APPLICATION OF THE PRINCIPLE OF COMPLEMENTARITY BY THE INTERNATIONAL CRIMINAL COURT, 2002-2018

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วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรดุษฎีบัณฑิต
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ศาลอาญาระหว่างประเทศเป็นกลไกที่ถูกจัดตั้งขึ้นเพื่อนำตัวผู้กระทำความผิดอาญาระหว่างประเทศมาเข้าสู่กระบวนการยุติธรรมเพื่อพิจารณาคดีและลงโทษ นอกจากนั้นศาลฯ ก็ยังเป็นองค์กรทางตุลาการที่มีบทบาทในการเสริมสร้างหลักนิติธรรมอีกด้วย เพื่อให้บรรลุตามเป้าประสงค์หลักดังกล่าว ธรรมนูญกรุงโรมว่าด้วยศาลอาญาระหว่างประเทศ ได้บัญญัติให้รัฐทั้งหลายมีหน้าที่รับผิดชอบในการดำเนินคดีอาชญากรรมระหว่างประเทศเป็นลำดับต้น โดยกำหนดให้ศาลฯ ทำหน้าที่ในการช่วยเสริมกระบวนการยุติธรรมภายในของรัฐเท่านั้น (หลักอำนาจเสริม) โดยตามหลักนี้ ศาลฯ จะใช้อำนาจในการสืบสวนสอบสวน หรือการพิจารณาพิพากษาคดีอาชญากรรมทำลายล้างเผ่าพันธุ์ อาชญากรรมต่อมนุษยชาติ อาชญากรรมสงคราม และอาชญากรรมการรุกรานได้ ก็ต่อเมื่อกระบวนการยุติธรรมภายในของรัฐล้มเหลวลงอันเนื่องมาจากความไม่ประสงค์ หรือความไม่สามารถ

หลักการสำคัญของหลักอำนาจเสริมนี้ปรากฏในบทบัญญัติของธรรมนูญกรุงโรมฯ มาตรา 17 เกี่ยวกับการรับคดีไว้พิจารณาโดยในกระบวนการพิจารณาของศาลฯ หลักอำนาจเสริมจะถูกนำมาปรับใช้ในสองขั้นตอนหลักของกระบวนการดำเนินคดี คือในขั้นการตรวจสอบเบื้องต้น และขั้นการรับคดีไว้พิจารณา โดยในขั้นการตรวจสอบเบื้องต้น ศาลฯ จะพิจารณาเกณฑ์ของหลักอำนาจเสริมในการอนุญาตให้ดำเนินการสืบสวนในสถานการณ์ใดสถานการณ์หนึ่ง ในขณะที่ขั้นของการรับคดีไว้พิจารณาศาลฯ จะพิจารณาเกณฑ์ดังกล่าวเพื่อตัดสินในการรับคดีใดคดีไว้พิจารณา อนึ่ง เกณฑ์ในการพิจารณาของหลักอำนาจเสริมนี้ ศาลฯ จะคำนึงถึงกระบวนการดำเนินคดีภายในของรัฐเป็นสำคัญ โดยการดำเนินคดีภายในของรัฐจะต้องเป็นการดำเนินคดีในคดีที่เหมือนกันกับการดำเนินคดีของศาลฯ ทั้งตัวบุคคลและการกระทำ นอกจากนั้นรัฐต้องมีความประสงค์และมีความสามารถในการดำเนินคดีนั้นด้วย ซึ่งหากเป็นไปตามเกณฑ์การรับคดีไว้พิจารณาดังกล่าวแล้ว ศาลฯ ก็จะตัดสินใจไม่รับคดีนั้นไว้พิจารณา และให้กลไกภายในของรัฐดำเนินการต่อไป

วิทยานิพนธ์นี้ มีวัตถุประสงค์หลักในการศึกษาหลักอำนาจเสริมของศาลฯ ที่บัญญัติในธรรมนูญกรุงโรมฯ และพลวัตในการปรับใช้หลักอำนาจเสริมของศาลฯ ในช่วง ค.ศ. 2002 ถึง 2018 จากการศึกษา พบว่า ศาลฯ ได้ปรับใช้หลักอำนาจเสริมอย่างมีพลวัตเพื่อให้บรรลุตามเป้าหมายในการนำตัวผู้กระทำความผิดเข้าสู่กระบวนการยุติธรรม และเสริมสร้างหลักนิติธรรมในการดำเนินคดีของศาล แต่อย่างไรก็ดี จากการศึกษายังพบว่า เกิดความไม่สอดคล้องกันของการปรับใช้หลักอำนาจเสริมของศาลฯ รวมไปถึงความท้าทายใหม่ ๆ บางประการที่ไม่เพียงแต่ส่งผลต่อประสิทธิภาพในการปรับใช้หลักอำนาจเสริมของศาลฯ เท่านั้น แต่ยังส่งผลต่อความน่าเชื่อถือและความชอบธรรมของศาลฯ อีกด้วย โดยการศึกษานี้ได้จึงได้เสนอมาตรการที่เหมาะสม เพื่อดำเนินการให้ศาลฯ สามารถปรับใช้หลักอำนาจเสริมได้อย่างมีประสิทธิภาพและความลอดคล้องกันในทางปฏิบัติมากยิ่งขึ้น ต่อไป

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ลายมือชื่อนิสิต .....
ลายมือชื่อ อ.ที่ปรึกษาหลัก .....
ลายมือชื่อ อ.ที่ปรึกษาร่วม .....

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KEYWORD: complementarity, principle of complementarity, International Criminal Court, application, dynamic, inconsistency

Kitti Jayangakula : APPLICATION OF THE PRINCIPLE OF COMPLEMENTARITY BY THE INTERNATIONAL CRIMINAL COURT, 2002-2018. Advisor: Asst. Prof. Saratoon Santivasa, Ph.D. Co-advisor: Prof. emer. Vitit Muntarbhorn

The International Criminal Court (ICC) was established for ensuring the effectiveness of bringing the perpetrators of international crimes to justice. In addition, the ICC plays its role in order to promote the rule of law in the international community. To archive these ultimate goals, the Rome Statute of the International Criminal Court outlines its role as a court of the last resort by emphasising states themselves are primarily responsible for the prosecution of international crimes. The main duty of the Court is to complement the proceedings at the national level of the state concerned (the principle of complementarity). The ICC will step in to intervene to investigate and prosecute the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, only when the justice cannot be achieved at the national level due to the unwillingness or the inability of the state concerned.

The principle of complementarity is outlined article 17 of the Rome Statute as the criteria for admissibility of a case. The complementarity determination will be done at two main stages of the ICC proceedings: the preliminary examination stage and the admissibility stage. At the preliminary proceedings, the Court will determine the principle of complementarity, for the authorization of an investigation into a situation. Then, at the admissibility stage, the complementarity test will be assessed, for rendering the admissibility determination of a case. In this regard, the Court will determine national proceedings of the state concerned, the same-case test (person and conduct), the willingness, and the ability of the state concerned. If all of these criteria for admissibility are satisfied, the Court will render the case inadmissible.

This dissertation aims at examining the complementarity provision under the Rome Statute, analysing the dynamic application of the principle by the Court during 2002-2018, and scrutinising the problems and challenges faced by the Court.

The result of the analysis demonstrates the dynamism of the application of the principle of complementarity. However, the inconsistency of the dynamic application, in turn, challenges the effectiveness of the ICC complementarity system as well as the credibility and legitimacy of the entire ICC system.

The study, therefore, aims at providing appropriate measures to ensure more effective and more coherent of the application of the principle of complementarity by the ICC.

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Student's Signature .....
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CHAPTER I INTRODUCTION

1.1 APPROACH AND THEORETICAL FRAMEWORK OF THE STUDY

1.1.1 Purpose and Subject Matter of the Study

The criminal justice system is the strongest form of enforcement in domestic legal systems.[1] The operation of this system is to bring to justice persons who commit criminal acts. This form of enforcement is backed up by the coercive power of the state, which ultimately includes the authorized use of force necessary to apprehend accused persons, to hold them in custody before and during the trial, and to carry out any punishment that the court may impose.[2] Prosecution before the domestic court is not limited to criminal acts committed in its territory, but also includes criminal acts with a foreign element[3] and international crimes, ranging from transnational crimes in a general sense, to certain core crimes of international law.[4]

International crimes are breaches of international rules, which are intended to protect core values considered important by the whole international community and consequently to bring all states and individuals.[5] Moreover, to protect the universal interest, the suppression of these crimes, subject to certain conditions, may, in principle, be prosecuted and punished by any state.[6] Hence, the prosecution of international crimes, in earlier times, was effected by domestic law and state tribunal.[7] However, the practice of prosecuting international crimes by domestic courts

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1 Lori Fisler Damrosch, "Enforcing International Law through Non-Forcible Measures," *Académie de Droit International Recueil Des Cours* 269 (1998): 194.

2 ibid.

3 See S. Z. Feller, "Jurisdiction over Offences with a Foreign Element," in *A Treatise on International Criminal Law Volume II: Jurisdiction and Cooperation*, ed. M. Cherif Bassiouni and Ved P. Nada (Illinois: Charles C. Thomas, 1973), 5-63.

4 Damrosch, "Enforcing International Law through Non-Forcible Measures," 196.

5 Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 23.

6 ibid.

7 Julio Barboza, "International Criminal Law," *Académie de Droit International Recueil Des Cours* 278 (1999): 28.

frequently faces the problem of the culture of impunity, which impairs the effectiveness of the legal system in bringing criminals to justice.[8]

The international community has attempted to put an end to impunity, by introducing a new mechanism for prosecuting international crimes at the international level. This mechanism has been launched and developed continuously since the post-World War I (WWI) era,[9] the emergence of the International Military Tribunal (IMT) at Nuremberg, and the International Military Tribunal for the Far East (IMTFE) at Tokyo, after World War II (WWII). In addition, the creation of two *ad hoc* tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY); and the International Criminal Tribunal for Rwanda (ICTR), and also a number of internationalized 'mixed' or 'hybrid' tribunals, such as the Extraordinary Chambers in the Court of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL) are legal institutions enforcing this new mechanism.

Of those initiatives, the most successful so far, to create an international judicial mechanism, appeared in Rome, Italy, when the first permanent international criminal tribunal was introduced to the international community in July 1998. It was the United Nations Diplomatic Conference of Plenipotentiaries, on the Establishment of an International Criminal Court, held in Rome, Italy, between 15 June and 17 June 1998 (Rome Conference). The International Criminal Court (ICC or Court), was established, by the adoption of the Rome Statute of the International Criminal Court (Rome Statute).[10]

The establishment of the ICC not only represents the culmination of the evolution of international criminal law, but is regarded as the world's best hope for

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8 See Diane Orentlicher, "Report of the Independent Expert to Update the Set of Principles to Combat Impunity," (United Nations Economic and Social Council, E/CN.4/2005/102/Add.1, 2005), 6.

9 William Schabas, "International Criminal Courts," in *The Oxford Handbook of International Adjudication*, ed. Cesare Romano, Karen J. Alter, and Yuval Shany (Oxford: Oxford University Press, 2014), 209.

10 Rome Statute of the International Criminal Court (Rome Statute), A/CONF/183/9, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June -17 July 1998.

genuine accountability regarding core crimes of international law.[11] One of the high expectations of the creation of this Court, is that it will contribute to putting an end to impunity, not only by investigating and prosecuting crimes within its jurisdiction, but also by inspiring, encouraging, or even pressuring, domestic justice systems to perform its function at the national level.[12]

The Rome Statute emphasises the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[13] Therefore, it frames the role of the ICC as a court of last resort. In other words, in the prosecution of international crimes, the priority of the duty of the Court is to supplement domestic courts, in exercising its jurisdiction over international crimes, listed under the ICC's jurisdiction (the crime of genocide, crimes against humanity, war crimes, and the crime of aggression).[14] These are expressly stipulated in paragraph 10 of the preamble, and article 1 of the Rome Statute (known as 'the principle of complementarity').[15] Accordingly, the state parties retain primary competence over any case, concerning the alleged commission of those crimes.[16]

Furthermore, the operation of the ICC is recognised as a mechanism, which plays a role to promote and to establish a global rule of law. This mandate of the ICC has been recognised by the General Assembly in its resolution 61/7.[17] It was expressed at a high-level meeting on the rule of law at national and international

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11 See Richard J. Goldstone, "South-East Asia and International Criminal Law," in *The 5th Princess Maha Chakri Sirindhorn Lecture on International Humanitarian Law*, FICHL Occasional Series (Oslo: Torkel Opsahl Academic EPublisher, 2011).

12 Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (New York Oxford University Press, 2013), 8.

13 Rome Statute, preamble, paragraph 6.

14 Ibid., article 5(1).

15 Ibid., preamble, paragraph 10 and article 1.

16 Triestino Mariniello, "'One, No One and One Hundred Thousand': Reflections on the Multiple Identities of the ICC," in *The International Criminal Court in Search of Its Purpose and Identity*, ed. Triestino Mariniello (New York: Routledge, 2015), 2.

17 UN General Assembly resolution 67/1 Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international level, adopted by the General Assembly on 24 September 2012, (Rule of Law Declaration), paragraph 23, states that:

> We recognize the role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law, and in this respect we welcome the States that have become parties to the Rome Statute of the International Criminal Court, and call upon all States that are not yet parties to the Statute to consider ratifying or acceding to it, and emphasize the importance of cooperation with the Court.

levels, on 24 September 2012.[18] The high-level meeting ended with the adoption by consensus, of a declaration on the rule of law at the national and international levels (Declaration on the Rule of Law), in which, the member states reaffirmed their commitment to the rule of law, and elaborated on the efforts required to uphold different aspects of the rule of law. The Declaration recognises "that the rule of law applies to all states equally, and to international organizations, the international adjudicative institutions, including the ICC. According to this, the ICC is accountable to just, fair and equitable laws, and is entitled without any discrimination, to equal protection by the law.[19] Thus, according to this, as an international adjudicative institution, the ICC has to play its role to promote and establish the rule of law, and to ensure equal access to justice for all.[20]

The Declaration reaffirms the role of the ICC in a multilateral system that aims to end impunity and establish the rule of law, and emphasise the importance of co-operation with the Court.[21] In this regard, the rule of law which promotes and protects human rights standards is essential for sustainable and inclusive development, and for lasting peace and security. [22]

According to above mandate to promote the global rule of law and to establish the rule of law, the Court will continue to do its work undeterred, in accordance with the principle of complementarity and the core idea of the rule of law. The Court has to play a critical role in international co-operation, strengthening the maintenance of peace and security, and furthering development in the area of international criminal justice.[23]

In addition, as a judicial organ, the ICC is an important tool to peacefully resolve disputes, supporting constructive international co-operation, and providing

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18 UN General Assembly resolution 67/1 Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international level, adopted by the General Assembly on 24 September 2012,.

19 Ibid.

20 Ibid., para. 2.

21 Ibid., para. 23.

22 UN General Assembly, Strengthening and coordinating United Nations rule of law activities, UN. Doc. A/68/213/Add.1, 11 July 2014, para. 81.

23 Ibid., para. 85.

stability and certainty in its system.[24] The practice of the Court should accord the predictability and legitimacy of its operation.

Regarding this, both pillars of the Court, justice and the rule of law, must be applied through the operation of the entire ICC system. This includes the application of the principle of complementarity during the ICC proceedings.

According to the principle of complementarity, the ICC monitors the exercise of primary jurisdiction of domestic courts.[25] The domestic courts have the primary right to investigate and prosecute crimes under the jurisdiction of the ICC. The Court only plays its role in limited situations, such as the failure or malfunction of national authorities, to carry out the investigations and prosecutions of the perpetrators in question.[26]

The principle of complementarity has been generally recognized as one of the cornerstones of the ICC mechanism,[27] which balances the national sovereignty of States and the interests of the international community, in combating impunity for international crimes.[28] But this principle also has been questioned, in particular, regarding the clear definition of the term 'complementarity.'[29]

The absence of a clear definition of 'complementarity' originates in the provisions of the Rome Statute. The word 'complementary' only appears in the preamble and article 1 of the Rome Statute, that the Court shall be complementary to domestic courts, without giving any further details concerning its application. Apart

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24 Ibid., para. 83.

25 Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (New York: Oxford University Press, 2008), 455.

26 Joshua Lam, "Contracting Complementarity: Assessing the International Criminal Court's Support for Domestic Prosecutions," in *International Criminal Justice: The ICC and Complementarity* (Nairobi: The Kenya Section of the International Commission of Justice (ICJ Kenya), 2014).

27 John T. Holmes, "The Principle of Complementarity," in The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results ed. Roy S. Lee (The Hague: Kluwer Law International, 1999), 41, 73.

28 Silvana Arbia and Giovanni Bassy, "Proactive Complementarity: A Registrar's Perspective and Plans," in The International Criminal Court and Complementarity: From Theory to Practice - Volume 1, ed. Carsten Stahn and Mohamed M. El Zeidy (Cambridge: Cambridge University Press, 2011), 52.

29 United Nations, UN Diplomatic Conference Concludes in Rome with Decision to Establishment International Criminal Court, UN Press Release (L/2889), 20 July 1998.

from this, the concept of complementarity appears as only one of the criteria of the admissibility, as set forth in article 17 of the Rome Statute.[30]

According to the Rome Statute, the ICC will apply the principle of complementarity, at two main stages of the proceedings: (1) at the preliminary examination stage, where the Court shall consider the criteria of admissibility, in order to authorize the Prosecutor to initiate the *proprio motu* investigation, pursuant to article 15(3);[31] and (2) at the admissibility stage, where the Court shall consider the criteria of admissibility, to decide whether the case is admissible before the Court, pursuant to articles 17, 18 and 19.

In practice, the assessment of the complementarity test, at both stages of the ICC proceedings, has become a controversial issue, because it involves various factors of complementarity raised by different stakeholders. In particular, the states concerned, the accused, the Prosecutor, and the Judges will be taken into consideration by the Court.[32] According to this, the different points of view from various angles influence the application of the unclear complementarity provisions, which may lead to ambiguous results.

This dissertation aims at analysing the complementarity provisions, as stipulated in the Rome Statute, with some related provisions in the Rules of Procedure and Evidence of the ICC (ICC RPE).[33] It also considers the controversial issues emerging from the application of the principle of complementarity, which has continued during the ICC proceedings. Taking the objectives of the establishment of the ICC as a benchmark, the analysis of the application of the principle of

30 Rome Statute, article 17(1).

31 Ibid., article 15(3).

32 See Carsten Stahn, "Taking Complementarity Seriously: On the Sense and Sensibility of 'Classic', 'Positive' and 'Negative' Complementarity," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Cambridge University Press, 2011); Kevin Jon Keller, "A Sentence-Based Theory of Complementarity," *Harvard International Law Journal* 53, no. 1 (2012).

33 Rule of Procedure and Evidence (ICC REP), reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A.

complementarity would provide an essential clarification of the admissibility regime.[34]

As an international judicial institution, which plays its role in promoting the rule of law, the Court will hold accountable to just, fair and equitable laws and is entitled without any discrimination to equal protection of the law.[35] In this regard, ICC, as a Court of law, will continue to do its work undeterred, in accordance with the main idea of the rule of law. To serve the ultimate purpose of the principles of justice and the rule of law, the application of the principle of complementarity by the Court should be consistent in order to accord predictability of the Court's operation.

As a multilateral treaty, the application and interpretation of those unclear complementarity provisions of the Rome Statute, have to comply with the provisions of the Vienna Convention on the Law of Treaties (VCLT). However, in practice, one of the most challenging issues of the Court's application of the principle of complementarity, is the adoption of the dynamic approach in order to assess the complementarity test, by employing the factual factors of the ongoing process.[36]

In general, for the purpose of this study, the application shall be called 'dynamic' if the unclear legal provision is applied or interpreted for more concrete results. In order to illustrate an example of the dynamic application, one must thus compare the application of the legal provision at a different moment in time and different stages of the proceedings. The findings must be compared. If there is an alteration, one may speak of a dynamic application.

In the context of the dynamic application of the principle of complementarity of the ICC, the Court employs a dynamic approach to determine the principle of complementarity, in order to achieve the ultimate purpose of international criminal justice. This is to ensure that impunity is not tolerated for international crimes under the jurisdiction of the ICC.

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34 See Michele Tedeschini, "Complementarity in Practice: The ICC's Inconsistent Approach in the *Gaddafi* and *Al-Senussi* Admissibility Decisions," *Amsterdam Law Forum* 7, no. 1 (2015): 97; Kevin Jon Heller, "PTC I's Inconsistent Approach to Complementarity and the Right to Counsel," Opinio Juris http://opiniojuris.org/2013/10/12/ptc-inconsistent-approach-right-counsel/.

35 UN General Assembly resolution 67/1, paragraph 2.

36 Carsten Stahn, "Admissibility Challenge before the ICC: From Quasi-Primacy to Qualified Deference," in *The Law and Practice of the International Criminal Court*, ed. Casten Stahn (Oxford: Oxford University Press, 2015), 230.

As mentioned earlier, the principle of complementarity regulates the interplay between and the interaction of domestic and international justice. They complement and reinforce each other in their mutual efforts to institutionalize accountability for mass crimes.[37] Thus, it is necessary to stress that the co-operation between both justice systems, national and international, will be closely examined in this dissertation. Furthermore, in the connection between the principle of complementarity and the co-operation of states, both parties, and non-parties, it must be added that, in this dissertation, the jurisprudence of the ICC during 2002 - 2018 must also be analysed. This is in order to indicate further measures to be taken to improve co-operation, to ensure the effectiveness of the application of the principle of complementarity.

Last but not least, the complementarity determination is not static, but an evolving concept. Therefore, in conclusion, the ultimate goal of this study is to generate new thinking, regarding a dynamic approach employed by the ICC, to apply the principle of complementarity under the Rome Statute. This will lead to a fresh approach to the application of the principle of complementarity of the ICC system. Moreover, the study intends to propose further measures, to ensure effective follow-up actions in the ICC complementarity system, in order to make the system more effective and more coherent.

1.1.2 Conceptual Background and Problem Statement

With regard to the mechanism of international criminal justice, it appears that domestic courts are the most appropriate forums for adjudicating international crimes, because all the evidence normally is there, witnesses are there and so on.[38] In addition, the special need for international action, such as the international co-

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37 Kai Ambos, *Treatise on International Criminal Law Volume III: International Criminal Procedure* (Oxford: Oxford University Press, 2016), 326.; Stahn, "Admissibility Challenge before the ICC: From Quasi-Primacy to Qualified Deference," 230.; Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, 83,105.

38 Antonio Cassese, "The Role of Internationalized Courts and Tribunals in the Fight against International Criminality," in *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, ed. Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner (Oxford: Oxford University Press, 2004), 4.

operation in detention, arrest, extradition, and punishment, shall be provided, in order to ensure the prosecution and punishment of core crimes of international law.[39] According to the prosecution of core international crimes under the ICC's jurisdiction, every state does not only have the right to try perpetrators of those crimes, but the Rome Statute stresses that every state has the duty to exercise its criminal jurisdiction, against those responsible for international crimes.

As mentioned earlier, the ICC is based on the principle of complementarity. Therefore, the ICC may intervene to exercise its jurisdiction only where states fail, being either unwilling or unable, to carry out the investigations and prosecutions. The classical view of this concept was confirmed by the early Statement of the first Prosecutor of the ICC, Luis Moreno-Ocampo, in the Paper on Some Policy Issues, before the Office of the Prosecutor in 2003, which stated that:

> [a]s a general rule, the policy of the Office of the Prosecutor (OTP) will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned.[40] …[t]he principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction.[41] …[T]he principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.[42]

According to this, the Prosecutor recognized that the exercise of national criminal jurisdiction is not only a right, but also a duty of states.[43] The Court was seen

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39 For details see United Nations General Assembly Resolution 3073 (XXVIII) of 3 December 1973, Principle of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973)

40 Office of the Prosecutor, "Paper on Some Policy Issues before the Office of the Prosecutor," (2003), 2.

41 ibid.

42 ibid.

43 Matthew E. Cross and Sarah Williams, "Recent Developments at the ICC: Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui - a Boost for Co-Operative Complementarity," *Human Rights Law Review* 10 (2010): 338.

largely as a residual mechanism, to fill the impunity gap, in circumstances when the assertion of national jurisdiction was shown to be deficient in limited.[44]

The Rome Statute left certain unanswered questions, concerning the definitions of complementarity, as well as the notion of admissibility and its assessment.[45] The provision in article 17 only provides the criteria of admissibility, and, in practice, this leads to some problematic issues. For instance, one problematic issue concerns the provision in article 17(1)(a), which provides that "[t]he case is being investigated…by a State which has jurisdiction over it."

According to this provision, an ongoing investigation also requires a state prosecuting the same person for the same conduct as the case before the ICC. Thus, the notion of the same case is a criterion, in determining whether the case is admissible. There have been a number of ambiguous issues before the ICC in many cases (for example, *Kenyatta et al., Ruto et al., Gaddafi, Al-Senussi,* and *Simone* cases).

Furthermore, in accordance with the jurisprudence of the ICC, the Court introduces a preliminary consideration with regard to when the state is in a circumstance of inaction, before assessing the issue of the state's unwillingness or inability to act. The notion of inactivity was applied and interpreted to serve the principle of complementarity (for example, *Kony et al., Katanga, Bemba,* and *Kenyatta et al.* cases).

In addition to this, the provisions in article 17(2) and (3) provides the criteria for the determination of unwillingness and inability. However, in practice, these matters become problematic issues in the proceedings of the ICC, such as in the *Katanga* case,[46] the *Gaddafi* case,[47] or the *Al-Senussi* case.[48]

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44 ibid.

45 Rod Rastan, "Situation and Case: Defining the Parameters," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Cambridge University Press, 2011), 421-59.; Federica Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," *Leiden Journal of International Law* 19, no. 04 (2006): 1106-13.

46 *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui,* Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC Appeals Chambers, 25 September 2009, ICC-01/04-01/07-1497 (*Katanga* Admissibility Judgment), paras. 58-113.

In addition, the jurisprudence of the ICC during 2002 - 2018 introduces some practical issues, with regard to the procedural aspect of the principle of complementarity. For example, the question of self-referrals, where the state parties refer the situation of crimes committed in their territories to the Prosecutor, as in the situations in the Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR), and Mali. Here, instead of demonstrating that they are willing and able to investigate and prosecute core crimes, they seek to justify their self-referrals, by claiming their inability and are unwilling to exercise jurisdiction themselves. This unwillingness is compatible with the intent to bring the person concerned to justice, albeit before the ICC, rather than their own courts.

As quoted earlier, that the principle of complementarity is not static, but evolving, therefore, the dynamic application of the principle of complementarity by the ICC should be scrutinized. In order to analyse the dynamic application of the principle, the accomplishment of the purposes of justice and the rule of law must be illustrated throughout its jurisprudence between 2002 – 2018. The outcomes of the study will help to identify possible measures to ensure a more effective application of the principle of complementarity by the ICC.

1.1.3 Research Questions and Hypothesis

Since 2002, the ICC has gained experience in applying the principle of complementarity, as well as interpreting some vague complementarity provisions, contained in the Rome Statute, which helps all stakeholders to gain a better understanding, with regards to those provisions. The ICC has conducted complementarity determinations, at both the preliminary examination stage and the admissibility stage.

Throughout the jurisprudence of the ICC, the Court has translated many of the complexities and underlying dilemmas of ICC engagement into formal questions of law and procedure. This, in fact, provides a dynamic application of the principle of

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47 *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the Decision on Pre-Trial Chamber I of 31 May 2013 Entitles 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', ICC Appeal Chamber, 21 May 2014, ICC-01/11-01/11-547-Red (*Gaddafi* Admissibility Judgment), paras. 212-214.

48 Ibid., paras. 189-203.

complementarity during the ICC proceedings. Therefore, the jurisprudence of the ICC, from 2002 to 2018, should be analysed to identify the Court's application of the principle and to indicate further measures to improve co-operation, to ensure more effective follow-up actions in the ICC complementarity system.

Thus, the general aim of this dissertation is to analyse the application of the principle of complementarity by the ICC, during its jurisprudence between 2002 - 2018. The objective will be reached by finding answers to the following research questions:

The first research question is: ***What is the principle of complementarity, which is enshrined in the Rome Statute of the International Criminal Court?***

It is considered, herein, that the concept of complementarity has emerged since the first attempt of the Allies to establish the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties after WWI, and the concept has been constantly developed since then. The productive results of those attempts were represented by the proposed complementarity models since WWI, until the Rome Statute's complementarity model, which was specifically introduced officially at the Rome Conference in 1998.

With regard to the concept and its revolution and the development of its productive results, which are represented by complementarity models, the analysis of such historical benchmarks will provide a clear idea of the principle of complementarity.

In addition, the concept of complementarity was adopted as a fundamental foundation, which is enshrined in the Rome Statute. Even if there were no term of 'complementarity' in the Statute, the concept of the principle and its functional operation, both in substantive and procedural aspects, would expressly reflect in the provisions of the Rome Statute.

The second research question is: ***Whether the jurisprudence of the ICC during 2002 – 2018, indicates the dynamic application of the principle of complementarity?***

With regard to the application of complementarity of the ICC, the lack of definition of complementarity, the limited provisions concerning the application of

such principle, which includes some unclear provisions may lead to ambiguity of the application of this principle.

Since 2002, the ICC has applied the principle of complementarity contained in the Rome Statute, the ICC has carried out the application of this principle, in its jurisprudence during 2002 - 2018. The examination of the approach, employed by the ICC, may illustrate the dynamic application of the ICC with regard to the principle of complementarity.

The third research question is: ***Whether the dynamic application of the principle of complementarity during 2002-2018, complies with the principle of the rule of law?***

According to the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, it recognises the role of the ICC in order to end impunity and establish the rule of law. In this regard, the ICC the task of the ICC, including the determination of the principle of complementarity during the ICC proceedings should be conducted consistently, in order to accord the predictability and legitimacy of the Court's operation.

The analysis of the dynamic application of the principle of complementarity during 2002-2018, carried out by the ICC, will provide the clear answer of the compliance with the rule of law of the application of the principle of complementarity by the ICC.

Hence, it is reasonable to hypothesize this dissertation:

The ICC employs the dynamic application of the principle of complementarity

With regard to the dynamic application of the principle of complementarity by the ICC, it appears that one key factor ensuring effectiveness is the co-operation between States and the ICC. Even the Rome Statute provides some provisions concerning co-operation; nevertheless, the practice of the Court shows some limitations and difficulties in its application of the principle of complementarity. Therefore, to ensure the improvement of the co-operation, between the states and the

ICC, further measures in improving co-operation, to ensure more effective follow-up actions in the ICC complementarity system, should be planned and implemented.

By shedding light on the application of the principle of complementarity by the ICC, this dissertation aims at stimulating new thinking on the application of the principle, to contribute a fresh approach to the application of the principle of complementarity under the Rome Statute. This dissertation aims at examining whether there is any legal basis or jurisprudence of the ICC, to give clear answers to those questions, concerning the application of the principle of complementarity; and if yes, when and how? The discussion involves a legal analysis of the provisions of the Rome Statute, that will be applied, according to the principle of complementarity, by the jurisprudence of the ICC during 2002 - 2018.

1.2 METHODOLOGY APPROACH AND MATERIALS

1.2.1 Method of Inquiry

To discuss the research questions and prove the hypothesis of the dissertation, and also when examining the above-listed sources, this dissertation employs qualitative methodology in the documentary analysis, for the application of the principle of complementarity by the ICC. The legal research methodology is implemented, as follows:

First, the idea of the relationship between domestic and international courts emerged and developed through the practice of international criminal courts and tribunals, as well as the works of official and unofficial bodies, such as the Advisory Committee of Jurists, the International Law Association, the Inter-Parliamentary Union and the International Association of Penal Law. In addition, it included a systematic analysis of the provisions of the Rome Statute, with regard to the principle of complementarity. The interpretation of those provisions shall comply with the provisions of the VCLT, which have been applied by the ICC. The legal analysis of the provisions in this dissertation considers: 1) the wording of the provisions, 2) the object and purpose of the Rome Statute, 3) a systematic and contextual reading of the provisions, 4) the drafting history *(travaux préparatoires)* of the Rome Statute, and 5) Commentaries on the Rome Statute of the ICC.

Secondly, the examination of the application of the principle of complementarity takes into account carefully and critically how it has been interpreted and applied by the ICC. Emphasis is given as to how, and to what extent, the judicial reasoning has shaped the scope of the principle of complementarity. Furthermore, whether the Judges/Chambers of the ICC issued their decisions or judgments within the limit of the provisions is also considered, and whether they implemented a dynamic interpretation of the principle of complementarity.

Thirdly, the analysis of the practice of the ICC, concerning the dynamic application of the principle of complementarity at both the preliminary examination stage and the admissibility stage, is examined. This is complemented by using and discussing relevant academic literature, and commenting on such sources. These textbooks and written documents of eminent publicists are used, to back up the dissertation either arguing for it, or criticising it.

Fourthly, the results of the analysis of the Court's jurisprudence regarding the dynamic application of the principle of complementarity may challenge the ICC complementarity system, to propose follow-up measures to improve the effective complementarity; then the practice concerning co-operation between States, the ICC, and other judicial institutions shall be considered.

