2020 Vol. 1 ALJ (No. 4) 53-79

Auxano Law Journal

Michael Usifo*

Abstract

The ICC describes complementarity as 'one of the cornerstones of the Rome Statute'.[1] This paper shows that if the third-world countries are able to put their house in order, establish a viable national justice system with the necessary independence, supported by political will, the quest by some of them to pull out of ICC will be unnecessary as ICC will be kept at bay in light of the principle of complementarity. Besides, these countries, as members of the ICC, could benefit for the technical support and expertise of the ICC in improving their justice system. The first part of this work discusses the principle of sovereignty as a background to the concept of complementarity. The second part analyzes the principle of complementary as captured in the Rome Statute while the third and final part reflect on current realities in third-world country and provides recommendations on what third world countries should do to benefit from the ICC system.

1.00 INTRODUCTION

When the final copy of the Rome Statute of the International Criminal Court (hereafter, Rome Statute) was adopted, there were doubts that the statute would easily secure the required 60 ratifications to enter into force. Many feared that countries dealing with various degrees of armed conflicts, and those that have just emerged from such experience would rather stay away from the Statute because their nationals would be vulnerability to prosecution at least for the crimes committed on their territories. Surprisingly, many of these countries, especially in Africa, ratified the statute earlier than expected, and helped in reaching the magical 60 ratifications required for the statute to enter into force sooner than many experts had thought.[2]

Subsequent to the entering into force of the Statute in 2002, Africa countries' relationship with the International Criminal Court (hereafter, ICC) started rosy. Many 'troubled' states on the continent conveniently referred situations on their territories to the ICC. The rosy relationship soon hit a bump in the Situation in Uganda when political compromise from peace talk prompted President Museveni to ask the Prosecutor to withdraw the arrest warrants issued against some rebel leaders.[3]

---

* Michael Usifo is a Legal Practitioner based in Lagos and a prolific legal researcher.

[1] Trial Chamber I, Prosecutor v Lubanga, Decision on the Practice of Witness Familiarisation and Witness Proofing icc-01/04-01/06 8 November 2006 para 34 & 38

[2] William A. Schabas, *An Introduction to the International Criminal Court*, 4th Ed. (Cambridge University Press: Cambridge, 2011). P 67.

[3] William A. Schabas and Mohamed M. El Zeidy, "Article 17: Issues of admissibility" in: Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Observer's notes, article by article, (Beck/Hart/Nomos 3nd edition 2016). p. 808-809.

It was however the issuance of arrest warrant against President Omar Al-Bashir by the ICC and subsequent declaration by the court that Malawi, Chad and Jordan had an obligation to arrest and surrender the ex-while Sudanese president to the ICC when Al-Bashir was on their territory irrespective of the provision of Article 98 (1) of the Rome Statute that seriously strained the continent's relationship with the ICC.[4]

The argument against the ICC was strengthened by the Prosecutor's failure to investigate and prosecute the United Kingdom's troops for their alleged war crime and crimes against humanity in Iraq. The prosecutor's explanation that the reported killings were too few to bring the case within the gravity requirement of the statute was unhelpful in light of the loss of life involved bearing in mind that the same court was prosecuting Thomas Lubanga Dyilo[5] for enlisting and conscripting children under the age of fifteen years (a crime essentially lower in degree than murder) at that time.[6]

At the height of this fractured relationship, some African leaders described the ICC as an "Infamous Caucasian Court for the prosecution of Africans and especially their leaders"[7] and pull their countries out of the ICC, or threatened to do so.

Indeed, while the ICC has its significant weaknesses and failings, the above criticism may be quite extreme. The criticism ignored the fact that except the situation in Kenya where the Prosecutor opened investigation *proprio motu* in 2010, most of the earlier cases investigated and tried by the ICC were actually referred to the court by the affected States.[8] Besides, many provisions in the Rome Statute recognize the sovereignty of states, and give priority to prosecute crime to states that

[4] For a discussion of the issues *see* Victor Tsilonis, *The Jurisdiction of the International Criminal Court* (Transl. by Angeliki Tsanta, Springer: Hague, 2019). pp. 169 – 180. *See also* Claus Kres and Kimberly Prost, "Article 98: Cooperation with respect to waiver of immunity and consent to surrender" in: Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Observer's notes, article by article, (Beck/Hart/Nomos 3nd edition 2016). pp. 2127 - 2139.

[5] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute. ICC-01/04-01/06-2842. Available on https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF . Accessed on 10 April 2020.

[6] William A. Schabas/Mohamed M. El Zeidy, *supra* note 3 at p. 815.

[7] *See* the Declaration for the Withdrawal of the Gambia from the ICC. Available on https://youtu.be/lEQ8mPS_KbU. Accessed on 15-December-2019.

[8] The governments of Uganda (January 2004), the DRC (April 2004), CAR (December 2004 and May 2014), Mali (July 2012) and Côte d'Ivoire (April 2003 by adopting the Court's jurisdiction, and subsequently ratifying the Rome Statute in February 2013) all referred situations in their State to the ICC. Available on https://www.icc-cpi.int/pages/situation.aspx,. Accessed on 15-December-2019.

have jurisdiction over such crimes.[9] We would discuss some of these provisions below, starting with the basis for such deference to state jurisdiction – sovereignty.

1.1 From Absolute Sovereignty to Complementarity – A Journey of Compromise

To King Louis IV who famously claimed *"l'etat c'est moi"* (I am the state), the idea of having a higher authority above him to try a crime that he had decided not to prosecute must have been unthinkable. His was the era of classical sovereignty.[10] This idea of sovereignty was well articulated by Jean Bodin in his 1576 work titled *Les six livres de la République* when he wrote "Majesty or Sovereignty… is the most high, absolute, and perpetual power over the citizens and subjects in a Commonweale."

To put the sovereign's absoluteness beyond doubt, Bodin said, "Sovereignty is not limited either in power, charge, or time certain."[11] He added that sovereignty cannot even be divided. To him, division of sovereignty is corruption of the state: "such states as wherein the rights of sovereignty are divided, are not rightly to be called Commonweales, but rather the corruption of Commonweales."

"where the rights of sovereignty are divided betwixt the prince and his subjects: in that confusion of the state, there is still endless stirs and quarrels, for the superiority, until that someone, some few, or all together have got the sovereignty."[12]

This sovereign is answerable only to God and not earthly powers: "he only is to be called absolute sovereign, who next unto God acknowledgeth none greater than himself." "If he be enforced to serve any man, or to obey any man's command (be it by his own good liking, or against his will) . . . he loseth the title of majesty, and is no more a sovereign." Bodin submitted that the sovereign is not even subject to his own laws.[13]

Thomas Hobbes' *Leviathan* published almost a century later in 1651 reflects this very idea. "Power unlimited, is absolute Sovereignty,"[14] Hobbes wrote.

