serious crimes. It is simply not feasible to bring charges against all apparent perpetrators."[1161] Commenting on the arrest warrant for Ugandan LRA leader Joseph Kony, the ICC Prosecutor noted:

> "We have collected evidence showing how he personally manages criminal campaign of the LRA. From his bases in the Sudan, Kony directs all LRA operations. Joseph Kony is the absolute leader of the LRA and controls life and death within the organization. Our investigation has shown that he orders the movements of his forces and dictates the types of military and civilian targets of the LRA attacks."[1162]

There are both moral and pragmatic reasons as to why it will be in the "interests of justice" to target the most responsible. The authors of the crimes are generally considered as the most blameworthy. They are the most dangerous, and thus the

---

[1157] Articles 25 and 28 of the Rome Statute.

[1158] *E.g.*, the ICTR's completion strategy aims at targeting "senior leaders" who "bear the greatest responsibility" for the genocide, see *Completion Strategy*, *supra* note 1095, para. 14.

[1159] *Paper on some policy issues*, *supra* note 18, p. 7. See also *Policy Paper on the Interests of Justice*, *supra* note 1063, p. 7.

[1160] *Statement of the Prosecutor to Diplomatic Corps*, *supra* note 1139, p. 2.

[1161] *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, *supra* note 606, p. 5.

[1162] *Statement by the Chief Prosecutor on the Uganda Arrest Warrant*, *supra* note 1144, p. 4.

need for a preventive effect is greatest. While one direct perpetrator might do considerable harm, an influential leader might prompt thousands of perpetrators to do indefinitely more harm. As an extreme example, most of the atrocities committed during the Second World War can arguably be attributed to Nazi Fuhrer Adolph Hitler. Further, the particularly dangerous nature of international crimes is best reflected when leaders are prosecuted.

Pragmatically, it is simply not possible to prosecute all persons involved in international crimes. This makes it all the more important to focus on the most responsible. It would not be perceived as just if less responsible persons were prosecuted while the most responsible were not. It should, however, be noted that at this point the opinion of the direct victims and the surroundings may differ. While the surroundings tend to focus on the leaders, the victims tend to be more eager to see the direct perpetrator punished as the one who actually inflicted the pain and suffering. At the same time, a greater number of victims will feel that "their" crime is being dealt with if a superior who is responsible for several crimes is prosecuted.

Some might argue that the prosecution of leaders naturally "belongs" at the international level, regardless of states' will and ability to prosecute them genuinely. According to the principle of complementarity, however, the prosecution of any perpetrator is the primary responsibility of states. The only point that can be made in this context is therefore that the prosecution of less responsible persons does not belong at the international level.

While leaders should be prioritised, the ICC Prosecutor should also be mindful of article 33 of the Statute which holds a subordinate criminally responsible for having followed an order if he or she knew that the order was unlawful or if it was "manifestly unlawful". To the extent that subordinates are deterred from following such orders, it will be more difficult for despots to carry out criminal plans in the future. When a subordinate has played a particularly active role in the commission of the crime, the Prosecutor should therefore consider prosecuting him or her. This may, on balance, be more appropriate than, for instance, prosecuting a military commander who merely "should have known" that crimes were committed.[1163] While the ICC Prosecutor has noted that "[t]he policy decision of the Office to focus its resources on the investigation and prosecution of those who bear the greatest responsibility for serious crimes has attached strong support",[1164] he has admitted

[1163] Article 28(a).

[1164] *Summary of recommendations received during the first Public Hearing of the Office of the Prosecutor*, 17-18 June 2003, p. 3 (available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph1.html).

that he also has prompted concerns about the immunity gap "which may be created if the Office is seen to limit its action to key leaders and major situations". He has therefore noted that he will address this concern

> "by continuing to assist territorial States with national investigations and prosecutions even where the Office is acting concurrently with regards to key leaders".[1165]

Thus, the state may "complement" the international proceedings *inter alia* by establishing alternative mechanisms designed to deal with the lower level perpetrators. The idea is echoed by the Prosecutor with regard to the situation in the DRC:

> "We have proposed a consensual division of labour with the DRC. We would contribute by prosecuting the leaders who bear the greatest responsibility for crimes committed on or after 1 July 2002. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals."[1166]

A burden sharing as suggested above might, however, create a moral paradox, illustrated by the situation in Rwanda: while the leaders prosecuted before the ICTR have received a maximum penalty of life imprisonment, less responsible persons have received the death penalty before Rwandan courts.[1167] Even though this is the practice of two different jurisdictions, the result is perceived as unfair and arguably reduces the reconciliatory effect of the international prosecutions. Remedying this problem by letting Rwanda deal with the most responsible has not been an option. Not only would Rwanda probably not have been able to deal adequately with the leaders, but such a burden sharing would convey a confusing message as to the appropriate role of an international criminal jurisdiction.

A different problem when leaders are prosecuted at the international level is that the accused might use the trial as an arena to win political support. The ICC Prosecutor should not, however, place too much weight on such considerations. Instead, the judges conducting the trial have a responsibility to avoid that the trial turns into a propaganda show.

[1165] *Ibid.,* p. 2.

[1166] *Statement of the Prosecutor to Diplomatic Corps*, *supra* note 1139, p. 4.

[1167] Article 80 provides that nothing in the Statute provisions on penalties "affects the application by States of penalties prescribed by their national law". This provision applies regardless of ICC interference.

Prosecuting leaders is, as a rule, more difficult than prosecuting less responsible persons who personally have carried out the crimes. For instance, demonstrating sufficient knowledge and participation can be complex. While the prospect of a successful prosecution is an important factor, considerations of mere convenience should not be decisive. It should be noted, however, that the ICTY, in its initial phase, targeted low-level perpetrators arguably in order to ensure quick results, and this prompted criticism. Former ICTY Prosecutor Richard Goldstone has noted:

> "There was one unfortunate aspect related to the first budget meeting. I had also been informed ahead of time that at least one indictment had to be issued before the November meeting in order to demonstrate that the system was working and that the tribunal was worthy of financial support. […] For that reason we issued our first indictment, against Dragna Nicolic, who despite the despicable nature of his alleged conduct, was a comparatively low-level member of the Bosnian Serb forces."[1168]

11.6. FACTORS NOT LISTED IN ARTICLE 53

In addition to the factors expressly listed in article 53, the following factors might be relevant when the Prosecutor selects situations and cases for investigation and/or prosecution. The scope of some of these factors extends beyond the situation or case in question.

11.6.1. The time passed

In the *Sawoniuk* case, the English Court of Appeal refused the claimant's application that his conviction for war crimes under the War Crimes Act 1991,[1169] for the murder of two Jewish civilians in Belarus in 1942, should have been stayed on account of the time delay between the offence and the date on which the prosecution was brought. The court noted that in order to obtain a stay of the proceedings the defendant needed *inter alia*

> "to show on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. In other words, the continuance of the proceedings amounts to an abuse of the process of the court."[1170]

[1168] Goldstone 2000, p. 105.

[1169] The War Crimes Act of 1991 confers jurisdiction on courts in the United Kingdom to prosecute war crimes committed by people connected with Nazi Germany during the Second World War.

[1170] *R. v. Anthony Sawoniuk*, Ground 1.

The Court found that the criterion was not fulfilled and therefore upheld the decision of the trial judge "despite the unprecedented passage of time since 1942".[1171]

The time that has passed since the commission of the crime is an obvious factor in ordinary criminal justice, and most judicial systems have statutes of limitation. As a general rule, the weight of the arguments for prosecution fades over time. For instance, the desire for the victims to see the perpetrator prosecuted might lessen, and the perpetrator might become less dangerous. With regard to international crimes, the arguments are the same, although less obvious. Such crimes often seem to leave large wounds that will only heal once justice is done. It suffices to observe the persistency with which aged Nazi criminals have been hunted down. At the same time, just as with ordinary crimes, the memory of the victims is arguably stronger than that of the world community. It is noteworthy that the Nazi hunters to a large extent have been private persons belonging to the victim group. Then again, the particular historical and cultural implications of international crimes that make it especially important to investigate and prosecute them should not be underestimated, and the reason why the public memory fades, might be the very fact that there have not been prosecutions.

Article 29 of the Rome Statute provides that the crimes within the jurisdiction of the Court "shall not be subject to any statute of limitations." In fact, many states have committed themselves not to let international crimes prescribe. Hence, an important stance has been taken; the perpetrators of international crimes shall, as the rule, be brought to justice regardless of the time passed. Yet, the fact that considerable time has passed should remain relevant, all other factors being equal. If victims have managed to come to terms with their situation, prosecuting arguably appears less urgent. If, in addition, the structures which once allowed the crimes to be committed have changed, it might no longer be in the "interests of justice" to prioritise a given case at the expense of another apparently more urgent case. It should be noted that the ICC Prosecutor thus far has exclusively interfered in ongoing conflicts, possibly reflecting a future policy (although it might partly be a function of the fact that the Rome Statute entered into force only in July 2002).

An additional argument against proceeding when a long time has passed is that it becomes increasingly difficult to collect reliable evidence. Courts might be

[1171] *Ibid*. The judge noted *inter alia* that it was "entirely speculative whether the unavailability of other witnesses represented a detriment to the appellant or a bonus".

reluctant to allow witness testimonies which refer to very old incidents.[1172] In such cases it is not, however, the time as such which causes the Prosecutor to refrain, but the fact that a *prima facie* case can no longer be established.

11.6.2. The prospect of success

Little else will have so profound an impact on the ICC's long-term credibility and support as the success or failure of its operations, especially in its early years. The Court must "deliver the goods" to the donor community. It would be ironic if the ICC should interfere on the grounds that a state had failed to bring the perpetrator to justice, only to fail itself. A prosecution before the ICC involves immense resources and has an important impact on the participants. As the Prosecutor will select from a caseload which by far exceeds the Court's capacity, the prospect of success should be an essential criterion for the selection.

The ICC Prosecutor must look beyond ordinary *prima facie* considerations, and consider carefully whether he or she will manage to obtain the accused and the necessary evidence. This will require sufficient cooperativeness from the state concerned, unless the Court will be backed by international forces. The situation is very different from that of a national prosecutor who "acts within a State which has the monopoly of force in its territory" where the "enforcement agencies of the State are subject to the rule of law and are at the disposal of the national prosecution system".[1173] By contrast, the ICC Prosecutor might need to operate in a violent situation which the state concerned is either unable or unwilling to control. The Prosecutor has noted:

> "It will also be necessary to consider whether there are available to the Prosecutor the necessary means of investigation and possibilities for protection of witnesses. Will the necessary assistance from the international community be available, including on matters such as the arrest of the suspect? In short, will it be possible in all reality to initiate an investigation at all?"[1174]

Other states than the territorial state might have important evidence in its possession, and the accused might even be located there. The Prosecutor should also assess the cooperativeness of such states before proceeding. If they are not states

---

[1172] Gross notes, regarding the use of eye witnesses many years after a crime, that "[t]here is no evidence that the intensity of the experience is a sufficient safeguard against forgetting", see Gross 1992, p. 359.

[1173] *Paper on some policy issues*, *supra* note 18, p. 1.

[1174] *Ibid.,* p. 2.

parties to the Rome Statute, it might be difficult to proceed successfully. The Prosecutor has noted that a way for a state to "take ownership of the Court" is to "enter into agreements to provide [investigative and protective] support".[1175] He has noted that such agreements with states

> "will be necessary, supporting the Court's efforts by providing security, police and investigative teams, and giving intelligence and other evidence. […] [N]ational investigative authorities may pass to the Office evidence of financial transactions which will be essential to the Court's investigations of crimes within the Court's jurisdiction […]. [The Prosecutor] will also have to be assured that there will be the means available for investigation, protection of witnesses and arrest of suspects."[1176]

At the national level, failing to bring perpetrators to justice due to difficulties as just described is intolerable and amounts to a recognition that the criminals have "won the battle" against the state. At the international level, however, such difficulties are more legitimate as the ICC Prosecutor will have to rely on either the cooperativeness of the territorial state or sufficient military support of other states or international organisations, most notably the Security Council.[1177] The general obligation of states under the Statute to cooperate[1178] might prove insufficient as states simply refuse to comply with the Court's requests. Instead, political will is required, presupposing that the interests of the state coincide with those of the Court or a considerable pressure.[1179] This makes it inherently difficult to interfere *vis-à-vis* unwilling states. A remark by the ICTY Appeals Chamber in the *Blaskic* case is illustrative:

> "In the final analysis, the International Tribunal may discharge its functions only if it can count on the *bona fide* assistance and cooperation of sovereign States. It is therefore to be regarded as sound policy for the Prosecutor […] first to seek, through cooperative means, the assistance of States […]."[1180]

An effective way to obtain cooperation might be to provoke self-referrals, as was the case *vis-à-vis* Uganda and the DRC.

[1175] *Ibid.,* p. 6.

[1176] *Ibid.,* pp. 2-3 and 6.

[1177] Article 87(7) of the Rome Statute provides that if a state "fails to comply with a request to cooperate by the Court […] thereby preventing the Court from exercising its functions and powers", the Court may "make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council".

[1178] Articles 86 *et seq*.

[1179] Sluiter 1998, p. 394.

[1180] *Prosecutor v. Blaskic* (Decision of Appeals Chamber, 29 October 1997), para. 31.

In addition to cooperative problems, obtaining the alleged perpetrator and necessary evidence can be logistically difficult. Regarding the situation in Ituri, one commentator has noted:

> "The Congolese conflict also promises to pose tremendous logistical difficulties for the ICC. The topography of the country is so difficult to navigate that prosecutors may struggle to properly carry out their investigations. Moreover, transporting witnesses to and from The Hague will be an enormous expense."[1181]

The prospect of cooperation will depend on whether the state concerned has implemented the necessary legislation. This is inevitable, despite the obligation of states parties to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".[1182] It should be noted that while article 89(1) of the Rome Statute provides that "States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender", this does not indicate that lacking national legislation is ever a valid excuse for non-compliance with the Court's requests. Rather, it is yet another reminder that states must adopt the necessary legislation. Article 27 of the Vienna Convention provides that a state Party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Related to the above, considerations of cost-effectiveness should also be viewed as legitimate, considering the limited resources that the ICC will allocate. The Prosecutor has noted:

> "The organisation of the structure and work process of the Office of the Prosecutor is based on an assumption that the Office should endeavour to maximize its impact while operating a system of low costs."[1183]

11.6.3. Political support

Another factor which might appear less legitimate, but which remains very real, is the need to enjoy sufficient political support.[1184] In carrying out his or her mandate, the Prosecutor will have to rely on the support of key actors, including the Security

---

[1181] Kambale 2004.

[1182] Article 88.

[1183] *Paper on some policy issues*, *supra* note 18, p. 3.

[1184] It may be noted that as of today powerful states such as the China, India, Russia and the USA have not ratified. These states cover almost half the world's population.

Council, the NATO and the European Union. The Prosecutor should therefore strive to establish and adhere to a long-term policy which is widely perceived as acceptable, while carefully balances the need for political support with the need to be perceived as independent and credible. These two aspects are intertwined, the latter being crucial if the ICC is to garner lasting global support. The Prosecutor should therefore prioritise situations where the Court enjoys broad support across political boarders, something which prosecutors seem to do although they tend to claim something else.

The discretion should not, however, let the discretion be guided by his or her private political opinions. Neither should he or she give in to political pressure. Acknowledging his inherently limited political role and skills, former ICTY Prosecutor Goldstone has noted with hindsight:

> "The real lesson that I learned from the Karadzic indictment is that Prosecutors should not take any account of political considerations in issuing their charges. Apart from being professionally inappropriate, neither the Prosecutors nor the advisors have the political expertise on which to base such decisions."[1185]

International prosecutors must be mindful of the fact that they have been elected in the capacity of legal and not political experts. That is not to say that the ICC Prosecutor should "avoid politically charged situations at the cost of its credibility as a legal institution".[1186] The crucial is that a decision under article 53 to proceed or not to proceed be based on legally legitimate criteria and that they not be dictated by external actors. Giving in to outright political pressure is inappropriate.[1187] Not only would it undermine the Court's credibility, it would also be in violation of article 42(1), which provides that the Prosecutor "shall not seek or act on instructions from any external source". In that sense, the Rome Statute requires that the selection process be depoliticised. This is perhaps the most important development that the Statute reflects regarding international prosecutorial discretion. Because the ICC Prosecutor cannot let external entities make the "political" choices which inevitably must be made, the Prosecutor must make them himself or herself, subject to the restrictions just outlined. Consequently, it is important that choices are made in a transparent manner and that some review mechanism exists (see below).

It is a paradox that some of the states which argued that the Prosecutor's *proprio motu* power created a risk of politically motivated investigations, in reality, favoured

---

[1185] Goldstone 2007.

[1186] Brubacher 2004, p. 83.

[1187] Côté 2005, p. 171.

an inherently political system based on state and Security Council control. In fact, it is submitted that the Prosecutor's power under article 15 to proceed on his or her own initiative provides the only truly non-political method of triggering the Court's jurisdiction. One form of external political control is, however, institutionalised in the Rome Statute: article 16 authorises the Security Council to bar ICC action for a period of 12 months.

11.6.4. The existence of a Security Council referral

The criterion in article 53 that the Prosecutor shall only proceed when it serves the "interests of justice",[1188] expressly applies to Security Council referrals. This means that the Security Council cannot instruct the Prosecutor to investigate a situation or to prosecute a specific individual. Commenting on the ILC Draft Statute which also provided for prosecutorial discretion, Crawford noted:

> "Once a crime has been referred by the Security Council, the normal requirements of the Statute will apply, including independent prosecution […]."[1189]

It might nevertheless be questioned whether the Security Council can effectively dictate a finding that proceeding will serve the interests of justice. A plain reading of article 53 suggests that the Council may not do that. Article 53(3) (a) expressly provides for a lesser power: the Council may request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed. Further, at a more principled level, the prosecutorial discretion, just like the admissibility issue, represents a fundamental feature of the ICC's total jurisdictional regime which the Council cannot eliminate. Moreover, article 42(1) on prosecutorial discretion should again be noted. Referring to the discussion above regarding the admissibility criteria, it is submitted that the Security Council cannot override the prosecutorial discretion. It is also inconceivable, at least with regard to the selection of cases to prosecute, that the Security Council should effectively force the ICC to proceed if the Prosecutor or, as applicable, the Court had found that it would not serve the interests of justice.

While the ICC Prosecutor will be under no duty to initiate an investigation of a situation referred by the Security Council,[1190] he or she will most probably invariably do so. First, such a referral will hardly be made unless there has been an extensive

---

[1188] Article 53(1) (c) and (2) (c).

[1189] Crawford 1994, p. 147.

[1190] According to article 53(1), the Prosecutor must conduct a full analysis of "the information made available to him or her" for the purpose of determining whether a "reasonable basis" exists.

dialogue between the Council and the Prosecutor. Prior to the Darfur referral, the ICC Prosecutor had on various occasions signalled his willingness to look at the Darfur situation if the Security Council would refer it to him. Second, irrespective of the existence and outcome of such dialogue, a referral under Chapter VII will have a considerable persuasive effect. In contrast to the admissibility question, the determination as to whether interfering in a given situation will serve the interests of justice appears to fall squarely within the Council's expertise. Third, if the ICC Prosecutor and the Court[1191] were not to follow up a referral, it would undermine the relationship between the ICC and the Council, and ultimately the Court's role as a credible executor of a mandate intimately linked to that of the Security Council. Fourth, all other things being equal, there will be increased prospective success, although a referral is no guarantee of military back up from the Security Council.

11.6.5. Restoring humanity's conscience

The more the conscience of humanity has been shocked by the crimes,[1192] the greater the reason to interfere and the more support the interference will garner. The impact on humanity's conscience is intimately related to a crime's gravity. There are, however, two additional aspects that should be considered in this context. First, the extent to which the community is informed of the crimes is essential. Not even the gravest crimes will truly shock the world unless they are actually displayed to the public. As cynical as it may sound, greater media coverage arguably means greater need to interfere, other factors being equal. It is illustrative that priority was given by the ICTY Prosecutor to the crimes committed in the *Omarska Camp* as this camp was the first in Bosnia where international journalists were permitted to film in August 1992.[1193]

[1191] Article 53(3) (a) empowers the Security Council to request a review by the Pre-Trial Chamber of the Prosecutor's decision not to proceed. Article 53(3) (b) authorises the Pre-Trial Chamber on its own motion to review a decision not to prosecute and when it is based solely on the "interests of justice" criterion and, if necessary, instruct the Prosecutor to proceed.

[1192] Preambular paragraph 2.

[1193] Schrag 1995, p. 193.

11.6.6. Peace and security

11.6.6.1. The mandate of the ICC vs. that of the Security Council

The investigation and prosecution of international crimes involve risks for the actors involved in the proceedings: investigators risk being intimidated, attempts might be made to neutralise witnesses, *etc*.[1194] From a broader perspective, the pursuit of justice might accentuate a conflict and even spread it to other regions. While seeking to bring perpetrators to justice should generally be held to promote reconciliation and peace (many will argue it is a *sine qua non* condition for achieving reconciliation),[1195] the exercise of criminal justice might also lead to more conflict and victimisation. As noted by Bantekas, when crimes are ongoing, "any sensible international criminal justice policy would have a twofold objective: to punish the perpetrator and to put an end to the crime and its effects".[1196] It is submitted that such considerations of peace and security fall squarely within the scope of the "interests of justice" criterion in article 53, as interpreted in light of the Statute's purpose.

Just like the two *ad hoc* Tribunals created by the Security Council, the ICC is established for the ulterior purpose of ensuring international peace and security. The Security Council's authority under article 13(b) to refer a situation and under article 16 to request the ICC's deferral underscores this. The latter authority also implies that when the ICC's activity conflicts with considerations of peace and security, the latter may trump all other considerations. The inherent relationship between peace and criminal justice, sometimes a conflict and sometimes a synergy, has since long been recognised. In 1953, the Committee on International Criminal Jurisdiction noted that

> "some members recognized that in exceptional cases the maintenance of international justice might interfere with the maintenance of peace. [...] [I]t might

[1194] The Prosecutor has, for instance, noted that "because of the security and logistical situation in Ituri Region, we remain heavily reliant on the support of the UN peacekeeping presence in the DRC […]", see *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, *supra* note 606, p. 2.

[1195] The Parliamentary Assembly of the Council of Europe has noted that "the impunity enjoyed by the perpetrators of the most serious crimes, such as genocide, crimes against humanity and war crimes, is an obstacle to reconciliation, fostering revisionism and depriving future generations of irrefutable evidence of such crimes", see Recommendation 1408 (1999) of the Parliamentary Assembly.

[1196] Bantekas 2006, p. 477.

> well be that in a particular case the settlement of a delicate and dangerous dispute would be imperilled by a criminal trial. Consequently, there was need for a kind of political screening of such a nature that the United Nations, in the interest of peace, could prevent a case from being brought before the court. It was recognized that the court would base its judgement solely on the principles of justice. Therefore, the appropriate moment for political considerations to be brought up was when the question had to be decided whether or not a case should be submitted to the court."[1197]

This statement acknowledges the need for some type of "political screening". The Committee wanted, however, to leave the screening entirely to the Security Council. It should be noted that article 16 of the Rome Statute gives the Security Council a far lesser control. Instead, the ultimate control should be exercised by the Prosecutor and the Court at large. A member of the French delegation to the ICC negotiations has noted:

> "Article 53 [is a provision] that France supported, that France wanted to insert in the Statute. It would be an exaggeration to say that we were ever planning to make the Court as a new form of political body, but we just wanted to give the Court the means to reconcile its independent decision-making with the objective of peace and reconciliation."[1198]

The Draft Regulations of the Office of the Prosecutor suggest that peace and security considerations be relevant factors for the determination of the "interests of justice". While no express proposal is formulated, a footnote reads:

> "The experts are not in a position to make a recommendation on whether the Regulations should contain a further definition of what may constitute "interests of justice". Were it to be decided that such a definition be given, this could comprise the following factors: (a) the start of an investigation would exacerbate or otherwise destabilize a conflict situation; (b) the start of an investigation would seriously

---

[1197] *Report of the 1953 Committee*, *supra* note 73, p. 5. Some Committee members considered, however, that "no conflict was possible between the functioning of international criminal justice and the maintenance of peace. The punishment of criminals could never interfere with the maintenance of peace." The term "justice" here refers to narrow criminal justice. At p. 16, the 1953 Committee also noted the need to "stop trials before the court if it were necessary to do so in the *interest of peace*".

[1198] Hellen 2001, p. 305.

> endanger the successful completion of a reconciliation or peace process; (c) the start of an investigation would bring the law into disrepute."[1199]

In his Policy Paper, the Prosecutor has noted:

> "It is clear in the first place that no investigation can be initiated without having careful regard to all circumstances prevailing in the country or region concerned, including the nature and stage of the conflict and any intervention by the international community."[1200]

Concerning the Security Council's referral of the Darfur situation, the Prosecutor noted that the ICC involvement "forms part of a collective international and regional effort to improve the security situation […]". He further noted:

> "When assessing issues relevant to the interests of justice and of the victims the Prosecutor has carefully considered the over-all context in which investigations will take place and has gathered information from various sources on efforts to restore peace and security to Darfur. […] The OTP will monitor and remain sensitive to developments in this context."[1201]

Against the above, it might be argued that a criminal court shall only be guided by the narrow (and more objective) interests of criminal justice as opposed to policy-oriented considerations of peace and justice. This was the rationale of the 1953 Committee in its statement quoted above. This fails, however, to acknowledge that criminal justice, and *a forteriori* international criminal justice, cannot be exercised in a vacuum isolated from the consequences of its exercise.[1202] Other factors being equal, there is more reason to interfere when this will stabilise a situation than when it will destabilise it.

It might further be argued that a Prosecutor who bases his or her decisions on considerations of peace and security acts *ultra vires*, as the Rome Statute expressly

---

[1199] *Draft Regulations of the Office of the Prosecutor*, 3 June 2003 (as of November 2007 under revision), p. 47, fn. 79 (available at http://www.icc-cpi.int/otp/otp_docs.html).

[1200] *Paper on some policy issues*, *supra* note 18, p. 2.

[1201] *Report to the Security Council Pursuant to UNSCR 1593*, *supra* note 361, pp. 5 and 10.

[1202] Higgins has noted that "[r]eference to the 'correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law. [...] Where there is ambiguity or uncertainty, the policy-directed choice can properly be made", see Higgins 1994, pp. 5-7. In *Prosecutor v. Erdemovic*, judges McDonald and Vorah noted that "[i]t would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy", see Joint separate opinion, para. 78.

gives such power to the Security Council in article 16. Human Rights Watch has noted that the Council's deferral power is "the only means by which the Rome Statute explicitly permits concerns about a peace process to 'trump' prosecutorial efforts".[1203] Amnesty International has argued strongly against including considerations of peace and security in the "interests of justice" criterion. The organisation has noted that a decision to suspend an investigation due to such considerations

> "would demoralize and endanger victims and witnesses; […] damage the credibility of the Court; be inconsistent with the object and purposes of the Rome Statute […]; weaken the Court's ability to be an effective deterrent and a catalyst for States to fulfil their complementarity obligations […]; and open the Court to permanent blackmail by warring factions implicated in crimes under international law".[1204]

Amnesty International quotes Goldstone who dismisses "political considerations" because "[a]part from being professionally inappropriate, neither the prosecutors nor their advisors have the political expertise on which to base such decision".[1205] Goldstone has further noted:

> "*C'est pourquoi nous avons à juger les responsables quelles qu'ils soient et quelles que soient les consequences politiques qui pourraient s'ensuivre. Ces éventuelles consequences ne sont pas notre souci.*"[1206]

Amnesty International concludes that if the Prosecutor were to take account of such considerations, he or she "would have to make difficult and sensitive determinations more appropriate for diplomats and politicians". Amnesty International makes reference to national prosecutors who are not allowed to take "political" considerations when the very gravest crimes have been committed, a problematic comparison because the ICC as a purely judicial entity does not, in contrast to national judiciaries, have an enforcement power at its disposal, and the ICC Prosecutor might be confronted with situations that have gone out of control.

[1203] *Human Rights Watch Policy Paper: The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, Human Rights Watch, June 2005, p. 8 (available at http://hrw.org/campaigns/icc/docs/ij070505.pdf).

[1204] *Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice*, 2005, (available at http://web.amnesty.org/library/Index/ENGIOR400232005?open&of=ENG-385).

[1205] Goldstone 2001.

[1206] Goldstone 1995.

Amnesty fails to suggest who should take such considerations, which inevitably must be taken, if not the Prosecutor.

The concerns raised by Amnesty are, of course, relevant. They just mean, however, that the authority under article 53 to refrain from proceeding in a given situation or against particular individuals due to peace and security considerations must be used sparingly, in exceptional situations. Cutting off *a priori* the possibility to avoid proceeding or to suspend the ICC activities would be in conflict both with the letter and the spirit of the Rome Statute; at the same time, the potential conflict between criminal justice and peace and security should not be exaggerated.

As already suggested, article 16 underscores the relevance of peace and security considerations, and the Prosecutor should constantly, but carefully, bear them in mind. He or she should continuously assess the implications, and not await a possible Security Council request for deferral under article 16. This is militated for two reasons: First, it would be unfortunate if the ICC Prosecutor effectively forced the Security Council to request a deferral. This would not only unnecessarily burden the Council; it would also make the Court appear irresponsible, and it would ultimately be perceived as more politically influenced as the Security Council, a political organ *par excellence*, would make the final decisions. Second, due to the ineffective procedures under Chapter VII of the United Nations Charter and the political disagreements which haunt the Council's debates, the "unscreened" opening of an ICC investigation could result in disaster. Therefore, promoting peace and security should be the prerogative of no single entity.[1207] Article 24 of the UN Charter provides that the member states "confer on the Security Council primary responsibility for the maintenance of international peace and security", indicating that the maintenance of peace and security still is a shared responsibility and not the exclusive responsibility of the Council. It should be noted that nothing in the Statute prevents the Prosecutor from consulting the Security Council, especially when the Council is or might become involved in the situation. Assessing the implications for peace and security remains, it is submitted, a duty of every actor effectively influencing the situation. Authorised to interfere in ongoing conflicts, the ICC Prosecutor will play a key role in maintaining and restoring peace and security. The Prosecutor has, however, expressed a certain reluctance to base its discretional assessments under article 53 on considerations of peace and security:

> "[The exercise of discretion] will naturally be guided by the objects and purposes of the statute – namely the prevention of serious crimes of concern to the international

[1207] A prerogative of the Security Council is, however, to decide on binding measures under Chapter VII of the UN Charter.

> community through ending impunity. […] [T]here is a difference between the concepts of the interests of justice and the interests of peace […]. [T]he broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."[1208]

11.6.6.2. The difficult assessment of the implications of ICC proceedings

The ICC Prosecutor needs to carefully assess the on-ground security of his or her personnel and other persons in the area, including witnesses, civilians and foreign humanitarian aid workers.[1209] He or she must also assess whether the involvement, from long-term perspective, might escalate the conflict. Where the state does not control or is an active part in the conflict, personnel are sent there only at great risk. Armed groups might be encouraged by the government to attack civilians in an attempt to bring the ICC activity into disrepute.[1210] On the other hand, the Prosecutor might also be granted some armed support. The ICC Prosecutor has noted that the Prosecutor at times

> "will not be able to exercise his powers without the intervention of the international community, whether through the use of peacekeeping forces or otherwise; the Prosecutor will not be able to establish an office in the country concerned without being assured of its safety".[1211]

Faced with the threat of prosecution, the perpetrators might resort to new violence. The risk of a *coup d'état* must be assessed *inter alia* in light of the severity of the punishment that the perpetrators face. Other important factors are the force employed by the perpetrators, and their inclination to resort to violence as demonstrated by their alleged previous crimes. When, exceptionally, the risks involved are too great, the Prosecutor should decline from interfering. To identify

---

[1208] *Policy Paper on the Interests of Justice*, *supra* note 1063, pp. 1 and 9. The Prosecutor refers to the situation in Uganda and "the attempts by various parties to resolve the conflict between the Government of Uganda and the LRA" and notes that "[t]his situation demonstrates well the exceptional nature of the provision on the interests of justice as well as the difference between this concept and the interests of peace", at p. 4.

[1209] Important instruments in this respect are the Agreements on Privileges and Immunities of the Court into which states parties are invited to enter, see article 48 of the Rome Statute.

[1210] Indeed, in Sudan, the violent activities by Janjaweed in the Darfur region seem to be linked to central authorities, and the Security Council's referral of the situation to the ICC Prosecutor against the express will of the Sudanese government has arguably increased the risk of such violence.

[1211] *Paper on some policy issues*, *supra* note 18, p. 6.

the circumstances under which interfering thus will not serve the "interests of justice" is, however, very difficult. The decision involves weighing short-term consequences against long-term consequences. The uncertainty is evident as any argument will be based on predictions.

If the relevance of peace and security considerations for the "interests of justice" determination is controversial, any actual determination based on such considerations will be even more controversial and inevitably spark criticism. The controversy is well illustrated by the criticism which the Prosecutor has faced regarding his first investigations. Critics have argued that the involvement in northern Uganda will only intensify and prolong the conflict. The Uganda Program Development Officer for Conciliation Resources has noted:

> "The irony is that the ICC is there for a humanitarian purpose, it wants to discourage terrible crimes with impunity, but instead it pushes the LRA back in the bush and this leads to a continuation of the atrocities."[1212]

LRA leader Kony is infamously known for using massacres to make his points. International Crisis Group has expressed fear that the ICC involvement will prompt attempts at "spectacular atrocities to show that his insurgency was still a force to be reckoned with".[1213] Some have extended the argument, noting that the interference goes against the wishes of the people of northern Uganda. Such arguments may or may not reflect realities, but even if they do that does not necessarily imply that interfering will not serve the "interests of justice" or even the more specific "interests of victims". Interfering might still be the justified, all factors considered. It might be the only way of achieving long-term reconciliation and peace, and the price of temporarily increased tension might be justified. Clearly, focusing on the long-term effects of interfering is much easier for persons safely removed from the conflict than for persons situated in the conflict area. Distance to the conflict makes the decision to interfere appear more cynical but also more balanced.

ICC Legal Officer Robinson has argued that the ICC may suspend an ongoing investigation when it no longer is believed to be in the "interests of justice". Responding to the criticism regarding Uganda he has, interestingly, noted:

> "We do not believe that the rate of defections from the LRA has been slowed by the ICC intervention, which has been known to Ugandans since 2004. […] Perhaps the ICC interference presents an opportunity. What we can do is to isolate the very top

---

[1212] Volqvartz 2005.

[1213] *Building a Comprehensive Peace Strategy for Northern Uganda*, International Crisis Group, 23 June 2005 (available at http://www.crisisgroup.org/home/index.cfm?id=3523).

> leadership. We can encourage the others to demobilize and we can help galvanize international attention to focus on the situation."[1214]

As for the situation in the DRC, another ongoing conflict at the time of this writing, the Congolese transitional government was composed with a view to salvage peace and therefore includes persons from more than one party. The ICC interference thus risks destabilising the political situation. Criticism appears, nevertheless, to have been more sporadic than that concerning the involvement in Uganda. Not least, there seems to be a broader consensus within the country that ICC involvement is necessary. With regard to the appropriateness of opening the investigation, the ICC Prosecutor has also received some support from the Security Council. The Prosecutor has noted:

> "In their last meeting on 7 July 2003, members of the Security Council again expressed their concern about the situation in the country. […] There was a general recognition that the transitional government faces many difficulties, but also that peace cannot be restored without an end to impunity. […] The members of the Security Council have also acknowledged the need for international assistance to effectively investigate the alleged crimes and punish the perpetrators."[1215]

11.6.6.3. ICC involvement and ongoing peace efforts

Where there is a promising development in an ongoing peace process, this might make the ICC Prosecutor less inclined to interfere. The concern is that ICC involvement will make negotiating parties, typically rebel leaders, shy away from the negotiating table. Hellen has noted that it is difficult to imagine "such a situation where a prosecutor would willingly get involved into the situation while there are really positive efforts being made to stop a conflict".[1216] Uganda Program Development Officer for Conciliation Resources has argued that starting investigations for the sake of justice at a time when northern Uganda

> "sees the most promising signs for a negotiated settlement of the violence risks having in the end neither justice nor peace delivered".[1217]

Similarly, British United Nations Ambassador Parry has criticised the Prosecutor's timing in Uganda, arguing that "first you need to put an end to the conflict and

---

[1214] Volqvartz 2005.

[1215] *Communications Received*, *supra* note 372, at III c.

[1216] Hellen 2001, p. 301.

[1217] Volqvartz 2005.

move into peace. After this come justice and reconciliation." Commenting on the ICC Prosecutor's decision to investigate in Darfur, the Sudanese Foreign Minister noted:

> "It is surprising that the ICC declaration was made while a government delegation is preparing to head to Abuja [capital of Nigeria] for talks with rebels on Friday to seek a political settlement."[1218]

While such considerations might be relevant, the Prosecutor should be aware of the risk that a party will launch an initiative purportedly aimed at achieving peace in order to prompt a conclusion that interference will jeopardise the effort. Alternatively, a party may "announce that it will be carrying out destabilizing activities or preclude peace talk".[1219] The actual motive for a party to seek a ceasefire might also be to strengthen its position. In an interview, Ugandan Minister of Internal Affairs noted:

> "It is true that we would have liked to have ceasefires. But our experience, as in the ceasefire of 1994, is that the period was used as time of recruitment by the rebel forces [of the LRA]. Last year when there was a ceasefire to enable us to talk with the rebel troops, we realized that the period was used by the rebels to [dig up] caches of arms and ammunition that had been buried in different parts of northern Uganda. So while we are pushing for peace, we know that they take advantage of the process to strengthen their position."[1220]

This comment illustrates the need to critically assess the arguments and proposals presented by the parties involved. It would seriously damage the ICC's credibility if it were "black-mailed" by an oppressive regime in the name of peace and security. At the same time, the realism underlying such "threats" and the persuasive power of violence should not be underestimated. If the ICC Prosecutor decides not to open an investigation, the possibility, under article 53, to "reconsider a decision whether to initiate an investigation or prosecution based on new facts or information" remains. The Prosecutor should reconsider his or her decision periodically. The term "new facts" would cover the ending of hostilities and a state's change of political regime. A temporary deferral made in the "interests of justice" should not be allowed to evolve into formal amnesty.

[1218] *Sudan warns ICC of probe into alleged Darfur war crimes*, Xinhuanet, 6 June 2005 (available at http://news.xinhuanet.com/english/2005-06/06/content_3052667.htm).

[1219] *Human Rights Watch Policy Paper*, *supra* note 1203, p. 14.

[1220] *Peace Is in Sight, But Term Limits a Hindrance, Says Uganda Minister*.