1.2.2 Sources and Materials

At a general level, legal sources considered in this dissertation are linked to the sources enumerated under article 38 of the Statute of the International Court of Justice (ICJ). This, according to the ICTY Appeal Chamber, is generally regarded as an authentic statement of the sources of international law.[49] This article reads as follows:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;

[49] *Prosecutor* v *Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgment, Appeal Chamber, 24 March 2000, footnote 364, http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf; see also *Prosecutor* v *Kupreškic et al.,* Case No.: IT-95-16-T, Judgement, 14 Jan. 2000, para 540, http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Rome Statute also stipulated, concerning the applicable law, which the Court shall apply in article 21. The provision reads as follows:

1. The Court shall apply:
   (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

At a more specific level, the provisions in the Rome Statute of the ICC contains the concept of complementarity in its preamble, and in article 1, which states 'the ICC shall be complementary to national criminal jurisdiction.' Moreover, the concept of complementarity is transformed as criteria of the admissibility of a case stipulated in article 17 of the Rome Statute. Article 17, is stated, as follow:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the

decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

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

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

The concept of the principle of complementarity is contained in the above provisions, and in considering the nature and contents of this dissertation, the following legal sources have chiefly been used.

Firstly, the instrument constitutive of the international criminal courts and tribunals, which consists of namely: the Charters of the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE), Statutes of the International Criminal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and particularly, the Rome Statute of the International Criminal Court (ICC). These instruments contain the general framework, concerning the relationship between the international criminal adjudication and the national justice mechanism. Furthermore, they include bilateral and multilateral treaties, with regard to the prosecution of international crimes.

Secondly, the Rules of Procedure and Evidence of the ICC (ICC RPE), which has been adopted by judges and the Prosecutor of the ICC. These sets of rules flesh

out considerably the provisions contained in the Rome Statute, to which they are subordinate in all cases. Therefore, they provide the necessary details to examine the application and interpretation of the principle of complementarity.

Thirdly, the case-law of international criminal courts and tribunals, which constitutes a fundamental authoritative application of the above-mentioned provisions. Moreover, the issue, concerning the principle of complementarity, may be claimed by states, in particular, non-state parties to the Rome Statute, and the accused, at different stages of the proceedings before the ICC. The consolidated and emerging jurisprudence of the ICC constitutes an essential source, to better understand how all the set of provisions are put into practice. Hence, the case-law of the ICC is the source, which is chiefly used in this dissertation. For more details in practice, there is the application of the OTP during the process of a preliminary examination. This comes before the determination of whether there is a reason to proceed and whether to initiate an investigation, when the Prosecutor shall consider the criteria of the admissibility of a case, contained in article 17 of the Rome Statute.

Finally, in addition to the three above-mentioned sources, other legal sources, with regard to the principle of complementarity, and the co-operation and mutual assistance for the prosecution of international crimes, are used, namely: Resolution of international bodies, such as the UN General Assembly, UN Security Council, etc. Moreover, official and non-official documents, such as reports and press statements issued by, for instance, the ICC, the OTP, or the Assembly of States Parties (ASP). This also includes all publications, academic textbooks and articles, opinions, reports, documents and other materials of international criminal law expertise, with regard to the principle of complementarity, in both theoretical and practical discussions.

However, concerning the sources and materials used in this dissertation, two limitations must be mentioned, related to the dissertation timeframe and access to materials. The sources used and analysed in this dissertation are limited to those, existing as of 31 December 2018. Thus, the analysis corresponding to the principle of complementarity at the ICC, puts special emphasis on the situations and cases before the ICC, before this date. In addition, materials considered in this dissertation, are those which were publicly available, as of 31 December 2018, on the website of the

international criminal courts, especially, the website of the ICC (https://www.icc-cpi.int/)

1.2.3 Limitations of the Study

As of June 2019, the ICC is conducting, or has conducted (i) preliminary examinations of 26 situations;[50] (ii) investigations into the situations in the DRC, Uganda, two occasions in CAR, Sudan, Kenya, Libya, Côte d'Ivoire, Mali, Georgia and Burundi; and (iii) pre-trial or trial proceeding in 27 cases.[51] Moreover, 8 cases have been convicted but ten additional cases are on hold, pending the arrest of the 15 suspects or voluntary appearance.[52]

Due to the scope of the study, this dissertation aims at examining the practice of the ICC, concerning the application of the principle of complementarity. However, the Rome Statute came into force, and the Court has been conducting its official and full operation since 1 July 2002. Thus, the analysis of such a practice is limited, since the first date of the operation to 31 December 2018.

Thus, 26 situations at the preliminary examination stage, the current 11 situations under the investigations of the Court, which initiated various numbers of cases under the ICC's proceedings, will be considered in this dissertation.

For the limited scope of this study, the complementarity principle, which is the key system of the ICC, will be the subject to be examined. To examine the conceptual framework of the complementarity principle of the ICC, the ambit of this study is limited to the jurisprudence of the ICC concerning the complementarity determination, in situations at the preliminary examinations before the ICC, namely: the *Situation in Kenya*; the *Situation in Côte d'Ivoire*; the *Situation in Georgia*; the *Situation in Burundi*; and the *Situation in Afghanistan.* In addition, the dissertation also analyses the complementarity determination in the cases before the ICC, which is not only limited to the *Kony et al* case (Uganda); the *Katanga* case (DRC); the *Bemba*

50 26 situations namely: Uganda; the DRC; Colombia; two occasions in CAR; Darfur, Sudan; two occasions in Venezuela; Guinea; Kenya; Honduras; Nigeria; Republic of Korea; Libya; Côte d'Ivoire; Mali; Registered Vessels of Comoros, Greece, and Cambodia; Iraq/UK; Ukraine; Palestine; Georgia; Gabon; Afghanistan; Burundi; the Philippines; and Bangladesh/Myanmar.

51 In details see Table 6.

52 Ibid.

case (CAR); the *Kenyatta et al* case (Kenya); the *Ruto et al* case (Kenya); the *Gaddafi* case (Libya); the *Al-Senussi* case (Libya); and the *Simone* case (Côte d'Ivoire).

To analyse the application of the principle of complementarity, the scope of this study is limited to examining, scrutinizing and analysing the ICC jurisprudence, concerning the application and interpretation of the principle of complementarity, and the reasoning of the Judges/Chambers, with regard to those of jurisprudence. The main purpose of this study, therefore, is to analyse whether the jurisprudence of the ICC between 2002 and 2018 can give clear answers, concerning the dynamic application of the principle of complementarity by the ICC. Additionally, the jurisprudence will be analysed to indicate further follow-up measures, to improve co-operation to ensure a more effective application of the principle of complementarity by the ICC.

1.3 STRUCTURE OF THE DISSERTATION

In addition to this introductory chapter, the present dissertation consists of five chapters. While the second chapter is of a general character of the principle of complementarity, in theory, the three subsequent chapters represent respectively, the application of complementarity in practice. The dissertation conclusions are contained in the last chapter.

Under this chapter titled 'Introduction' is contained the introductory part of the research, which gives a concept of the prosecution of international crimes by the domestic and international courts. These have greatly developed since the MIT's trials for crimes committed during WWII, to include the UN Security Council *ad hoc* tribunals (ICTY and ICTR) to the ICC prosecutions. The significance of the operating system of the principle of complementarity of the ICC, is where the Court may step in to prosecute international crimes. Such a case would arise when domestic courts fail to carry out the investigation and prosecution, as stipulated in article 17 of the Rome Statute

Under the second chapter titled 'The Complementarity Regime under the Rome Statute of the ICC,' it is intended to examine the concept of the principle of complementarity and its evolution, including the genesis and development of the principle of complementarity. The chapter gives a short background note on the

prosecution mechanism for international crimes, at both national and international levels, and the concept of jurisdiction and admissibility of international criminal courts and tribunals. Then, the emergence and development of the complementarity principle until the complementarity system of the ICC and its development before the ICC, will be reviewed. The relationship between the international court and the domestic court, in prosecuting international crimes since post-WWI until the present, and the development of the international criminal tribunals from the primacy principle to the complementarity principle of the ICC, will be discussed.

Under the third chapter titled 'Complementarity under the ICC Application at the Preliminary Examination Stage,' the practice of the ICC is examined, concerning the dynamic application of the complementarity test, in order to authorize the Prosecutor to proceed with an investigation. The analysis of the application covers the situations before the ICC, namely: the *Situation in Kenya*; the *Situation in Côte d'Ivoire*; the *Situation in Georgia*; the *Situation in Burundi*; and the *Situation in Afghanistan*. The chapter also analyses the practice of complementarity through the jurisprudence of the ICC during 2002 – 2018, and provides several dynamic applications of the principle of complementarity, at this stage of the proceedings.

Under the fourth chapter titled ''Complementarity under the ICC Application at the Admissibility Stage', the practice of the ICC is examined, concerning the dynamic application of the complementarity test at the state of admissibility. This is after the cases have commenced and the state or person in question has submitted the challenge to the admissibility of the case before the Chamber of the ICC. The chapter also analyses the practice of complementarity, in the cases of *Kony et al., Katanga, Bemba, Kenyatta et al., Ruto et al., Gaddafi, Al-Senussi, and Simone.* In addition, the chapter also provides an analysis of the dynamic application of the principle of complementarity, at this stage of proceedings.

The fifth chapter entitled 'Challenges of the Application of the ICC's Complementarity' examines challenging issues, with regard to the application of the principle of complementarity of the ICC. Focussing on this, the measures to ensure the effective operation of the ICC's complementarity are also examined.

Under the last chapter, titled 'Concluding Remarks,' some general conclusions regarding the application of the principle of complementarity are drawn, as well as the

overall operation of the complementarity system, for ensuring more effective and more coherent application of the principle of complementarity by the ICC.

CHAPTER II THE COMPLEMENTARITY REGIME UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

2.1 INTRODUCTION

As mentioned in the previous chapter, the principle of complementarity is at the heart of the entire ICC system. This chapter seeks to examine some fundamental questions, regarding the principle of complementarity under the Rome Statute. The analysis and conclusions of this chapter address the main general issues of the principle of complementarity, within the framework of international criminal law. These include the genesis of the principle and its revolution, the enhancement of the outcomes of the models of complementarity, which have been constantly developed since the post-WWI trials, up to the current regime of the ICC.

Furthermore, this chapter also analyzes the principle of complementarity, in the realm of ICC under the Rome Statute. The chapter is accordingly structured into eight subchapters. After this introductory part (section 2.1), the second subchapter concerns the review on the theoretical approach of the principle of complementarity (section 2.2). It consists of three parts: (i) the genesis of the concept of the complementarity; (ii) the origin of the principle of complementarity in international criminal law; and (iii) the development of the models of the principle of complementarity. (sections 2.2.1 – 2.2.3)

Subsequently, the third subchapter frames the principle of complementarity in the ICC system, under the Rome Statute (section 2.3). The subchapter examines the rationale of the principle, the concepts of jurisdiction and admissibility under the Rome Statute, the jurisdictional aspects of the ICC, and the admissibility before the ICC (sections 2.3.1 – 2.3.4).

The fourth subchapter analyses the substantive aspect of the principle of complementarity, under the Rome Statute (section 2.4). This subchapter examines: (i) the requirements of the complementarity test, under the Rome Statute; (ii) the proceedings requirement; and (iii) the unwillingness or inability requirement (sections 2.4.1 – 2.4.3).

The fifth subchapter examines the procedural features of the ICC complementarity system (section 2.5). The subchapter covers the overview of the procedural mechanism, in particular, the notion of situation and case under the Rome Statute. This includes the trigger mechanism, procedural matters of admissibility of a case, ranging from the initiation of an investigation by the Prosecutor, ruling regarding admissibility, to the challenge of the admissibility of a case (2.5.1 – 2.5.3).

The sixth subchapter examines the co-operation regime under the Rome Statute (section 2.6). The subchapter examines the co-operation regime of the ICC, which is closely linked to the complementarity system of the Court, the relationship between the state co-operation and the principle of complementarity (sections 2.6.1 – 2.6.2).

This chapter ends with chapter conclusions (section 2.7).

2.2 THE CONCEPTUALIZATION OF THE PRINCIPLE OF COMPLEMENTARITY

The principle of complementarity is a fundamental concept of the Rome Statute, which links the two autonomous systems of international and domestic justice. The principle represents the balance between national sovereignty, and the interest of the international community in combating impunity for international crimes.[1] The concept of this principle is easy to understand, namely that the ICC will act as a court of last resort. A case will be admissible before the ICC only when the domestic courts have failed to investigate and prosecute a case or demonstrated the unwillingness or inability to do so in a genuine manner.[2] However, according to the ICC practices, it is an extremely complex one. The literacy debates among scholars, on how collaboration between the two systems could be achieved, as well as the practical applications, pose a serious challenge to the functioning of the ICC, still exist today.[3]

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1 Silvana Arbia and Giovanni Bassy, "Proactive Complementarity: A Registrar's Perspective and Plans," in The International Criminal Court and Complementarity: From Theory to Practice - Volume 1, ed. Carsten Stahn and Mohamed M. El Zeidy (Cambridge: Cambridge University Press, 2011), 52.

2 Serge Brammertz and Kevin C. Hughes, "From Primacy to Complementarity: The International Criminal Tribunal for the Former Yugoslavia, 1993-2015," in *Historical Origins of International Criminal Law: Volume 4*, ed. Morten Bergsmo, et al., FICHL Publication Series (Brussels: Torkel Opsahl Academic EPulisher, 2015), 174.

3 Ovo Catherine Imoedemhe, "National Implementation of the Complementarity Regime of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria

Before analysing the application of the principle of complementarity, the genesis of the concept of complementarity, the emergence, and development of the principle of complementarity will be examined, in a general manner, in order to frame the clear idea of this principle of the entire ICC system.

2.2.1 The Genesis of the Concept of Complementarity

At the outset, the principle of complementarity is recognized as being at the heart of the entire ICC system. Nevertheless, this principle has been one of the most controversial issues, since the Rome Conference in 1998. The lack of a clear definition of the term 'complementarity' has become a weak point of the principle, since it was introduced and used explicitly for the first time, in the international criminal law perspective.

In the English language, this term stands for 'a complementary relationship or situation'[4] or 'a state or system that involves complementary components.'[5] Components are complementary if they complete each other.[6] Then, the word 'complementary' is the adjective of the verb 'to complement.'[7]

Even the term 'complementarity' was invented and has been applied for the first time, without a clear definition since 1998, in the field of international criminal law. However, this term has been defined as well as usually used in other various fields of science, such as physics, psychology, and biology as well as economics.[8]

In the philosophy of science, the formulation of the term 'complementarity' is attributed to Niels Henrik David Bohr, the Danish physicist, the 1922 Nobel Prize winner in physics.[9] However, some authors believe that the idea of complementarity has eastern origins, that go back to ancient Chinese thinking more than 2,500 years

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as a Case Study" (University of Leicester, 2014), 17. See for example Darryl Robinson, "Three Theories of Complementarity: Charge, Sentence, or Process," *Harvard International Law Journal* 53 (2012): 165-82.

4 *The Oxford English Reference Dictionary*, 2 ed. (Oxford: Oxford University Press, 1996), 296.

5 *Collins English Dictionary: 21st Century Edition*, 5 ed. (London: Harper Collins Publishers, 2001), 327.

6 *The Oxford English Reference Dictionary*, 296.

7 Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Koninklijke Brill NV, 2008), 1.

8 ibid.

9 ibid., 3.

ago. The belief was based on the fact that opposite concepts form a 'complementary' relationship. This was represented by the archetypal poles of *yin* and *yang*.[10]

In 1947, Bohr was awarded the "Danish Order of the Elephant" for outstanding achievements in physics, and he chose a design for a coat of arms, to be placed in the church of the Frederiksborg at Hillerød. The design was the symbol representing complementarity (*yin* and *yang*), inscribed with the words *comtraria sunt Complementa*, which means opposites are complementary or complements.

Although Bohr believed that the concept of complementarity might apply by analogy to different fields of science, this means, it does not seem to have been applied to the sphere of international law. In particular, international criminal law before the Rome Conference.

With regard to the perspective of international criminal law, the concept of complementarity is designed to define the relationship between domestic courts and the ICC.[11] Because of this, the idea gives the domestic courts priority to exercise jurisdiction, with respect to the core crimes listed under the Rome Statute.[12] The preference given to domestic jurisdiction is governed by the fact that, states are duty bound to investigate and prosecute many of the enumerated acts, as defined under the Rome Statute.[13] Only when domestic courts manifest 'unwillingness' or 'inability' to adjudicate, will the ICC step in to remedy the deficiencies of the failure of one or more states to fulfil their duties.[14]

Although domestic and international prosecutions of international crimes seem 'equally essential,' in Bohr's words, they do not seem to mutually exclude one another. The application of the principle of complementarity in the field of international criminal law requires the exclusion of neither the domestic courts nor the ICC. The core idea of complementarity is fundamentally based on the existence of the two jurisdictions, simultaneously completing each other's work.

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10 For details see ibid., 1-5.

11 ibid., 4.

12 Rome Statute of the International Criminal Court (Rome Statute), article 5.

13 Ibid., preamble, paragraph 6 recalls that "[i]t is the duty of every State to exercise to exercise its criminal jurisdiction over those responsible for international crime"; Holmes, "The Principle of Complementarity," 41-42.

14 Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 4.

In conclusion, it is only similar to Bohr's concept in the fact that both represent the feature of wholeness.[15] The ICC completes the tasks of domestic courts when they fail to perform their job to adjudicate on an alleged crime, as defined under the Rome Statute, by intervening to remedy the insufficiencies. In this regard, national and international jurisdiction cannot be deemed to be mutually exclusive. In fact, the fundamental idea is that the two systems exist simultaneously to complete the function of one another.[16] Thus, they are both essential for achieving punishment, prevention, and deterrence. From this perspective, they satisfy the idea of "wholeness."

2.2.2 The Origin of the Principle of Complementarity in International Criminal Law

'Complementarity' has been one of the most hotly debated issues among international criminal law scholars, in particular, regarding its origin. It has been regarded as a novel concept,[17] attributed to the sole work of the International Law Commission (ILC). Any subsequent effort in studying the question of international criminal jurisdictions occurred during the early 1990s,[18] and the outcome of any recent work on the subject was during the 21st Century.[19]

In the 1990s, the ILC was responsible for drafting the Statute for an international criminal court. During the process of drafting, the draft Statute, establishing an international criminal court was launched in 1994, and the concept of complementarity appeared in the draft under the issues of admissibility.[20] According

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15 In physics, "exhausting the whole" is what make "wave" and a "particle" complementary description of light. They are both essential to the description and complete each other. See ibid.

16 Mohamed M. El. Zeidy, "The Genesis of Complementarity," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Cambridge University Press, 2011), 73. See also Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 1-5.

17 Leila Nadya Sadat, "Understanding the Complexities of International Criminal Tribunal Jurisdiction," in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (Oxon: Routledge, 2013), 197.; Zeidy, "The Genesis of Complementarity," 73.

18 See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (New York: Oxford University Press, 2010), 336-37.

19 Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 6.

20 Draft Statute for an International Criminal Court, article 35.

to the draft Statute of the ILC, complementarity has been used as a criterion for an admissibility test. This means that a case would be inadmissible on the grounds that the crime in question has been investigated by a state with jurisdiction or it is under the investigation of a state which has or may have jurisdiction. Regarding this, the exercise of jurisdiction, over the crime in question, under this provision, would give priority to domestic courts in the state concerned.

However, some scholars, in particular, Mohamed M. El Zeidy, argued that the concept of complementarity existed a long time before the ILC exercised its mandate to prepare a draft Statute. He claimed that the notion of complementarity appeared in many proposals, prepared by the official and non-official bodies from the WWI period, until it was asserted in the 1998 Rome Statute.[21] In fact, after the end of WWI, the international pressure to prosecute and punish those responsible for the atrocities committed during the conflict, was very important for the international community. The deliberate attempt by the Allies led to the establishment of the Commission on the Responsibility of the Authors of the War, and on Enforcement of Penalties (Commission on Responsibility)[22] for investigating, assessing and identifying perpetrators, who were responsible for criminal acts taking place during hostilities. They considered whether prosecutions could be initiated against them.[23] The Commission on Responsibility decided on the proper forum for prosecution of those who had been involved in these events. This appeared in the text of the penalty clauses of the Treaty of Versailles, and was reiterated in the following four other peace treaties, namely St. Germain-En-Laye, Truanon, Neuilly-Sur Seine and Sèvres.[24]

Subsequently, the post-WWI trials and their aftermath can be considered the prime examples of the notion of complementarity. They address exclusively elements

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21 Zeidy, "The Genesis of Complementarity," 71.

22 Patricia Pinto Soares, "Article 17 of the Rome Statute of the International Criminal Court: Complementarity - between Novelty, Refinement and Consolidation," in *Historical Origins of International Criminal Law: Volume 4*, ed. Morten Bergsmo, et al. (Brussels: Torkel Opsahl Academic EPublisher, 2015), 263.

23 Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 11.

24 Zeidy, "The Genesis of Complementarity," 78-79. For more details *see* Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 11-26.

of coordination between different jurisdictions, whereby *vis-à-vis* unwillingness or inability of the primacy jurisdiction to carry out proceedings, complementarity jurisdictions would immediately be entitled to step in to administer justice.[25]

In accordance with the Versailles Treaty, after WWI, the Allies prepared similar agreements with other enemy governments. The peace treaties were drafted for negotiation with Turkey, Bulgaria, Austria, and Hungary. The Allies eventually agreed to recognize the jurisdiction of domestic courts with the safety value, that permitted the adjudication of cases which did not appear to have been dealt with satisfactorily.[26]

In conclusion, the above-mentioned peace treaties in the aftermath of WWI were an initiative aimed at the prosecution and punishment of war crimes. The making of these peace treaties reflects an attempt to close the loopholes, which enabled the creation of safe havens for perpetrators of core crimes, as well as an effort to set up the legal landscape for the development of a complementary relationship, between domestic courts and an international criminal court.

2.2.3 The Development of the Models of Principle of Complementarity

The failure to achieve international goals, regarding the trial and sufficient punishment of war criminals of the post-WWI experience, was evident to all. In particular, the domestic prosecutions in Leipzig, which were deemed unsatisfactory because of the recommendation of the Commission of Responsibility, meant that the Allies should not send any further cases to Leipzig. In addition, neither the Hungarians not the Turks took effective steps to bring war criminals before their domestic courts. The failure of their courts to prosecute effectively did not mean that the complementary mechanism introduced by the peace treaties was not a feasible solution for the question of forum allocation. However, it was not an appropriate concept, in a period when political imperatives prevailed over the rule of law.[27]

The unsatisfactory results influenced, to a great extent, the thoughts and works of scholars on the subject, concerning the interplay between national and international

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25 Soares, "Article 17 of the Rome Statute of the International Criminal Court: Complementarity - between Novelty, Refinement and Consolidation," 265.

26 For details see Zeidy, "The Genesis of Complementarity," 83-90.

27 ibid., 90.

criminal jurisdictions. Several proposals had been introduced by official and unofficial bodies, such as the Advisory Committee of Jurists, the International Law Association, the Inter-Parliamentary Union and the International Association of Penal Law. The general idea of the proposals favoured the establishment of an international criminal court, having jurisdiction over international crimes. Eventually, the negotiation of a draft convention, establishing the international criminal court under the support of the League of Nations in 1937, was the first introductory step of the complementarity model. It relied heavily on state consent, which shaped the significant role of domestic courts, and the exceptional nature of the proposed international criminal court.

2.2.3.1 The Complementarity Model of the League of Nations

The 1937 League of Nations Convention was the first official and genuine attempt to create an international criminal court. The League of Nations introduced the first model, based on the relationship between international and domestic jurisdictions, by providing states with freedom of choice as the forum of conveniences.[28]

The League of Nations Convention itself was prepared, in response to the assassination of King Alexander of Yugoslavia and the French Foreign Minister, Jean Louis Barthou, during the King's visit to Marseilles on 9 October 1934. The refusal of the extradition request of the French government, to extradite assassins from Italy and Austria, led to the French government addressing a letter to the Secretary-General of the League of Nations. This letter emphasised the significance of fighting international political crimes, and called for the setting up of an international criminal court to try individuals accused of acts of terrorism, as defined in the convention.[29]

In the resolution adopted by the Council of the League of Nations on 10 December 1934, the Council noted that the rules of international law, concerning the repression of terrorist activity are not, at present, sufficiently precise to guarantee efficient international co-operation.[30] Also, the Council decided to set up a committee

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28 ibid., 91.

29 *History Survey of the Questions of International Criminal Jurisdiction,* UN Doc., A/CN.4/7/Rev.1, at 11, 16.

30 Ben Saul, "Attempts to Define 'Terrorism' in International Law," *Netherlands International Law Review* 52, no. 1 (2005): 62.

of experts for the international repression of terrorism, to study this subject-matter. This was done with a view to drawing up a preliminary draft of an international convention to ensure the repression of conspiracies and terrorism.[31] A committee of experts, during its first session in Geneva, proposed that the future court should not replace national jurisdiction. The prosecuting of crimes committed with a political and terrorist purpose would rest with the courts of each state.[32] The proposed court, however, would be set up at the same time, to exercise jurisdiction in exceptional situations.[33]

The Convention allows a state to have the option, of either trying the accused before its domestic courts, or of extraditing him or her to another contracting party to the Convention or the international criminal court, on the basis of the principle *aut dedere aut judicar*.[34] It might also commit him or her for trial, before the international criminal court. This was due to its unwillingness, inability or any other reason that would prevent it from exercising jurisdiction over any given case.[35]

In this League of Nations' model of complementarity, a state had the option of either trying the accused before its own national courts, or extraditing him or her to another contracting party to the convention or the international criminal court, or committing him or her, for trial before the international criminal court should it wish to do so. This is stipulated in article 2 of the Convention for the Creation of an International Criminal Court.[36]

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31 The resolution confined the scope of the convention further by stating that it should have 'as its principle objects': (1) To prohibit any form of preparation or execution of terrorist outrages upon the life or liberty of persons taking part in the work of foreign public authorities and services; (2) to prevent and detect such outrages; and (3) to punish terrorist outrages which 'have an international character., see ibid.; Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 44-45.

32 Saul, "Attempts to Define 'Terrorism' in International Law," 62.

33 Zeidy, "The Genesis of Complementarity," 92.

34 ibid., 99.; The maxim *aut dedere aut judicare* is commonly used to refer to the alternative obligation to extradite or prosecute which is now contained in a number of multilateral treaties aims at securing international cooperation in the suppression of certain kinds of criminal conduct., see M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1995).

35 For details see Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 43-56.

36 Convention for the Creation of an International Criminal Court, opened for signature at Geneva, 16 November 1937, article 2 provides that:

2.2.3.2 The Complementarity Model Developed by the International Bodies

Apart from the attempt of the League of Nations in developing the idea of the relationship between domestic courts and an international criminal tribunal, the concept of complementarity was developed through several works by various official and unofficial international bodies, including the London International Assembly (LIA).

In 1941, the LIA was created under the auspices of the League of Nations Union.[37] It proposed a clear complementary relationship between a domestic and a future international court. This body was responsible for making recommendations, relating to the question of war crimes committed during WWII,[38] and to finding suitable solutions to ensure effective punishment for those who were responsible for those deeds.[39]

One of the proposals made by M. De Baer of Belgium during one meeting was, that although the establishment of an international criminal court was essential, it could not be expected to try all war crimes, since the number of cases would be too large to accommodate. Thus, domestic courts should continue with their responsibility, whenever they had jurisdiction, leaving the most serious crimes to come under the jurisdiction of the international criminal court. Thus, in general, every case that could be judged by domestic courts, should be judged by them in their own

1. In the cases referred to in articles 2, 3, 9 and 10 of the Convention for the Prevention and Punishment of Terrorism, each High Contracting Party to the present Convention shall be entitled, instead of prosecuting before his own courts, to commit the accused for trial to the Court.
2. A High Contracting Party shall further, in cases where he is able to grant extradition in accordance with article 82 of the said Convention, be entitled to commit the accused for trial to the Court if the State demanding extradition is also a Party to the present Convention.
3. The High Contracting Parties recognize that other Parties discharge their obligations towards them under the Convention for the Prevention and Punishment of Terrorism by making use of the right given them by the present article.

37 *History Survey of the Questions of International Criminal Jurisdiction,* UN Doc., A/CN.4/7/Rev.1, at 11.

38 John W. Bridge, "The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law," *The International and Comparative Law Quarterly* 13, no. 2 (1964): 1255, 68.

39 Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 59-60.

way, without any interference.[40] M.de Baer also stated that it was only when a trial by a national court was impossible or inconvenient, that the case should be tried by an international or United Nations court. Regarding this, the terms "impossible" or "inconvenient," as criteria to be fulfilled before the international criminal court, could govern the proceedings, instead of domestic courts.[41]

In order to prove that the trials were impossible or inconvenient, it had to be shown that the case concerned the following conditions: (i) crimes, in respect of which, no Allied court has jurisdiction; and (ii) crimes, in respect of which, although an allied court has jurisdiction, the trial is, for some reason, inconvenient, and the country concerned has decided that the case should be tried by an international (UN) court.[42]

The first condition mirrors the lack of competent domestic courts, which was considered as a necessary admissibility test, so that the international criminal court could exercise its jurisdiction. While the second condition creates optional concurrent and complementarity jurisdiction between the domestic courts and the proposed international criminal court, it provided the state with the choice of the forum to try the case. A state, for some reason, might prefer to waive jurisdiction in favor of the international criminal court.[43]

Ultimately, similar conclusions were highlighted, that establishing an international criminal court with exclusive jurisdiction, was not a valid option. Instead, the obligatory competence of the proposed court would be too specific in cases where national courts, either military or civilian, were not in a position to try a case. [44] The outcome of the discussion of the LIA appeared in a draft convention for the creation of an international criminal court, in November 1943. The nature or scope of the proposed court, appeared in articles 3 and 4(1) of the draft.[45]

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40 Zeidy, "The Genesis of Complementarity," 100.

41 ibid., 101.

42 Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 61 n.8.

43 Zeidy, "The Genesis of Complementarity," 101.

44 Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 61-62.

45 For more details see ibid., 62-63. The London International Assembly (LIA) Draft Convention for the Creation of an International Criminal Court, article 3 states:

2.2.3.3 The Complementarity Model Developed by the United Nations War Crimes Commission

In 1943, the United Nations War Crimes Commission (UNWCC) was established to investigate war crimes, committed by the Axis powers during WWII. Its task was also extended to examining the available evidence and reporting to the Allied governments, for the express purpose of requesting the alleged perpetrators to surrender the moment fighting ceased.[46] The progressive report, adopted by the UNWCC, showed satisfaction that an inter-Allied tribunal or an international court, competent to exercise jurisdiction in any case of a violation of the laws of war, was to be established.[47] The UNWCC was concerned with the question of establishing a war crimes court, or an inter-Allied tribunal to try major war criminals, in accordance with the terms of the Moscow Declaration of 1943.[48]

The Draft Convention for the Establishment of a United Nations War Crimes Court was introduced by the UNWCC in 1944. The preamble of the draft convention stated that, having "[d]ecided to set up an Inter-Allied Court before which the Governments of the United Nations may at their discretion, bring the trial persons accused of an offence to which the Convention applies, in preference to bringing them before the national court."[49]

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1) As a rule, no case shall be brought before the Court when a domestic Court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction
2) Accused persons in respect of whom the domestic Courts of two or more United Nations have jurisdiction, may however, by mutual agreement of the High Contracting Parties concerned, be brought before the International Criminal Court, either by national legislation of the State concerned, or by mutual agreement of the High Contracting Parties concerned in the trial.

Further Article 4(1) states:

Each High Contracting Parties shall be entitles, instead of prosecuting before his own Courts a person residing or present in his territory who is accused of a war crime, to commit such accused for trial to the International Criminal Court.

46 Zeidy, "The Genesis of Complementarity," 104.

47 United Nations War Crimes Commission, Draft Convention for the Establishment of a United Nations War Crimes Court, C.50(1), 30 September 1944. (UNWWC's Draft Convention)

48 Moscow Declaration on Atrocities by President Roosevelt, Mr. Winston Churchill and Marshal Stalin, issued on 1 November 1943, stated that: "[T]he above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies".

49 UNWWC's Draft Convention, preamble, para. 4 states:

According to the draft convention, as a general rule, domestic courts had the primary jurisdiction to try the crimes under consideration.[50] A state, however, had the freedom to decide whether it was in the position (whether due to unwillingness, inability or for whatever reason) to deal with a certain case before its national courts, and to refer the case to the Inter-Allied court.[51] In this regard, the rationale for choosing the court that complemented domestic courts could be determined from some documents, that were issued after the drafting of such a convention.[52]

However, the idea of establishing a UNWCC, by means of a treaty to be signed in a diplomatic conference, was thwarted by vigorous opposition on several grounds.[53] It was suggested to establish mixed military tribunals to speed up the proceedings when hostilities had ceased. Subsequently, this idea was enacted by the IMTs, in order to bring perpetrators, who committed crimes during WWII, to justice.

2.2.3.4 The Development of the Complementarity Model before the International Military Tribunals (IMTs)

The idea of complementarity was adopted and developed during the prosecutions of criminals for crimes committed during WWII. After WWII, the IMT in Nuremberg, Germany was established, pursuant to the London Agreement of 8 August 1945, an international agreement, signed by the four major Allied powers. It was subsequently ratified by 19 more states, and deposited with the Secretary-General of the United Nations.[54] Also, the objective of the IMT is the international attempt to try prominent

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Have decided to set up an Inter-Allied Court before which the Governments of the United Nations may at their discretion bring to trial persons accused of an offence to which the Convention applies in preference to bringing them before a national court …,

50 Ibid., preamble, para. 2 states that:

Recognising that in general the appropriate tribunals for the trial and punishment of such crimes will be national courts of the United Nations.