---

[9] E.g. Article 17 of the Rome Statute. *See also* Mark S. Ellis, "The international criminal court and its implication for domestic law and national capacity building," (2002-2003) 15 *Florida Journal of Int'l Law* 215, pp. 215, 224–225.
[10] Don Herzog, *Sovereignty, RIP* (New Haven: Yale University Press, 2020). 1-50.
[11] Jean Bodin, *The Six Bookes of a Commonweale: A Facsimile Reprint of the English Translation of 1606 Corrected and Supplemented*, ed. Kenneth Douglas McRae (Cambridge, MA: Harvard University Press, 1962), 84, 85.
[12] *Ibid*, 194.
[13] *Ibid*, at p. 86, 114, 128, 92.
[14] Thomas Hobbes, *Leviathan* (London, 1651), p. 115.

This form of sovereignty is reflected in the criminal laws of the time, and relics of it exist today. In England for instance, early English judges do not allow extraterritorial application of criminal law because English criminal sanction was predicated on the beach of the King's peace, the judges could not be bothered by the breach of the peace of a foreign sovereign – more so as such could not be committed in English since the foreign sovereign's rule does not extend to England.[15]

In *Huntingdon v Attril*[16] the court explained that "the rule has its foundation in well recognized principle that crime, including in that term all branches of public law…are local in the sense that they are only cognizable and punishable in the country where they are committed.[17] This idea was re-echoed in *Macloed v Att-Gen. for N.S.W.,*[18] where the court said "all crime is local, the jurisdiction over a crime belongs to the country where the crime was committed."[19]

The earliest criminal law treaties reflect this principle. For instance, the Treaty of International Penal Law, signed at Montevideo on 23 January 1889, states that: "Crimes are tried by the Courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, or of the injured."[20]

As we earlier noted, the idea that crime is local is rooted in the notion of sovereignty. The contemporary notion of sovereignty has been traced back to the treaty of Westphalia[21]- though the idea is older. While the idea of absolute sovereignty predominated the earlier days especially in Europe, the concept has continued to be subjected to revision and readjustment to reflect evolving realities. In any case, states continue to recognize and hold tightly on to the core of the concept[22]: "the legal doctrine that no higher authority stands above the state, except that to which the state voluntarily assents."[23]

Because states jealously guard their sovereignty, it took a while before the idea universal jurisdiction[24] over crime and the creation of a permanent court to deal with serious crime was

[15] I. O. Agbede,. *Themes on Conflict of Laws*, (Shaneson C. I. Ltd, Ibadan 1989) pp. 89.
[16] (1983) A.C. 156.
[17] *Ibid*.
[18] (1981) AC 455.
[19] Ibid, 458.
[20] (1935) 29 *American Journal of International Law* 638.
[21] Michael Vaughan, "After Westphalia, Whither the Nation State, its People and Its Governmental Institutions?" (2011) *A Paper For Presentation At The International Studies Association Asia-Pacific Regional Conference.*
[22] See Bethlehem, "The End of Geography: The Changing Nature of the International System and the challenge to International Law" 25(1) *European Journal of International Law (EJIL)* 9, at 22.
[23] *Ibid*, at p. 6.
[24] The idea of Universal Jurisdiction was codified in an international treaty for the first time in the 1949, Geneva Conventions on the laws of war in respect of "Grave Breaches" of the Geneva Convention.

accepted by states.[25] Until such idea gained acceptance, it was sufficient to establish jurisdiction over a crime by virtue of some nexus to state sovereignty. This nexus could be that the crime was committed in the state's territory, or by their nationals. States could also exercise jurisdiction if their national(s) were the victim of the crime or where the state's interest was affected.[26]

The turning point was the Great Wars – First and Second World Wars (WWI and WWII). The atrocities committed, especially during the WWII were too serious to be easily glossed over. While the allied powers at the end of the WWI could not agree on using international law and a High Tribunal made of judges from different countries to try the violators of the laws and customs of war,[27] the situation was different after the WWII with the setting up of the Nuremburg Military Tribunal. The tribunal is a reference point in International Criminal Law. It provided impetus to the creation of subsequent tribunals and the eventual establishment of the ICC.

A delicate compromise that had to be worked into all of the treaties setting up international tribunals with criminal jurisdiction ever set up was how to balance state's sovereign right with the jurisdiction of these tribunals. For Tribunals such as the ICTY and ICTR, since they were creations of the United Nations Security Council (UNSC) pursuant to Article 41 of the UN Charter, the priority[28] they enjoy over state courts to try alleged crimes committed in a State's territories or by their nationals derive from the authority of UNSC to use a variety of measures to enforce its decision on peace. In the case of the ICC, the compromise was different. In addition to states' consent, the Rome Statute relies upon the principle of complementarity.[29]

2.0 WHAT IS COMPLEMENTARITY?

As the name suggests, the idea of 'one thing complementing another' underpins this principle. *Complementarity* emerged from physics,[30] where it helps to explain the situation in which two contrasted theories may explain a set of phenomena, although each separately only accounts for

[25] The suggestion for the creation of a permanent international criminal court was made as early as 1922, by professor Bellot. *See* Hugh H.L. Bellot, *A Permanent International Criminal Court*, 31 INT'L L. ASS'N REP. CONF. (1922). 75-80.

[26] Devika Hovell. "The Authority of Universal Jurisdiction." (2018) 29 *The European Journal of International Law (EJIL)* 2. P. 439.

[27] *See* Hugh H.L. Bellot, *A Permanent International Criminal Court*, 31 INT'L L. ASS'N REP. CONF. 63, 72-73 (1922).

[28] Article 9 (2) ICTY Statute and Article 8 (2) ICTR Statute, expressly stated that "the International Tribunal shall have primacy over national jurisdictions".

[29] H. Von Hebel and D. Robinson, "Crimes within the Jurisdiction of the Court" in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute Issue, Negotiations, Results* (Kluwer Law International 1999). P. 108.

[30] Bohr N, "On the notion of causality and complementarity." (1950) 111 *Science*: pp. 51, 54;

some aspects. In law, it is a principle preventing jurisdictional overlap in legislation, administration, or prosecution of crime."[31]

Applied to international criminal law, this principle recognizes the vertical structure of international criminal justice system by protecting the sovereign rights of the state to investigate and prosecute crimes that fall within their jurisdiction, while at the same time creating a mechanism in the form of an international criminal tribunal to ensure that failure by states to prosecute crimes would not encourage impunity where a person is found to have committed serious crimes.