While it might be justified to await the result of local peace negotiations, it should be remembered that persons who allegedly have committed horrific crimes might not be suitable parties to any negotiation. This resembles the classic dilemma as to whether to negotiate with terrorists, with the notable difference that the persons in question often will be positioned in the state apparatus. In this vein, after having indicted President Milosevic, former ICTY Prosecutor Arbour responded to a question as to whether the indictment would not jeopardise the peace negotiations:

> "The evidence upon which this indictment was confirmed raises serious questions about their suitability to be guarantors of any deal, let alone a peace agreement."[1221]

11.6.6.4. Marginalising disruptive figures

ICC involvement might effectively marginalise disruptive figures and thus remove obstacles to reconciliation.[1222] A related argument for ICC involvement might be that it is likely to generate international attention and thus put some pressure on the parties to resolve the conflict. Against this, it might be argued that it is improper for the ICC Prosecutor to take such tactical considerations into account. At one moment, an alleged perpetrator might be a key person for achieving a peace agreement, and in the next moment the same person might be "dispensable". Commenting on the timing of the indictment of President Milosevic, Lord Owen noted:

> "The conclusion […] was that it would not be very wise to indict the heads of state if we wanted to arrive at a negotiated peace between them and with them. I believe that Goldstone and Arbour had this pragmatic attitude, this judgment of good sense, and the tribunal only indicted Milosevic when the Prosecutor understood that he was no longer an obstacle, politically. Because after Kosovo there were no more means to negotiate with Milosevic."[1223]

The difficult timing is illustrated by Teitel who has noted, referring to the indictments of Mladic and Karadzic, that

> "the apparently paradoxical efforts to bring the leadership to justice were complicated by the fact that some of those subject to prosecution were partners in the peace negotiations under overarching United Nations authority".[1224]

[1221] Bass 2000, p. 273, citing press conference of 27 May 1999.

[1222] Brubacher 2004, p. 82.

[1223] Hazan 2004, pp. 61-62, citing discussion with Pierre Hazan of 8 November 1999.

[1224] Teitel, 2002, p.51.

The ICTY Prosecutor's indictments of Mladic and Karadzic seem to have forced the two to hold a low profile, thereby contributing to their removal from the political arena. A problem in this respect might be that people are not sufficiently informed as to whom the ICC actually is targeting. If they are insufficiently informed, perpetrators that are not targeted might still perceive the ICC as a threat and resort to violence to avoid being arrested. The chief of the Acholi tribe in northern Uganda, Acana, has noted:

> "You have to remember the way the LRA operates. Only a few at the top have access to the radio and to information. When they hear about the ICC, they just say, 'The ICC is coming for us. If you surrender, the ICC will get you.'"[1225]

It is important to bear in mind that the effect of targeting certain leaders might be slow, in the sense that the criminal organisation gradually erodes and becomes more and more officer-heavy.

11.6.6.5. Security Council involvement in the situation

When the ICC Prosecutor considers investigating a situation, the Security Council might be involved in the situation in two different ways: first, the Council might have authorised peacekeeping forces to operate within the situation; or second, it might have referred the situation to the ICC. The former scenario requires extreme prudence, while the latter only encourages ICC involvement.

If crimes appear to have been committed by UN peacekeeping forces, this will represent a particularly delicate situation. There will be considerable pressure on the ICC both to investigate and to refrain from investigating. The resolutions adopted by the Security Council in 2002 and 2003 exempting from the ICC's exercise of jurisdiction personnel of peacekeeping operations coming from non-states parties were subject to much debate.[1226] If such arrangements exist, the Prosecutor might be called by NGOs to challenge their legality by seeking an authorisation from the Pre-Trial Chamber to investigate under article 15(2).

As for the legitimising effect of a Security Council referral, in his report to the Security Council regarding the Darfur situation, the ICC Prosecutor confirmed his independence, while at the same time noting:

[1225] Blair 2005.

[1226] Security Council Resolutions 1422 (2002) and 1487 (2003). On 23 June 2004, the United States withdrew a proposal for renewal of Resolution 1487.

> "In referring the situation in Darfur to the ICC the Security Council has highlighted both the gravity as well as the vital role that the delivery of independent and impartial justice will play in combating the sense of impunity persisting in Darfur and preventing the commission of further crimes."[1227]

11.6.7. Enhancing effect on the local judiciary and democracy

ICC interference might strengthen a state's judicial system and democratic institutions, especially when the state is willing but unable to proceed genuinely. A "burden sharing" as suggested by the ICC Prosecutor in his Policy Paper might include support to the local system from the ICC staff or external legal experts provided by the ICC. The possibility of a catalytic effect on national prosecutions would be relevant to the "interests of justice" criterion as it falls squarely within the purpose of the complementarity principle. Indeed, commenting on the situation in the DRC, Kambale even noted the possibility of

> "rejecting all international judicial mechanisms in favour of rebuilding the [DRC's] national justice system. In some sense, this is the obvious route because it addresses a problem that will persist regardless of international prosecutions and thus constitutes a long-term investment in the DRC. […] Wide-ranging changes could restore the population's trust in the judiciary, which is currently viewed as the weakest branch of government."[1228]

Kambale has further noted that

> "a strategy of only national justice reforms presents many downsides. Given the composition of the transitional government, the notion that the Congolese justice system could ever bring charges against any major rebels-cum-politicians is currently inconceivable. From all accounts, the culture of corruption within the current judiciary is so strong that it would be almost inconceivable for trials to be broadly accepted by the population as fair, open and neutral."[1229]

[1227] *Report to the Security Council Pursuant to UNSCR 1593*, *supra* note 361, pp. 4-5. As for the further significance of a Security Council referral for the Prosecutor's determination of the "interests of justice", reference is made to the discussion above regarding the prospect of success.

[1228] Kambale 2004.

[1229] *Ibid*.

The Prosecutor's authority to review his or her decision to defer once the national proceedings have started addresses, to some extent, the concern that the state might not be proceed genuinely after all once the assistance is implemented.[1230]

Another factor relevant to the "interests of justice" determination is the fact that the interference might garner political consensus within the state. Within the DRC, where administrative institutions have been particularly fragile, the ICC Prosecutor seems to enjoy the support of the most important actors on the political scene, as well as the majority of the population. Even the Congolese Vice-President Bemba, himself associated with the events in Ituri, declared on 9 April 2004 that he acknowledged the role of the ICC.[1231] The involvement has provided an arena for a national debate on the issue of impunity.

11.6.8. Establishing a balanced historical record

Establishing a historical record might have an educational and even preventive effect. As noted in the Preamble, "all peoples are united by common bonds, their cultures pieced together in a shared heritage".[1232] There seems to be a strong global desire to establish a correct historical record of gross human rights violations. The vast literature on the Second World War demonstrates this. It is submitted that such history writing promotes the Statute's purpose and thus is relevant to the "interests of justice" criterion.

A satisfactory record requires that the gravest situations are reflected and representatives of all parties are targeted in a balanced manner. As for the trials after the Second World War, it remains a moral problem that major Allied crimes, such as the bombings of Dresden, Hiroshima and Nagasaki, were not dealt with satisfactorily. Such imbalance might create the false impression that the other party committed no wrongs or detract legitimacy from the trials actually conducted. The two *ad hoc* Tribunals have not escaped criticism at this point either. The ICTR has been criticised for almost exclusively targeting Hutus as opposed to Tutsis,[1233] and the ICTY has been criticised for mainly targeting Serbs. The ICC, as the first truly independent Court, should seek to avoid such criticism.

[1230] Article 53(4).

[1231] Kambale 2004.

[1232] Preambular paragraph 1 of the Rome Statute. The poetic language is composed by the Andorran delegation to the Rome Conference.

[1233] Most notably there has been a failure to target members of the Rwandan Patriotic Front (RPF).

11.6.9. The prospect of justice outside the ICC

The prospect of a genuine national proceeding does not make a case inadmissible. Yet, the likelihood as to whether a case within reasonable time will be genuinely handled by a state should be relevant when the ICC Prosecutor selects cases. All other factors being equal, the Prosecutor should prioritise the cases where there is least prospect of the perpetrator being held accountable elsewhere.[1234] The Prosecutor should even consider whether the perpetrator might be held accountable by non-prosecutorial mechanisms, subject to a careful assessment whether such mechanism would be reconcilable with the crime's gravity and the perpetrator's degree of guilt. The ICC should not spend its limited resources on proceedings that instead could have been carried out nationally. As noted, the ICC apparatus might also assist states otherwise unable states.[1235]

11.6.10. Other relevant factors

11.6.10.1. A balanced selection of situations for investigation

Several commentators have criticised the fact that as of November 2007, the Prosecutor's involvements have been on the African continent: the DRC. There have been accusations that the Prosecutor represents developed Northern countries, pursuing justice in less developed Southern countries. The Prosecutor has also been criticised for only targeting unable states as opposed to unwilling states. In response to criticism raised in 2006 during the Second Public Hearing, the Prosecutor has stated:

> "Questions were raised on the selection of situations. Specifically, it was noted that the concentration of the three situations in Africa contributed to a perception that the prosecution strategy was intentionally geographically-based. However, the fact that the three African states [Uganda, the DRC and the Central African Republic] have referred situations in Africa is a result of the strict application of the mandate of the Court to deal with the most serious crimes. Regional balance is not a criterion for situation selection under the Statute."[1236]

[1234] In addition to national mechanisms, the Prosecutor should also take into account the possibility of prosecution before other international or internationalised jurisdictions.

[1235] *Paper on some policy issues*, *supra* note 18, p. 5.

[1236] *Annex to the Three Year Report and the Report on the Prosecutorial Strategy* (of 16 September 2006), Office of the Prosecutor, p. 1 (available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html).

The *North-South* argument is not surprising; it seems to be widely held that the ICC is a Northern/Western project. The likeminded states that pushed the negotiations and arguably still are most actively involved in the ICC as a project are all states comfortably removed from the African region. Still, the picture is not black and white. The following three points should be noted: First, while it seems fair to say that the ICC was established as a "Western" project, the Rome Statute has now been ratified by a large number of African states which thus recognise the Court. Second, the African situations involve, as noted above by the Prosecutor, particularly numerous and horrific crimes, *inter alia* massive crimes against children. The selection therefore appears to be firmly justified by the "gravity of the crime" and "interests of victims" criteria. Third, three states have made self-referrals, albeit after some pressure from the ICC Prosecutor to do so, and the Security Council has referred the Darfur situation. Both types of referrals arguably legitimise the decision to investigate.

As for the targeting of unable rather than unwilling states, targeting the former will generally be easier, and this may, at least in the Court's initial phase, be a relevant argument.[1237] The ICC must not only bring justice to needy victims; it must also show the donor community that it is able to allocate its limited resources in an efficient way. If the Prosecutor should continue, however, to focus exclusively on unable states, this will represent a growing moral problem. Therefore, although the Statute does not list regional balance as a criterion, the fact that the situations chosen are all extremely grave cannot, in the long run, compensate for the failure to target unwilling states and states in other regions as well. Indeed, the Office of the Prosecutor has also noted that, based on the communications it receives, "its legal analysis has in fact extended to other continents".[1238]

11.6.10.2. A balanced selection of cases for prosecution

The situations selected will typically cover large areas and might even involve several countries.[1239] It would therefore seem desirable to spread the cases geographically,

---

[1237] The argument is linked to other factors such as the prospect of success, cost-effectiveness, *etc.*

[1238] *Annex to the Three Year Report and the Report on the Prosecutorial Strategy*, *supra* note 1236, p. 1. The Prosecutor notes that the Office has "conducted a preliminary analysis of allegations against 25 states parties [*sic*] involved in the Iraq conflict".

[1239] The *ICTY* deals with cases spread over several countries; the *ICTR* handles a genocide that involved all provinces of Rwanda; and the conflicts in northern Uganda and Darfur, in which

thematically and politically to the extent this is feasible. Thus, the interests of the greatest number of victims will be addressed. A balanced distribution of justice might also be necessary in order to avoid impressions of bias, favouritism or discrimination and also as a way of enhancing the prospect for national reconciliation.[1240] It will further promote a balanced historical record. The Completion Strategy of the ICTR lists the "need to cover the major geographical areas of Rwanda in which the crimes were allegedly committed".[1241] All other factors being equal, the Prosecutor should therefore spread the activities so that no party to the conflict feels betrayed by the process. As a consequence, the Prosecutor might under the circumstances need to select a less responsible perpetrator from one party rather than a more blameworthy perpetrator from another. As for targeting different types of crime, the ICC Prosecutor has noted that an aim is to

> "carry out short investigations and propose expeditious trials while aiming to represent the entire range do criminality. In principle, incidents will be selected to provide a sample that is reflective of the gravest incidents and the main types of victimization."[1242]

While selective, exemplary or symbolic prosecutions arguably can have the positive effect of avoiding collective guilt, Teitel has noted that a policy of exemplary prosecutions policy runs the risk of "undermining the very democracy purposes of the trial, advancing instead a rank message of political justice" and that a "[s]elective prosecutions policy can threaten the rule of law".[1243] Far from being viewed as "acquitting" those not targeted, the few individuals that are in fact targeted might be seen as representing a large number of equally guilty individuals from the same group. The result might then be the opposite of the intended: the persons prosecuted are turned into "representatives of groups seen as guilty as themselves by the victims".[1244] According to Bass, what is billed as individual justice might instead become a way of *de facto* exonerating others.[1245] The ICC Prosecutor must be aware of such possible effects as he or she selects cases for prosecution.

---

the ICC currently is involved, are inter-connected as the Ugandan government has supported the SPLM in Sudan, and the Sudanese government has supported the LRA in Uganda.

[1240] Jallow 2005, p. 153.

[1241] *Completion Strategy*, *supra* note 1095, para. 14.

[1242] *Report on Prosecutorial Strategy*, *supra* note 1062, p. 5-6.

[1243] Teitel 2002, p. 40.

[1244] Côté 2005, p. 175.

[1245] Bass 2000, pp. 300-01.

11.6.10.3. Avoiding unfortunate division of a conflict

ICC involvement might divide a conflict geographically. Some Congolese observers have argued that the ICC involvement in Ituri will have negative judicial consequences as it omits entire conflicts.[1246] In response to this, President Kabila decided in March 2004 to refer to the ICC Prosecutor all crimes within the Court's jurisdiction committed throughout the territory of Congo. The decision came as a direct response to an invitation made by the ICC Prosecutor to the Congolese authorities during a speech to the Assembly of States Parties.[1247]

A conflict might also be divided temporally. According to articles 11 and 24, the ICC does not have jurisdiction over crimes committed before 1 July 2002. If the ICC interferes in a situation comprising crimes committed both before and after 1 July 2002, or a later date on which the state in question ratified the Statute, the ICC will only have jurisdiction to pursue the crimes committed from that date.[1248] It might be argued that there is little justice in splitting up a conflict with no other explanation than the date on which the crimes were committed, and the local population might perceive such division as biased or, at best, as random. Some victims might view the failure to deal with "their" crimes as a sign that their crimes have not been found worthy of prosecuting. Such perception could possibly accentuate a conflict. A way of dealing with this problem might be a burden sharing, where the state deals with the crimes that fall outside the ICC's jurisdiction, ensuring justice for these crimes as well.[1249]

11.6.10.4. Avoiding abuse of the ICC by one party to a conflict

The ICC Prosecutor should be careful not to allow the Court to be abused as a tool of a government policy to legitimise the government's actions. The reason why, for instance, a state would make a self-referral might be that it seeks international legitimacy and support in its fight against political opponents. Kress notes that the ICC Prosecutor should be aware that a state might wish to make a "selective or asymmetrical self-referral".[1250] With the international support that ICC interference

---

[1246] Kambale 2004.

[1247] *Report of Prosecutor of the ICC to the Second Assembly of States Parties*, *supra* note 800.

[1248] This has not prevented the Prosecutor from interfering in the DRC and Uganda where there will be such division.

[1249] The only sharing that the Prosecutor has suggested, however, is one where the ICC deals with the more responsible, see *Paper on some policy issues*, *supra* note 18, p. 3.

[1250] Kress 2004, p. 946; Gaeta 2004, pp. 951-52.

generates, a government might find its case for use of military force against opponents strengthened. For instance, in December 2003, Ugandan President Museveni referred "the situation concerning the Lord's Resistance Army [LRA]" to the ICC Prosecutor.[1251] The Prosecutor noted, however:

> "My Office has informed the Ugandan authorities that we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the situation of northern Uganda by whomever committed."[1252]

Thus, as interpreted by the Prosecutor, that referral also applies to governmental forces. An interesting question is whether the referring state has to accept such adjusted interpretation or whether it instead could have limited its cooperation with the Prosecutor to the crimes expressly referred to in the referral. It is submitted that the state does not have to respect the Prosecutor's interpretation. Kress suggests, however, that if the Prosecutor is not allowed to "correct" an asymmetrical referral, it might be considered as legally void.[1253] The view is endorsed. It should be noted that after the ICC's opening of investigations there has nevertheless been rhetorical use of the ICC involvement to justify intensified military operations. Soon after the opening of investigations, the Ugandan army announced that it would re-enter Sudan to hunt down the LRA leadership. An interesting question is whether Museveni might have made the referral in order to position himself *vis-à-vis* the LRA, enabling him to make a deal with the LRA which includes his promise to withdraw the referral (*i.e.* refuse to cooperate further with the ICC) in return for LRA concessions.

As for the admissibility it might be questioned whether the state can make a partial waiver with respect to some perpetrators.[1254] It is submitted that this is possible and that this could be appropriate when there is a consensual burden sharing between the state and the ICC where the ICC deals with the most

---

[1251] *President of Uganda refers situation concerning the LRA to the ICC*, *supra* note 414.

[1252] Noted in letter annexed to *Decision assigning the situation in Uganda to Pre-Trial Chamber II*.

[1253] Kress 2004, p. 947. As for *ad hoc* acceptance of jurisdiction under article 12(3), rule 44(2) provides that such declaration "has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 *of relevance to the situation*". An asymmetrical acceptance of jurisdiction will thus automatically be corrected and can thus not be withdrawn. There is, however, no corresponding rule regarding self-referrals.

[1254] Kress suggests this based on an argument *a maiore ad minus*, see Kress 2004, p. 946.

responsible perpetrators. The ICC Prosecutor must be aware that the state might seek to shield certain persons from criminal responsibility altogether.

In several conflicts, such as in the one in the DRC, most actors, save civilian victims, have at some point been the aggressor and at another point been the victim. Handling such situations will be immensely challenging and require in-depth understanding. The complexity should not, however, prevent the Prosecutor from interfering. Dealing successfully with such situations will increase his or her own credibility and esteem as well as that of the Court. Conversely, it would be a paradox if the complexity of the conflict should both explain its brutality and be used as an argument for not interfering.

11.6.10.5. The relationship to a wider strategy

There is a two-way relationship between the long-term strategy of the ICC and the case-by-case selection of situations and individuals. On the one hand, each selection will contribute to the shaping of the Court's role and strategy. On the other hand, when the Prosecutor makes each selection, he or she should adhere to a sensible overall strategy roughly carved out and, preferably, published beforehand. Over time, if and when a distinct strategy has been established, the Prosecutor should adhere to this, unless it proves inadequate. General principles regarding the exercise of discretional power, including the principle of equality before the law, require such consistency.

As examples of possible strategies, Hall notes that the Prosecutor might target few situations each with a high number of victims, or he or she might decide to interfere in more situations each with fewer victims. A precondition must be that the situations in which he or she interferes are of sufficient gravity or have had sufficient impacts to justify the interference. The point is not so much the justification *vis-à-vis* the state concerned, but the fact that the Prosecutor, due to limited resources, must be very selective. The selections of the DRC, Uganda and Sudan situations seem to fit into the former strategy as there have been particularly grave crimes with numerous victims. As illustrations of the latter strategy, Hall suggests the crimes committed in Chile in 1973-75 (approximately 3,000 deaths and many forced disappearances and torture), and the crimes committed in Argentina in the 1970s and early 1980s (9,000-30,000 forced disappearances).[1255]

[1255] Hall 2003, p. 21.

11.6.10.6. The implication for other cases

One reason why the Prosecutor would want to proceed with a case might be the fact that it would facilitate the investigation and prosecution of other cases. This factor is related to another factor, "the prospect of success", discussed above, with the notable difference that the point here is the success of other cases. The ICC Prosecutor has noted:

> "In some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers, if investigation of certain type of crimes or those officers lower down the chain of command is necessary for the whole case."[1256]

Similarly, in his Completion Strategy referred to above, the President of the ICTR lists "the alleged connection an individual may have with other cases" as a relevant factor for selecting a particular individual. The application of this factor is not unproblematic as it potentially conflicts with the "gravity of the crime" factor. From the perpetrator's perspective, it will probably be perceived as unfair if he or she is targeted simply because proceeding with his or her case is expected to facilitate another proceeding. Yet, it is submitted that proceeding with a less grave crime might be justified when this facilitates proceeding with another particularly grave crime, provided the first crime is of "sufficient gravity" and thus admissible according to article 17(1) (d).[1257]

11.6.10.7. Contributing to the development of international criminal law

The jurisprudence of the ICC will play an important role in the future development of international criminal law. The ICC will deal with challenging legal issues, such as whether a conflict is international or non-international in character, whether genocide has occurred, the scope of command responsibility and the scope of various modes of participation. The Court will also most probably be handling novel issues, such as the use of child soldiers and the responsibility of individuals associated with multinational corporations which have benefited economically from the crimes. International proceedings enjoy a unique authority and, as noted by Burke-White,

> "the ICTY and the ICTR have handed down important and well-reasoned judgments that have had profound impact on the development of international criminal law. The *Tadic* case articulated the rules of command responsibility, the

[1256] *Paper on some policy issues*, *supra* note 18, p. 7.

[1257] If the threshold in article 17(1) (d) is not met, the case will be inadmissible.

> *Kunarac* case found rape to be a crime against humanity, and the *Akayesu* case was the first modern international decision to find an individual guilty of genocide."[1258]

The fact that a situation or a case involves issues that appear to be important to the development of international criminal law might be an argument for proceeding. Apparently in contradiction to this, uncertainty as to the legality of certain behaviour has in fact also been used as an argument against proceeding. After having decided not to proceed with the NATO bombing campaign in Kosovo 1999, the ICTY Prosecutor explained, referring to the "Final Report" which she had received, that

> "either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower level accused for particularly heinous offences".[1259]

This *non liquet* argument has not escaped criticism. It appears unsatisfactory to avoid proceeding with a case on the ground that the law, as opposed to the facts, is unclear. A more acceptable approach would be to seek to remove any uncertainty by providing authoritative interpretations and decisions.

11.6.10.8. The existence of a self-referral

One might argue that there is particular reason to follow up a state's self-referral. As noted in the historical survey, the 1953 Committee indeed envisaged the ICC merely as an optional court, with the authority to act only at the request of a state party. By contrast, the ICC may also interfere against the express will of the state concerned, subject of course to the jurisdictional requirements in article 12. In 1998, states first of all envisaged the ICC to interfere against the state's will. In principle, the Prosecutor should not feel, and certainly is not, obliged to prioritise a self-referral. There are, however, two reasons why acting upon a self-referral nevertheless might be sensible: First, the prospect of success will usually be greater as the state is more likely to cooperate with the ICC.[1260] Second, the referral might indicate that the

---

[1258] Burke-White 2002, p. 11.

[1259] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing against the Federal Republic of Yugoslavia, *International Legal Materials 39*, p. 1257, at para. 90, (available at http://www.un.org/icty/pressreal/nato061300.htm).

[1260] The ICC Prosecutor has noted: "We appreciate very much the trust expressed by Uganda and the DRC in making these referrals, and their ongoing cooperation with our work. The referrals will allow the Court to start its first cases with clear jurisdiction and open channels of cooperation". See *Address by Prosecutor Luis Moreno-Ocampo to the third session of the*

interest of victims in criminal proceedings is strong. Third, to the extent that the Prosecutor believes that such referrals represent a sound practice, he or she should perhaps encourage their making by responding positively to them. Of course, when the ICC Prosecutor beforehand has encouraged the self-referral, as the case was in the DRC and Uganda, he or she will in reality already have made a positive decision to open an investigation.

At the same time, if self-referrals become a popular mode of referral, the Court will have to turn some of them down. Further, self-referrals might in reality be attempts to marginalise political opponents or to legitimise the use of force against them, as noted above.[1261] This would seriously undermine the Court's legitimacy and credibility. In addition, too much reliance on self-referrals might "not only water down the significance of [the *proprio motu*] power or even cast doubt on its legitimacy, but […] also detract from the legal obligation of States Parties to cooperate with the ICC".[1262] The unfortunate perception might be created that the ICC first of all is an optional Court as opposed to a complementary court which keeps an eye on states, revealing and complementing their non-genuine proceedings. Finally, and perhaps most seriously, the cooperation inherently present when the ICC Prosecutor proceeds upon a self-referral inevitably represents a danger that the Court's independence is cast into doubt. While this hardly is a reason not to proceed upon a self-referral as such, it illustrates the need for the ICC Prosecutor to proceed in a transparent and objective manner, in particular when his or her actions have been triggered by a self-referral.

11.6.10.9. The degree and distinctness of national failure

It might be argued that when there is a particularly clear failure of the state to proceed genuinely according to articles 17 or 20, there is increased reason for the Prosecutor to interfere. Such policy might increase the enhancing effect on national proceedings and thus underscore the responsibility of states as the primary enforcers of law. Against this, however, it might be argued that the ICC is not established as a corrective to states, although a corrective effect *de facto* will exist and is an important positive effect of the complementarity principle. It is submitted that interfering as a corrective at the cost of more serious matters appears not to be in the "interests of

---

Assembly of States Parties, 6 September 2004 (available at http://www.icc-cpi.int/otp/otp_events.html). A similar argument can be made in the case of Security Council referrals.

[1261] Gaeta 2004, p. 952.

[1262] Kress 2004, p. 948.

justice", but all other factors being equal, the degree of national failure should be decisive. If the ICC over time fails to interfere *vis-à-vis* the clearest instances of national failure, this might entail a credibility loss, regardless of the gravity of the situations in which the ICC actually interferes. The ICC Prosecutor has noted:

> "As a general rule, however, the policy of the Office [of the Prosecutor] in the initial phase of its operations will be to take action only when there is a clear case of failure to take national action."[1263]

The implications of this statement are not very clear. It has implications both to the issue of prosecutorial discretion and to that of admissibility. If the term "clear case of failure to take national action" refers to inaction, this would effectively remove the significance of the "genuinely" threshold in article 17. While focusing on inaction might be appropriate in an initial phase, it would be inappropriate to indicate *a priori* that the Prosecutor will *only* interfere against inaction. If "clear failure" also refers to cases where the state has proceeded in a clearly inadequate manner, the meaning might still be either material or procedural, refer either to situations where the state has failed by a considerable margin or to situations where the failure is easy to demonstrate. Either way, the result of the statement might be that the message conveyed in article 17 is weakened as it seems to elevate the threshold for interfering. Instead, the possibility that the ICC will target any case of national failure to meet the requirements of article 17 should be kept open. Only then may the complementarity principle have the full envisaged enhancing effect. It might be argued that the term "[a]s a general rule" signals that the full scope of article 17 is retained. If that is the case, however, the statement loses its significance. In reality, the statement seems more than anything to address the concerns of two groups of states: those that fear that the Court will require too much (as they have not properly understood the "genuinely" threshold), and those that are resourceful and not likely to display any "clear case of failure" (but fear that their citizens might commit crimes within the Court's jurisdiction).

A potential problem with selecting the clear cases of failure is that a state which is clearly unwilling or clearly unable also might be a difficult state to cooperate with. Where there is clear case of inability in the sense that a state's judicial system has totally collapsed, a fruitful burden sharing also appears less realistic.

[1263] *Paper on some policy issues*, *supra* note 18, p. 2.

11.7. JUDICIAL CONTROL

11.7.1. General

The required authorisation from the Pre-Trial Chamber under article 15(4) when the Prosecutor wants to initiate an investigation *proprio motu* appears not to involve a review of the discretion. Such authorisation will be given if

> "the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court".

Here, "reasonable basis" refers to the *prima facie* assessment.[1264] Under article 53(3), however, the Pre-Trial Chamber may, irrespectively of how the Court's jurisdiction has been triggered, review a decision of the Prosecutor not to proceed when it is based solely on the "interests of justice" criterion. The Chamber can do so at the request of a referring state, the Security Council (when it has referred the situation) or *ex officio*. Zappalà has explained the provision for such extended judicial control as follows:

> "Awareness of the unsettled status of the situation in which [the ICC] is likely to intervene made it appropriate to add an element of judicial supervision in the pre-trial phase. This element was not necessary for the *ad hoc* Tribunals because in that case the Security Council had already made the evaluation as to the political impact of criminal investigations and prosecutions, when the decisions to create the Tribunals were taken."[1265]

The ICC Prosecutor has noted that when he selects situations and cases under article 53, he must carry out a "careful analysis based on the principles of objectivity and impartiality".[1266] Further, the Prosecutor has noted that

> "impartiality does not mean that we must necessarily prosecute all groups in a given situation. Impartiality means that we will objectively apply the same criteria for all,

---

[1264] The same term is used in article 53(1) (a) where the issue is whether "[t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed", clearly not covering the prosecutorial discretion.

[1265] Zappalà 2003, p. 38.

[1266] *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, *supra* note 606, p. 6.

> in order to determine whether the high thresholds or [sic] the Rome Statute are met […]".[1267]

The wording of article 53(3) seems to give the Pre-Trial Chamber unlimited authority to reverse a decision of the Prosecutor not to proceed with a case. There are, however, valid reasons as to why the Chamber will be reluctant to decide such reversal. The purpose of allowing prosecutorial discretion in the first place should be observed. Selecting situations and cases for investigation and prosecution should generally be the task of prosecutors and not of judges. This is where the Prosecutor has the expertise, and, at a practical level, the Prosecutor will generally be in a position to make a more informed decision than the judges. Such selection involves comparative analysis, and while the Prosecutor will have access to the whole crime base, the judges will only be able to compare the present case with previous cases that the Prosecutor has brought before the Court.[1268]

11.7.2. The principles of legality and equality before the law

Article 42 provides that the Prosecutor shall carry out the task as an independent and separate organ and "not seek or act on instructions from any external source". While it might be argued that the Chamber for this purpose is not an "external source" (indeed, article 53(3) authorises the Chamber to instruct him or her), it is submitted that the Pre-Trial Chamber should focus on the legality of the decision and not the discretion as such. The fact that the "interests of justice" criterion is so vague and typically "discretional" supports this. Instead, the Court should proceed with a presumption that the discretion is exercised regularly. The Chamber will, when the matter is raised, have to satisfy itself that the Prosecutor has exercised the discretion in an acceptable manner based only on relevant criteria. It will not, it is submitted, set aside the actual weighing of the factors, unless general principles of administrative discretion have been violated. The Chamber will, *inter alia*, determine whether the Prosecutor has exercised his or her discretion impartially, with due regard to the principle of equality of law and whether there has been any form of abuse of power.

Indeed, as a general principle, no discretion can, under the rule of law, be absolute and unfettered. Discretion is subject to certain restraints such as good faith,

---

[1267] *Ibid*.

[1268] Jallow 2005, p. 155.

proper motives, non-discrimination and fairness.[1269] In the field of criminal law, the "abuse of power" doctrine is reflected in various human rights instruments and should probably be viewed as customary law. It may be noted that the *Oxford Companion to Law* defines "discretion" as "the faculty of deciding or determining in accordance with circumstances and what seems just, right, equitable, and reasonable in those circumstances".[1270] While the term "seems" is no objective term (indeed, it is *discretion*), the discretion must be exercised in good faith. The ICTY's Appeals Chamber has noted:

> "The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognized principles of human rights."[1271]

According to article 21(1) (b) of the Rome Statute, the Court (including the Prosecutor) must interpret and apply the "interests of justice" criterion while having regard to principles of due process of law. Such principles are reflected *inter alia* in article 7 of the 1948 Universal Declaration of Human Rights[1272] and articles 14 and 26 of the ICCPR.[1273] The Court must also have regard to international customary law as reflected *inter alia* by the *ad hoc* Tribunals in their exercise of discretion. Further, article 21(3) of the Rome Statute provides that the Statute must be interpreted and applied "consistent[ly] with internationally recognized human rights", and it specifically provides that the interpretation and application be "without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3,

---

[1269] Jallow 2005, p. 154. See also Bergsmo and Kruger who note that a discretional decision under article 53(1) (c) "cannot be made on arbitrary grounds" as "[t]hat could amount to abuse of prosecutorial discretion", see Bergsmo 1999a, p. 710, para. 24.

[1270] This definition is quoted in Ntanda Nsereko 2005, p. 1.

[1271] *Prosecutor v. Delalic et al.*, para. 604.

[1272] Article 7 of the Declaration provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law […].

[1273] Article 14 of the ICCPR provides: "All persons shall be equal before the courts and tribunals […]", and article 26 provides: "All persons shall be equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law prohibits any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

Explaining the precise significance of the principle of equality before the law is complex. No two cases are alike, and it is certainly not required that every case be treated in exactly the same manner, irrespective of the circumstances. Instead, in order to apply a norm "equally" to different cases, it is necessary to take the differences into account. In an ICC context, the issue of equality is particularly complex. While the prosecutorial discretion in ordinary criminal cases in reality is limited to *prima facie* considerations, the ICC Prosecutor must identify and weigh a variety of factors which might be conflicting. In *Prosecutor v. Delalic et al.*, the defendant claimed that he was the subject of a "selective prosecution policy." He defined "selective prosecution" as one in which

> "the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience".[1274]

The defendant argued that such selective prosecution violated article 21 of the ICTY Statute referring to the "equality before the Tribunal" and the "rules of natural justice and of international law".[1275] He argued that he was singled out for prosecution "simply because he was the only person the Prosecutor's office could find to "represent" the Bosnian Muslims", while indictments against all other defendants without military rank who were all non-Muslims of Serbian ethnicity were withdrawn by the Prosecution on the ground of changed prosecutorial strategies.[1276] The Prosecutor's intention had been, the defendant contended, to give an appearance of even-handedness to the Prosecutor's policy.[1277] In light of the decision to except "the one Muslim defendant without military rank or command responsibility from the otherwise complete dismissal of charges against Defendants having that status", the defendant rejected the justification given by the Prosecutor in a press release of a "revaluation of indictments according to changed strategies".[1278] The Appeals Chamber noted:

> "In the present context, indeed in many criminal justice systems, the entity responsible for prosecution has finite financial and human resources and cannot

[1274] *Prosecutor v. Delalic et al.*, para. 596.
[1275] *Ibid.,* para 598 and annex A, para. 12.
[1276] *Ibid.,* para. 612.
[1277] *Ibid.,* para. 611.
[1278] *Ibid.,* para. 612.

> realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted."

While it was "beyond question that the Prosecutor has broad discretion", the Chamber also noted that it was "clear that a discretion of this nature is not unlimited".[1279] In line with what has been said above, the Chamber referred to recognised human rights principles, noting that

> "one such principle is explicitly referred to in Article 21(1) of the Statute which provides: All persons shall be equal before the International Tribunal".[1280]

The Chamber also referred to article 21(3) of the Rome Statute and concluded that the ICTY Prosecutor "is subject to the principle of equality before the law and to this requirement of non-discrimination".[1281] The Chamber noted, however, that the burden put on the defendant was heavy:

> "The burden of proof rests on Landzo, as an appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised I relation to him. Landzo must therefore demonstrate that the decision to prosecute him […] was *based on improper motives*, such as race or religion, and that the Prosecution *failed to prosecute similarly situated defendants*."[1282]

The Appeals Chamber further noted:

> "The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, *imply a presumption* that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute […]. This would require evidence from which *clear inference* can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with [the principle of equality before the law]."[1283]

Thus, a two-pronged test was applied which required that the accused (i) establish an unlawful or improper motive for the Prosecution, and (ii) establish that other similarly situated persons were not prosecuted. Further, the requirement of "clear inference" with regard to (i) should be noted. In is not quite clear, however, whether

---

[1279] *Ibid.,* para. 602.

[1280] *Ibid.,* para. 605.

[1281] *Ibid.*

[1282] *Ibid.,* para. 607 (emphasis added).

[1283] *Ibid.,* para. 611 (emphasis added).

this requirement is stricter than what would normally follow from a presumption, and, if so, what the legal basis for such strict requirement is. The Appeals Chamber reasoned that

> "in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the decision to continue the trial against Landzo was *consistent with the stated policy* of the Prosecutor to "focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences".[1284]

In addition, the Chamber noted that a decision

> "made in the context of a *need to concentrate prosecutorial resources*, to identify a person for prosecution on the basis that they are [sic] believed to have committed *exceptionally brutal offences* can in no way be described as a discriminatory or otherwise impermissible motive".[1285]

The defendant had failed to demonstrate that he had been selected for unlawful or improper motives.[1286] The Appeals Chamber compared his case with that of other persons who had not been prosecuted, and it noted that the defendant had been in the Tribunal's custody and that a trial against him was already ongoing, while the other persons charged had not yet been arrested. The decision therefore appeared to be sensible for practical reasons.[1287] Finally, as if the above was not enough to turn down the defendant's claims, the Appeals Chamber further noted that even if the defendant had established that the right to equality before the law had been violated, reversing the conviction "would be an entirely disproportionate response to such a procedural breach".[1288] The Appeals Chamber agreed with the Trial Chamber that the argument could not be accepted that

> "unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial".[1289]

While the latter statement of the chamber is easy to agree with, this case illustrates that selective justice might be problematic even if it is not discriminatory. If one person apparently is randomly selected from among several equally blameworthy

---

[1284] *Ibid.,* para. 614 (emphasis added).
[1285] *Ibid.*
[1286] *Ibid.,* para. 615.
[1287] *Ibid.,* paras. 616-17.
[1288] *Ibid.,* para. 618.
[1289] *Ibid.,* referring to para. 180 of the Trial Chamber's judgement.

perpetrators, this will not be done for improper motives, as discrimination is never random. Yet it will probably be perceived as unfair. This is an inherent problem when a court with limited capacity interferes in a situation comprising mass crimes. It should also be noted that the Appeals Chamber fails to address the indisputable fact that the Prosecution, at one point, shifted focus from Serbs to Muslims. It might reasonably be suggested that this shift indicated that the focus before the shift in fact had been unjust. In this respect, it should be noted that the ICTY Deputy Prosecutor has acknowledged, in relation to the indictments of Kordic and General Blaskic, that "[t]he Tribunal tried to get these indictments out before Dayton […] to defuse accusations of anti-Serbs bias".[1290]

As for the ICTR, the Tribunal's failure to indict persons from RPF has, as noted, been criticised. In *Prosecutor v. Akayesu* and *Prosecutor v. Ntakuritmana*, the Appeals Chamber echoed the words in *Prosecutor v. Delalic et al.* In *Prosecutor v. Ndindiliyimana*, the defence unsuccessfully argued that there had been an

> "abuse of process and non-compliance with the Statute and Rules of the Tribunal in the Prosecution's selective and discriminatory policy of not prosecuting the Rwandan Patriotic Front (RPF), and instead prosecuting only Hutus".[1291]

In Resolution 1503 (2003), the Security Council called on all states, especially Rwanda, Kenya, the DRC and the Republic of Congo, to collaborate fully with the Tribunal and especially in the investigation of allegations of violations by the members of the RPF. Coming from the Security Council which is supposed to make political decisions, such a shift appears to be unproblematic as such. At the same time, it might be viewed as an indication that there had been an unfortunate focus on the Hutus prior to the shift.