See Zeidy, "The Genesis of Complementarity," 106.

51 UNWWC's Draft Convention, Preamble, para. 3 states that:

Mindful of the possibility that cases nay occur in which such crimes cannot be conveniently or effectively punished by a national court,

52 Zeidy, "The Genesis of Complementarity," 106.

53 ibid., 107.

54 Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United Stathes of America, the Provisional of the French Republic and the Government of the Union of Soviet Socialist Republic for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 (London

members of the political, military, and economic leadership of Nazi Germany for war crimes, crimes against humanity and crimes against peace at Nuremberg.[55]

Later, in 1946, the IMTFE was created in Tokyo, Japan, pursuant to a 1946 proclamation by U.S. Army General Douglas MacArthur, Supreme Commander for the Allied Powers in occupied Japan. The IMTFE presided over a series of trials of senior Japanese political and military leaders, under its authority to try and punish Far Eastern war criminals. Thus, the IMTFE was organized to try the leaders of the Empire of Japan for those crimes in Tokyo.[56]

The idea of complementarity had never been defined clearly during the post-WWII trials at the IMTs; however, the trials of the IMTs mirror another form of complementarity, and underline the significance of co-operation with national criminal jurisdiction.

With regard to the practice of the IMTs, the idea of complementarity was reflected in the relationship between the IMTs and domestic courts, because IMTs were created only to try the major war criminals, whose offences have no particular geographical location. Hence, the remaining, in particular, minor criminals would be sent back to domestic courts for prosecutions.[57] In this regard, the relationship between the MITs and domestic courts creates a clear system of complementarity, that relies on effective co-operation, on the basis of the distribution of function and the level of responsibility of the accused.[58]

This model of complementarity represents a different approach from that adopted at the end of WWI. The Treaty of Versailles and other peace treaties outlined the concept of the deferral of jurisdiction, which reflected the direct application of

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Agreement); The Charter of the International Military Tribunal, 1945 (IMT Charter) was annexed to the London Agreement..

55 IMT Charter, article 6

56 The Charter of the International Military Tribunal for the Far East, 1946 (IMTFE Charter), article 5.

57 The proceedings of the Allied Power under the CCL 10 carried out around 2,248 war crimes trials concerning other categories of Japanese war criminals in the Pacific theatre by way of establishing military commission or tribunals., Zeidy, "The Genesis of Complementarity," 124-25. ; see also M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Journal* 10 (1997): 35-36.

58 Mohamed M. El Zeidy, "From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *Bis* of the Ad Hoc Tribunals," *International and Comparative Law Quarterly* 57, no. 2 (2008): 401-02.

complementarity.[59] The inter-Allied tribunals would intervene if the German courts failed to act. The doctrine of "state sovereignty" played a major role in shaping the settlement.[60]

On the contrary, the IMTs reflected the principle of primacy, or the supremacy of international law over national law, with regard to trying major war criminals for core crimes. Due to the lack of a direct relationship between the IMTs and domestic courts, the complementarity principle emerged in a different form. Both IMTs and domestic courts had different jurisdictions and tried different categories of war criminals. The IMTs tried only major criminals, whose offences were not associated with any particular geographical location, leaving the minor criminals to national criminal jurisdictions. This task was undertaken by domestic courts, established by governments with competence to adjudicate on war crimes, at the places where they were committed, and by the occupying powers themselves. Each operated within its own zone, with its own set of courts, applied its own scheme of law.[61]

2.2.3.5 The Complementarity Model under the Primacy Regime of the Ad Hoc Tribunals

Apart from the complementary relationship reflected in post-WWII trials, the complementarity principle was developed by the jurisprudence of two UN *ad hoc* tribunals, during the 1990s: the ICTY and the ICTR.[62]

After the serious international crimes committed in the Former Yugoslavia and Rwanda, the UN Security Council created *ad hoc* tribunals of ICTY in 1993, and of ICTR in 1994, for prosecuting those guilty of serious crimes committed in the Former Yugoslavia and Rwanda, respectively. The creation of these two *ad hoc* tribunals has a special mission to restore and maintain peace in the Former Yugoslavia and Rwanda. Both ICTY and ICTR are mechanisms, created by the UN Security Council, according to Chapter VII of the UN Charter.

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59 For more details see Zeidy, "The Genesis of Complementarity," 79-90.

60 *Zeidy, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice, 75.*

61 M. Cherif Bassiouni, "The Time Has Come for an International Criminal Court," *Indiana International & Comparative Law Review* 1, no. 1 (1991): 5.

62 United Nation Security Council resolution 824 (1993), UN Doc. S/RES/827, 25 May 1993; United National Security Council resolution 955 (1994), UN Doc. S/RES/955, 8 November 1994.

The concept of complementarity has been developed, through the practice of regarding the relationship between domestic courts and these two *ad hoc* tribunals. Within the regime of the tribunals, the relationship between the *ad hoc* tribunals and domestic courts, are prescribed in the provision of Statute of each tribunal; the provision provides that jurisdiction of the tribunal is based on the principle of concurrent jurisdiction.[63] In addition, the primacy regime of the tribunal is also defined, under rule 9 of the Rule of Procedure and Evidence, of both ICTY and ICTR.[64]

According to these rules, at any stage of the prosecution of domestic courts, the tribunals may request the domestic courts to defer the cases in their jurisdiction. The application of this primacy regime of the tribunals is justified by the compelling international humanitarian interests involved,[65] and by the Security Council's determination that both situations constituted a threat to international peace and security.[66] However, some scholars argue that the reason for entrusting the primacy, was mainly to remedy the apparent lack of will and ability to carry out fair trials before a domestic court.[67]

The primacy principle seeks to entrust the *ad hoc* tribunals with the upper hand, over any case that is under its jurisdiction. Then the Prosecutor of the tribunals may request a deferral of a case at any stage of the proceedings. But, in practice,

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63 Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993 (ICTY Statute), article 9 and Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), article 8.

64 ICTY Rules of Procedure and Evidence (ICTY RPE), rule 9 and ICTR Rules of Procedure and Evidence (ICTR RPE), rule 9 provide in the same words that:

> Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:
>
> (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
>
> (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
>
> (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal, the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

65 Zeidy, "From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *Bis* of the Ad Hoc Tribunals," 403.

66 Charter of the United Nations 1945, Article 39

67 Cassese, *International Criminal Law*, 349.

within the prosecutorial discretionary powers, the exercise of its primacy jurisdiction is not strictly primacy. Sometimes the Prosecutor chose a different practice, by creating the relationship between the tribunal and domestic court, which was close to being complementarity than primacy, and which seemed to have been applied for a different purpose.[68] In this regard, the complementary relationship stands alongside the existing mechanism of the primacy of the *ad hoc* tribunals.[69]

In conclusion, even the *ad hoc* tribunals are based on a primacy regime, where the tribunal's first priority is to prosecute the perpetrator of international crimes. However, their common basis is concurrence with the jurisdiction of domestic courts. This common ground leads to the mechanism of vertical concurrent jurisdiction, strengthened with primacy for the *ad hoc* tribunals.[70]

2.2.3.6 The Complementarity Model as a Central Mechanism of the Rome Statute

The ICC was established by the Rome Statute in July 1998, which came into force on 1 July 2002. This is the first permanent international criminal tribunal, which had jurisdiction over the four most serious crimes, of concern to the international community as a whole: the crime of genocide; crimes against humanity; war crimes and the crime of aggression. By signing and ratifying the Rome Statute, states voluntarily accepted a limitation to their sovereignty, in order to exercise its right to adjudicate over those international crimes.[71] However, the reason for the establishment of the ICC was not to replace any national judicial system, but to complement it when national authorities were unwilling or unable to carry out proceedings. This meant that, on the one hand, state sovereignty and independence of domestic courts had to be strictly respected; but on the other hand, the right of the international community to punish criminal behaviour had also to be observed. It has been mentioned earlier that the principle of complementarity was the heart of the

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68 Zeidy, "From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *Bis* of the Ad Hoc Tribunals," 407-08.

69 For details see Brammertz and Hughes, "From Primacy to Complementarity: The International Criminal Tribunal for the Former Yugoslavia, 1993-2015," 161-233.

70 Zeidy, "From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *Bis* of the Ad Hoc Tribunals," 404.

71 Mariniello, "'One, No One and One Hundred Thousand': Reflections on the Multiple Identities of the ICC," 1.

entire ICC system. It was described as the 'cornerstone,' the 'pivotal article,'[72] the 'main'[73] or 'key'[74] feature of the ICC, and one of the 'underlying principles'[75] of the Rome Statute. According to the Statute, the ICC would be governed by the principle of complementarity, which means that the major role of the investigations and prosecutions should be performed by domestic courts. The ICC played its role as a court of last resort, existing to plug the impunity gap, in which states and their domestic legal systems, are unable or unwilling to prosecute perpetrators of international crimes.[76]

The relationship between the ICC and domestic courts is governed by the complementarity regime under the Rome Statute. The principle recognizes the primacy of domestic courts, as regulated by the provisions of the preamble, and article 1 of the Rome Statute that the ICC shall be complementary to national criminal jurisdiction.[77]

In this regard, the principle of complementarity shall be applied to all articles, as well as the preamble of the Statute. The preamble clearly declares that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.[78] It means that the ICC does not solely have primacy jurisdiction.[79]

In conclusion, the complementarity approach of the ICC is to balance a concern for state sovereignty with the creation of an international authority, by giving

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72 William A. Schabas and Mohamed M. El Zeidy, "Article 17 Issues of Admissibility," in *Rome Statute of the International Criminal Court: A Commentary*, ed. Otto Triffterer and Kai Ambos (Oxford: Hart Publishing, 2016), 786.

73 Paolo Benvenuti, "Complementarity in the Rome Statute and National Criminal Jurisidictions," in *Essays on the International Criminal Court to National Criminal Jurisdictions*, ed. Flavia Lattanzi and William A. Schabas (Il Sirente: Fagnano Alto, 1999), 21.

74 Mauro Politi, "Reflections on Complementarity at the Rome Conference and Beyond," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Cambridge University Press, 2011), 142.

75 Linda E. Carter, "The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis in Idem*," *Santa Clara Journal of International Law* 1 (2010): 168.

76 Lam, "Contracting Complementarity: Assessing the International Criminal Court's Support for Domestic Prosecutions."

77 Rome Statute, preamble, paragraph 10 and article 1.

78 Ibid., preamble, paragraph 6.

79 Imoedemhe, "National Implementation of the Complementarity Regime of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study," 24.

states the first option to prosecute cases. The effect of complementarity should be to encourage national prosecutions for the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute refines the framework of complementarity, not only for a more clear-cut articulation of the complementarity criteria, but to institute a forum to litigate and adjudicate disputes over jurisdiction and admissibility. The complementarity regime of the ICC encourages and facilitates the compliance of states, with their responsibility to investigate and prosecute international core crimes.[80] But where a state party fails to do this, the ICC prosecutor must step in to initiate proceedings.

2.2.3.7 The Complementarity Model as a Catalyst for National Capacity Building

Twelve years after the creation of the ICC, in 2010, the first Review Conference on the Rome Statute of the ICC took place in Kampala, Uganda (Review Conference). During the first Review Conference, the issue of the importance of the complementarity principle was reaffirmed throughout the conference, and stocktaking exercise. In addition to this, there was a platform for the participants at the Review Conference, to reflect on the successes and the failings of the ICC's operation and to consider measures that could be taken to enhance and strengthen the Court's functions in the years to come. The meeting highlighted the centrality of the principle of complementarity, the significance of the principle in bringing justice closer to victims, and affected communities. Importantly, the platform discussed the application of positive complementarity, which was a general agreement during all meetings, affirming that the active involvement of states and civil society in building national capacity is desirable.[81]

Hence, the concept of complementarity was developed through the Review Conference, in particular, the role of ICC, in the positive approach of the application of complementarity. Using this approach, the ICC would be limited to ensure that the

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80 See Nidal Nabil Jurdi, "Some Lessons on Complementarity for the International Criminal Court Review Conference," in *The South African Yearbook of International Law* (Verloren van Themaat Centre of Public Law Studies, University of South Africa, 2009), 28-56.

81 Morten Bergsmo, Olympia Bekou, and Annika Jones, "Complementarity after Kampala: Capacity Building and the ICC's Legal Tools," in *Active Complementarity: Legal Information Transfer*, ed. Morten Bergsmo (Oslo: Torkel Opsahl Academic EPublisher, 2011), 3-4.

construction of national capacity would not interfere with the ICC's judicial function, or divert funds from investigations and prosecutions being carried out by the Court.[82] This means that states, international organizations and civil society should play a leading role in encouraging and assisting states to enact national implementation legislation, and to investigate serious international crimes committed on their territory, or by their nationals.

At the Review Conference, the debate concerning complementarity focused on strengthening national capacity, for the investigation and prosecution of core international crimes. The Conference highlighted a significant shift in the use of the term 'positive complementarity,' from originally referring to the ICC's role in the construction of national capacity, to currently referring to the involvement of states, international organizations and civil society, in strengthening justice at the national level.[83]

The Rome Statute set out a framework of the principle of complementarity, in which national jurisdictions had the primary responsibility, subject to their willingness and ability, to exercise jurisdiction over crimes, listed in the Rome Statute. A negative interpretation of complementarity maintains that if a state is unwilling or unable, the Court has no jurisdiction, regardless of whether this issue is raised in litigation. In contrast to positive complementarity, it provides that the unwillingness or inability criteria only apply, if there a conflict between the Court and national criminal jurisdiction, and the matter is brought to the Court for litigation.[84]

2.3 Framing the Principle of Complementarity under the Rome Statute

At the outset, the common understanding of complementarity is one of the tests for admissibility. This is imposed by article 17, which stated that the ICC may not proceed with a case, when the concerned states are investigating or are prosecuting in good faith. This is regardless of taking fundamental aspects of complementarity, as set forth in the Rome Statute, into consideration.

82 ibid., 4.

83 ibid.

84 Arbia and Bassy, "Proactive Complementarity: A Registrar's Perspective and Plans," 54.

The word 'complementary' appears in the provisions of the preamble and article 1 of the Rome Statute.[85] Nevertheless, complementarity is implied in all articles, including the preamble, making it an overriding feature of the Statute.[86]

According to the principle of complementarity, the ICC does not have primacy jurisdiction over national mechanism, but it plays a role to subsidize and supplement the domestic investigation and prosecution of the most serious crimes of international concern. These are listed under article 5 of the Rome Statute.[87] In this relationship, the Court is only meant to act, when domestic authorities fail to take the necessary steps, in the investigation and prosecution of those crimes.

2.3.1 The Rationale of the Principle of Complementarity

There are, at least, three reasons for the complementarity system under the Rome Statute. Firstly, to protect and serve the sovereignty, both of the state parties and third states. Secondly, to put the obligations on states to do their duty under international and national law, to investigate and prosecute alleged serious crimes. Finally, to promote greater effective prosecution of international crimes and the deterrence of the future commission of such crimes. [88]

In the first place, the principle of complementarity under the Rome Statute is designed to protect and serve the sovereignty, of both state parties, and third states.[89] The ICC architects were motivated to respect state sovereignty, to the greatest extent

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85 Rome Statute, preamble, paragraph 10 and article 1.

86 Imoedemhe, "National Implementation of the Complementarity Regime of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study," 23.

87 M. A. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court," *Military Law Review* 167 (2001): 20.

88 For example Paul Seils distinguishes four reasons of the complementarity system namely: 1) it protects the accused if they have been prosecuted before national courts; 2) it respects national sovereignty in the exercise of criminal jurisdiction; 3) it might promote greater efficiency because the ICC cannot deal with all cases of serious crimes; and 4) it puts the onus on states to do their duty under international and national law to investigate and prosecute alleged serious crimes (that is, it is not just a matter of efficiency but a matter of law, policy, and morality), see Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Center for Transitional Justice, 2016).

89 Markus Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," *Max Plank Yearbook of United Nations Law* 7 (2003): 595.

possible.[90] Under general international law, States have the right to exercise criminal jurisdiction over criminal acts, within their jurisdiction. The exercise of criminal jurisdiction can indeed be said to be a central aspect of sovereignty itself.[91]

Secondly, paragraph 6 of the preamble of the Rome Statute, refers to the duty of every State to exercise its criminal jurisdiction, over those responsible for international crimes.[92] A purpose of the principle of complementarity may, thus, be to ensure that states abide by that duty, either by prosecuting the alleged perpetrators themselves, or by providing for an international prosecution in case of their failure to do so.[93] According to the wording in the preamble, it states that this duty precedes the coming into force of the Rome Statute. The principle was designed to allow for the prosecution of most serious crimes of concern to the international community as a whole. This applies at the international level where national systems are not doing what is necessary to avoid impunity, and to deter the future commission of crimes.[94] Furthermore, the principle of complementarity is surely designed to encourage States to exercise their jurisdiction, and thus make the system of international criminal law enforcement more effective.[95]

In reality, the limited resources, including infrastructure and personnel, have become one of the practical problems of the ICC. Thus, it made more sense to leave the vast majority of those cases to domestic courts.[96] Besides, domestic courts would have a strong jurisdictional connection with the case, based on territoriality or nationality.[97] Furthermore, among other things, these domestic courts would be more

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90 Gregory S. Gordon, "Complementarity and Alternative Justice," *Oregon Law Review* 88, no. 3 (2009): 5. ;see Cassese, *International Criminal Law*, 351.

91 Ian Brownlie, *Principles of Public International Law*, 5 ed. (New York: Oxford University Press, 1998), 289, 303.

92 Rome Statute, preamble, paragraph 6.

93 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 596.

94 ibid., 296.

95 Danesh Sarooshi, "The Statute of the International Criminal Court," *International & Comparative Law Quarterly* 48, no. 2 (1999): 395.

96 Cassese, *International Criminal Law*, 351.

97 M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," *Law and Contemporary Problems* 59 (1996): 63, 68.

likely to have more means available, to collect the necessary evidence and to arrest the accused.[98]

Finally, the effective prosecution of international crimes is in the interest of the international community, and also the endeavour to put an end to impunity, and the deterrence of the future commission of such crimes.[99] A primary concern of the Rome Statute, under the principle of complementarity, is to strike an adequate balance between this interest of the international community and State sovereignty.[100] The battle against the culture of impunity incentivizes a large number of domestic jurisdictions to become more operational and effective, in investigating and prosecuting cases of genocide, crimes against humanity and war crimes, including aggression.[101] The expanded number of jurisdictions has the potential to bolster both the deterrence and expressive goals of international criminal justice.[102]

Interestingly, the principle of complementarity has been affirmed by the international community, as the best form of jurisdiction for an international adjudicatory institution. John Holmes, a diplomat, who was deeply involved in the negotiations that preceded the Rome Statute, noted that:

> [T]hroughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which *must be based on national procedures complemented by an international court* … The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime … in the balance struck in Rome would like have unravelled support for the principle of complementarity and, by extension, the Statute itself.[103] (*emphasis* added)

98 Cassese, *International Criminal Law*, 351.

99 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 597.

100 ibid. For details see, Robert Cryer, "International Criminal Law vs State Sovereignty: Another Round?," *The European Journal of International Law* 16, no. 5 (2006): 979-1000.; Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1095-123.

101 Cassese, *International Criminal Law*, 353.

102 Gordon, "Complementarity and Alternative Justice," 5.

103 Holmes, "The Principle of Complementarity," 73-74.

2.3.2 The Concepts of Jurisdiction and Admissibility under the Rome Statute

The discussions in several sessions have previously reflected some linkage between the principle of complementarity, ICC jurisdiction, and admissibility of the ICC. Thus, the concept of jurisdiction and admissibility of international courts and tribunals must be reviewed, before going on to the discussion of the principle of complementarity.

The jurisdiction and admissibility are two main concepts in the legal system of the international courts and tribunals. The role of international courts and tribunals, including the ICC, in international life, is decisively influenced by their jurisdictional power, and the rules of admissibility to which they are subject.[104]

The ability of the international courts to fulfil their various functions – dispute resolution, law enforcement, norm-interpretation, information production, expressing the values of the international community, etc. – depends on the level of actual and potential business that they can expect to attract or generate. The legal power of international courts is determined by the courts' jurisdictional provisions. These rules on admissibility represent potential limits on jurisdictional powers, by defining the circumstances under which courts can, or should decline, to exercise jurisdiction over a case brought before them.[105]

The decision of Courts, which do not respect jurisdictional limits, may be invalidated by the controlling authority. Its determination as to the admissibility of claims should be final. Also, mistakenly classifying issues of admissibility as jurisdictional may, therefore, result in an unjustified extension of the scope for challenging awards, and frustrate the parties' expectation that their dispute is decided by the chosen neutral tribunal.[106]

The distinction between jurisdiction and admissibility is an initial question. To distinguish these two key concepts is a matter of considerable concrete importance.[107]

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104 Yuval Shany, "Jurisdiction and Admissibility," in *The Oxford Handbook of International Adjudication*, ed. Cesare PR. Romano, Karen J. Alter, and Yuval Shany (London: Oxford University Press, 2014), 779.

105 ibid., 779-80.

106 Jan Paulsson, "Jurisdiction and Admissibility," in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen and Robert Briner (Paris: ICC Publishing, 2005).

107 ibid., 601.

In general, the distinction, based on their relationship to a delegated power, is analytically useful. Jurisdiction is the legal powers of the courts; thus, questions of jurisdiction pertain to whether legal power exists or not.

Traditionally, the legal literature distinguishes four categories of the jurisdiction of international adjudicative bodies: jurisdiction *ratione personae* (personal jurisdiction); jurisdiction *ratione materiae* (subject-matter jurisdiction); jurisdiction *ratione temporis* (temporal jurisdiction); and jurisdiction *ratione loci* (spatial or territorial jurisdiction).[108] Regarding this, jurisdictional provisions dictate who has accessed to the courts, which issues may be litigated, what legal claims may be raised in the course of litigation and, at times, what remedies can be sought.[109] The international courts may adjudicate cases, only if all the applicable jurisdictional requirements are satisfied, that is, all of the dimensions of the case brought before them, fall within the legal mandate conferred upon them, and if all other jurisdictional conditions are met.[110] If any jurisdictional condition has not been met, the court must reject jurisdiction, as it does not have the legal power to adjudicate the case in question.

Rules on admissibility represent potential limits on jurisdictional power – that is, they define the circumstances, under which courts can or should decline to exercise jurisdiction over cases brought before them.[111] In this respect, questions of admissibility pertain to whether or not, the court may decline to exercise the power of adjudicating.[112] In this sense, they do not assume a lack of power to adjudicate, but rather the power to decline to adjudicate, notwithstanding having the legal authority to do so. [113]

Concerning the ICC, the jurisdictional conditions, providing for adjudication as a last resort only, may exist again if certain states are reluctant to empower the courts, in a manner that leads to the surrender of control over their legal dispute. By according a right of way to other dispute settlement venues, over which they retain

108 Shany, "Jurisdiction and Admissibility," 781.
109 ibid., 779-80.,
110 ibid., 781.
111 ibid., 780.
112 ibid., 787.
113 ibid., 796.

some influence (such as national courts or negotiations), states may be able to minimize the loss of control over the dispute, associated with international adjudication.[114]

The complementarity regime under the Rome Statute represents the alternative venue jurisdictional condition, which limits the Court's jurisdiction to cases that national courts are unwilling, or unable, to adjudicate. The Court cannot exercise its jurisdiction if the case is inadmissible.[115] Thus, the principle of complementarity does not affect the existence of jurisdiction of the Court as such, but regulates when the jurisdiction may be exercised by the Court.[116] In this sense, article 17 of the Rome Statute functions as a barrier to the exercise of jurisdiction. Thus, in practice, the Court shall rule on any challenge to its jurisdiction first, before dealing with matters of admissibility.[117]

Whenever two legal systems or regimes can each exercise jurisdiction over the same issues, some mechanism will usually be developed, to determine which one proceeds first. In the case of the crime of genocide, crimes against humanity and war crimes, including the crime of aggression, the ICC operates in parallel with national justice systems, which are also positioned to prosecute the offences in question. The underlying premise of the Rome Statute is that, when national justice systems fail, the ICC steps in, as a last resort.

Consequently, article 17 of the Statute prescribes that the Court may take on a prosecution, only when national justice systems are 'unwilling or unable genuinely' to proceed. The Rome Statute addresses the issue under the rubric of 'admissibility.' The Court may well have jurisdiction over a case, in the sense that the alleged international crime was committed before 1 July 2002, on a territory of a state party to the Rome Statute, or by a national of a state party, or where there has been a Security Council referral, or a declaration accepting jurisdiction by a non-party State. But, if

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114 ibid., 795.

115 John T. Holmes, "Complementarity: National Courts Versus the ICC," in *The Rome Statute of the International Criminal Court: A Commentary Vol. I*, ed. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford University Press, 2002), 667, 72.

116 ibid., 672.

117 Rule of Procedure and Evidence of the International Criminal Court (hereinafter 'ICC REP'), Rule 58(4): "The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility"

the case is being investigated or prosecuted by a state with jurisdiction over the crime, the Prosecutor must demonstrate that it is 'unwilling or unable genuinely.'[118]

2.3.3 The Jurisdictional Aspects of the ICC

The Rome Statute of the ICC is a treaty and, therefore, an act of those states which have signed the treaty. The Rome Statute is not binding on other third-party, non-signatory states.[119] The Court was created to have jurisdiction over only 'the most serious crimes of concern to the international community as a whole'.[120] According to article, these are: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Generally speaking, this reflects the jurisdictional reach of the *ad hoc* tribunals, being a combination of the ICTY article 2-5, and ICTR article 2-4, to which the crimes of aggression had been added.[121]

According to the Rome Statute, the Court may exercise its jurisdiction if: (1) a situation, in which the alleged crimes have been committed in the territory, or on board a vessel or aircraft registered in such State, or by one of its nationals,[122] is referred to the Prosecutor by a state party.[123] In addition, the ICC may exercise its jurisdiction when a non-state party files an *ad hoc* declaration, that accepts the Court's jurisdiction, and the crime has been committed on that state's territory, or the accused is one of its nationals;[124] (2) a situation, in which the alleged crimes have been committed, is referred to the Prosecutor by the Security Council, acting under Chapter

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118 William A Schabas, *An Introduction to the International Criminal Court*, 3 ed. (Cambridge: Cambridge University Press, 2007), 171.

119 This is a general principle of international law enshrined in articles 34 and 35 of the Vienna Convention on the Law of Treaties, 1969.

120 Rome Statute, preamble, paragraph 4.

121 Antonio Cassese, "International Criminal Law," in *International Law*, ed. Malcolm D. Evan (New York: Oxford University Press, 2006), 728-29.

122 Rome Statute, article 12(2) provides:

> In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with Paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.

123 Ibid., article 13(1).

124 Ibid., article 12(3).

VII of the UN Charter;[125] or the Prosecutor has initiated an investigation *proprio motu* on the basis of communications, with authorization of the Pre-Trial Chamber under article 15 of the Rome Statute.[126]

In general, the jurisdiction of the ICC is mainly based on territorial jurisdiction and personal jurisdiction, and not on a theory of universality principle jurisdiction. However, the universality of the Court's jurisdiction is represented by the Security Council referrals, which are not linked to the territoriality of any state, whether they are parties or non-parties.[127]

To explore the issues of jurisdiction of the Court, it is necessary that each issue must be considered separately. This examination of this section covers the issues of personal jurisdiction, subject-matter jurisdiction, temporal jurisdiction, and territorial jurisdiction, respectively.

2.3.3.1 Personal Jurisdiction: The Subjects of Criminal Responsibility

The jurisdiction *ratione personae* establishes that the Court can exercise jurisdiction over nationals of a state party, who are accused of a crime, in accordance with article 12(2)(b), regardless of where the acts are perpetrated.[128] Furthermore, persons falling into the jurisdiction of the ICC are not limited to only nationals of state parties. The Court's jurisdiction over nationals of a non-Party State could also be, in the case that such a non-party state accepts the jurisdiction of the Court on an *ad hoc* basis, pursuant to article 12(3)[129] or pursuant to a decision of the Security Council under article 13(b). This is provided that referral is made by a resolution, adopted under Chapter VII of the UN charter.[130] The Court shall exercise its jurisdiction over all persons in the same way, without any distinction based on official capacity.

Additionally, article 24 of the Rome Statute adds the "non-retroactivity *ratione personae*." In this regard, no person shall be criminally responsible under the

125 Ibid., article 13(2).
126 Ibid., article 13(3).
127 M. Cherif Bassiouni, "The Permanent International Criminal Court," in *Justice for Crimes against Humanity*, ed. Mark Lattimer and Phillipe Sands (Oregon: Hart Publishing, 2006), 184.
128 Rome Statute, article 12(2)(b).
129 Ibid., article 12(3), see also ICC REP, rule 44.
130 Rastan, "Situation and Case: Defining the Parameters," 424.

Statute, for conduct before its entry into force of the Statute.[131] According to this, the jurisdiction *ratione personae* has an exception, which is worth mentioning,[132] that is, the Court will not exercise jurisdiction over persons under the age of eighteen, at the time of the alleged commission of a crime.[133] Importantly, according to the purpose and spirit of the Rome Statute, the ICC rejects the concept of immunity.[134]

However, in practice, the prosecutions to date are based solely on territory, and not nationality. In the prosecutions concerning Uganda and the DRC, there are no allegations that the accused persons are nationals of a state party. Nor did the Security Council give the Court jurisdiction over the acts of Sudanese nationals, committed outside of Sudan, even when these might be germane to the conflict in Darfur, Sudan.[135]

2.3.3.2 Subject-Matter Jurisdiction: The Crimes within the Jurisdiction of the ICC

The subject-matter *(ratione materiae)* jurisdiction refers to the crimes, within the jurisdiction of the court. Article 5 of the Rome Statute, declares that the Court's jurisdiction is limited to the most serious crimes, of concern to the international community as a whole and, specifically, to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[136]

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131 Although Article 24 has the title "non-retroactivity *ratione personae*" it is often examined together with Article 11, which addresses the temporal jurisdiction., See Fernanda Emília Cota Campos, "The International Criminal Court: The Principle of Complementarity, the Question of Surrender and the Recent Request Sent by the ICC to the STF," *Revista Eletrônica de Direito Internacional* 7 (2010): 142.

132 Schabas, *An Introduction to the International Criminal Court*, 72.; Campos, "The International Criminal Court: The Principle of Complementarity, the Question of Surrender and the Recent Request Sent by the ICC to the STF," 142.

133 Rome Statute, article 26.

134 Ibid., article 27(2) provides that:

> [i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law shall not bar the Court from exercising its jurisdiction over such a person

135 Schabas, *An Introduction to the International Criminal Court*, 71.

136 Rome Statute, article 5.

2.3.3.2.1 The Crime of Genocide

Genocide has been developed from a category of crimes against humanity, to an autonomous crime after WWII. [137] The term 'genocide' was invented in 1944 by Raphael Lemkin in his book on Nazi crimes in occupied Europe.[138] However, the term was not yet codified as a separate crime during the Nuremberg trials, but it was adopted by the prosecutors at Nuremberg and used in the indictments. The defendants were charged, pursuant to article 6(c) of the Nuremberg Charter.[139] Later, in 1946, genocide was declared an international crime by the UN General Assembly.[140] The General Assembly affirmed that genocide was a crime under international law which the civilized world condemned, and for the commission of which principles and accomplices – whether private individuals, public officials or statemen, and whether the crime was committed on religious, racial, political or any other grounds – were punishable.[141]

In addition, it was also decided to proceed with the drafting of a treaty on genocide, by requesting the Economic and Social Council to undertake the necessary studies, intending to draw up the draft convention on the crime of genocide.[142] The term 'genocide' was explicitly defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 October 1948.[143]

These days, the prosecution of the crime of genocide is widely accepted. The ICJ recognized the genocide prohibition as 'assuredly a peremptory norm of international law' (*jus cogens*), and an *erga omnes*[144] obligation of states.

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137 Kai Ambos, *Treatise on International Criminal Law Volume II: The Crimes and Sentencing* (Oxford: Oxford University Press, 2014), 1.; William A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), 1.

138 Raphael Lamkin, *Axis Rule in Occupied Europe: Laws of Occupied, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for World Peace, 1944).

139 Ambos, *Treatise on International Criminal Law Volume II: The Crimes and Sentencing*, 1-2.

140 General Assembly Resolution 96(I), The Crime of Genocide, adopted by the fifty-fifth plenary meeting, 11 December 1946.

141 Ibid.

142 Ibid.

143 Convention on the Prevention and Punishment of the Crim of Genocide (9 October 1948), 78 UNTS 277 (1951), entered into force 12 January 1951.

144 ICJ, *Case Concerning the Application of the Convention on the Protection on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Yugoslavia*), Judgment, para 31 (11 July 1996); ICJ, *Case Concerning the Application of the Convention on the Protection on*

The crime of genocide is defined in article 6 of the Rome Statute, as follows:

> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[145]

2.3.3.2.2 Crimes Against Humanity

The concept of crimes against humanity was established in intentional humanitarian law, and the regulations of armed conflicts. In 1945, it was defined by the Charter of the IMT, as the last category.[146] Subsequently, crimes against humanity were developed in article 5(c) of the IMTFE Charter, article 5 of the ICTY Statute, and article 3 of the ICTR Statute.

