

The Principle of Complementarity

**Admissibility to the
International Criminal Court**

Candidate number: 7

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Deadline for submission: 07.07.06

Number of words: ca 12 000

Date of submission: 05.07.06



"In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished."

-- Kofi Annan, United Nations Secretary-General

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Abbreviations:

ICC : International Criminal Court

The Statute : The Rome Statute of the International Criminal Court

ICTY : International Criminal Tribunal for the Former Yugoslavia

ICTR : International Criminal Tribunal for Rwanda

DRC : Democratic Republic of Congo

LRA : Lord's Resistance Army

1. Introduction

1.1. A brief overview

The ICC is the very first permanent, treaty based, international criminal court, established to remedy the reign of impunity with regard to the most heinous international crimes. “The Rome Statute of the International Criminal Court” (The Statute) entered into force 1 July 2002, and as of today, hundred States are parties to the Statute.¹

In order to satisfy the diverse and sometimes contradicting interests of the states involved in the process, in particular regarding state sovereignty, the principle of complementarity was adopted. This was a result of several compromises States had to pledge in order to reach an agreement.

The ICC is in this way different from the two ad hoc international tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), who have primacy over national authorities.²

The principle of complementarity addresses the relationship between the ICC and the states’ national justice systems. In the preamble of the Statute and in article 1, it is stated that the ICC “shall be complementary to national criminal jurisdiction”.

This means that the court plays a subsidiary role, and is only meant to act when domestic authorities fail to take the necessary steps in the investigation and prosecution

¹ See: www.icc-cpi.int/asp/statesparties.html

² The primacy also includes courts, investigating authorities, prosecution and international co-operation in criminal matters, see: Tallgren, Immi; “*Completing the International Legal Order*”, Nord. J. Int’l L. 67 (1998)107 et seq.

of the crimes mentioned in art 5 of the Statute.³ Phillippe Kirsch has expressed it this way: “It is the essence of the principle of complementarity that if a national jurisdiction system functions properly, there is no reason for the International Criminal Court to assume jurisdiction.”⁴

Complementarity as such has not been defined in the Statute, but article 17 establishes the substantive rules that constitute the principle of complementarity.

1.2. The structure of the thesis

This paper aims at giving an examination of the substantive issues of admissibility, and clarifying whether the conditions set forth in article 17 is an effective instrument in fighting impunity for the gravest international crimes or not.

In order to do so I will analyze the wording of article 17, and look at the cases that today are under investigation by the court.

By doing so I will attempt to determine if the process of assessment of admissibility to the International Criminal Court is too lengthy, and if it is, what eventually could be done to remedy it. I will also discuss whether the complementary nature of the International Criminal Court gives it the flavour of an appellate body, whether a court run by the principle of primacy better serve the purpose, namely fighting impunity, and if there are any lacunas in article 17.

The structure of the work is as follows: The second chapter deals with the main issues of admissibility under art 17; “genuinely”, “unwillingness” and “inability”, including the “non bis in idem” principle and the threshold of “sufficient gravity”. I will also

³ See the Statute article 5: genocide, crimes against humanity, war crimes and aggression.

⁴ Kirsch, Phillippe; keynote address, Cornell International Law Journal (1999) 438

compare complementarity with primacy, and look at complementarity in relationship to truth- and reconciliation commissions.

A brief overview of situations referred to the court, and situations and complaints refused or under consideration will be given in chapter 3, in order to see how article 27 works in practice.

Finally, chapter four will be a summing up of the thesis, and try to give a conclusion as to whether the conditions of admissibility in art 17 constitute an effective remedy against impunity.

1.3. Sources and Methodology

Sources used in this thesis will be both legal and factual.

The legal sources are mainly the “Rome Statute of the International Criminal Court”, as well as charters, resolutions, customs etc. Other sources are legal literature by distinguished scholars, of which many have worked closely with the making of the Statute in the preparatory committee, at the Rome conference, in work groups etc, and some are by now judges in the International Criminal Court. Information has also been collected from the web sites of various non-governmental organizations working with Human Rights and humanitarian law.

As for the methodology of this thesis, it is analysis according to the 1969 Vienna Convention on the law of Treaties. It codifies a general norm of interpretation of treaties, and will be used to interpret the Statute of the International Criminal Court. In accordance with article 31 (1) in the Vienna Convention, I will interpret the statute in accordance with the ordinary meaning of the terms used and in the light of its object and purpose. All under the chapeau of good faith.

2. Admissibility – article 17

2.1. General

According to article 17 (1) there are four alternative criteria of inadmissibility:

- (a) the case is being investigated or prosecuted by a state which has jurisdiction over it
- (b) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned
- (c) the person concerned has already been tried for the conduct in question
- (d) the case is not of sufficient gravity to justify action by the court.

According to the criteria a case will under all circumstances be admissible if there is no national action at all. If such a situation occurs the ICC is not required to prove whether the state is unable or unwilling to investigate the alleged crime or prosecute the alleged perpetrator, the lack of action itself is enough to make the case admissible to the court.

A case which is being, or has been, investigated or prosecuted, might still be admissible if the state in question has demonstrated “unwillingness” or “inability” to proceed genuinely.

“Unwillingness” and “inability” are the core terms of the complementarity concept, and this chapter will focus on these two criteria.

The state must also investigate and prosecute the crime in question “genuinely”, meaning that a proper effort has to be done, and not just conduct a sham investigation or prosecution.

So what happens if a person is already tried for the conduct in question? Does it matter whether the trial has taken place in a state or before an international tribunal? What if the national court has sentenced the person for murder, and he stands trial for genocide before the ICC? These are all questions concerning the principle of *ne bis in idem*.

The fourth ground of inadmissibility concerns the gravity of the case, and is not so much a question about state action or not, but is more of an objective criterion which applies in addition when a case is not inadmissible under the other three alternatives. It will therefore only be briefly discussed.

Initially, in chapter 2.2, I will discuss why complementarity was chosen over primacy, and in the end of the chapter I will discuss the issue of amnesties and truth- and reconciliation commissions.

The procedural aspects of admissibility, article 18 and article 19 of the Statute, will not be discussed, as the subject only is the substantive issues of admissibility.

2.2. Article 17 versus the primacy of the ICTY and the ICTR

Article 17 is not formulated in a positive manner, as to say when a case is admissible, but determines when a case is *inadmissible*. Accordingly, the main rule is that the case is being inadmissible. This underlines that the ICC is not a court of appeal, and that national jurisdiction have primacy over the court.

This is in contrast to the ICTY and ICTR which have primacy over national courts, and it might seem strange that such different solutions have been chosen, when all three courts work with the same type of crime and has the same goal, namely fighting impunity for the most heinous international crimes.