The two *ad hoc* Tribunals have often referred to their limited capacity as justification for a certain prosecutorial policy. While limited capacity necessitates selectiveness, it does not, however, indicate which situations or cases should be selected. The fact that a court has limited capacity has no implications as to the selection other than the objective implication that the most "important" matters must be prioritised. Interestingly, the factor has been used to justify a shift or a narrowing of the prosecutorial focus.[1292] While limited capacity seems irrelevant in

---

[1290] Bass 2000, p. 244.

[1291] *Prosecutor v. Ndindiliyimana*, para. 2.

[1292] In *Prosecutor v. Delalic et al.*, the prosecution argued, rather vaguely, that a "*change of prosecutorial tactics*, in view of the need to reassign available resources of the Prosecution, cannot be considered as being significant of discriminatory intent", see para. 613. As noted above, the Appeals Chamber accepted the Prosecution's justification while, however, at the

the context of a shift, decreased capacity could justify a further narrowing of prosecutorial focus. Indeed, this is arguably the only legitimate argument for a random selection among cases equally deserving of justice.

11.8. THE NEED FOR A PROSECUTORIAL POLICY, TRANSPARENCY AND GUIDELINES

11.8.1. The choice of a prosecutorial policy

Article 53 provides the ICC Prosecutor with a flexible tool for determining whether to interfere in a given situation and, from a wider perspective, developing a sustainable prosecutorial policy. Thus far, statements from the Prosecutor, some of which have been mentioned here, have indicated that two criteria for the selection of individual cases stand out as the most important: the gravity of the crime and the alleged perpetrator's responsibility. As for the selection of cases, it is not given which strategy the ICC should or will choose. While gravity is an obvious criterion, the dilemma is that the ICC Prosecutor will be presented with so many situations that he or she will have to make the following choice: shall he or she pursue a "case-driven" approach or a "resource-driven" approach? The Prosecutor has noted that a *case-driven approach* would imply that

> "the Court should act in every situation involving crimes that appear to fall within our jurisdiction. As a result, the Court would take on multiple situations, including those of comparatively lesser gravity, and would thereby expand its reach, reducing the role of national States. Increasing demands for cooperation and intervention in less grave situations which may fail to reflect the concern of the international community as a whole might lead to ICC 'fatigue' and a diminishing of support."[1293]

The Prosecutor has further noted that a court "accepting all situations would also need a much larger budget,[1294] and that the Rome Statute's repeated reference to the gravity of the crimes "seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world".[1295] He noted that a *resource-driven approach* with

---

same time noting that the defendant was "believed to have committed *exceptionally brutal offences*", see para. 614 (emphasis added).

[1293] *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, *supra* note 606, p. 8.

[1294] *Ibid.*

[1295] *Ibid.*, p. 9.

> "the capacity to take only two or three situations each year would require the Court to focus on the worst crimes. This would likely increase the international consensus towards their prosecutions. This approach would enable the Court to have more efficiency. A resource driven approach, however, would mean that situations involving hundreds of crimes, such as killings and rapes, may have to be set aside in the interest of focusing on a competing situation involving thousands of killings and rapes. Many could feel that justice is not served if hundred of deaths are not enough to warrant the intervention of the Court."[1296]

The Prosecutor concludes that determining the "correct model" is a "legal, financial and strategic question that will require dialogue between many actors". He notes that this

> "has a *legal* dimension, namely the interpretation of Article 53, and therefore involves the Office of the Prosecutor [Office of the Prosecutor] and ultimately the judges. It has a *budgetary* dimension and therefore involves the States Parties. It also has a *strategic* dimension – what is the desired scope and role of the Court?"[1297]

11.8.2. Prosecutorial transparency

In order to prevent criticism as to how the "interests of justice" criterion is interpreted and applied, the Prosecutor should listen carefully to all arguments and be open to entering into public discussions with serious actors. After all, the Prosecutor acts on behalf of the world community and is vested with the authority to investigate and prosecute crimes of concern to the international community as a whole. Therefore, the community should be heard. A public debate regarding prosecutorial policies is a sound "democratic" feature which can only promote justice. Such discussion would indicate public engagement in the Court's activities and might generate further engagement which in turn might amplify the positive effects of the Rome Statute and the complementarity principle. The Prosecutor should, however, never make a certain prosecutorial decision for the purpose of satisfying popular opinion. Acting on behalf of the entire world community, which hardly will have a coherent opinion, the Prosecutor should be more careful than national prosecutors in this respect.

The Prosecutor will at times be called upon to explain why some situations and cases are dealt with and others are not. Even though the Statute does not require that the Prosecutor justify his or her actions, publicly that is, providing some explanation

---

[1296] *Ibid.*

[1297] *Ibid.*

would be a sound feature. The perception of the ICC as legitimate and credible depends not only on the Court's exercise of jurisdiction but also on its non-exercise. Therefore, there might be a need to explain why a given situation or case was not proceeded with. The necessity of offering some explanation in politically charged situations was illustrated in the ICTY Prosecutor's Kosovo Report:

> "It is not the Prosecutor's normal policy to make public the details about investigations or allegations received but not investigated. Standard practice is to comment only about indictments that have been made public. Even then, any comment by the Prosecutor outside the courtroom must be extremely limited. [As for the] NATO air campaign, however, […] there has already been much public debate about the allegations. The Prosecutor considers that in this situation, quite unforeseen when the Tribunal came into existence, she should take the unusual step of making her reasoning public."[1298]

In this particular situation, the ICTY Prosecutor appointed a committee within her Office to

> "assess the allegations and material accompanying them, and advise the Prosecutor and the Deputy Prosecutor whether or not there is a sufficient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing".[1299]

Due to the intimate relationship between the ICTY Prosecutor and NATO, which *inter alia* had assisted the Tribunal by collecting evidence and making arrests, the Prosecutor realised that criticism would be raised if she decided not to deal with the matter. Appointing a special committee appears to have been a wise decision. The criticism regarding the *non liquet* argument that the law might not be sufficiently clear has been referred to above. Criticism was also sparked by the note in the Report that the committee had

> "relied essentially upon documents, including statements made by NATO and NATO countries at press conferences and public documents produced by the FRY. It has *tended to assume* that the NATO and NATO countries' press statements are *generally reliable* and that explanations have been honestly given."[1300]

Relying on information from the very organisation that the alleged perpetrators represented seems inappropriate. Instead of assuming that the information was

---

[1298] *Prosecutor's Report on the NATO Bombing Campaign*, *supra* note 1090.

[1299] *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing against the FRY*, para. 3.

[1300] *Ibid.,* para. 90.

reliable, the ICTY Prosecutor should have satisfied herself that the information seemed to be reliable, that the explanations seemed to be honest and that the information actually indicated that no crime had been committed. Later, the Prosecutor stated, now focusing on the *prima facie* issue, that

> "after a careful examination of the material, she was 'very satisfied' that although NATO had made some mistakes there was no deliberate targeting of civilians or unlawful military targets during the air campaign".[1301]

Irrespective of the material correctness of the decision not to take the matter further, the result of the episode was that the ICTY Prosecutor's independence and impartiality were seriously questioned. Among some observers, there is a possibility that the impression was created that more lenient standards than the regular apply *vis-à-vis* certain actors in humanitarian interventions when the overall purpose of the operation is considered as legitimate.

With a detailed legal framework in place in the Rome Statute and a steadily increasing awareness of the importance of justifying prosecutorial choices, it should be expected that the ICC Prosecutor will strive at being perceived as fully independent from external influence and that he or she will make his or her choices in a transparent manner. This will, however, not halt criticism. Indeed, none of the Prosecutor's openings of investigations have so far escaped criticism. Yet, it seems thus far that the majority of the critics contend that the Prosecutor's choices have been unwise rather than that they have been politically motivated. It is submitted that the Prosecutor can live with that kind of criticism.

11.8.3. Prosecutorial guidelines

Charges that decisions are politically driven are easy to make but hard to rebut. One way to address this problem is to issue prosecutorial guidelines beforehand.[1302] The existence of such guidelines might prevent such charges from being made and it might facilitate their rebuttal when they are made, provided the guidelines have been adhered to. With such guidelines in place, interested groups and individuals will better be able to predict and accept the Prosecutor's selections. As to another positive effect, such guidelines might also make the preventive effect more targeted, as individuals would be advised from committing certain crimes in particular, and

---

[1301] *'No basis' to investigate NATO for bombing of Yugoslavia*, ICTY Prosecutor, Press Release, 2 June 2000 (available at http://www.un.org/peace/kosovo/news/99/may00_5.htm).

[1302] It may be noted that the ICC Prosecutor's *Paper on some policy issues* (*supra* note 18) discusses the policy in some detail.

states would be advised to genuinely prosecute certain crimes in particular. Further, guidelines might structure a public debate. Last but not least, they will promote fairness and consistency in the Prosecutor's selections.[1303] International law encourages prosecutors to elaborate guidelines.[1304] Prosecutors should *inter alia* observe the following:

> "In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution."[1305]

It may be argued that the ICC judges, in light of their role under article 53, should have a role in elaborating such guidelines.[1306] It is further submitted that the ICC Prosecutor, when preferable, might elaborate specially designed guidelines to be applied within a given situation in which he or she is already involved. This would in

---

[1303] In addition, more detailed guidelines will probably exist for the internal use of the Office of the Prosecutor.

[1304] *E.g.* the *UN Guidelines on the Role of Prosecutors*, *supra* note 1044.

[1305] *Ibid.*, article 17. Many states have such guidelines: *inter alia* Belgium, France and Germany. The adoption of guidelines is *inter alia* proposed in Italy where the credibility of the legal system has been challenged by an increasing amount of organised crimes, see Hall 2003, p. 11.

[1306] Kress 2003, pp. 603 *et seq*.

fact be similar to elaborating guidelines for the prosecutor of an *ad hoc* tribunal where the situation is pre-defined. Arguably, such situation-specific guidelines can be more focused and further promote the marginalising of certain actors while avoiding undue fear from actors whom the Prosecutor does not intend to target. This might, in its turn, facilitate peace talks.

12. COMPLEMENTARITY AND ALTERNATIVE NATIONAL MECHANISMS

12.1. INTRODUCTION

The Rome Statute builds on the assumption that in the aftermath of gross human rights violations criminal justice is a key ingredient for achieving sustainable peace. This recipe contrasts the historical fact that more often than not international crimes have been left unpunished. In fact, it was this failure of states to investigate and prosecute that prompted the establishment of the ICC. Not only have suppressive governments failed to punish crimes in which they themselves were involved; most of the peaceful transitions from oppressive regimes to democracies over the last decades have involved some form of legal or *de facto* amnesty, granted or accepted by democratic governments.[1307] Some would say that such amnesty has been a necessary ingredient in these processes. It can reasonably be questioned whether Chile's General Pinochet and the South African apartheid regime would have ceded power voluntarily if they had not been granted amnesty but risked prosecution. The way the amnesty was granted in these two situations was, however, very different: When Pinochet in 1990 after considerable international pressure allowed free elections in Chile, he only did so after having appointed himself to senator for life (he also remained commander in chief of the Chilean army until 1998). According to Chilean law, this title gave him full immunity.[1308] The continuous attempts later to prosecute him, in and outside Chile, illustrated that the arrangement was never really accepted by his opponents.[1309] The South African amnesty, by contrast, was the result of a democratic process and represented a compromise between the perpetrators' demand for a blanket amnesty and the African National Congress' demand for prosecutions. Moreover, the amnesty was conditioned on the perpetrators' cooperation with the Truth and Reconciliation Commission (TRC), although few of those who refused to cooperate have subsequently been

[1307] *De jure* amnesties have been granted *inter alia* in Argentina, Cambodia, Uruguay, Chile, El Salvador, Guatemala, Haiti, South Africa, Algeria and Sierra Leone. A *de facto* amnesty might for instance be arranged by letting the perpetrator leave the territorial state to live in exile, such as when former Ugandan dictator Idi Amin was allowed to travel to Saudi Arabia.

[1308] This privilege was granted by the Constitution to former presidents with at least six years in office.

[1309] Before Pinochet was arrested in 1998 in London, allegations of abuses had been made numerous times but never acted upon. At the time of his death in December 2006, around 600 criminal charges were still pending against him in Chile for human rights abuses such as torture, forced disappearance and murder as well as tax evasion and embezzlement under his rule and afterwards. Pinochet's supporters, including Richard Nixon, Henry Kissinger and Margaret Thatcher, hailed him as the man who had prevented Chile from turning into a Communist regime.

prosecuted.[1310] Many commentators have hailed the South African TRC as a successful provision of justice in a tense situation. It is telling that while the House of Lords was hearing arguments that would lead to its famous decisions that Pinochet was not immune from torture charges, South Africa's last apartheid president, de Klerk, was in London releasing his autobiography.[1311] More generally, the UN Secretary-General has described TRCs as "a potentially valuable complementary tool in the quest for justice and reconciliation".[1312] Others might argue that the whole concept of reconciliation without criminal justice only is a utopian feel-good idea.

Legally the term "amnesty" means foreclosing criminal prosecution for past offences.[1313] In practical terms, where in force, "the authorities are prevented from taking action within the scope of the amnesty, however unlawful the acts in question would otherwise be".[1314] An amnesty may be blanket or conditional (*e.g.* combined with a TRC).[1315] A blanket and a conditional amnesty contrast starkly; the former means concealing and forgetting while the latter means exposing and remembering.

A collision between an international criminal jurisdiction and a national conditional amnesty has not yet occurred. It is, however, only a matter of time before it happens, and the question is then whether the existence of the amnesty may

---

[1310] TRCs are "official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years [which] take a victim-centred approach and conclude their work with a final report or findings of fact and recommendations", see *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the United Nations Secretary General, 23 August 2004, S/2004/616, para. 50 (available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2004/616&Lang=E&Area=UNDOC).

[1311] Brody 2001.

[1312] *The rule of law and transitional justice*, *supra* note 1310, summary. The South African TRC has not escaped criticism altogether. For instance, Koskenniemi notes that "[o]nly 17 per cent in South-Africa feel that the TRC process has had a positive effect, while two-thirds feel that race relations after the TRC have deteriorated", see Koskenniemi 2002, p. 6.

[1313] The first known amnesty to be declared was in Sparta 404 BC. The term "amnesty" means "forgetfulness, oblivion; intentional overlooking", deriving from the Greek term "*amnestia*" ("forgetfulness"), see *The Oxford English Dictionary*. This *pre-conviction* (or non-conviction) measure must be distinguished from post-conviction measures, *e.g.* parole and commutation of sentence.

[1314] Broomhall 2003, p. 93.

[1315] Since 1974, approximately 30 TRCs have been established, including those of Argentina, Chile, South Africa, Peru, Ghana, Morocco, El Salvador, Guatemala, East Timor and Sierra Leone, see *The rule of law and transitional justice*, *supra* note 1310, para. 50. See also Dugard 2002a, p. 694.

either make a case inadmissible or imply that interfering will not serve the interests of justice. In chapter 11 it was concluded that in order to ensure local reconciliation and/or international peace and security it might, exceptionally, be required to sacrifice both the victim's need for vindication and the world community's demand for a moral balance. The issue here is whether the existence of a national alternative non-prosecutorial mechanism can justify a finding that bringing a matter before the ICC will not serve the "interests of justice".

The question can be viewed from different perspectives. From a *sovereignty perspective*, it can be argued that a state should be allowed to decide freely how to deal with the crimes, as long as the choice is made in good faith. That argument fails, however, to take account of two facts: First, the ICC bases its jurisdiction on states' voluntary acceptance (or a Security Council referral), and an objection based on sovereignty concerns should be viewed in that light. Second, the ICC crimes are crimes of international concern, and the interest in their suppression extends beyond the state directly involved. Therefore, sovereignty considerations do not dictate a definite answer as to how a national amnesty should be treated in an ICC context. From a *pragmatic perspective*, one might argue that not allowing national amnesties would mean removing an effective tool for violence-torn states to negotiate a peaceful end to their crises. This argument is stronger since granting amnesty undisputedly has ended many conflicts. In the same vein, only in a longer perspective, however, one might counter that only criminal justice allows a lasting peace to develop. From a *moral perspective*, it can be argued strongly that "trading justice for peace" disregards fundamental moral values, and that impunity for international crimes is *a priori* unacceptable.

Commentators who might be referred to as "realists" argue, albeit with diminishing support, that the luxury of justice comes at too high a price in conflict situations, and that the greater good is best served through amnesties and immunities if it means securing the peace. In line with this thinking, the suggestion that the ICC will make it impossible for states to grant amnesties has been actively used in the American campaign against the ICC. Defending the United States' position on the ICC, the General Counsel of the Department of Defence has warned that

> "the ICC may well undermine nascent transitions to democracy and the rule of law by preventing transitioning societies from making their own choices about how to face their past. In cases such as South Africa and Chile, the responsible government has chosen to limit the scope of prosecutions in the interest of national reconciliation and has used alternative mechanisms like truth and reconciliation commissions. Such a judgment, made by the parties who had themselves suffered

> most from the prior oppression, should not lightly be disturbed by an external judicial body."[1316]

Representing a more nuanced view, South African TRC member Alex Boraine has expressed hope that the ICC

> "will not, either by definition or by approach, discourage attempts by national states to cone to terms with their past […]. It would be regrettable if the only approach to gross human rights violations comes in form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights."[1317]

As will be elaborated below, the future of national amnesties *vis-à-vis* the ICC as an alternative mechanism for dealing with mass atrocities depends largely on two things: Will ICC interference with a given amnesty jeopardise peace and security? And does the amnesty form part of a larger mechanism which provides some accountability and/or restoration? The discussion will conclude that there is no one-size-fits-all answer to the question as to whether the ICC will defer when confronted with a given amnesty for crimes amounting to ICC crimes.

It will also be argued that in order to minimise the impunity gap that the ICC activity otherwise would leave, a national TRC *vis-à-vis* less responsible perpetrators might complement ICC prosecutions, instead of competing with them.

This chapter will describe the dilemma that a transitional government faces (12.2); discuss the validity of national amnesties *vis-à-vis* other states (12.3); analyse whether national amnesties may be respected under the Rome Statute (12.4); highlight some factors according to which a national amnesty can be "evaluated" (12.5); and make some conclusive remarks (12.6).

12.2. THE TRANSITIONAL GOVERNMENT'S DILEMMA

The responsibility of the state to respond adequately to past atrocities is amply reflected in the Rome Statute's Preamble.[1318] It may also be noted that the existence of such responsibility has recently been supported by the UN Commission on

---

[1316] Haynes 2002.

[1317] Boraine 2000, p. 433. Boraine has also argued that the Rome Statute "should be amended to introduce a clause which actually encourages a state to accept responsibilities for [its] situation", seemingly thinking of a mechanism explicitly recognising national TRCs.

[1318] Preambular paragraphs 4 and 6.

Human Rights.[1319] This responsibility is owed to the victims, their relatives, the local community and the world at large. At the same time, an even more crucial responsibility is, arguably, to protect the citizens against new atrocities. Therefore, one might argue that where there is a certain risk that prosecuting the perpetrators of past crimes will provoke new crimes, the state should prioritise the safety of its citizens and thus forego criminal justice. Important as it may be, criminal justice is thus seen as secondary to avoiding adding fire to the conflict.

A transition from an authoritarian to a democratic regime often weakens the police force. The crime control, which previously has been carried out by the army, might no longer function properly. Consequently, the number of ordinary crimes such as violence, robbing, stealing and isolated killings might increase. In addition, a group of frustrated individuals, the former regime's administration and supporters, might resort to violence if they fear they will face prosecutions. Such a situation might conceivably amount to a grave and imminent threat where a state may legitimately forego prosecutions as a matter of necessity.

From a pragmatic perspective, a state might want to focus on strengthening democratic structures and developing a healthy economy and a more efficient infrastructure, in an effort to make the society's cogs spin again. The state might want to spend its scarce resources on strengthening the judiciary's ability to deal with present and future crimes, rather than spending them on the past. At the same time, however, the new government will know that the successful prosecutions of past atrocities would strengthen its credibility. On top of this, there might be a risk of private acts of revenge carried out by the victim group if the state remains passive.

On balance, therefore, when a state establishes a TRC, it might well be trying to do several right things at the same time. Strongly simplified, four options are available to a new democratic government: (i) regular criminal proceedings, (ii) conditional amnesty, (iii) unconditional amnesty, and (iv) inaction. The effect of the two latter options is, in reality, identical as inaction will mean a *de facto* amnesty.

[1319] Principle 19 of the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, 8 February 2005, addendum to Promotion and Protection of Human Rights, Diane Orentlicher, E/CN.4/2005/102/Add.1 (available at http://daccess-ods.un.org/TMP/5376763.html) provides: "States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."

Those who advocate prosecutions in such situations highlight the importance of re-introducing the rule of law in a previously lawless society. Criminal proceedings can reinstate peoples' belief in the state's ability to protect them; they can give the new regime strongly needed credibility and legitimacy; and might strengthen a new and fragile democracy. Conversely, a failure to prosecute might spur vigilante justice and a never-ending spiral of violence. It might also result in distrust toward the new government and the political system and encourage cynicism toward the rule of law.[1320] As noted by Orentlicher:

> "If law is unavailable to punish widespread brutalities of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct. This may be tolerable when the law or the crime is of marginal consequence, but there can be no scope for eviscerating wholesale laws that forbid violence and that have been violated on a massive scale."[1321]

Those who advocate amnesties argue that the first priority of the new government must be to ensure its further existence. If the new democracy does not survive, new human rights violations are certain to occur. If granted amnesty, there is a better chance that the offenders will allow the new government to survive. The threat of prosecution might, on the other hand, cause the perpetrators to cling to power, possibly resulting in bloodshed. Put in an ICC context, if national amnesties are ruled out *a priori* under the Rome Statute, this will make a perpetrator more reluctant to accept an amnesty offered by the state, knowing he or she still might end up before the ICC. While this can be viewed as a positive effect, it might also mean that an important option is effectively removed.[1322]

The dilemma is often referred to as one of peace versus justice. Justice is then, however, used in a narrow sense, confined to criminal proceedings. The aim of the present discussion is to determine whether there are solutions that, in such difficult situations, can provide both peace and a broader justice.

[1320] Huyse 1998, p. 81.

[1321] Orentlicher 1991, p. 2542.

[1322] With reference to the ICC Prosecutor's decision of July 2004 to open an investigation into the northern Uganda situation, Archbishop John Baptist Odama of the Gulu Catholic Archdiocese noted: "How can we tell the LRA soldiers to come out of the bush and receive amnesty [according to the 2000 Ugandan Amnesty Law] when at the same time the threat of arrest by the ICC hangs over their heads?", see Uganda: *Waiting for Elusive Peace in the War-ravaged North*, Africa News Service, 21 June 2005 (available at http://www.gmu.edu/departments/icar/ICC/Uganda.pdf).

12.3. NATIONAL AMNESTIES AND OTHER STATES

This question as to whether other states have to respect a national amnesty is fairly easy to answer. Sovereign states are, as a matter of principle, only bound by treaty obligations that they have accepted, rules of customary international law and Security Council resolutions. The criminal courts of one state are not bound by an amnesty granted by another state unless there is a binding rule to that effect. As for the *ne bis in idem* principle, this is, absent a special agreement, only valid within an isolated legal system. Besides, an amnesty will, as already indicated, not qualify as a "trial" for the purpose of that principle. A state therefore retains its sovereign right to prosecute, despite the existence of an amnesty granted by another state. The ICTY's Trial Chamber has noted:

> "The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture."[1323]

Noting that the prohibition against torture is a *jus cogens* norm which a state cannot make legal through national law, the Chamber concluded with regard to an amnesty:

> "If such a situation were to arise, the national measures, violating the general principle and any treaty provision […] would not be accorded international recognition. […] [P]erpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime."[1324]

This has been confirmed by the Special Court for Sierra Leone which has noted, with reference to the universality principle, that

> "it stands to reason that a state sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*".[1325]

Because an amnesty will not bind other states, and because states signal an increased willingness to exercise universal jurisdiction, perpetrators who have been granted amnesty for international crimes rarely travel abroad. Thus, when General Pinochet was arrested in England in 1998, pursuant to an arrest warrant issued by Spanish

---

[1323] *Prosecutor v. Furundzija*, para. 155.

[1324] *Ibid.*

[1325] *Prosecutor v. Kallon*, para. 71.

judge Garzon Balthasar, Pinochet's lawyers never suggested that the Chilean amnesty had any effect in England.

As for the duty of the state concerned to respect its own amnesty, this appears to be an internal matter. If the amnesty is void under internal law – it is, for instance, given in violation of the state's constitution – a subsequent government should not consider itself bound. It is noteworthy that the Chilean amnesty that Pinochet once enjoyed was finally removed after Chilean courts found that it was not in accordance with Chilean law.

12.4. NATIONAL AMNESTIES AND THE ROME STATUTE

12.4.1. General

During the ICC negotiations, a number of states were of the opinion that the Statute should expressly regulate the status of national amnesties under the complementarity principle. They felt that there should be guidelines on the matter, indicating "the circumstances in which the international criminal court might ignore a national amnesty".[1326] These states thus wanted to instruct the ICC to defer to amnesties that met certain criteria. Some of the negotiating states had recently experienced international crimes and granted or contemplated an amnesty. In light of the South African experience, it appeared to be widely acknowledged that an amnesty for international crimes might be acceptable in exceptional circumstances. In the Preparatory Committee's draft forwarded to the Rome Conference, there was a footnote attached to article 15 (now article 17) that the provision might

> "also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 18 [now article 20] did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 18 to determine whether the reference to article 18 was sufficient."[1327]

At the Rome Conference, the US delegation circulated an informal discussion paper suggesting that a decision by a democratic regime to grant an amnesty should be considered as part of the admissibility determination. It was argued that one would have to balance the need for prosecution of international crimes with the need to

---

[1326] *Report of the Ad Hoc Committee Report*, *supra* note 60, para. 46.

[1327] *Report of the Preparatory Committee, Vol. II*, *supra* note 321, p. 41, fn.42.

"close a door on the conflict of a past era" and "encourage the surrender or re-incorporation of armed dissident groups", in order to facilitate the transition to democracy.[1328]

In the end, no express provision on the relationship between the ICC and national amnesties was adopted into the Rome Statute. The reason was probably twofold: First, the idea of an amnesty as an alternative to criminal proceedings did not fit well with the prevailing ideas. While most states acknowledged that in exceptional circumstances it would be inappropriate for the ICC to interfere with a national amnesty, the agenda was the fight against impunity. It was an indisputable fact that the South African TRC had received wide support, but at the same time, most states and NGOs who played an important role in this matter viewed it as inappropriate to suggest in the Statute that anything other than criminal proceedings might be acceptable. That would only undermine the Statute's purpose. It is a paradox, however, that many of the same organisations that warmly advocated prosecutions in Rome have promoted alternative mechanisms in other settings. Second, agreeing on a proper wording of an "amnesty exception" would have been extremely difficult, and the Rome Conference was not in short supply of difficulties already. Most states realised that an ICC decision to defer could only be made after a concrete and complex assessment, and that foreseeing all relevant factors was next to impossible. There was, therefore, a general satisfaction that the Court would address the matter on a discretional case-by-case basis and possibly develop a consistent rule rather than mechanically applying pre-fixed criteria.

The fact that the Court's relationship with national amnesties is not expressly regulated does implies that the ICC *must* respect them nor that it *cannot*. When Colombia ratified the Statute, it declared:

> "None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are in conformity with the Constitution and with the principles and norms of international law accepted by Colombia."[1329]

Strictly understood, the statement is obvious: the Statute does not prevent a state party from granting amnesties, pardoning, *etc*. The Statute merely provides that a case is admissible when there has been no criminal investigation, and it obliges the

---

[1328] Scharf 1996, p. 42, quoting the United States Delegation Draft (rev.) from the August session of the Preparatory Committee.

[1329] *Declarations and Reservations to the Rome Statute*, *supra* note 335.

state to surrender a suspect upon request. Yet the statement is troubling as it might be viewed as a signal of Colombia's unwillingness to respect an ICC decision to set a Colombian amnesty or pardon aside.

The existence of a national amnesty is not irrelevant for the determination whether to interfere. It may be noted that the Allied Control Council Law No. 10 expressly provided that national amnesties did not bar prosecution.[1330] That does not, however, warrant an *e contrario* inference that the ICC is barred by amnesties. Absent a specific provision (such as article 17 with regard to national criminal proceedings), the general rule that national decisions do not bind an international court must prevail. The result is *flexibility*, in the sense that the ICC may or may not respect the amnesty depending on the concrete circumstances.

It may also be noted that before internationalised courts there is a clear tendency that national amnesties *are not* considered as barring interference. In a report on the establishment of the Special Court, the UN Secretary-General noted:

> "At the time of the signature of the Lomé Peace Agreement, the Special representative of the Secretary-General for Sierra Leone was instructed to append his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement[1331] […] shall not apply to international crimes of genocide, crimes against humanity, or other serious violations of international humanitarian law."[1332]

The Statute of the Special Court for the Sierra Leone accordingly provides:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution."[1333]

The Special Court has confirmed this in practice.[1334] It should also be noted that the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for

---

[1330] Article II (5) of the Allied Control Council Law No. 10 (1946) provided that "nor shall immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment".

[1331] Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone provided that the government granted "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement".

[1332] *Report of Secretary-General on the Establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, at 22-23. See also Security Council Resolution 1315 (2000).

[1333] Article 10 of the Statute of the Special Court for Sierra Leone.

[1334] *Prosecutor v. Kallon et al.*, para. 71.

the Prosecution of Crimes Committed During the Period of Democratic Kampuchea provides:

> "The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in articles 3, 4, 5, 6, 7 and 8 of this law."[1335]

This provision only provides that the Special Court is not barred from interfering (*i.e.* a given case is admissible). The Prosecutor might still discretionally decide not to interfere.

The following sections will analyse the relationship between national amnesties and the Security Council's power to bar ICC proceedings under article 16, the admissibility determination (articles 17 and 20) and the prosecutorial discretion (article 53(1) (c)).[1336]

12.4.2. National amnesties and Security Council-deferrals under article 16

According to article 16, the Security Council may request of the ICC that "no investigation or prosecution […] be commenced or proceeded with […] for a period of 12 months". Such request must be made under Chapter VII of the United Nations Charter, and therefore the Council must find that ICC interference would somehow conflict with the maintenance or restoration of peace and security.[1337] The Council might, for instance, find that the interference would undermine a fragile negotiated peace. The case might also be that an amnesty has been brokered with the assistance of the Security Council, a situation in which it might be argued that the ICC should respect the amnesty, even absent a specific request by the Council under article 16. By requesting deferral where an amnesty has been granted, the Council will effectively give effect to the amnesty *vis-à-vis* the ICC for a period of 12 months at the time. It should be noted, however, that recent practice suggests that the Security Council will be disinclined to find that there is such conflict between peace and

---

[1335] Article 40.

[1336] Dugard notes that extradition agreements between states not uncommonly provide that a requested state may refuse to extradite a person who has been granted amnesty. He also notes, however, that this practice "cannot […] be transposed upon rendition to the ICC as the Statute, in article 102, makes it clear that 'surrender' of a person is to be distinguished from 'extradition'", see Dugard 2002a, p. 701.

[1337] Article 39 of the UN Charter. It should be noted that the Security Council has already used article 16 for the purpose of exempting peacekeeping forces from non-states parties from ICC jurisdiction, see Security Council Resolutions 1422 and 1487.

criminal justice. When confronted with the peace-justice dilemma, albeit not necessarily in the explicit context of national amnesties, the Council has tended to view investigations and prosecutions as prerequisites for the maintenance and restoration of peace rather than as threats to it.[1338]

A delicate situation would appear if the ICC should find that an amnesty brokered with the Security Council's assistance violates international law. The Court would then have to decide whether it would have the competence to review the Council's request. One might then argue that the Council's request would run counter to article 24(2) of the United Nations Charter which provides that the Security Council "shall act in accordance with the Purposes and Principles of the United Nations".[1339]

It should be noted that while the Security Council may exercise negative control over the Court under article 16, it cannot exercise positive control, *i.e.* dictate that the ICC actually interfere in a situation. While the Council may, under article 13(b), refer a situation to the ICC Prosecutor, the final decision to initiate an investigation is that of the Prosecutor's[1340] or, where the decision is based on the "interests of justice" criterion, possibly with the Court.[1341] It has been argued that the Council, when making a referral under article 13(b) may instruct the ICC to respect an amnesty. Former US Ambassador for War Crimes Scheffer has noted:

> "The Security Council also could use the power of *referral* to insulate domestic amnesty arrangements from the reach of the ICC by specifying in a referral, for example, that those individuals who have received or will receive amnesty in accordance with domestic procedures fall outside the scope of the referral."[1342]

The latter appears to be erroneous as article 53 of the Rome Statute authorises the Prosecutor to decide which cases to handle within a given situation. If the Council were allowed to limit the referral in the way suggested by Scheffer, this would make the Prosecutor's right under article 53 illusory and undermine the purpose, namely to ensure the Prosecutor's integrity.

[1338] A manifestation of this is the Security Council's establishment of the ICTY and the ICTR as well as its referral of the Darfur situation to the ICC Prosecutor.

[1339] Stahn 2005, p. 699.

[1340] Article 53(1).

[1341] Article 53(3) (b), applying to state and Security Council referrals, see the preceding discussion on the complementarity procedures.

[1342] Scheffer 2002, p. 90.

12.4.3. National amnesties and the issue of admissibility under articles 17 and 20

An amnesty is in itself and per definition the opposite of a criminal proceeding. It will therefore not make a case inadmissible under article 17 which refers to criminal proceedings. When, however, amnesties follow a thorough investigation based on a set of objective and reasonable criteria by which the state selects some cases for prosecution and others for amnesty, the latter cases might be inadmissible. It is then the investigation as such, and not the amnesty, that makes the cases inadmissible. According to article 17(1) (b), a case is inadmissible where it "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". Not any inquiry into the matter will qualify as a genuine investigation. Subparagraph (b) requires an individual investigative effort which may or may not result in a prosecution.[1343] This is evident when the provision is read in light of subparagraph (a), which regulates the situation where the case "is being investigated or prosecuted", and paragraphs 2 and 3, which also apply to paragraph 1(b) and clearly refer to criminal proceedings with terms such as "criminal responsibility"[1344] and "bring the person concerned to justice".[1345] The reason why subparagraph (b) only refers to the "investigation" (and not the "prosecution") of a case is that it deals with investigations which do not result in prosecution. The provision also refers to the state's decision "not to prosecute" upon investigation, implying that prosecution must have been an option. The investigation must therefore have been undertaken with a view to prosecute if warranted, according to regular prosecutorial criteria.[1346] The inquiry must therefore seek to establish all relevant facts and evidence required to determine the question of guilt as used in criminal law. The use of terms such as "the case" and "the person" further indicates that the investigation must be individual and not general. When

[1343] See this author's interpretation of the term "investigation" in the discussion of the admissibility criteria.

[1344] Article 17(2) (a).

[1345] Article 17(2) (b) and (c). As shall be elaborated below, article 17 uses the term "justice" in a narrower sense than article 53 where the same term is used in a meaning beyond criminal justice.

[1346] Holmes, who was the coordinator of the Working Group on the complementarity principle during the Rome Conference, notes: "It is clear that the Statute's provisions on complementarity [*i.e.* admissibility] are intended to refer to criminal investigations", see Holmes 1999, p. 77.

amnesties are granted without any individual assessment, which they often are, the proceedings will automatically fail the admissibility test. It may be noted that a TRC typically proceeds from the opposite starting point of that of a criminal proceeding: amnesty will be granted so long as certain criteria are met, even though national prosecutions might not be completely precluded.

Where a national prosecutor is faced with a particularly large number of perpetrators, he or she has to exercise selectivity. Pertinent questions for the admissibility determination would be whether the state has proceeded for the purpose of "shielding the person concerned from criminal responsibility",[1347] and whether the proceedings were not conducted independently and impartially, but in a manner "inconsistent with an intent to bring the person concerned to justice".[1348] Where the state has conducted targeted prosecution in the sense that the most responsible are prosecuted and the less responsible are granted amnesty, this might be considered as a genuine effort also with respect to those persons who were not prosecuted.[1349] Where amnesty has been granted to the most responsible, the picture is changed. Such a process would hardly qualify as a genuine criminal investigation. Where the state *a priori* has decided not to prosecute anybody, this represent the antithesis of criminal proceedings, and the state will have failed to meet the criteria in article 17. Instead, such amnesties must be assessed under article 53 as part of the prosecutorial discretion (see below).

Alternatively, it might be argued that a national amnesty would render a case inadmissible as the perpetrator has been "tried", according to articles 17(1) (c) and 20(3). That interpretation harmonises poorly, however, with the term "trial" which seems to refer exclusively to criminal trials.[1350] While standing before a commission and having to admit crimes might share some characteristics with a criminal trial, the exercise is not undertaken with a view to inflicting punishment on the guilty. This understanding is supported by the fact that article 20(3) refers to a trial by "another court", clearly referring to a court of the same genre as the ICC, *i.e.* a criminal court. A commission granting amnesty is but a commission and no criminal court. Article 20 also uses the term *ne bis in idem*, albeit only in its title, a

[1347] Article 17(2) (a).

[1348] Article 17(2) (c).

[1349] Besides, pursuing the remaining cases would hardly be in the "interests of justice" under article 53(1) (c).

[1350] Reference is made to the interpretation of the term "trial" in the discussion on the admissibility criteria.

term which invariably refers to criminal trials.[1351] Finally, the use of the terms "criminal responsibility"[1352] and "bring the person to justice" in article 20(3) (a) and (b)[1353] indicates that the national "trial" must be a criminal trial.

Moreover, it has already been noted that the Rome Statute's object and purpose dictate a narrow interpretation of the inadmissibility criteria in article 17 combined with a broad interpretation of the discretional criteria in article 53. Cutting off *a priori* from the Court's reach cases where national amnesties have been granted upon some inquiry would only undermine the Court's effectiveness (although "improper" amnesties probably could have been set aside if they were found to reflect the state's unwillingness or inability to proceed genuinely). Having to demonstrate such unwillingness or inability would, however, represent an additional burden on the Court and could effectively discourage the Prosecutor from interfering in situations where he or she otherwise should have interfered.