The complementarity principle is a not a new concept – at least a form of it existed since 1919.[32] Its workings in earlier criminal tribunals before the ICC was however different from what is captured in the Rome Statute. At the Nuremburg International Military Tribunal for example, cases were allocated between IMT and domestic courts.[33] The International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL) enjoyed primacy over national jurisdiction,[34] though they developed filtering systems that set out cases to be tried by the court and those to be left to states with jurisdiction to try.[35] However, none of these tribunals has a sophisticated complementarity system like the ICC.

Longevity does not always mean acceptability. While complementarity might have been around for a long time, scholars have divided opinions on the principle. William Schabas, for instance, opines that complementarity is a misnomer. To him, the system created does not resonate with two systems complementing each other in practice. What obtains in reality is inherently antagonistic in functionality. Complementarity has a tendency to lead to hostilities between the two systems.[36]

[31] *See* Complementarity on https://www.lexico.com/en/definition/complementarity. Accessed on 20/10/2019.
[32] ElZeidy M, "The genesis of complementarity." In: Stahn C, ElZeidy M (eds) *Complementarity from theory to practice*. (CUP: UK, 2011) pp. 71–78 (where the author explained that complementarity is not a novel concept, but one which dates back to the twentieth century, starting about 79 years but ending with the Rome Statute).
[33] *See* The Tripartite Conference at Moscow, October 19–30, 1943, reprinted in: International Conciliation, No. 395, at 599–605 (1943) [Moscow Declaration], and London Agreement of August 8, 1945, reprinted in: (1947) 1 Trial of Major War Criminals Before the International Military Tribunal 8 [London Agreement] 8. In which German war criminals were sent to the IMT for trial, while minor offenders were to be judged and punished in the countries in which their crimes were committed under the Control Council Law No. 10.9.
[34] *Supra* note 28.
[35] William A. Schabas and Mohamed M. El Zeidy, *supra* note 3 at p. 785.
[36]William A. Schabas, *An introduction to the international criminal court, 3rd edn.* (Cambridge University Press: Cambridge, 2007), p. 175 and William A. Schabas, "Complementarity in practice some uncomplementary thoughts". 19 *CLF* 5. P. 6.

Immi Tallgren describes the principle as "an open container of contradictory or at least inconsistent arguments."[37] To him, complementarity is a legal fallacy in as much as it presents international criminal justice system as a single coherent framework of values.[38]

By demanding the same standards of compliance with international law from all states irrespective of their resource and capacity to investigate and prosecute crime, Frédéric Mégret suggests that complementarity fails to capture the peculiarity of different domestic justice system.[39]

Ovo Catherine, however, gives a contrary view to the above; she argues that complementarity remains the best effort so far made by the international community to ensure accountability for international crimes. Rather than viewing the concept as mutually exclusive, she opined that the system should be perceived as an inclusive effort to fight impunity. Success at national level will translate to success and sustainability of the ICC.[40] William Schabas and Mohamed El Zeidy share this view, "the complementarity principle strikes a balance between state sovereignty and an effective and credible ICC. Without it there would have been no agreement."[41]

2.1 Complementarity in the Rome Statute

The Trial Chamber I of the ICC described complementarity as "one of the cornerstones of the Rome Statute"[42] for good reason; without it, it would almost be impossible to market the statute to states since the ICC is a court that encroaches on states' sovereignty, something which states jealously protect.

Preamble 10, Article 1, 17 and 20 all reflect complementarity principle in the Rome statute. The principle is also implied in all the provisions of the Rome Statute being an overriding principle that makes the Statute itself operative.

Preamble 10 states that the ICC shall be complementary to national criminal jurisdictions, while preamble 6 emphasizes the obligation of states to prosecute crimes: "…it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes." Preamble 4

[37] Tallgren I, "Completing the international criminal order," (1998) 67(2) *Nor. J. Int'l. L*: pp. 107–137, 123.
[38] Tallgren I, "The sensibility and sense of international criminal law," (2002) 13(3) *EJIL*: pp. 561–595, 568–569.
[39] Mégret F (2005) "What is 'Unwilling' or 'Unable' Jurisdiction Under Article 17 of the Rome Statute? Lessons from international law's theories of denial of justice." *Que. Rev. Int'l L*. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id¼1277523. Accessed 15 November 2019.
[40] Ovo Catherine Imoedemhe, *The Complementarity Regime of the International Criminal Court National Implementation in Africa*. (Springer International Publishing: Switzerland, 2017). P. 23.
[41] William A. Schabas and Mohamed M. El Zeidy, *supra* note 3 at p. 793.
[42] Trial Chamber I, Prosecutor v Lubanga, Decision on the Practice of Witness Familiarisation and Witness Proofing icc-01/04-01/06 8 November 2006 para 34 & 38.

relates states' duty to prosecute crime to the overall objective of the statute of ensuring that perpetrators of heinous crimes are punished.

The complementarity principle is reemphasized in Article 1 – since preambles are not an operation part of treaties, but it is Article 17 that sets out how the principle works at the ICC.

Article 17 is titled "Issues of Admissibility". The Article starts with a reference to the complementary role of the court as stated in Preamble 10 and Article 1, before setting out how the rule should work. Observe that paragraph 1 is cast in the negative; "the Court shall determine that a case is inadmissible where…" this is part of the effort to emphasize the primacy of state's investigative and prosecution role over crime about that of ICC.

Article 17(1)(a)-(c) constitute the core of the complementarity principle, while Article 17(1)(d) sets the gravity test for cases that ICC should handle. A combination of the complementarity principle and the gravity test form the ICC's admissibility rule. The court is free to decide which of these requirements to check first to determine whether a case is admissible, since whichever order the court treats these tests has no substantial value.[43] In practice, though, the court seems to favour checking the complementarity test first before the gravity test.[44]

In any case, a case is inadmissible at the ICC where the same case is being genuinely investigated or prosecuted by a state which has jurisdiction over it, or where the state with jurisdiction over the case has genuinely investigated it and decided not to prosecute the person concerned. Besides, the double jeopardy rule which prevents a person from being tried again for the same offence for which they had been tried before also bar the admissibility of cases at the ICC. Lastly, the court only admits cases that are of sufficient gravity.[45]

The court's jurisprudence on Article 17 (1) has clarified some salient elements of Article 17. The Pre Trial Chambers has even broadened some of these elements. Before we look at the court's jurisprudence of Article 17, we should discuss how cases come to the court.

[43] William A. Schabas and Mohamed M. El Zeidy, *supra* note 3 at p. 794.