The ICTY and ICTR are however temporary tribunals established by UN Security Council Resolutions⁵ and designed to work in specific areas, covering events within a limited space of time. The ICC is a permanent court, supposed to work with cases from all over the world, and The Rome Statute the result of lengthy negotiations between states. The issue of state sovereignty was therefore much more important, and a number of state delegations stressed that the principle of complementarity was preferable in order to protect state sovereignty. This, they said, was justified by the advantages of a case being treated by the national judicial system,⁶ one of the main advantages being a functioning enforcement mechanism.

Very few states were willing to give an international tribunal permanent primacy over their national courts. An international criminal court with primacy over national courts

⁵ UN Security Council Resolution 827 (1993) - Establishment of an International Tribunal on the Former Yugoslavia, and UN Security Council Resolution 955 (1994) – Establishment of an International Tribunal on Rwanda

⁶ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court , UN GAOR, 50th session., Supp. No. 22, p31, UN Doc A/50/22 (1995)

would in the eyes of most states, give the ICC too much power. One of the fore fighters for the primacy of national jurisdiction was the United States of America. They signed the statute, but decided not to ratify it, because they did not want any other than their own courts to be able to try US citizens. They have even entered into special extradition agreements with 42 member states of the Statute to be assured that US citizens suspected of having committed article 5 crimes, will be handled over to them, and not to the ICC. Despite the principle of complementarity embedded in the statute, they fear interference from the ICC.

A more practical reason for choosing complementarity is the question of capacity. An ICC with primacy over national courts could easily risk being flooded, while an ICC which is complementary can not admit a case until the criteria of article 17 is fulfilled.

Even if making the ICC complementary to some extent limits the amount of cases that is admissible to the court, it is surprising that all kind of cases are admissible as long as the criteria in article 17 are fulfilled. The Nürnberg tribunal only dealt with the major leaders accused of international crimes. This model was continued before the Tokyo tribunal for the Far East. The ICTR has since its establishment concentrated on military and civilian leaders, and the ICTY is moving towards the Nürnberg scheme.⁷

Even so, the ICTY and ICTR have handled a not insignificant amount of cases since they were established⁸, and the ICTY already has experienced problems handling the amount of cases. An expert group has even suggested that some of the cases should be

⁷ Cassese, Antonio; *“International Criminal Law”*, Oxford University Press (2003), p 355-356

⁸ ICTY has indicted 161 individuals (see: <http://www.un.org/icty/glance-e/index.htm>) and ICTR has finished 21 cases, and 11 is in progress (see: <http://69.94.11.53/default.htm>)

transferred to the International Criminal Court.⁹ Some cases have also been transferred to competent national courts.¹⁰

An ICC with primacy over national courts could not possibly survive. The amount of admissible crimes would be so enormous that no court alone could ever be able to handle it all, not even if the Nürnberg model was used. The ICC simply does not have the resources to be a first-line court for international crimes from all over the world.

The principle of complementarity is therefore the result of endless discussions among the parties, and a compromise that was acceptable to most of them.

⁹ This proposal was very fast abandoned, both of procedural and practical reasons, see Mundis, Daryl. A.; *Current Developments-improving the operation and functioning of the international tribunals*, 94 American Journal of International Law (2000), p 759 flg

¹⁰ In UN Security Council Resolution 1503 (2003), the council called on the ICTY and ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010. Furthermore, in UN Security Council Resolution 1534 (2004), it called on the Prosecutors of the two tribunals to review their caseloads, and as soon as possible, to determine which cases to proceed with and which to transfer to competent national jurisdictions, as well as the measures which would need to be taken to meet their completion strategies.

2.3. Genuinely

A fairly complicated aspect in the negotiation of the Rome Statute was to develop the criteria setting out the circumstances for when a situation should be admissible to the ICC even when national investigation and prosecution have occurred.

“Genuinely” is supposed to cover the situations where the investigation and prosecution done by the state for some reason lack the quality they should have. It is also clear that the court is not to function as an appellate body of domestic decisions, thus notions such as “good faith”, “diligently”, “sufficient grounds” etc, were discussed, but rejected. Moreover, they were deemed to be too subjective.

The notion “genuinely” is not a legal expression as such and has no predetermined or set way of interpretation when used in a legal context. The court therefore has no clear judicial precedence or standards of interpretation for “genuinely”. This gives the court the opportunity to develop a standard of its own as to how the notion is to be understood, and to more or less decide how much effort a state must put into the investigation and prosecution of a situation in order to prevent its case from being brought before the ICC.

On the other hand, the notion is vague and it is difficult for states to know what needs to be done in order to have investigated and prosecuted a case “genuinely”. An undefined and vague notion gives little predictability for the states. In most of Europe and the USA this might not be a problem. Rich, developed countries have the resources and the judiciary needed to perform proper investigation and prosecution, if they want to. Poor, developing countries on the other hand, often struggle to maintain a judicial system at all. This might not be out of ill will, but simply because they have limited resources and have to make priorities also when it comes to handling the most heinous international crimes.

Not fully understanding the threshold for “genuinely” might have the unfortunate consequence that if poor countries make unwise decisions with the little resources they have, and the investigation and prosecution take off in an unwanted direction, there are

no resources to get it back on track. This might be considered not being “genuinely” and the situation might be referred to the International Criminal Court by other states or brought to the prosecutors’ attention by the individuals concerned or non-governmental organizations.

But what if the state in question claims that it had the *intention* of conducting a genuine investigation and prosecution? There is no doubt that “genuinely” implies the serious intent on behalf of a state to bring the offender to justice, and if the state really had the intent of doing so, then lack of resources should not lead to admission to the ICC on the grounds of the investigation and prosecution not being genuine.¹¹ The problem, however, is how to prove the intent of a state. A state is not a living, thinking creature, and has not a mind and a will of its own. The answer probably lies in looking into the way it has conducted the national proceedings, the general policy of the state towards this sort of crimes and whether the judiciary is independent, or ridden by corruption and power.

This shows that the lack of guidelines as to how to interpret the notion “genuinely” may make it difficult to decide what the substantive meaning of it is.

If we look into the *common* meaning of “genuinely”, a dictionary defines it as “free from hypocrisy or dishonesty; sincere.”¹²

If we look at the *purpose* of using the notion “genuinely”, it is to consider if it is a defect in the approach taken by a state which inevitably, if left to its conclusion, would result in a travesty of justice.

Taking this a bit further, it is questionable whether “genuinely” adds anything at all to the terms unwillingness and inability. If you look into the elaboration of these terms in

¹¹ Lack of resources could, however, be considered as the state being *unable* to investigate or prosecute. Inability is discussed in chapter 2.5

¹² Definition from “The free dictionary” by Farlex at: <http://www.thefreedictionary.com>

art 17 (2) and (3), the assessment is to a greater or lesser degree the same as for “genuinely”. A state that has opened investigation and prosecution, but does not do it properly might as well be termed to be unwilling, and if it is a question of lacking resources or no legal system at all, it might be termed to be unable.