12.4.4. National amnesties and the prosecutorial discretion under article 53

12.4.4.1. The irrelevance of a national duty to prosecute

In the discussion as to whether the ICC may defer to national amnesties, some scholars tend to include an analysis as to whether international law imposes on states a duty to prosecute international crimes. The reasoning appears to be that if international law imposes such duty, national amnesties are automatically void and the ICC "must" interfere against them. This is, however, an unfortunate point of departure for two reasons: First, even if international law imposes a duty on states to prosecute, which is controversial, the ICC does not automatically "take over" that duty. The Court's authority to interfere derives solely from the Rome Statute, and the question of such a duty for states to prosecute is not part of the criteria for interfering, although the Preamble speaks of it.[1354] Far from envisaging interference in any case of a failure to prosecute, even where the non-prosecution is the result of a non-genuine national proceeding, the Statute presupposes that the Court will only interfere in a limited number of situations and cases. Indeed, this is why there is a

[1351] It may be noted that ICCPR article 14(7), on *ne bis in idem*, refers to persons who have been "finally convicted or acquitted in accordance with the law and *penal procedure*" (emphasis added).

[1352] Article 17(2) (a). It should be noted that article 53 appears to use the term "justice" in a broader sense beyond criminal justice.

[1353] Article 17(2) (b) and (c).

[1354] Preambular paragraph 6.

provision for prosecutorial discretion. Thus, even if amnesties *per se* were considered as illegal under international law, the ICC would be under no duty to interfere.[1355] The reason why a national amnesty does not make a given case inadmissible is the fact that an amnesty is no criminal proceeding and not that the amnesty violates international law. Second, articles 17 and 20 require genuine criminal proceedings, irrespective of the existence or non-existence of a duty under international law to prosecute. An ICC interference *vis-à-vis* a national amnesty should not be viewed as a sanction of the state's violation of its duty to prosecute any more than deference necessarily implies the Court's recognition of the amnesty as permissible under international law (see below).

If a duty to prosecute the ICC crimes existed, it would be irresponsible to argue that such a duty was absolute. Just as there are exceptions before the ICC according to article 53(1) (c) and (2) (c), there would have to be some exceptions at the national level. First, a duty would not require that a transitional government prosecute all offenders. Instead, prosecuting the most responsible would arguably suffice.[1356] Second, there would have to be an exception of necessity where the state experienced a "grave and imminent threat", according to which governments would not be required "to press prosecution to the point of provoking their own collapse".[1357] Both these factors would also be relevant to the prosecutorial discretion

---

[1355] Most scholars seem to contend that such a duty exists for states parties to the 1948 Genocide Convention (article 4), the 1949 Geneva Conventions (with respect to "grave breaches" as referred to in Convention I, article 49), and the 1984 Convention Against Torture (Article 7(1)), see for instance Broomhall 2003, p. 97-98; Dugard 2002a, p. 696. As for the remaining crimes within the ICC's jurisdiction (crimes against humanity and serious violations of the laws of armed conflict), the situation is less clear. Principle 7 of the Princeton Principles provides that "[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law, including war crimes, crimes against humanity and genocide", see *Princeton Principles on Universal Jurisdiction*, the Princeton Project on Universal Jurisdiction, adopted 25-27 January 2001 (available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf). Recent state practice does not, however, support the existence of such a customary rule. In the first *Pinochet* case before the English House of Lords, Lord Lloyd noted that "[i]t has not been argued that these amnesties [referring *inter alia* to the amnesty granted by the South African TRC] are as such contrary to international law by reason of the failure to prosecute the individual perpetrators", see *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet*, p. 929.

[1356] Robinson 2003, p. 493.

[1357] Orentlicher 1991, p. 2548.

under article 53. The decisive question before the ICC would, however, scarcely be whether the state had violated its own duty or not.

An additional point is that none of the cases assessed under article 53 will have been subject to genuine criminal proceedings as they otherwise would have been inadmissible. The state would thus invariably have violated a duty to prosecute any admissible case.

The suggestion that the ICC should be bound *ab initio* to interfere against a certain type of national mechanism appears inappropriate. Not only would it make the prosecutorial discretion provided for in the Statute far less significant; it would also be impracticable and dangerous as the ICC has limited resources and the state's decision to grant amnesty might be based on legitimate considerations such safeguarding peace and security.

12.4.4.2. Non-interference vs. recognition

An ICC deferral *vis-à-vis* a national amnesty will not automatically imply that the amnesty is actually recognised as permissible under international law or that the amnesty is viewed as appropriate. The only thing that can be inferred, unless the Prosecutor expressly elaborates on the amnesty's appropriateness, *etc*., is that other matters have been found more urgent. This may or may not be due to the existence of the amnesty. As a result of the ICC's limited capacity, the threshold for interfering will be high, and the fact that the international community does not find the amnesty acceptable is not a sufficient ground for interfering (although it is conceivable that the point that the Prosecutor in a given situation wants to make is precisely that a national amnesty has been inappropriate). The inference that can be made from the ICC's non-interference remains uncertain. Neither should the possibility be excluded that a third state, which is in a position to do so, upon the ICC deference might intervene *vis-à-vis* the same amnesty with the blessing of the ICC and the world community at large.

12.4.4.3. The concept of "justice"

It has already been concluded that the term "justice" in article 53 of the Rome Statute must be understood in a broad sense, allowing a variety of factors to be considered for the determination of the "interests of justice". Below, various *specific components* that must be addressed in the context of a post-conflict society will be presented and analysed, in order to determine whether there might exist alternative, non-prosecutorial mechanisms that might provide "justice".

Arguably, "justice" is a universal concept known to all human beings, although opinions as to its proper ingredients might vary. Seeking justice, or rather avoiding injustice, seems to be a crucial part of being a human being. The fact that all individuals from time to time express a need for "justice" (in one sense or another) and every state has a justice system supports this assumption. Yet, it is difficult, and many have tried, to give a universal recipe as to how justice is achieved. In the end, "justice" appears to be a subjective and relative concept. The perception of what is a just result in a given situation might vary between individuals, between societies and, even more likely, between cultures. Law may seek to generalise such perceptions more or less successfully. The parties to a given conflict might have very different perceptions of an actual situation, and the underlying norms might not be the same. An essential task of a judiciary is therefore to identify shared norms and values. What the law ultimately labels as right may still be perceived as morally wrong, and *vice versa*. In order to mend broken bonds after a conflict, both parties should, however, ideally perceive the reaction as just.

The fundamental starting point of the Rome Statute is that punishing a guilty perpetrator of a crime is always just and that anything else is unjust. The complementarity principle should be analysed from that point of departure. Sands notes:

> "For better or worse, and whatever theoretical of policy justifications may be found (whether deterrence, or punishment, or the 'seeking of the truth'), the international community has determined that the gravest crimes are properly the subject of criminal justice systems. If nothing else, that is the one clear consequence of the creation of the ICC: in establishing it, the international community has determined that criminal courts (as opposed to civil courts, or administrative courts, or human rights courts) are to be a principal means for the enforcement of international criminal law, and that national courts and international courts have a role to play."[1358]

Because article 53 presupposes that prosecuting in a given situation might, nevertheless, not be in the "interests of justice", it seems imperative to explore whether there are alternative reactions which might lessen the need for criminal justice. To the extent that alternative mechanisms address the concerns that criminal justice is meant to address, there is less reason to interfere. *A forteriori* this will be true if an alternative mechanism addresses the concerns even better than criminal justice. Sands argues:

[1358] Sands 2003, p. 71-72.

> "Criminal justice as dispensed through courts (national or international) can be an appropriate way – although not the only way – of dealing with the most serious international crimes. That is not an assumption which is universally held, as a growing literature on the subject indicates. Criminal law in general – and international criminal law in particular – will never be a panacea for the ills of the world. And there are other means for dealing with the gravest crimes: they can be ignored; they can be the subject of national amnesties; they can be addressed through processes which have come to be known as 'truth and reconciliation'; they can be the subject of extra-judicial means providing for summary justice; and they can be the subject of diplomatic deals."[1359]

In the context of mending post-conflict societies, the UN Secretary-General has noted that alternative mechanisms, such as TRCs, can "do the things that courts do not do or do not do well […]".[1360] In its *Final Report*, the South African TRC argued that it had provided justice, and made the following appeal to the world community:

> "The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the process of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies."[1361]

Chairperson Bishop Tutu of the South African TRC noted in the foreword to the Final Report that the Commission had promoted "another kind of justice", a restorative justice "which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships […] with healing, harmony and reconciliation".[1362] An essential difference between retributive and restorative justice seems to be that the former is *backward-looking* and more concerned with the commission of the crime and punishing the offender, while restorative justice is *forward-looking* and more concerned with redressing the victim, mending broken bonds and promoting reconciliation. In an attempt to minimise criticism, the TRC argued in its Report that

---

[1359] *Ibid.,* pp. 70-71.

[1360] *The rule of law and transitional justice*, *supra* 1310, para. 47.

[1361] *Final Report of the Truth and Reconciliation Commission*, Cape Town, TRC 1998, Vol. 5, Ch. 8, para. 114.

[1362] *Ibid.,* Vol. 1, Ch. 1, para. 35.

> "the tendency to equate justice with retribution must be challenged and the concept of restorative justice considered as an alternative. This means that amnesty in return for full and public disclosure […] suggests a restorative understanding of justice, focusing on the healing of victims and perpetrators and on communal restoration."[1363]

In 2006, the TRC noted that it can be argued that "crimes under apartheid have international implications and demand an appropriate response from the new state".[1364] It noted further, however, that the Commission acknowledged that

> "the urgent need to promote reconciliation in South Africa demanded a different response, and that large-scale prosecution was not the route the country had chosen. This does not mean, however, that those who were in power during the apartheid years should not acknowledge that the crimes committed in the name of apartheid were grave and heinous. […] The liberation movements were cognisant of this at the time of negotiations. They were, however, also sharply aware of the fact that prosecutions could endanger the peace process; hence the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the right of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law."[1365]

Member of the South African TRC Alex Boraine has argued:

> "[Y]es, it was justice, attempted at the very heart of the commission, but it certainly could not be interpreted in a very narrow framework of retribution, but rather in the wider context of restorative justice."[1366]

As for the definition of justice, the following remark of the United Nations Secretary-General should be noted:

> "For the United Nations, 'justice' is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard to the accused, for the interests of victims and for the well

---

[1363] *Ibid.,* Ch. 5, para 54.

[1364] *Truth and Reconciliation Commission of South Africa: Report - Volume Six*, March 2006, Cape Town, Sec. 5, Ch. 1, p. 594, paragraph. 22 (available at http://www.info.gov.za/otherdocs/2003/trc/rep.pdf).

[1365] *Ibid.,* pp. 594-95, paras. 23-24.

[1366] *Knowledge and Justice after the Truth and Reconciliation Commission*, conversation with Thomas Kendall at Bard 24 April 2000 (transcript available at http://www.bard.edu/hrp/resource_pdfs/thomasandboraine.transcript.pdf).

> being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant."[1367]

12.4.4.4. The various effects of "justice"

In order to better understand how justice can be achieved, and thus to apply the "interests of justice" in post-conflict societies, it seems useful to identify some effects that a justice mechanism is intended to have. A comprehensive analysis of the functions of a justice system has been provided by Nader and Combs-Schilling. They note that a justice system in the aftermath of systematic human rights abuses must (i) stop further violence, (ii) re-integrate the offender in society, (iii) compensate the victim's loss, (iv) re-establish moral balance, (v) give the victim back his or her dignity and self-respect, (vi) confirm society's values and the validity of society's norms, (vii) prevent new crimes by the same person, and (viii) prevent crimes by other people.[1368] It is suggested that all these factors must be considered in the ICC Prosecutor's "interests of justice" determination. It is, of course, highly debatable as to whether *any* justice system, regardless of its philosophy and sophistication, can realistically meet all these requirements. If a reaction does not adequately address most of them, however, the system's credibility is in trouble. This is particularly true with regard to retributive criminal justice which involves intentionally inflicting pain on the perpetrator and therefore needs to be justified.

a. Stop further violence

Interesting to the present discussion, Nader and Combs-Schilling place the need to stop further violence at the top of their list of effects that a justice system is intended to have. This is in line with the finding that ensuring peace and security is the ulterior purpose of the Rome Statute.[1369] The most fundamental need of all is arguably to avoid violence. In a post-conflict society – where people have experienced extreme violence, and the danger of new violence occurring may be imminent – the need to ensure peace and security is deeply felt. In contrast to the complex concept of justice as such, there is little subjectivity or relativity in this. In the present context, this factor implies the absence of crimes under the ICC's

---

[1367] *The rule of law and transitional justice*, *supra* note 1310, para. 7.

[1368] Nader 1976.

[1369] Dugard 2002a, p. 720 notes that "the international community […] has decided that justice, in the form of prosecution, must take priority over peace and national reconciliation".

jurisdiction. How peace and reconciliation can be achieved and how different justice mechanisms may contribute will be discussed in more detail below.

b. Reintegrating the offender in society

As for the ability to reintegrate the offender, both retributive and restorative justice might have merits. Punishment allows the offender to make up for his or her misdeeds. Through repentance, the perpetrator expects society's forgiveness, although he or she also risks being isolated as punishment might only confirm the perpetrator's identity as an evil person. It might reasonably be argued that placing perpetrators in prison does not promote their reintegration into society, but rather creates a stigma. From that perspective, restorative mechanisms such as a TRC might contribute more to the offender's reintegration as it might provide some basis for better understanding the misdeeds.

c. Compensating the victim's loss

As for the ability to compensate the victim's loss, this will depend largely on the impact that the crime has had. Generally, the crimes within the ICC's jurisdiction will create deep wounds which scarcely can be compensated. Article 53(2) (c) lists the "gravity of the crime" as a relevant factor for determining the "interests of justice", and what is meant is clearly that the graver the crime, the more reason to prosecute. Yet, the converse might also be claimed: the graver the crime is, the more inadequate will punishment be as a response, and therefore alternative mechanisms should be explored.[1370] Here, the Rome Statute has taken a stand as it firmly expresses a preference for punishment, in particular for the perpetrators of the gravest crimes.

d. Re-establishing moral balance

Retributive justice and restorative justice both seek to re-establish moral balance, but the recipes are very different. A levelling effect might be achieved either by punishing the offender or by restoring the victim. Here, the strength of one

[1370] Christie 2004, Ch. 7. In the same vein, Giertsen notes that punishment is a symbolic expression which cannot become "equal" to the crime in the relation one to one. Punishment cannot be used as a measure-stick expressing the value of the victim; it is first and foremost a statement that an act has damaged an important value, a value that must be re-established, see Giertsen 2003, p. 182 *et seq*.

mechanism is the weakness of the other. Retribution punishes the offender but tends to neglect the victim, whereas restorative justice strengthens the victim but often fails to hold the offender responsible in an adequate manner. According to Aristotle, "acting justly is a mean between committing injustice and suffering it, since the one is having more than one's share, while the other is having less".[1371] Crucial points are to which extent the victim is included in the criminal proceeding and whether a restorative mechanism can bring about some accountability. The gravity of the crime makes it more imperative to punish; but, again, the graver a crime is, the less adequate will punishment arguably be as a means to re-establish moral balance.

e. Giving the victim back his or her dignity and self-respect

As for the ability to give back the victim's dignity and self-respect, both types of mechanisms have advantages and disadvantages. By demonstrating its will to punish through retributive justice, society acknowledges and condemns the suffering of the victim. At the same time, the retributive exercise risks letting the victim remain a victim. It affords the victim an inadequate part in the proceedings as the conflict is transformed to one between the offender and society. In a restorative setting, without the constraints inherent in a criminal proceeding, the victim is given more focus and plays a more active role. It should be noted, however, that the victim, as a tendency, is gradually being given a more important role in criminal proceedings. Before the ICC, for instance, the victim may participate actively, and he or she enjoys a well-developed set of rights.[1372] The factor of giving back the victim's dignity and self-respect appears to fall squarely within the "interests of victims" factor in article 53(1) (c) and (2) (c). It should be noted that cultural differences might play an important role at this point.

f. Confirming society's values and norms

Both retributive and restorative mechanisms represent ways of confirming values and norms. They both typically imply condemnation and convey strong moral messages. It might be argued, however, that the confirmation of the norms is not sufficiently strong unless the perpetrator is punished and that punishment is the only credible confirmation of rules aimed at protecting basic human rights.

[1371] Aristotle 2000, 1133b.

[1372] These include *inter alia* procedural rights under articles 15(3), 19(3); the victims and witnesses unit under article 43(6); provisions on protection in article 68; rules on reparations to victims under article 75; and the trust fund provided for in article 79.

g. Preventing new crimes by the same person

As for the ability to promote such prevention, the effects of both types of mechanisms might be questioned. The only certainty seems to be that the offender cannot commit new crimes while he or she is imprisoned. There is hardly any guarantee, however, that he or she will not commit new crimes once released. Indeed, one might argue that the perpetrator will only be more inclined to commit crimes after he or she has served the sentence. A positive effect of punishment might, however, be that the stigma placed on the perpetrator leads to the perpetrator's marginalisation. The ICTY indictments of *Karadzic* and *Mladic* as well as that of the Special Court for Sierra Leone of *Charles Ghankay Taylor* illustrate the effect.[1373] The offender might, as a result of the criminal proceeding, experience difficulties in obtaining a position similar to the one the offender had when he or she committed the crimes. The same effect might, however, also result from restorative justice when the truth about the crime is made public and the perpetrators are condemned. As a counter argument it might be argued that such marginalising effect represents the antithesis to the offender's reintegration referred to above.

h. Preventing crimes by other people

As for the ability to prevent other people from committing crimes, the deterrent effect appears to be most specific effect to retributive justice, although the reliability of the effect is controversial. Arguably, restorative non-prosecutorial mechanisms cannot provide a similar deterrent. This is perhaps the strongest argument against such alternatives. In the present context, it might be countered, however, that while a deterrent effect may be real *vis-à-vis* ordinary criminals, it is illusory *vis-à-vis* persons inclined to commit international crimes. Gross human rights violations are usually the result of deeply rooted hostile attitudes and badly shaped relationships. Further, they are committed and ordered by persons who do not appear to act rationally. Because criminal justice is exercised *post facto*, and the crimes cannot be made undone, it might also be argued that restoring broken bonds has a greater preventive effect.

Summing up thus far, restorative justice might promote some of the aims that criminal justice normally is intended to promote. To the extent that a chosen alternative mechanism, such as a TRC, promotes these aims there is increased reason why interfering will not serve the "interests of justice".

[1373] *Prosecutor v. Karadzic*; *Prosecutor v. Mladic* and *Prosecutor v. Taylor*.

14.4.4.5. The paramount: Peacebuilding

In a society torn by a violent conflict, the importance of re-establishing and maintaining peace is evident. This aspect is also covered by the factor "interests of victims", as the most fundamental interest of the victims is not to be exposed to more violence. In his discussion of retributive vs. restorative justice, Carlos Niño has noted:

> "Though it is true that many people approach the issue of human rights violations with a strong retributive impulse, almost all who think momentarily about the issue are not prepared to defend a policy of punishing those abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses […]."[1374]

a. Reconstruction – resolution – reconciliation

The causality between reconciliation and peace is fundamental. *The Oxford English Dictionary* defines "reconciliation" as "to bring a person into friendly relations with another after an estrangement". Reconciliation aims at reconstructing peaceful co-existence. Therefore, it is submitted that reconciliation is a key factor for the interpretation of the term "justice" in the Rome Statute, which has as its purpose to ensure peace. This is supported by Galtung who proposes a peacebuilding orientation based on three pillars: (i) reconstruction (repairing physical damages); (ii) resolution (developing acceptable structures); and (iii) reconciliation (ensuring friendly relations):[1375]

[1374] Niño 1991, p. 2620.
[1375] Galtung 1995.

PEACEBUILDING		
RECONSTRUCTION	RESOLUTION	RECONCILIATION

According to Galtung, the three pillars are interdependent, and each of them is needed in order to reach the overall objective of building peace. If reconstruction and reconciliation are carried out without the resolution of issues underlying the conflict, these issues will "fester like a superficially healed wound". If resolution and reconstruction are carried out without reconciliation, then all the traumas, hatred and damage done to the social structure and the culture of the society will hit back, sooner or later. If resolution and reconciliation are carried out without reconstruction, the material damage done will be a shouting testimony and a permanent reminder of the war.[1376] Thus, as long as a strong conflict of interest exists, and as long as the victims of past violations have not reconciled with the crimes, any period of peace will most likely be an interlude between hostilities. A crucial question is therefore how reconciliation is achieved.

b. Justice – healing – truth – security

Van der Merwe lists four substantial components of a reconciliation process: justice, truth, healing and security.

[1376] *Ibid.*

These are, according to van der Merwe, "the key issues raised in the theoretical and international literature that have to be addressed as part of a process which promotes reconciliation".[1377] If these four components are not addressed, the parties to a conflict will not reconcile, they will not manage to live in friendly relations with one another. In a report to the Security Council, the United Nations Secretary-General confirms the necessity of justice, noting that

> "[the United Nations'] experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for peaceful settlement of disputes and the fair administration of justice".[1378]

Thus, "justice", in the broad sense referred to in article 53, must be construed as a concept which promotes peace. Peace necessitates reconciliation, and in order to reconcile, the parties need not only justice, but also healing, truth and security. Peace (security) is, accordingly, both an end (something that justice must promote) and a prerequisite (something that is needed in order for parties to reconcile). It is

[1377] Van der Merwe 1999, Ch. 2.

[1378] *The rule of law and transitional justice*, *supra* note 1310, para. 2.

necessary, however, to distinguish between short-term and long-term peace. Justice must promote a long-term peace after the parties have reconciled. In order to reconcile, however, a period of peace which allows the parties to interact on peaceful terms is required. As long as the parties still fear for their lives, there is little chance of reconciling. This is why the first concern of peace negotiators is to achieve a cease-fire. This is also why an often heard argument is that efforts to attain narrow criminal justice while peace is still elusive in the end risk achieving neither justice nor peace.

In the present context, it might not be possible to achieve the necessary period of peace unless one is willing – at least temporarily – to forego criminal prosecutions. It has been noted that prosecuting international crimes, due to their scale and the powerful individuals typically involved, almost invariably involves some danger of new hostilities. The offenders might be willing to commit further acts of violence "if they or their close associates will face life imprisonment".[1379] The usual inclination to attempt to escape criminal responsibility is amplified by the severe penalties that await the perpetrators of international crimes. Another danger is that groups of people might be driven into social or political isolation and might establish dangerous subcultures.[1380] Commenting on the South African situation, van Zyl has noted that

> "only a few months before the scheduled election, generals in command of the South African police delivered a veiled warning to the ANC that they would not support or safeguard the electoral process if it lead to the establishment of a government that intended to prosecute and imprison members of the police force. […] Dullah Omar, a key ANC negotiator and current Minister of Justice, stated publicly that 'without an amnesty agreement there would have been no elections'."[1381]

Thus, the ICC Prosecutor's decision as to whether to interfere or not in a conflict which is not settled involves great responsibility. Both interference and a failure to interfere might have fatal consequences. The Prosecutor therefore needs to be mindful of the security situation and assess carefully the possible effects of interfering. Security must always be a primary concern; both the civilian population and the Prosecutor's staff must be as safe as can reasonably be expected when such crimes are investigated. If the ICC interference were to cause bloodshed, this would not only be a human tragedy; it would also bring the Court into serious disrepute.

[1379] Scharf 1999, p. 508.

[1380] Majzub 2002, p. 251.

[1381] Van Zyl 1999, p. 650.

Concerning the peace and security assessment, it is necessary to distinguish between short-term and long-term effects of prosecution and amnesty. While granting amnesty might momentarily ensure peace, a lasting peace will, arguably, only be achieved with reconciliation, and a prerequisite for reconciliation is that there has been some accountability and/or compensation. An unconditional amnesty does therefore not appear to be a viable alternative. The situation in Sierra Leone is illustrative. Here, a national amnesty had been given in Lomé, in the belief that this was necessary in order to ensure peace. The refusal of the United Nations later to endorse this amnesty did not, however, keep members of the Revolutionary United Front from entering into peace talks. Robinson has noted that

> "blanket amnesties were granted for horrific crimes against humanity in the belief that this was necessary for peace and reconciliation; instead this merely reinforced a culture of impunity in which brutal acts of mutilation and lawlessness continued. After more conflict and more atrocities, the policy was reversed in favour prosecution and punishment of those bearing the greatest responsibility for international crimes."[1382]

Therefore, importantly, a temporary deterioration of the security situation as a result of ICC interference might be acceptable as long as the activity is most likely to ensure long-term peace. It is crucial that the ICC's Office of the Prosecutor manages to explain this to the local population. Otherwise the impression might be created that the ICC only cares about bringing perpetrators to justice in order to restore humanity's conscience, without worrying about the local security.

A particular question arises if a state, as a matter of such "necessity" as described above, has granted amnesty, and the situation at the time of the ICC Prosecutor's decision no longer appears to be dangerous. It is suggested that the ICC Prosecutor then take into consideration the following two aspects: First, there might now be new reasons to maintain *status quo*. A peaceful climate might have developed, and the parties might reasonably expect that a final and proper solution has been found. The Court should carefully assess whether interfering now would level or reverse the positive effects already achieved, including possible structural changes. Second, the Court must bear in mind that if a conditional amnesty were considered necessary at the time of its implementation (it is stressed that this will only exceptionally be the case), disqualifying it later, when the justification no longer exists, might make other future actors reluctant to enter into similar arrangements in similar situations. An important purpose of the complementarity principle is, arguably, to invite states to

[1382] Robinson 2003, p. 496.

make the right choices. If a choice were right at the time it was made, there might be reason to respect it later, irrespective of the subsequent development. If, however, the sole factor which made the amnesty acceptable was the danger of more violence, the fact that this threat no longer exists would, as the rule, mean that it is now proper to seek criminal justice.

12.4.4.6. The necessary components of justice

It is possible to identify the following components that a justice mechanism must deal adequately with in order to promote reconciliation:

a. Truth

Truth is a key element in any reconciliation process. The parties to a conflict cannot reconcile without knowing what to reconcile with, and what is unknown cannot be acknowledged or forgiven. Therefore, truth must replace uncertainty and denial; it must be found and published. If society fails to acknowledge the victims' suffering, this may be said to constitute a "second crime". A prerequisite for a society's catharsis and condemnation of the atrocities, the truth must be established and remembered by all parties as a society without a common memory can have no common identity. Member of the Chilean Truth Commission Zalaquett argues that "[a] society cannot reconcile itself on the grounds of a divided memory. Since memory is identity, this would result in a divided identity."[1383] Rather than to "forgive and forget", the aim of any justice mechanism must be to "forgive but not forget". The Latin American Institute of Mental Health and Human Rights in Santiago has noted:

> "The victims know that individual therapeutic intervention is not enough. They need to know that their society as a whole acknowledges what has happened to them. […] Truth means the end of denial and silence. […] Truth will be achieved only when literally everyone knows and acknowledges what happened during the military regime."[1384]

There might be different views as to which events have taken place and the reasons why human rights violations have occurred. Establishing the facts has vast implications in this respect. As formulated by Bascom, "it is important to know what

[1383] Zalaquett 1994, p. 13.
[1384] Becker 1990, p. 147.

the majority in a society believes to be true [about the past] at a given point in time, for people act upon what they believe to be true".[1385]

b. Accountability

The most outright form of accountability is punishment imposed through criminal proceedings. It might be argued, however, that accountability can be provided without criminal justice. For instance, it has been argued that truth might be a substitute for punishment in the sense that an offender is "held accountable" when the truth about his or her misdeed is made public. The public exposure of the crime might undermine the offender's reputation and esteem, and he or she might even risk civil "sanctions", such as loss of job and social network. While naming names in a non-prosecutorial setting is possible and has been done, it is not, however, unproblematic. As the perpetrator is not accorded the rights offered by a criminal proceeding, exposing his or her name publicly arguably means violating his or her human rights, most notably the right to be presumed innocent. The Chilean Commission therefore avoided naming names in its report, although names were eventually leaked to the press. As a response to criticism, Commissioner Zalaquett explained in the Commission's report that the Commission had

> "named the victims but not the perpetrators. It mentions the branch of the armed forces or police responsible for the acts and even the specific unit, but it does not attribute guilt to individuals. However, it sent to the courts the incriminating evidence it could gather. The Commission was not a tribunal and was not conducting trials. To name culprits who had not defended themselves and were not obliged to do so would have been the moral equivalent to convicting someone without due process. This would have been in contradiction with the spirit, if not the letter, of the rule of law and human rights principles."[1386]

This statement reflects the punitive effect of naming names and thus confirms the potential adequacy of a truth commission as a means for providing accountability. At the same time, it reflects caution against such accountability. This view has not, however, been shared by all subsequent truth commissions. The El Salvadorian Commission (1992) was the first truth commission to name names, and it did so having considered the punitive effect. The Commission noted that it could be argued

> "that, since the Commission's investigation methodology does not meet the normal requirements of due process, the report should not name the people whom the

[1385] Bascom 1985, p. 13.

[1386] Zalaquett 1993, Introduction.

> commission considers to be implicated in specific acts of violence. The commission believes that it had no alternative but to do so. […] In the peace agreements, the Parties made it quite clear that it was necessary that the 'complete truth be made known', and that was why the Commission was established. Now, the whole truth cannot be told without naming names. […] This task cannot be performed in the abstract, […] especially when the persons identified occupy senior positions and perform official functions directly related to violations or the cover-up of violations. Not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end."[1387]

Richard Goldstone has noted with regard to the South African TRC that "the perpetrators suffered a very real punishment – the public confession of the worst atrocities with the permanent stigma and prejudice that it carries with it".[1388] One observer has suggested that the procedures of a TRC can be seen as a prosecution without sentencing. Kendall Thomas has suggested that a perpetrator arguably is held responsible if there is a public recognition that he or she has engaged in gross human rights violations, and that such a mechanism is no blanket amnesty. Therefore, what he would

> "urge the International Criminal Court to do is to de-couple the prosecution of individuals from the sentencing/punishment concerns that we ordinarily think of as a piece when we talk about courts and when we think about a sort of legal response to these things".[1389]

The suggestion that truth can be a substitute for punishment has been challenged. Pointing *inter alia* to the attempts to bring Pinochet to justice, Roht-Arriaza has noted that

> "those who posited that truth could substitute for [criminal] justice […] are now seeing that even almost twenty years later the thirst for justice is there even after at least a good part of the truth has been officially acknowledged".[1390]

The truth surrounding international crimes is often difficult to establish. Not only are offenders typically unwilling to admit the truth, there will also be diverging versions of it. As noted, each party might have its own perception of what "really

---

[1387] *Report of the United Nations Truth Commission on El Salvador*, S/25500 (1993), p. 25.

[1388] Gibson 2002 p. 544, quoting Goldstone. It may be noted that *expressing remorse* was not a precondition for receiving amnesty before the South African TRC. The reasoning was probably that such requirement *vis-à-vis* some perpetrators would have amounted to hypocrisy.

[1389] *Knowledge and Justice after the Truth and Reconciliation Commission*, *supra* note 1366.

[1390] Roht-Arriaza 1998, p. 313.

happened". In fact, due to the complex context in which international crimes typically are committed, it appears somewhat naïve to suggest that an objective truth exists at all.[1391] Thus, while both prosecutions and TRCs can be effective ways of establishing facts, the "final truth" will almost inevitably remain controversial. This might weaken the desired effect of either mechanism. Arguably, the truth established in a trial is, due to the strict examination of evidence and the requirement that guilt be proven beyond reasonable doubt, more reliable than the truth established by a TRC.[1392] At the same time, a valid counterargument is that, due to the same strict procedures, the truth uncovered in a trial will rarely be the whole truth, or the deepest truth. The facts established will typically only cover what is strictly necessary in order to convict the accused, and facts that have not been proven beyond reasonable doubt by admissible evidence will be omitted (at least with regard to facts pertaining to the issue of guilt). In the context of international crimes, this is a serious problem. Although a certain context has to be proven and a whole policy might be said to be at trial, such trials often fail to deal adequately with underlying attitudes and relations between the parties. In a trial setting, the underlying motive behind a crime is, as a rule, irrelevant. Further, the adversarial framework of a trial is not conducive to openness and confession. In this respect, a TRC has arguably a greater potential of encouraging offenders to reveal the whole truth because the climate is less hostile and the perpetrator's truth telling is rewarded rather than punished. When the constitutionality of the South African TRC was challenged, former Chief Justice Ismail Mohamed stated:

> "That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth which persons in the positions of the applicants so desperately desire."[1393]

A TRC will typically have the necessary mandate and opportunity to analyse the underlying causes of the crimes. A potential weakness is, however, that some perpetrators inevitably will refuse to cooperate with the commission. It is decisive to the commission's success that it manages to make enough people come forward. Therefore, a crucial issue is whether the commission has the power to issue

---

[1391] Koskenniemi 2002, pp. 11 *et seq*.

[1392] Mendez 1997, p. 16.

[1393] *AZAPO and others v. President of the Republic of South Africa and others*, para. 684.

subpoenas. The South African TRC was authorised to impose up to two years of prison on those who did not cooperate. The Chilean *Rettig* Commission had no such threat available. That Commission even lacked the authority to interview members of the security forces, widely known to have carried out a large part of the crimes. Therefore, the Chilean effort appeared largely senseless. In many countries, especially those of the Third World, the South African threat of prosecution is difficult to replicate.

There are two particular reasons why it is imperative to reveal the offenders' identities: First, the result might otherwise be that collective guilt instead of individual guilt is established. This might severely damage the mutual trust among the parties so crucial for reconciliation.[1394] Second, if the identities are not revealed, the offenders are deprived of the *catharsis* that punishment is meant to offer. Only by being exposed can the offender engage in a "cleaning process", and only then can he or she eventually be forgiven and truly be expected to acknowledge and condemn his or her misdeeds. That effect cannot, however, always be expected to occur in the first place.

c. Compensation

International law generally recognises that victims of human rights abuses may have a right to compensation for their injuries.[1395] Not all TRCs have, however, provided for compensation, and some have offered it only inadequately. Compensation is an important part of the restorative process as two things might be achieved: First, compensation will improve the victim's material situation, and might thus facilitate reconciliation. Second, the victim will feel that society, by providing compensation, has acknowledged his or her suffering, condemned the crime and offered some vindication. If the compensation comes from the offender, there is also a punitive aspect, which might make it easier to accept that the offender is not punished in a traditional way.[1396]

Based on the above, to the extent that a national non-prosecutorial mechanism provides truth, accountability and compensation, there is increased reason to

---

[1394] Britain's Chief Prosecutor at Nuremberg, Hartley Shawcross, declared in an article written some 50 years later: "There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs", see Shawcross 1996.

[1395] *E.g.* ACHR article 63(1).

[1396] A duty for the perpetrator to pay compensation will, however, hardly have the same preventive effect as imprisonment, see *e.g.* Bergsmo 1998, p. 128.

determine that interfering will not serve the "interests of justice" according to article 53(1(c) and (2) (c) of the Rome Statute.

12.5. SUGGESTED FACTORS FOR THE "EVALUATION" OF NATIONAL AMNESTIES

Fanciful terms such as "truth and reconciliation commission" and "restorative justice" have positive connotations, but they should not influence the assessment of a national mechanism unless they reflect realities. Some of the Latin-American commissions referred to above were called "truth commissions", but failed to provide the truth. Restorative justice, properly defined, is a valuable concept which has its place in transitional justice policy, but the term is sometimes used to advocate mechanisms that entail neither criminal justice nor truth-telling. Such use of the term is no more than an attempt to justify or disguise impunity.[1397]

A TRC must, as the term implies, aim at revealing the truth and reconciling the victims and the perpetrators. It is, however, difficult to pinpoint detailed criteria that would promote reconciliation in every situation. As noted by Dugard, TRCs are "not, *in theory*, antithetical to prosecution".[1398] The assessment as to whether ICC interference will serve the "interests of justice" under article 53 of the Rome Statute will to a large extent depend on whether the national mechanism meets certain expectations. While international law provides some specific requirements to criminal proceedings, TRCs are not yet subject to such requirements. Full-fledged truth and reconciliation commissions are a fairly new concept, still at the experimental stage, and they are gradually becoming sophisticated. The South African TRC and perhaps the one in Sierra Leone appear to have set the standard thus far, but clear-cut requirements have not yet crystallised.

Based of the discussion above, it is submitted that five critical points must be considered before the ICC Prosecutor decides to interfere *vis-à-vis* a national amnesty in the "interests of justice". First, the Prosecutor must explore the reasons why the amnesty was chosen instead of prosecutions.[1399] Second, because a main purpose of the Rome Statute is to single out governments that are proceeding in bad faith, the Prosecutor should determine whether the amnesty was adopted and implemented in good faith by a democratic process. Third, it should be assessed whether the body granting the amnesty had a sufficiently broad mandate and powers

[1397] Joseph 2005, p. 7, referring *inter alia* to writings of Juan Mendez and Miriam Aukerman.
[1398] Dugard 2002a, p. 694.
[1399] Compare with the term "nevertheless" in article 53(1) (c).

to establish the relevant truth. Fourth, it should be determined whether some accountability and/or compensation have been provided. Fifth, and finally, the Prosecutor should decide whether the most responsible persons have been granted amnesty as an amnesty to those perpetrators is the least acceptable.[1400]

a. Were there compelling reasons to grant amnesty?

It cannot reasonably be claimed, as the South African TRC seems to claim, that restorative justice is generally superior to retributive justice as a response to international crimes. Under the complementarity principle which requires criminal proceedings, a state cannot opt for restorative justice without compelling reasons. One such compelling reason might be the fact that the offenders have access to military force, and that they are inclined to use all means available in order to avoid prosecution. If pursuing justice would amount to a "political suicide", no state can reasonably be expected to choose that path. In order to ensure peace and security, granting the perpetrators conditional amnesty might exceptionally be justified. As a new democratic regime might be particularly fragile in its early years, the possibility of postponing criminal proceedings should first be considered as an alternative.

This factor is logically related to the concept of necessity and the "grave and imminent peril" doctrine, according to which a state may justify a breach of an international obligation by demonstrating that a grave and imminent peril existed.[1401] An illustration is the 1993 United Nations support to the Governors Island Agreement granting full amnesty to members of General Cedras' and Brigadier General Biamby's military regime, accused of having committed crimes against humanity in Haiti from 1990-94. The Security Council described the Agreement as "the only valid framework for resolving the crisis in Haiti".[1402] There

[1400] Several of these factors listed are reflected in some decisions of international human rights organs which have scrutinised the adequacy of a national response to international crimes. In *Velásquez Rodríguez v. Honduras*, the IACtHR sums up most of the factors, noting that the state "has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation" (para. 174).

[1401] The term "grave and imminent peril" stems from the "state of necessity" doctrine elaborated in article 33 of the ILC's Draft Articles on State Responsibility, see *Report of the International Law Commission on its thirty-second session* (1980), A/35/10.