[44] See, *Prosecutor v. William Samoei Ruto*, *Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC- 01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012 <https://www.legal-tools.org/doc/96c3c2/>, para. 38; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011 <https://www.legal-tools.org/doc/dbb0ed/>, paras. 48 et seq.

[45] See generally, Article 17 of the Rome Statute.

2.2 Trigger Mechanism

The Statute set rules for calling the court to act. The jargon for that is "trigger mechanism"; the rules are found in Articles 13, 14, 15 and 15*bis* of the Rome Statute.

By the above provisions, and subject to other relevant provisions,[46] the ICC may commence investigation into a situation within its competence if such situation is referred to it by a State Party[47], by the United Nations Security Council pursuant to Chapter VII of the Charter of the United Nations,[48] or if the Prosecutor acts *proprio motu* on the basis of information received on crimes within the court's jurisdiction.[49]

Of all the above scenarios, state's self-referrals were arguably the least envisaged.[50] States' sovereignty extends to states' primary obligation to investigate and prosecute crime committed in their domain. Since states jealously guard this sovereignty, referring alleged criminals within their jurisdiction to the ICC instead of trying them by their domestic court is an unnecessary surrender of sovereignty. Interestingly, state referrals especially among African countries turned out to be frequent than envisaged.[51]

States' referrals have raised concerns about states' international obligation to prosecute crime. Are states, by the referral mechanism, abdicating their customary international law obligation to prosecute by pushing up that responsibility to the ICC? A negative answer to this question has been offered by some experts. These experts argued that the customary obligation *aut dedere aut judicare* involves a duty to prosecute or extradite an alleged criminal. By referring a Situation to the ICC, a state was actually fulfilling its customary law obligations by cooperating with the ICC to ensure justice is served.[52] The argument draws a line between inaction by a state, and state's referrals. The latter is said to be attune to the pursuit of effective justice which is the central goal of the Rome statute.

[46] *See* for example the provisions of Articles 18 (Preliminary rulings regarding admissibility), 19 (Challenges to the jurisdiction of the Court or the admissibility of a case) and 53 (initiation of an investigation)
[47] Rome Statute, Articles 13(a) & 14
[48] Article 13(b).
[49] Articles 13(c) & 15.
[50] Ovo Catherine Imoedemhe, *supra* note 40 at p. 26 - 27.
[51] *See* note 8.
[52] 'Paper on Some Policy Issues before the Office of the Prosecutor' (2003) 5, <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> accessed 7 November 2019.

Prosecutor acting *proprio motu* was also controversial. An unchecked prosecutor might abuse this power, and turn the ICC into a "bully". The drafters of the statute easily realize this and created a special provision in Article 15 for cases where the Prosecutor acts *proprio motu.*[53]

Of the 13 Situations under investigation at the ICC, six were referred by states, two by the UNSC while the prosecutor acted *proprio motu* in the remaining five. Some of the States that have adopted self-referrals are Uganda, DRC, CAR (twice: 2004 and 2014) and Mali. Cote d'Ivoire adopted the *ad hoc* jurisdiction of the court in 2003, thus allowing ICC to investigate crimes committed in the State – this is a technical form of self-referral. The country later ratified the Rome Statute in 2013.

The UNSC has referred two situations to the court: Situation in Darfur, March 2005, and the Situation in the Libyan Arab Jamahiriya, February 2011; while the *proprio motu* rule was activated in the situation in Kenya (March 2010), Georgia (January 2016), Burundi (October 2017), as well as in the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, and in Afghanistan.[54]

There is no automatic mandatory duty investigate once any of the trigger mechanisms is activated. Article 53 requires the prosecution to first evaluate the information received and determine that there is reasonable basis to proceed with the Situation before going on to investigate.[55] A prosecutor's decision not to investigate may however be reviewed by the Pre-Trial Chamber.

Articles 13 and 14 allow states and UNSC to refer "Situation" to the Court and not a "matter", "case" or "crime" to preserve the independence of the Prosecutor, especially in situations referred to the court by the UNSC.[56]

In *Prosecutor v. Calliste Mbarushimana*,[57] the Pre-Trial Chamber I held that

> pursuant to articles 13 and 14 of the Statute, a State Party may only refer to the Prosecutor an entire "situation in which one or more crimes within the jurisdiction of the Court appear to have been

[53] Morten Bergsmo, Jelena Pejic and Dan Zhu, "Article 15: Prosecutor." in: Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Observer's notes, article by article, (Beck/Hart/Nomos 3nd edition 2016). pp 726 - 729.

[54] "Situations under investigation," Available on https://www.icc-cpi.int/pages/situation.aspx accessed on 18/March./2020.

[55] Rule 104(1) Rule of Procedure and Evidence (RPE).

[56] William A. Schabas and Giulia Pecorella, "Article 13: Exercise of jurisdiction." in: Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Observer's notes, article by article, (Beck/Hart/Nomos 3nd edition 2016). P. 695.

[57] No. ICC-01/04-01/10-451, Decision on the 'Defence Challenge to the Jurisdiction of the Court', Pre-Trial Chamber I, 26 October 2011.

committed". Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e. g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated. In the case at hand, as the situation of crisis referred was ongoing at the time of the Referral ("situation qui se de'roule dans mon pays"), the boundaries of the Court's jurisdiction can only be delimited by the situation of crisis itself.[58]

2.3 Complementarity at work

Article 17 (1) (a)-(c) sets the parameters within which complementarity works at the ICC; the court cannot proceed with a situation which is already being investigated and prosecuted by a national judicial system. This bar is not absolute. There are some factors which the court checks to decide whether or not it should suspend its exercise of jurisdiction in deference to a state which is already exercising jurisdiction over the situation before the Court. We will now discuss these factors.

2.3.1 State's Inactivity or Inaction

Article 17 does not use the word "inactivity" or "inaction". Rather, this procedural check emerged from the office of the prosecutor and has been endorsed by the court. Inactivity or inaction is rooted in state referral. The subtle message in state referral is that a state was not doing anything – or is "unable"[59] to do anything about a situation. By referring the situation to the court therefore, the state accepts not to contest the jurisdiction of the court over the situation.

This "uncontested admissibility" theory evolved from an attempt to give meaning to the phrase "the case is being investigated or prosecuted" in Article 17. International criminal law experts recommended this approach to the Prosecutor as how 'complementarity in practice' should be. They opined that complementarity should create a relationship built on cooperation and assistance between the ICC and the states.[60] They explained that,

> 'Article 17 specifies the consequences for admissibility where a state is investigating or prosecuting, but does not expressly oblige states to act. However, paragraph 6 of the preamble refers to the "duty" of States to exercise criminal jurisdiction. While the preamble does not as such create legal obligations, the provisions of the Statute may be interpreted in the light of the preamble. The duty to "exercise criminal jurisdiction" should be read in a manner consistent with the

[58] *Ibid*, para. 27.
[59] "Unable" was used in Article 17 (1) (a) and it is discussed below.
[60] Informal Expert paper: 'The Principle of Complementarity in Practice' (2003), ICC-01/04-01/07-1008-AnxA.