In my opinion “genuinely” simply stresses the need for effective prosecution, without elaborating how this is to be done, and therefore adds nothing to unwilling and inability.

In the next two chapters we are now going to look into criteria for the court to decide whether states are acting genuinely, for both *unwillingness* to act and *inability* to do so.

2.4. Unwilling

The concept of unwillingness has been characterized as “going through the motions”,¹³ in order to make it look as if the state has an intent to investigate and prosecute genuinely.

The unwillingness of a state to investigate or prosecute perpetrators of paragraph 5 crimes, often stems from the fact that those individuals enjoy the acquiescence of the authorities of performing such actions, or they have even been instruments of the state in implementing its policies.

In order to establish "unwillingness," the Court must therefore demonstrate the underlying intent of the national authorities. On a practical level, it is difficult for the Court to gain access to information regarding a criterion as subjective as the intent of state authorities. In addition, this standard means that the Court would have to investigate and make subjective assessments as to the willingness of state authorities to bring to justice the perpetrators of serious violations. Ironically, the desire to avoid creating an ICC which sits in judgment of national authorities was the justification given by certain states for seeking a strong provision on complementarity.¹⁴

Art 17 (2) sets out three situations for determining whether unwillingness is applicable in a particular case, and the court “shall” take into account these factors, meaning that it always has to consider if one or more of the factors are applicable whenever it assesses the admissibility of a case. One question arising, is whether the list in art 17 (2) is exhaustive or if the court may also refer to other factors.

¹³ Schabas, William A.; “*An Introduction to the International Criminal Court*” Cambridge University Press, second edition (2004), p 67

¹⁴ Duffy, Helen; “Justice in the balance-Recommendations for an Independent and Effective International Criminal Court”, see: <http://www.hrw.org/reports98/icc/jitbwb-07.htm>

An interpretation in accordance with the ordinary meaning of the word “consider” may lead us to believe that the three factors are just examples that need to be taken into consideration, and that an assessment of unwillingness may also refer to other not listed factors.

Art 17 (2) cannot, however, be interpreted isolated from the other provisions in the rest of the Statute. Art 90 (6) and art 97 use the clarifying addition “inter alia” and “including but not limited to”. The lack of such additions in article 17 indicates that the list is exhaustive after all. It must also be noted that the listing of the factors creating unwillingness is an exception to the general rule, and in lack of other factors of interpretation, exceptions should be interpreted narrowly.

These two arguments seen together indicate that the term should be interpreted narrowly and the list deemed exhaustive.¹⁵ This is however arguable in light of the following: As more cases are being referred to the court situations of unwillingness may arise that was not thought of when making the statute. A broader interpretation of unwillingness may then be necessary in light of the object and purpose of the treaty, which is to make sure that the most serious international crimes do not go unpunished.

Which interpretation the court will arrive at is yet to be determined.

“The principles of due process recognized by international law”, is the umbrella of art 17 (2), under which the three factors have to be assessed. The phrase was first meant to cover only 17 (2) (c), but came to cover all three criteria.¹⁶

¹⁵ This view is supported by Holmes, John T.; “*Complementarity: National courts versus the International Criminal Court*”, in Cassese, Antonio/ Gaeta, Paola/Jones John R. W. D. (eds); “*The Rome Statute of the International Criminal Court : A Commentary*”, 2002, Vol 1, p 675

¹⁶ Holmes, John T.; “*The Principle of Complementarity*”, in Lee, R. S. (ed.); “*The International Criminal Court: The making of the Rome Statute: Issues, Negotiations, Results*”, (1991), p 53-54

The concept of “due process” was inserted to add a further element of objectivity to the criteria of unwillingness.¹⁷ The thought was to avoid a too subjective interpretation of unwillingness. Even though the phrase has been a part of the discussion since the Discussion Paper and the Bureau Proposal of the Bureau, there is no definition as how it is to be understood.

One could ask if a trial that breaches due process rights of the accused, is to be deemed as unwillingness by the state to investigate and prosecute. Plunging into such an assessment would involve considering whether the accused’s human rights were violated, and would be far beyond both the object of the court, and the object of this thesis. The notion of “due process” is only meant to be a chapeau covering the three factors to ensure an objective interpretation of unwillingness, and not an independent criterion. In addition comes that many situations where due process is breached would be in favour of the accused.

It has even been suggested that the criteria of “unwillingness” may be interpreted in a way that raises doubt as to whether the International Criminal Court truly is complementary to national criminal jurisdictions.

The argument goes like this: even if a state in good faith decides not to indict or convict a person accused of international crimes, the court may say it is unwilling and the case be deemed admissible to the International Criminal Court. If the court should be said to be truly complementary, the argument goes, then a more objective term is needed, e.g. a “clearly erroneous” standard.¹⁸ This seems to be one of the reasons why the USA has not ratified the Statute.

¹⁷ Holmes, see note 16, p 54

¹⁸ Gurulé, Jimmy “*United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction truly Complementary to National Criminal Jurisdictions?*”, 35 Cornell International Law Journal (nov 2001-Feb 2002), p 14 ff

Having painted the background as to how “unwillingness” is to be understood, I will now take a closer look at the three criteria:

- (a) shielding the person from criminal responsibility
- (b) an unjustified delay in the proceedings which is inconsistent with an intent to bring the person to justice
- (c) the proceedings were not conducted independently or impartially and were not conducted in a manner consistent with bringing the person to justice

A typical example of proceedings undertaken for the purpose of shielding the person from criminal responsibility, i.e. sham proceedings, is when a regime or dictatorship itself is responsible for committing international crimes, and the perpetrators are state employees or representatives of the state. The authorities may then want to undertake some sort of trial to make it look like the accused has been properly tried, even though the purpose is to avoid that they are brought before international tribunals.

The provision clearly demands a “purpose” of shielding. It is therefore not sufficient that the proceedings are initiated to avoid the case being brought before the ICC. That would, on the contrary, be exactly what the principle of complementary aims at, namely making states bring the perpetrators of international crimes to justice. Rather the purpose demands intent to shield the perpetrator, and this is a high threshold, which is not easy to prove.

An indication that the proceedings are for the purpose of shielding may be a disproportionately lenient sentence, inefficient investigation, the prosecution for “ordinary crimes”, e.g. bodily harm, when the indictment should have been for torture,

and so on. The court must make an individual assessment in each case, and so far no such assessment has been done.