Article 7 of the Rome Statute codifies the development of the definition of crimes against humanity, and stipulates that:

> For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;

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the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v. *Servia and Montenegro*), Judgment, para. 161 (26 February 2007).

145 Rome Statute, article 6.

146 IMT Charter, article 6(c) provides that:

> [m]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[147]

2.3.3.2.3 War Crimes

War crimes are the oldest crime of the four categories, defined in article 8 of the Rome Statute. War crimes have been prosecuted as domestic offences, probably since the beginning of criminal law. Also, they were the first to be prosecuted, according to international law, as for example, in the trials conducted in Leipzig in the early 1920s. this was a consequence of article 118-230 of the Treaty of Versailles, in which a small number of German soldiers were convicted of acts in violation of the laws and customs of war.[148]

The basis of international law war crimes was the Regulation annexed to the 1970 Hague Convention IV. Later, war crimes were codified in the Charter of the IMT.[149]

Subsequently, the four Geneva Conventions of 1949 defined war crimes in the 'grave breaches' provisions that: "[w]ilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to

147 Rome Statute, article 7.

148 Schabas, *An Introduction to the International Criminal Court*, 112.

149 IMT Charter, article 6(c) provides that:

[v]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[150]

However, these provisions do not cover the entire range of serious violation of the laws of war. They extend only to the most extreme atrocities, and their victims must be, by and large, civilian or non-combatants. In the late 1970s, the Geneva Conventions was updated with two Additional Protocols in 1977, in particular, those which cover the grave breaches during a non-international armed conflict.

The most substantial provisions concerning war crimes, were the provisions in the Rome Statute. Article 8 of the Rome Statute, which defined four categories of war crimes.

The first category of war crimes, under article 8, cover grave breaches of the Geneva Conventions namely, any acts against persons or property, protected under the provisions of the relevant Geneva Conventions: wounded and sick in land warfare (Geneva Convention I); wounded, sick and ship-wrecked in sea warfare (Geneva Convention II); prisoners of war (Geneva Convention III); and civilians (Geneva Convention IV).

The grave breaches of the four Geneva Conventions are set out in article 8(2)(a) of the Statute, namely: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly; compelling a prisoner of war or any other protected person to serve in the forces of a hostile Power; wilfully depriving a prisoner-of-war or other protected person of the rights of a fair and regular trial; unlawful deportation or transfer, or unlawful confinement; and the taking of hostages.[151]

The second category is laid down in article 8(2)(b), which covers other serious violations of the laws and customs, applicable in international armed conflict, within the established framework of international law, for example: intentionally directing attacks against the civilian population, civilian objects, personnel, installations,

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150 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Force in the Field of 12 August 1949, article 50.

151 Ibid., article 8 (2)(a).

material, units or vehicles involved in a humanitarian assistance or peacekeeping mission. This is in accordance with the Charter of the United Nations; attacking or bombarding dwellings or buildings, which are undefended, and which are not military objectives; killing or wounding a combatant who has surrendered at discretion, etc. [152]

The third group is a non-international armed conflict, serious violations of common article 3 to the four Geneva Conventions, pursuant to article 8 (2)(c), namely: any of the following acts committed against persons, taking no active part in the hostilities. This includes members of armed forces, who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention or any other cause.[153]

The fourth group consists of other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. Examples of this are intentionally directing attacks against the civilian population, buildings, material, medical units, and transport, and personnel using the distinctive emblems of the Geneva Conventions, in conformity with international law; ordering the displacement of the civilian population, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; killing or wounding treacherously a combatant adversary; etc. [154]

2.3.3.2.4 The Crime of Aggression

In 1998, the crime of aggression is listed as one of four crimes, under the jurisdiction of the ICC, by article 5(1) of the Rome Statute (along with the crime of genocide, crimes against humanity and war crimes) but paragraph 2 of article 5 adds that: "[t]he Court shall exercise jurisdiction over the crime of aggression, once a provision is adopted, in accordance with Articles 121 and 123, defining the crime. With respect to this crime, such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."[155]

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152 Ibid., article 8 (2)(b).
153 Ibid., article 8 (2)(c).
154 Ibid., article 8 (2)(e).
155 Rome Statute, article 5(2).

At the 2010 Review Conference on the Court's Statute, held in Kampala, Uganda, consensus amendments were adopted, which were designed to activate the definition of the crime of aggression and the Court's jurisdiction over the crime of aggression, based on the Special Working Group on the Crime of Aggression (SWGCA)'s draft.[156] The definition of the crime of aggression, adopted by the Kampala Conference, was inserted as article 8 *bis* of the Rome Statute.[157] The definition consists of two parts, a mixed combination of the generic and specific definitions, incorporating a large number lot of ambiguities. Also, there are other provisions, which are extremely vague regarding the exercise of jurisdiction of the ICC, on the crime of aggression, which makes the jurisdiction potentially available, even in the absence of a referral from the Security Council.[158]

Article 8 *bis* defines the crime of aggression as:

> [p]lanning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. [159]

2.3.3.3 Temporal Jurisdiction: When the ICC May Exercise Its Jurisdiction

Concerning the jurisdiction *ratione temporis,* the Court has jurisdiction, only with respect to crimes committed, after the entry into force of the Statute, 1 July 2002.[160] Also, the ICC is a prospective institution, contrary to previous international courts, which were created to have jurisdiction over crimes committed, prior to their establishments, such as IMTs, ICTY, and ICTR.

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156 Surendran Koran, "The International Criminal Court and Crimes of Aggression: Beyond the Kampala Convention," *Houston Journal of International Law* 34, no. 2 (2012): 250-51.; Roger S Clark, "Amendment to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010," *Goettingen Journal of International Law* 2, no. 2 (2010).; Roger S. Clark, "Complementarity and the Crime of Aggression," in *The International Criminal Court and Complementarity: From Theory to Practice -Volume 2*, ed. Carsten Stahn and Mohamed M. El Zeidy (Cambridge: Cambridge University Press, 2011), 722.

157 Koran, "The International Criminal Court and Crimes of Aggression: Beyond the Kampala Convention," 252.

158 Sean D. Murphy, "The Crimes of Aggression at the ICC," in *Legal Studies and Legal Theory Paper No. 2012-50* (George Washington University Law School, 2012), 1-2.

159 Rome Statute, article 8 *bis* (1).

160 Rome Statute, article 11(1)

In practice, the issue of temporal jurisdiction has already been clearly addressed by the Pre-Trial Chamber I in the *Lubanga* case. According to the facts of the case, the DRC became a state party on 11 April 2002, and President Kabila referred the situation in the DRC to the Prosecutor in March 2004. The Pre-Trial Chamber I concluded that the case fell within the Court's jurisdiction, and later, the Appeals Chamber confirmed the Pre-Trial Chamber's decision on the accused's challenge to the jurisdiction of the Court".[161] Regarding this, the requirement of article 11 had been met, as the *Lubanga* case referred to crimes committed between July 2002 and December 2003, and since the Statute entered into force in the DRC on 1 July 2002.

2.3.3.4 Territorial Jurisdiction: The Matters of Territory Where the Crimes were Committed

Regarding the territorial jurisdiction *(ratione loci)*, the ICC exercises jurisdiction over offences perpetrated on the territory of state parties, regardless of the nationality of the offender.[162] Such jurisdiction over offences, committed on the territory of non-party states, accepting its jurisdiction on an *ad hoc* basis, under article 12(3) of the Rome Statute, is also possible.

Furthermore, the definition of territory covers not only the land of the territory of the State but also vessels and aircraft registered in that state party, as well as the airspace above the State and its territorial waters.[163]

The fulfilment of these jurisdictional criteria does not automatically mean that, after the alleged commission of international crimes, the ICC may directly exercise its jurisdiction over them. On the contrary, the state parties have granted to the ICC, a jurisdiction which is deactivated. It can only be activated, with regard to a particular situation of crisis, when several circumstances occur, and the ICC launches an

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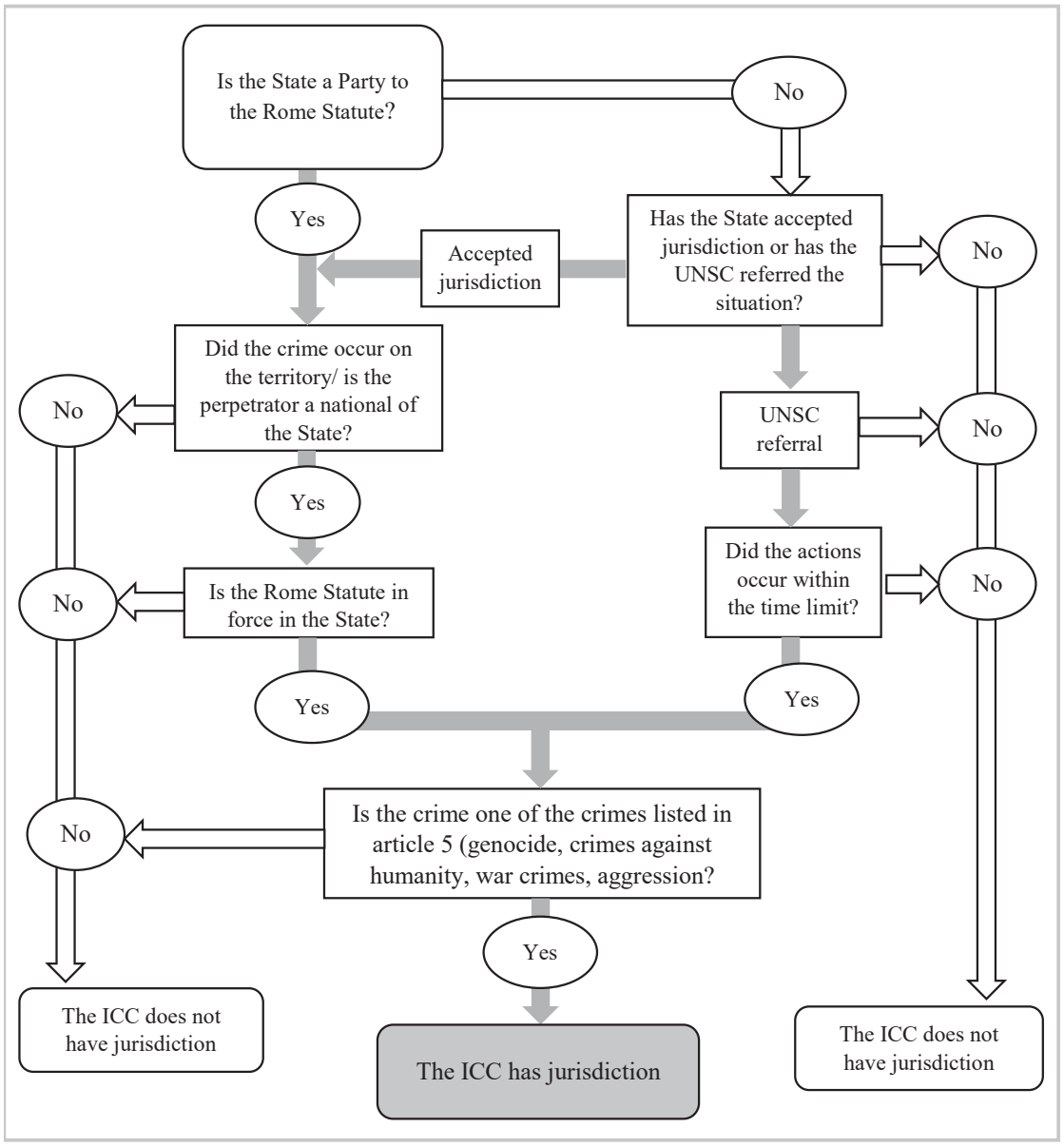
161 *Prosecutor* v. *Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC Pre-Trial Chamber I, ICC-01/04-01/06-2842, para. 9.

162 Rome Statute, article 12(2)(a).

163 Ibid.

investigation into such crimes.[164] The jurisdictional aspects of the ICC, are detailed in Diagram 1.

Diagram 1 Jurisdictional Aspects of the ICC



Source: Author's diagram, derived from the Rome Statute of the ICC

164 Héctor Olásolo, "The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor," *International Criminal Law Review* 5 (2005): 122-23.

2.3.4 The Admissibility before the ICC

The admissibility assessment arises normally at a later stage, once the court is already satisfied that it has jurisdiction to commence proceedings. It involves some discretion on the part of the Court, assessing whether a situation or a case can, or should be admitted. The concept of admissibility before the ICC appears in article 17 of the Rome Statute, stating that "having regard to paragraph 10 of the preamble and article 1".[165]

The repeated reference to complementarity in both preamble and the operative provisions of the Statute reflects the fundamental importance that States have attached to it.[166] Without referring to complementarity, article 17 of the Rome Statute outlines the standard of ICC complementarity, by regulating the relationship between the ICC, and domestic courts that the Court must defer to the primacy of national criminal jurisdiction, in cases where a case is inadmissible. However, this does not, *per se*, create a presumption, in the technical sense of the word, in favour of inadmissibility.[167]

The provision of article 17 of the Rome Statute outlines the standard of ICC complementarity, by regulating the relationship between the ICC and domestic courts, which means that the Court must defer to the primacy of national criminal jurisdiction, in cases where a case is inadmissible. It applies the term of 'unwillingness and inability' of the state's national proceedings as a criterion, and uses the term 'genuinely', to carry out the investigation or prosecution as a key to the interpretation of those criteria. This makes complementarity a workable instrument.[168]

2.3.4.1 Historical Background of the Criteria for Admissibility under Article 17

A fundamental question facing the drafters of the Statute of the ICC was the role the Court would play regarding national courts. The general view of the Court was that it

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165 Rome Statute, article 17, para. 1.

166 Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (New York: Oxford University Press, 2008), 99.

167 Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," *European Journal of International Law* 10 (1999): 158.

168 Soares, "Article 17 of the Rome Statute of the International Criminal Court: Complementarity - between Novelty, Refinement and Consolidation," 238.

should be complementary to national jurisdictions; hence, the term complementarity was used, to describe such a relationship between these two institutions.[169]

During the drafting process of the Statute, one of the most problematic issues was that of the conflicting visions, regarding the principle of complementarity. This was because the nature of this principle linked both political sensitivities and legal complexities.[170]

According to the principle of state sovereignty, states have obligations to prosecute many crimes, including crimes considered for inclusion in the Court's Statute. Hence, in supporting the establishment of the ICC, some states were unwilling to create such a body. It meant that the Court should solely assume jurisdiction, when the national judicial system was unable to investigate or prosecute perpetrators. Some states and many international non-governmental organizations supported the idea that the Court should have such the potential for the greater role. [171]

2.3.4.1.1 The ILC Approach to Admissibility

The ILC placed the principle of complementarity in the third preambular paragraph of its Draft Statute, stating that the Court was "intended to be complementary to national criminal justice systems, in cases where such trial procedures may not be available or may be ineffective."[172] In this regard, it was made clear that the ILC believed that the Court's jurisdiction should extend beyond those situations, where the national jurisdiction was not functioning.

In addition, the ILC Draft also provided the criteria for the Court, in determining the admissibility of the case in article 35:

> **Article 35. Issues of admissibility**
> The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

169 Holmes, "The Principle of Complementarity," 41.
170 ibid.
171 ibid., 42.
172 ILC Draft Statute, preamble.

(a) Has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
(b) Is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
(c) Is not of such gravity to justify further action by the Court.

According to this provision, the Court may decide that a case should be considered inadmissible in three scenarios. First, the case has been duly investigated by a state with jurisdiction over it, and the decision of that state was not to proceed to prosecution, that is apparently well-founded. Secondly, the case was under investigation by a state, which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being, with respect to the crime. Finally, the case was not of such gravity, as to justify further action by the Court.[173]

In this regard, the provision of article 35 of the Statute enabled the court to decide whether a particular complaint is admissible. This provision ensured that the Court only deals with cases, in the circumstances outlined in the preamble.

The approach suggested by the ILC, contributed to the resolution of the complementarity question. This stipulated that the Statute should provide criteria, permitting the Court to intervene in cases where the national authorities had acted, or had been acting. This gave great weight to the negotiations on this point at the Rome Conference.

2.3.4.1.2 Thoughts during the Preparatory Committee

The question of complementarity arose during the first debate of the Preparatory Committee on the Establishment of the International Criminal Court, during the March-April session in 1996.[174]

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173 ILC Draft Statute, article 35.

174 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly Official Records, Fifty-first Session Supplement No.22 (A/51/22), paras. 153-169.

The Committee observed that complementarity, as referred to in the third paragraph of the preamble to the ILC Draft statute, was to reflect the jurisdictional relationship between the ICC and national authorities, including national courts. It was generally agreed that a proper balance between the two was crucial, in drafting a statute that would be acceptable to a large number of States.[175]

During the meeting, several delegates made proposals, setting out different approaches from the ILC approach, as reflected in the text of the Draft Statute. In particular, they felt that complementarity should more accurately reflect the intention of the Commission, in respect of the role of an international criminal court, in order to provide clear guidance for interpretation.[176]

With regard to paragraph 3 of the preamble of the ILC Draft Statute, some delegations agreed that, while the preambular reference to complementarity should remain, a more accurate definition of the concept, enumerating its constituent elements, should also be embodied in an article of the Statute.[177] In addition, the words 'unavailable' or 'ineffective' should be further defined, or should be omitted. This was because the determination of 'availability' of national criminal systems was more factual while the determination of whether such a system was 'ineffective,' was too subjective.[178]

With regard to article 35, several delegations felt that the three grounds of inadmissibility seemed too narrow, for example, because firstly, it focused on only the decisions of a State not to proceed to prosecution. This ignored other national decisions to discontinue the proceedings, acquit, convict of a lesser offence, sentence or pardon, or even requests for mutual assistance or extradition. The view was expressed that the article should be expanded to include cases which are being, or have been prosecuted, before national jurisdictions, subject to qualifications in respect of impartiality, diligent prosecution, etc.[179] Secondly, it indicated that a crime under investigation was a reason for inadmissibility, without taking into account the

175 Ibid., para. 143.
176 Ibid., para. 161.
177 Ibid.
178 Ibid.
179 Ibid., para. 164.

circumstances under which a crime was investigated, and the possibilities of ineffective or unavailable procedures, or even sham trials.[180]

The question of complementarity was raised again in the 1997 session of the Preparatory Committee, during which new proposals were submitted. Later, after the negotiations, a draft article on complementarity was produced and subsequently approved. It stated the following:

> Article 11 [35]
> Issues of admissibility
> 1. [On] application of the accused or at the request of [an interested State] [a State which has jurisdiction over the crime] at any time prior to [or at] the commencement of the trial, or of its own motion], the Court shall determine whether a case before it is inadmissible.
> 2. Having regard to paragraph 3 of the preamble, the Court shall determine that a case is inadmissible where:
>   (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>   (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>   (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of article 42;
>   (d) the case is not of sufficient gravity to justify further action by the Court.
> 3. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:
>   (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 20;
>   (b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>   (c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

[180] Ibid., para 165.

> 4. In order to determine inability in a particular case, the Court shall consider whether due to a total or partial collapse or unavailability of its national judicial system the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. [181]

However, the draft left further proposals concerning the classification of the principle of complementarity, elsewhere in the Statute. There were concerning cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly, also, pardons and amnesties. Moreover, it also proposed an alternative approach that the Court shall not have the power to intervene, when a decision at the national level has been taken in a particular case. That approach could be summarised as "[T]he Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."[182]

2.3.4.1.3 The Negotiations at the Rome Conference

At the Rome Conference, the principle of complementarity was taken up by the Committee of the Whole (CW), in the second week of the conference.

In the general debate, many delegates expressed their support for the complementarity provision. However, there were three main questions which emerged, regarding the issues of admissibility. First, the article gave the Court too broad a discretion, in determining unwillingness, and no objective criteria, on which the Court should base its determinations. Secondly, the phrase "undue delay" was criticized, as being too low a threshold. And, finally, for the determination by the Court of inability, the partial collapse of the national judicial system was insufficient for the Court to exercise jurisdiction. [183]

In order to respond to the first question, the phrase "having regard to the principle of due process recognized by international law" was included as the element

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181 Report of the Working Group on Complementarity and Trigger Mechanism, the Preparatory Committee on the Establishment of the International Criminal Court, 4 - 15 August 1997, A/AC.249/1997/WG.3/CRP.2 (13 August 1997).

182 Ibid.

183 Holmes, "The Principle of Complementarity," 53.

of the objective to all criteria on unwillingness.[184] Regarding the second question, the term "undue delay" was changed to "unjustified delay." It seemed clear that the word "unjustified" sets a higher standard than "undue", in that it implied the right of States to explain any delay before the Court determined that a case was admissible.[185] Lastly, regarding the last question concerning the partial collapse, the adjective "partial" was replaced with "substantial," which met with broader support from the delegates.[186]

Finally, at the Rome Conference, the Rome Statute was completed, and the complementarity provision was also included in the final package of the Conference, in article 17 of the Rome Statute.

2.3.4.2 Criteria of Admissibility under the Rome Statute

Article 17(1) of the Rome Statute lays downs the substantive conditions for the admissibility of cases before the ICC.[187] According to this provision, the admissibility test is composed of two main parts of the consideration. The first part requires the consideration of the complementarity test, to determine whether the relevant case at hand is being, or has been, genuinely investigated, or prosecuted by a state's national judicial system. This is the main object of the analysis continued in this dissertation. The second part of the assessment relates to the analysis of the gravity test, to determine whether the case is of sufficient gravity to justify further action by the Court. [188] Within these two sets of test, are included three criteria for the admissibility of the cases before the ICC, namely: complementarity, pursuant to article 17(1)(a) and (b); double jeopardy *(ne bis in idem),* pursuant to article 17(1)(c); and gravity, pursuant to article 17(1)(d).[189]

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184 ibid., 54.

185 ibid., 41.

186 ibid.

187 Rome Statute, article 17.

188 Mohamed Abdou, "Article 17 Issues of Admissibility " in *Commentary on the Law of the International Criminal Court*, ed. Mark Klamberg (Brussels: Torkel Opsahl Academic EPublisher, 2017), 206.

189 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 336.

2.3.4.2.1 Criteria under article 17(1)(a) and (b)

The core of the admissibility assessment, based on the principle of complementarity, is whether there is a state with jurisdiction, which has the willingness and ability to investigate and prosecute, as stipulated in article 17(1)(a) and (b) of the Rome Statute. If the Court concludes that such a national forum is available, it must show deference to the national jurisdiction which has taken up the matter. The ICC is meant to supplement a national investigation and prosecution.[190] However, the two grounds for inadmissibility of cases before the ICC are: (1) genuine ongoing national proceedings, either investigations, or prosecution (article 17(1)(a)); and (2) national investigations that have been concluded by a decision not to prosecute, for reasons other than a lack of willingness or ability genuinely to prosecute (article 17(1)(b)).

2.3.4.2.2 Criteria under article 17(1)(c)

The second test for admissibility is the principle of double jeopardy *(ne bis in idem)*, which that means a person has already been tried for the offence in question.[191] Articles 17 (1)(c) and 20 (3) declare a case inadmissible, in a situation in which the person concerned has already been tried for conduct, which is the subject of the complaint. For this reason, the rule is specified in article 20, which provides that no person who has been tried by another court for crimes, falling within the jurisdiction of the Court.[192] In other words, a concluded domestic prosecution, in which the Statute's exceptions to the prohibitions of double jeopardy do not apply.[193]

Declaring such a case inadmissible, is based on article 17(1)(c), which applies to the situation in which, the person concerned has already been tried for conduct, which is the subject of the complaint. The provision refers to article 20(3) of the Rome Statute, which regulates the conditions under which a retrial by the ICC is permissible. This is when a person has already been tried by another court for the

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190 Morten Bergsmo, "The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11-19)," *European Journal of Crime, Criminal Law and Criminal Justice* 6, no. 4 (1998): 359.

191 Iain Cameron, "Jurisdiction and Admissibility Issues under the ICC Statute," in *The Permanent International Criminal Court: Legal and Policy Issues*, ed. Dominic McGoldrick, Peter Rowe, and Eric Donnelly (Oregon: Hart Publishing, 2004), 83.

192 Rome Statute, article 20.

193 Sarah M.H. Nouwen, "Fine-Tuning Complementarity," in *Research Handbook on International Criminal Law*, ed. Bartram S. Brown (Glos: Edward Elgar Publishing, 2011), 208.

same conduct, as prescribed under article 6, 7, 8 or 8 *bis*, and permissible because of the *ne bis in idem* rule, contained in paragraph 3 of article 20. [194]

However, the *ne bis in idem* principle under the situation of admissibility test must be distinguished from the other three situations, in which the questions of *ne bis in idem* may arise. Firstly, the situation under article 20(1), in which the ICC is barred from trying a person, is for conduct, which has formed the basis of crimes for which the person has been acquitted or convicted by the Court.[195] Secondly, a previous trial by the ICC also bars a subsequent trial 'by another court.'[196] And finally, the question may arise as to whether, and to what extent, a trial by one domestic court bars the courts of another state from subsequently trying the same person for conduct which has formed the basis of crimes, for which the person has been acquitted or convicted in the first domestic trial.[197] Concerning the three situations, the Rome Statute focuses on the questions of *ne bis in idem,* which arise with prior or subsequent proceedings, before the ICC.

The *ne bis in idem* principle, under article 20(3), specifies two situations which constitute the exception to the rule, that such a subsequent trial before the ICC is impermissible. With these provisions, the ICC may try such a person again if the proceedings in the other court '[w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court'[198] or '[o]therwise were not conducted independently or impartially in accordance with the norms of due process as recognized by international law. They were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'.[199] These two exceptions closely resemble the two forms of unwillingness, as defined in article 17(2)(a) and (c).[200]

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194 Schabas and Zeidy, "Article 17 Issues of Admissibility," 810-11.; see details Immi Tallgren and Astrid Reisinger Coracini, "Article 20 Ne Bis in Idem," ibid.

195 Rome Statute, article 20(1).

196 Ibid., article 20(2).

197 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 118-19.

198 Rome Statute, article 20(3)(a).

199 Ibid., article 20(3)(b).

200 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 119.

2.3.4.2.3 Criteria under article 17(1)(d)

The final test for admissibility of the ICC is based on the gravity of justice under article 17(1)(d) of the Rome Statute. On this ground, it requires that the crimes within the jurisdiction *ratione materiae* of the ICC must be sufficiently grave, to justify action by the Court.

The final reason for declaring a case inadmissible is insufficient gravity to justify further action by the ICC. The gravity of the threshold attained is an element of the existence of national proceedings for admissibility assessment, as stipulated in article 17(1)(d). According to this provision, the element is not connected to evaluate the national proceedings, but it contains specific features of the case itself. Thus, a state may have been inactive concerning national proceedings, which prompts the ICC's intervention; however, the Court may still determine that the case is inadmissible because it 'is not of sufficient gravity to justify further action by the Court.'[201] This test must be distinguished from the jurisdictional limits of the ICC to 'the most serious crimes' of concern to the international community as a whole, which are enumerated in article 5, and further defined in articles 6 to 8. Article 17(1)(d) requires that the crime within the jurisdiction *ratione materiae* of the ICC must also be sufficiently grave to justify further action by the Court. Regarding this, the Court can declare inadmissible, situations in which the conduct in question amounts to genocide, crimes against humanity or war crimes, but lacks the requisite gravity.[202]

However, neither the Statute nor the ICC REP contains the definition of gravity. Furthermore, there is no provision indicating how the Court's assessment should be performed, and, in the practice of the ICC, the gravity is almost limited.

Under article 17(1)(d), a case is inadmissible if '[t]he case is not of sufficient gravity to justify further action by the Court', under article 17(1)(d).[203] According to this scenario, it deals with the situation, where a prosecution is at the international level before the ICC. Additionally, as a matter of admissibility, the insufficient gravity test must be distinguished, from the jurisdictional limits of the ICC, to the most serious crimes of concern of the international community as a whole. These are

201 Schabas and Zeidy, "Article 17 Issues of Admissibility," 811.

202 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 125-26.

203 Rome Statute, article 17(1)(d).

enumerated in article 5, and further defined in articles 6 to 8 *bis*.[204] This test requires that the crimes within the jurisdiction *ratione materiae* of the ICC must also be sufficiently grave to justify further action by the Court. Then the Court can declare cases inadmissible, in which the conduct in question amounts to genocide, crimes against humanity, war crimes, or the crime of aggression, but which lack the requisite gravity.[205] According to this scenario, if the ICC determines that the crimes are not sufficiently grave, the case is inadmissible. In contrast to this, if the Court determines that the prosecution of such case is of sufficient gravity to justify, it then the case is admissible before the Court.

2.4 THE SUBSTANCE OF THE PRINCIPLE OF COMPLEMENTARITY

The principle of complementarity is precisely regulated in articles 17 and 20(3) of the Rome Statute.[206] These complementarity provisions delineate the idea of complementarity, referred to in the preamble and article 1, by way of an admissibility rule. As for the previous discussions, article 17(1) proceeds to regulate four different scenarios for the tests of admissibility of cases.

Based on the scenarios under article 17, the first three scenarios concerning the admissibility of a case, is based on the principle of complementarity. It can be distinguished, based on what measures a state has taken, and how far a case has progressed on the national level.[207] According to this, a preliminary issue to be considered in this context of complementarity, must be whether there exists any investigation or prosecution at the national level. Failure by a state concerned, to take any measure against any person, who is involved in the commission of crimes, falling within the jurisdiction of the ICC, renders the case admissible before the Court, according to article 17(1)(a) to (c).

All three scenarios concerning the principle of complementarity require action taken by national authorities of a state, which has jurisdiction over that case at the national level. If one of the three scenarios is satisfied, then it renders the case

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204 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 125.

205 ibid.

206 See Michael A. Newton, "Comparative Complementarity Domestic Jurisdiction Consistent with the Rome Statute of the ICC," *Military Law Review* 167 (2001): 20-73.

207 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 103.

inadmissible before the ICC. If each of the first three scenarios is not met (or if a state remains inactive), then the gravity threshold will be taken into consideration, and the case will be admissible when the gravity threshold is reached.[208]

The analysis of this dissertation is based on the principle of complementarity; hence, the complementarity test, pursuant to article 17(1)(a) – (c), 2 and 3, is the main object of this study. In this subchapter, the complementarity provisions, under article 17, will be examined. This aims to achieve a better understanding and further outlining of the framework of the application of the principle of complementarity in the ICC proceedings.

2.4.1 The Requirements of Complementarity Test

The Inadmissibility of cases is rebuttable, under conditions outlined in the provisions of article 17(1)(a)-(c), based on the principle of complementarity (hereinafter referred as 'complementarity test'). The provisions structure deals with three difference factual scenarios: the first is where national authorities are currently dealing with the same case, as the ICC; the second is where the national authorities have investigated the same case and decided not to prosecute, and the third is where the same case has been prosecuted, at the national level.

Regarding this, the first criterion, which concerns the existence of national proceedings, must be satisfied. The absence of national proceedings (domestic inactivity) is sufficient to make the case admissible. However, if the first criterion is satisfied, the question, of further assessment of this requirement, is whether such proceedings relate to potential cases being examined by the ICC. In particular, this entails whether the focus is on those most responsible for the most serious crimes committed. This means that, under this requirement, the effective link under this requirement must be evaluated, as to whether the case in question at the national level, is the same case being examined by the ICC.

Only when the first requirement of the complementarity test, proceedings requirement, is fulfilled, can the second requirement of the complementarity test,

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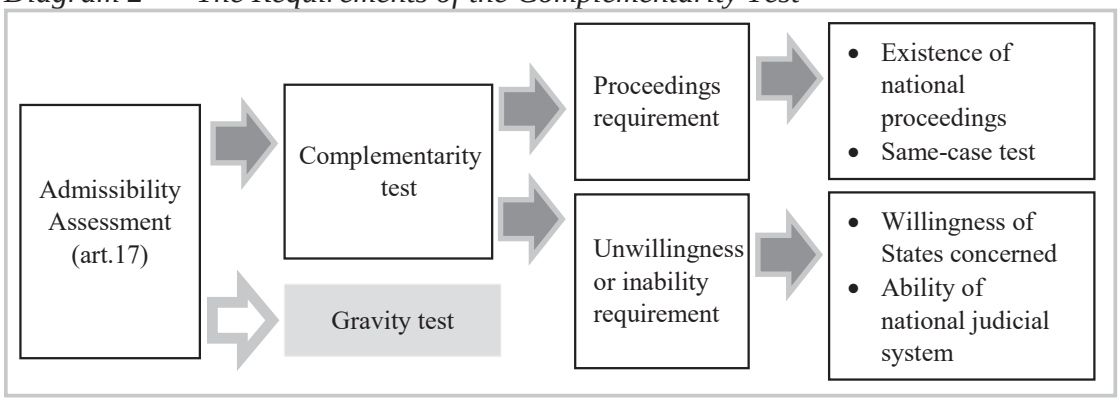
208 Mark Klamberg, ed. *Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher, 2017), 206, fn. 16. See also *Prosecutor* v. *Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC Pre-Trial Chamber I, ICC-01/04-01/06-8 (*Lubanga* Article 58 Decision), para. 29.

unwillingness or inability requirement, be assessed. This decides whether such national proceedings are vitiated by an unwillingness, or inability genuinely to carry out the proceedings. In order to assess the second requirement, the criteria of unwillingness, pursuant to article 17(2) (shielding, unjustified delay, and lack of independence or impartiality) and the criteria of inability, pursuant to article 17(3) (total or substantial collapse or unavailability of national judicial system), will be taken into consideration by the Court.