> customary obligation *aut dedere aut judicare*, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution. However, as noted above, the reference to a duty also reflects the spirit of the Statute that States are intended to carry the main burden of investigating and prosecuting. This is necessary for the effective operation of the ICC. In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity.'[61]

A commentary on some policy issue by the prosecutor shows that the prosecutor accepted the above view.

> '[T]here may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each other's hands and yet agree to a prosecution by a Court perceived as neutral and impartial.'[62]

Further justifications of the theory were offered by experts: "[t]here may also be situations where the Office of the Prosecutor (OTP) and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible."[63] Besides, "[t]here may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution."[64]

In effect, different scenarios may lead to inactivity by the states. The state's compliance with its obligation to investigate and prosecute will however be judged based on its motive, instead of the scenario leading to the inactivity.

[61] *Ibid.,* p. 19, fn. 24.
[62] 'Paper on Some Policy Issues before the Office of the Prosecutor' (2003) 5, <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> accessed 7 March 2019.
[63] Informal Expert paper: 'The Principle of Complementarity in Practice' (2003) 3, ICC-01/04-01/07-1008-AnxA.
[64] *Ibid.* 18. Also 20.

In the earlier cases,[65] the approach was that once inactivity was established, the question of State's inability or unwillingness to investigate or prosecute is not considered in order for the ICC to initiate investigation or prosecution: In the *Lubanga case*, the Pre-Trial Chamber explained that

> no State with jurisdiction over the case […] against Mr […] Lubanga is acting, or has acted in relation to [such case]. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.[66]

This approach was, however, modified by the Trial Chamber II in the 2009 *Katanga case* where the "willingness" requirement was emphasized.[67] This decision threw the procedure into disarray until the Appeals Chamber overruled the Trial Chamber II's position.

The Appeals Chamber noted that,

> Such an interpretation is not only irreconcilable with the wording of the provision, but is also in conflict with a purposive interpretation of the Statute. The aim of the Rome Statute is "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished". This object and purpose of the Statute would come to naught were the said interpretation of article 17 (1) of the Statute as proposed by the Appellant to prevail. It would result in a situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations. The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court.'[68]

The Appeals Chamber went on to clarify the procedural requirement:

---

[65] Situation in the Democratic Republic of the Congo, ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrents of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <https://www.legaltools.org/doc/73acb4/> accessed 5 November 2019; and *Prosecutor v. Bahar Idriss Abu Garada*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010 <https://www.legaltools.org/doc/cb3614/> accessed 5 November 2019, para. 29.

[66] *Ibid*, *Situation in the Democratic Republic of the Congo*, para. 40. See also *Prosecutor v. Bahar Idriss Abu Garada*, para. 29.

[67] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 June 2009 <https://www.legal-tools.org/doc/e4ca69/> accessed 3 March 2015, para. 77.

[68] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009 <https://www.legal-tools.org/doc/ba82b5/>accessed 5 March 2015, para. 79.

> [I]n considering whether a case is inadmissible under article 17(1)(a) and (b)[…], the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d)[…].'[69]

In effect, the court endorsed a sequential application of the treaty provision. Inaction would need to be determined first. Where it is established that a case is not being investigated or prosecuted by a State, the case will become admissible – there would be no need to check the potential willingness or inability of the state to initiate action. Provided, of course, that the situation meets the gravity requirement and does not violate the *Ne bis in idem* (double jeopardy) rule.

2.3.2 *Case is being Investigated*

The *Lubanga*[70] case offers an interesting insight into complimentarity in practice at the ICC. It establishes that a case is inadmissible only if the same person is being investigated, prosecuted or tried by the state for the same conduct as the one before the ICC – that is, is established the *"same person, same conduct test"*.[71] The court formulated this test while analyzing the notion of 'case' being investigated in Article 17(1)(a).[72]

Articles 20(3) and article 90(1) of the Statute make references to 'same person' and the 'same conduct', and thus provide good basis for this test. This test has become a part of ICC's

[69] *Ibid*., para. 78.
[70] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr.
[71] *Ibid*, para 31
[72] *Ibid*, at para 30

jurisprudence.[73] It was, however, modified in the *Kenya* case[74] where the Appeal Chamber added the word "substantially" to the conduct requirement when a concrete case is to be established.[75] In that case, the court noted that,

> "The defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(l)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."[76]

The same modified test was applied in the *Saif Al-Islam Gaddafi*[77] case by the Pre-Trial Chamber I and endorsed on Appeal.[78]

[73] See for example: *The Prosecutor v Mr Germain Katanga* ICC-01/04-01/07-1497 OA 8 (Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case) para 81-82; *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1- Corr, para. 24; *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-01/07-262, para. 21; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-2-Conf, para. 50 (public redacted version in ICC-02/05-01/09-3); and *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Prosecutor's Application under Article 58, 7 May 2009, ICC-02/05-02/09-l-Conf, para. 4 (public redacted version in ICC-02/05-02/09-12-Anxl), The same approach was taken by Pre-Trial Chamber II in *The Prosecutor v. Kony et al*., Decision on the Admissibility of the Case under Article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, paras 17–18; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101, para. 54; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, para. 48; Pre-Trial Chamber III in *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG (Translation notified 17 July 2006), para. 16.

[74] Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11-274, para. 39. The same requirement has been recalled in paras 40,41,42 and 61 of the said decision. https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF. Accessed on 15-November-2019.

[75] *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 August 2011 https://www.legal-tools.org/doc/ac5d46/pdf/. Accessed 20 January 2020, para. 39. (hereafter: "Ruto Admissibility Judgment")

[76] ICC-01/09-02/11-274, *supra* note 72 at *para.* 39.

[77] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein* ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the Admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013. http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf (Saif Al-Islam case).

[78] *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Appeals Chamber, Judgement on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014 https://www.legaltools.org/doc/0499fd/. Accessed 5 March 2019.