One has often seen that proceedings may be delayed for years without any reasonable explanation. The longer it takes the more difficult it may be to produce the evidence required for a conviction, and the result may be impunity. In the draft the notion “undue delay” was suggested, but the notion was criticised as being too low a threshold, and it was replaced with “unjustified delay”. This was more than a mere cosmetic change of the wording, because it implies the right of the state to explain any delay, a right which some fear will be abused.

An indication of whether a delay is unjustified or not, is of course how lengthy similar cases are in the same legal system, because the difference between systems may be considerable. Sweden, for instance, is known to have a very speedy system, while in Norway it is not uncommon that even serious cases like armed robbery, murder and rape may take one to two years from the commencement of the investigation until the perpetrator stands trial. A solution could be to compare the member states and find the average time it takes to conclude investigation before the perpetrator put before the court. It would of course be necessary to make amends in light of specific circumstances that could occur.

If the delay is due to the need to respect human rights then it may not be deemed unjustified, but all delays will at some stage become unjustified. It could also, in time, be considered as “inconsistent with an intent to bring the person concerned to justice”.¹⁹

Setting a concrete time limit would facilitate the work of the court considerably, and avoid time consuming comparisons and lengthy assessments of national practice.

¹⁹ See article 17 (2) litra c

Whether this would be an acceptable solution to the state parties is, however, questionable.

The absence of procedural fairness may cast doubts about the legitimacy of the national procedures. One of the main principles for fair trial in both national and international tribunals is independence and impartiality.

Independence requires that the court is separate from any other state organ and political parties, both institutionally and functionally. In countries with a democratic government the principle of separation of the powers guards the courts' independence. In countries with dictatorship and one-party government the courts are less likely to be really independent.

A major obstacle to the realisation of independence, is corruption. The prosecution and the judges, and even the defence may be paid off to make sure of a certain outcome of a case. A requirement for an independent judiciary is an objective and neutral selection criterion. If a judge or a prosecutor is too closely connected to the sitting authorities it may raise questions as to the neutrality of the court, even though investigations and prosecution still might be conducted independently and impartially.

As for impartiality, that is a more subjective issue, connected to the individuals that constitute the court. They must be open-minded and able to see the positions of both parties, and be free from prejudice and bias.

It may be difficult to distinguish between independence and impartiality. An example is South Africa under the Apartheid-regime, when white pro-apartheid judges were appointed to judge both white and black people. These judges were both impartial to black people and dependent on the government that appointed them in order to keep their position.

Sentencing people due to reasons emanating from political opinion, race, religion, nationality etc is one of the most blatant examples of dependent and partial courts.

A state's reaction to atrocities committed may not necessarily be to formally investigate and subsequently prosecute. In the later years there has been a frequent use of Truth and Reconciliation Commissions, and some states choose to grant amnesties even for the most heinous crimes.

Should this be viewed as unwillingness on behalf of the state, and make the case admissible before ICC? This topic will be discussed in chapter 2.6.

2.5. Unable

Inability is a more objective, “fact-driven” notion²⁰ than unwillingness, and it was brought to the table to cover situations where a state lacks a central government due to a breakdown of the state institutions, a civil war or any other situation of disorder.

In such situations the state may be willing to investigate and prosecute the alleged perpetrators, but it may simply have no possibility of doing it due the collapse of the legal system. Evident situations in recent times are those of Congo, Uganda and Rwanda.

Art 17 (3) lists three situations which can lead to inability, namely:

- the State is unable to obtain the accused
- the State is unable to obtain the necessary evidence and testimony
- the State is unable to otherwise carry out its proceedings

This listing diminishes the potential for subjective interpretation by the court, except the last one, which is pretty broad and may be interpreted to cover also situations not thought of when making the statute. The court may here use its own discretion to develop a clearer understanding as to when a state may be “unable”.

The presence of the accused is always important in order to shed as much light as possible on the case. Under certain circumstances, at the national level, a case may proceed even if the accused is not present, i.e. in absentia. As for the grave crimes that may be referred to the ICC, however in most countries, he would have to be present.

²⁰ Holmes, see note 16, p 41 flg

An accused may be able to delay the proceedings by simply not showing up or by fleeing abroad. A referral to the ICC may contribute to the apprehension of the accused. Even if the court has no police force of its own, more than half of the world's countries are members of the statute, and art 86 to 102 give rules for general cooperation and judicial assistance, and the member states have an obligation to surrender persons to the court if the court so requests.

If a state for some reason is not able to obtain the necessary evidence and testimony, the case might be referred to the ICC. The above mentioned provisions would then give the investigatory section at the prosecutor's office the necessary legal authority to obtain the information needed.

It is, however, not enough that one or more of the three situations described above occur. It is also a criterion that they occur "due to the total or substantial collapse or unavailability of its national judicial system", meaning that the inability has to be caused by a "total or substantial collapse".

A total collapse is when there is no national judicial system in function, hence nothing meaningful can be done at national level, and the case becomes admissible to the ICC because of the states' inability to bring the perpetrators to justice.

It is therefore essential to determine what a substantial collapse is, and when a national judicial system is unavailable.

The word "substantial" replaced "partial" in the draft statute. Again, the reason for the change was states' concern regarding their sovereignty. They wanted to preclude the ICC from assuming jurisdiction in situations where an armed conflict in a state had partially affected the judicial system. By changing it they underlined the courts' role as a complementary organ.

A definition, however, of "substantial" was not considered necessary because of the existence of an additional factor, namely the state being unable to obtain the accused, or the necessary evidence and testimony.

Again it is left to the court's discretion to determine how to interpret one of the most central notions in the assessment of admissibility.

Some more practical questions also arise: May capacity overload in the judicial system be said to constitute a total or substantial collapse? If other cases are being handled, then it obviously is no total collapse, but could it be considered a substantial collapse or an unavailability of the national judicial system?

All cases/situations have to be considered on an individual basis, and if the case in question cannot be investigated or prosecuted due to lack of resources, then the state is unable to carry out its duty to put the perpetrator before a court. If the case cannot be handled by a court, then the national judicial system may be said to be unavailable, and the court unable to handle the case. It must be emphasized that this is hardly the situation that was thought of when the statute was made, but it shows that the wording of the statute is created so as to cover also other situations when necessary to fulfil the purpose of the statute.

In some countries the core crimes in article 5 are not yet prohibited, and the judiciary is not able to punish the perpetrators for these crimes as such. This means that a perpetrator may be indicted for murder, when he should have been indicted for genocide. A glaring example is Norway, where genocide as such is not yet punishable.²¹

May such a shortcoming of the law be considered as inability of the state? It sure renders the judicial system unable to punish genocide as such, but the perpetrator is after all being punished for murder.

²¹ A new penal code is under revision, entailing that both genocide and other international crimes will be punishable according to Norwegian law.