In conclusion, in order to make an admissibility assessment, under article 17 of the Rome Statute, the complementarity test consists of two requirements: the proceedings requirement (assessing the existence of national proceedings); and the unwillingness or inability requirement (assessing the willingness of States concerned and the inability of national proceedings), as illustrated in Diagram 2.

Diagram 2 The Requirements of the Complementarity Test



Source: Author's own diagram, derived from article 17 of the Rome Statute.

2.4.2 The Proceedings Requirement

Before analysing the grounds of inadmissibility, according to the elements outlined in article 17 of the Rome Statute, there are some initial criteria for admissibility that need to be addressed. According to article 17(1)(a), (b) and (c), the initial criteria in an investigative step that (1) whether a State initiates an investigation or a prosecution and remains an on-going phrase; (2) whether a State has investigated and decided not to prosecute the person concerned; or (3) whether a person concerned has already been tried by another court, must all be fulfilled. The second question relating to the

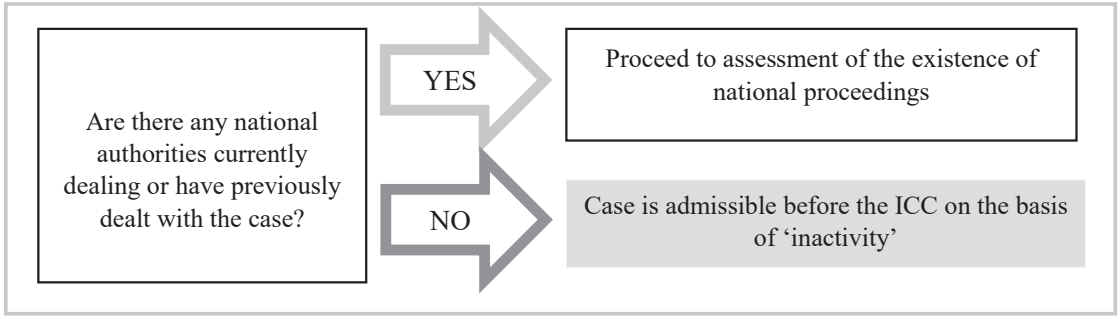
sameness of cases, will be applied to determine whether the proceedings at the national level are related to the same case, as being tried before the ICC.

2.4.2.1 The Existence of National Proceedings

According to article 17(1), ICC interference can only be pre-empted, by 'a State which has jurisdiction over it".[209] It is submitted that the term "jurisdiction" also refers to jurisdiction under international law, and not to jurisdiction under national law.[210]

In this regard, the existence of national proceedings is the primary criterion for the proceedings requirement of the complementarity test. The scenario exists, where no state which has jurisdiction over it has investigated a given case; thus, the case is automatically admissible, based on the inaction of states in question, as illustrated in Diagram 3.

Diagram 3 *Scenario of Inactivity*



Source: Author's own diagram, derived from article 17(1)(a) of the Rome Statute.

In this respect, if there is the existence of national proceedings, then the criteria under article 17(1)(a) will be applied. A preliminary issue then arises, that it would not only have to be proven that the investigation or prosecution is being, or has been carried out, but also that it is being or has been carried out 'genuinely.' This has been criticized, as to whether the term 'genuinely' increases the threshold of admissibility,

209 Further, a "State with has jurisdiction" may challenge the admissibility under article 19(2)(b).

210 Joshua N. Aston and V. N. Paranjape, "Admissibility and the International Criminal Court," *Social Science Research Network* (2013): 5-6.

because it would not suffice to prove that a state is unwilling or unable, but also that the state is genuinely so unwilling or unable. [211]

According to the drafting history of article 17, there were some arguments, with regard to the interpretation of the term taken in this context, which includes the text in the preamble and annexes, as stipulated in article 31(1) of the VCLT.[212] Regarding this, identical terms are required in different places in a treaty, to be presumed to bear the same meaning in each.[213] The term 'genuinely' is attached in article 17 of the Rome Statute, to both the concept of unwillingness and inability, that is to say, doubts are raised about the willingness or inability of a State to investigate or prosecute a case. The entity making the allegation, must establish to the Court's satisfaction that the investigation or prosecution was not genuine.[214] Moreover, in article 17(1)(b), the decision of admissibility has resulted from the unwillingness or inability of the State genuinely to prosecute, which clearly relates to how a prosecution is carried out.[215]

However, the definition of 'genuinely' also needs to be determined. During the drafting process, the meaning of 'genuinely' was proposed for consideration. The term 'genuinely' must be understood as 'having supposed character, not a sham or feigned'[216] and translated as meaning 'in good faith'.[217] This was expressly considered during the negotiations, but rejected after some delegates had expressed the view that it was too vague.[218] However, the supposed character of the investigation and/or prosecution is to establish the guilt or innocence of an accused, in accordance with internationally recognized standards of the administration of justice, to ensure that ICC crimes do not go unpunished. Additionally, the applicable standard

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211 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 114.

212 The 1969 Vienna Convention of the Law of Treaties, Section 3 Interpretation of Treaties, Article 31 General Rule of Interpretation, provides that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. …

213 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 115.

214 Holmes, "Complementarity: National Courts Versus the ICC," 674.

215 Office of the Prosecutor, "Informal Expert Paper: The Principle of Complementarity in Practice," (ICC-OTP, 2003), 8.

216 Holmes, "The Principle of Complementarity," 50.

217 See Schabas and Zeidy, "Article 17 Issues of Admissibility," 805. ('…unless the State is unwilling or unable genuinely, in other words in good faith, to carry such proceedings out…')

218 Holmes, "Complementarity: National Courts Versus the ICC," 674.

which has to be met for proceedings not to be considered sham or feigned can, in turn, be derived from 'principles of due process recognized by international law,' to which reference is made in article 17(2).

In this regard, article 17 applied when one of the listed national proceedings conditions was presented: ongoing investigations or prosecutions; decision against prosecution; or completed trials.

2.4.2.1.1 Ongoing Investigations or Prosecutions

Under article 17(a)(1), there are two alternatives: in the first alternative, a case is inadmissible if a State with jurisdiction is investigating the case in question, unless the State concerned is "unwilling or unable genuinely to carry out the investigation." The second alternative, an ongoing national prosecution bars ICC interference, unless the State is unwilling or unable genuinely to prosecute. It reads, as follows:

> [T]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

According to the first alternative, the inadmissibility ground concerns, in a case being genuinely investigated by the State, there is no need for the international community to interfere. If the investigation remains genuine throughout, it will, by definition, ensure that impunity does not prevail. This inadmissibility ground is conceptually related to the *ne bis in idem* principle, motivated both by sovereignty concerns and concerns for the suspect's integrity. [219] While the second alternative, the inadmissibility ground reflects a general reluctance to interfere in a matter that is being adjudicated elsewhere, due to sovereignty and fair trial concerns. A reason why a state seeking to shield the perpetrator would opt for a sham trial, instead of inaction, might be based upon internal or external pressure. The purpose would be to create the false impression, that the perpetrator is being brought to justice. [220]

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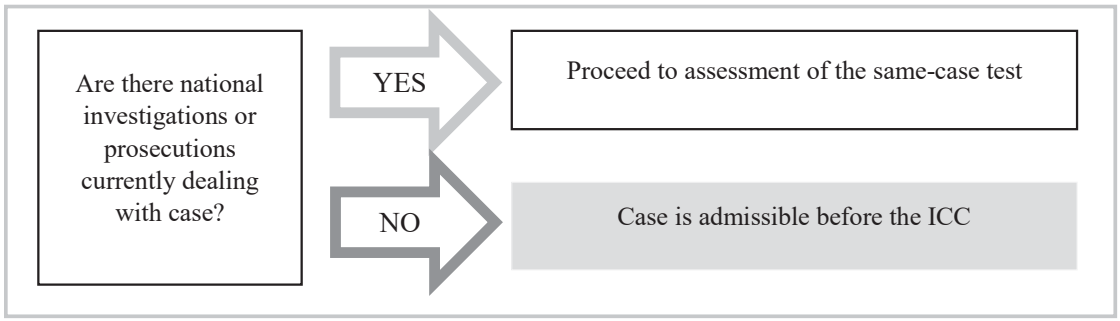
219 Aston and Paranjape, "Admissibility and the International Criminal Court," 13.

220 ibid., 14.

In this regard, under article 17(1)(a), the cases are admissible if 'the state is unwilling or unable genuinely, to carry out the investigation or prosecution.'[221] Referring to this article, the question of whether there are any ongoing proceedings, concerning the same case as the ICC, must be addressed. If such proceedings exist and the state is willing and able to genuinely carry out those proceedings, then the case will be inadmissible before the ICC.[222] On the contrary, if the state is deemed unwilling or unable, the case is admissible before the ICC, as illustrated in Diagram 4.

Diagram 4 Scenario of the Ongoing national Proceedings, relating to the case taking place at the national level



Source: Author's own diagram, derived from article 17(1)(a) of the Rome Statute.

2.4.2.1.2 Decision against Prosecution

According to article 17(1)(b), a national decision not to prosecute makes a case inadmissible, "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute." The rationale for this inadmissibility ground is this: if the State has genuinely decided not to prosecute, there is no need for the international community to interfere. Article 17(1)(b) reads, as follows:

> The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute

According to this, the case is also inadmissible where the Court determines that it has, in fact, been investigated by a state, that has jurisdiction over that case, and the state

221 Rome Statute, article 17(1)

222 Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, 39.

has decided not to prosecute the person concerned. The key element of this provision lies in defining the scope of a decision not to prosecute. The decision in question refers only to the final decisions closing an investigation, and preventing a prosecution against a suspect/accused before any court, may constitute a decision not to prosecute.[223]

According to the wording of article 17(1)(b), two requirements need to be fulfilled: the case must be investigated, and a decision not to prosecute, must have been taken. Unlike the notion of 'being investigated,' in article 17(1)(a), the investigation under article 17(1)(b) must be completed. Because, as long as the decision not to prosecute is not final, for instance, because an appeal against or if a judicial review of such a decision is pending, an important opportunity to remedy the possible deficiencies of such a decision at the national level, would be missed.[224]

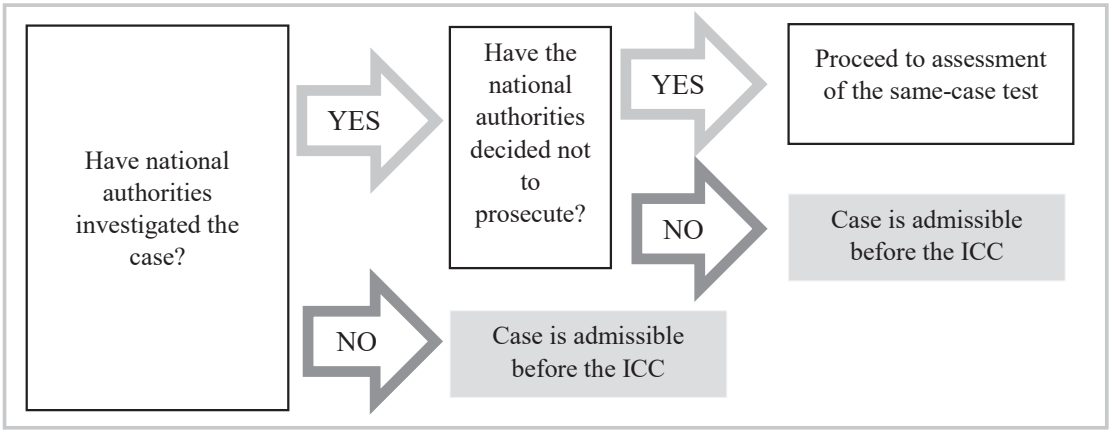
Under article 17(1)(b), a case is admissible when the decision not to prosecute, has resulted from the unwillingness or inability of the state to genuinely prosecute.[225] There are two questions which derive from this provision: Has there been an investigation into the same case as the ICC? And did the state decide not to prosecute? If the answer to the first question is 'No,' the ICC case is admissible. But if the answer to the first question is Yes', then the second question would be asked. If the answer to the second question is 'NO", then the case is admissible. But if the answer to the second question is 'YES,' the case would be considered on whether the decision not to prosecute, arose from unwillingness or inability, as illustrated in Diagram 5.

223 Schabas and Zeidy, "Article 17 Issues of Admissibility," 806.

224 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 117.

225 Rome Statute, article 17(1)(b).

Diagram 5 Scenario of the Case Which has Been investigated, and It Has Been Decided not to Prosecute at the National Level



Source: Author's own diagram, derived from article 17(1)(b) of the Rome Statute.

2.4.2.1.3 Completed Trials

According to articles 17(1)(c) and 20(3), a case is inadmissible if the same person has already been tried nationally for the same conduct. Unless the trial was "for the purpose of shielding the person concerned, from criminal responsibility for crimes within the jurisdiction of the Court", or otherwise "not conducted independently or impartially, in accordance with the norms of due process recognized by international law" in a manner which was "inconsistent with an intent to bring the person concerned to justice". Article 17(1)(c) reads, as follows:

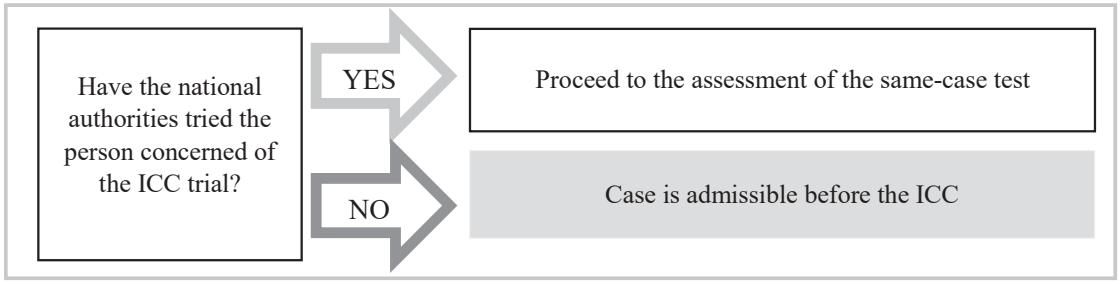
> The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

In addition, article 20(3) reads as follows:

> No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice

Article 17(1)(c) deals with the situation, where the prosecution at the national level has taken place, concerning the same case as the ICC. If the ICC determines that such prosecution has taken place, there will rarely be any need to consider the state's inability. Equally, there is no need to consider the issue of delay because the trial has already finished. In this situation, the case can still be admissible, only if the national prosecution is on the same case, but with the intention to shield the accused, or if it cannot be established that the case was conducted impartially and independently, with the intention of bringing the accused to justice, see in Diagram 6.

Diagram 6 *Scenario of the same case has been prosecuted at the national level*



Source: Author's own diagram, derived from article 17(1)(c) of the Rome Statute.

2.4.2.2 The Sameness of Cases

To make an ICC case admissible, the proceedings must not only exist at the national level, but must also relate to the same case as the ICC case. In this regard, there is a sameness between the two cases: before the domestic court and before the ICC. It is another criterion in determining the proceedings requirement. The national authority has to show that it is dealing with a case that sufficiently mirrors the ICC case, in terms of both suspects and conduct.[226]

This approach was first adopted in the *Lubanga* case, when the Pre-Trial Chamber I assessed admissibility, as part of the decision on whether to issue an arrest warrant. The Chamber, held that:

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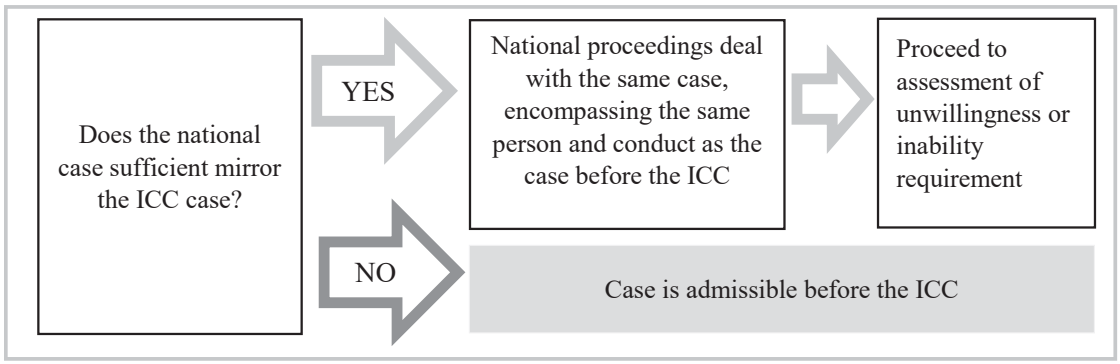
226 Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, 46.

> [f]or a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and conduct.[227]

In addition, in the *Lubanga* case, the case was decided to be admissible, despite the fact that the relevant authority had initiated an investigation. It had even issued a warrant of arrest against the accused of crimes, some of which appeared to be within the Court's jurisdiction but differed from those which the Prosecutor alleged to have been committed, in relation to the case in question.[228] Hence, the domestic proceedings do not encompass the conduct that the Prosecutor alleged. Due to this, this decision introduces the notion of sameness, to considering the complementarity requirement, that the case in question at the national level must relate to the same person and conduct, as of the ICC.

In conclusion, the assessment of the same-case condition, the Court has to take effective links of the same person/same conduct into consideration, as detailed in Diagram 7.

Diagram 7 The Same-Case Test



Source: Author's own diagram, derived from article 17(1)(c) of the Rome Statute.

227 *Prosecutor* v. *Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Document into the Record of the Case against Mr Thomas Lubanga Dyilo, Pre-Trial Chamber I, 24 February 2006, ICC-01/04-01/06-8-US-Corr, (*Lubanga* Arrest Warrant Decision), paras. 23.

228 David Rosello Gates, "The Principle of Complementarity: The Admissibility of Cases before the International Criminal Court" (2007), 37.

2.4.3 The Unwillingness or Inability Requirement

According to article 17(1) of the Rome Statute, the complementarity test consists of two requirements: the proceedings requirement; and the unwillingness or inability requirement. When the first requirement has been satisfied, then the case will proceed with the assessment of the second requirement of the test. To assess the unwillingness or inability, the Rome Statute also provides the criteria for the assessment, in article 17(2) and (3) of the Rome Statute.

2.4.3.1 The Unwillingness of State Concerned (Article 17(2))

While the mere existence of national proceedings should normally preclude the ICC from intervening, the unwillingness criterion permits the opening of a case, where such proceedings prove to be carried out, to escape justice.[229] Thus, the unwillingness to carry out the investigation or prosecution of ICC's crimes is a test for admissibility under the complementarity system. Article 17(2) of the Rome Statute defines 'unwillingness,' by providing a criterion for the determination of unwillingness in a particular case, that:

> [I]n order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[230]

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229 Vincent Dalpé, "On the Difficult Case for a Functional Interpretation of the Unwilling Criterion before the International Criminal Court," *Journal of International Law and International Relations* 13, no. 2 (2017): 50.

230 Rome Statute, article 17(2).

According to article 17(2), the criterion of unwillingness is identified by referring to 'the principle of due process recognized by international law' and adheres to widely known concepts of international human rights law: shielding; unjustified delay; and independence and impartiality. As mentioned in the preamble and context of the Rome Statute, the purposes of providing international justice and contributing to the rule of law, are preventing impunity, and deterring future crimes. Therefore, the ICC should consider the accused's rights in determining the admissibility, according to the wordings of the Rome Statute.[231]

Furthermore, article 21(1) of the Rome Statute, sets out the formal sources of law that the Court will apply.[232] These sources include the Rome Statute, Element of Crimes and the Court's Rules of Procedure and Evidence, applicable treaties, principles, and rules of international law, and general principles of the international legal system. Also, article 21(3) states that:

> '[t]he application and interpretation of law pursuant to this article must be consistent with 'internationally recognized human rights.'

In this regard, the application and interpretation of those sources shall be consistent with the subject matter of internationally recognized human rights law. However, the Rome Statute does not define 'internationally recognized human rights.' Therefore, to comply with this in practice, the Court shall comply with the major international human rights treaties. All of those concerned with civil and political rights have recognized the fundamental rights of an accused in criminal justice, including the right to access legal representation.[233] Importantly, the standard rules of treaty

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231 Holly Kendall, "The Right to Access Legal Representative and Admissibility to the International Criminal Court: Walking the Tightrope between Legitimacy and Effectiveness," *UCL Journal of Law and Jurisprudence* 4, no. 2 (2015): 300, 09.

232 Rome Statute, article 21(1).

233 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976 (ICCPR), article 14(3)(d), see also, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), article 6(3)(c); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), article 8(2)(d); African Charter of Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986), article 17(1)(c); Arab Charter of Human Rights (adopted 15 September 1994, entered into force 15 March 2008) article 16(3); ASEAN Human Rights Declaration (AHRD) (adopted 18 November 2012), principle 20.

interpretation under the VCLT, require that complementarity should be read consistently, with any other relevant rules of other international obligations.[234] Thus, when the Court assesses whether a case is admissible, it should consider whether the State is complying with its international human rights obligations, which is recognized as customary international law, including the right to a fair trial.[235]

Accordingly, the consideration of 'internationally recognized human rights' under article 21(3) of the Rome Statute, should be applied both in substantive and procedural due process rights, to ensure that procedural availability of rights is not divorced from their purpose to effectively implement justice.[236] This concept is supported by the Judgment of the Appeals Chamber in the *Lubanga* case. The Chamber, held that:

> [a]rticle 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights […][237]

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234 VCLT, article 31(3)(c).; see Kendall, "The Right to Access Legal Representative and Admissibility to the International Criminal Court: Walking the Tightrope between Legitimacy and Effectiveness," 311.

235 For more detail see Patrick Robinson, "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY," *Berkley Journal of International Law* 3 (2009): 5-7.

236 Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 169.; Kendall, "The Right to Access Legal Representative and Admissibility to the International Criminal Court: Walking the Tightrope between Legitimacy and Effectiveness," 311.

237 *The Prosecutor* v. *Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC Appeals Chamber, 14 December 2006, ICC-01/04-01/06-772, (*Lubanga* Appeal Judgment on Challenge to Jurisdiction), para. 37; See also the decision rendered by the Trial Chamber I, which refers to the obligation of interpreting the Statute in the light of internationally recognized human rights as set out in article 21(3) of the Rome Statute: *The Prosecutor* v. *Thomas Lubanga Dyilo,* Decision on victims' participation, ICC Trial Chamber I, 18 January 2008, ICC-01/04-01/06-1119, paras. 34-35; *Situation in the Republic of Kenya*, Decision on Victims' Participation in proceedings Related to the Situation in the Republic of Kenya, Pre-Trial Chamber II, 3 November 2010, ICC-01/09-24, paras 4-5; *Prosecutor* v. *Bemba et al.,* Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment

With regard to the application of article 21(3) of the Rome Statute to admissibility, the State concerned must be willing and able to investigate or prosecute, in compliance with internationally recognized human rights standards.[238] Hence, the provision in this article only bind the ICC to apply the criteria of admissibility, consistent with 'internationally recognized human rights'; however, it does not bind national jurisdictions. Regarding this, the question arose whether the violation of internationally recognized human rights of the defendants at the national level, made a case admissible before the ICC.[239] In other words, whether the violation of human rights at the national level, might be eventually considered as an expression of unwillingness or inability.

In the context of the assessment of complementarity, the possibility of human rights violation at the national level, may make a case admissible before the ICC, has been provided and explored in the scholarly literature. The mutual relationship between the principle of complementarity and human rights, can be separated into three schools of thinking.

The first group of scholars concludes that the violation of human rights, *per se*, does not make a case admissible before the ICC. This doctrinal strand is represented by the basic idea of Kevin Jon Hello that:

> [P]roperly understood, article 17 permits the Court to find a State 'unwilling or unable' only if its legal proceedings are designed to make a defendant more difficult to convict. If its legal proceedings are designed to make the defendant easier to convict, the provision requires the Court to defer to the State no matter how unfair those proceedings may be.[240]

According to this strand, a potential violation of due process rights is not sufficient to make a case admissible. If national proceedings, though unfairly delayed or biased,

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pursuant to Article 74 of the Statute", Appeals Chamber, 8 March 2018, ICC-01/05-01/13-2275-Red, paras 3 and 5,

238 Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1115.

239 Ondřej Svaček, "The Human Rights Dimension of the ICC's Complementarity Regime," in *Czech Yearbook of Public & Private International Law*, ed. Pavel Šturma and Peter Mišúr (2015), 277.

240 Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," *Criminal Law Forum* 17 (2006): 257.

make it easier to convict, a case is still inadmissible before the ICC. It provided that a state does not lack the intent to bring a defendant to justice.[241] If the human rights guarantees provided at the national level are breached to the benefit of the defendant, a case might be admissible before the ICC, under article 17(2) of the Rome Statute.[242] In this situation, the failure to provide fair trial guarantees would be a sophisticated way to grant impunity, to perpetrators of crimes under international law. Additionally, mere deficiencies, in due process protection, are surely not enough to result in the collapse or unavailability of the domestic judicial system. This is a sign of the inability of a State to proceed genuinely with investigation and prosecution, under article 17(3).[243]

Moreover, one of the objects of the creation of the ICC, is to put an end to impunity. The ICC is not a human rights court, overseeing compliance with the right to a fair trial at the national level.[244] Nothing in the Statute that would make the ICC responsible for the protection of the human rights of the defendant in the process of national enforcement of international criminal law. The Rome Statute also focussed on an assessment of individual aspects of the proceedings, rather than an assessment of the domestic system in general.[245] Hence, unfair proceedings, at the national level is not a task for the ICC, even if the State's violation of the suspect's rights is evident. Unfair convictions must be brought before human rights bodies.[246]

Furthermore, a reference to *travaux préparatoires,* during the negotiations in Rome, Italy, proposed a definition of unwillingness, which would have specifically made the absence of national due process, a ground for admissibility. But this proposal was rejected, as most delegations believed that the ICC should only intervene where there was no functioning judicial system. The intervention of the

241 ibid., 260-63.

242 Svaček, "The Human Rights Dimension of the ICC's Complementarity Regime," 278.

243 Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," 264.

244 Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, 67.

245 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2008), 129.

246 Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Koninklijke NV, 2008), 221.

court, in situations where an operating national judicial system was being used as a shield, required very careful consideration.[247]

The second approach is based on the presumption that any State's failure to guarantee the defendant due process makes a case admissible before the ICC, under article 17 of the Rome Statute. The violations of due process rights are signs of unwillingness or inability to proceed genuinely at the domestic level.[248]

The third approach rejects the idea that every violation of due process rights signals unwillingness or inability to genuinely prosecute, but, at the same time, it states that violations of human rights at the national level are relevant, only when they are designed to make the defendant easier to convict.[249] According to this approach, if such a violation is so egregious, a case would still be admissible before the ICC.[250]

According to those approaches, the relevance of violation of human rights (due process guarantees) at the national level, and its relation to the admissibility proceedings before the ICC, were widely foreseen. The ICC faced the problem, that the lack of legal representation at the national level has become one of the most notably controversial issues in the complementarity regime. This was tested in practice in the *Gaddafi* case and the *Al-Senussi* case. In both cases, the Court assessed whether the concerned state was "unwilling or unable to carry out the investigation or prosecution," according to article 17(1)(a).

Although the criteria of unwillingness are identified, the language of article 17(2) unambiguously requires the Court to consider the factors listed under (a) to (c). In determining, however, the consideration that unwillingness is meant to be an exception to the general rule, and that a case is inadmissible if a State investigates or

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247 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 September 1995, A/50/22, para. 45.

248 Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," 257-59.; Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1111-13.

249 Elinor Fry, "Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effect on Domestic Due Process Protections," *Criminal Law Forum* 23 (2012): 52-55.

250 Svaček, "The Human Rights Dimension of the ICC's Complementarity Regime," 280.

prosecutes, the factors specifying the term should be constructed narrowly, and the list deemed exhaustive.[251]

The question of unwillingness is one of the most problematic issues in the complementarity system under the Rome Statute. Its definition has been debated throughout the *travaux préparatoires,* in which the notion of unwillingness was sensitive both for state sovereignty, and from the perspective of the rights of the individual, and was, *per se*, vested with high degrees of substantivity.[252] Most scholars point out that an issue of unwillingness is due to arise in connection with 'fake trials,' whereby a case is investigated and/or prosecuted, with the intention of shielding the person concerned from any meaningful judicial determination.[253] This is, possibly, because of political implications or the complicity of the judiciary.[254]

The first criterion for determining "unwillingness" is to preclude the possibility of sham trials, aimed at shielding a person from criminal responsibility, or conducting proceedings inconsistent with an intent to bring the person concerned to justice. The second criterion is relating to a delay, which would result in the perpetrator not being held to account. The final criterion is the question of the independence and impartiality of the proceedings. [255]

To determine unwillingness in a particular case, the Statute also provides that 'the principles of due process, as recognized by international law, are the paramount standard against which the ICC has to carry out its discretionary judgment, concerning the 'unwillingness' of a state.[256] Then the first question that needs to be answered is what these 'principles' actually are. The Statute does not identify them, and neither does the drafting history of article 17(2) clarify what the drafters had in mind, when including the notion of 'principle of due process' in the provision.[257]

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251 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 606.

252 Beatrice Pisani, "The System of the International Criminal Court: Complementarity in International Criminal Justice" (University of Trento, 2012), 49.

253 Holmes, "Complementarity: National Courts Versus the ICC," 668.

254 Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1110.

255 Holmes, "The Principle of Complementarity," 50-51.

256 Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1110.

257 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 127.

Traditionally, the concept of due process has evolved to regulate the conduct of legal proceedings, according to established principles and rules, which safeguard the position of the individual charges.[258] In addition, contemporary international law regulated the matter with some principles and rules, most notably those regarding *fair trials.*[259] However, there is an interesting and unresolved question, which is whether unwillingness, in the light of the reference to norms of due process, also applies to proceedings that are detrimental to the accused. [260]

Article 17(2) of the Rome Statute establishes the situations of unwillingness, in which at least one has to be verified, for the case to be admissible: (1) shielding a person from criminal responsibility; (2) unjustified delays in the proceedings; and (3) the lack of independent and impartial national proceedings. Regarding this, the Court shall determine unwillingness in a particular case, when the standards for rebutting the presumption of inadmissibility: shielding, unjustified delays or lack of independence and impartiality, are met.[261]

2.4.3.1.1 Shielding a Person from Criminal Responsibility

Shielding a person from criminal responsibility is the first form of unwillingness, which is stipulated in article 17(2)(a), that:

> [t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court […].[262]

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258 David Maxwell Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980)., cited in Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 129.

259 For instance, Articles 9-11 of the Universal Declaration of Human Rights (1948) (UDHR), UNGA Res. 217A(III); Articles 12 and 20 of the ASEAN Human Rights Declaration (2012) (AHRD) (adopted 18 November 2012); Articles 4, 6, 9, 14, 15 of the International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976); Article 7 of the African Charter on Human and People's Rights (AfCHPR) (adopted on 27 June 1981, entered into force 21 October 1086); Articles 4, 7-9, 27 of the Inter-American Convention on Human Rights (IACHR)(adopted on 18 July 1978); Articles 5-7, 15 of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) (entered into force 3 September 1953).

260 Pisani, "The System of the International Criminal Court: Complementarity in International Criminal Justice," 50.

261 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 127.

262 Rome Statute article 17(2)(a)

This provision requires proof of a purpose of shielding, which is quite a high threshold and raises the question of how such intent is to be proved before the Court.[263]

Regarding this provision, a state's intention to shield a person from criminal responsibility is not possible. The term 'proceeding' and 'national decision' refer to the investigations and prosecutions, as well as decisions not to prosecute, made by a state in article 17(1)(a) and (b).[264] Furthermore, the 'proceeding in the other court' in article 20(3)(a) on shielding, is an exception to the principle of *ne bis in idem*. Additionally, the phrase 'for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court,' implies that the proceedings or the decision in question, must be specifically directed at shielding.

This situation is the litmus test for discerning the bad faith of a state, by checking the effectiveness of national proceedings. Thus, any intentional deficiency or serious negligence in conducting national proceedings, that lead to a negative result, through certain acts or omission, might reflect a State's intention to shield the person from criminal responsibility.[265]

Article 17(2)(a) of the Rome Statute established the first situation for unwillingness that, whether national proceedings are or were conducted or the decision was made in order to shield a person from being held criminal responsibility. The OTP elaborated on the indicators of unwillingness, and suggested that the purpose of shielding the person from criminally responsible should be assessed, by looking at the scope of the investigation. This meant, in particular, whether this was directed towards the 'marginal perpetrators' or 'minor offenders,'[266] rather than to the persons most responsible for the commission of the crimes under examination.

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263 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 609-10.

264 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 135.