The "same person, same conduct" test is a stricter rule than the "same person and substantially same conduct" test. "What is 'substantially the same conduct as alleged in the proceedings before the Court' will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis.[79]

The court has drawn attention to the different degrees of proof required to establish that the same person and the same case before the ICC was already being investigated by the national judicial system. The Appeals Chamber stated;

> The meaning of the words 'case is being investigated' in article 17 (1) (a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of "information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2" that the Prosecutor's notification to States should contain.
>
> In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be reasonable grounds to believe that the person named therein has committed a crime within the jurisdiction of the Court. Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17 (1) (c) and 20 (3) of the Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20 (3) (a) or (b) of the Statute are met. Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.[80] [footnote omitted.]

[79] *Supra*. note 75 at *para*. 77.
[80] Ruto Admissibility Judgment, supra note 73, paras. 39-40.

In summary, at the early stages of a case, such as when the Prosecutor is about to commence investigation into a situation, the court will assess the proof provided to see if a potential case exists. Where the prosecutor has conducted his investigation and now approaches the Pre Trial Chamber for the issuant of warrant of arrest or summon to appeal, the court will assess the evidence presented by the prosecutor to establish that there is a 'concrete case' – concrete in the sense that there should be an actually identified suspect and a criminal conduct known to the court.[81]

The burden of proving that a domestic investigation, prosecution or trial is ongoing falls on the state who wishes to do so. Such state must provide "all material capable of proving that an investigation or prosecution is ongoing."[82]

2.3.3 *Unwilling*

Because the ICC has frequently decided to proceed with a case on the premise of 'inactivity' or 'inaction' by states without going as far as analysing the "unwilling" of a state to investigate or prosecute a case, the court's jurisprudence on the "unwilling" requirement has not been so robust. However, there is usually an overlap in the analysis of the "inactivity" element and the question of 'unwillingness'. This overlap gives insight into what "unwilling" means. The Pre-Trial Chamber I noted this overlap when it held that

> "[T]he two limbs of the admissibility test [i.e., inactivity and unwillingness or inability], while distinct, are nonetheless, intimately and inextricably linked… Indeed, evidence related, inter alia, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of "inactivity" at the national level, are also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings."[83]

Besides, Article 17(2) creates three parameters for determining state's "unwillingness" to try a case: first is whether the proceeding on the case was done or being done to shielding the person concerned from criminal responsibility for crimes, second is whether the proceeding is/was

[81] William A. Schabas and Mohamed M. El Zeidy, *supra* note 3 at pp. 799 – 800.

[82] *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Cote D'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014 available on https://www.legaltools.org/doc/ef697a/. Accessed 15 November 2019, para. 29.

[83] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 available on https://www.legaltools.org/doc/af6104/. Accessed 15 November 2019, para. 210.

unjustifiably delayed in a way that suggests an intention not to bring the person concerned to justice, and third whether the proceeding lacks necessary impartiality and independence, such as to suggestion an intention not to bring the person concerned to justice. Any of these is sufficient proof that a state is "unwilling" to try the particular case.

The *chapeau* of Article 17 (2) *say*s that unwillingness should be determined having "regard to the principles of due process recognized by international law". This means that the list under the subparagraph is not exhaustive. Due process recognized by international law has been interpreted to include "the presumption of innocence, non-retroactivity of criminal law, the right to a public hearing, the right to obtain free legal assistance, the right to be informed, the right to examine the witnesses and the right to remain silent.[84] Failure to comply with any of these may also demonstrate a state's unwillingness to try a case.

Lack of an appropriate legal framework, lack of institutional capacity or of political will are some of the roots of unwillingness.[85] When Kenya challenged the ICC's jurisdiction,[86] over a case which the State claimed to be investigating, the court found that the available evidence in support of Kenya's claim does not relate to the same suspects before the ICC, neither was the claim of local investigation substantiated with specific proof.[87] While the court did not go as far as saying Kenya's defence demonstrated an attempt to shield the suspects, the inference can easily be drawn.

2.3.4 *Unable*

This requirement relates to the existence and capacity of the national judicial system to investigate and prosecute the accused person, as well as the ability of the state with jurisdiction over the crime to apprehend the accused person and secure relevant evidence for the prosecution to proceed.[88] Where an assessment of these situations lead to a negative result, the state in question might be found to unable to investigate and prosecute the person concerned.[89]

[84] Ovo Catherine Imoedemhe, *supra* note 40 at P. 33-34.
[85] *Ibid*, at p. 33.
[86] ICC-01/09-02/11-274 30-08-2011, supra note 72.
[87] Ibid, paras 67-68.
[88] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein* ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the Admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013. http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf (Saif Al-Islam case). para 205 – 215., see also Ovo Catherine Imoedemhe, *supra* note 40 at pp. 34 – 35.
[89] Article 17 (3).

In the *Saif Al-Islam Gaddafi* case,[90]the court raised concerns about the ability of Libya to bring the accused under its direct control. At the time of the proceeding, the state was also having challenges with gathering evidence – including witnesses' testimonies that would be used be used in prosecuting the case. Besides, there were unsettled question about witness protection as well as the state's ability to secure legal representation for the accused.[91] All these led the Pre-Trial Chamber I to hold that Libya was not "able genuinely to carry out an investigation against Mr Gaddafi."[92]

2.3.5 *Genuinely*

The drafting history of the Statute shows that "genuinely" was included in the text to prevent the ICC from passing subjective judgment on how states perform their obligation to investigate and prosecute crime at the national level. Of course, the word 'genuinely' bears some measure of subjectively, but delegates found it less objectionable compared to words like 'effectively' or 'diligently'. In any case, no definition was given to the word in the Statute; the Rules of Proceeding and Evidence is silent on it too. When the court was confronted with the application of the word in both *Gaddafi* and *Al-Senussi*, it didn't give any definition to the word either.[93]

Scholars have attempted to give meaning to "genuinely" in the context of Article 17. It has been suggested that the word bears the same meaning as "good faith". This position was supported by drawing experience from some decisions of the European Court of Justice.[94] Another view is that the word "genuinely" suggests that the drafters want to prioritize due process in the assessment of investigation and prosecution claimed by state.[95] Ovo Catherine suggests that genuinely in this context "presupposes something real and sincere, having the value claimed without a form of pretence."[96]

Opinions on this will continue to expand, but what can reasonably be submitted is that the test of genuineness of the proceeding at the national level will depend on each case. The whole trial at

[90] *See* note 88.
[91] *Ibid*, at para 215.
[92] *Ibid*, at para 219.
[93] William A. Schabas and Mohamed M. El Zeidy, *supra* note 3 at p. 805.
[94] John Holmes, "Complementarity: National Courts versus the ICC," in Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press: Oxford, 2002) 674.
[95] Jon Heller K (2006) The shadow side of complementarity: the effect of article 17 of the Rome Statute on national due process. 17 *CLF* pp.255–280.
[96] Ovo Catherine Imoedemhe, *supra* note 40 at p. 37.

the national level will have to be objectively securitized before concluding whether the process was a charade or a genuine one.