The lack of laws punishing genocide or other core crimes is therefore not considered to render the state unable to prosecute, and can certainly not be considered as impunity.

2.6. Ne bis in idem

The principle of *ne bis in idem* is a corollary of the principle of complementarity reflected in article 17, which likewise prevents the court from asserting jurisdiction when a competent national legal system has already asserted jurisdiction.

Ne bis in idem is Latin for “not twice the same”. In legal terms it means that no legal action can be instituted twice for the same cause of action, and it covers the situation where a person has already been tried by another court

The principle has its origin in Roman Civil Law and exists today, in different versions, in both civil law and common law countries alike. As for other international courts, the ICTY Statute art 10 and the ICTR Statute art 9 should be mentioned. The principle is also reflected in ICCPR art 14 (7) and ECHR art 4 (7), and is considered as a fundamental human right.

In the statute of the International Criminal Court we find the principle in art 17 (1) c which refers to art 20 (3). Art 20 (3) regulates the situation where a national court has tried the person, and the ICC then cannot try the person with respect to the same conduct.

Yet what about the situation mentioned above, if a Norwegian citizen has committed genocide, e.g. killed a substantial number of the Sami people of Norway in order to extinct them as an ethnic group? Norway convicts him for murder, but cannot convict him for genocide. Can the ICC then subsequently prosecute him for genocide?

The answer appears to be no. What he has done, the conduct, is the same whether it is called murder or genocide, and as long as Norway has performed a due process with the genuine intent to serve justice, there principle of *ne bis in idem* prevails.

For the perpetrator this is a sword with two edges: If the crime is committed in a country such as Norway where the maximum sentence is 21 years imprisonment it might be to his advantage to avoid prosecution and a possibly more severe sentence before the ICC. If, however, he committed the same act in a country which has death

penalty for murder, then it would have been to his advantage to be tried by the ICC. The court, however, cannot seize jurisdiction even if the person faces execution in his homeland.

Is a final judgement required in order to bar the ICC from trying the case?

Article 20(3) uses the words “has been tried”, suggesting that any termination of the case may suffice as long as the proceedings have been conducted in good faith. Article 20(1) and (2) say that a person cannot be tried again for a crime that he has already been “convicted or acquitted” for. The omission of this term in article 20(3) supports the view that a final judgement is not needed to bar the International Criminal Court from assuming jurisdiction.

Such an interpretation is contrary to ICTY case law,²² but underlines the primacy of the national courts and the fact that the *ne bis in idem* principle should be understood in correlation with the complementary nature of the International Criminal Court.²³

A pertinent question is whether this gives states too much freedom in order to prolong cases and delay them unnecessary in order to avoid referral to the ICC until the case is getting older and it is more difficult for the court to gather evidence etc.

²² Prosecutor v. Tadic, case IT-94-1-T, 14 November 1995: “...there can be no violation of *ne bis in idem*, under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been the subject of a judgment on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges.”

²³ Wyngaert, Christine Van den/Ongena, Tom, “*Ne bis in idem Principle, Including the Issue of Amnesty*” in Cassese, Antonio/ Gaeta, Paola/Jones, John R. W. D. (eds);, “*The Rome Statute of the International Criminal Court : A Commentary,*” 2002, Vol 1, p 705-729

This could be an unfortunate consequence of interpreting art 20 (3) as not requiring a final judgement. Most of the delays that a state might cause will, however, be covered by litra a and b, and the case will still be admissible if the trial were:

- for the purpose of shielding the person, or
- not conducted independently or impartially

It is the ICC that decides whether any of the exceptions exist. If states should decide themselves, they would have too much freedom in setting up sham trials.

The two exceptions to the principle are the same as in art 17(2). During the negotiations, the issue of *ne bis in idem* was treated after the other issues covered in art 17, and most delegations had no problem using the same phrases, as the meaning was already discussed and agreed upon.²⁴

²⁴ This is discussed in chapter 2.4 of the thesis.

2.7. Gravity of the offence

According to art 17 (1) litra d the court may determine that a case is inadmissible if it is not of sufficient gravity to justify further action by the Court.

The Statute does not define “sufficient gravity”, but factors that might be taken into consideration are for instance whether the crime reflects a general policy, the harm done to both people and infrastructure, etc. It rests, however, with the court to clarify the meaning of the notion.

Even if a crime is listed in art 5, it does not mean automatic admissibility to the ICC. Article 17 (1) litra d makes it clear that there might be different levels of crimes, even when talking about international crimes.

This criterion seem to be an extra safeguard to avoid flooding the court with cases that otherwise would be admissible to the court, and it gives the court an extended possibility to control which cases will be admitted.

2.8. Amnesties, truth- and reconciliation commissions and admissibility to the ICC

2.8.1 General

So far the approach to the issue of amnesties and truth- and reconciliation commissions has been on a theoretical level, but the time will soon come when the court has to take a stand that will have significant practical ramifications.

Two situations may arise:

- A state has investigated, prosecuted and sentenced the perpetrator, but shortly after he receives an amnesty. Will that case be admissible to the ICC?

- A state chooses not to prosecute the perpetrators at all, not even to investigate, but aims at using truth- and reconciliation commissions like they did in South Africa.

Would such cases be admissible to the ICC?

The question of regulating these issues was discussed both in the Preparatory Committee and during the Rome Conference, but it was decided against it, due to opposition from many states that feared court interference in administrative or executive decision-making.²⁵ The issues had to be dropped in order to reach an agreement over the Statute as a whole, but in reality it was only to postpone a problem everyone knew would arise.

The statute says nothing concrete. The question is therefore whether the Statute might be interpreted to cover the issues, because there are no rulings or case law that might provide guidance.

²⁵ Holmes, see note 16, p 60

2.8.2. Amnesties

A person who is already convicted for a crime, may afterwards be pardoned, paroled or otherwise freed after a brief or non-existent period of incarceration. If an amnesty is granted immediately after a conviction it might be reasonable to question whether the proceedings really were genuine.

At the point of departure such a case will be inadmissible according to art 17 (1) c, and due to the principle of ne bis in idem, because the person has already been tried for the conduct at national level. The amnesty might however be considered as conclusive evidence that the proceeding lacked genuineness from the outset, and that the case was only meant to shield the person concerned from criminal responsibility. The assessment will be similar to the one discussed above in chapter 2.4.

The inclusion of a provision regulating the issue would clearly have been desirable in order to avoid such situations and to spare the court from unnecessary, lengthy considerations regarding admissibility. But, as the Statute is worded, the only choice for the court is to interpret the existing provisions.

2.8.3. Truth- and reconciliation commissions

Truth- and reconciliation commissions are an alternative way of dealing with perpetrators that would otherwise face prosecution.