265 Schabas and Zeidy, "Article 17 Issues of Admissibility," 819.

266 Pisani, "The System of the International Criminal Court: Complementarity in International Criminal Justice," 51.

2.4.3.1.2 Unjustified Delays

A state will be determined by the ICC to be unwilling when there has been an unjustified delay in the proceedings, which in the circumstances, is seen to be inconsistent with an intent to bring the person concerned to justice.[267] This second form of unwillingness appears in article 17(2)(b), which states that:

> [a]n unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.[268]

Concerning unjustified delays, the national proceedings are not the same as normal delays in the national system for the cases. Furthermore, there is evidence in the circumstances of a lack of intent to bring such person to justice. The delay may happen at various stages of the proceeding, both at the investigation and prosecution stages. That information should be examined, for example, in comparison with normal delays in that national system for cases of similar complexities. In addition, in the case of delays, are there justifications for that delay? And, in the case of unjustified delay, is it inconsistent with an intent to bring the person concerned to justice?[269]

In this situation, the unwillingness must meet the test of (1) a delay in the proceedings, which has to be (2) unjustified and needs to be (3) inconsistent with an intent to bring the person concerned to justice. According to the jurisprudence of human rights bodies, the right to be tried 'without undue delay' and the right to a hearing 'within a reasonable time,' is necessary for the determination of criminal charges. Equally the right to such a hearing in the determination of one's civil rights and obligations, are helpful for justifying the 'delay.' It depends on the specific circumstances of the case in question, and cannot be determined in the abstract.[270]

2.4.3.1.3 Lack of Independence or Impartiality

The last form of unwillingness, provided in articles 17(2)(c), states that:

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267 Schabas and Zeidy, "Article 17 Issues of Admissibility," 821.

268 Rome Statute article 17(2)(b).

269 Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdiction* (New York: Oxford University Press Inc., 2008), 127.

270 Schabas and Zeidy, "Article 17 Issues of Admissibility," 821.

> [t]he proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[271]

And article 20(3)(b) of the Rome Statute provides that

> [t]he proceedings in other court […] were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[272]

These provisions establish a contextual framework for assessing whether or not such inconsistency exists, by requiring that processes, such as assessment take place in light of the circumstances.[273] Regarding this, the ICC may determine that the proceedings were not, or are not being conducted independently, or impartially, and are, in fact, being conducted in a manner which in the circumstances is inconsistent with an intent to bring the person concerned to justice. If this happens, the case will be admissible.[274] This criterion requires the adjudication of cases fulfilling gravity requirements, to guarantee that current and future cases will be submitted to fair and impartial proceedings.

The concept of 'independence' and 'impartiality' are well-known concepts in human rights law, developed to protect individuals against abusive proceedings, disadvantageous to them. On the one hand, independence means the independence of the judiciary from the executive and legislature, as well as from the parties. Independence has an institutional dimension, as well as relating to a 'state of mind' or 'attitude,' in the actual exercise of judicial functions. The factors of independence cover the degree of independence of the judiciary, and of prosecutors of investigating agencies, procedures of appointment and dismissal, the nature of the governing body, the pattern of political interference in investigation and prosecution, and patterns of trials reaching preordained outcomes.[275]

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271 Rome Statute, article 17(2)(c)

272 Ibid., article 20(3)(b)

273 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdiction*, 138.

274 Schabas and Zeidy, "Article 17 Issues of Admissibility," 825.

275 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdiction*, 127.

2.4.3.2 *The Inability of the National Judicial System (Article 17(3))*

The notion of inability was inserted to cover situations where a State lacks a central government due to a breakdown of state institutions,[276] or suffers from chaos due to civil war or natural disasters, or any other event leading to public disorder.[277] This inability arises when a national system is so dysfunctional, that it cannot proceed with obtaining evidence or trying the individual.

Article 17(3) establishes the criteria for determining the inability of the state to investigate, or prosecute a particular case, that:

> [I]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[278]

The provision identifies three scenarios for determining inability (1) inability to obtain custody of the accused; (2) a State is unable to obtain the necessary evidence and testimony for putting the person deemed responsible on trial; or (3) the state is incapable of carrying out its proceedings. All three scenarios of inability aim to address the situations, where the official structures of the state have collapsed, totally or substantially (the destruction of the judicial system, the non-existence of courts, prosecutors or qualified legal personnel),[279] or when the national judicial system is available.

A total collapse of a State's judicial system can be assumed where the state authorities have lost control over its territory, to the extent that the administration of justice has broken down completely, or where the authorities, while exercising effective control over the territory, do not perform such administration. Usually, a substantial collapse is possible, only where the state authorities, even though not

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276 Mohamed M. El. Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law," *Michigan Journal of International Law* 23, no. 4 (2003): 903.

277 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 613.

278 Rome Statute, article 17(3).

279 Soares, "Article 17 of the Rome Statute of the International Criminal Court: Complementarity - between Novelty, Refinement and Consolidation," 242-43.

completely dysfunctional, are not generally capable of carrying out the investigation of the case, and the prosecution of the responsible individuals.[280]

The unavailability of a national legal system is a separate requirement for substantial collapse. It can generally be said that a national legal system is unavailable, when the authorities for the administration of justice do exist, and are functioning normally, but cannot deal with a specific case for legal or factual reasons, such as sheer capacity overload.[281]

2.5 THE PROCEDURAL ASPECT OF COMPLEMENTARITY

This subchapter intends to analyse how complementarity is operated procedurally. The questions on when and how complementarity criteria have to be determined, and who is adhering to the application of the principle of complementarity in the ICC proceedings. An examination of the procedural setting of complementarity in the ICC proceedings, will help to classify the consequences of complementarity, for the investigation and prosecution of core crimes by domestic courts. This is because the principle of complementarity governs the interaction between domestic courts and the ICC.

Under the principle of complementarity, the procedural issues can be raised at different stages of the ICC proceedings. For instance, the judicial assessment of the fulfillment of the requirement, under article 17 of the Rome Statute, is only the last resort of a long set of procedures and interactions between different actors; Judges and Prosecutor, on the one hand, and States, including the defendants on the other.[282] This subchapter will deal with how the procedural aspect of complementarity is operated. The questions as to when and how the complementarity system is able to apply the (un)willingness and in(ability) of states concerned, has to be determined by the proceedings of the ICC. Scrutinising of this subchapter helps to clarify the consequences of complementarity, for the investigation and prosecution of the ICC's

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280 See Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 614.

281 ibid.

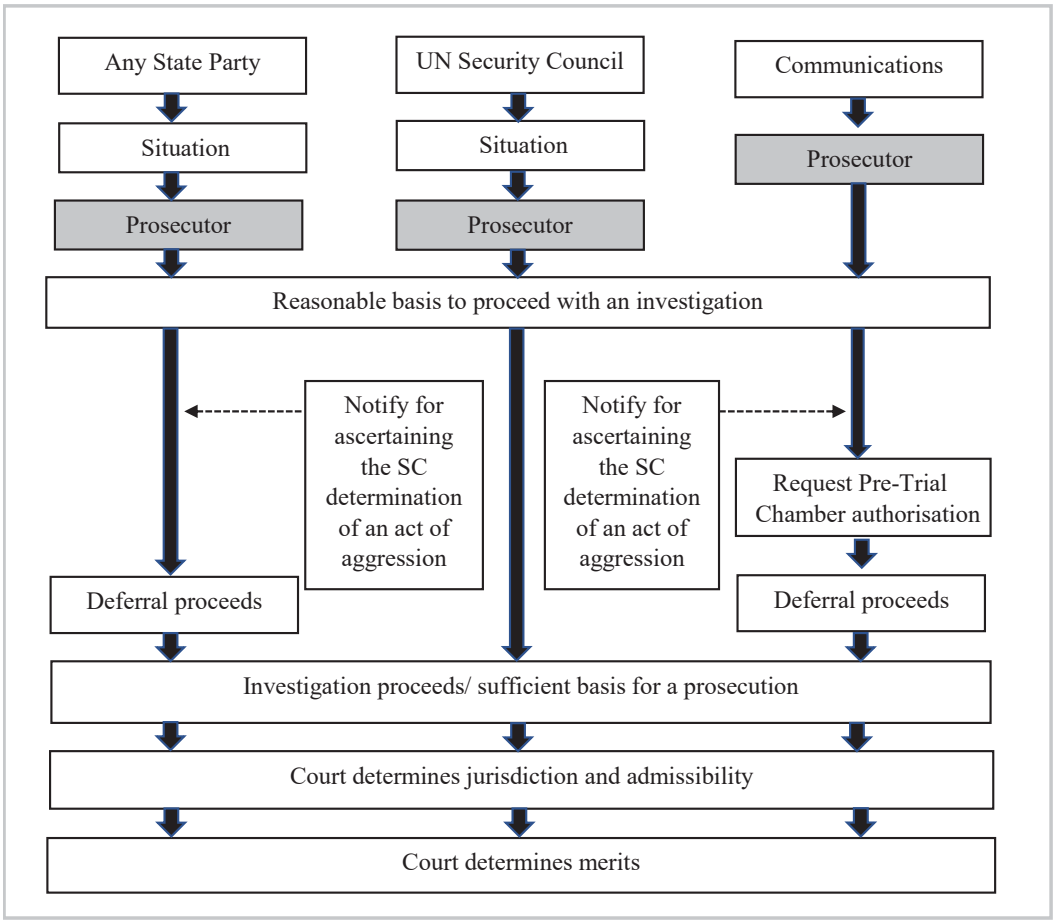
282 Pisani, "The System of the International Criminal Court: Complementarity in International Criminal Justice," 74.

crimes before domestic courts, which have to interact with the ICC, and the effect that this interaction may have on national enforcement.

2.5.1 Setting Procedural Scene of Complementarity under the Rome Statute

According to the Rome Statute, the system of the procedural complementarity relates to the mechanism of the ICC proceedings, as illustrated in Diagram 8.

Diagram 8 *Mechanism of the ICC Complementarity System*



Source: Author's own diagram, derived from the Rome Statute of the ICC

According to the Rome Statute, the ICC jurisdiction can be triggered in three ways. Firstly, a State Party may refer a situation to the Court. Secondly, there may be a referral of a situation by the Security Council. Finally, the Prosecutor, based on the

communications, may initiate charges, acting *proprio motu*, that is, to say, on his/her own initiative.[283]

Therefore, in all situations coming before the Court, including situations referred to by a state party and the Security Council, as well as the communications,[284] are first reviewed by the Prosecutor to determine whether there is a reasonable basis to proceed with an investigation, pursuant to article 53. This is entitled "initiation of an investigation" and includes rule 48 of the ICC RPE.[285] Article 53(1)(b) provides that, in deciding whether to initiate an investigation, the Prosecutor will consider several criteria, including the criteria of admissibility, under article 17 of the Rome Statute.[286] According to this article, the complementarity test must be applied, and the criteria, under proceedings requirement and unwillingness or inability requirement, will be taken into consideration by the Prosecutor.

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283 Rome Statute, articles 13 provides that:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

284 Office of the Prosecutor (OTP), Policy Paper on Preliminary Examinations (November, 2013), para. 73.

285 ICC RPE, rule 48.

In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c).

286 Rome Statute, articles 53(1) provides that:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

If the Prosecutor determines that there is a reasonable basis to continue with the initiation of an investigation, then the investigation will proceed. However, in the case of a crime of aggression, before continuing with an investigation, the Prosecutor has to notify the Secretary-General. It must be ascertained whether or not the Security Council has made the determination of a crime of aggression, committed by the State concerned, according to article 15 *bis* (6).[287]

In addition, in the case of an investigation initiated by the Prosecutor's *proprio motu* power, the Prosecutor shall submit a request for authorization of an investigation, to the Pre-Trial Chamber, under article 15(3) of the Rome Statute. [288]

When the situation is referred by a state party or the Prosecutor is determined to initiate it, the Prosecutor shall notify all state parties and all States concerned, according to the deferral process, according to article 18 of the Rome Statute.

Upon investigation, the Prosecutor will take the criteria under article 53(2) into consideration, and decide whether there is a sufficient basis for a prosecution. Article 53(2)(b) provides that, before reaching a conclusion, the Prosecutor shall take the criteria of admissibility, under article 17, into consideration.[289] Because of this, the complementarity test in article 17, will be applied by the Prosecutor.

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287 Ibid., articles 15 *bis* (6) provides that:

> Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the Stat concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

288 Ibid., articles 15(3) provides that:

> If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

289 Ibid., articles 53(2) provides that:

> If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
>
> (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
>
> (b) The case is inadmissible under article 17; or
>
> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under

If the Prosecutor has determined that there is a sufficient basis for a prosecution, then the Prosecutor may submit the application, requesting the Pre-Trial Chamber to issue a warrant of arrest to the person concerned, or a summons. The person concerned, can appeal, according to article 58 of the Rome Statute. Once a warrant or a summons has been issued, then a case is commenced before the Court.[290]

During the trial before the ICC, the accused or, any person, for whom a warrant of arrest or a summons to appear has been issued, or a state, may challenge the admissibility of a case, pursuant to article 19(2) of the Rome Statute. [291]

According to the admissibility proceedings, if the Court decided that the case was admissible under article 17, the case would proceed during the ICC proceedings, for the determination of merits.

2.5.2 Situation and Case before the ICC Proceedings

In general, the first step that the Court must determine the appropriateness of its intervention. This is always concerning a given *situation* before the Court, and the Prosecutor will single out specific *cases*, and then bring them before the ICC Judges.

The terms ‘situation’ and ‘case’ are to be found in the Rome Statute. Articles 13(a) and (b), 14(1) and 19(3) of the Statute establish that the object of a referral by the Security Council, or a State Party is to be a ‘situation.’[292] Additionally, article 18(1) makes it clear that the preliminary examinations and investigation, initiated by the Prosecutor, as a result of such referrals must also refer to ‘situations.’[293] In the same way, articles 15(5) and (6) and 18(1) emphasise that ‘situations’ are also the object of the preliminary examinations, and investigations resulting from

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article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

290 Rod Rastan, "What Is a 'Case' for the Purpose of the Rome Statute " *Criminal Law Forum* 19 (2008): 442-43.

291 Rome Statute, article 19(2) provides that:

Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
(c) A State from which acceptance of jurisdiction is required under article 12.

292 Olásolo, "The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor," 44.

293 Holmes, "The Principle of Complementarity," 71, fn.40.

communications made by natural or legal persons, other than state parties and the Security Council.[294] Once the investigation into a 'situation' is initiated, the Prosecutor may request the issuance of a warrant of arrest, or summons to appear, according to article 58 of the Rome Statute, against one or more identified individuals. The issuance of the requested warrant or summons marks the commencement of a 'case.'[295]

At this stage of the preliminary proceedings, the criteria of admissibility, under article 17, will be applied according to article 53(1)(b) of the Statute, and rule 48 of the ICC RPE. Pursuant to these provisions, the Prosecutor must carry out the assessment, before deciding to initiate an investigation into the situation. Hence, the 'situation' is an object of the preliminary examinations.

At the admissibility stage of the proceedings, article 19 of the Rome Statute establishes that the challenge to the admissibility of a 'case', in accordance with article 17, can be made by the accused. This applies also to any person against whom a warrant or summons has been issued under article 58, or a state in question. Then, at this stage of the proceedings, the Statute requires the application of the complementarity test, under article 17, into the 'case,' which is the object of the proceedings.

These terms, 'situation' and 'case,' are two key terms used throughout its complementarity provisions, but neither term is defined. A 'case' refers to an identified person or persons suspected of conduct constituting a crime under the Rome Statute, while a 'situation' encompasses the broader geographical and temporal context – usually an international or internal armed conflict or another major episode of civil strife – within which such crimes were allegedly committed.[296] A case emerges from a situation in which the Court issues an arrest warrant, or a summons against a specific person, suspected of criminal conduct within the situation. Hence, one situation may ultimately generate many cases.

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294 Olásolo, "The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor," 44.

295 Rastan, "What Is a 'Case' for the Purpose of the Rome Statute " 442-43.

296 Gideon Boas et al., *International Criminal Procedure: International Criminal Law Practitioner Library Vol. III* (Cambridge: Cambridge University Press, 2011), 68.

The term 'situation,' under the Rome Statute, defines the parameters within which the Court can determine whether there is a reasonable basis to initiate an investigation, and determines the jurisdictional parameters of any ensuing investigation[297], as stipulated in articles 15 and 53(1)(a), and rule 48.

Furthermore, in the *Situation in the DRC,* the Pre-Trial Chamber I has characterized the situation on the territory of the DRC since 1 July 2002, stating that:

> [S]ituation, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation on the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.[298]

While the same decision, the Pre-Trial Chamber I observed that *'cases'* involve a higher level of specificity, than situations entailing 'specific incidents. This is during which one or more crimes, within the jurisdiction of the Court, seem to have been committed, by one or more identified suspects. The Chamber stated that:

> [C]ases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear. [299]

According to this decision, the Chamber defined a 'case' by referring to 'specific incidents during one or more crimes, within the jurisdiction of the Court, which seem to have been committed by one or more identified suspects.[300]

Later, in the *Kony et al.* case, the Pre-Trial Chamber II noted that:

> [t]he proceedings must have reached the stage of a case (including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects"), as opposed to the

297 Rastan, "Situation and Case: Defining the Parameters," 422.

298 *Situation in the Democratic Republic of the Congo,* Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4. VPRS-5, VPRS-6, ICC Pre-Trial Chamber I, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 65.

299 Ibid.

300 Ibid., paras 124, 135, 153, 167, 176 and 186.

> preceding stage of the situation following the Prosecutor's decision to commence an investigation pursuant to article 53 of the Statute. [301]

In practice, the concept of the case has become one of fundamental importance in the whole structure of admissibility. Thus, in the first place, the terms situation and case must be identified for clear understanding, since both terms are referred to in the Rome Statute.

According to the operation of the ICC, as of June 2019, there are 26 situations all around the globe, which have been submitted to the OTP for the preliminary examinations. Among those processes, four situations were closed and it was decided not to proceed with the investigation; 11 situations were completed with the decision to investigate, and, currently, the OTP has been conducting preliminary examinations in 10 situations, as detailed in Table 1.

Table 1 The Status of Situations before the ICC

No	Situation	Triggers			Preliminary Examination		
		State Parties	UNSC	Communications	Ongoing	Closed; Not to proceed	Completed with Decision to Investigate
1	Uganda (2004)	✓					⊙
2	DRC (2004)	✓					⊙
3	Colombia (2004)			✓	●		
4	CAR (2004)	✓					⊙
5	Darfur, Sudan (2005)		✓				⊙
6	Venezuela (2006)			✓		⊗	
7	Guinea (2009)			✓	●		
8	Kenya (2010)			✓			⊙
9	Honduras (2010)			✓		⊗	
10	Nigeria (2010)			✓	●		
11	Republic of Korea (2010)			✓		⊗	
12	Libya (2011)		✓				⊙
13	Côte d'Ivoire (2011/2013)			✓			⊙
14	Mali (2012)	✓					⊙
15	Registered Vessels of	✓				⊗	

[301] *The Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* Decision on the Admissibility of the Case under Article 19(1) of the Statute Pre-Trial Chamber II, 10 March 2009, ICC-02/04-01/05-377, (*Kony et al,* Admissibility Decision), para. 14.

No	Situation	Triggers			Preliminary Examination		
		State Parties	UNSC	Communications	Ongoing	Closed; Not to proceed	Completed with Decision to Investigate
	Comoros, Greece, and Cambodia (2013)						
16	Iraq/UK (2014)			✓	●		
17	Ukraine (2014)	✓			●		
18	CAR II (2014)	✓					⊙
19	Palestine (2015)	✓			●		
20	Georgia (2016)			✓			⊙
21	Gabon (2016)	✓				⊗	
22	Afghanistan (2017)			✓	●		
23	Burundi (2017)			✓			⊙
24	The Philippines (2018)			✓	●		
25	Venezuela (2018)			✓	●		
26	Bangladesh/Myanmar (2018)			✓	●		
	Total	**10**	**2**	**16**	**10**	**5**	**11**

Source: Author's own table, derived from the website of the ICC.

According to eleven situations under the investigation of the ICC, 5 of them have been referred to the ICC by state parties (Uganda, DRC, CAR, and Mali); the Security Council has referred to 2 non-parties' situations (Sudan and Libya); and the Prosecutor has opened the investigations, *proprio motu,* in four situations (Kenya, Côte d'Ivoire, Georgia, and Burundi). Among those situations, 27 cases have so far been brought to the attention of the ICC judges, for a total of 45 suspects, as detailed in Table 2 and Table 3.

Table 2 Situations and Cases before the ICC

No.	Situation	Case	Defendant	Charges	Case Status
1	**DRC**	ICC-01/04-01/06	Thomas Lubanga Dyilo	War crimes	Convicted/ reparation
		ICC-01/04-02/06	Bosco Ntaganda	War crimes Crimes against humanity	Trial/ in the ICC custody
		ICC-01/04-01/07	Germain Katanga	Crimes against humanity	Convicted/ reparation
		ICC-01/04-01/10	Callixte Mbarushimana	War crimes Crimes against	Closed /charges not confirmed

No.	Situation	Case	Defendant	Charges	Case Status
				humanity	
		ICC-01/04-01/12	Sylvestre Mudacumura	War crimes	At large
		ICC-01/04-02/12	Mathieu Ngudjolo Chui	Crimes against humanity	Closed/ Acquitted
2	**Uganda**	ICC-02/04-01/-5	Joseph Kony	Crimes against humanity War crimes	At large
			Vincent Otti	Crimes against humanity War crimes	At large
			Okot Odhiambo	Crimes against humanity War crimes	Closed/ death
			Raska Lukwiya	Crimes against humanity War crimes	Closed/ death
		ICC-02/04-01/15	Dominic Ongwen	Crimes against humanity War crimes	Trial/ in the ICC custody
3	**CAR**	ICC-01/05-01/08	Jean-Pierre Bemba Gombo	Crimes against humanity War crimes	Closed/ acquitted
		ICC-01/05-01/13	Jean-Pierre Bemba Gombo	Offences against the administration of justice in connection with witnesses' testimonies in the case of *The Prosecutor* v. *Jean-Pierre Bemba Gombo.*	Convicted/ appeal
			Aimé Kilolo Musamba		
			Jean-Jacques Mangenda Kabongo		
			Fidèle Babala Wandu		
			Narcisse Arido		
4	**Darfur, Sudan**	ICC-02/05-01/07	Ahmad Muhammad Harun ("Ahmad Harun")	Crimes against humanity War crimes	At large
			Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")	Crimes against humanity War crimes	At large
		ICC-02/05-01/09	Omar Hassan Ahmad Al Bashir	Crimes against humanity War crimes Genocide	At large
		ICC-02/05-02/09	Bahar Idriss Abu Garda	War crimes	Closed/ charges not confirmed

No.	Situation	Case	Defendant	Charges	Case Status
		ICC-02/05-03/09	Abdallah Banda Abakaer Nourain	War crimes	At large
			Saleh Mohammed Jerbo Jamus	War crimes	Closed/ death
		ICC-02/05-01/12	Abdel Raheem Muhammad Hussein	Crimes against humanity War crimes	At large
5	**Kenya**	ICC-01/09-01/11	William Samoei Ruto	Crimes against humanity	Closed/ charges not confirmed
			Henry Kiprono Kosgey	Crimes against humanity	Closed/ charges not confirmed
			Joshua Arap Sang	Crimes against humanity	Closed/ charges not confirmed
		ICC-01/09-02/11	Uhuru Muigai Kenyatta	Crimes against humanity	Closed/ charges withdrew
			Francis Kirimi Muthaura	Crimes against humanity	Closed/ charges withdrew
			Mohamed Hussein Ali	Crimes against humanity	Closed/ charges not confirmed
		ICC-01/09-01/13	Walter Osapiri Barasa	Offences against the administration of justice consisting in corruptly influencing or attempting to corruptly influence three ICC witnesses, regarding cases from the situation in Kenya	At large
		ICC-01/09-01/15	Paul Gicheru		At large
			Philip Kipkoech Bett		At large
6	**Libya**	ICC-01/11-01/11	Muammar Mohammed Abu Minyar Gaddafi	Crimes against humanity	Closed/ death
			Saif Al-Islam Gaddafi	Crimes against humanity	Pre-Trial/ not in the ICC custody
			Abdullah Al-Senussi	Crimes against humanity	Closed/ inadmissible
		ICC-01/11-01/13	Al-Tuhamy Mohamed Khaled	Crimes against humanity War crimes	At large
		ICC-01/11-01/17	Mahmoud Mustafa Busayf Al-Werfalli	War crimes	At large
7	**Côte d'Ivoire**	ICC-02/11-01/12	Simone Gbagbo	Crimes against humanity	Pre-Trial/ not in the ICC custody
		ICC-02/11-01/15	Laurent Gbagbo	Crimes against humanity	Trial/ not in the ICC custody

No.	Situation	Case	Defendant	Charges	Case Status
			Charles Blé Goudé	Crimes against humanity	Trial/ not in the ICC custody
8	**Mali**	ICC-01/12-01/15	Ahmad Al Faqi Al Mahdi	War crimes	Convicted / reparation
		ICC-01/12-01/18	Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud	Crimes against humanity War crimes	Pre-Trial/ in ICC custody
9	**CAR II**	ICC-01/14-01/18	Alfred Yekatom	Crimes against humanity War crimes	Pre-Trial/ in ICC custody
			Patrice-Edouard Ngaïssona	Crimes against humanity War crimes	Pre-Trial/ in ICC custody
10	**Georgia**	ICC-01/15	-		
11	**Burundi**	ICC-01/17	-		
		27 cases	**45 defendants**		

Source: Author's own table, derived from the website of the ICC.

Table 3 Status of Cases before the ICC

No.	Situation	Case	Defendants	Current Status							
				Case Closed					In ICC Custody	At large	Convicted
				Death	Charges not confirmed	Charges withdrew	Acquitted	Inadmissible			
1	DRC	ICC-01/04-01/06	Thomas Lubanga Dyilo								✓
		ICC-01/04-02/06	Bosco Ntaganda						✓		
		ICC-01/04-01/07	Germain Katanga								✓
		ICC-01/04-01/10	Callixte Mbarushimana		✓						
		ICC-01/04-01/12	Sylvestre Mudacumura							✓	
		ICC-01/04-02/12	Mathieu Ngudjolo Chui				✓				
2	Uganda	ICC-02/04-01/-5	Joseph Kony							✓	
			Vincent Otti							✓	
			Okot Odhiambo	✓							
			Raska Lukwiya	✓							
		ICC-02/04-01/15	Dominic Ongwen						✓		
3	CAR	ICC-01/05-01/08	Jean-Pierre Bemba Gombo				✓				
		ICC-01/05-01/13	Jean-Pierre Bemba								✓

No.	Situation	Case	Defendants	Current Status							
				Case Closed					In ICC Custody	At large	Convicted
				Death	Charges not confirmed	Charges withdrew	Acquitted	Inadmissible			
			Gombo								
			Aimé Kilolo Musamba								✓
			Jean-Jacques Mangenda Kabongo								✓
			Fidèle Babala Wandu								✓
			Narcisse Arido								✓
4	Darfur, Sudan	ICC-02/05-01/07	Ahmad Muhammad Harun ("Ahmad Harun")							✓	
			Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")							✓	
		ICC-02/05-01/09	Omar Hassan Ahmad Al Bashir							✓	
		ICC-02/05-02/09	Bahar Idriss Abu Garda		✓						
		ICC-02/05-03/09	Abdallah Banda Abakaer Nourain							✓	
			Saleh Mohammed Jerbo Jamus	✓							
		ICC-02/05-01/12	Abdel Raheem Muhammad Hussein							✓	
5	Kenya	ICC-01/09-01/11	William Samoei Ruto		✓						
			Henry Kiprono Kosgey		✓						
			Joshua Arap Sang		✓						
		ICC-01/09-02/11	Uhuru Muigai Kenyatta			✓					
			Francis Kirimi Muthaura			✓					
			Mohamed Hussein Ali		✓						
		ICC-01/09-01/13	Walter Osapiri Barasa							✓	
		ICC-01/09-01/15	Paul Gicheru							✓	
			Philip Kipkoech Bett							✓	
6	Libya	ICC-01/11-01/11	Muammar	✓							

No.	Situation	Case	Defendants	Current Status							
				Case Closed							
				Death	Charges not confirmed	Charges withdrew	Acquitted	Inadmissible	In ICC Custody	At large	Convicted
			Mohammed Abu Minyar Gaddafi								
			Saif Al-Islam Gaddafi							✓	
			Abdullah Al-Senussi					✓			
		ICC-01/11-01/13	Al-Tuhamy Mohamed Khaled							✓	
		ICC-01/11-01/17	Mahmoud Mustafa Busayf Al-Werfalli							✓	
7	Côte d'Ivoire	ICC-02/11-01/12	Simone Gbagbo							✓	
		ICC-02/11-01/15	Laurent Gbagbo						✓		
			Charles Blé Goudé						✓		
8	Mali	ICC-01/12-01/15	Ahmad Al Faqi Al Mahdi								✓
		ICC-01/12-01/18	Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud						✓		
9	CAR II	ICC-01/14-01/18	Alfred Yekatom						✓		
			Patrice-Edouard Ngaïssona						✓		
10	Georgia	-	-								
11	Burundi	-	-								
	Total	**27**	**45**	**4**	**6**	**2**	**2**	**1**	**7**	**15**	**8**

Source: Author's own table, derived from the website of the ICC.

In cases before the ICC, 3 cases against four defendants are divided into on-going trials, in relation to the *Ntaganda* case (DRC); the *Ongwen* case (Uganda); and the *Gbagbo and Blé Goudé* case (Côte d'Ivoire). Five cases were sentenced namely: the *Lubanga* case (DRC); the *Katanga* case (CAR I); the *Bemba* case (CAR I); the *Bemba et al.* case (CAR I) and the *Al Mahdi* case (Mali). Interestingly, there was only the *Al-Senussi* case, in the context of the *Situation in Libya,* which was inadmissible before the Court.

To date, 15 warrants of arrest have been issued by the ICC Pre-Trial Chambers: Al Bashir, Harun, Ali Kushayb, Banda, and Hussein (Sudan);

Mudacumura (DRC); Kony and Otti (Uganda); Barasa, Gicheru and Bett (Kenya); Gaddafi, Khaled and Werfalli (Libya); and Simone (Côte d'Ivoire). Interestingly, all the suspects are still at large, and all the cases remain at the Pre-Trial stage, and the ICC cannot try those individuals unless they are present in the courtroom.

2.5.3 Triggering Procedure Placing a Situation before the Court

The exercise of jurisdiction of the ICC is not an automatic matter. The complementarity mechanism of the ICC will function after the fulfilment of the jurisdictional and admissibility requirements. In accordance with the provisions of the Rome Statute, the state parties have granted the ICC jurisdiction over the crimes, provided for in the Rome Statute. This is when they are committed in the territory of a state party or by a national of a state party, or when the Security Council refers to the ICC, a situation of crisis in which such crimes appear to have been committed. But this does mean that the ICC may directly exercise its jurisdiction over them. On the contrary, the state parties have granted to the ICC a jurisdiction which is deactivated, and that can only be activated with regard to a particular situation of crisis, as defined by personal, territorial, and temporal parameters.[302]

According to the Rome Statute, a complex procedure is provided for by which the ICC assesses the legality and prudence of asserting jurisdiction over a case, and taking it away from national authorities. This procedure is triggered in one of three different circumstances[303], that the Prosecutor may act upon a referral by a state party[304], or by the Security Council[305], or on his or her own motion, *proprio motu*, on the basis of the communications.[306] As mentioned earlier, under the ICC mechanism, it is not automatically triggered; but entails a regular investigation.[307] The Prosecutor

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302 Olásolo, "The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor," 123-24.

303 Boas et al., *International Criminal Procedure: International Criminal Law Practitioner Library Vol. III*, 69.

304 Rome Statute, articles 13(a) and 14.

305 Ibid., article 13(b)

306 Ibid., articles 13(c) and 15.

307 Jo Stigen, "The Admissibility Procedures," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Cambridge University Press, 2011), 504.

must first find that there is a 'reasonable basis' to proceed,[308] involving the three criteria of jurisdiction,[309] admissibility[310] , and prosecutorial discretion.[311] For *proprio motu* investigations, the Prosecutor requires the authorization to launch an investigation from the Pre-Trial Chamber, applying the same standard.[312] Hence, there are three types of triggering proceedings, which are respectively applied to State Party referrals, the United Nations Security Council referrals and the investigations, *proprio motu*.

2.5.3.1 A State Party Refers a Situation to the Prosecutor

State Party referrals are provided, under article 13 of the Rome Statute, based upon articles 12 and 14. According to article 13(a) of the Rome Statute, the Court may exercise jurisdiction over "a situation referred to the Prosecutor by a state party, in which one or more crimes appears to have been committed, in accordance with article 14".[313] Then, any State that has ratified the Rome Statute, may refer a situation to the Prosecutor for possible investigation, where it appears that crimes within the ICC's jurisdiction have been committed, whether on the referring state's own territory or elsewhere.[314] This context entails an ability to direct the Court's attention to events in a particular time and place, possibly involving criminal acts, to initiate an exercise of jurisdiction over those acts.[315]

Article 14 of the Rome Statute allows a State Party to refer a 'situation' to the Prosecutor and not merely an individual, or partly 'for the purpose of determining whether one or more specific persons should be charged with the commission of such a crime.'[316] However, a state party in this provision refers to any state that has ratified the Rome Statute, non-state parties are limited to an *ad hoc* declaration under article

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308 Rome Statute, article 53(1) for state and Security Council referrals, and article 15(3) for *proprio motu* investigations.

309 Ibid, articles 5-8, 11, 12, 13, 16 and 26.

310 Ibid., article 17.

311 Ibid., article 53(1)(c) requires that an investigation serve the 'interests of justice'.

312 Ibid., article 15(4).

313 Ibid., article 13(a).

314 Boas et al., *International Criminal Procedure: International Criminal Law Practitioner Library Vol. III*, 69.

315 Klamberg, *Commentary on the Law of the International Criminal Court*, 175.

316 Rome Statute, article 14(1).

12(3), and the appropriate trigger mechanism falls under article 13(c) and 15 of the Rome Statute. This would concern the initiation of an investigation by the Prosecutor, for example, into the *ad hoc* declarations of *Côte d'Ivoire*, *Ukraine,* and *Palestine*.