[1402] *Statement of the President of the Security Council*, 15 November 1993, S/26747 (and S/INF/49).

has, however, since 1993 been a development in the view on amnesty as a means to achieve peace in the aftermath of international crimes, and blanket amnesties will today scarcely, if ever, be accepted. For instance, while the United Nations in principle endorsed the Lomé Agreement, the Special Representative made an oral disclaimer "exempting" international crimes from the amnesty. Robinson has noted that there must be

> "a serious scrutiny of [States'] claims of 'necessity' to ensure that decision-makers do not give in to the easy temptation of concluding that amnesty is unavoidable in their specific circumstances. As Méndez argues, 'it is important to assess the threats before the new government realistically, to take into consideration the countervailing strength of democratic forces in society'. […] Indeed, recent experience has tended to contradict the supposedly 'pragmatic' view that prosecution is destabilizing and that amnesties are necessary for peace […]."[1403]

The observation is essential. The Prosecutor must make an independent critical assessment and not automatically defer to the state's assessment, even where it appears to be made in good faith. There should, however, be a dialogue between the Prosecutor and the state as the state's own knowledge and understanding of the situation and possible effects of criminal justice might prove invaluable to the Prosecutor's determination. The question of *timing* is crucial as the situation might change so that prosecuting no longer appears equally dangerous. Also, the Prosecutor must "weigh all of the consequences, including the long-term global consequences of granting impunity to violators".[1404]

Another possible reason for foregoing criminal justice is that the perpetrators are heavily represented in all fields of state administration, and that governing the state without their participation appears to be impossible. This seems to have been an important factor in South Africa, where perpetrators and victims decided to share power. Here, the perpetrators were practically the only ones with formal education and some experience in governing. They were therefore indispensable and could not be removed from their positions.

Conversely, if there are no compelling reasons for granting amnesty, ICC deference will scarcely be in the "interests of justice", unless the crimes' gravity is inferior to that of other crimes. For instance, in the *Barrios Altos* case, the IACtHR condemned Peruvian amnesty laws that barred investigation and prosecution of members of the *Peruvian army*. The Court noted that

---

[1403] Robinson 2003, p. 496.

[1404] *Ibid*. See also Dugard 1997, p. 284.

> "States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. […] Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible […]."[1405]

b. Is the amnesty adopted and implemented democratically and in good faith?

An amnesty should be brokered in a democratic debate in which the victims, and preferably also the offenders, participate. Further, the legislature or a democratically-elected executive must adopt the amnesty. A self-amnesty granted by an oppressive regime while still in power stands little chance of being recognised. Spain has, for instance, not respected the amnesty laws in Chile and Argentina as bars to universal jurisdiction. The Chilean amnesty

> "was announced by the incoming president who decided almost by fear that there is going to be a commission and the appointed group of people without any real democratic consultation to do the work of that commission".[1406]

The process must be thorough, and various alternatives, including criminal proceedings, must be considered. Criminal justice should be foregone only because it was not a viable option.

Amnesties are often part of a deal which ensures the transition to democracy. Such amnesties are adopted for a good purpose, and they are not self-amnesties adopted for the purpose of shielding as such. Such amnesties will stand a better chance of being respected, even if they in principle should be respected only if there were compelling reasons to grant them. Whether the motives behind an amnesty were, on balance, good or bad may ultimately be the decisive factor. Ratner notes:

> "Although governments and international organizations have condemned authoritarian states for failing to punish human rights abusers, they have […] generally refrained from condemning those states for failure to prosecute past abuses once they adopt democratic systems of governance."[1407]

[1405] *Chumbipuma Aguirre et al. v. Peru*, paras. 43-44.

[1406] *Knowledge and Justice after the Truth and Reconciliation Commission*, *supra* note 1366.

[1407] Ratner 1999, p. 722.

It is not given, however, that the ICC Prosecutor will be equally forgiving when he or she determines the "interests of justice". The ICC Prosecutor will probably be more concerned with assessing whether the perpetrators have somehow been held accountable than assessing whether the state's course of action has been legitimate, reasonable, in good faith, *etc*.

c. Has the amnesty-granting body proceeded in an effective manner?

In order to ensure that truth prevails, the body granting amnesty must have a sufficiently broad mandate. In addition, it must make an official and comprehensive report. The body should also work in a quasi-judicial manner and be independent and impartial.[1408] As for persons who do not wish to appear before the amnesty commission, the commission must have the power to issue subpoenas. Those who do not appear before and cooperate fully with the commission should not benefit from the amnesty. The Chilean TRC requested General Pinochet to appear before it, but he was entitled to refuse and did so. Even ordinary members of the security forces could not, as noted, be forced to appear before that Commission. This contrasts the South African TRC where full cooperation was a precondition for amnesty. The South African TRC had the power to subpoena and used it, most notably in the case of ex-President Botha.[1409]

As for the successful execution of the mandate, there are various reasons why a TRC or a similar body might fail. In a post-conflict society, limiting factors may include a weak civil society, political instability, victims' and witnesses' fear of testifying, an incompetent or corrupt judiciary, insufficient time to carry out the proceedings, lack of public support and inadequate funding.[1410]

d. Does the mechanism provide some measure of accountability or compensation?

As noted, "justice" must entail some form of accountability for the perpetrator. If no form of accountability is provided for, an amnesty will not easily pass the ICC Prosecutor's "interests of justice" assessment, provided the crimes are of sufficient gravity. This is the most common "deficiency" of a national amnesty. The Argentine

---

[1408] Robinson 2003, p. 501-02.

[1409] The TRC issued a subpoena requiring P. W. Botha "to appear and answers questions in Cape Town on December 5 [1997]", see *Subpoena was delivered to P. W. Botha at 1230 PM*, statement by A. Boraine, Deputy Chairperson of the TRC, 20 November 1997 (available at http://www.polity.org.za/html/govdocs/pr/1997/pr1120b.html?rebookmark=1).

[1410] *The rule of law and transitional justice*, *supra* note 1310, para. 51.

National Commission on Disappeared Persons (1984) was criticised on this account after having published a report on the atrocities committed by the military junta in the 1970s. While no persons were officially stipulated as guilty, a list of names was eventually leaked to the press, and the prosecution of 2000 persons was initiated. Due to threats of a military coup, however, two amnesty laws were adopted, reducing the number of prosecutions to less than 50. President Menem, who replaced President Alfonsin, pardoned almost all of the remaining persons. In the end, Argentina did not remove the military leaders who had participated in the crimes.[1411] As the complete truth was never published, uncertainty still haunts the Argentine society.

A common description of TRCs is that the power to prosecute is "bargained away in exchange for the peace".[1412] The discussion above has suggested that when perpetrators instead are named, the mechanism can be seen as providing some accountability. Bassiouni has noted that justice, at the very least, means a "comprehensive exposé of what happened, how, why, and what the sources of responsibility are".[1413] The truth must include the identity of the victims, the identity of the offenders, the characteristics of the crimes and preferably the crimes' causes. If these questions are answered publicly through a non-prosecutorial mechanism, it might not be in the "interests of victims" to interfere.

Other possible accountability mechanisms are vetting and dismissals or a combination of the two. The need to remove not only senior leaders but also some perpetrators at the local level should be considered by the state. In Chile, just as in Argentina, few of the perpetrators within the local police who had committed torture under the previous regime were removed. As a result, some of the same persons were allowed to continue to practice torture, this time perhaps not against political opponents but against common criminals. A violent culture was allowed to continue.

Another important component is compensation to the victim. If the offender has no possibility of compensating the crime, the state should preferably intervene. Indeed, according to the doctrine of continuity of the state in international law, a new democratic regime arguably assumes the responsibility of the former regime for

---

[1411] For a useful overview, see *Argentina: The National Commission on Disappeared Persons* (CONADEP), the Truth Commissions Project, collaboration between the Program on Negotiation at Harvard Law School et al.), 1984 (available at http://www.truthcommission.org/commission.php?cid=0&case_x=0&lang=en).

[1412] Teitel 2002, p. 53.

[1413] Bassiouni 1996, p. 24.

having failed to prevent the human rights abuses. It should be noted that while most commentators have praised the South African TRC, the Commission has not escaped criticism for having failed to offer victims compensation. By contrast, in Chile the families of those listed by the Commission as killed or disappeared, but not those tortured, receive monthly checks for life. In Argentina, President Menem finally decided to give adequate monetary compensations as a result of litigation before the IACmHR.[1414] Hayner notes, however, that "in very poor states, or where hundreds of thousands of persons were killed or disappeared, substantial individualized monetary compensation may simply not be feasible".[1415] Moreover, compensation recommended by a commission might not materialise, such as in El Salvador and Haiti.

Another measure which might prevent crimes from reoccurring and at the same time might be viewed as a form of accountability is the changing of the society's structures that created the conflict. There might be important factual developments in the local situation, most notably when perpetrators in powerful positions are replaced.

e. Is amnesty granted to the most responsible perpetrators?

As noted, the number of perpetrators might be too great for a state to handle, even with a well-functioning judicial system. A state cannot be required to perform the impossible, and it may consequently prioritise among possible cases. Prosecuting thousands of perpetrators is not only next to impossible; it is hardly desirable due to the destabilising effect it will have on any society. Instead, exemplary prosecutions relieving the great masses of collective guilt might be preferable. All that the complementarity principle requires is therefore, arguably, that states prosecute a reasonable number of offenders, and that the selection of cases is made independently and impartially according to reasonable criteria. Most notably, the selection must reflect the individual responsibility of the perpetrators. Leaders should be prosecuted before subordinates; the authors of the crimes should be prosecuted before those who merely executed them; and persons who have

[1414] *Vaca Narvaja et al. v. Argentina*. This case is an example of successful use of the "friendly settlement" provision in the ACHR, article 48(1) (f), according to which "[t]he Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention".

[1415] Hayner 2002, p. 171.

committed particularly heinous crimes should be prosecuted before those who have committed lesser crimes.

It is often said that targeted prosecutions, combined with restorative justice *vis-à-vis* those less responsible, are more acceptable than restorative justice *vis-à-vis* all perpetrators, including the most responsible. Robinson has noted that the ICC generally must insist on prosecution of international crimes (of course, to the extent feasible). He notes, however:

> "There is *practical*, *legal*, and *moral* justification for dealing with lesser offenders through truth commissions and conditional amnesties, whereas the persons most responsible – i.e., planners, leaders, and those committing the most notorious crimes – should still be held criminally accountable."[1416]

Discussing whether there is a duty to prosecute under international law, Kritz notes that

> "international law does not, however, demand the prosecution of every individual implicated in the atrocities. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations, especially where an overly extensive trial program will threaten the stability of the country."[1417]

There appears to be an inherent tension between the above-mentioned factor of ensuring a peaceful transition and the prosecution of the most responsible. To satisfactorily address them both might turn out to be impossible. Prosecuting the most responsible may, however, be less risky if the ICC does it. A possible solution might thus be to let the state deal with minor criminals, possibly through alternative mechanisms, while the ICC deals with major criminals. This would minimise the remaining impunity gap.

Where a state, for capacity reasons, has prosecuted the leaders while granting the minor criminals amnesty, it will hardly be in the "interests of justice" for the ICC to prosecute the latter.[1418] The focus of the ICC should, as noted, be on the most responsible offenders. To the extent that there are differing opinions between the national prosecutor and the ICC Prosecutor with regard to the individual degree of responsibility, the state should, arguably, be given a certain margin of appreciation. Robinson notes that in such cases, complementarity (here referring to the admissibility regime)

[1416] Robinson 2003, p. 494.

[1417] Kritz 1996, p. 134.

[1418] Article 53(2) (c) refers to the perpetrator's "inferior role in the alleged crime".

> "would not bar ICC action, since complementarity is case-specific. Nevertheless, provided that the state's effort to select the most serious crimes for prosecution were based on objective criteria and carried out in good faith, it would be appropriate for the Prosecutor to defer to the national programme, even if the Prosecutor would have made a few different choices in selecting perpetrators."[1419]

Whereas a "few different choices" should be accepted, huge discrepancies should not be accepted. Further, if the ICC Prosecutor concludes that the national selection is not made in good faith, but rather in an attempt to shield those not targeted, the effort should not prevent him or her from interfering.[1420]

A legitimate reason for not prosecuting a leader might be that the state has considered that it will be particularly difficult to establish the required proof. If a decision against prosecution is based on a regular investigation and on legitimate prosecutorial criteria, the case will not be admissible.

f. Has the amnesty had positive effects and has it been internationally recognised?

Where the parties to a conflict appear to be satisfied with the chosen solution, and the human rights situation has improved since the amnesty was granted, the ICC Prosecutor will arguably, for those reasons alone, be reluctant to interfere. In a comment on the hypothetical relationship between the ICC and the South African TRC,[1421] the UN Secretary-General noted:

> "The purpose of the clause in the Statute [the "unwillingness or inability" exception from the inadmissibility under article 17] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future."[1422]

Even if a national amnesty does not meet the other "requirements" suggested above, the ICC Prosecutor might still decide not to interfere because the development in the

---

[1419] Robinson 2003, p. 494, fn. 58.

[1420] *Ibid.,* fn. 58.

[1421] The apartheid crimes in question fall outside the ICC's jurisdiction, as they were committed before 1 July 2002, the earliest starting point of the ICC's jurisdiction, see article 11 of the Rome Statute.

[1422] Villa-Vicencio 2004, p. 91.

state has, perhaps against the odds, been a positive one. If interfering at the time of the ICC determination will have little positive effect and perhaps only set back an improved situation, the Court should arguably not interfere simply to make a point *vis-à-vis* the state. Here, utilitarianism might prevail before principle, in particular because the ICC's resources are so limited. The Prosecutor must, however, be mindful of the long-term effects of impunity and carefully assess whether a seemingly positive development is not, after all, only temporary.

The international reaction to the national mechanism (*i.e.* from other states, the United Nations, NGOs and other important international actors) should be taken into consideration when the "interests of justice" is determined, if nothing else as a corrective to the Prosecutor's own view. If an alternative national mechanism is widely considered as successful, the Prosecutor should definitely think twice before interfering. After all, the ICC derives its mandate from the states parties and it interferes, albeit not technically,[1423] on their behalf. Whether the Assembly of States Parties through "administrative" control mechanisms in reality can instruct the ICC Prosecutor not to interfere in a given situation is an open question (this is treated in the discussion on the Prosecutor's discretion). The duty of the ICC Prosecutor at least to take into consideration the opinion of the "world community" seems to be uncontroversial. Absent a binding instruction from the Security Council under article 16 or a possible "instruction" from the Assembly of States Parties, however, the Prosecutor must eventually make an independent decision. Wide recognition of a national mechanism involving an amnesty is therefore a weighty but not determinative factor. The ICC practice might in its turn contribute to the shaping of the international attitudes and expectations.

g. Do the involved parties perceive the amnesty as fair?

The Ugandan Amnesty Law of 2000 was adopted with the participation of the people in the northern Uganda, and Branch, having himself done research in the region, has reported:

> "Support for the blanket amnesty is overwhelming among the displaced people themselves, as I discovered while doing fieldwork in the war zone. For the people of

[1423] According to article 4 of the Rome Statute, the Court has its own "international legal personality".

> the North, the guarantee of amnesty to Kony and other top leaders was an insignificant price to pay for getting their children back."[1424]

Such arguments must be considered with caution. Although the most entitled to have an opinion, people directly involved in the conflict will not be objective and might have positions that they seek to uphold. Furthermore, there is not necessarily a contradiction between supporting an amnesty and arguing that the perpetrator should be held accountable. A support for amnesty might be based on perceptions of the feasibility of bringing the perpetrators to justice, without the sacrifice of thousands of civilians. A population-based survey on the attitude toward peace and justice in northern Uganda indicated that of the 2,585 respondents, most of them victims of grave crimes, 65 percent supported amnesty for LRA members. Of these, only 4 percent supported unconditional amnesty. At the same time, 76 percent answered that those responsible for the abuses should be held accountable for their actions. When asked whether they would accept amnesty if it were the only road to peace, 71 percent answered yes.[1425] This demonstrates the complex relationship between peace and accountability and suggests that peace is more important than anything else. Generally, if both parties to a conflict perceive a mechanism as just, this is in itself an argument against interfering.

The "interests of victims" factor, referred to in article 53(1) (c) and (2) (c), should not be considered as objective, but as subjective. Whenever a preference is expressed, it should be duly considered, provided that it is credible and sufficiently enlightened. The extent to which the victims view a mechanism as "just" might partly depend upon cultural differences. Several observers have argued, in the context the South African TRC, that the South Africans have a different perception of justice than Western people. Desmond Tutu has argued that restorative justice reflects a fundamental and venerable *African value* of healing and nurturing social relationships at the expense of exacting vengeance, a quality of humane sociality referred to as "*ubuntu*".[1426] Graybill has noted:

[1424] Branch 2003. Branch spent a year in the conflict zone in the northern Uganda, involved in peace efforts.

[1425] Pham *et al*. 2005, pp. 24 *et seq*. Forty percent of the respondents had been abducted by the LRA, 45 percent had witnessed the killing of a family member and 23 percent had been physically mutilated at some point during the conflict.

[1426] Tutu 1999, pp. 54-55. There is no precise definition of "*ubuntu*", but it connotes *inter alia* humaneness, caring and community. The word derives from the Xhosa expression "*umuntu ngumuntu ngabanye bantu*" which means "people are people through other people", see Graybill 2002, p. 32.

> "Emphasizing the communal over the individual, *ubuntu* emphasizes the importance of reintegrating the individual into the group. In African traditional thought, the emphasis is on restoring evildoers back into the community rather than punishing them. *Ubuntu* emphasizes the priority of 'restorative' as opposed to 'retributive' justice."[1427]

The point here is whether the involved parties perceive the chosen mechanism as *fair* and not whether they perceive it as necessary for reasons pertaining to peace and security, *etc*. The latter is not a subjective but an objective issue where the ICC Prosecutor should make his or her own assessment, unaffected by local perceptions.

Whether or to what extent the ICC will take into account cultural differences remains an open question. Human Rights Watch has argued that considering such differences "could also result in identical crimes being treated dissimilarly, or, even worse, more egregious crimes not being prosecuted in favor of lesser ones".[1428] This would undermine the perception of the Office of the Prosecutor as an impartial organ, it has been argued.[1429] This author submits, however, that true equality means treating equal incidents equally and different incidents differently. In order to dispense equality across different cultures, due regard must be had to cultural differences. While the ICC is an integral legal system, it also functions as an extension of diverse legal cultures.[1430]

When assessing the "interests of justice" a relevant issue is, just as when the admissibility is determined, whether the national effort has been genuine. The reference to the "interests of victims" supports that understanding. If a non-prosecutorial mechanism has been implemented in good faith, and the victims of the crime perceive it as just, these are relevant factors. The ICC Prosecutor has noted that he "will take into consideration the need to respect the diversity of legal systems, traditions and cultures".[1431] The world community should be prepared to share not only the suffering imposed on the victim, but also the satisfaction that the victim might receive from alternative accountability mechanisms. Yet, that is not to say that

---

[1427] Graybill 2002, p. 33.

[1428] *Human Rights Watch Policy Paper*, *supra* note 1203, p. 15.

[1429] *Ibid*.

[1430] It has already been noted that, due to cultural differences, some latitude must be given under article 17 as to how states carry out their criminal proceedings.

[1431] *Paper on some policy issues*, *supra* note 18, p. 5. It should be noted that the point was made with regard to the admissibility determination.

the victim should ultimately carry the burden of deciding whether the ICC should interfere or not.[1432] That remains the responsibility of the Prosecutor and the Court.

In connection with the ICC investigations in the northern Uganda, leaders of the Acholi community visited the ICC Prosecutor in March 2005 at his invitation. After the meeting, statements both from the local leaders and the Prosecutor were issued. The Acholi leaders asked the Prosecutor to state publicly (i) that he was mindful of the local traditional justice and reconciliation process; (ii) that he was mindful of the peace process and dialogue and therefore continually assessed the situation; and (iii) that whoever had already benefited from an amnesty would not be investigated or prosecuted by the ICC.[1433] In response to this, the Prosecutor offered a much more careful statement:

> "Under the Rome Statute, the Prosecutor has the responsibility to investigate and prosecute serious international crimes, taking into account the interests of victims and justice. I am mindful of traditional justice and reconciliation processes and sensitive to the leaders' efforts to promote dialogue between different actors in order to achieve peace."[1434]

This statement underscored the Prosecutor's responsibility, while taking note of the local leaders' concerns and carefully avoiding the amnesty issue.

12.6. CONCLUSIVE REMARKS

This chapter has revealed that considerable uncertainty remains as to whether and when the ICC will defer to national amnesties. Only the Court's own jurisprudence will provide the answer, and it will do so on a case-to-case basis. Given the uniqueness of each situation, the precedent effect of a given decision not to prosecute will most probably be low.[1435] The discussion has suggested that it would neither be desirable nor possible to regulate the question in a more detailed way than the Statute does. Flexibility is needed to make the right decisions according to the Statute's object and purpose. The essence remains that despite the strong message that international crimes must not go unpunished, respecting a national conditional

---

[1432] Of course, when a whole victim group expresses satisfaction, it should not easily be disregarded.

[1433] *Statements by ICC Chief Prosecutor and the visiting Delegation of Acholi leaders*, *supra* note 1150.

[1434] *Ibid*.

[1435] Cameron 2004, p. 91.

amnesty might, under the circumstances, serve the "interests of justice". Crawford has noted that

> "there is a question about truth commissions, because you can't say a priori which ones are a reasonable response to the situation, and which ones are a cover-up. It's going to require extreme care by the prosecutor. There may be some problem with the capacity to subvert those processes if they are reasonable, and we'll just have to hope that the institutions within the court take a sensible view about it. But complementarity extends to covering internal processes which don't necessarily involve prosecutions of individuals, so there's no reason why the principle of complementarity ought not to cover an appropriately constituted truth commission."[1436]

First of all, prosecutions might destabilise a potentially dangerous situation. When the need for criminal justice arguably is greatest, the danger of pursuing it might also be the greatest. Further, the wounds created by the crimes might be so deep, and the causes might be so complex, that criminal justice will appear inadequate, at least when it is not paralleled by other mechanisms aimed at mending broken bonds. Cultural differences must be taken into account when the effects of retributive versus restorative mechanisms are determined. Further, some of the arguments normally associated with criminal proceedings, most notably their preventive effect, might be less relevant in the context of international crimes. To the extent that the positive effects otherwise associated with criminal justice will be lacking, it will probably be in the "interests of justice" to defer. A TRC needs, in order to be effective, to be independent, well resourced and endowed with subpoena power. It must hold public hearings when necessary and be allowed to name the "guilty" publicly. Few past and present commissions meet these criteria.

The following statement of the ICC Prosecutor suggests that it is not necessarily a question of "either-or". A labour sharing in which the major criminals are prosecuted at the ICC and the minor criminals are brought before a national TRC is not inconceivable.[1437] With regard to the Darfur situation, the ICC Prosecutor has noted:

> "Additional international and national efforts will be required to bring justice to offenders and to promote the rule of law and reconciliation through traditional and

---

[1436] Dwarkin 2002, quoting Crawford.

[1437] He proposed that the ICC "contribute by prosecuting the leaders", and "[n]ational authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals", see *Statement of the Prosecutor to Diplomatic Corps*, *supra* note 1139, p. 4.

> other mechanisms. This has particular significance in the context of Darfur where, as in other areas of Africa, tribal and traditional systems exist for the promotion of dispute resolution. The ICC will cooperate with and support such efforts, the combination of which will mark a comprehensive response to the need for peace, justice and reconciliation."[1438]

Alternatively, states might themselves combine trials with a TRC, and thus complement their own criminal proceedings. If this is done according to a reasonable selection process, the ICC Prosecutor should defer. Further, Dugard suggests as a possible compromise, where there has been a national amnesty, that the ICC "may take the fact that the accused has been granted amnesty into account in mitigation of sentence".[1439]

As for blanket amnesties, the tendency is not to accept them for international crimes. Not only are they morally unacceptable, it also seems imperative to remove the option, as future despots otherwise might not be willing to accept anything less. Besides, blanket amnesties are typically implemented under undue pressure or by the perpetrators themselves. That being said, the establishment of the ICC will hardly mark the end of blanket amnesties. While they should in no way be endorsed, the ICC will most probably not have the capacity to interfere every time they are granted. A blanket amnesty will in itself neither be a reason for interfering nor for deferring, the latter being the essential. The ICC Prosecutor must apply the "interests of justice", and the existence of an amnesty as such can hardly be decisive. The point is that the non-existence of genuine criminal proceedings makes the cases in question admissible. If the ICC does not interfere due to capacity reasons, an improper amnesty may only be prevented or reversed through concerted political action, nationally and/or internationally.[1440] In that sense, the open and critical

---

[1438] *Report to the Security Council Pursuant to UNSCR 1593*, *supra* note 361, p. 10. The Prosecutor has also noted that "[f]or other offenders, alternative means for resolving the situation may be necessary, whether by international assistance in strengthening or rebuilding the national justice systems concerned […]", see *Paper on some policy issues*, *supra* note 18, p. 3.

[1439] Dugard 2002a, p. 703. If the convicted person has spent time in detention during the national proceedings, this time shall be deducted according to article 78(2). Otherwise, rule 145(2) (a) (ii) might be applicable, instructing the Court to take into account "[t]he convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court". Relevant factors might be: the fact that the offender has surrendered voluntarily, the fact that the offender has expressed public remorse and the fact that there has been an undue delay as a result of the amnesty proceedings.

[1440] Broomhall 2003, p. 96.

discussion on national amnesties that the establishment of the ICC has prompted should be welcomed. In the long run it will most probably result in fewer blanket amnesties, irrespective of the ICC activity as such.

The Rome Statute conveys an explicit and strong message: in order to achieve a long-lasting peace it is necessary to look past expediency and confront the perpetrators with the rule of law. Many of the legal and practical implications of this dramatic shift are, however, yet to be realized. The circumstances that exceptionally can make an alternative mechanism acceptable, even when it entails amnesty, are well summed up by the United Nations Secretary-General:

> "Achieving and balancing the various objectives of criminal justice is less straightforward and there are a host of constraints in transitional contexts that limit the reach of criminal justice, whether related to resources, caseload or the balance of political power. […] The international community must see transitional justice in a way that extends way beyond courts and tribunals. The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law."[1441]

Truth-telling alone, however complete, does not adequately address the gravity of the gravest crimes. As noted by Aryeh Neier, "the results of a truth process would not have been commensurate to the criminality that took place in Rwanda or Bosnia [in the 1990s]",[1442] let alone the major crimes committed by the German Nazi regime in the 1940s, it may be added. These crimes were massive atrocities, including systematic killings of the members of particular ethnic groups. Placing before a TRC a person who has ordered the killing of thousands simply appears inadequate. By contrast, the crimes of the South African apartheid regime, did not, as appalling as they were, amount to such massive and explicit atrocities.

What makes trials preferable in the aftermath of gross human rights violations is perhaps more than anything their ability to emphasize that a transition to democracy has been successful by demonstrating the old regime's inability to impede them. Moreover, trials enable victims to establish or recover their dignity as holders of legal rights and they vindicate them in a way which sharply contrasts the lawlessness that the perpetrators represented. Broody notes that in Haiti "the total impunity with which a small elite literally got away with murder and plunder for

---

[1441] *The rule of law and transitional justice*, *supra* note 1310, paras. 25 and 39.

[1442] Harpster undated, quoting Neier.

generations had left the poor majority assuming that they had no rights".[1443] As noted by Broody:

> "In a democratic state, trials of the ancient regime should juxtapose the meticulous rules of due process with the conduct of the accused. It was richly ironic that Pinochet, whose war tribunals conducted sham trials and ordered the summary execution of political opponents, took advantage of the full measure of British rule of law for well over a year. Yet it was precisely in honour of the rule of law that he was prosecuted."[1444]

[1443] Brody 2007.
[1444] *Ibid*.

13. CONCLUSIVE REMARKS

13.1. INTRODUCTION

This book has explained that the purposes of the Rome Statute can only be promoted within the framework of the complementarity principle, which governs the ICC's exercise of jurisdiction. A thorough analysis of the principle's procedural and material provisions has been undertaken in order to understand the implications of this framework, and the possibilities and the limitations that it establishes. The interpretation and analysis of the various provisions has been based on the terms' linguistic meanings, the context in which they appear, the underlying purposes, the drafting history, statements and documents provided by the Office of the Prosecutor as well as a selected body of human rights law and jurisprudence. The latter source has been important due to the current lack of ICC jurisprudence applying the complementarity principle. The aim has been to find out when the ICC Prosecutor may use his investigative and prosecutorial powers and when he or she should do so, according respectively to the admissibility criteria and the rules on prosecutorial discretion. The discussion has included the complex issue as to whether the ICC may and should respect domestic alternatives to criminal justice such as truth commissions combined with amnesties.

This final chapter assesses how well the complementarity principle will promote the purposes that it is intended to promote: safeguarding sovereignty (13.2); enhancing national criminal proceedings (13.3); ensuring effective ICC interference (13.4); and ensuring an appropriate selection of situations and cases (13.5). Finally, the chapter will, as a "benchmark test", ask whether a primary ICC would have been preferable (13.7).

13.2. SAFEGUARDING STATE SOVEREIGNTY

It has been explained how states' perception of their sovereignty is constantly changing. Today, the question is not *whether* international judicial intervention can be justified, but *when* it is justified. The complementarity principle suggests an answer to that question. The length and thoroughness of the negotiations, the prominent place that sovereignty issues had in them and the fact that as of October 2007 105 out of 194 states have ratified the Rome Statute all seem to suggest that sovereignty is adequately safeguarded. States that hesitate to ratify the Statute may do so for other reasons than the ICC's intrusiveness. Indeed, some non-states parties have expressed their satisfaction with the complementarity principle. The Department of Treaty and Law of the Chinese Ministry of Foreign Affairs has noted:

> "In order to establish the authority of the International Criminal Court, build up the trust and confidence of all countries and […] realize the real universality of the Rome Statute, the Chinese Government is of the view that the operation of the

> Court should strictly follow relevant principles based on which the Court was established, firstly of all, the principle of complementarity. The most important role of the International Criminal Court is expressed in that it promotes all countries to improve their domestic judicial systems and guarantees that all countries exercise jurisdiction over perpetrators of grave crimes according to their domestic judicial systems."[1445]

While most commentators seem to find that sovereignty is adequately safeguarded, some commentators still argue that complementarity principle unduly infringes upon sovereignty. At times, the sovereignty argument has been used creatively, but equally unreasonably, such as in the words of this commentator:

> "The ICC will also become an unavoidable participant in the national legal process. Indeed, because it will set precedents regarding what it considers [genuine] domestic criminal trials, the ICC will indirectly force states to adopt those precedents or risk having cases called up before the international court. That constitutes an unprecedented change in the sources of national lawmaking, one that diminishes the traditional notion of state sovereignty."[1446]

Whether the complementarity principle duly respects state sovereignty is not easily measured. Not only are the implications of the principle complex, the legitimate scope of sovereignty also remains controversial. Below, some key points will be highlighted as to how the complementarity principle will affect state sovereignty.

13.2.1. The admissibility criteria and sovereignty

The complementarity principle is based on the recognition that states – for various reasons not limited to sovereignty considerations – should have jurisdictional priority.[1447] There is also a recognition that this priority should not be unchecked. Once the need for an international check is recognised, arguing that *genuineness* represents an intrusive threshold appears, at face value, unreasonable. Any lesser requirement would defeat even the most modest purpose.

Moreover, the "intrusiveness" of any interference with a state's domestic affairs must be assessed in light of its legal basis and the nature of the values that are sought

---

[1445] *China and the International Criminal Court*, Department of Treaty and Law (MFA), 28 October 2003, (available at http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2627/t15473.htm).

[1446] Dempsey 1998, p. 6.

[1447] The reasons are not limited to sovereignty considerations; this book's discussion has also elaborated the general advantages of national justice.

protected. As for the legal basis of the ICC interference, states ratify the Rome Statute and undertake the obligations therein voluntarily. The ratification of the Statute is in itself a manifestation of the states' sovereignty. This consensual basis contrasts the automatically binding nature of the *ad hoc* Tribunals, which in that respect certainly are more intrusive than the ICC.[1448] It should also be borne in mind that the ICC has no means for enforcing its requests. As to the nature of the values sought protected by the Rome Statute, the ICC crimes are per definition of concern to the whole world community, and the repression of them can hardly be said exclusively to be the business of any single state. The concept of universal jurisdiction which increasingly seems to be gaining ground builds on exactly the same assumption.

By recognising the necessity of a complementary burden sharing, states acknowledge that sovereignty not only implies a set of rights and that some rights may not be exclusive. Sovereignty also implies a responsibility to exercise it in a way which promotes, or at least is not detrimental to, the world community's fundamental interests. The ICC crimes are *jus cogens* crimes, and arguing that states should have a right to insist on obstructing justice for these crimes and thereby encourage their commission, disregards recent developments in international law. The complementarity principle prevents states from abusing their sovereignty in a way which obstructs fundamental community interests. The gain is the states parties' possibility to jointly uphold their common interests and, presumably, increased individual and collective security.[1449]

An essential merit of the complementarity principle is that it allows states to bring perpetrators to justice within their own judicial frameworks. Far from attaching detailed requirements to national proceedings, the principle entrusts states to proceed according to their legal cultures and their individual procedures as long as they proceed genuinely. The admissibility factors of shielding, unjustified delays and lack of independence or impartiality inconsistent with an intent to bring the

[1448] When the Security Council refers a situation to the ICC Prosecutor, however, the ICC regime becomes similarly intrusive as the duty to cooperate is then not premised on state consent but is based on Chapter VII and articles 25 (and 103) of the UN Charter.

[1449] Some states that historically have been exposed to human rights violations might have a particular interest in joining the ICC. The ICC may, as a back-up court in case of national failure, have a preventive effect on both external and internal actors. *Vis-à-vis* internal actors, the attachment to the ICC can be viewed as a form of international constitutionalisation which binds successor governments in a much more efficient and permanent way than will a domestic constitution.

perpetrators to justice, total or substantial collapse or unavailability of the judicial system can hardly be called strict requirements. When such irregularities exist, the national proceedings will be inadequate by any meaningful standard, and impunity will prevail if no other party interferes. The complementarity principle confirms that states are the principle enforcers of international criminal law, and it defines rather conservatively the point where the integrity of national jurisdictions ends and international jurisdiction is authorised to step in and remedy national failure.

13.2.2. The admissibility procedures and sovereignty

During the negotiations, many states felt that the Statute's effective material regime, including the definitions of the crimes, the preconditions to the exercise of jurisdiction, the triggering mechanisms and the admissibility criteria, had to be balanced by procedures enabling states to secure their right to jurisdictional priority in an effective manner. We have seen that states are given ample opportunity to invoke the admissibility criteria under articles 18 and 19. This makes it difficult to argue that sovereignty is not adequately safeguarded by the procedures. Indeed, it can be argued that article 18, on preliminary rulings regarding admissibility, is too protective and that it unduly hampers the ICC proceedings in a crucial early phase. The marginal expenses to the Court of a precipitous investigation and the marginal interference with domestic investigations caused by a potentially duplicative ICC investigation do not, it might be argued, justify this additional safeguard.[1450]

The suspensive effect of challenges to the admissibility is also a feature that continues to worry observers. It should not be forgotten, however, that the suspension is for a purpose. If the Prosecutor were allowed to proceed while an admissibility ruling was pending and, as it turned out, genuine national proceedings existed, the latter proceedings could be seriously compromised: sensitive information could leak out, witnesses could be intimidated and witnesses that had already been interviewed by ICC personnel could be less willing to testify again. The possibility for the Prosecutor to, exceptionally, pursue necessary investigative steps, and the fact that an appeal of the admissibility ruling does not have a suspensive effect, significantly balances the picture. Once the question of admissibility has been determined in favour of the Prosecutor in the first instance, the Prosecutor may resume the investigation. This also appears to be a satisfactory solution from the state's perspective, as both the Prosecutor and the independent judges of the Pre-Trial Chamber will have assessed the admissibility at this point.

[1450] Bleich 1997, p. 241.

On balance, if the negotiations on the material provisions were "won" by those states wanting an effective Court, it seems fair to say that the negotiations on the procedural provisions were "won" by the less Court-friendly states. Some of the counterproductive safeguards that exist, such as article 18, should be regarded as the necessary trade-offs of a strong material regime. The result nevertheless remains that the Prosecutor and the Court inevitably will become entangled in procedures and legal questions that have little to do with a criminal trial. In addition, unwilling states will most probably seek to abuse these procedures.

Even with the cumbersome admissibility procedures there is no guarantee that prosecutorial abuse will not occur. The complementarity principle will, however, function as intended only if the Prosecutor and the Court interpret and apply all provisions reasonably. If the eagerness to promote justice for international crimes should lead to a stretching of the wording beyond the reasonable, this would in the long run undermine the Court's integrity. This fact alone might effectively discourage unreasonable interpretations.

13.3. PROMOTING NATIONAL CRIMINAL PROCEEDINGS

An essential feature of the complementarity principle is that it not only enables the actual allocation of a case to the ICC; the mere possibility of such interference shall encourage the state to do deal adequately with the case in the first place. Just as extradition treaties say "prosecute or extradite", the Rome Statute's message is "prosecute or risk international interference". In order to pre-empt such interference, states must proceed genuinely. While this effect of the complementarity principle is less spectacular than actual interference, it will be far more important as a tool against impunity, not least in light of the Court's severely limited capacity. The complementarity principle may promote national proceedings in three ways that are interconnected: first, states are encouraged to adopt adequate legislation; second, they are encouraged to conduct genuine criminal proceedings; and, third, the principle might encourage third states to exercise universal jurisdiction.

13.3.1. The adoption of adequate national legislation

Although the Rome Statute does not instruct states to revise their penal legislation when they ratify the Rome Statute,[1451] states typically do this as a precautionary

[1451] The only obligations on states to legislate are (1) to criminalise offences against the administration of justice *vis-à-vis* the ICC committed in their territories or by their nationals,

measure. The discussion has demonstrated that parliamentary debates focus on whether the national legislation and the legal apparatus are adequate so that ICC interference can be avoided if crimes under the Court's jurisdiction should be committed in the territory or elsewhere by the state's citizens. Therefore, many states have adopted special provisions on "genocide", "crimes against humanity" and "war crimes", often blueprints of articles 6-8 of the Rome Statute. The increasing number of states effectuating such revision reflects both the need for such changes and the efficiency of the complementarity principle in this respect. Further, not only does such revision enable states to proceed genuinely; it sparks national debates on the responsibility of states to investigate and prosecute international crimes. A positive "domino effect" might be created as other states feel inspired to adopt similar legislation, irrespective of whether they become parties to the Rome Statute or not.