It is important to underline that there is no intrinsic tension between the use of such commissions and the ICC's use of investigations and prosecutions. Both alternatives aim at serving justice and hold perpetrators responsible for their actions, albeit in a different sense and to a different degree. The main difference lies in the fact that a court may punish the violations, while the commissions aim at "healing the wounds" and to make peace and reconciliation by making the truth public.

The best known example of such commissions is probably the South African commission which handled the perpetrators of the Apartheid regime. This commission had the power to grant amnesties. Otherwise the perpetrators risked prosecution.

In relation to the ICC, the issue arises as to whether the cases concerning those granted amnesty are admissible.

As noted above, the wording of article 17 does not provide any direct solution to the question, despite the wish of some delegations to explicitly recognize truth- and reconciliation commissions. Other delegations and non-governmental organizations, however, opposed the proposition. They feared abuse by states, and more importantly, they argued that "such a provision would imply recognition of legislation granting impunity for the crimes within the jurisdiction of the Court. There can be no "legitimate" amnesty for these crimes; rather, the application of an amnesty law to these offences would be a clear contravention of established principles of international law."

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²⁶ See <http://hrw.org/>

The strict wording of the provision suggests that there is no obstacle for admitting cases already treated by truth- and reconciliation commissions, the consequence being a sort of double treatment, first in a commission and then before the ICC.

There seems indeed to be some possible escapes in the Statute.

One of these is found in article 17 (1) litra b which deals with ongoing investigation and prosecution. A broad interpretation of this provision may result in such cases being inadmissible to the court after all.

The word “investigation” might not necessarily cover just a traditional criminal investigation, but also other forms of diligent, methodical effort to uncover the truth about what has really happened. Such effort may be carried out by truth- and reconciliation commissions.

There must also, according to litra (b), have been a “decision” not to prosecute. This suggests that prosecution must be at least an option, which the state deliberately has chosen not to opt for. If prosecution never was an alternative, it is impossible to “decide” against prosecution, because you cannot choose away something that is not available. Further, the decision has to be made by the “State”. Decisions made by individuals in their own capacity will not be covered.

Finally, the decision can not originate from the state’s unwillingness or inability to carry out a genuine prosecution. If the state had no other option than using such commissions or was unwilling to do so, the decision is not made in such a way as to render the case inadmissible to the court.²⁷

Another possible escape is presented in article 53. The prosecutor may in some circumstances decline to initiate an investigation on the grounds that it would not serve “the interests of justice”. According to article 53 (1) the prosecutor shall initiate an investigation unless there is no reasonable basis to proceed, specified in article 53 (1)

²⁷ For a discussion of “genuinely”, “unwillingness” and “inability”, see chapter 2.3, 2.4 and 2.5.

litra c which requires the Prosecutor to consider whether “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 interest of justice.”²⁸

This calls for prosecutorial discretion whether or not to initiate an investigation.²⁹

A question is whether the prosecutor is confined to interpret “justice” as retributive criminal justice, or whether a broader consideration of justice can be taken into account. Article 53 (1) litra c emphasizes the traditional criminal justice considerations such as the gravity of the crime and the interest of the victims, but also adds “interests of justice”, which clearly indicates that the notion may be interpreted in a broader sense. An example might be truth- and reconciliation commissions.

If the commission has done a proper effort and all parties to the crime have participated, it might seem unreasonable both to the perpetrator and the victims to revive the case. The thought behind such commissions is to bury the hate, and to forgive but not forget. If the perpetrator were to be brought before the ICC after having been granted amnesty by a national commission, this could undermine the system of truth- and reconciliation commissions as well as the ICC. The secretary general of the UN, Mr Kofi Annan supports this view by suggesting that it would be “inconceivable” for the International

²⁸ The same criterion is used in article 53 (2) litra c, which governs the prosecutors decision whether or not there is sufficient basis for a prosecution. Litra c, however, refers to additional factors such as “the age or infirmity of the alleged perpetrators and his or her role in the alleged crime”, because at the prosecution stage particular suspects are at hand, and the prosecutor will be able to consider specific situations relating to specific suspects.

²⁹ It is not purely a matter of prosecutorial discretion, as the prosecutor “shall” inform the Pre-Trial Chamber if he decides not to initiate an investigation based solely on the fact that it would not serve the interests of justice.

Criminal Court to set aside an approach like that adopted in the South African situation.³⁰

In concluding, although such cases may be deemed inadmissible due to loopholes in the Statute, a very carefully case-to-case consideration has to be made. The ICC must not bow to carefully crafted shams set up by national authorities seeking to avoid cases being brought before the court. There must always be an assessment as to whether the work of the commissions is genuine, and how justice is best served. If, in the future, a provision regulating these situations should be made, it had to be carefully crafted in order to take into consideration all the above mentioned aspects.

³⁰ From Mr Annan's speech at the Witwatersrand University Graduation Ceremony in september 1998, quoted in: Villa-Vicencio, Charles; "Why perpetrators Should not always be Prosecuted: Where the international Criminal Court and Truth Commission Meet", 49 Emory Law Journal 205, at 222

3. Ongoing cases - Admissibility in practice

The International Criminal Court, now close to its fourth anniversary, must still be considered a new and relatively inexperienced actor on the stage of international tribunals. So far investigations have been opened in three situations, namely Congo, Uganda and Sudan. Individuals, groups etc, have also brought several other situations to the attention of the prosecutor, but so far only these three has been admitted. Central Africa has referred itself to the court, but the prosecutor has not yet decided whether to open a formal investigation.

To better illustrate how the criteria of admissibility work in practice, I will give a brief overview of the three situations that have been admitted. I will also look into some of the situations that are still under consideration or that were refused.

At the moment of writing, the first case of the International Criminal Court is about to unfold. This is Case 01/04-01/06 - The Prosecutor v. Thomas Lubanga Dyilo.³¹

³¹ The Congo-case, see chapter 3.1.

3.1. Congo

On 19 April 2004, the Democratic Republic of Congo (DRC), a state party, referred itself to the court. By then, states, international organizations and non-governmental organizations had 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.

Lubanga was the leader of one of the main militias in the province of Ituri in north-eastern Congo where inter-ethnic violence erupted in 1999 in the aftermath of the invasion of the DRC by Ugandan and Rwandan forces supporting rebels seeking to overthrow the government of President Mobutu Sese Seko.

In March 2006, Lubanga had his initial appearance before the court. The hearing was of a formal character confirming his identity and his awareness of the charges³². Lubanga is charged with conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities.

The Lubanga case will be the first trial before the ICC, and the court needs to show the international community that they can perform a speedy and efficient trial. The way the trial is performed will have an impact on how the world at large looks at the court, and might also decide the extent to which states will cooperate with the court in future cases.