Referrals of state parties can be divided into two categories: third-party referrals and self-referrals According to the drafting history, the drafters focused on third-state referrals, but practice shows an increasing tendency towards self-referrals by states.[317] The third-party referrals denote the referrals by a state party to a situation which occurred outside its territory, while the latter refers by a state party to the situation in which crimes falling within the jurisdiction of the Court, appear to have been committed on that state party's territory.[318] Furthermore, the OTP has adopted a policy of inviting and encouraging such voluntary self-referrals, by stating in Paper on Some Policy Issues, before the Office of the Prosecutor, that:

> [T]he Office of the Prosecutor will encourage States Parties to take ownership of the Court in a number of ways. They can enter into agreements to provide such support. They may of course refer a situation directly to the Court under article 14.[319]

To date, all referrals under article 14 are such self-referrals, except Palestine. In Palestine, crimes were allegedly committed by Israel, and if this referral leads to a full investigation, it will constitute the first referral, in the sense of a 'complaint', against a third state. Up to 2018, five situations referred to the ICC under article 14, and the OTP initiated the investigations, according to article 53(1) Rome Statute, namely: *Uganda* (2004); the *DRC* (2004); *CAR* (2005); *Mali* (2012); and *CAR II* (2014).

Another two self-referrals were initiated by Comoros, with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla for the Gaza Strip, requesting the Prosecutor of the ICC, pursuant to articles 12, 13 and 14, to initiate an investigation into the crimes committed within the Court's jurisdiction. However, the

317 Crist Gallavin, "Prosecutorial Discretion within the ICC: Under the Pressure of Justice," *Criminal Law Forum* 17 (2006): 49.; Klamberg, *Commentary on the Law of the International Criminal Court*, 177-78.

318 *Commentary on the Law of the International Criminal Court*, 178.

319 Office of the Prosecutor, "Paper on Some Policy Issues before the Office of the Prosecutor," (International Criminal Court, 2003), p. 6.

referral by Comoros was rejected, based on article 53(1) of the Rome Statute. The Prosecutor announced that:

> [t]he information available did not provide a reasonable basis to proceed with an investigation of the situation on the registered vessels of Comoros, Greece, and Cambodia that arose in relation to the 31 May 2010 incident. This conclusion is based on a thorough legal and factual analysis of the information available and pursuant to the requirement in article 17(1)(d) of the Statute that cases shall be of sufficient gravity to justify further action by the Court. A detailed report has been issued by the Prosecutor presenting the findings of the Office on jurisdictional and admissibility issues.[320]

Moreover, the OTP rejected referral by the Gabonese Republic ("Gabon"), with respect to alleged crimes potentially falling within the ICC's jurisdiction, committed in its territory since May 2016, with no end-date. On 29 September 2016, the Prosecutor issued a statement, informing the public of the referral, and announcing the opening of a preliminary examination into the situation in Gabon. However, on 21 September 2018, the Prosecutor concluded that there was no reasonable basis to proceed with an investigation, and decided to close the preliminary examination, due to the lack of subject-matter jurisdiction. [321]

2.5.3.2 A Situation Referred by the Security Council

The United Nations Security Council referrals are evident in the ability of the Security Council, to refer situations to the Court, under article 13(b) of the Statute. It must act under Chapter VII of the United Nations Charter.[322]

According to article 13(b) of the Rome Statute, the Security Council may refer to the Court a situation, in which one or more crimes within the jurisdiction of the Court, appear to have been committed. Article 12(2) excludes the case of Security Council referrals, from those for which the alternative criteria of territory or nationality of the state that is a party, or have accepted the jurisdiction of the Court.

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320 Klamberg, *Commentary on the Law of the International Criminal Court*, 178.; Office of the Prosecutor, "Report on Preliminary Examination Activities 2014," (International Criminal Court, 2014), para. 247.; for detail see "Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report," (International Criminal Court, 2014).

321 "Report on Preliminary Examination Activities 2018," (International Criminal Court, 2018), paras.285-90.

322 Gallavin, "Prosecutorial Discretion within the ICC: Under the Pressure of Justice," 48.

Then, the referrals may relate to enabling the Court to exercise its jurisdiction in a situation, which has no jurisdictional links with the Court. In other words, the Security Council will trigger the Court's jurisdiction under article 13(b), in the case of crimes committed on the territory of non-state parties.[323] This context is an acknowledgment of the fundamental role of the Security Council, to confront situations of threats to peace, breaches of peace, and acts of aggression.[324]

According to the Rome Statute, in the case of a Security Council referral, the state concerned has not directly conferred its criminal jurisdiction on the ICC. The Statute authorizes the Security Council to strengthen the Court's power, to influence those in States that have not yet ratified the Rome Statute. Conceptually, the Security Council referral is an indirect conferral of powers, in which the Security Council is acting under Chapter VII of the UN Charter, exercising powers conferred to it by UN member states collectively, to refer situations to the OTP.[325] From the perspective of the state concerned, the decision to refer a situation to the ICC is, therefore, an indirect conferral of criminal jurisdiction from the state with primary jurisdiction.[326] As regards the obligations of a state, which is not a party to the ICC, the binding nature of acts of an international organization (UN) equally derive from the conferral of powers, (usually by their member states).[327] It follows that for the ICC to lawfully issue binding decisions on a third state, these must also have its basis in the conferral of powers. The Security Council resolution containing the decision to refer a situation to the ICC must, therefore, be interpreted as such a conferral of powers. This was confirmed by the ICTY Appeals Chamber in the *Blaškić* case. The Appeals Chamber held that:

> [t]he obligation [on States] to lend co-operation and judicial assistance to the International Tribunal … is laid down in Article 29 and restated in paragraph 4 of

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323 Klamberg, *Commentary on the Law of the International Criminal Court*, 175.

324 ibid.

325 Richard Dicker, "The International Criminal Court (ICC) and Double Standards of International Justice," in *The Law and Practice of the International Criminal Court*, ed. Casten Stahn (Oxford: Oxford University Press, 2015), 2.

326 Gabriel M. Lentner, "Why the ICC Won't Get It Right – the Legal Nature of UN Security Council Referrals and Al-Bashir Immunities," EJIL: Talk! (Blog of European Journal of International Law), ejiltalk.org/why-the-icc-wont-get-it-right-the-legal-nature-of-un-security-council-referrals-and-albashir-immunities/.

327 ibid.

> Security Council resolution 827 (1993). Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions.[328]

The Prosecutor, however, is still required to perform its checks, in accordance with article 53(1) of the Statute. Up till now, the Security Council has referred situations to the Prosecutor of two non-state parties to the Rome Statute: Sudan[329], and Libya.[330] In addition, the Security Council rejected it once on the Syria referral, which failed to pass by a vote of thirteen in favor, and two against, by two permanent members of the Security Council, China and the Russian Federation.[331]

In Resolutions 1593 and 1970, the Security Council also stated that it was acting according to Chapter VII, and it does not appear reasonable to question that Chapter VII was properly invoked, since each situation did very probably constitute a threat to peace, [or] a breach of peace.[332] However, both Sudan and Libya have vehemently protested against what they saw as an infringement of their sovereignty.

The Security Council's referral of the *situation in Darfur*, where the estimated number of deaths were in the hundreds of thousands, with millions having been displaced,[333] met the article 13(b) threshold of one or more' ICC crimes appear to have been committed.' It would also satisfy the article 17(1)(d) gravity threshold that, according to article 53(1)(c), the Prosecutor has to consider in determining, whether there is a reasonable basis to proceed with an investigation.

In the *Situation in Libya,* more questions might be posed in this respect, in that, at the time of the referral, the crimes were beginning.[334] While that may be the best time to deter crimes and would satisfy the article 13(b) terms, that one or more

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328 *Prosecutor* v. *Tihomir Blaškić,* Judgment on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 2997, ICTY Appeals Chamber, 29 October 1997.

329 UNSC Res. 1593 (31 March 2005) UN Doc S/RES/1593.

330 UNSC Res. 1970 (26 February 2011) UN Doc S/RES/1970.

331 Press Release, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Doc. SC/11407 (22 May 2014), available at https://www.un.org/press/en/2014/sc11407.doc.htm

332 Jennifer Trahan, "The Relationship between the International Criminal Court and the U.N. Security Council: Parameters and Best Practice," *Criminal Law Forum* 24 (2013): 429-30.

333 John E. Tanagho and John P. Hermina, "The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice," *Loyola University Chicago International Law Review* 6, no. 2 (2009): 367-68.

334 For detail see John J. Liolos, "Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes," *Boston College International and Comparative Law Review* 35, no. 2 (2012): 592-94.

crimes under the jurisdiction of the ICC appear to have been committed. The referral should also consider the ICC's role to prosecute the most serious crimes of concern to the international community as a whole. This means that the ICC gravity threshold must also be satisfied, for the Prosecutor to proceed with an investigation and for the case to be admissible.

2.5.3.3 When the Prosecutor Decides to Initiate an Investigation into a Situation

According to article 13(c) of the Rome Statute, the Prosecutor may initiate proceedings *ex officio* (by virtue of his or her office), and the exercise of this power must be carried out, under article 15 of the Statute, which is the safeguard against any abuse of this function. Article 15 deals with one of the three ways of initiating an investigation, which outlines the *proprio motu* (on his own motion) power of the Prosecutor.[335] However, many states at the Rome Conference in 1998 objected to giving the Prosecutor any *proprio motu* power at all, fearing that he or she might use it to launch politically motivated prosecutions.[336]

The provision regulates a complex preliminary examination procedure. Any *proprio motu* activation by the Prosecutor to initiate an investigation is based on the basis of the communications. However, the initiation of investigation is subject to the authorization of the Pre-Trial Chamber, pursuant to article 15(3)-(4) of the Statute. The Prosecutor decides whether to use this discretionary power, by examining any information received, and determining whether a 'reasonable basis' exists for proceeding with an investigation.[337]

From 2002 to the present time, the Prosecutor has decided to initiate investigations into five situations: *Kenya, Côte d'Ivoire, Georgia, Burundi,* and *Afghanistan*.[338]

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335 Klamberg, *Commentary on the Law of the International Criminal Court*, 182.

336 Boas et al., *International Criminal Procedure: International Criminal Law Practitioner Library Vol. III*, 71.

337 See Schabas, *An Introduction to the International Criminal Court*, 163.

338 The first four situation have been authorized by the Pre-Trial Chambers, while Pre-Trial Chambe has not authorized to proceed with an investigation into the *Situation in Afghanistan.*

2.5.4 Preliminary Proceedings

At the stage of preliminary examinations, when one of the three trigger mechanisms discussed above, places a situation on the Court's agenda, the Prosecutor or relevant Chamber must then determine whether the case is admissible.[339] The Prosecutor determines a 'reasonable basis' to proceed with an investigation, and he or she 'shall' submit a request for authorization. In the case of state parties' referrals and Security Council referrals, the Prosecutor enjoys freedom from such authorization.[340] Under article 53(1)(b), in the making of such a decision, the Prosecutor shall consider the criteria of admissibility, under article 17.[341]

The first step that involves a consideration of issues of complementarity, occurs when the Prosecutor decides whether to initiate an investigation, after having analysed the information gathered, *proprio motu,* or if the information was made available in the course of a referral by a State or the Security Council. Dealing with this trigger mechanism, the Prosecutor has to determine whether there is a reasonable basis to proceed with,[342] or to initiate an investigation.[343] According to article 15(3), if the Prosecutor decides that there is a reasonable basis to proceed with an investigation, he or she shall submit, to the Pre-Trail Chamber, a request for authorization of an investigation, together with any supporting material collected.

The mechanism at this stage of the procedure of the ICC, is framed by article 18 of the Rome Statute.[344] According to this article, a state may seek a ruling on admissibility from the Court at an early stage of the proceeding, even before a case has been formulated and when the matter is still at the preliminary examination stage. However, this procedural mechanism does not exist in the case of the Security Council referral, implying that when the situation has been referred by the Security Council, in accordance with article 13(b), there is a presumption of admissibility.[345]

339 Boas et al., *International Criminal Procedure: International Criminal Law Practitioner Library Vol. III*, 85.
340 Klamberg, *Commentary on the Law of the International Criminal Court*, 186.
341 ibid.
342 Rome Statute, article 15(3).
343 Ibid., article 53(1).
344 Rome Statute, article 18.
345 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 354.

The procedure starts when the situation has been referred, and the Prosecutor has determined that it is a sufficient reason to launch an investigation. The Prosecutor is then required to notify all state parties and 'those states which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned' as stipulated in article 18(1). Non-party states, that would normally exercise jurisdiction over the crimes, also shall be distributed.

Within one month of receipt of such notification, a state may inform the Court that it is investigating, or has investigated, its nationals or others within its jurisdiction, with respect to criminal acts which may constitute crimes under the Court's jurisdiction[346]

The information provided by the State to the Prosecutor, must be communicated by the Prosecutor to the Pro-Trial Chamber with the application. The Prosecutor is required to notify the State concerned, when he or she submits such an application to the Pre-Trial Chamber, although he or she is only required to provide the State with 'a summary of the basis of the application.'[347] The procedure to be followed, is left largely to the Pre-Trial Chamber. No such proceedings have yet been initiated by the Court.

According to the ICC RPE, the Pre-Trial Chamber may hold a hearing, implying that this is not a requirement. The Pre-Trial Chamber is required to examine the Prosecutor's application and any observations, submitted by a state, that requested a deferral.[348] The state concerned is at a disadvantage here, to the extent that it may not have access to all of the materials, submitted by the Prosecutor to the Pre-Trial Chamber. In deciding whether to authorize an investigation, the Pre-Trial Chamber has to consider the relevant factors, in article 17 of the Statute, as stipulated in rule 55(2) of the ICC RPE.[349]

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346 Ibid., article 5.

347 Ibid., rule 54.

348 Ibid., rule 55.

349 ICC RPE, rule 52 provides that:

> The Pre-Trial Chamber shall examine the Prosecutor's application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in article 17 in deciding whether to authorize an investigation.

The Prosecutor may review a deferral to a State's investigation 'six months after the date of deferral, or at any time when there has been a significant change of circumstances. This is based on the State's unwillingness or inability to genuinely carry out the investigation.'[350]

The appeal to the Appeals Chamber is made against a ruling of the Pre-Trial Chamber, made under article 18(2). The appeal is based on a decision made after a renewed request for authorization, according to article 18(3). The State concerned, and the Prosecutor, may appeal against the decision. The appeal 'may be heard on an expedited basis.'

When the Prosecutor has deferred an investigation, he or she may request that the state concerned has to disclose information, regarding the progress of its investigations, and the states shall respond to such a request without undue delay, according to article 18(5).

While an application to the Pre-Trial Chamber is pending, or when the Prosecutor has deferred an investigation, he or she may. 'on an exceptional basis,' apply to the Pre-Trial Chamber for authorization to pursue necessary investigative steps to preserve evidence. This is done when there is a unique opportunity to obtain important evidence or if there is a significant risk that such evidence, may not be subsequently available, pursuant to article 18(6). Such an application is to be made *ex parte* and *in camera*.[351] And, it is to be adjudicated on an 'expedited basis.'

Finally, article 18(7) reserves the right of a state, which has challenged a ruling of the Pre-Trial Chamber under this article, to challenge the admissibility of a case under article 19, on the grounds of additional significant facts, or a significant change of circumstances. The consequences of this provision may lead to strategic decisions by the counsel for states, who will assess the relative advantages of proceeding under either article 18 or 19.

Article 18 applies at an earlier stage, when only a 'situation' has been designated. Article 19, on the other hand, and as article 18(7) confirms, operates with respect to a 'case.' Moreover, there may be other participants in litigation under

350 Ibid., rule 56(1).

351 Ibid., rule 57.

article 19, including representatives of victims.[352] However, the provision of the preliminary ruling regarding admissibility have not been applied in practice, because the concerned states have all implied their consent to admissibility, through the vehicle of self-referral. Sudan is the only exception, but its policy has been to ignore the Court, rather than to use the available mechanism to contest its operations.

Since 2002, a number of situations have been under the scrutiny of the OTP. Currently, the situations in Colombia, Guinea, Nigeria, and Iraq/UK are under preliminary examinations, to assess if there are genuine national proceeding being carried out. The Prosecutor decided to request Pre-Trial Chambers to commence investigations into the situations in *Kenya*, *Côte d'Ivoire, Georgia, Burundi,* and *Afghanistan.*

2.5.4 Admissibility Proceedings

When the Prosecutor of the ICC has determined, or has been authorized, to commence an investigation in a situation, the Prosecutor will be directed towards the assessment of whether and which cases shall be brought before the Court, for the prosecution. Article 19 of the Rome Statute constitutes the main statutory provisions, defining the complementarity regime of the ICC.[353] It primarily deals with the procedural aspects, related to both jurisdiction and admissibility of a case.

Furthermore, it differs from article 18, in that it only applies to concrete and clearly-defined cases, unlike article 18, which deals with challenges to the initiation of an investigation into a situation as a whole.[354] The provisions in this article will; clarify several procedural matters, including the entities having the standing to make challenges, the timing, those who are entitled to participate in the proceedings and submit observations, as well as the competition for deciding admissibility and jurisdictional challenges.[355]

Once the jurisdiction of the Court is triggered, it is for the Court to apply the provisions governing the complementarity regime, and to make a binding

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352 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 360.

353 Rome Statute, article 19.

354 For details see Klamberg, *Commentary on the Law of the International Criminal Court*, 266; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 365.

355 Holmes, "The Principle of Complementarity," 60-65.

determination on the admissibility of a given case. This flow, first and foremost, from the wording of article 17, which states that "the Court shall determine that a case is inadmissible...". It also includes and is consistent with the very nature of the Court as a judicial institution, and has been labeled by scholars as to the "fundamental strength" of the principle of complementarity.[356] This inherent power of the Court is known as *la compétence de la compétence*, which has been applied consistently, and without controversy, by many tribunals.

Article 19 of the Rome Statute provides the power of the ICC in determining its jurisdiction in article 19(1). This provides that the admissibility of a given case may be examined either by the Court acting on its own initiative, or in response to an admissibility challenge filed by one of the parties referred to in article 19(2). The significance of the Court's obligation to satisfy itself that it has jurisdiction over the case, was highlighted by the Pre-Trial Chamber II in the *Bemba* case, that:

> [n]otwithstanding the language of Article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element in the exercise by any judicial body of its functions. Such power is derived from the well-recognised principle of *'la compétence de la compétence'*[357]

In the same vein, this power of the ICC was confirmed by the same Chamber, in the *Kony et., al.* case, based on the admissibility of the case, that:

> [a]ny judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence. Such a power and duty, commonly referred to as *"Kompetenz-Kompetenz"* in German and *"la compétence de la competence"* in French, is enshrined in the first sentence of article 19(1), which provides that "the Court shall satisfy itself that it has jurisdiction in any case brought before it."[358]

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356 ibid., 74.

357 *Prosecutor* v. *Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, ICC Pre-Trial Chamber II, 15 June 2009, ICC-01/05-01/08-424, para. 23

358 *Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhuambo and Dominic Ongwen,* Document Decision on the admissibility of the case under article 19(1) of the Statute, ICC Pre-Trial Chamber II, 10 March 2009, ICC-02/04-01/05-377, para 45.

Also, in the *Ruto et al.* case, the Pre-Trial Chamber II reaffirmed that, regardless of the mandatory language of article 19(1) of the Statute, which requires an examination as to whether the Court has the competence to adjudicate the case under consideration, any judicial body has the power to determine its own jurisdiction. This applies even in the absence of an explicit reference to that effect.[359]

According to this, the Court shall satisfy that it has jurisdiction over the case brought before the Court. It regulates the challenges to the jurisdiction of the Court, or the admissibility of a case before the ICC, in which the judicial assessment of the admissibility of a case, as according to the criteria, established by article 17. And the Court may, 'on its own motion', determine the admissibility of a case, in accordance with article 17, pursuant to article 19(1). Pursuant to article 19, the admissibility of a case may be triggered by (i) the accused, or a person for whom a warrant of arrest or a summons to appear, has been issued, under article 58; (ii) a state which has jurisdiction over a case, on the grounds that it is investigating or prosecuting the case, or has investigated or prosecuted it,; or (iii) a state from which acceptance of jurisdiction is required, under article 12.[360] Hence, the admissibility of a given case may be examined, either by the Court acting on its own initiative, or in response to admissibility challenges, filed by one of the parties.

In addition, the Statute gives the Prosecutor the right, under article 19(3), to seek a ruling from the Court, regarding a question of jurisdiction or admissibility. Under this provision, the Prosecutor, the defence, and the victims may participate in the proceedings.

According to this assessment, however, the Prosecutor should adhere to the criteria, as set forth in article 53(2) of the Rome Statute. In order to make the decision to prosecute, the Prosecutor has to be satisfied that there is not a sufficient legal or factual basis, to seek a warrant or summons, under article 58;[361] and that the case is

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359 *Prosecutor* v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC Pre-Trial Chamber II, 08 March 2011, ICC-01/09-01/11-1, para. 8

360 Rome Statute, article 19(2).

361 Ibid., article 53(2)(a).

inadmissible under article 17;[362] or that, there is no reason to believe that a prosecution would not be in the interests of justice.[363]

Pursuant to Article 19(4), the admissibility of a case, or the jurisdiction of the Court, may be challenged only once by the person concerned or the state. However, the Court may, in exceptional circumstances, grant leave for a challenge to be brought more than once, or at a time after the commencement of the trial. The challenges made after the commencement of the trial may only be based on article 17(1)(c), addressing instances of double jeopardy. In addition, such challenges made, are permissible only if "the person concerned has been already tried for the conduct, which is the subject of the complaint."

Additionally, in the case of a state, challenging the admissibility of a case, the challenges shall be made at "the earliest opportunity", pursuant to article 19(5)

Article 19(6) stipulates that the decisions, with respect to jurisdiction or admissibility, may be appealed against, before the Appeals Chamber, in accordance with Article 82. Article 82(1)(a) of the Statute provides that either party may appeal against "a decision, with respect to jurisdiction or admissibility." Decisions with respect to jurisdiction or admissibility may be directly appealed against, by the parties to the proceedings, (the Prosecution, the Defence or the state), before the Appeals Chamber. This does not include other interlocutory appeals, brought under Article 82(1)(b), which require prior leave from the first instance chamber.

When a State makes a challenge to the admissibility of a case before the Court, the Prosecutor "shall suspend the investigation, until such time as the Court makes a determination", pursuant to article 19(7). The Prosecutor, however, may still seek a ruling from the Court: (a) to pursue necessary investigative steps, for the purpose of preserving evidence, where there is a unique opportunity to obtain important evidence, or if there is a significant risk that such evidence may not be subsequently available; (b) to take a statement or testimony from a witness, or complete the collection and examination, of evidence which had begun, prior to the making of the challenge; and (3) in co-operation with the relevant States, to prevent the absconding of persons, in respect of whom, the Prosecutor has already requested a

362 Ibid., article 53(2)(b).

363 Ibid., article 53(2)(c).

warrant of arrest, under article 58. In addition, pursuant to rules 58 and 61 of the ICC RPE, the Prosecutor's request for provisional measures shall be considered *ex parte* and *in camera*, and the Pre-Trial Chamber shall rule on it expeditiously.

According to article 19(9), the making of a challenge shall not affect the validity of any act performed by the Prosecutor, or any order or warrant issued by the Court, before it was made. And under Article 19(10), the prosecutor may submit a request for the review of the admissibility decision, after being satisfied "that new facts have risen, which negate the basis on which the case had previously been found inadmissible, under Article 17 by the Court. Such a request shall be presented to the Chamber that made the ruling on admissibility, in accordance with the provisions of rules 58, 59 and 61. The state or states that initially presented the challenge to admissibility, shall be notified, within a specified time limit, in order for them to make their representations.

No application has been submitted by the Prosecution, pursuant to article 19(10), before the Court. The provision demonstrates that the admissibility assessment is not static, but must take into consideration the possible changes in circumstances, that may have occurred over time.

Hence, article 19 constitutes the last phase for determining admissibility; the end of this matter is a declaration of admissibility or inadmissibility of the Court, in accordance with this provision.

Until the present time, the ICC has conducted the admissibility determination in eight cases, namely: (1) *Kony et al* case (Uganda); (2) *Katanga* case (DRC); (3) *Bemba* case (CAR); (4) *Kenyatta et al* case (Kenya); (5) *Ruto et al* case (Kenya); (6) *Gaddafi* case (Libya); (7) *Al-Senussi* case (Libya); and (8) *Simone* case (Côte d'Ivoire).

2.6 CO-OPERATION UNDER THE COMPLEMENTARITY SYSTEM

As discussed earlier, with regard to the post-WWII trials of the IMTs, this is a reflection of another form of the principle of complementarity and the significance of co-operation with national criminal jurisdictions. Once an international criminal tribunal has determined that it has jurisdiction, or a case is admissible before it, the question of co-operation with national jurisdictions arises.

Effective co-operation between the international courts and the States can be categorized into four main types, namely: co-operation, by transferring national prosecutions to the international court or tribunal; transfer of the accused; co-operation, related to investigations and the production of evidence; and co-operation, with respect to the enforcement of sentences, all of which are indispensable for international criminal proceedings.[364]

Under the principle of complementarity of the ICC, the effectiveness of the application of this principle requires, not only the criminalization of international crimes, but also the ability to effectively investigate them. An essential element for effective investigation and successful prosecution of those committing international crimes, is inter-state cooperation.[365] In the absence of a police force of its own, the ICC may not, and cannot itself implement its decisions. This is bound to rely on states to execute any judicial order that entails an enforcement-related function. Most importantly, this includes its arrest warrants, but also measure to obtain evidence, the appearance of witnesses, and the freezing and seizing of assets.[366] The successful operation of the complementarity system of the ICC, is completely dependent upon international co-operation, which is at the heart of effective international criminal proceedings.

2.6.1 The Co-operation Regime under the Rome Statute

At the outset, it was noted that the ICC had a unique system in terms of co-operation, as distinct from the Chapter VII powers, because it facilitated co-operation with the *ad hoc* tribunals. The ICC is an independent and autonomous intergovernmental organization, of an international legal personality and power to request co-operation from the state parties. The Rome Statute created an elaborate co-operation regime, to promote the effectiveness of the ICC. Part 9 of the Rome Statute opens with the

364 Zahar and Sluiter, *International Criminal Law: A Critical Introduction*, 457.

365 Dire Tladi, "Complementarity and Cooperation in International Criminal Justice: Assing Initiatives to Fill the Impunity Gap," ISS Paper 277 (Institute for Security Studies, 2014), 4.

366 Cryer et al., *An Introduction to International Criminal Law and Procedure*, 405.; Philipp Ambach, "A Look Towards the Future—the ICC and 'Lessons Learnt'," in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn (Oxford: Oxford University Press, 2015), 1279.

general obligation binding state parties *'to cooperate fully with the Court,'*[367] to ensure that national law allows all specified form of co-operation. The duty to cooperate fully is explicitly restricted to co-operation in accordance with the provisions of the Rome Statute, which means that the ICC cannot demand co-operation beyond what the statute requires.[368]

Part 9 is intimately related to other Parts of the Rome Statute, for example, when the Court decides on the investigative measures to be taken, and on the arrest of the suspect. In this case, the issuance of an arrest warrant is governed by article 58, which is part of Part 5. In addition, the rules on co-operation under Part 9, have a close link to the jurisdiction and complementarity regime, under Part 2 of the Statue. [369]

Part 9 of the Rome Statute contains provisions, with regard to a general framework, the provision relating to the surrender of persons, including one provision on transit, and provisions relating to other forms of co-operation.[370] These forms include the identification of individuals, the taking of evidence, the questioning of any person, the service of documents, the execution of searches and seizures, the freezing of assets and the catch-all phrase, 'any other type of assistance, which is not prohibited by the law of the requested state.'[371] Among these forms of co-operation, the most important form of co-operation provided for in the Rome Statute, is the obligation to cooperate in the arrest and surrender of persons, under an ICC arrest warrant.[372]

Part 9 is complemented by Chapter 11 of the ICC REP, which lists various forms of co-operation, underlines what a state is obligated to provide.[373] In addition, the Regulations of the Court,[374] and the Regulations of the Registry [375] touch upon the issue of co-operation.

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367 Rome Statute, article 86.

368 Cryer et al., *An Introduction to International Criminal Law and Procedure*, 405.

369 Claus Kreß and Kimberly Prost, "Part 9 International Cooperation and Judicial Assistance," in *Rome Statute of the International Criminal Court: A Commentary*, ed. Otto Triffterer and Kai Ambos (Oxford: Hart Publishing, 2016), 2007.

370 Rome Statute articles 87-102.

371 Rome Statute, article 93(1).

372 Ibid., articles 91 and 92.

373 ICC REP, rules 176-197.

374 Regulations of the Court, regulations 107-112.

2.6.1.1 The General Obligation to Cooperate

According to article 86 of the Rome Statute, all state parties are obligated to co-operate with the ICC.[376] Generally, states are familiar with co-operation because they are comparable to those addressed in extradition and mutual legal assistance. Extradition involves the arrest and surrender of individuals to another state, while mutual legal assistance covers a range of other activities connected with the investigation and prosecution of crimes.[377]

The provision of article 86 provides a general obligation to cooperate in full, on all state parties. It imposes obligations on requested States and recognizes that the Court may take various measures, which are necessary for the protection of victims, witnesses, or their families. The provisions also outline the options available to the Court, in the case of non-compliance by a state party or a non-state party, where the assistance has been sought under an agreement or arrangement, entered into by a state.[378]

Co-operation under the Rome Statute can be divided into two categories: the surrender of suspects (articles 89 to 92), and other forms of co-operation (article 93). For both categories of co-operation, the Court has the authority to make requests to state parties, for measures of co-operation as stipulated by general rules, under article 87 of the Rome Statute. In the case where a state party fails to comply with a request to cooperate, the Court has the power to make a judicial finding, and refer the matter to the ASP or to the Security Council for its referred situations. Moreover, when a State denies a request for assistance it shall, pursuant to article 93(6), inform the Court or the prosecutor of the reasons for such a denial. In addition to making findings of non-compliance, the Court may also proceed with a) further consultations with the State, or b) deducing the existence or non-existence of a fact, which may have implications for the question of the guilt of an accused. [379]

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375 Rule of Registry, rules 76-78.

376 Rome Statute, article 86 provides that:

> [S]tates Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

377 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 976.

378 Kreß and Prost, "Part 9 International Cooperation and Judicial Assistance," 2020.

379 Klamberg, *Commentary on the Law of the International Criminal Court*, 635.

With regard to the procedure for request for co-operation, all requests, together with supporting documents from the Court shall be transmitted through the diplomatic channel or any appropriate channels, as may be designed by each State Party upon ratification, acceptance, approval or accession. [380] State parties are under the obligation to ensure the confidentiality of the requests for co-operation, together with any supporting documents from the Court.

Regarding non-state parties to the Rome Statute, they are under no statutory obligation to cooperate, in line with the principle of the law of treaties, as embodied in articles 34 and 35 of the VCLT.[381] Regarding co-operation, however, the Court is empowered to make the request for co-operation to state parties and to indicates that the Court may seek the assistance of non-state parties and international organizations.[382] Additionally, the ILC recognized that all states as a member of the international community had an interest in the prosecution, punishment, and deterrence of international crimes. Even those states which are not parties to the Rome Statute are encouraged to cooperate with the Court, by providing assistance, on the basis of a unilateral declaration. This may be general or specific in character, an *ad hoc* arrangement for a particular case, or some other type of agreement between the State and the court. [383] Hence, the Court may invite any non-state party to provide assistance, based on an *ad hoc* arrangement, an agreement, or any other appropriate basis.[384] As a result, non-state parties may be required to cooperate with the Court, by virtue of a Security Council resolution, at least when the situation has been referred by the UNSC.[385] Importantly, a non-state party that has made a declaration, accepting

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380 Rome Statute, article 87(1)(a).

381 Vienna Convention on the Law of Treaties of 1969, article 34 provide that:

> A treaty does not create either obligations or rights for a third State without its consent.

Article 35 provides that:

> An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

382 Rome Statute, article 87.

383 International Law Commission, "Draft Statute for an International Criminal Court with Commentaries," in *Yearbook of the International Law Commission, Vol. II, Part Two* (1994), 65-66.

384 Regulations of the Court, regulation 107.

385 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 982-83.

the jurisdiction of the Court is required to cooperate with the Court without any delay or exception.

In the case where a state party fails to comply with a request to cooperate, the Court has the power to make a judicial finding, and refer the matter to the ASP or to the Security Council, in situations which specifically refer to the Security Council. Moreover, when a State denies a request for assistance, it shall, pursuant to article 93(6), inform the Court or the prosecutor of the reasons for such a denial. In addition to making findings of non-compliance, the Court may also proceed with a) further consultations with the State, or, b) deducing the existence or non-existence of a fact, which may have implications for the question of the guilt of an accused person. [386]

2.6.1.2 The Arrest and Surrender Proceedings

Failing to surrender the accused is an important obstacle to the effectiveness of the international criminal system.[387] Article 89 of the Rome Statute provides for the co-operation between the Court and state parties, regarding the surrender of suspects to the ICC, and the three following articles 90 to 92, also apply to the arrest and surrender proceedings. Arrest and surrender of the persons wanted by the Court remain crucial issues. The ICC cannot fulfil its mandate without it, as there can be no trials without arrests.[388] Moreover, the co-operation of state parties, in this regard, requires not only operational and technical assistance, but also general political support. [389]

When the Court transmits a request for arrest and surrender, the requested States must comply. And, when the person sought by the Court is available for

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386 Klamberg, *Commentary on the Law of the International Criminal Court*, 635.