13.3.2. The conduction of genuine national proceedings

An ICC finding that the territorial state or the suspect's home state is unwilling or unable to proceed genuinely may well be perceived as a considerable stigma that states will seek to avoid.[1452] Ironically, in the negotiations, states favouring a high admissibility threshold argued that this would prevent the Court from sitting in judgement of national jurisdictions (absent clear failure). At the same time, as the threshold was elevated, the stigma associated with interference was increased. In his first address to the Assembly of States Parties, the ICC Prosecutor noted:

> "Also, due to the dissuasive effect that the mere existence of the court generates, the possibility of presenting a case at the International Criminal Court could convince some states with serious conflicts to take the appropriate action."[1453]

This enhancing effect is specific, or at least more pronounced, to a complementary allocation mechanism as a primary international jurisdiction will have priority irrespective of the national proceedings' adequacy.[1454] Having said that, it should be noted that while such a stigmatic effect and corresponding enhancement is easy to envisage *vis-à-vis* unwilling states, it is not so easily envisaged *vis-à-vis* unable

---

article 70(4) (a), and (2) to "ensure that there are procedures available under their national law for all of the forms of cooperation", article 88.

[1452] Benzing and Bergsmo refer to this as the "embarrassment factor", see Benzing 2004, p. 414.

[1453] *OTP – Election of the Prosecutor*, Statement by Mr. Moreno Ocampo, Press Release, 2 May 2003 (available at http://www.icc-cpi.int/press/pressreleases/5.html).

[1454] In practice, no primary court will disregard the existence of genuine national proceedings.

states.[1455] The fact that Uganda, the DRC and the Central African Republic have referred their situations to the ICC Prosecutor, noting that they are not capable of handling the situations adequately, actually indicates that being labelled as unable is something that some states can live well with (although the self-referral might obviate the need for an extensive elaboration of the admissibility issue). Moreover, it makes less sense to envisage that an unable state can be "encouraged" to proceed genuinely absent some external assistance. The point is well made by Kleffner who notes:

> "The 'antagonist assumption' of the formal framework of complementarity also entails that complementarity's catalyst function is limited to the extent to which the respective interests of States and the ICC to retain or assume jurisdiction over a case coincide."[1456]

An important aspect of the complementarity principle is what is sometimes referred to as "positive complementarity", *i.e.* the possibility for the Prosecutor to, as an *a maiore ad minus* measure, enter into dialogue and cooperation with the state concerned in order to encourage it to take action domestically and possibly even assist it in that respect. Such strategy is reflected in this statement by the Prosecutor:

> "A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes […]. [The Office will] encourage States to undertake State action, using means appropriate in the particular circumstances of a given case."[1457]

The Prosecutor has noted that the Office "has adopted a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation".[1458] The Prosecutor has further noted that "[i]nternational justice, national justice, the search for the truth, and peace negotiations can and must work together; they are not alternative ways to achieve a

---

[1455] Kleffner notes that "inability is beyond the control of States" and points out that while this is true with regard to collapses, "[o]ther forms of inability may, however, very well be under the control of States. One such form is the lack of implementing legislation, which causes the 'unavailability' of a State's national judicial system", see Kleffner 2006, p. 85.

[1456] *Ibid*.

[1457] *Paper on some policy issues*, *supra* note 18, p. 5. See also *Statement of the Prosecutor to Diplomatic Corps*, *supra* note 1139.

[1458] *Report on Prosecutorial Strategy*, *supra* note 1062, p. 5 (emphasis added).

goal; they can be integrated into one comprehensive solution".[1459] These statements introduce positive aspects of the complementarity principle which hardly were contemplated by all the negotiators.

Inevitably, due to the ICC's limited capacity, some states will speculate that the Court will not interfere. Indeed, the limited capacity might be a reason as to why some states have joined the ICC. Yet, while the limited capacity might make the ICC threat less real, no state can with certainty exclude the possibility that the ICC will ever interfere in its business. In particular, the Prosecutor's *proprio motu* powers ensure some unpredictability as to the Court's activities and priorities. States seeking to shield perpetrators can, however, in a given situation, await the development and only initiate proceedings once the Prosecutor makes a move. Here, the notification under article 18 will serve as an early-stage warning for states, and states may apply such a strategy even after the Prosecutor has initiated an individual investigation as long as a trial has not yet started. This is what, at the time of this writing, seems to be happening in Sudan, where the government counters ICC arrest warrants with the announcements that Sudanese authorities are investigating the persons concerned. This potentially severely reduces the enhancing effect of the complementarity principle. An alternative solution, which might have prevented such speculation, would have been to give states priority only as long as the ICC Prosecutor had not yet decided to investigate. At this point, however, sovereignty concerns prevailed as the alternative would have been perceived as too intrusive. Besides, letting states act even at a late stage allows states to set the record straight when there is a change of political will or a strengthening of the judiciary in the meantime, and it enables states to relieve the Court of as much burden as possible.

The ICC Prosecutor may enhance the enhancing effect of the complementarity principle by applying mild pressure *vis-à-vis* unwilling states, using the possibility of interfering as a lever. The Prosecutor may signal that he or she considers opening an investigation but still awaits a genuine national proceeding. The importance of the fact that the procedures necessitate some dialog between the ICC Prosecutor and the state(s) concerned should not be underestimated either. Kleffner notes that the "the procedural setting of complementarity contains elements of an interaction between the Court and national criminal jurisdictions, which may serve to induce states to carry out investigations and prosecutions".[1460]

[1459] *Building a Future on Peace and Justice*, address by Mr. Luis Moreno-Ocampo at Nuremberg, 25 June 2007 (available at http://www.icc-cpi.int/otp/otp_events/LMO_20070624.html).

[1460] Kleffner 2006, p. 82.

The general focus on national proceedings that the complementarity principle generates will most probably enhance national proceedings in more indirect ways. The introduction of the principle has sparked a global discussion as to how states should deal with international crimes. This is important, as a treaty alone hardly can dictate a shift away from the existing culture of impunity. A sustainable culture of justice must be built at the national level as a result of increased national awareness of and commitment to solving the impunity problem.

While the complementarity principle takes note of the systemic and cultural differences of national jurisdictions, it will inevitably promote assimilation. Striving to meet the admissibility criteria, states will look to how other systems operate. And as the ICC starts to handle cases, states will look to how the ICC assesses national efforts and even to the ICC's own criminal proceedings.

13.3.3. Encouraging third state action

An important feature of the complementarity principle is that it lets *any state* with jurisdiction pre-empt ICC involvement. The right to invoke the admissibility criteria is not limited to the states directly affected by the crimes and not even to states parties. The Rome Statute gives priority to any willing and able state, without requiring any particular link to the crime, provided the state has jurisdiction, including, as applicable, universal jurisdiction.[1461] This potentially enables several states to alleviate the ICC of cases. As an effect of this, when a third state signals its interest, this might provide an additional incentive for the state directly affected to act. By way of illustration, albeit not in an ICC context, the interest which Spain signalled in prosecuting Pinochet under the universality principle in the late 1990s had an enhancing effect on Chilean courts. These courts had previously not been concerned with the crimes committed under Pinochet's regime. After Spanish Judge Garzon unsuccessfully had sought to apply universal jurisdiction, this had the subsequent effect of reviving interest in Chile to prosecute Pinochet.

It is possible to envisage a "converse complementarity", where third states remedy ICC inaction. Spain has signalled that its Public Prosecution Office "[will not] act *ex officio* when [it] has knowledge of crimes that may fall within the competence of the ICC if such crimes have not been committed in Spain or by a Spanish national". Thus, Spain has "amended the scope of the principle of universal

[1461] The scope of universal jurisdiction under international law is briefly discussed above in the context of the criterion "State which has jurisdiction" which appears in articles 17(1) and 19(2) (b).

jurisdiction set out for the Spanish legal system under the Organic Act on the judiciary". Spain has explained, however, that

> "this amendment of universal jurisdiction is defined as temporary and that it could operate, as needs be, as a mere 'suspension' of Spanish jurisdiction if the ICC does not exercise its own. In this sense, it is noteworthy that Art. 7.3 of the Organic Act on Cooperation with the ICC expressly states that if the ICC Prosecutor does not initiate an investigation related to the facts that have been reported, or if the ICC determines the inadmissibility of the matter, the report, complaint or request may be resubmitted to the competent Spanish authorities, which thus recover their full jurisdiction and competence."[1462]

The fact that the complementarity principle gives priority also to non-states parties also represents, however, a potential problem. If, for instance, a perpetrator is located in the unable territorial state, and his or her home state, a non-state party, purports to be willing and able, the ICC Prosecutor must defer to the latter unless there are sufficient reasons to conclude that a proceeding there will be non-genuine. Upon arrival in the home state, there is no guarantee that the perpetrator will be brought to justice. Should this not happen, the state is under no duty to surrender the person to the ICC, and the perpetrator will effectively have escaped the ICC's reach.

13.4. ENSURING EFFECTIVE ICC INTERFERENCE

The enhancing effect of the complementarity principle will not obviate the need for an effective ICC. Indeed, the enhancing effect depends on states' perception of the ICC as a credible interferer. The Court's effectiveness will also influence its political support. States will scarcely support a Court which over time fails to deliver results. Just as support is vital to success, success is vital to support. It is therefore essential that the complementarity principle lets the ICC interfere in an effective manner. Four aspects are crucial to the ICC's effectiveness: first, it must be possible for the ICC Prosecutor to detect instances of national failure; second, the admissibility criteria must cover the situations that would otherwise lead to impunity; third, the procedures for invoking the principle and resolving complementarity issues must be sufficiently effective; and, fourth, there should be a system for enforcing the allocation of cases.

[1462] 2006 Progress Report of Spain in *Fourth Consultation on the Implications for Council of Europe member States of the Ratification of the Rome Statute of the International Criminal Court*, CE doc. 4th Consult/ICC (2006), Strasbourg, 14 September 2006.

13.4.1. Detecting national failure

The admissibility procedures allow the ICC Prosecutor to request and receive information from states necessary to assess their criminal proceedings. Prior to this, however, the Prosecutor must be put on notice of possible instances of national failure. The Statute establishes no obligation for states to keep the Prosecutor informed as to the occurrence of international crimes perpetrated in their territories or elsewhere by their citizens, the existence or non-existence of national criminal proceedings and, when they exist, their adequacy. There is no formalised supervising organ, although the Prosecutor is free to establish early-warning mechanisms, for instance with the assistance of NGOs, as long as state sovereignty is duly respected. In brief, effective procedures for identifying potential national failure are totally absent. The best guarantee that the ICC Prosecutor still will manage to stay adequately informed is the Prosecutor's *proprio motu* powers and the liberty to rely on information from any source that he or she deems reliable.

13.4.2. The effectiveness of the admissibility criteria

The term "genuinely" is broad, and so are the "unwillingness" and "inability" criteria, even though their scopes are narrowed in article 17(2) and (3). It can be argued that these criteria are too vague, leaving states with room to raise a plethora of arguments, with which the ICC will have to grapple, spending time which it otherwise could have spent on proper criminal law matters. That argument is, however, overly simplistic and overlooks two significant facts: First, the same vagueness leaves *the Court* with useful latitude in determining a national proceeding's genuineness. Terms such as "purpose of shielding" and "total or substantial collapse or unavailability" leave room for a variety of considerations and give the Court the flexibility to adapt to unforeseen ways of obstructing justice. To regulate in detail all possible forms of non-genuineness would have been impossible due to the complexity of criminal proceedings, the creativity of states bent on shielding the perpetrators and the many possible causes of a legal system's collapse. Second, *the Court* remains the final judge of the national proceeding, and it will hardly interpret the admissibility criteria so as to allow states to obstruct justice, save when this is the result of one of the lacunas identified in the analysis above. Besides, the fact that national inaction automatically makes a case admissible is important. Historically, inaction has by far been the dominating cause of impunity. Here, the complementarity principle has opened an important hole in the shield of sovereignty.

The admissibility criteria establish a high threshold for interfering, but this is not unreasonable. An international jurisdiction should not be allowed to interfere with national criminal jurisdiction unless there are compelling reasons to do so. Reserving the ICC for instances of inaction and national proceedings that are seriously defective as defined by the criteria appears reasonable. The admissibility criteria cover the most notorious shortcomings of national proceedings, *i.e.* inaction, unwillingness and inability, while failing to cover less disturbing shortcomings (which also might lead to impunity), such as sloppiness and lesser degrees of incapacity and incompetence.

From a pragmatic perspective, one should also keep in mind that the ICC will be allowed to interfere in far more situations than it can possibly handle. The Court will not be short of cases. Whenever the ICC is prevented from interfering where interference otherwise would have been desirable, the problem is far more likely to be one of lacking jurisdiction or lacking prosecutorial courage than inadequate admissibility criteria.

The discussion has identified three scenarios which might be considered as lacunas, but which on balance are not, all pertaining to the *ne bis in idem* situation. First, a case will not be admissible when the accused has secured an acquittal by abusing the process of justice so long as the state has not demonstrated unwillingness or inability. It has been noted that such impunity is less disturbing than impunity which is the result of a culture of impunity. The fact that several national systems do not allow for a retrial in such situations has been noted. Second, the Rome Statute's *ne bis in idem* principle does not allow a retrial before the ICC where new significant evidence is discovered after a national acquittal. Reference has been made to the need for finality underlying the general prohibition against retrials. Most systems do not allow retrials in such situations either. Third, in contrast to the two *ad hoc* Tribunals, the ICC may not retry a person who has been prosecuted nationally for an ordinary crime, so long as the proceeding was genuine and reflected all the aspects that, in the view of the ICC Prosecutor, make the crime international.

The discussion has, however, identified two true lacunas: First, the ICC may not, under article 20(3) interfere when a state has completed a trial in good faith but, as it turned out, the state failed to conduct the trial in an adequate manner due to problems amounting to inability. The state was for instance unable to obtain the necessary evidence (of course, the result in such a situation may well be that a verdict is not handed down, in which case the case will be admissible). Here, ICC interference is barred once the accused is acquitted. This situation was hardly

thought of when the Statute was negotiated. Second, and more critical, the Statute fails to address the situation where a convicted person is subsequently pardoned or paroled by the state. Here, the Prosecutor will have to demonstrate that the trial was non-genuine in the first place, and the subsequent administrative decision is but a factor to consider. This means that where a state has convicted a person after a genuine trial, a subsequent regime may release the person without risking ICC interference. The failure to regulate such post-conviction measures is a serious lacuna. As noted, the negotiating states were aware of the issue, and it is possible that an attempt to include this admissibility ground would have jeopardised the negotiations.

13.4.3. The effectiveness of the complementarity procedures

The complementarity procedures are flexible and facilitate dialogue between the Prosecutor and states once the former has begun to examine a matter. A dispute which the Prosecutor and the state concerned cannot resolve between them will be resolved by the Court as an independent organ with the possibility for both parties to appeal within the ICC. It is important that the Prosecutor may rely on any source that he or she deems appropriate, including NGOs and expert commissions. The single most important feature of the complementarity principle is, however, that the final say regarding the admissibility determination rests with the Court.

The lack of a provision instructing states to provide information at the ICC's pre-investigative stage is to some extent balanced by the fact that the Prosecutor, if he or she defers, may request periodic information on the domestic proceedings. The Court cannot, however, expect smooth cooperation from unwilling or unable states, and the lack of efficient enforcement mechanisms remains a problem.

The discussion has concluded that the burden of proof regarding the admissibility rests with the Prosecutor. Nevertheless, once the Prosecutor has decided to investigate and informed states to that effect, a concerned state must challenge the admissibility criteria and provide the Prosecutor with the necessary information. It is not the Prosecutor but the state which must demonstrate the existence of criminal proceedings. As for the proceedings' genuineness, it suffices, however, for the state to claim they are genuine; then the Prosecutor must demonstrate their non-genuineness on a preponderance of the evidence. At times, this will be extremely difficult as states may shield perpetrators in subtle ways and may not cooperate. Cassese notes that complementarity "might amount to a shield

used by states to thwart international justice".[1463] The ICC may thus end up legitimising states' circumvention of justice due to the difficulty in proving national failure. It is important, however, that the burden of proof might, so it is submitted, be shifted to the state if it fails to provide the Court with sufficient credible information to determine the matter. Such reversal is not expressly provided for in the Statute, but it can probably be deducted from a general principle of law as reflected in jurisprudence referred to in the discussion above.

In light of the possibility for the Prosecutor to seek authority to take necessary investigative steps while an admissibility ruling is pending, the authority to request periodic information from the state, the possibility to shift the burden and the fact that the Court has the final say regarding admissibility, the admissibility procedures appear, on balance, to be sufficiently effective.

It may be noted that although the state, the Prosecutor as well as the Court may become involved in the interpretation and application of all three tests leading to the Court's eventual handling of a case, it is possible to discern a certain burden sharing: The question of jurisdiction is primarily the concern of *the Court* (the Court must always be satisfied that it has jurisdiction); the question of admissibility is primarily *the state's* concern (states are given a double set of opportunities to invoke it, and they may even, for all practical purposes, waive it); and the "interests of justice" criterion is first of all *the Prosecutor's* concern (the Prosecutor's decision is highly discretional, and there is less room for challenge and judicial review).

13.4.4. The possibility of enforcing the allocation

A person will not be prosecuted at the ICC unless he or she is apprehended and brought to the Court.[1464] In addition to the ICC's limited jurisdiction and limited capacity, the lack of effective enforcement mechanisms when states remain unwilling or unable to execute the Court's requests for surrender unwilling will be an important impediment to ICC prosecutions.[1465] Where there is a Security Council referral, the Court may refer a matter of non-compliance to the Council, but it remains to be seen whether the Council will be willing to apply the necessary

---

[1463] Cassese 1999, p. 159.

[1464] According to article 63(1), the ICC cannot try a person *in absentia*.

[1465] Perhaps this was what the Editorial Comment in Detroit News had in mind when it noted: "The International Criminal Court is an extremely bad idea that would work only to the extent that it is able to breach national sovereignty", see Detroit News, 28 July 1998, p. A6. A similar problem occurs when a state is unwilling to facilitate an ICC investigation.

pressure.[1466] Whether other organs, such as NATO or the EU, can and will assist the Court in collecting evidence and by arresting suspects and bringing them to The Hague remains to be seen.

Such impediments have, however, little to do with the choice of allocation mechanism; they are not specific to a complementary court. The lack of an effective regime for enforcing requests haunts all international criminal jurisdictions. It is indicative of a fundamental shortcoming of international law stemming from state sovereignty. It illustrates the contrast between the stated political will to solve problems and the reluctance to pay the costs once the chosen solutions are implemented. Cassese has noted that

> "the framers of the Rome Statute were not sufficiently bold to jettison the sovereignty-oriented approach to state cooperation with the Court and opt for a 'supra-national' approach. Instead of granting the Court greater authority over states, the draughtsmen have left too many loopholes permitting states to delay or even thwart the Court's proceedings."[1467]

Unless avoided, these impediments might mean that the ICC ends up duplicating national failure, something that would undermine public respect and eventually marginalise the Court. It has been noted that the Prosecutor should avoid compensating the lack of effective enforcement mechanisms by exclusively targeting unable states as this might lead the Court into other credibility problems. It would seem that the ICC Prosecutor first of all will have to rely on the will and ability of third states, NGOs and civil society to apply pressure in ways that are not foreseen in the Statute.

13.5. ENSURING AN APPROPRIATE SELECTION OF SITUATIONS AND CASES

The United Nations High-Level Panel on Threats, Challenges and Change has, with regard to the prevention of conflicts, concluded that "[i]n the area of legal mechanisms, there have been few more important recent developments than the Rome Statute creating the International Criminal Court".[1468] Whether this really is

---

[1466] Reference is made to the problems that the ICC have faced in Sudan, despite the fact that the Darfur situation was referred to the Court by the Security Council.

[1467] Cassese 1999, p. 170.

[1468] *A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change*, 2 December 2004, A/59/565, para. 90 (available at http://www.un.org/secureworld/report.pdf).

true will largely depend on how the ICC is used as a tool for promoting peace and security, *i.e.* when and how it will actually interfere.

The rules governing the prosecutorial discretion shall ensure that the ICC only interferes in appropriate situations and only deals with appropriate cases, *i.e.* where the "interests of justice" are served. The analysis has demonstrated that this criterion must be broadly construed, covering the narrow interests of the perpetrator and the victim, the broader interests of the local community as well as the broadest interests of the world community. Ensuring that the ICC interferes only when appropriate is crucial not only from a legal perspective, but also from a political perspective. If the ICC were to exercise its jurisdiction against the interests of the world community, it would enjoy little political support.

In the early years, the ICC Prosecutor will probably be wise to deal with notoriously violent situations where interfering does not appear too controversial and where interference is most likely to be successful in terms of collecting evidence, arresting suspects and convicting some high-level perpetrators. Over time, however, the activity needs to be perceived as credible and responsible from a wider perspective. The ICC Prosecutor must demonstrate capability and readiness to target not only weak and unable states, such as the violence-torn African states the Prosecutor presently is targeting, but also strong and unwilling states. While targeting the latter will be more difficult, success will be all the more rewarding. Even the mere attempt to target such states will, regardless of the outcome, demonstrate prosecutorial independence and courage. At the same time, however, failing to interfere in the most horrific situations despite the authority to do so will spark criticism. At the end of the day, the prosecutorial strategy will have to reflect a balanced approach, targeting states of different size, region and political orientation.

The "interests of justice" criterion allows for dynamic assessments and enables the Prosecutor to adjust to legitimate criticism and changing realities. It also allows him or her to continuously evaluate and periodically revise the prosecutorial strategy. More specifically, it allows the ICC Prosecutor to select situations and cases with sensitivity and due regard to the local and regional peace and security situation. This is essential despite the Prosecutor's remark that "the Prosecutor's mandate for international justice should be clearly distinguished from those bearing the responsibility for establishing peace".[1469] In that light, it was pertinent when the Prosecutor also noted that

---

[1469] *Annex to the Three Year Report and the Report on the Prosecutorial Strategy*, *supra* note 1236, p. 2.

> "the Office intends to identify in a more systematic manner the potential deterrent impact of the Office's activities, starting as early as the analysis phase. Efforts will be made to reinforce such impact by aligning the strategies of the Office with broader efforts aimed at stabilizing situations of violence and crime. This will require frequent consultations with an expanding set of interlocutors, in the areas of rule of law, conflict resolution, peace and security, as well as humanitarian action."[1470]

Article 53 fails, wisely so it is submitted, to include an express reference to national non-prosecutorial mechanisms. Instead, the Prosecutor (and the Court as applicable) must in each situation assess whether interfering will be in the "interests of justice". The complementarity principle should be expected to cause a decrease in national alternative mechanisms such as truth and reconciliation commissions, compared to what would otherwise have been the case given states' increased awareness of and interest in such mechanisms. When alternative mechanisms nevertheless are implemented, their adequacy will probably be enhanced in terms of accountability for the perpetrator and restoration for the victims, making it more likely that the ICC Prosecutor discretionally will respect them. One would expect that the number of blanket amnesties for crimes under the Court's jurisdiction will decrease dramatically, not only due to the ICC's complementary nature, but also due to the critical debate on amnesties that the establishment of the ICC has generated in a variety of fora.

It should be remembered that the "interests of justice" criterion has a negative function. The lack of such interest justifies a decision against interference, whereas the existence of such interest will not alone justify a decision to interfere. The existence is a necessary but not sufficient criterion. All three main criteria must be met: jurisdiction, admissibility *and* the "interests of justice". Far from authorising the Prosecutor to interfere whenever this might otherwise serve the "interests of justice", the discretional criterion shall ensure that no interference conflicts with these interests. In practical terms this means that the Prosecutor shall select the most pressing among all cases that fall under the ICC's jurisdiction and are admissible.

The discussion has identified five arguments as to why an international prosecution might be considered desirable (hence in the interests of justice), but which the admissibility criteria fail to cover. First, the argument that international criminal proceedings generally hold a higher professional standard than national proceedings is irrelevant as long as the national standard meets the "genuinely" test. Second, the fact that vindictive national proceedings almost certainly will violate the suspect's right to due process will not make a case admissible. Third, while it is

---

[1470] *Report on Prosecutorial Strategy*, *supra* note 1062, p. 9.

possible to argue that it would always be preferable to prosecute the most responsible perpetrators, typically civil and military leaders, before an international tribunal, genuine national proceedings have priority regardless of the perpetrator's rank or degree of guilt. Fourth, while there is a general recognition that the ICC will play a key role in the future development of international criminal law, the ICC Prosecutor may not take over a case just because it involves important legal issues. Fifth, and finally, while the Prosecutor might have wanted to take over a given case due to its implications for other cases before the ICC, national jurisdiction prevails also here.

All five factors are, however, relevant to the "interests of justice" determination once the criteria of jurisdiction and admissibility are met. All other things being equal, there is increased reason for selecting a case when one or more of these factors are present. In that light, the Prosecutor's seems to be left with adequate room for manoeuvring.

13.6. WOULD A PRIMARY ICC HAVE BEEN PREFERABLE?

As the Rome Statute was negotiated, some observers warned that unless the ICC was equipped with primacy, it would be a weak court. Reference was made to an observation made by the ICTY Appeals Chamber that an international criminal jurisdiction had to be given primary jurisdiction:

> "Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as 'ordinary crimes' […], or proceedings being 'designed to shield the accused', or cases not being diligently prosecuted […]. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute."[1471]

This was before the complementarity principle had been fully elaborated. It would seem that the Appeals Chamber considered an unconditional national primacy as the only alternative to primacy, or at any rate a national primacy with less restrictions than the one states finally agreed upon. Complementarity as defined in the Rome Statute is effectively a national primacy conditioned on the national proceeding's genuineness. This book has explained that the admissibility criteria

[1471] *Prosecutor v. Tadic*, para. 58. The same was noted by then ICTY Prosecutor Louise Arbour in an address to the Preparatory Committee in August 1997 (on file with author).

amply address the concerns raised by the Appeals Chamber, save the one regarding the characterisation of the crimes as "ordinary crimes". The differences between international primacy and complementarity under the Rome Statute are less important than the different terms indicate. To the extent that there are noticeable differences, these can largely be explained by the different situations underlying the establishment of the respective regimes:

First, while the ICC will be quasi-global, the jurisdictions of the two *ad hoc* Tribunals remain strictly confined geographically and temporally. Other states than those directly involved in the two conflicts are minimally affected. This made primacy politically possible. Second, as the Security Council established the Tribunals, it was clear that Yugoslavia lacked the will and Rwanda the ability to proceed genuinely.[1472] The Tribunals would not have been created but for those two facts. Thus, the *ad hoc* Tribunals are effectively based on the same idea as the ICC: an international criminal jurisdiction should only remedy national failure. (As a consequence and due to political and structural changes in the states concerned, cases are, the time of this writing, being transferred from the *ad hoc* Tribunals and back to the states that were once deemed unwilling or unable.) Third, the *ad hoc* Tribunals have experienced enforcement problems similar to those that the ICC must be expected to experience (even despite the fact that the Security Council created them). Fourth, and finally, the two *ad hoc* Prosecutors have never enjoyed full liberty in their selection of cases within the respective situations. Their primacy is, as noted, significantly modified by the *ne bis in idem* provisions[1473] and the Tribunals' respective Rules of Procedure and Evidence.[1474]

An obvious advantage of primacy is that it keeps things simpler. As the complementarity principle was taking its final form, and especially as the late-hour article 18 on preliminary rulings regarding admissibility was introduced, quite a few observers questioned whether the principle still was healthy. As noted, the cumbersome procedures were probably a necessary price for having the principle accepted. Whether the price was also reasonable will largely depend on whether the Prosecutor and the Court will manage to adopt techniques for avoiding the delays and deadlocks that otherwise might jeopardise the integrity of the ICC proceedings. Some important provisions aimed at ensuring this have been highlighted.

[1472] The Security Council did not, of course, use those exact terms now found in the Rome Statute.

[1473] ICTY article 10 and ICTR article 9.

[1474] Rule 9(iii) of the ICTY; and rule 9(iii) of the ICTR.

The intuitive conclusion that primacy is more intrusive than complementarity is not necessarily reflective of actual perceptions. While complementarity leaves states with some measure of control over the prosecution of their citizens, the evaluation of a national proceeding that is necessary once the admissibility criteria are actually applied will most probably be felt as highly intrusive. Brown notes that

> "states are likely to perceive this process of external evaluation as a challenge to their sovereign dignity. An ICC with [primacy] over all cases involving certain crimes […] would not need to assess national legal systems before assuming jurisdiction."[1475]

With international primacy states would no longer have prosecutorial priority, but they would have seen cases being allocated to the ICC according to an objective pre-determined order of priority. It has been noted, however, that the inconvenience and stigma implicit in the admissibility determination do not represent an undue encroachment on sovereignty. At the same time, and more importantly, they are neccesary ingredients for the normative effect that the ICC is hoped to have on national criminal proceedings.

[1475] Brown 1998, p. 425.

INDEX

A

Accountability 224, 363, 365, 420, 432, 436, 439, 444, 447, 450, 452, 455, 456, 457, 461, 462, 466, 485,
Admissibility
  Appeal of a decision on 167-169
  Challenge to 35, 65, 68, 73, 79, 83, 87, 88, 89, 91, 93, 97, 105, 113, 124, 128, 130, 132, 134, 141, 147-150, 150-184, 186, 187, 190, 196, 221, 222, 236, 238, 239, 243, 248-250, 327, 472, 481, 482,
  Determination of 8, 9, 19, 29, 77-78, 81, 82, 87, 88, 90-91, 95-97, 102-105, 112-115, 120-123, 152-153, 157, 160-163, 178-184, 187, 193, 199, 201, 210, 212, 216, 222, 225, 258, 277-278, 286, 288, 306, 316, 326, 424, 427, 430, 481, 488
  Waiver of 152-154, 166, 248-250, 397, 482
Actus reus 198
Ad Hoc Committee on the Establishment of an ICC 28, 64, 67
Ad hoc tribunal(s) 5, 13, 15, 32, 41, 44, 48, 64, 70, 71, 72, 76, 154, 155, 192, 193, 231, 236, 237, 240, 241, 242, 244, 260, 336, 349, 350, 362, 369, 380, 392, 403, 405, 409, 415, 471, 480, 487,
African Charter on Human and Peoples' Rights
  Article 7 291, 299, 307
  Article 26 299
  Article 50 226
African Commission on Human and Peoples' Rights 9, 287, 307, 318, 319, 322, 324, 329,
Age of the perpetrator 3, 367
Allied Control Council Law No. 10
  Article II 426
American Convention on Human Rights
  Article 1 224, 225, 454
  Article 2 454
  Article 8 181, 221, 291, 293, 294, 299, 454
  Article 25 181, 224, 294, 454
  Article 46 181, 226, 296-298
  Article 63 450
Amnesties 1, 65-66, 73, 77, 81, 204-205, 266, 321-323, 329, 388, 417-467, 469, 485
Appeal of admissibility decision (see Admissibility)
Appellate Body (WTO) 220
Argentina 398, 417, 418, 454, 456, 457,

B

Bagaragaza, Michele, 192
Burden of proof 64, 65, 78, 88, 137, 159, 178-181, 265, 407, 481, 482
Burden sharing 355, 371, 391, 396, 397, 402, 471, 482

C

Challenge to the admissibility (see Admissibility)
Chile 268, 311, 367, 398, 417-419, 424, 446, 447, 449, 450, 454-457, 477
Collapse of national legal system 1, 71, 74-75, 81-82, 218, 312, 313-322, 331, 402, 432, 472, 475, 479
Commission on Human Rights 254

Committee on the Elimination of Racial Discrimination 269
Convention on the Elimination of Racial Discrimination
Article 6 224
Cooperation of states with the ICC 19, 20, 73, 83, 103, 114, 117, 146-147, 168, 175, 177-178, 179-180, 225, 132, 237-238, 242, 250, 265, 317, 320-321, 374-376, 397, 400-402, 474-475, 478, 481, 483
Crime deterrence 224, 370, 383, 422, 434, 440, 485
Crime prevention 6, 12-14, 17, 19, 24, 26, 49, 225, 236, 252, 341, 351, 369-370, 384-385, 391-392, 413, 436-437, 440-441, 450, 452, 457, 464, 471,
Cultural differences 72, 216, 217-218, 365-366, 439, 461-464, 477

D

Darfur (of Sudan) 96, 114, 115, 182, 199, 212, 237, 239, 241, 244, 245, 263, 264, 265, 266, 269, 276, 285, 320, 323, 329, 379, 382, 385, 388, 390, 391, 394, 428, 464, 465, 483,
Decision against prosecution 111, 122, 203-205, 210, 262, 277-278, 284, 310-312, 366, 459
Deferral by the ICC 3, 62, 66-67, 69, 70, 79, 83, 88, 91, 105, 108, 113, 117, 125, 131-148, 159-162, 166, 168, 177-178, 191, 198, 202-203, 209, 232-233, 236, 239, 249, 317-318, 337, 380, 383, 384, 388, 392, 420, 424, 425, 427-428, 431-433, 453, 459, 463-465, 478, 481
Deferral dictated by the Security Council 3, 85, 119, 232, 237, 242, 378, 380, 381, 383, 384, 427, 428, 460
Democracy 1, 17, 22, 149, 154, 256, 261, 283, 287, 300, 328, 391-392, 395, 411, 418-419, 421, 421-422, 424-425, 451-456, 466-467
Democratic Republic of Congo 93, 99, 100, 156, 170, 246, 249, 361, 362, 365, 366, 367, 371, 375, 380, 387, 391, 392, 393, 396, 398, 400, 401, 409, 475,
Determination on the admissibility (see Admissibility)
Deterrence (see Crime deterrence)
Due process 81, 82, 105, 206, 216, 220, 221-223, 256, 257, 272, 280, 282, 290, 292, 304, 311, 405, 447, 467, 485,

E

East Timor 231, 265, 269, 270, 271, 277, 279, 281, 283, 286, 418
Effective remedy 216, 220, 224-226, 229, 351,
El Salvador 181, 298, 417, 418, 447, 448, 457
Enhancing effect on national proceedings 14, 18, 19, 21, 71, 189, 244, 391-392, 401-402, 414, 470, 473-478
Erdemovic, Drazen, 357, 382,
European Convention on Human Rights
Article 1 223
Article 2 223
Article 3 223
Article 5 223
Article 6 221, 291, 294, 299, 332
Article 13 224
Article 14 223, 287
Article 26 226
Article 32 302
European Court of Human Rights 9
Exhaustion of local remedies 49, 51-52, 59, 181, 216, 219, 220, 226-229, 247, 295-299, 301, 318-319, 323, 329,

F

Fair trial 205, 208, 221, 288, 308, 372

G

Geneva Convention No. 1
Article 49 25, 192, 432
Geneva Convention No. 2
Article 50 25, 192
Geneva Convention No. 3
Article 129 25, 192
Geneva Convention No. 4
Article 146 25, 192
Genocide Convention
Article 4 432
Article 6 37, 192
Genuineness 2-4, 8, 9, 11-12, 17-19, 22, 23, 28, 36, 43, 53, 76, 78, 82, 87-89, 96, 101-102, 104, 108, 117, 121, 125, 129, 131, 133-135, 137, 140-146, 149, 152-153, 157-158, 164-166, 168-169, 173, 177-181, 183, 185, 188-191, 193-194, 196, 197, 198, 200, 201-207, 210-213, 215-229, 232-236, 239, 243-245, 248, 250-252, 254, 256, 260-262, 265, 273, 275-278, 280, 283-284, 287, 292, 307, 309-310, 312, 316-319, 321, 314-330, 331-334, 336, 339, 341-342, 366, 370, 391-393, 401-403, 414, 429-433, 462, 465, 470-474, 476, 478-481, 485-487
Guatemala 269, 301, 303, 304, 308, 417, 418,

H

Human rights 1, 9, 12, 17, 22, 48-49, 165, 194, 216, 219-229, 233, 248, 266-267, 271-273, 290-299, 301-309, 315, 318, 322, 324, 328-330, 358-359, 368, 404-410, 420-422, 439-441, 446-448, 450, 452, 454, 457, 459, 469, 471
Human Rights Committee 269, 303, 304, 306, 307, 308, 328

I

Immunity 17, 235, 254, 321, 322, 371, 417, 426
Impartiality 9, 21, 22, 49, 50, 76, 77, 81, 119, 163, 213, 271, 282, 286, 299-312, 403, 413, 471,
Impunity 1, 4, 11, 12, 14, 19, 25, 29, 34, 42, 43, 71, 88, 100, 115, 189, 194, 200, 202, 205, 215, 221, 233, 243, 247, 253, 271, 294, 298, 301, 306, 308, 318, 324, 326, 328, 331, 333, 337, 339, 341, 346, 356, 359, 380, 385, 386, 387, 391, 392, 419, 420, 421, 425, 436, 445, 448, 451, 453, 454, 458, 460, 466, 472, 473, 477-480
Inability 1, 3, 9, 24, 36, 44, 46, 50, 74-75, 76, 81, 85, 101, 140, 160, 179, 190, 191, 193, 198, 200, 201, 203, 205, 210, 213, 215, 216, 218, 219, 221, 244, 251, 252, 256, 265, 266, 270, 275, 277, 313-330, 331, 332, 336, 341, 351, 402, 429, 431, 459, 466, 475, 479-480
In absentia trials 165, 482
Independence 9, 16, 21, 76, 77, 81, 91, 92, 98, 112, 162, 213, 227, 265, 270, 271, 285, 299-312, 343, 344, 347, 390, 401, 407, 413, 471, 484,
Indonesia 80, 265, 271, 277-283, 286,
Infirmity of the perpetrator 368
Interests of justice 2, 4, 7, 8, 13, 14, 29, 47, 66, 88, 90, 91, 95, 96, 97, 102-123, 102, 134, 142, 172, 187, 194, 201, 211, 251, 252, 257, 310, 336, 339-346, 349, 351, 353-402, 403, 404, 405, 411, 419, 428, 430, 433, 434, 437, 438, 440, 451, 453, 455, 458, 460, 462, 464, 465, 482, 484-486,
Interests of victims 121, 357, 363-367, 386, 394-395, 398, 401, 437, 439, 441, 456, 461-463
Inter-American Commission on Human Rights 9, 181, 266, 272, 294-298, 304, 305, 457,