In terms of admissibility, the judicial infrastructure in the DRC, weak to begin with, has been absolutely destroyed in the Ituri region. There is a shortage of trained lawyers, judges, magistrates and other legal professionals throughout the country, and the national judiciary lacks independence. Ituri has a population of five millions, but had only one court based in Bunia, from which the judges fled when the ethnic fighting

³² See the Statute article 60

escalated in May 2003. Public salaries have not been paid for years in Ituri, and the police are corrupt and often abusive.

After years of impunity and a collapsed judiciary the Ituri Region, and other national courts, have not been able to perform trials against warlords, such as Lubanga. The judiciary is too weak, the corruption runs too deep and the ethnic opposition is strong.

At the present, the DRC is simply not able to investigate and prosecute the alleged international crimes, and nothing has been done at national level to bring the perpetrators to justice. According to the criteria in article 17 a case is admissible before the ICC if there is no national action at all, like we see it in Congo at the present. The situation in the DRC is therefore admissible before the ICC.

It rests, however, to point out that there is an ongoing judicial reform in the DRC, aiming at rebuilding the judiciary and re-establish confidence in the rule of law. Congolese law must also be updated, as relevant crimes, e.g. rape, is not currently adequately defined and incorporated in the national penal code. This process will be lengthy, but if the DRC, some time in the future, should consider itself to be able to bring the perpetrators to justice, it may at any time challenge the admissibility of the ICC on the ground that it is now investigating or prosecuting the case itself. The challenge must take place prior to or at the commencement of the trial.³³

The prospect of the DRC investigating and prosecuting all the perpetrators itself is not very likely to happen in many years. As for now, the ICC has proposed a consensual division of labour with the Congolese government: The ICC will 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

³³ See the Statute article 19 (2) and (4)

community, could implement appropriate mechanisms to address other responsible individuals.³⁴

³⁴ “Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps in The Hague Netherlands”, 12 February 2004 (see http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf#search='diplomatic%20corps%20ocampo')

3.2. Uganda

In December 2003, as the first member state ever, Uganda referred the situation concerning the Lord's Resistant Army (LRA) to the ICC.

The current conflict has persisted for about twenty years, during which civilians in northern Uganda have been subjected to regular attacks. Tensions began soon after President Yoweri Museveni seized power in 1986. Not long thereafter a rebel group, the LRA, was formed by several splinter groups originating from the former Ugandan People's Democratic Army.

The president of Uganda seems to seek to confine the scope of the referral to the atrocities committed by the LRA, but this is not how the prosecutor's office of the International Criminal Court sees it. The prosecutor's office has announced, in accordance with the Statute, that all crimes will be investigated impartially, regardless of whether the perpetrators are LRA soldiers or represent the other party. Thus, also government soldiers risk being focused at.

According to various reports given to the Office of the Prosecutor, the situation has resulted in a pattern of serious human rights abuses against civilians in the region, including summary executions, torture and mutilation, recruitment of child soldiers, child sexual abuse, rape, forcible displacement, and looting and destruction of civilian property.

As for the question of admissibility, Uganda's judicial infrastructure is better functioning than that of Congo, and could potentially handle the cases against LRA-members and governmental perpetrators if it so wished. There are, however, factors that make it questionable whether Ugandan courts are really suitable to handle these cases.

Even though a working system exists, the lower courts of Uganda are ridden with understaffment, weakness and inefficiency. Far worse is president Museveni's significant control over judicial appointments, which has severely damaged the impartiality of the

courts, and the people's trust in the judicial system. The security forces have also been accused of torture and mistreatment of prisoners.

In this climate one can hardly expect an unbiased trial, either for LRA soldiers or perpetrators associated with the government, and so far there have been no national proceedings against any of the parties. This puts Uganda in the same situation as the DRC; no national action means admissibility before the ICC according to article 17. The situation has therefore been admitted to the ICC, and an investigation was opened in July 2004. The investigation is still going on, and 1 June 2006, for the first time in history, the Interpol issued red Notices for the arrest of five LRA commanders, on behalf of the ICC. Finding these commanders, and putting them on trial before the International Criminal Court will be a critical test of the states will to cooperate and facilitate the work of the court.

3.3. Darfur, Sudan

Not only states may refer situations to the ICC. According to the Statute's article 13 *litra b*, also the Security Council may do so, and by resolution 1593 (2005), the situation in Darfur was referred to the ICC. The resolution requires, among other things, Sudan and all other parties to the conflict in Darfur to cooperate with the Court.

Prior to the resolution, The International Commission of Inquiry on Darfur was established by UN Secretary-General Kofi Annan in October 2004. The Commission reported to the UN in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur and recommended that the situation should be referred to the ICC. The alleged crimes included attacks, raids, rapes and other atrocities performed by government soldiers in the three regions of Darfur.

In terms of admissibility, it might be held that because of the position of the Security Council in the international community, the Principle of Complementarity should not be applied on Security Council referrals; such referrals should automatically be admissible before the ICC. An interpretation of article 18 and 19 might support such a view. According to article 19 of the Statute the ICC may "on its own motion, determine the admissibility of a case in accordance with article 17".

Furthermore, article 18(1) implies that the Prosecutor is not obliged to inform State Parties and States that would normally exercise jurisdiction over the crimes concerned when the referral is made by the Security Council. This would prevent States that have started national proceedings, to use the right in article 18(2) to inform the ICC that it is investigating or has investigated situations within the court's jurisdiction. Interpreted this way, these rules indicate that the principle of complementarity need not be regarded on referrals made by the Security Council.

My opinion is the opposite: The Security Council may be one of the most powerful organs in the international community, but its decision to refer a situation to the ICC does not oblige the court to admit the case. The ICC is an independent international

subject of its own, and is in no way bound by decisions adopted by the Security Council.

Furthermore, despite article 18 and 19, article 53 states that the Prosecutor shall consider whether the case is admissible under article 17. Article 53 is applicable on referrals from the Security Council as well, and proves, together with the purpose of the principle of complementarity that the principle must indeed be applied on Security Council referrals.

The actions of the prosecutor seem to indicate that he supports this view. In June 2005 he explained to the Security Council what has been done to assess whether there are reason to believe that there are cases from Darfur that would be admissible to the court according to article 17.

The prosecutor has studied Sudanese institutions, laws and procedures, and the government has provided information about the legislative system. The office has also interviewed individuals and sought information on what Sudan has done regarding crimes within the jurisdiction of the International Criminal Court.

The report of the international Commission of Inquiry on Darfur notes that:

“The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards. 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. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the

perpetrators of the serious crimes committed in Darfur. In any event, many have feared reprisals in the event that they resort to the national justice system.”³⁵

In addition to this report, the prosecutor has resorted to multiple sources of information, including reports from the Government of Sudan, the African Union, the United Nations, and other organizations, local and international media and academic experts.