2.3.6 *Decision not to Prosecute by State*

It is possible that after conducting a thorough investigation into a potential case, a state decides not to prosecute the case. Such a decision may be informed by many factors. In this scenario, Article 17 (1) (b) of the ICC says such a case is inadmissible "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute". The requirements of "unwillingness" and "inability" have already been discussed above, we must now interrogate "decision not to prosecute" since it is not all such decisions that make a case inadmissible at the ICC.

A decision not to prosecute by a state will only bar proceedings at the ICC if such decision is a final decision.[97] It is not a final decision if the decision is made as part of plans to refer the case to the ICC.[98] Also, such decision must be subsequent to the conclusion of a genuine investigation. A decision not to prosecute, when in fact no investigation has been done will translate to inaction. As we have seen above, inaction is sufficient to make a case admissible at the ICC.

In *Prosecutor v. Katanga and Ngudjolo Chui*, the Appeal Chamber considered the effect of the DRC's Auditeur General's decision to close domestic proceedings against Germain Katanga on 17 October 2007. After due analysis, the Chamber said,

> 'This decision was not a decision not to prosecute in terms of article 17 (1) (b) of the Statute. It was, rather, a decision to surrender the Appellant to the Court and to close domestic investigations against him as a result of that surrender. The thrust of this decision was not that the Appellant should not be prosecuted, but that he should be prosecuted, albeit before the International Criminal Court.'[99]

The court based this decision on the overall purpose of the Statute, which is to end impunity.

> If the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a "decision not to prosecute", the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible. In such

[97] William A. Schabas and Mohamed M. El Zeidy, *supra* note 3 at p. 806.
[98] *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009 https://www.legal-tools.org/doc/ba82b5/. Accessed 21 November 2019, para. 82.
[99] *Ibid.*

> scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute. Thus, a "decision not to prosecute" in terms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC (footnotes omitted).[100]

A similar conclusion was reached in *Prosecutor v. Jean Pierre Bemba Gombo.*[101]

A decision not to prosecute might sometimes be a political necessity. Such decision may follow a peace settlement – as happened in Uganda, and in South Africa in ending apartheid. The court has not precisely weighed in on whether such settlement will qualify as "decision not to prosecution" that will suffice to make a case inadmissibility. Since these decisions are usually not a product of investigation but measure to restore peace, it is hard to situate them within Article 17 (1) (b).

It has been suggested that situations like this should be handled by the UN Security Council pursuant to Article 16 of the Rome Statute.[102] In effect, UNSC should, as part of its work on global peace, ensure that investigations and prosecution of persons protected under a peace deal should be deferred.[103]

2.3.7 Ne Bis In Idem Rule

This rule has its equivalent in the double jeopardy principle at common law. Its effect is to prevent a person from being judged twice for the same office.[104] Article 17 (1) (c) which created this inadmissibility rule refers to Article 20(3) for its scope.

Article 20 (3) focuses on trial; it establishes *Res iudicata* for a person who 'has been tried', thus bringing the ***ne bis in idem*** rule into play where a person has been tried before another court. The other court's decision in the previous trial – be it acquittal, conviction or dismal which terminates

[100] *Prosecutor v. Katanga and Ngudjolo Chui*, *ibid*, para. 83.
[101] *Prosecutor v. Jean Pierre Bemba Gombo,* ICC-01/05-01/08-962-Corr, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 24 June 2010 Entitled 'Decision on the Admissibility and Abuse of Process Challenges', Appeals Chamber, 19 October 2010 https://www.legal-tools.org/doc/37e559/ Accessed 15 November 2019, para. 68; For the Trial Chamber decision, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 June 2010 https://www.legal-tools.org/doc/a5de24/. Accessed 15 November 2019.
[102] William A. Schabas and Mohamed M. El Zeidy, *supra* note 3 at p. 810.
[103] This approach will require repeated deferrals in light of the limited timeframe for deferral under Article 16.
[104] It bars new prosecution and blocks a second punishment.

proceedings, seems to be immaterial provided a trial was done by a court. It then means that "there can be no violation of *non-bis-in-idem*, …unless the accused has already been tried."[105]

The courts envisaged under this provision are national courts of member states and non-member states, which have the necessary legal competence to bring a person concerned to justice. It also includes international courts with necessary jurisdiction to tried conducts within ICC's jurisdiction.

The ***ne bis in idem rule*** has exceptions: it does not apply where the initial trial was a sham, done to shield the person concerned from criminal responsibility for the crimes they have allegedly committed. The other exception is about how the previous trial went. Such trial must have been independently and impartially conducted "in accordance with the norms of due process recognized by international law". A trial "that is inconsistent with an intent to bring the person concerned to justice," will not affect admissibility of a case at the ICC.

The division of these exceptions into two is superficial. A trial conducted to shield a person from criminal responsibility will qualify as one done inconsistent with an intent to bring the person concerned to justice. In both cases, impartial and independent trial is unlikely to have been conducted.

The exceptions impliedly require an assessment of the earlier trial, though the Statute does not set an assessment parameter. In light of this omission, such assessment is open to the subjective views of the assessor.

2.3.8 *Sufficient Gravity*

The ICC only has jurisdiction over the most serious crimes of international concern.[106] These crimes are genocide, crime against humanity, war crime and the crime of aggression.[107] However, the ICC has limited resources to prosecute all the perpetrators of these crimes. It has to device a means of filtering cases in order to have the maximum impact using the minimum resources. It must also constantly work with national justice systems to ensure that accused persons do no escape being punished.

[105] *Prosecutor v. Tadic*', Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of Non-Bis-In-Idem, Trial Chamber, 14 November 1995, para. 24.
[106] Article 1, Rome Statute.
[107] Article 5, Rome Statute.

A filtering mechanism built into the exercise of jurisdiction by the ICC is the gravity test. The test ensures that only the most serious crimes with sufficient gravity – ones which states with jurisdiction are unable or unwilling to prosecute, are investigated and prosecuted by the Court.

In the *Lubanga* case, the Pre-Trial Chamber I explained that:

> '[T]he gravity threshold is in addition to the drafters' careful selection of crimes included in articles 6 to 8 of the Statute […]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.'[108]

What brings a case within the "sufficient gravity" requirement is not explained in the statute, but the court has suggested two features to look out for:

> 'First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes (which are defined by both contextual and specific elements) included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.'[109]

In the Kenya situation, Pre-Trial Chamber II provided further useful guidance on what to look for in considering the gravity test:

i. the scale of the alleged crimes (including assessment of geographical and temporal intensity);
ii. the nature of the unlawful behaviour or of the crimes allegedly committed;
iii. the employed means for the execution of the crimes (i. e., the manner of their commission); and
iv. the impact of the crimes and the harm caused to victims and their families.'[110]

The office of the prosecutor has reflected these tests of sufficient gravity in case-selection process.[111] Prosecutor also usually focuses investigation and trials on principal actors of the crime.