International Commission of Inquiry, 114, 239, 245, 263, 265, 269, 276, 277, 320, 329
International Covenant on Civil and Political Rights
Article 2 224, 225
Article 6 269
Article 7 269
Article 14 194, 207, 209, 221, 291, 299, 303, 307, 308, 368, 405, 431
Article 26 405
Article 41 226, 296
International crimes
Aggression 2, 39, 40, 41, 63
Apartheid 63, 417, 418, 435, 436, 459, 466,
Crimes against humanity 2, 26, 63, 79, 192, 265, 280, 281, 320, 329, 357, 380, 426, 432, 445, 452, 474
Genocide 1, 2, 13, 24, 26, 27, 36, 37, 40, 45, 50, 53, 63, 69, 76, 77, 79, 84, 92, 140, 191, 192, 198, 228, 260, 279, 280, 315, 319, 320, 321, 329, 336, 350, 358, 369, 380, 394, 399, 400, 426, 432, 474,
Torture 27, 49, 99, 115, 128, 192, 223, 224, 262, 296, 336, 361, 398, 417, 418, 423, 456, 457
War crimes 2, 26, 49, 54, 63, 79, 115, 128, 140, 187, 192, 264, 265, 270, 278, 280, 282, 294, 320, 329, 334, 348, 361, 372, 380, 388, 428, 432, 464
International Criminal Court
Appeals Chamber 124, 136, 138, 139, 140, 147-149, 151, 167-169
Assembly of States Parties 119, 168, 246, 344, 375, 396, 401, 460, 474
Presidency 62, 119, 167
Pre-Trial Chamber 65, 79, 85, 90-125, 134-156, 167-174, 245, 246, 311, 341-344, 356, 378, 379, 390, 397, 403, 404, 472,
Trial Chamber 65, 167, 169, 311, 341, 356, 368
International criminal jurisdictions
International Criminal Tribunal for the former Yugoslavia (ICTY)
International Criminal Tribunal for Rwanda (ICTR)
International Military Tribunal 6, 25, 347, 348,
International Military Tribunal for the Far East 6, 346, 347, 348,
Internationalised criminal jurisdictions
"Regulation 64" Panels in the Courts of Kosovo 231
Serious Crimes Panels in the District Court of Dili (East Timor) 231
Special Court for Sierra Leone 231, 234, 235, 423, 426, 440,
Extraordinary Chambers in the Courts of Cambodia 231, 426
Ituri (of DRC) 99, 100, 362, 366, 367, 376, 380, 392, 396

J

Judicial control 98, 403
Jurisdictional bases
Universal jurisdiction 21, 25-27, 51, 56, 128, 129, 191-193, 319-320, 423, 432, 454, 471, 473, 477-478
Nationality principle 191
Passive nationality 192, 193,
Territorial principle 191
Protective principle 191
Jurisdiction of the ICC
Preconditions to exercise of jurisdiction 3, 106, 238, 362, 472
Challenges to the jurisdiction 93, 134, 156, 161, 162, 169, 184,
Justice
Restorative justice 21, 365, 435, 436, 438, 439, 440, 441, 451, 452, 458, 461

Retributive justice 438, 439, 440, 452, 462

K

Karadzic, Radovan 198, 377, 389, 390, 440

L

Law of the Extraordinary Chambers in the Courts of Cambodia
Article 40 426

M

Mens rea 261
Mladic, Ratko 198, 389, 390, 440
Milosevic, Slobodan 27, 368, 389

N

National legislation 192, 195, 292, 336, 376, 473
Ne bis in idem principle 42, 55, 56, 58, 59, 65, 68, 73, 78, 77, 80, 153, 156, 157, 165, 185, 194, 202, 206-209, 233, 286, 287, 332, 333, 335, 423, 430, 431, 480, 487
Same conduct 153, 194, 197, 199, 206, 207, 233, 261, 336
Double jeopardy 207
Necessary investigative steps (at the ICC)
Non-governmental organisations (NGOs)
Amnesty International
Human Rights Watch
Nuremberg Charter
Article 14 346, 348

O

Ordinary crimes 1, 44, 289, 293, 321, 335, 367, 373, 421, 486, 487

P

Pardons and paroles 210, 335
Peace and security 1, 11-14, 27, 32, 33, 36, 39, 40, 45, 126, 236, 237, 245, 341, 356, 358, 362, 366, 380-388, 419, 420, 427, 433, 437, 444, 452, 462, 484, 485
Penalties 28, 222, 286, 288, 321, 371, 444
Permanent Court of International Justice 255,
Pinochet, Augusto 311, 367, 417, 418, 423, 424, 432, 448, 455, 467, 477
Political support 371, 376, 377, 478, 484
Preliminary ruling regarding admissibility 78-79, 86, 89, 91, 122, 123-150, 187, 198, 212, 238, 472, 487,
Preparatory Committee (on the Establishment of an ICC) 31, 32, 45, 69-81, 86, 92, 166, 169, 186, 239, 249, 314, 335, 424, 425, 486
Prevention (see Crime prevention)
Primacy 5, 8, 15, 41-44, 64, 70, 71, 154, 226, 238-244, 486-488
Prima facie case 25, 92, 96, 145, 200, 204, 278, 309, 310, 349-351, 374
Prosecutor
Prosecutorial discretion 2-4, 9, 12, 15, 19, 20, 66, 74, 78, 81, 87, 88, 90, 91, 95, 98, 100, 105, 107, 113, 118-119, 127, 141, 182-183, 187, 194, 201, 208, 211, 224, 236, 252, 310-311, 339-415, 427, 430, 431-451, 460, 470, 482, 483-486
Prosecutorial policy 6, 101, 107, 130, 225, 340, 343, 349, 361, 369, 370, 373, 377, 380, 382, 391, 395, 402, 410-415,
Prosecutorial transparency 346, 377, 401, 411-413
Prosecutorial guidelines 7, 413-415
Proprio motu powers 32-33, 78, 79, 85, 89, 90, 95, 96, 97-112, 113, 115,

122-125, 136, 149, 152, 237, 238, 239, 246, 342, 344, 377, 401, 403, 476, 479,

R

Reasonable grounds 76, 121, 156, 174, 181, 349
Reconciliation 9, 12, 21, 22, 73, 211, 268, 273, 365, 380-382, 386, 388, 389, 395, 417-419, 435-454, 463-465, 485
Referrals to the ICC
Security Council referral3, 17, 32-35, 45, 83-84, 89-93, 97, 99, 100, 105, 109, 110, 111, 112-120, 122, 125-127, 129, 158, 162, 163, 166, 168, 212, 236-245, 340, 342, 375, 378-379, 382, 385, 390-391, 401, 403, 419, 428, 471, 482, 483
Self-referral 67, 246-250, 345, 375, 393-394, 396-397, 400-401, 403, 475
State Referral 32-35, 78, 79, 85, 89-93, 97, 99, 100, 105, 109, 110, 111, 112-120, 122, 125-127, 134, 162, 163, 340
Role of the perpetrator 280, 360,
Rome Conference 30, 32, 33, 67, 80-86, 175, 219, 240, 249, 286, 315, 392, 424, 425, 429
Rome Statute of the International Criminal Court
Article 1 4, 82, 83, 153, 187, 189, 233, 238, 357, 360
Article 4 460
Article 5 2, 3, 48, 81, 92, 124, 126, 130, 131, 131, 187, 190, 256, 280, 357, 360, 397
Article 6 2, 3, 260, 310, 321, 474
Article 7 2, 3, 320, 336, 407, 474
Article 8 2, 3, 187, 320, 361, 474
Article 11 3, 23, 232, 396, 459
Article 12 3, 6, 91, 92, 129, 133, 150, 158, 159, 187,192, 237, 238, 241, 242, 249, 397, 400
Article 13 3, 17, 89, 90, 91, 95, 98, 117, 123, 150, 158, 162, 176, 237, 239, 241, 246, 249, 341, 380, 428
Article 14 3, 79, 89, 90, 91, 92, 95, 114, 163, 191, 239, 246, 341
Article 15 3, 17, 79, 89, 90, 91, 95, 97-112, 114, 123, 124, 129, 136, 137, 142, 150, 152, 169, 179, 186, 203, 239, 249, 261, 284, 343, 378, 390, 403, 439
Article 16 3, 85, 119, 232, 237, 242, 378, 380, 381, 383, 384, 427, 428, 460
Article 17 4, 9, 11, 21, 62, 68, 76, 77, 80, 81, 82, 83, 88, 91, 94, 95, 96, 101, 107, 120, 128, 130-137, 141, 143, 150, 151, 153, 157, 158, 165, 168, 169, 175, 176, 177, 179, 180, 182, 185-213, 216, 218, 220-23, 226, 228, 232, 233, 235, 238, 240, 245, 248, 249, 251, 253, 256, 257, 258, 260, 261, 262, 275, 287, 289, 291, 297, 299, 300, 311, 312, 313, 314, 316, 317, 322, 323-328, 331, 333, 334, 335, 336, 356, 361, 366, 399, 401, 402, 424, 426, 427, 429-431, 459, 462, 477, 479
Article 18 91, 93, 101, 104, 105, 108, 113, 117, 122, 123-150, 151, 152, 158, 159, 162, 163, 164, 166, 168, 170, 171, 177, 178, 179, 182, 187, 196, 198, 201, 202, 203, 212, 238, 247, 249, 264, 317, 472, 473, 476, 487
Article 19 21, 62, 68, 91, 93, 105, 106, 108, 113, 121, 122, 124, 128, 130, 132, 133, 134, 136, 137, 143, 147, 148, 149, 150-178, 179, 182, 186, 187, 190, 192, 196, 198, 201, 212, 221, 236, 238, 243, 245, 247, 248, 249, 296, 327, 349, 439, 472, 477

Article 20 48, 60, 77, 141, 152, 156, 186, 190, 194, 197, 198, 206-212, 213, 233, 234, 253, 259, 287, 288, 331-334, 336, 356, 401, 424, 427, 429-431, 480
Article 21 7-9, 169, 194, 220, 221, 222, 226, 232, 233, 240, 241, 358-359, 405, 407
Article 22 17
Article 24 396
Article 25 140, 369
Article 26 3, 367
Article 27 17
Article 28 262, 369, 370
Article 29 209, 373
Article 33 370
Article 34 116
Article 36 120
Article 40 299
Article 41 299
Article 42 100, 112, 119, 120, 343, 344, 377, 378, 404
Article 43 108, 439
Article 46 120
Article 47 120
Article 51 239
Article 53 3, 4, 78, 88, 90, 91, 94-97, 99, 102-123, 113, 120, 124, 127, 129, 132, 134, 137, 142, 179, 180, 182, 187, 194, 199, 201, 204, 208, 211, 212, 239, 243, 245, 248, 251, 252, 257, 310, 339-415, 427-451, 458, 461, 485
Article 54 105, 117, 121, 137, 145, 171, 299, 306
Article 55 155, 221
Article 56 121, 170, 317
Article 57 121, 137, 146
Article 58 93, 120, 121, 155-156, 174, 180
Article 60 156
Article 61 65, 91, 113, 121, 137, 155, 156, 344, 356
Article 63 482
Article 64 306, 356, 368
Article 65 356
Article 66 120, 180, 221, 311
Article 67 156, 221, 291, 299, 306, 356
Article 68 108, 116, 117, 122, 439
Article 70 321, 474
Article 72 117, 133, 137, 178
Article 73 117
Article 75 439
Article 78 194, 286, 465
Article 79 439
Article 80 28, 222, 286, 371
Article 82 138, 167-169
Article 83 139, 168
Article 84 176
Article 86 117, 147, 168, 177, 180, 182, 376
Article 87 117, 168, 173, 237, 375
Article 88 317, 321, 376, 474
Article 89 156, 175, 199, 376
Article 90 196, 197, 240, 257
Article 93 159, 160, 173
Article 94 199
Article 97 257
Article 102 195, 427
Article 103 195
Article 104 195
Article 107 196
Article 108 196
Article 110 288
Article 112 120, 344
Article 119 168, 182-183, 245
Article 120 183
Article 127 35
Rwanda 1, 13, 24, 32, 43, 72, 74, 228, 229, 269, 315, 329, 350, 371, 392, 394, 395, 409, 466, 487

S

Sham trials 46, 467
Shielding the perpetrator 49, 75, 77, 80, 149, 185, 186, 199, 206, 223, 253, 256-290, 310, 312, 331-334, 430, 454, 471, 479
Sierra Leone 231, 234, 235, 417, 418, 423, 426, 440, 445, 451
South-Africa 418
State responsibility 31, 39, 40, 181, 254, 255, 256, 452
Statute of the International Court of Justice
    Article 36 45, 302
    Article 38 8
Statute of the International Criminal Tribunal for Rwanda
    Article 8 41
    Article 9 260, 335, 487
    Article 10 348
    Article 15 348
    Article 16 348
    Article 17 348
    Article 18 349
    Article 20 291
Statute of the International Criminal Tribunal for the former Yugoslavia
    Article 9 41
    Article 11 348
    Article 10 5, 42, 260, 335, 487
    Article 16 348
    Article 17 348
    Article 18 92, 348, 349
    Article 21 291, 406-407
Statute of the Special Court for Sierra Leone
    Article 10 426
Statutes of limitation 288, 321, 322, 329, 373
Sudan 96, 114, 125, 200, 212, 237-239, 244, 245, 264-266, 285, 287, 303, 320, 329, 369, 385, 388, 395, 397, 398, 476, 483
Sufficient basis 90, 92, 94, 95, 120, 127, 138, 182, 187, 192, 239, 310, 341, 348, 349, 412
Sufficient gravity 58, 185, 186, 199, 222, 248, 361, 398, 399, 455
Suspension of ICC proceedings 19, 88-89, 138-139, 144, 164, 167-175, 178, 472,

T

Tadic, Dusko 13, 15, 43-44, 152, 154, 192, 335, 337, 399, 486
Taylor, Charles 235, 440
Tokyo Charter
    Article 8 346, 347
Torture Convention
    Article 5 192
    Article 7 192, 432
    Article 14 224
Trigger mechanisms (see Referrals *and* Prosecutor's *proprio motu* powers)
Truth and reconciliation commissions 9, 21, 211, 273, 417-425, 430-438, 440, 448-466, 485,

U

Uganda 27, 114, 115, 116, 246, 249, 352, 361, 363, 364, 365, 367, 369, 375, 385-401, 417, 422, 460-463, 475
Unavailability of national legal systems 62, 72, 74, 145, 146, 218, 219, 226, 228, 312, 314, 316-324, 325, 327, 327, 328, 329-330, 331, 472, 475, 479
Unjustified delay 9, 82, 143, 201, 210, 213, 218, 221, 228, 256, 258, 259, 274, 288, 290, 292, 295, 297, 306, 312
United Kingdom 11, 31, 83, 86, 224, 267, 275, 293, 306, 320, 346, 347, 372
United Nations Basic Principles of the Independence of the Judiciary
    Article 1 301

Article 6 299
United Nations Charter
Chapter VII 42, 83, 85, 240, 241, 379, 384, 427, 471
Article 2 16
Article 24 384, 428
Article 25 114, 241-242, 471
Article 27 85
Article 39 127
Article 103 114, 240, 241, 471
United Nations Guidelines on the Role of Prosecutors
Article 17 414
Article 18 330
United Nations
General Assembly 13, 14, 36, 38, 39, 40, 41, 43, 48, 50, 55-57, 61, 162, 236, 366
Secretary-General 16, 41, 42, 43, 55, 100, 199, 239, 245, 335, 405, 418, 426, 435, 436, 443, 459, 466,
Security Council 2, 3, 5, 9, 12, 16, 17, 31-34, 43, 45, 83, 84, 85, 89-97, 99, 100, 109, 111, 112-119, 122, 125-126, 129, 158, 166, 168, 182, 184, 199, 200, 212, 228, 231, 232, 236-245, 248, 323, 341, 342, 343, 344, 348, 350, 359, 375, 378-379, 380-385, 387, 390, 391, 394, 401, 403, 409, 419, 423, 426, 427-428, 443, 452, 460, 465, 471, 482, 483, 487
United States 16, 31, 33, 34, 67, 75, 78, 79, 83, 86, 100, 126, 136, 140, 153, 154, 157, 184, 208, 220, 301, 334, 345, 346, 347, 351, 390, 419, 425
Universal Declaration of Human Rights
Article 7 405
Article 8 224
Universal jurisdiction 21, 25, 26, 51, 56, 129, 192, 193, 319, 423, 432, 454, 471, 473, 477, 478
Unwillingness 1, 3, 9, 24, 26, 32, 36, 37, 44, 46, 47, 50, 52, 57, 61, 73, 74, 75-76, 77, 78, 81, 82, 85, 114, 125, 140, 141, 144, 145, 146, 147, 149, 160, 168, 178, 179, 183, 185, 189, 190, 191, 195, 198, 200, 201-205, 210, 213, 215, 216, 218-219, 224, 228, 244, 251-312, 313, 314, 318, 322, 329, 313, 332, 341, 342, 345, 351, 366, 374, 375, 393, 394, 402, 426, 429, 431, 459, 473, 474, 476, 479, 480, 481, 482, 484, 487

V

Velásquez Rodríguez, Angel Manfredo 180, 225, 273-274, 308, 324, 452
Vienna Convention on the Law of Treaties
Article 7 254, 255
Article 27 183, 290, 376
Article 31 8, 11, 31, 66, 335
Article 32 31
Article 33 355
Article 34 143
Article 36 158

W

Waiver of admissibility (see admissibility)

Y

Yerodia, Abdoulaye (*Arrest Warrant Case*) 26, 192-193

BIBLIOGRAPHY

(All websites last visited December 2007.)

Agirre, Xabier *et al.*, *Informal expert paper: The principle of complementarity in practice*, ICC-OTP 2003, available at http://www.icc-cpi.int/library/organs/otp/complementarity.pdf.

Ali, Wasil, "ICC Prosecutor says UN Security Council must force Sudan to cooperate", *Sudan Tribune*, 19 November 2007 (last visited November 2007).

Álvarez, Adrián *et al.*, *Balancing Peace, Justice and Stability: A Great Lakes Regional Justice Commission and a Special Tribunal in the Democratic Republic of the Congo*, Princeton University Woodrow Wilson School of Public and International Affairs, March 2004.

Amerasinghe, C. F., "The Exhaustion of Procedural Remedies in the same Court", *International and Comparative Law Quarterly 12*, 1963.

Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations*, 2nd edition, Cambridge University Press, 2005.

Arbour, Louise, "Progress and Challenges in International Criminal Justice", *Fordham International Law Journal 21,* 1997.

Arbour, Louise & Bergsmo, Morten, "Conspicuous Absence of Jurisdictional Overreach", in H. A. M. von Hebel, J. G. Lammers, and J. Schukking, *Reflections on the International Criminal Court*, T. M. C. Asser Press, The Hague, 1999.

Arendt, Hannah, *Eichmann in Jerusalem. A Report on the Banality of Evil*, rev. and enlarged edition, Penguin Books, 1994.

Aristotle, "Nicomachean Ethics", in Roger Crisp, *Aristotle: Nicomachean Ethics*, English translation, Cambridge University Press, 2000.

Arsanjani, Mahnoush H., "Jurisdiction and Trigger Mechanisms of the ICC", in H. A. M. von Hebel, J. G. Lammers and J. Schukking (eds.), *Reflections on the International Criminal Court*, T. M. C. Asser Press, The Hague, 1999a.

Arsanjani, Mahnoush H., "The Rome Statute of the International Criminal Court", *American Journal of International Law 93(1)*, 1999b.

Bantekas, Ilias, "Corruption as an International Crime and Crime Against Humanity", *Journal of International Criminal Justice 4*, 2006.

Bascom, William, "The Forms of Folklore" in Alan Dundes (ed.), *Sacred Narratives: Readings in the Theory of Myth*, University of California Press, 1984.

Bass, G. J., *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, 2000.

Bassiouni, M. Cherif, "Searching for Peace and Achieving Justice: The Need for Accountability", *Law and Contemporary Problems 59(4)*, 1996.

Becker, D. *et al*., "Therapy with Victims of Political Repression in Chile: The Challenges of Social Reparation", *Journal of Social Issues 40 (3)*, 1990.

Benzing, Markus, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", in Armin von Bogdandy & Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law 7,* 2003.

Benzing, Markus and Morten Bergsmo, "Some Tentative Remarks On The Relationship Between Internationalized Criminal Jurisdictions And The International Criminal Court", in Cesare P. R. Romano, André Nollkaemper & Jann K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* Oxford University Press, 2004.

Bergsmo, Morten and Pieter Kruger, "Initiation of an investigation", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, 1999a.

Bergsmo, Morten and Pejic, Jelena, "Article 15: Prosecutor", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Baden-Baden, 1999b.

Bergsmo, Morten, "Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council", *Nordic Journal of International Law 69(1)*, 2000.

Bergsmo, Morten, "Folkerettslig belysning av "etnisk rensing" i det tidligere Jugoslavia", in Bård-Anders Andreassen and Elin Skaar (ed.), *Forsoning eller rettferdighet? Om beskyttelse av menneskerettighetene gjennom sannhetskommisjoner og rettstribunaler*, Oslo, 1998.

Bertodano, Sylvia de, "East Timor: Trials and Tribulations", in Cesare P. R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* Oxford University Press, 2004.

Blair, David, "I killed so many I lost count, says boy", *The Daily Telegraph 3 August 2005*.

Bleich, Jeffrey L., "Complementarity", in M. Cherif Bassiouni (ed.), in *The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, Novelles Études Pénales 13, 1997.

Boraine, A., J. Levy & R. Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa*, IDASA, Cape Town, 1994.

Boraine, A., *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, Oxford University Press, 2000.

Bos, A., "The Role of an International Criminal Court in the Light of the Principle of Complementarity", in Erik M. G. Denters, and Nico Schrijver (eds.), *Reflections on International Law from the Low Countries*, Kluwer Law International, The Hague, 1998.

Bourdon, William, *La Cour pénale internationale: le statut de Rome*, collab. Emmanuelle Robineau-Duverger, Editions du Seuil, Paris, 2000.

Boustany, Nora, "An Insistent Appeal for Aid to Africa", *Washington Post*, 22 December 2004.

Branch, Adam, "International Justice, Local Injustice: The International Criminal Court in Northern Uganda", *Dissent Magazine*, Foundation for Study of Independent Ideas, 2003.

Brody, Reed, "Justice: The First Casualty of Truth", *The Nation Magazine*, 30 April 2001, available at http://www.thenation.com/doc/20010430/brody.

Brody, Reed, "We do believe that former heads of state deserve a fair trial", *The Guardian*, 18 October 2007.

Broomhall, B., *International Justice and the International Criminal Court: Between sovereignty and the rule of law*, Oxford University Press, 2003.

Brown, Bartram, "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals", *Yale Journal of International Law 23(383),* 1998.

Brubacher, Matthew. R., "Prosecutorial Discretion within the International Criminal Court", *Journal of International Criminal Justice 2(1),* 2004.

Burke-White, William, "A Community of Courts: Towards a System of International Criminal Law Enforcement", *Michigan Journal of International Law 24(1)*, 2002.

Cameron, Iain, "Jurisdiction and Admissibility Issues under the ICC Statute", in Domenic McGoldrick, Peter Rowe and Eric Donnelly, *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford and Portland, 2004.

Cassese, Antonio, "The Statute of the International Criminal Court: Some Preliminary Reflections", *European Journal of International Law 10(1)*, 1999.

Cassese, Antonio (chairman) in "Round Table: Prospects for the Functioning of the International Criminal Court", in Mauro Politi & Giuseppe Nesi (eds.)*, The Rome Statute of the International Criminal Court, A challenge to impunity*, Ashgate Darthmouth, 2001.

Cassese, Antonio, *International Criminal Law*, Oxford University Press, 2003.

Cassese, Antonio, *International Law*, second edition, Oxford University Press, 2004a.

Cassese, Antonio, "The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality", in Cesare P. R. Romano, André Nollkaemper & Jann K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* Oxford University Press, 2004b.

Christie, Nils, *A suitable amount of crime*, Routledge, London, 2004.

Clark, Roger S., "The Influence of the Nuremberg Trial on the Development of International Law", in George Ginsburgs & V. N. Kudriavtsev, *The Nuremberg Trial and International Law,* Martinus Nijhoff Publishers, 1990.

Clark, Roger S., "The ICC Statute: Protecting the Sovereign Rights of Non-Parties", in Dinah Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*, Ardsley, NY, Transnational Publishers, 2000.

Condorelli, Luigi and Santiago Villalpando, "Referral and Deferral by the Security Council, in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A commentary. Volume I*, Oxford University press, 2002.

Corker, David and David Young, *Abuse of Process and Fairness in Criminal Proceedings*, Butterworths, 2000.

Côté, Luc, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law", *Journal of International Criminal Justice 3(1),* 2005.

Crawford, J., "The ILC's Draft Statute for an International Criminal Tribunal", *American Journal of International Law 88(1)*, 1994.

deGuzman, Margaret McAuliffe, "Article 21: Applicable law", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Baden-Baden, 1999.

Deller, Nicole, *Rule of Power or Rule of Law? An Assessment of U.S. Policies and Action Regarding Security-Related Treaties* (Executive Summary), Institute for Energy and Environmental Research, Apex Press, New York, 2003.

Dempsey, Jack T., "Reasonable Doubt: The Case against the Proposed International Criminal Court", *Cato Policy Analysis No. 311*, 1998.

Dinjens, Els and Warda Henning, *Undue Delay in the case-law of the European Court of Human Rights*, Amsterdam International Law Clinic, 2001.

Duffy, Helen, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court*, Human Rights Watch, New York, 1998.

Dugard, John, "Retrospective Justice: International Law and the South African Model", in A. J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame University Press, 1997.

Dugard, John, "Possible Conflicts of Jurisdiction with Truth Commissions", in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary. Vol. I*, Oxford University press, 2002a.

Dugard, John, *Third report on diplomatic protection*, Report to the ILC, 7 March 2002, UN Doc. A/CN.4/523, 2002b.

Dwarkin, Anthony, "The United States and the International Criminal Court: A Briefing", in *Crimes of War Project*, 15 May 2002, available at http://www.crimesofwar.org/onnews/news-us-icc.html.

Evans, Rhys David, "Amnesties, Pardons and Complementarity: Does the International Criminal Court Have the Tools to End Impunity", *Human Rights Law Commentary 1*, 2005.

Fernández de Gurmendi, Silvia & Friman, Håkan, "The Rules of Procedure and Evidence of the International Criminal Court", Yearbook of International Humanitarian Law, 2000, reprinted in O. Bekou & R. Cryer (eds.), *The International Criminal Court,* Ashgate Darthmouth, 2004.

Fowler, Jerry, "The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations", *Human Rights Brief 6*, 1998, available on http://www.wcl.american.edu/hrbrief/fall98/fowler.html.

Frank, Thomas, "Legitimacy in the International System", *American Journal of International Law 82*, 1988.

Frei, N., "Le Retour du droit en Allemagne. La justice et l'histoire contemporaine après l'Holocauste – un bilan provisoire", in F. Brayard (ed.), *Le genocide des Juifs entre procèc et histoire 1943-2000,* 2000.

Gaeta, Paola, "Is the Practice of 'Self-Referrals' a Sound Start for the ICC?", *Journal of International Criminal Justice 2(4),* 2004.

Galtung, Johan, "The Challenge of peace", *Newsletter for the War-Torn Societies Project* (UNRISD), 2(1-2) July, 1995.

Geslin, Jean Domenique and Annd Kappès-Grangé, "L'Afrique est une tache sur la conscience occidentale", *Jeune Afrique L'intelligent*, 29 October 2003.

Gibson, J. L., "Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa", *American Journal of Political Science 46(3),* 2002.

Giertsen, Hedda, "Straff er ikke noe rensemiddel", in Kristian Andenæs and Knut Papendorf (eds.), *Festskrift til Thomas Mathiesen 70 år* (forthcoming), Pax Forlag, 2003.

Goldstone, Richard, "Le Tribunal des Tragédies", *Politique Internationale 67*, 1995.

Goldstone, Richard, *For Humanity: Reflections of a War Crimes Investigator*, New Haven: Yale University Press, 2000.

Goldstone, Richard, *The Tribunal's Progress*, comment from Johannesburg, May 2001, available at http://groups.yahoo.com/group/balkanhr/message/2220.

Graybill, Lyn S., *Truth and Reconciliation in South Africa*, Lynne Rienner Publishers, Boulder, 2002.

Gropengiesser, Helmut and Jörg Meissner, "Amnesties and the Rome Statute of the International Criminal Court", in *International Criminal Law Review 5*, 2005.

Gross, Richard D., *Psychology: The Science of Mind and Behaviour*, Hodder and Stoughton, London 1992.

Hall, Christopher K., "Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Baden-Baden, 1999.

Hall, Christopher K., *Suggestions concerning International Criminal Court: Prosecutorial Policy and Strategy and External Relations*, 28 March 2003, available at http://www.icc-cpi.int/library/organs/otp/hall.pdf.

Harpster, Emily, "Rwanda: Report on the history of conflict", *U. C. Berkeley War Crimes Studies Center*, undated, available at http://ist-socrates.berkeley.edu/~warcrime/Rwanda/Rwanda_History_of_the_Conflict.htm.

Harvard Research in International Law, "Jurisdiction with Respect to Crime", *American Journal of International Law 29 (Suppl. 1935)*.

Hayner, Pricilla B, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Routledge, New York 2002.

Haynes II, W. J., *Speech at San Francisco World Affairs Council*, 30 May 2002, available at http://www.defenselink.mil/speeches/2002/s20020530-Haynes.html.

Hazan, Pierre, *Justice in a time of war: the true story behind the International Criminal Tribunal for the Former Yugoslavia*, Texas A & M University Press, 2004.

He, Qinglian, "Media Control in China", *China Rights Forum 2004 (1)*.

Hebel, H. A. M. von, J. G. Lammers, & Schukking, J., *Reflections on the International Criminal Court*, T. M. C. Asser Press, The Hague, 1999.

Hellen, Bèatrice Le Fraper du in "Round Table: Prospects for the Functioning of the International Criminal Court", in Mauro Politi and Giuseppe Nesi (eds.) ,*The Rome Statute of the International Criminal Court, A challenge to impunity*, Ashgate Darthmouth 2001.

Higgins, Rosalyn, *Problems and Process: International Law and How We Use It,* Oxford: Clarendon Press, 1994.

Holmes, John T., "The Principle of Complementarity", in Roy S. Lee (ed.), *The Internatinal Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999.

Holmes, John T., "Jurisdiction and Admissibility", in Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence,* Transnational Publishers, 2001.

Holmes, John T., "Complementarity: National Courts versus the ICC", in Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary. Volume I*, Oxford University Press, 2002.

Howse, Robert L. and Ruth Wedgwood, "Where should Saddam Hussein be tried?", in *Legal Affairs: The magazine at the intersection of law and life*, 5 May 2005, available at http://www.legalaffairs.org/webexclusive/debateclub_saddam0705.msp.

Hultman, Tamela, "Peace Is in Sight, But Term Limits a Hindrance, Says Uganda Minister", *AllAfrica Global Media, 2 June 2005*, Washington DC, available at http://allafrica.com/stories/printable/200506020652.html.

Huyse, Luc, "To Punish or to Pardon: A Devil's Choice", in Christopher C. Joyner and M. Cherif Bassiouni (eds.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings Of The Siracusa Conference, 17–21 September 1998*, Nouvelles Études Pénales 14:, Association Internationale De Droit Pénal, 1998.

Jallow, Hassan B., "Prosecutorial Discretion and International Criminal Justice", *Journal of International Criminal Justice 3(1),* 2005.

Joseph, Yav Katshung, *The Relationship Between the International Criminal Court and Truth Commissions: Some Thoughts on How to Build a Bridge Across Retributive and Restorative Justices*, Centre for Human Rights and Democracy Studies, 2005, Lubumbashi, available at http://www.lawandsocietysummerinstitutes.org/workshop06/participants/joseph.pdf.

Kambale, Pascal and Anna Rotman, *The International Criminal Court and Congo: Examining the Possibilities*, Crimes of War Project, 2004, available at http://www.crimesofwar.org/africa-mag/afr_05_kambale.html.

Kaplow, Louis and Steven Shavell, *Fairness versus Welfare*, Harvard University Press, 2002.

Kaufman, I., "The Essence of Judicial Independence", *Columbia Law Rev 80(671)*, 1980.

Kaul, H. P., "Towards a Permanent International Criminal Court – some observations of a negotiator", *Human Rights Law Journal 18(5-8),* 1997.

Kaur, Jaskaran, "A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India", *Harvard Human Rights Journal 15 (Spring)*, 2002.

Kelsen, Hans, *What is Justice?*, University of California Press Berkley and Los Angeles, 1960.

Kleffner, Jann K., "The Impact of complementarity on National Implementation of Substantive Criminal Law", *Journal of International Criminal Justice 1*, 2003.

Kleffner, Jann K., "Complementarity as a Catalyst for Compliance", in Jann K. Kleffner and Gerben Kor (eds.), *Complementary Views on Complementarity*, T.M.C. Asser Press, The Hague, 2006.

Kokott, Juliane, *The Exhaustion of Local remedies*, Interim Report in The International Law Association, 2000.

Kor, Gerben, "Sovereignty in the Dock", in in Jann K. Kleffner and Gerben Kor (eds.), *Complementary Views on Complementarity*, T.M.C. Asser Press, The Hague, 2006.

Koskenniemi, M., "Between Impunity and Show Trials", *Max Planck Yearbook of United Nations Law*, *Yearbook 6*, 2002.

Kress, Claus, "Römisches Statut des Internationalen Strafgerichtshof – Vorbemerkungen", in H. Grützner and P. G. Pötz (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, second edition, 2002.

Kress, Claus, "The Procedural Law of the International Criminal Court in Outline: The Anatomy of a Unique Compromise", *Journal of International Criminal Justice 1*, 2003.

Kress, Claus, "'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy", *Journal of International Criminal Justice 2(4)*, 2004.

Kritz, Neil J., "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights", *Law & Contemporary Problems 59(4)*, 1996.

Linton, Suzannah, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", *Criminal Law Forum 12*, Kluwer Academic Publishers, 2001.

Lobe, Jim, "ICC to Probe Darfur Killings", *Inter Press Service*, 7 June 2005, available at www.allafrica.con/stories/200506070004.html.

Majzub, Diba, "Peace or Justice? Amnesties and the International Criminal Court", *Melbourne Journal of International Law (3)247,* 2002.

Mégret, Frédéric, "Why would States want to join the ICC? A theoretical exploration based on the legal nature of complementarity", in in Jann K. Kleffner and Gerben Kor (eds.), *Complementary Views on Complementarity*, T.M.C. Asser Press, The Hague, 2006.

Mendez, J. E., "In Defense of Transitional Justice", in A. James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, 1997.

Mohacsi, Peter and Péter Polt, "Estimation of War Crimes and Crimes against Humanity According to the Decision of the Constitutional Court of Hungary", *Revue Internationale de Droit Pénal 67*, 1996.

Moore, Matthew, "Military Innocent: UN to blame for Timor Atrocities", *Sydney Morning Herald*, 17 August 2002.

Moravcsik, Andrew, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe", *International Organization 54*, 2000.

Morris, Madeline, "The Trials of Concurrent Jurisdiction: The Case of Rwanda", *Duke Journal of Comparative and International Law 7(2)*, 1997.

Mullerat, Ramón *et al*., *Human rights in the administration of justice*, University of Minnesota Human Rights Library, 2002, available at http://www1.umn.edu/humanrts/monitoring/hradmin.html.

Murphy, Dan, "Reluctant to prosecute", *Christian Science Monitor*, 29 April 2002.

Nader, Laura and Elaine Combs-Schilling, "Restitution in Cross-cultural Perspective", in J. Hudson and B. Gallaway (eds.), *Restitution in Criminal Justice*, Heath Publishing Co., Lexington, Massachusetts, 1976.

Newton, Michael A., "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court", *Military Law Review 167 (March),* 2001.

Nill, David A., "National sovereignty: must it be sacrificed to the International Criminal Court?", *Brigham Young University Journal of Public Law, 14(1)*, 1999.

Niño, Carlos S., "The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina", *Yale Law Journal 100 (8),* 1991.

Ntanda Nsereko, Daniel D., "Preliminary rulings regarding admissibility", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Baden-Baden, 1999.

Ntanda Nsereko, Daniel D., "Prosecutorial Discretion before National Courts and International Tribunals", *Journal of International Criminal Justice 3(1)*, 2005.

Nyanzi, Peter, "Victims of the LRA speak out on treatment of rebels", *International Center for Transitional Justice*, 10 August 2005, available at http://www.ictj.org/en/news/coverage/article/322.html.

Obote-Odora, Alex, "Competence of the International Criminal Tribunal for Rwanda", *Murdoch University Electronic Journal of Law 6(3)*, 1999.

Orentlicher, Diane, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal 100(8)*, 1991.

Pellet, Allain, "Applicable Law", in A. Cassese, P. Gaeta, and John R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary. Volume II*, Oxford University Press, 2002a.

Pellet, Allain, "Settlements of Disputes", in A. Cassese, P. Gaeta, and John R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary. Volume II*, Oxford University Press, 2002b.

Pham *et al.*, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda*, University of California, Berkeley, 2005, available at http://www.ictj.org/images/content/1/2/127.pdf.

Philips, Ruth B., "The International Criminal Court Statute: Jurisdiction and Admissibility", *Criminal Law Forum 10(1)*, 1999.

Pocar, Fausto, "The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community", *Journal of International Criminal Justice 2(2),* 2004.

Politi, Mauro, "The Establishment of an International Criminal Court at the Crossroads: Issues and Prospects after the First Session of the Preparatory Committee", in M. Cherif Bassiouni (ed.), *Novelles Études Pénales 13, The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, 1997.

Politi, Mauro and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court, A challenge to impunity*, Ashgate Darthmouth, 2001.

Popkin, Margaret, "Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective", in USAID Office of Democracy and Governance (ed.), *Guidance for Promoting Judicial Independence and Impartiality – Revised Edition*, U.S. Agency for International Development, Technical Publication Series, 2002.

Ratner, Steven R., "New Democracies, Old Atrocities: An Inquiry in International Law", *Georgetown Law Journal 87*, 1999.

Robinson, Darryl, "The Rome Statute and its impact on National Law", in A. Cassese, P. Gaeta, and John R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary. Volume II*, Oxford University Press, 2002.

Robinson, Darryl, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", *European Journal of International Law 14 (3)*, 2003.

Roht-Arriaza, "Truth Commissions and Amnesties in Latin America: The Second Generation", *Proceedings of the American Society of International Law 92*, 1998.

Roscini, Marco, "Great Expectations: The Implementation of the Rome Statute in Italy", *Journal of International Criminal Justice (5)*, 2007.

Rousseau, Charles E., *Droit international public, Vol. 1*, Recueil Sirey, Paris, 1970.

Safferling, Christoph J. M., *Towards an International Criminal Procedure,* Oxford University Press, 2001.

Sands, Philippe, "After Pinochet: the role of national courts", in Sands (ed.), *From Nuremberg to The Hague, The Future of International Criminal Justice*, Cambridge University Press, 2003.

Schabas, William A., *An Introduction to the International Criminal Court,* second edition, Cambridge University Press, 2004.

Scharf, Michael P., "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", *Law and Contemporary Problems 59(4)*, 1996.

Scharf, Michael P., "Rome Diplomatic Conference for an International Criminal Court", *Asil Insights 1998*, available at http://www.asil.org/insights/ insigh20.htm.

Scharf, M. P., "The Amnesty Exception to the Jurisdiction of the International Criminal Court", *Cornell International Law Journal 32(3)*, 1999.

Scheffer, David J., *An International Criminal Court: The Challenge of Enforcing International Humanitarian Law*, address before the Southern California Working Group on the International Criminal Court, Los Angeles, 26 February 1998, available at http://www.state.gov/www/policy_remarks/1998/980226_ scheffer_hum_law.html.