In June 2005, the prosecutor concluded that it existed enough information to believe that there were cases connected to the Darfur-situation that would be admissible to the International Criminal Court. The prosecutor stressed that this decision did not represent a determination on the Sudanese legal system as such, but that it was essentially a result of the absence of criminal proceedings relating to the cases in question.³⁶

³⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, see: http://www.un.org/News/dh/sudan/com_inq_darfur.pdf#search='Report%20of%20the%20International%20Commission%20of%20Inquiry%20on%20Darfur%20to%20the'

³⁶ Report of The Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the United Nations Security Council pursuant to UNSR 1593 (2005), June 2005, see: http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf

3.4. Cases under consideration and cases dismissed

The International Criminal Court has developed a methodology and general practice as to how to handle information submitted to the court.³⁷ This is to ensure an equal and fair treatment of all communication received, and to make the working methods of the court accessible to the public, in order to not just serve justice, but also to show how it is done.

An important part of the assessment is “the admissibility test” under art 17, which comprises all the above mentioned factors. In addition the prosecutor must also look into the factual and legal basis of the communication, and he must consider if it is in the interest of justice to proceed with the case.

Since July 2002 the court has received 1732 communications from 103 different countries. 80 % of those communications were found to be manifestly outside the courts jurisdiction. Only 10 situations have been subjective to scrutinizing; only three, as we already know, has proceeded to investigation, 5 analyses are going on and 2 were dismissed.

The two cases dismissed are the situation in Venezuela and the invasion of Iraq in 2003. As for Venezuela, the court did not find that Crimes against Humanity were committed, nor did it find any reason to say that War Crimes and Genocide had taken place.

The Complaint about the Iraqi Invasion in 2003, were not considered to reach the gravity threshold.

So far, it seems that the issues of admissibility in article 17 have not been the reason why situations have been taken up by the prosecutor. It remains to be seen what

³⁷ Annex to the “Paper on some policy Issues before the Office of the Prosecutor; Referrals and communications”, see: http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf

conclusions the court reaches regarding the five situations currently being analyzed, and whether the criteria of admissibility in article 17 will be decisive.

4. Conclusion

This thesis has attempted to analyze whether the principle of complementarity laid down in article 17, contributes to make the ICC an effective court.

Article 17 is the result of endless discussions and compromises between the states that participated in the negotiations, and it is clearly influenced by political considerations and the wish to safeguard state sovereignty.

That does not mean, however, that the choice of complementarity is not a good one. As opposed to other international courts established by UN Security Council³⁸ resolutions, or by the winners of a world war,³⁹ the ICC is the product of a decision made by the majority of the countries of the world, representing the international community.

Having reached a common agreement, the chances that states will respect the Statute is better, compared to being forced by the Security Council or the winning party of a war. The court thus has the possibility to gain the support and cooperation needed to function effectively, provide an incentive for states to investigate and prosecute crimes, and to adopt the proper legislation to handle the crimes covered by the Statute. In Norway, for instance, genocide is currently not punishable as such, but the penal code is about to be adjusted so as to fit the international obligations that Norway has taken on by, amongst others, “the Rome Statute of the International Criminal Court”.

³⁸ ICTY and ICTR were both established after UN Security Council resolutions

³⁹ The Nürnberg tribunal after the second world war

On the other hand, an international court run by the principle of complementarity, might be too weighted in favour of national jurisdiction, and give states too much latitude, so as to create lengthy processes that have the shine of willingness and ability.

In my opinion, however, there is no great risk that such a thing will happen. The kind of crimes the International Criminal Court will deal with are crimes of such magnitude and seriousness, that the court will become aware of them at an early stage, and thus be able to follow the development carefully. If there are unjustified delays, sham trials etc, the prosecutor, with authorization from the Pre-Trial Chamber, may initiate investigations at his own initiative, and article 17 provides the legal authority for the case to be admissible to the court.

The wording of article 17 is, however, open for interpretations, and there are many factors to consider before a case is deemed admissible to the International Criminal Court. It is, of course, of great importance to leave the court with some discretion, but the problem is the time it will take to assess whether all the criteria are met. The more unclear a criterion is, the more room there is for argument. This might tie the court up in lengthy proceedings regarding procedural and interpretive arguments, and much time may be wasted which should rather be spent on proper investigations and prosecutions of criminals.

More standardized conditions with less room for interpretation could possibly save the court a lot of time, but it would also make the court less flexible. Standardized conditions with no room for discretion would further make it easier for states to circumvent the criteria set forth.

By now, investigations have been opened in only three situations, and there is an ongoing assessment regarding admissibility as separate cases arise from these situations.

As the situation is now, there is no sufficient basis for concluding whether the provision needs amendment or not.⁴⁰

The most striking lacuna in article 17 is, however, the lack of regulation concerning post-trial amnesties. If anything is to be amended it will most likely be this. As for truth- and reconciliation commissions article 53 provides flexibility, but still this lacuna allows for the most unfortunate uncertainty for states where amnesties are already granted by truth- and reconciliation commissions, and for states that consider choosing alternatives to prosecution of crimes punishable under the Statute.

So far, there have been lengthy theoretical discussions as to whether the wording in article 17 allows for such cases to be admitted or not, and no one can say for sure whether the principle of complementarity will apply to post-trial amnesties and truth- and reconciliation commissions.

The omission of the states to make direct reference to this problem, has left it entirely with the court's discretion to decide how article 17 is to be interpreted.

No matter what the court decides, the result of using the principle of complementarity is that the quality and standard of national proceedings may now be subject to scrutiny. This scrutiny is clearly a positive aspect of the statute, as it urges states to conduct genuine proceedings. States have obviously no obligation to do so, but if the court finds that the conditions in article 17 are not met, the case is no longer inadmissible to the ICC.

Does this mean that the ICC is nothing but an appellate body to national jurisdiction? The answer is probably no. In order for the ICC to decide whether a case is admissible, i.e. whether a state is unwilling or unable genuinely to investigate and prosecute, the

⁴⁰ According to article 121 (1), no amendments can be suggested until the expiry of seven years from the entry into force of the Statute.

court must take into consideration factors like length of sentence, evidence presented, etc. An appellate court deals with pretty much the same issues. The difference is, however, that for an appellate court these factors are the main issues that it has to decide upon, whereas for the ICC these factors are only symptoms of unwillingness to carry out genuine proceedings; they are never the main issue.

Summing up, the principle of complementarity appears to make the ICC a unique instrument for fighting impunity. Any lacunas and ambiguities that might exist in article 17, may be subject to amendment by the assembly of state parties.

As it seems now, the principle of complementarity will remain the cornerstone of the Statute, as it appears to be the only mechanism by which the ICC can work properly.

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