---

[108] *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <https://www.legaltools.org/doc/73acb4/>. Accessed 6 March 2015, para. 41.
[109] Ibid., para. 46.
[110] Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010 https://www.legal-tools.org/doc/338a6f/. Accessed 6 March 2015, para. 62.
[111] Luis Moreno-Ocampo OTP, Draft Policy Paper on Selection Criteria

2.4 Complimentarity Principle in Article 18 and 19

Article 18 and 19 of the Rome Statute provide further complementarity checks. Article 18 requires the ICC to defer to states that are already investigating a case. By this provision, the prosecutor is required to notify state parties before commencing investigation into a situation whether the situation was referred by a state party or the prosecutor acts *proprio motu*. If within a month of issuing such notice, a state having jurisdiction over the case signifies that it was already investigating the conducts in question and requests the prosecution to defer her investigation, the prosecution is required to do so except otherwise authorised by the Pre-Trial Chamber to proceed with the investigation.

Such deferral is not a gateway for states to shield a suspect from prosecution or to relax its investigation. Subparagraph 3 of Article 18 allows the prosecution to review the deferral after 6 months. The prosecutor can also request the State concerned to periodically inform her of the progress of its investigations and any subsequent prosecutions from the case. States have an obligation to respond to that request without delay.

Article 19 allows states to challenge the admissibility of cases at the ICC. States that wish to do so must act at the earliest opportunity.

3.00 CONCLUSION AND RECOMMENDATIONS

The principle of complementarity is not merely the cornerstone of the Rome Statute, but also the central principle that regulates the ICC's eventual jurisdiction.[112] An understanding of this principle and its judicious application will ensure that a state remains unaffected by ICC's intervention and unnecessary 'encroachment' on a state's sovereignty. The view that the court is an "Infamous Caucasian Court for the prosecution of Africans and especially their leaders"[113] will also change.

[112] Victor Tsilonis, *supra* note 4 at p. 211.
[113] *See* the Declaration for the Withdrawal of the Gambia from the ICC. Available on https://youtu.be/lEQ8mPS_KbU. Accessed on 15-December-2019.

There is no doubt that many third-world countries are embroiled in 'dangerous' armed conflicts.[114] Some of these conflicts involve serious crime of international concern within the jurisdiction of the ICC. Unfortunately, many of these countries lack the requisite institutional framework to deal with the causes of this crisis, and the crime perpetrated as the conflict continues.

In many third-world countries, especially in Africa, leaders act with impunity, men of affluence do not respect the law. Because desperation for wealth has become an acceptable craft, core value has been eroded; even the courts can no longer be trusted to dispense justice. The quest for power to gain control of state resources, ethnic jingoism, and corruption bred by this loss of value are the roots of the conflicts bedevilling many third-world nations.

This situation weakens state institutions, and crumbles state's capacity to help the weakest among its citizens. It also throws up ill-equipped people in leadership space. Weak leaders leave lasting but disastrous impact on state. Unfortunately, the impact is not felt within national borders alones. A quest for survival will force people to seek greener pasture outside their national borders. An international crisis will emerge where this movement of people produce mass forced migration, with one state's failure having effect in another state.

Forced migration, of course, is only a symptom of deeper issues which include justice. When people lose faith in their state system, they naturally seek it through other means. The volume of communication to the ICC – mostly from third-world countries are evidence of state failure. The people's desire for justice at a neutral and trusted forum cannot be wished away by 'blackmail' that the court is biased or any other smearing campaigns.[115] Of course, this does not mean that the court is perfect.

To forestall the continuing situation where nationals, especially leaders, of third-world countries are the defendant at the ICC, there is a serious need for introspection in these countries. A sincere commitment to justice, end impunity, create an egalitarian society is needed.

Indeed, many third-world countries have gone through colonial experience. The experience instilled a sense of deprivation and strong desire for selfish accumulation. Segregation and divide-

[114] In 2019, the ICRC identified 14 countries (all third-world nations predominately in Africa) where crisis has created serious humanitarian need sufficient enough to draw the ICRC attention. *See* ICRC Special Appeal 2019: The ICRC's Response to Sexual Violence. P.56.

[115] Romel Bagares echoed this fact when Philippines officially left the ICC: "it (ICC) is our last resort when our institutions fail". *See* Jasaon Gutierrez, Philippines Officially Leaves the International Criminal Court, March 17, 2019. Available on https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html. Accessed on 15 November, 2019.

and-rule are common features of colonial rule. Decades after colonial rule, it has been difficult for many colonized third-world countries to shed this past and form a truly united state. Serious efforts must now be made to arrest this trend.

The above reflection provides a background for how third-world countries should rethink their relationship with the ICC. Rather than take an antagonistic approach, third-world countries must deal with their local problems with deep sincerity, and ride on the principle of complementarity to benefit from the provisions of the Rome Statute and the ICC's structure.

Indeed, membership of the ICC provides a subtle deterrence for aggressive nation to tread careful in relations with ICC member-states. It also provides opportunity to build local capacity in the justice sector through better cooperation with the ICC.

The principle of complementarity shapes the relationship between states and the ICC, but a successful depends on the capacity of national judicial system to deliver justice. Leaders at national leader must therefore commit to developing local institutions to deal with the crimes and human rights violation.

Developing local institution must translate to institutionalizing good governance. Institutions must be manned by competent people, and they should enjoy sufficient independence to do their job. Rule of law, emphasis on merit and competence, respect for human dignity and other democratic values must be vigorously pursued.

The only thing democratic about the current democratic system in many third-world countries is periodic election. Other than that, even the electoral system lacks democratic values. This trend must stop.

ICC was created to pursue the cause of humanity. Genocide, crimes against humanity, war crimes, and crime of aggression are not mere evil, they are evil that deeply shock the conscience of humanity and threaten the peace, security and well-being of world. Humanity will therefore act whenever and wherever such crimes are committed.

The recent authorization of investigation into the Rohinga people's case,[116] and the power of the UNSC to refer situations to the ICC are pointers to the fact that exiting the ICC is not sufficient to

[116]The Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Rohinga Case), ICC-01/19-27.

escape justice. As members of the same humanity, Africa and the rest of the third-world, must turn the mirror to ourselves and begin to rework our systems to facilitate equality and justice.