Scheffer, David J., "Staying the Course with the International Criminal Court", *Cornell International Law Journal 35(1),* 2002.

Scheffer, David J., "Three Memories from the Year of Origin, 1993", *Journal of International Criminal Justice 2(2)*, 2004.

Schense, Jennifer and Piragoff, Donald K., "Commonalities and Differences in the Implementation of the Rome Statute", in Matthias Neuner (ed.), *National Legislation Incorporating International Crimes*, Berlin, 2003.

Schrag, Minna, "The Yugoslav Crimes Tribunal: A Prosecutor's View", *Duke Journal of Comparative and International Law 6(1),* 1995.

Shattuck, John, Paul Simmo and William J. Durch, *Ending Congo's Nightmare, What the US Can Do to Promote Peace in Central Africa*, International Human Rights Law Group, October 2002.

Shaw, Malcolm N., *International Law*, fifth edition, Cambridge University Press, 2003.

Shawcross, Hartley, *International Herald Tribune*, 23 May 1996, p. 8.

Sluiter, G., "To cooperate or not to cooperate?: The case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal", *Leiden Journal of International Law 11(2),* 1998.

Stahn, Carsten, "Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court", *Journal of International Criminal Justice 3(3)*, 2005.

Stigen, Jo, "'What's in the ICC for states?", Martinus Nijhoff, 2008 (forthcoming article).

Stork, "International Criminal Court", *Foreign Policy in Focus 3*, 1998.

Sunga, Lyal S., *Individual Responsibility in International Law for Serious Human Rights Violation*, Martinus Nijhoff Publishers, 1992.

Sylvester, Douglas J., "Myth in Restorative Justice History", *Utah Law Review* , 2003.

Tallgren, Immi, "Ne bis in idem", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Baden-Baden, 1999.

Taylor, Telford, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Little, Brown & Co, 1992.

Teitel, R. G., *Transitional Justice,* Oxford University Press, 2002.

Tomuschat, Chriatian *et al.*, *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification*, 1999, available at http://shr.aaas.org/guatemala/eh/report/english/toc.html.

Turone, Giuliano, "Powers and Duties of the Prosecutor", in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. II*, Oxford University Press, 2002.

Tutu, Desmond, *No future without forgiveness*, Doubleday (Random House), New York, 1999.

Udombana, Nsongurua J., "So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights", *American Journal of International Law 97*, 2003.

United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, London: H.M.S.O., 1947-49.

Van der Merwe, Hugo, *The Truth and Reconciliation Commission and Community Reconciliation: An Analysis of Competing Strategies and Conceptualization*, Centre for the Study of Violence and Reconciliation, 1999, available at http://www.csvr.org.za/papers/paphd0.htm.

Van Zyl, Paul, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission", *Journal of International Affairs 52(2),* 1999.

Villa-Vicencio, Charles and Erik Doxtader (eds.), *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, 2004.

Volqvartz, Josefine, "ICC Under Fire Over Uganda Probe", *Global Policy Forum*, 23 February 2005, available at http://globalpolicy.igc.org/intljustice/icc/2005/0223iccfire.htm.

Williams, Sharon A., "Issues of admissibility", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Baden-Baden, 1999.

Wilmshurst, Elisabeth, "The International Criminal Court: The Role of the Security Council", in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate Darthmouth, 2001.

Zalaquett, Jose, *Report of the Chilean National Commission on Truth and Reconciliation* (translation by Philip E. Berryman), University of Notre Dame Press, 1993.

Zalaquett, Jose, "Conference presentation", in A. Boraine, J. Levy and R. Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa*, IDASA, Cape Town, 1994.

Zappalà, Salvatore, *Human rights in international criminal proceedings*, Oxford University Press, 2003.

Zimmermann, Andreas, "The Creation of a Permanent International Criminal Court", *Max Planck Yearbook of United Nations Law 2*, 1998.

Zimmermann, Andreas, "Prosecuting the Crime of Genocide: The role of national courts, international criminal tribunals and the International Court of Justice", *Nordic Journal of Human Rights 21* (2003).

SELECTED DOCUMENTS

(All websites last visited December 2007.)

Address by Prosecutor Luis Moreno-Ocampo to the third session of the Assembly of States Parties, 6 September 2004, available at http://www.icc-cpi.int/otp/ otp_events.html.

Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the General Assembly of the United Nations, 4. November 1997, available at http://www.un.org/icty/pressreal/SPE971104e.htm.

Address to the United Nations General Assembly by Philippe Kirsch, President of the International Criminal Court, 8 November 2005, available at http://www.icc-cpi.int/presidency/presspeeches.html.

Ad hoc human right court for East Timor is below standard, *The Institute for Policy Research and Advocacy*, 2002, available at http://www.elsam.or.id/txt/english/publications/progrep4_eng2.htm

A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, A/59/565, available at http://www.un.org/secureworld/report.pdf.

An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping, Report of the United Nations Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 – S/24111, available at http://www.smallarmssurvey.org/source_documents/UN%20Documents/Other%20UN%20Documents/A_47/A_47_277.pdf.

Annex to the Three Year Report and the Report on the Prosecutorial Strategy (of 16 September 2006), Office of the Prosecutor, available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html.

Appointment of Special Representative on Impact of Armed Conflict; Would be Recommendation of Draft Approved by Third Committee, 22 November 1996, Press Release GA/SHC/3401, available at http://www.un.org/News/Press/docs/1996/19961122.gash3401.html.

Argentina: The National Commission on Disappeared Persons (CONADEP), the Truth Commissions Project, collaboration between the Program on Negotiation at Harvard Law School *et al.*), 1984, available at http://www.truthcommission.org/commission.php?cid=0&case_x= 0&lang=en.

Building a Comprehensive Peace Strategy for Northern Uganda, International Crisis Group, 23 June 2005. Available at http://www.crisisgroup.org/home/ index.cfm?id=3523.

Building a Future on Peace and Justice, address by Mr. Luis Moreno-Ocampo at Nuremberg, 25 June 2007, available at http://www.icc-cpi.int/otp/otp_events/ LMO_20070624.html.

China and the International Criminal Court, Department of Treaty and Law (MFA), 28 October 2003, available at http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2627/t15473.htm.

Commentary to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, International Law Commission, UN doc. A/56/10, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

Comments of United States to Ad Hoc Committee on the Establishment of an International Criminal Court, discussion paper A/AC.244/1/Add.2 (1995).

Communications received by the Office of the Prosecutor of the ICC, Press Release, 16 July 2003, available at http://www.icc-cpi.int/press/pressreleases/67.html.

Completion Strategy of the International Criminal Tribunal for Rwanda, annex to letter of 30 April 2004 from the President of the ICTR to the Security Council, S/2004/431.

Croatia: Victims and witnesses in war crimes trials must be adequately protected, *Amnesty International*, Press Release, 20 June 2002, available at http://web.amnesty.org/library/Index/ENGEUR640022002?open&of=ENG-HRV.

Declarations and Reservations to the Rome Statute, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp.

Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, UN doc. UNGAR 56/83, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

Draft Regulations of the Office of the Prosecutor, 3 June 2003 (as of November 2007 under revision), available at http://www.icc-cpi.int/otp/otp_docs.html.

Explanation of Vote [of the] Head of Delegation of India, on the Adoption of the Statute of the International Court, 17 July 1998, available at http://www.un.org/icc/speeches/717ind.htm (last visited November 2007).

Fair Trials Manual, Amnesty International USA, available at http://www.amnestyusa.org/International_Justice/Fair_Trials_Manual/page.do?id=1104744&n1=3&n2=35&n3=843.

Fifth report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSCR 1593, 7 June 2007, available at http://www.icc-cpi.int/otp/otp_events.html.

Final Report of the Truth and Reconciliation Commission, Cape Town, TRC, 1998.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing against the Federal Republic of Yugoslavia, *International Legal Materials 39*, p. 1257, available at http://www.un.org/icty/pressreal/ nato061300.htm.

First Public Hearing of the Office of the Prosecutor, 17 - 18 June 2003, available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph1.html.

Fourth report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSCR 1593, 14 December 2006, available at http://www.icc-cpi.int/otp/otp_events.html.

Human rights field operation in Rwanda, 19 February 1998, Report of the United Nations High Commissioner for Human Rights, E/CN.4/1998/61, available at http://daccess-ods.un.org/TMP/2201788.html.

Human Rights Watch Policy Paper: The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute, Human Rights Watch, June 2005, available at http://hrw.org/campaigns/icc/docs/ij070505.pdf.

Indonesia: East Timor trials deliver neither truth nor justice, Amnesty international Press Release15 August 2002, available at http://www.amnesty.org/en/alfresco_asset/59d187b8-a438-11dc-bac9-0158df32ab50/asa211212002en.html.

Indonesia: Implications of the East Timor Trials, International Crisis Group, 8 May 2002, available at http://se2.isn.ch/serviceengine/FileContent?serviceID=10&fileid=62B701FD-5B10-FC39-8715-14057C59549D&lng=en.

Informal meeting of Legal Advisors of Ministries of Foreign Affairs, Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, 24 October 2005, available at http://www.icc-cpi.int/otp/otp_events.html.

Knowledge and Justice after the Truth and Reconciliation Commission, conversation with Thomas Kendall at Bard 24 April 2000, transcript available at http://www.bard.edu/hrp/resource_pdfs/thomasandboraine.transcript.pdf.

Letter dated 17 May 1993 from the Deputy Prime Minister and Minister for Foreign Affairs of the Federal Republic of Yugoslavia to the Secretary-General, annexed to A/48/170 and S/25801.

'No basis' to investigate NATO for bombing of Yugoslavia, ICTY Prosecutor, Press Release, 2 June 2000, available at http://www.un.org/peace/kosovo/news/ 99/may00_5.htm.

Official Records of the General Assembly, Twenty-third Session (1968), Annexes, vol. I, document A/7250.

Official Records of the General Assembly, Twenty-ninth Session (1974), Annexes, agenda item 86, document A/9890.

Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice (2005), available at http://web.amnesty.org/library/Index/ENGIOR400232005?open&of=ENG-385.

OTP – Election of the Prosecutor, Statement by Mr. Moreno Ocampo, Press Release, 2 May 2003, available at http://www.icc-cpi.int/press/pressreleases/5.html.

Paper on some policy issues before the Office of the Prosecutor, Office of the Prosecutor, September 2003, available at http://www.icc-cpi.int/otp/ otp_policy.html.

Policy Paper on the Interests of Justice, Office of the Prosecutor, September 2007, available at http://www.icc-cpi.int/otp/otp_docs.html.

Prepared Statement of David J. Scheffer before the Senate Committee on Foreign Relations, 23 July 1998, available at http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind9807&L=twatch-l&D=1&F=P&O=D&P=53201.

President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, Press Release, 29 January 2004, available at http://www.icc-cpi.int/press/pressreleases/16.html.

Princeton Principles on Universal Jurisdiction, the Princeton Project on Universal Jurisdiction, adopted 25-27 January 2001, available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

Progress Report of Spain (2001): The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court, Strasbourg, 9 August 2001, CE doc. Consult/ICC (2001).

Progress Report of Spain (2006): Fourth Consultation on the Implications for Council of Europe member States of the Ratification of the Rome Statute of the International Criminal Court, Strasbourg 14 September 2006, CE doc. 4th Consult/ICC (2006).

Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, Press Release, 29 July 2004, available at http://www.icc-cpi.int/press/pressreleases/33.html.

Prosecutor receives referral concerning Central African Republic, Press Release, 7 January 2005, available at http://www.icc-cpi.int/press/pressreleases/87.html.

Prosecutor receives referral of the situation in the Democratic Republic of Congo, Press Release, 19 April 2004, available at http://www.icc-cpi.int/press/ pressreleases/19.html.

Prosecutor's Report on the NATO Bombing Campaign, 13 June 2000, PR/P.I.S.510-e, available at http://www.un.org/icty/pressreal/p510-e.htm.

Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to member states on independence, efficiency and role of judges, adopted 13 October 1994, available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/ Conv_Rec_Res/Recommendation(94)12.asp.

Referrals and Communications, Annex to the "Paper on some policy issues before the Office of the Prosecutor", September 2003, available at http://www.icc-cpi.int/otp/otp_docs.html.

Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 1995, A/50/22.

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (pursuant to UNSCR 1564 of 18 September 2004), Geneva, 25 Januar 2005, available at www.un.org/News/dh/sudan/com_inq_darfur.pdf.

Report of the International Criminal Court for 2004, 1 August 2005, A/60/177, available at http://www.icc-cpi.int/press/pressreleases/120.html.

Report of the International Law Commission on its thirty-second session (1980), A/35/10.

Report of the International Law Commission on its forty-eighth session (1996), A/51/10.

Report of the International Law Commission on its fifty-eight session (2006), A/61/10.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, 1996, A/51/22.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, 1998, A/CONF.183/2/Add.1.

Report of the Prosecutor of the ICC to the Second Assembly of States Parties, 8 September 2003, available at http://www.icc-cpi.int/otp/otp_events.html.

Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593, 29 June 2005, available at http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf.

Report of Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915.

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, available at http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm.

Report of the United Nations Truth Commission on El Salvador, S/25500 (1993).

Report of the 1953 Committee on International Criminal Jurisdiction, General Assembly official Records, Ninth Session, Supplement No. 12, A/2645 (1954).

Report on Prosecutorial Strategy, Office of the Prosecutor, 14 September 2006, available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2. html.

Report on the activities performed during the first three years (June 2003 – June 2006), Office of the Prosecutor, 16 September 2006, available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html.

Report on the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13.

Second Public Hearing of the Office of the Prosecutor, 25-26 September and 17-18 October 2006, available at http://www.icc-cpi.int/organs/otp/otp_public_ hearing/otp_ph2.html.

Second report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSCR 1593, 13 December 2005, available at http://www.icc-cpi.int/otp/otp_events.html.

Spanish Progress Report on ratification and implementation of the Rome Statute to the Council of Europe (2001), to the Council of Europe. http://www.coe.int.

Statement by the Chief Prosecutor on the Uganda Arrest Warrant, 14 October 2005, available at http://www.icc-cpi.int/press/pressreleases/114.html.

Statement of the President of the Security Council, 15 November 1993, S/26747 (and S/INF/49).

Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps, 12 February 2004, available at http://www.icc-cpi.int/otp/otp_events.html.

Statement of the US delegation, Article 11bis – Preliminary Rulings Regarding Admissibility, 3 April 1998, A/AC.249/1998/WG.3/DP.2.

Statements by ICC Chief Prosecutor and the visiting Delegation of Acholi leaders from northern Uganda, 18 March 2005, available at http://www.icc-cpi.int/press/pressreleases/96.html.

Subpoena was delivered to P. W. Botha at 1230 PM, statement by A. Boraine, Deputy Chairperson of the TRC, 20 November 1997, available at http://www.polity.org.za/html/govdocs/pr/1997/pr1120b.html?rebookmark=1.

Sudan Court for crimes in Darfur lacks credibility, Amnesty International, 15 June 2005, available at http://www.scoop.co.nz/stories/WO0506/S00215.htm.

Sudanese Darfur crimes court starts work, rebels cry foul, *Sudan Tribune*, 14 June 2005, available at http://www.sudantribune.com/spip.php?article10139.

Sudan not trying Darfur war crimes: UN official, *Reuters*, 23 October 2005, available at http://darfurdaily.blogspot.com/2005/10/sudan-not-trying-darfur-war-crimes-un.html.

Sudan warns ICC of probe into alleged Darfur war crimes, Xinhuanet, 6 June 2005, available at http://news.xinhuanet.com/english/2005-06/06/content_ 3052667.htm.

Summary of recommendations received during the first Public Hearing of the Office of the Prosecutor, 17-18 June 2003, available at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph1.html.

The International Criminal Court: Making the right choices – part V, Amnesty International, 1998, available at http://web.amnesty.org/library/index/ engior400101998?open&of=eng-385.

The Office of the Prosecutor opens its first investigation, Press Release, 23 June 2004, available at http://www.icc-cpi.int/press/pressreleases/26.html.

The rule of law and transitional justice in conflict and post-conflict societies, Report of the United Nations Secretary General, 23 August 2004, S/2004/616, available at United Nations Secretary General, 23 August 2004, S/2004/616, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2004/616&Lang=E&Area=UNDOC.

Third report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSCR 1593, 14 June 2006, available at http://www.icc-cpi.int/otp/otp_events.html.

Truth and Reconciliation Commission of South Africa: Report - Volume Six, March 2006, Cape Town, available at http://www.info.gov.za/otherdocs/2003/trc/rep.pdf.

Uganda: Acholi leaders in The Hague to meet ICC over LRA probe, interview with United Nations Integrated Regional Information Network, 16 March 2005, available at http://www.irinnews.org/report.aspx?reportid=53434.

Uganda: Waiting for Elusive Peace in the War-ravaged North, Africa News Service, 21 June 2005, available at http://www.gmu.edu/departments/icar/ICC/Uganda.pdf.

Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (the Kraków Resolution), Institute of International Law, Kraków, 26 August 2005, available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

UN Press Release L/2771: Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions, 1 April 1996, available at http://www.un.org/news/Press/docs/1996/19960401.l2771.html.

UN Press Release L/2772: Jurisdiction of Proposed International Criminal Court Discussed in Preparatory Committee on its Establishment, 2 April 1996, available at http://www.un.org/news/Press/docs/1996/19960402.l2772.html.

UN Press Release L/2773: Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions, 2 April 1996, available at http://www.un.org/News/Press/docs/1996/19960402.l2773.html.

Universal Jurisdiction: The duty of states to enact and enforce legislation, Amnesty International, 2001, available at http://web.amnesty.org/pages/legal_memorandum.

UN Basic Principles on the Independence of the Judiciary, adopted at the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August to 6 September 1985, endorsed by General Assembly resolutions 40/32 and 40/146, available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm.

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by A/RES/40/34, 29 November 2985, available at http://www.unodc.org/pdf/compendium/compendium_2006_part_03_02.pdf.

UN Guidelines on the Role of Prosecutors, Eight UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August – 7 September 1990, A/CONF.144/28/Rev.1, available at http://www.ohchr.org/english/law/prosecutors.htm.

Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, addendum to Promotion and Protection of Human Rights, Diane Orentlicher, E/CN.4/2005/102/Add.1, available at http://daccess-ods.un.org/TMP/5376763.html.

Yearbook of the International Law Commission 1951, Vol. II, A/1858.

Yearbook of the International Law Commission 1976, Vol. II, A/CN.4/1976/Add.1.

Yearbook of the International Law Commission 1983, Vol. II, A/CN.4/SER.A/1983/Add.1.

Yearbook of the International Law Commission 1988, Vol. II, A/CN.4/SER.A/1988/Add.1.

Yearbook of the International Law Commission 1990, Vol. I, A/CN.4/SER.A/1990.

Yearbook of the International Law Commission 1990, Vol. II, A/CN.4/SER.A/1990/Add.1.

Yearbook of the International Law Commission 1991, Vol. I, A/CN.4/SER.A/1991.

Yearbook of the International Law Commission 1992, Vol. I, A/CN.4/SER.A/1992.

Yearbook of the International Law Commission 1992, Vol. II, A/CN.4/SER.A/1992/Add.1.

Yearbook of the International Law Commission 1993, Vol. II, A/CN.4/SER.A/1993/Add.1.

Yearbook of the International Law Commission 1994, Vol. I, A/CN.4/SER.A/1994.

Yearbook of the International Law Commission 1994, Vol. II, A/CN.4/SER.A/1994/Add.1.

(The yearbooks of the International Law Commission are available at http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm.)

TABLE OF CASES

(All websites last visited December 2007.)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Amnesty International and others v. Sudan, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (1999).

Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Comm. No. 148/96 (1999).

Dawda Jawara v. The Gambia, Comm. Nos. 147/95 and 149/96 (2000).

Malawi African Association and others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

APPELLATE BODY (WTO)

United States—Standards for Reformulated and Conventional Gasoline, Appellate Body, 20 March 1996, AB-1996-1, WT/DS2/AB/R.

COMMISSION ON HUMAN RIGHTS

Report on the mission to Guatemala; Addendum to: "Civil and Political Rights, Including Questions of Independence of the Judiciary, Administration of Justice, Impunity"; Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Coomaraswamy (submitted in accordance with Commission Resolution 1999/31), 6 January 2000; E/CN.4/2000/61/Add.1.

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination (Rwanda), CERD/C/304/Add.97 (2001).

DILI DISTRICT COURT

Prosecutor v. Joni Marquez et al., Case No. 09/2000, Judgement of 11 December 2001, available at http://www.jsmp.minihub.org/judgmentspdf/LPEnglish.pdf.

EUROPEAN COURT OF HUMAN RIGHTS

Banković and others v. Belgium and 16 Other Contracting States, Judgement of 12 December 2001, Appl. 52207/99, ECHR 2001-XII.

Bunkate v. The Netherlands, Judgement 26 May 1993, Appl. 13645/88, Series A, No. 248-B.

Civet v. France, Judgement of 28 September 1999, Appl. 29340/95, ECHR 1999-VI.

Dika v. The Former Yugoslav Republic of Macedonia, Judgement 31. May 2007, Appl. 13270/02.

Fey v. Austria, Judgement of 24 February 1993, Appl. 14396/88, Ser. A No. 255.

Findlay v. The United Kingdom, Judgement of 25 February 1997, Appl. 22107/93, *Reports* 1997-I.

Golder v. The United Kingdom, Judgement of 21 February 1975, Appl. 4451/70, Ser. A No. 18.

Johnston and others v. Ireland, Judgement of 18 December 1986, Appl. 9697/82, Ser. A No. 112.

Jordan v. The United Kingdom, Judgement of 4 May 2001, Appl. 24746/94, 37 ECHR 2001-III.

Kemmache v. France, Judgement of 27 November 1991, Appl. 12325/86, 14992/89, Series A, No. 218,

Mansur v. Turkey, Judgement 8 June 1995, Appl. 16026/90, Series A, No. 319-B.

Mitap and Müftüolu v. Turkey, Judgement of 25 March 1996, Appl. 15530/89 and 15531/89, Reports 1996-II.

Moreira de Azevedo v. Portugal, Judgement of 23 October 1990, Appl. 11296/84, Ser. A No. 189.

Sramek v. Austria, Judgement of 22 October 1984, Appl. 8790/79, Ser. A No. 84.

Van Oosterwijk v. Belgium, Judgement of 6 November 1980, Appl. 7654/76, Ser. A No. 40.

Yagci and Sargin v. Turkey, Judgment of 8 June 1995, Apppl. 16419/90, Series A, No. 319-A

HUMAN RIGHTS COMMITTEE

A. P. v. Italy, Comm. No. 204/1986, UN Doc. CCPR/C/OP/2 (1986).

Champagnie et al. v. Jamaica, Comm. No. 445/1991, UN Doc. CCPR/C/51/D/445/1991.

Concluding observations of the Human Rights Committee 3 April 1996 (Zambia), Consideration of reports submitted by States Parties under article 40 of the Covenant, CCPR/C/79/Add.62.

Concluding observations of the Human Rights Committee 18 November 1996 (Peru), Consideration of reports submitted by States Parties under article 40 of the Covenant, CCPR/C/79/Add.67.

Concluding observations of the Human Rights Committee 1 May 1997 (Bolivia), Consideration of reports submitted by States Parties under article 40 of the Covenant, CCPR/C/79/Add.74.

Concluding observations of the Human Rights Committee 5 May 1997 (Colombia), Consideration of reports submitted by States Parties under article 40 of the Covenant, CCPR/C/79/Add.76.

Concluding observations of the Human Rights Committee 19 November 1997 (Sudan), Consideration of reports submitted by States Parties under article 40 of the Covenant, CCPR/C/79/Add.85.

Concluding observations of the Human Rights Committee 27 July 1999 (Cambodia), Consideration of reports submitted by States Parties under article 40 of the Covenant, CCPR/C/79/Add.108.

Concluding observations of the Human Rights Committee 27 August 2001 (Guatemala), Considerations of reports submitted by States Parties under Article 40 of the Covenant, CCPR/CO/72/GTM/Add.1.

Concluding observations of the Human Rights Committee 24 July 2002 (Kyrgyzstan), Consideration of reports submitted by States Parties under article 40 of the Covenant, CCPR/CO/69/KGZ (2000).

Concluding observations of the Human Rights Committee 19 September 2003 (Guatemala), Considerations of reports submitted by States Parties under Article 40 of the Covenant, CCPR/CO/72/GTM/Add.1.

Del Cid Gómez v. Panama, Comm. No. 473/1991, UN Doc. CCPR/C/57/1 (1996).

Dwayne Hylton v. Jamaica, Comm. No. 407/1990, UN Doc. CCPR/C/51/D/407/1990.

Fillastre, Bizouarn v. Bolivia, Comm. No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988.

General Comment 13 (1984): *Equality before the courts and the right to a fair and public hearing by an independent court established by law*, HRI/GEN/1/Rev.6.

General Comment 31 (2004): Nature of the general obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para 2.

Karttunen v. Finland, Comm. No. 387/1989, UN Doc. CCPR/C/46/D/387/1989.

Lubuto v. Zambia, Comm. No. 390/1990 Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1.

Richards and Walker v. Jamaica, Communication No. 639/1995, U.N. Doc. CCPR/C/60/D/639/1995.

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, 5 November 1992; Annex to: Communication No 387/1989, CCPR/C/46/D/387/1989.

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, 9 January 1998; Annex to: Communication No 577/1994, CCPR/C/61/D/577/1994.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Cesar Chaparro Nivia and Vladimir Hincapie Galeano v. Colombia, Case 11.026, Report No. 30/99, OEA/Ser.L/V/II.95 Doc. 7 rev. at 83 (1998).

Heliodoro Portugal v. Panama, Case 357/01, Report No. 72/02 (2002).

Jose Milton Canñas Cano et al. v. Colombia, Case 042/2002, Report No. 75/03 (2003).

Jose Ruben Rivera v. El Salvador, Case 880/01, Report No. 53/05 (2005).

Las Palmeras Case, Judgment on Preliminary Objections of 4 February 2000, Inter-Am. Ct. H.R. (Ser. C) No. 67 (2000).

Maria Ramirez and Celerino Almaraz v. Mexico, Case 12.116, Report No. 9/03 (2003).

Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (1997).

Vaca Narvaja et al. v. Argentina, Case 10.288, 10.310, 10.436, 10.496, 10.631, 10.771 Report No. 1/93, OEA/Ser.L/V/II.83 Doc. 14 at 35 (1993).

INTER-AMERICAN COURT OF HUMAN RIGHTS

Chumbipuma Aguirre et al. v. Peru (Barios Altos Case), Judgement of 14 March 2001, Ser. C No. 75.

Durand and Ugarte v Peru, Preliminary Objections, Judgement of 28 May 1999, Ser. C No. 50.

Manuel Aguirre Roca et al. v. Peru, Decision of 5 May 1998, Case 11.760, Report No. 35/98.

Suárez Rosero v. Ecuador, Judgement of 12 November 1997, Series C No. 35.

Velásquez Rodríguez v. Honduras, Judgement of 29 July 1988, Ser. C No. 4.

INTERNATIONAL COURT OF JUSTICE

Avena and Other Mexican Nationals (Mexico v. The United States of America), Judgement of 31 May 2004, ICJ Reports 2004, p. 128.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement of 14 February 2002, ICJ Reports 2002, p.18.

Barcelona Traction, Light and Power Company Ltd. (The United Kingdom v. Spain), Judgement of 24 July 1964, preliminary objections, ICJ Reports 1964, p. 6.

Certain Expenses of the UN, Advisory opinion of 20 July 1962, ICJ Reports 1962, p. 151.

Difference Relating to Immunity from Legal process of a Special Rapporteur of the Commission on Human Rights, Advisory opinion of 29 April 1999, ICJ Reports 1999, p. 62.

Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), Judgement of 25 September 1997, ICJ Reports 1997, p. 7.

Interhandel Case (Switzerland v. United States of America), Preliminary Objections, 21 March 1959, ICJ Reports 1959, p. 6.

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgement of 11 June 1998 regarding preliminary objections, ICJ Reports 1998, p. 275.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory opinion of 9 July 2004.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory opinion of 8 July 1996, ICJ Reports 1996, p. 226.

Lockerbie Case (Libya v. United States of America), Order of 14 April 1992 concerning the interpretation and application of the 1971 Montreal Convention, ICJ Reports 1992, p. 3.

Reparations Case, Advisory opinion of 11 April 1949, ICJ Reports 1949, p. 174.

Second Admissions Case, Advisory opinion of 3 March 1950, ICJ Reports 1950, p. 4.

Territorial Dispute (Libya v. Chad), Judgement of 3 February 1994, ICJ Reports 1994, p. 6.

INTERNATIONAL CRIMINAL COURT

Decision assigning the situation in Uganda to Pre-Trial Chamber II, ICC-02/04, Decision of the Presidency, 5 July 2004.

Situation in Democratic Republic of Congo, ICC-01/04, Decision of Pre-Trial Chamber I, 9 November 2005.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Prosecutor v. Akayesu, ICTR-96-4-T, Judgement of Trial Chamber I, 2 September 1998.

Prosecutor v. Bagaragaza, ICTR-2005-86-R11*bis*, Decision of the Trial Chamber, 19 May 2006.

Prosecutor v. Bagaragaza, ICTR-2005-86-R11*bis*, Decision of the Appeals Chamber, 30 August 2006.

Prosecutor v. Ndindiliyimana, ICTR-2000-56-I, Decision of the Trial Chamber on urgent oral motion for a stay of the indictment, 26 March 2004.

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. Blaskic, IT-95-14, Decision of the Appeals Chamber on the admissibility of the request for review, 29 July 1997.

Prosecutor v. Blaskic, IT-95-14, Decision of the Appeals Chamber on the request for review, 29 October 1997.

Prosecutor v. Delalic et al., IT-96-21-A, Judgement of Appeals Chamber, 20 February 2001.

Prosecutor v. Erdemovic, IT-96-22-T, Sentencing Judgement of the Trial Chamber, 29 November 1996.

Prosecutor v. Erdemovic, IT-96-22-A, Judgement of the Appeals Chamber, Joint separate opinion of Judge McDonald and Judge Vorah, 7 October 1997.

Prosecutor v. Furundzija, II-95-17/1-T, Judgement of the Trial Chamber, 10 December 1998.

Prosecutor v. Karadzic, IT-95-5/18, Amended indictment, 28 April 2000.

Prosecutor v. Kupreskic et al., IT-95-16-T, Judgement of the Trial Chamber, 14 January 2000.

Prosecutor v. Mladic, IT-95-5/18-I, Amended indictment, 11 October 2002.

Prosecutor v. Tadic, IT-95-16-T, Decision of the Appeals Chamber on the Defence motion on interlocutory appeal, 2 October 1995.

INTERNATIONAL MILITARY TRIBUNAL

Trial of the Major War Criminals, available at http://www.holocaust-history.org/works/imt/01/htm/t147.htm.

PERMANENT COURT OF INTERNATIONAL JUSTICE

Certain German Interests in Polish Upper Silesia, merits, P.C.I.J., Series A, No. 7 (1926).

SS Lotus (France v. Turkey), Judgement, P.C.I.J., Series A, No. 10 (1927).

SELECTED NATIONAL CASES

A (FC) and others (FC) v. Secretary of State for the Home Department (2004), House of Lords, Session 2004-05 [2004] UKHL56.

Attorney General of Israel v. Eichmann, Judgement of the Supreme Court of Israel of 29 May 1962, International Law Reports 36, p. 277 et seq.

Azanian Peoples Organization (AZAPO) and others v. President of the Republic of South Africa and others, The Constitutional court of South Africa, 1996 (4) SA.

Demjanjuk v. Petrovsky, United States, 776 F. 2d (6th Cir. 1985).

Green v. United States (1957), 355 US 184.

Karl-Hans Hermann Klinge, Judgement of the Supreme Court of Norway of 27 February 1946, Rt. 1946, p. 198. (English translation in: Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume III, London, 1948.)

Mushikiwabo and others v. Barayagwiza (USA, 1997), International Law Reports 107, p. 457.

R. v. Anthony Sawoniuk (England, 2002), 2 Cr. App. R. 220 (quoted at http://www.icrc.org/ihl-nat.nsf/0/95d2c9d10c739213c1256ba4005001fb).

R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet, No. 1 (1998), England (House of Lords), 4 All ER 897.

R. v. Inland Revenue Commissioners, ex parte Mead and Cook (1993), House of Lords, 1 All ER 772.

R. v. Moore, Judgement of the High Court of 17 September 1999, Palmerston North Registry, New Zealand, T31/99 (unreported).

R. v. Sikumba, South Africa Law Reports 3(125), 1955.

United States v. Noriega (1990), 746 F. Supp. (1506), S.D. Fla.

Valiente v. The Queen, Canada (1985), 2.S.C.R, available at www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.htm.

SPECIAL COURT FOR SIERRA LEONE

Prosecutor v. Kallon et al., SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E), SCSL-2004-16-AR72(E), Decision of the Appeals Chamber on challenge to jurisdiction: Lomé Accord Amnesty, 13 March 2004.

Prosecutor v. Taylor, SCSL-2003-01-I, Decision of Appeals Chamber on immunity from jurisdiction, 31 May 2004.

UNITED STATES MILITARY TRIBUNAL

United States v. Wilhelm List et al., Judgment of 19 February 1948, reproduced in United Nations War Crimes Commission 1947-49, Vol. VIII, Case No. 47.

UNITED NATIONS REPORTS OF INTERNATIONAL ARBITRAL AWARDS

Currie Case (1954), UNRIAA, Vol. XIV, p. 21.

Robert E. Brown (United States) v. Great Britain (1926), UNRIAA, Vol. VI, p. 120.

The Raoul Wallenberg Institute Human Rights Library

1. Göran Melander (ed.): The Raoul Wallenberg Institute Compilation of Human Rights Instruments
   ISBN 0 79233 646 1
2. U. Oji Umozurike: The African Charter on Human and Peoples' Rights
   ISBN 90-411-0291-4
3. Bertrand G. Ramcharan (ed.): The Principle of Legality in International Human Rights Institutions; Selected Legal Opinions
   ISBN 90 411 0299 X
4. Zelim Skurbaty: As If Peoples Mattered; Critical Appraisal of 'Peoples' and `Minorities' from the International Human Rights Perspective and Beyond
   ISBN 90 411 1342 8
5. Gudmundur Alfredsson and Rolf Ring (eds.): The Inspection Panel of the World Bank; A Different Complaints Procedure
   ISBN 90 411 1390 8
6. Gregor Noll (ed.): Negotiating Asylum; The EU Acquis, Extraterritorial Protection and the Common Market of Deflection
   ISBN 90 411 1431 9
7. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred de Zayas (eds.): International Human Rights Monitoring Mechanisms; Essays in Honour of Jakob Th. Möller
   ISBN 90 411 1445 9
8. Gudmundur Alfredsson and Peter Macalister-Smith (eds.): The Land Beyond; Collected Essays on Refugee Law and Policy
   ISBN 90 411 1493 9
9. Hans-Otto Sano, Gudmundur Alfredsson and Robin Clapp (eds.): Human Rights and Good Governance; Building Bridges
   ISBN 90 411 1776 8
10. Gudmundur Alfredsson and Maria Stavropoulou (eds.): Justice Pending: Indigenous Peoples and Other Good Causes; Essays in Honour of Erica-Irene A. Daes
    ISBN 90 411 1876 4
11. Göran Bexell and Dan-Erik Andersson (eds.): Universal Ethics; Perspectives and Proposals from Scandinavian Scholars
    ISBN 90 411 1933 7
12. Hans Göran Franck, Revised and edited by William Schabas: The Barbaric Punishment; Abolishing the Death Penalty
    ISBN 90 411 2151 X
13. Radu Mares (ed.): Business and Human Rights; A Compilation of Documents
    ISBN 90 04 13656 8
14. Manfred Nowak: Introduction to the International Human Rights Regime
    ISBN 90 04 13658 4 (Hb)
    ISBN 90 04 13672 X (Pb)
15. Göran Melander, Gudmundur Alfredsson and Leif Holmström (eds.): The Raoul Wallenberg Institute Compilation of Human Rights Instruments; Second Revised Edition
    ISBN 90 04 13857 9
16. Gregor Noll (ed.): Proof, Evidentiary Assessment and Credibility in Asylum Procedures
    ISBN 90 04 14065 4
17. Ineta Ziemele (ed.): Reservations to Human Rights Treaties and the Vienna Convention Regime; Conflict, Harmony or Reconciliation
    ISBN 90 04 14064 6
18. Nisuke Ando (ed.), on behalf of the Committee: Towards Implementing Universal Human Rights; Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee
    ISBN 90 04 14078 6

19. Zelim A. Skurbaty (ed.): Beyond a One-Dimensional State: An Emerging Right to Autonomy?
ISBN 90 04 14204 5
20. Joshua Castellino and Niamh Walsh (eds.): International Law and Indigenous Peoples
ISBN 90 04 14336 X
21. Herdís Thorgeirsdóttir: Journalism worthy of the Name Freedom within the Press under Article 10 of the European Convention on Human Rights
ISBN 90 04 14528 1
22. Bertrand G. Ramcharan (ed.): Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials
ISBN 90 04 14562 1
23. Gro Nystuen: Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement
ISBN 90 04 14652 0
24. Maria Deanna Santos: Human Rights And Migrant Domestic Work – A Comparative Analysis of The Socio-Legal Status of Filipina Migrant Domestic Workers in Canada and Hong Kong
ISBN 90 04 14527 3
25. Ragnhildur Helgadóttir: The Influence of American Theories of Judicial Review on Nordic Constitutional Law
ISBN 90 04 15002 1
26. Jonas Grimheden and Rolf Ring (eds.): Human Rights Law: From Dissemination to Application
Essays in Honour of Göran Melander
ISBN-13 978 9004151 81 9
ISBN-10 90 04 15181 8
27. Brian Burdekin, assisted by Jason Naum: National Human Rights Institutions in the Asia-Pacific Region
ISBN-13 978 9004153 36 3
ISBN-10 90 04 15336 5
28. Jonathan Power: Conundrums of Humanity
The Quest for Global Justice
ISBN-13 978 9004155 13 8
ISBN-10 978 9004155 13 8
29. Nina-Louisa Arold: The Legal Culture of the European Court of Human Rights
ISBN 978 90 04 16067 5
30. Hans Morten Haugen: The Right to Food and the TRIPS Agreement
With a Particular Emphasis on Developing Countries' Measures for Food Production and Distribution
ISBN 978 90 04 16184 9
31. Joakim Nerglius (ed.): Constitutionalism – New Challenges: European Law from a Nordic Perspective
ISBN 978 90 04 16348 5
32. Stephen Kabera Karanja: The Schengen Information System and Border Control Co-operation: A Transparency and Proportionality Evaluation
ISBN 978 90 04 16223 5
33. Radu Mares: The Dynamics of Corporate Social Responsibilities
ISBN 978 90 04 16392 8