387 See Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 994.

388 Assembly of States Parties, "Report of the Bureau on Cooperation", ICC-ASP/6/21, 19 October 2007, para. 39

389 Ibid, paras 39-40, the Bureau of the Assembly of States Parties explained that political support for arrest and surrender is important in relation to all cases. States Parties can support arrest and surrender both in bilateral contacts and activities and through regional and international organisations.7 In order to generate the necessary political support and pressure, all States Parties should, where relevant, stress the importance of this issue. The Court's judicial mandate is not negotiable. This, however, does not contradict the need to view the activities of the Court in a broad political perspective.

surrender, the requested State must immediately inform the Registrar.[390] In this regard, state parties require changes to national legislation, in order to comply with obligations under the Rome Statute, with respect to requests to authorize transit.[391] The requested state and the Registrar have to agree upon the date and how the surrender shall take place.[392]

Custody is a challenging issue for the operation of the principle of complementarity. The problem of at large suspects has challenged the operation of the principle of complementarity of the ICC. For those particular countries, that willingly submitted themselves to the ICC's jurisdiction, are often weakly governed; their authorities may find it difficult to gain custody of rebel leaders, in areas in which the state exercises little control or authority, notwithstanding the Rome Statute obligations to cooperate fully with the Court.

The ICC does not recognize trials *in absentia*, that is, trials without the suspect (who is called the accused at the trial), being present, according to paragraph 1 of article 63 of the Rome Statute.[393] This means that unless a person is arrested and surrendered to The Hague, a proper trial cannot take place. And if such a trial does not take place, the provisions mentioned above can never become truly relevant.[394] In this regard, the ICC is characterized by a certain degree of "weakness" in its structure, because it does not have the means to enforce its own decisions; it has no executive powers, and no police force. As a result, the ICC is totally dependent on the international co-operation of state parties. In other words, the effectiveness of the trial

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390 ICC RPE, rule 184 (1) provides that:

(1) The requested State shall immediately inform the Registrar when the person sought by the Court is available for surrender.

391 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 999.

392 ICC RPE, rule 184 (2)-(4) provides that:

(2) The person shall be surrendered to the Court by the date and in the manner agreed upon between the authorities of the requested State and the Registrar.

(3) If circumstances prevent the surrender of the person by the date agreed, the authorities of the requested State and the Registrar shall agree upon a new date and manner by which the person shall be surrendered.

(4) The Registrar shall maintain contact with the authorities of the host State in relation to the arrangements for the surrender of the person to the Court.

393 Rome Statute, article 63, paragraph 1 provides that:

The accused shall be present during the trial.

394 Christophe Paulussen, *Male Captus Bene Detentus? - Surrendering Suspects to the International Criminal Court*, vol. 41, School of Human Rights Research Series (Antwerp: Intersentia, 2010), 675-76.

before the ICC, is dependent on others to carry out the arrest and surrender of the suspect to the ICC.[395]

According to the Rome Statute, arrest and surrender or provisional arrest must always be based on an arrest warrant, issued by the Pre-Trial Chamber. Article 89 of the Rome Statute, provides that requests for arrest and surrender are to be transmitted to, and executed by the state, on whose territory the suspect is located.[396] National authorities will enforce the request, by applying national procedures, but the Statute sets forth some minimum requirements concerning national arrest proceedings, and prescribes a division of competences, consultations regarding the provisional release, and speedy execution of the request.[397] An arrest warrant may be combined with a request for identification, tracing, and seizing or freezing of assets and property, belonging to the suspect.[398]

Those particular countries, whose officials are subject to ICC charges, according to Security Council referrals, maybe hostile (*e.g.,* Sudan) or uncooperative (*e.g.,* Libya), regarding ICC jurisdiction. As non-state parties, they are subject only to those obligations that have been imposed on them by the referral resolution, which may employ imprecise language on this point—no doubt by design. However, such States may refuse, or find it difficult, in light of internal political realities, to cooperate voluntarily with the Court, or to appear to be doing so. All told, given this situational variation, strategies aimed at gaining custody of one fugitive, will not necessarily be relevant to other fugitives. Instead, the international community, in co-operation with the Court, needs to devise bespoke solutions. That said, there are some common approaches that, if pursued, might bring closure to the pressing problem of at large defendants.

The challenges are numerous. The fact is that under the Rome Statute system of international criminal justice, the Court does not have its own enforcement mechanism, and there are recurring instances of non-compliance, with requests for

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395 ibid., 676.
396 Rome Statute, article 89(1).
397 Ibid., arts. 89(1), 58 and 59.
398 Ibid., article 57(3)(e); *The Prosecutor v. Thomas Lubanga Dyilo,* Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Thomas Lubanga Dyilo, ICC Pre-Trial Chamber I, ICC-01/04-01/06-8-US-Corr, paras. 130-141,

execution of arrest warrants. The powers to execute the ICC's arrest warrants are vested in states. Regarding this, state parties have an obligation to cooperate fully with the ICC (article 86 of the Statute), and to ensure that there are procedures available, under their national law, to meet all co-operation requests from the Court, made under Part 9 of the Statute (article 88 of the Statute). Additionally, states may be obliged to cooperate with the ICC, by virtue of Security Council resolutions, referring situations to the ICC. This applies also to requests for arrest and surrender from the ICC. Such requests are to be met, in accordance with the relevant provisions of the Rome Statute, namely articles 59 and 89, and procedures available under national law.

The support of the state parties, at the diplomatic or operational level, is crucial. States alone have the powers to execute arrest warrants. Although some arrest warrants attract more publicity than others, they are all equally important, and are all issued based on the same evidentiary threshold. The Court strives to ensure that they are all carried out. Considering the obligations of state parties under the Rome Statute, the warrants must be expedited.

The ICC may invite any non-state party to assist in the arrest and surrender of a person, against whom an arrest warrant has been issued. Non-state parties have no obligation under the Statute to cooperate with the Court, but they are encouraged to do so. Some of them have played an active role in previous surrender operations. However, when the Security Council triggers the Court's jurisdiction over a given situation, the duty to cooperate binds the relevant UN member states, regardless of whether or not they are a State Party to the Rome Statute. For instance, when the Security Council referred to the situations in Darfur (Sudan) and Libya to the ICC, it imposed an obligation on those two States to cooperate. It also urged all other states to cooperate fully with the Court.

2.6.1.3 Other Forms of Co-operation

Apart from the surrender proceedings, other forms of co-operation are enumerated in article 93 of the Rome Statute. The provisions address general assistance between the Court and state parties. The framework of legal assistance was designed to permit a

broad range of assistance of the flexible application.[399] According to article 86, which regulates the general obligation to cooperate, it is equally applicable to other forms of co-operation. Similar to article 87, the provision authorizes the Court to make requests for the whole range of co-operation, as set out in article 93(1). The provisions set out the twelve forms of mutual legal assistance that state parties are required to provide. The first eleven forms, in article 93(1)(a) to (k), describe legal assistance concerning the conduct of on-site investigations, inspections, and proceedings.

Moreover, the final form, in subparagraph (l), highlights any other type of assistance, which is not prohibited by the law of the requested state, thus, facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.[400] Regarding this, it may not be a simple matter, in practice, because the fact that something is 'not prohibited,' by national legislation does not necessarily mean that it is permitted.[401] The Court could request a form of co-operation that is 'not prohibited,' yet the state party has no legislation enabling it to effect compliance. [402]

According to those forms of co-operation, the applicability of Part 9 of the Statute to any or all of the procedural steps, for which complementarity has to be determined, would thus make such forms of co-operation available to the Court. This means that obligated state parties have to comply with the request.[403] However, Part 9 is not available for the Prosecutor, to make an assessment of admissibility, in the course of the Prosecutor's decision to initiate an investigation. This is because, one has to gather information from the Prosecutor, on which to base his or her decision on admissibility.[404]

Additionally, the co-operation is also available, at the stage of the preliminary ruling regarding admissibility, under article 18, during the period immediately after sending the notification, until a state requests the Prosecutor to defer to its

399 Kreß and Prost, "Part 9 International Cooperation and Judicial Assistance," 2081.
400 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 1019.
401 ibid., 1020.
402 ibid.
403 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 224.
404 Rome Statute, article 53.

investigation. During this period, the Prosecutor may thus request documents or any other type of assistance.[405]

2.6.2 The Relationship between State Co-operation and the Principle of Complementarity

The ICC co-operation regime under the Rome Statute is also influenced by the principle of complementarity, in which domestic investigations and prosecutions have priority in principle. [406] Generally, a decision by the Court on admissibility is a key matter, because it determines whether the Court will go ahead with its investigation or prosecution. At the admissibility stage, an admissibility challenge by a State has the effect that the Prosecutor must suspend the investigation.[407] However, the authority to take certain measures may be sought from the Chamber. In addition to this, the State's duty to cooperate remains in effect, until the Court orders otherwise, as does an arrest warrant.[408]

According to this arrest and surrender process, a person whose surrender is sought will challenge transfer in the national courts, based on the principle of *ne bis in idem*, which is set out in article 20 of the Rome Statute, arguing that the case is inadmissible before the ICC. The principle of *ne bis in idem,* is one of the three factors relevant to the issues of admissibility. The provision in article 89(2) recognizes that a suspect, against whom an arrest warrant has been issued under article 58, may challenge the *ne bis in idem* dimension of admissibility before the national court. However, he/she may not challenge the other two prongs of the issue of complementarity and gravity. However, if a national court could accept such a challenge and application of *ne bis in idem*, it would place a national court into the paradoxical position of assessing the unwillingness or inability of its own State. This would include the judicial system, of which it is a part. Such power exercised by national courts would reverse the principle that admissibility is determined independently by the Court, rather than by states themselves. [409]

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405 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 224-25.

406 Cryer et al., *An Introduction to International Criminal Law and Procedure*, 412.

407 ibid., 413.

408 Rome Statute, articles 19(7)-(9) and 58(4).

409 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 227.

When an admissibility test is submitted before national courts by the suspect, the Statute requires that the state in question has to consult immediately with the Court, to determine if there has been a relevant ruling on admissibility.[410] Article 89(2) declares that, if the case is admissible, the requested state shall proceed with the carrying out of the request. Although it is not explicit, this presumably means that admissibility has been established by a relevant ruling of the Court.[411]

Additionally, the challenge of *ne bis in idem* before a domestic court, as provided in article 20 of the Rome Statute, may cause the requested state to postpone surrender pending an admissibility decision by the ICC. However, the execution of the arrest warrant may not be postponed.[412] This also applies in the situation when a state party has not only received a request from the Court to surrender a person, but has also received a request from another state for the extradition of the same person.

With regard to challenges to the admissibility of a case under article 19, this applies after the Prosecutor has already commenced proceedings. She may consider it necessary in the course of determining admissibility on its own motion, under article 19(1). Part 9 of the Rome Statute can, therefore, be used. Furthermore, when a request for assistance has already been made by the Court, article 95 provides that, when there is an admissibility challenge under consideration by the Court, pursuant to article 18 or 19, the requested State may postpone the execution of a request. This applies to Part 9, pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence, pursuant to article 18(6) or 19(8).[413]

2.7 CHAPTER CONCLUSIONS

The principle of complementarity is an important concept of the Rome Statute, which connects the two autonomous systems of international and domestic justice. The

410 Rome Statute, article 89(2).

411 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 998.

412 Rome Statute, article 89(2).

413 Rome Statute, article 95 provides that:

> Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

concept balances national sovereignty and the interest of the international community, by denying impunity for international crimes. Historically, the long journey of the concept can be traced back to ancient Chinese thinking, which believes that opposite concepts form a complementary relationship, as represented by the archetypal poles of *yin* and *yang.* The well-known concept of complementarity in the academic approach, was presented by David Bohr, the Danish Physicist, with the words *comtraria sunt Complementa*. This means opposites are complementary or complements. In international criminal law, the concept of complementarity designs and organizes the relationship between domestic and international courts.

The idea of complementarity was first introduced in the post-WWI trials and has been developed since then. The principle of complementarity was adopted and developed, in order to bring the perpetrators of international crimes to justice. The idea of complementarity has been represented by various models of official and unofficial bodies. The first tangible model of complementarity was introduced by the League of Nations, for combatting terrorism. In addition, the London International Assembly proposed the idea of complementarity, as criteria for determining whether a trial by a national court is impossible or inconvenient. The Graft United National War Crimes Court set complementarity as the freedom of a state to decide whether it was in a position to enact it, due to unwillingness, inability, or for whatever reason. Therefore, it has the right to choose to deal with a certain case before its national courts, or to refer the case to the Inter-Allied court.

According to the practice of the international criminal tribunals, the IMTs' trials reflected the relationship between the IMTs and national courts, because IMTs were created only to try the major war criminals, whose offences have no particular geographical location. In contrast, the regarding jurisprudence of the primacy regimes of the two United Nations *ad hoc* tribunals, the Prosecutor sometimes chose a different practice by creating the relationship between the tribunal and national court, almost being complementarity rather than primacy. Subsequently, the principle of complementarity was recognized as a cornerstone of the Rome Statute, which defines the relationship between the national courts and the ICC, which is based on the 'unwilling/unable paradigm.' Later, the complementarity has been used to catalyse the building of national capacity.

The principle of complementarity is recognized as a key mechanism of the entire ICC system, as laid down in the preamble and article 1 of the Rome Statute. It stipulates that the Court shall be complementary to the national criminal jurisdictions. However, the Rome Statute does not explicitly use or define the term 'complementarity.' The idea of complementarity actually represents the issues of admissibility, which relate to whether or not a case can come before the Court.

The Rome Statute explicitly frames the substantive and procedural aspects of the principle of complementarity. The substance of the principle appears as a complementarity test for admissibility of the case before the ICC, under article 17. This sets up the proceedings requirement, and the unwillingness or inability requirement. The proceedings requirement concerns the existence of national proceedings, relating to the same case as that of the ICC, while the unwillingness or inability requirement concerns the willingness of the state concerned, and the inability of a national judicial system, pursuant to article 17 (2) and (3).

While setting out the procedural aspects, the Rome Statute sketches the trigger mechanism and the admissibility proceedings, (preliminary examination, ruling regarding admissibility and challenges to the admissibility of a case), to which the complementarity test will be applied at a different stage of the proceedings. In particular, this will be done at the preliminary examination stage and the admissibility stage.

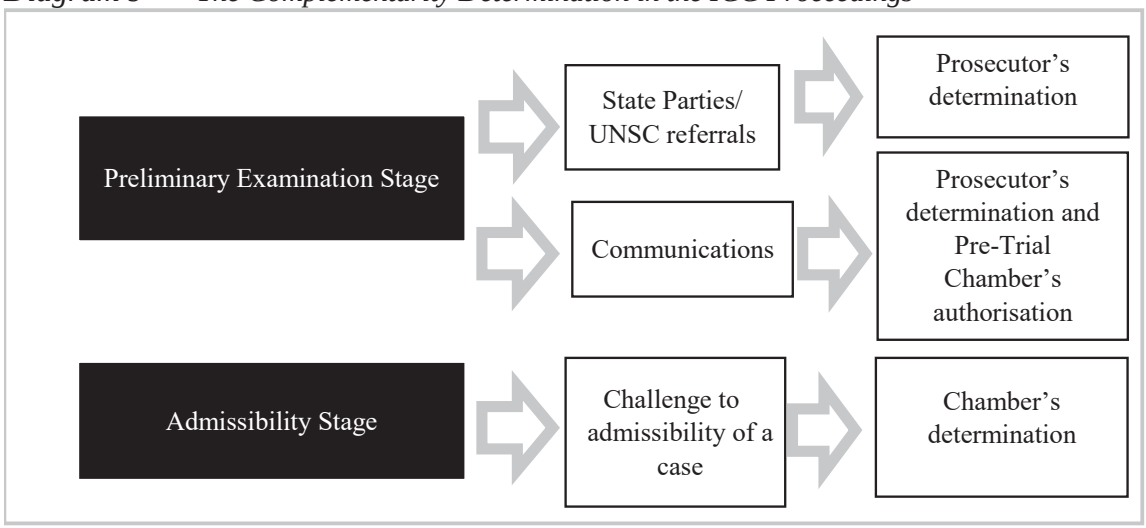
As regarding which particular feature will be applied may be meaningful for the application of the principle of complementarity, the co-operation of the ICC and the state parties would be necessary for the successful operation of such a principle. Accordingly, the Rome Statute begins with the general obligation binding state parties to cooperate fully with the Court, and ensure that national law permits all specified forms of co-operation. In reality, the effectiveness of the application of this principle requires not only the criminalization of international crimes, but also the ability to investigate them effectively. An essential element for effective investigation and successful prosecution of those committing international crimes is inter-state cooperation.

In theory, the principle of complementarity seems to be a key feature for the operation of the ICC in order to put an end to impunity and bring the perpetrators to

justice, while, at the same time, respecting the sovereignty of the state. However, it contains some gaps, with regard to the application of this principle, both in order to its definition and context. Hence, it is worth mentioning that these gaps may be filled by the dynamic application of the principle of complementarity, throughout the jurisprudence of the ICC.

In practice, the complementarity test will be applied to determine the complementarity test, under the admissibility assessment. This will happen both at the preliminary examination stage and the admissibility stage of the ICC proceedings, which is the framework for the discussion in the following two chapters (Chapter III and Chapter IV), as illustrated in Diagram 9.

Diagram 9 *The Complementarity Determination in the ICC Proceedings*

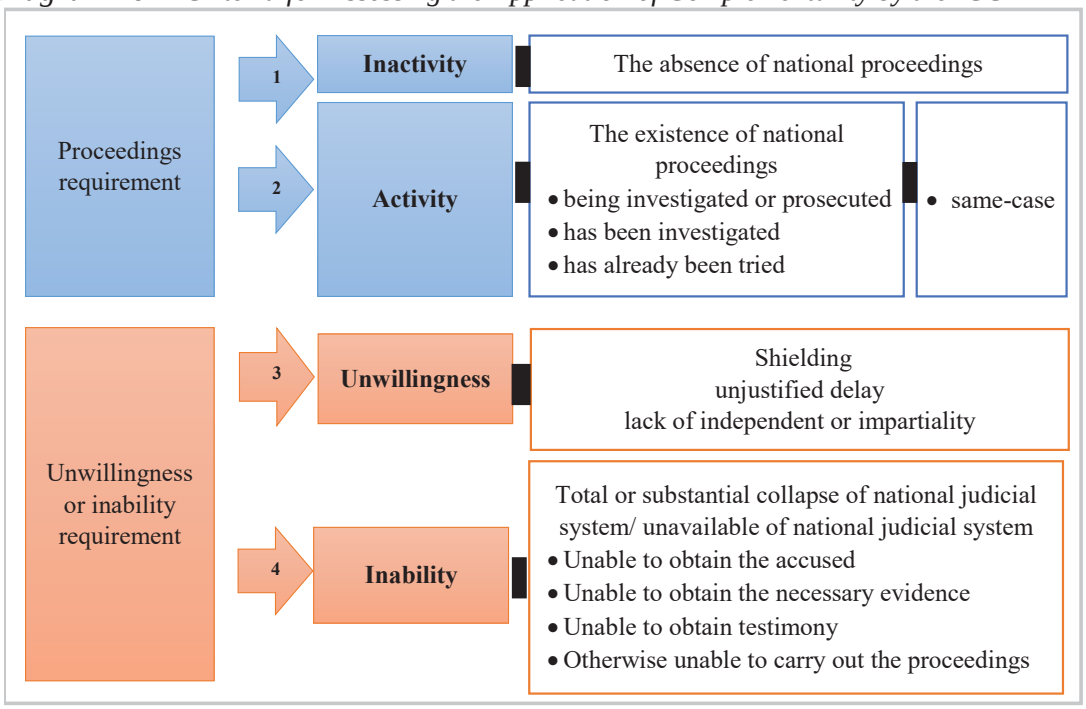


Source: Author's own diagram, derived from the Rome Statute.

This diagram helps us to analyse the application of the complementarity test at both stages of the proceedings. As mentioned above, the complementarity test contains two requirements: the proceedings requirement; and the unwillingness or inability requirement. Therefore, the analysis of the fulfilment of these two requirements, must include all criteria, namely: (1) inactivity (the absence of national proceedings); (2) activity (the existence of national proceedings) (3) unwillingness; and (4) inability. All these must be taken into consideration to identify the dynamic

application of the principle of complementarity in both the preliminary examination stage, and the admissibility stage, as detailed in Diagram 10.

Diagram 10 *Criteria for Assessing the Application of Complementarity by the ICC*



Source: Author's own diagram.

CHAPTER III COMPLEMENTARITY UNDER THE ICC APPLICATION AT THE PRELIMINARY EXAMINATION STAGE

3.1 INTRODUCTION

In the previous chapter (Chapter II), the dissertation analysed the concept of the principle of complementarity under the Rome Statute, which was at the heart of the entire ICC system. According to the Rome Statute, the principle of complementarity appeared as the test for the admissibility, complementarity test. In addition, the ICC determined the complementarity test in different stages of the ICC proceedings. According to the approach employed, this dissertation divides the determination of the complementarity test by the Court into two different stages: the preliminary examination stage and the admissibility stage.

This chapter intends to analyse the application of the complementarity test as the admissibility criteria, pursuant to article 17, at the preliminary examination stage. The conclusions of the analysis will reflect the dynamic of the application, and some practical obstacles of the complementarity determination at this stage of the proceedings of the ICC.

In this regard, the preliminary examination stage starts when the ICC has been triggered by one of three channels: state parties' referrals, Security Council referrals, or the Prosecutor, on the basis of communications. Hence, the preliminary proceedings aim at deciding whether to initiate an investigation, after having analysed the information gathered or the information was made available in the course of a referral, by a state or the Security Council.

As mentioned earlier, situations are the object of preliminary examinations.[1] Articles 15, 18 and 53 of the Rome Statute suggest that the Prosecutor cannot investigate a case, without previously opening the investigation of the relevant

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[1] *Situation in the Democratic Republic of the Congo,* Decision on Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, Pre-Trial Chamber I, 17 January 2006, ICC-01/04-101-tEN-Corr (*DRC* Participation Decision), para. 65.

situation, in the context of which the case has taken place.[2] In fact, before the Prosecutor has opened an investigation, she does not know with any certainty what evidence she will gather, against which persons and for what conduct.[3]

As in previous discussions, if the initiation of an investigation into a situation precedes the subsequent opening of one or more cases, relating to such a situation, the criteria for the admissibility, including the complementarity test, under article 17(1)(a) to (c), and admissibility analysis, required by article 53(1)(b) and rule 48 will be applied at the phase of preliminary examinations.[4] Indeed, admissibility assessment could be conducted at the time when there is no case, and when the analysis focuses on whether an investigation into a situation must be initiated.[5]

As for the structure, apart from this introductory part (section 3.1), this chapter consists of another five subchapters. The second subchapter intends to analyse the application of complementarity test in the trigger mechanism (section 3.2). At this stage, the states and Security Council will apply the principle of complementarity through their referrals of the situations to the Prosecutor (sections 3.2.1 – 3.2.3). The third subchapter inspects the practice of the ICC, in order to apply the complementarity test at the preliminary examination stage where the Prosecutor will apply the complementarity test, for assessing whether there is a 'reasonable basis to proceed' with an investigation into a situation (section 3.3). In addition, in case of a *proprio motu* investigation, the Pre-Trial Chamber will also apply the complementarity test, in order to the authorization for the initiation of an investigation into the situation, as requested by the Prosecutor. Under this subchapter, the criteria set forth in the previous subchapter (inactivity, activity, unwillingness, and inability) will be applied, to identify the application of complementarity through the situations (sections 3.3.1 – 3.3.4).

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2 Héctor Olásolo and Enrique Carnero-Rojo, "The Application of the Principle of Complementarity to the Decision of Where to Open an Investigation: The Admissibility of 'Situation'," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Cambridge University Press, 2011), 402.

3 *DRC* Participation Decision, para. 65.

4 Olásolo and Carnero-Rojo, "The Application of the Principle of Complementarity to the Decision of Where to Open an Investigation: The Admissibility of 'Situation'," 402.

5 ibid.

The fourth subchapter analyses the application of complementarity test at the preliminary examination stage, which faced several obstacles, and the practice reflects the dynamic application of the principle of complementarity at this stage (section 3.4). this subchapter analyses the practice of the ICC, regarding complementarity determination at the preliminary examinations phase, the question of a reasonable basis to proceed with an investigation, and the application of a potential case at the preliminary examination stage (sections 3.4.1 – 3.4.2)

This chapter ends with chapter conclusions (section 3.5).

3.2 COMPLEMENTARITY APPLICATION THROUGH THE TRIGGERING PROCEDURE

From the procedural perspective, the trigger mechanism marks the starting point of the proceedings of the ICC. According to the Rome Statute, the exercise of jurisdiction of the ICC over the situation, may be triggered by a state party, the Security Council, or the communications. The complementarity test has been applied by the state parties and the Security Council with the aim of deciding to refer the situation to the Prosecutor.

At this phase of the proceedings, the Rome Statute provides that information concerning the crimes under the jurisdiction of the Court, appear to have been committed. There is nothing concerning the application of the complementarity test under article 17, in this mechanism. In the practice of state parties' referrals and the Security Council referrals, the complementarity principle has been applied, in making their decisions.

3.2.1 Outline of the Triggering Procedure in the ICC's Operation

According to the Rome Statute, any state party may request the Prosecutor to open an investigation, by referring to the situation when the crimes were committed in its territory (territorial jurisdiction) or a person accused of the crime is a national of such a state (personal jurisdiction). Also, such a state may request the Prosecutor to investigate the situation, for determining whether one or more specific persons should be charged with the commission of crimes, under the jurisdiction of the Court. Based on the practices of the ICC, five situations have arisen, in relation to which the Prosecutor had opened an investigation originating from the DRC, Uganda, CAR on

two occasions (CAR and CAR II); and Mali. Furthermore, the OTP has conducted and closed the preliminary examinations of another two state parties referral of *Situations in Gabon,* and *Situation in Registered Vessels of Comoros, Greece and Cambodia.* However, two non-state parties' situations of Darfur (Sudan) and Libya have been referred to the Prosecutor by the Security Councils.

A number of situations were triggered by communications with other natural and legal persons, which the Prosecutor on his/her motion own initiative, may initiate an investigation on the basis of the communications. The Prosecutor cannot initiate investigations with respect to non-state parties, unless the matter involves nationals of state parties allegedly involved in committing Rome Statute crimes, on the territory of the non-state party in question. The Prosecutor may open an investigation on her own initiative, after the authorization of the Pre-Trial Chamber. According to the practice of the ICC, there have been four situations, in which the Pre-Trial Chambers was authorized to open investigations, into the situations in *Kenya, Côte d'Ivoire, Georgia, and Burundi*. Moreover, there are another 10 situations in *Colombia, Guinea, Nigeria, Iraq/UK, Ukraine, Palestine, Afghanistan, the Philippines, Venezuela, and Bangladesh/Myan*mar, in which the OTP has been conducting preliminary examinations for the Prosecution. The Prosecutor has also conducted preliminary examinations triggered by the communications, and decided not to proceed with an investigation of situations in *Venezuela, Honduras,* and the *Republic of Korea.* The situations are under the trigger mechanism of the ICC.

The complementarity principle has been applied in the trigger mechanism. In particular, the referrals of state parties and the Security Council will be discussed, in detail, in the following sessions.

3.2.2 Complementarity in relation to the State Parties Referrals

3.2.2.1 The Auto Referrals of State Parties

The five situations, in relation to which the Prosecutor had opened an investigation, originated from state parties, namely the DRC,[6] Uganda,[7] CAR,[8] and Mali[9], and all

6 Letter of Joseph Kabila, dated 3 March 2004, ICC-01/04-01/06-39-AnxB1.
7 Letter of Referral dated 16 December 2003 from the Government of Uganda.

referrals were self-referrals. This meant that state parties referred the situation, in which the crimes under the jurisdiction of the ICC had been committed, in their own territory.

These self-referrals start from the opposite assumption, namely that any state making such a referral wants the ICC to carry out proceedings. This concerns matters which that State considers to be detrimental to its interests, if adjudicated on its own judicial system. Instead of demonstrating that they are willing and able to investigate and prosecute core crimes, they seek to justify their self-referral, by claiming their inability, and they are unwilling to exercise jurisdiction themselves. However, this unwillingness is compatible with the intent to bring the person concerned to justice, albeit before the ICC rather than their own courts. This apparent incompatibility between complementarity and self-referrals, demonstrates the need to analyse whether, and to what extent, complementarity in general, and its procedural framework, in particular, applies in the context of self-referrals.

The DRC has been a State Party to the Rome Statute since 1 July 2002. On 3 March 2004, President Joseph Kabila of Congo requested the Prosecutor to investigate the situation, in which crimes under the jurisdiction of the ICC had been taking place in its territory since 1 July 2002. The letter mentioned, applied the principle of complementarity:

> [t]he relevant authorities are *unable* to carry out investigations into the above-mentioned crimes or to conduct the necessary prosecutions without the participation of the International Criminal Court. However, the authorities of my country are willing to cooperate with the Court in any course of action it undertakes pursuant to this request. [10] (*emphasis* added)

Due to the specific circumstances in which Congo finds itself, there is an inability to carry out the investigation or prosecution at the national level. Regarding this, it is clear that the request of the Congolese government demonstrates the inability of

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8 ICC Press Release, '*Prosecutor receives referral concerning Central African Republic'*, The Hague, 7 January 2005, ICC-OTP-20050107-86-En; Letter of Referral dated 3 May 2014 from the Government of Central African Republic.

9 Letter of Referral dated 13 July 2012 from the Government of Mali.

10 Letter of Joseph Kabila, dated 3 March 2004, ICC-01/04-01/06-39-AnxB1.

Congo, to act within the formal framework of the principle of complementarity, and this can be assumed to be the waiver of complementarity.

According to the referral letter of the DRC, the Congolese government not only identified its inability to carry out investigations into crimes committed in its territory, and referred the situation to the ICC, but it also expressed the willingness of the Congolese authorities to cooperate with the Court in any further action.

In this regard, each State Party to the Rome Statute is normally obligated to fully cooperate with the ICC, pursuant to Part 9 of the Rome Statute. This willingness of the DRC reaffirmed the future co-operation between the Court and the DRC, guaranteeing that the requested information of the Court will be communicated by national authorities of the DRC, including the information for the evaluation of the complementarity test, under the process of the admissibility of the situation assessment of the Prosecutor.

Regarding the Ugandan referral,[11] the first referral of a situation by a State Party, the Ugandan President referred the situation, concerning the crimes committed by the organized armed group Lord's Resistance Army (LRA) in Northern Uganda, to the Prosecutor.

In this situation, the Prosecutor reportedly expressed his willingness to investigate war crimes, and to try by the ICC.[12]

The statement of the ICC Prosecutor illustrates that:

> [i]t may assume that "[w]here the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide the Office with all the co-operation within the country that it is required to give under the Statute" and that "the Prosecutor can be confident that the national authorities will assist the investigation".[13]

In this regard, it can be concluded that the co-operation between the national authorities of the State in question, and the ICC to investigate the situation, is the

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11 Letter of Referral dated 16 December 2003 from the Government of Uganda.

12 Luis Moreno-Ocampo, "Remarks by ICC Prosecutor Luis Moreno-Ocampo at the 27th Meeting of the Committee of Legal Advisers on Public International Law (CADHI), Held in Strasburg, on 18-19 March 2004," http://www.iccnow.org/documents/ICCProsecutorCADHI18Mar04.pdf.

13 Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications.

prior concern of the Prosecutor. In order to conduct a preliminary examination and further investigation, the co-operation and assistance from national authorities of the State in question, is a key feature for the effectiveness of the proceedings.

It is exactly in scenarios of instrumentalization, by the self-referring States, where the co-operation may be limited to those aspects of the investigation, and prosecution before the ICC, which advances the political goals of the self-referring State.[14]

One can expect the DRC, Uganda, Mali, and CAR to do everything in their power to provide the Court with the information necessary, to achieve its objectives. However, this will not necessarily be the case, in relation to information, which may be harmful to them. A good example of this is when investigations target political allies or governmental officials.[15]

One of the striking features of the application of the principle of complementarity of the ICC, is that the state parties refer situations that occur on their territory to the ICC, known as "auto-referral." According to this practice, the most fundamental question facing a complementarity system, is whether complementarity applies at all in the context of auto-referrals, or whether cases of auto-referrals would render cases admissible, without the need to establish that the referring State is either wholly inactive or unwilling and unable within the meaning of article 17(2) or (3).[16] This understanding appears to underline the conceptualization of auto-referrals, as 'waivers of complementarity.'[17]

The idea the auto-referral might raise some doubts, about accepting the theory of waiver, which lies within the wording of the preamble to the Statute. According to paragraph 4 of the preamble of the Rome Statute, it affirms that crimes within the

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14 Jann K. Kleffner, "Auto-Referrals and the Complementary Nature of the ICC," in *The Emerging Practice of the International Criminal Court*, ed. Carsten Stahn and Göran Sluiter, Legal Aspects of International Organization (Leiden: Martinus Nijhoff Publishers, 2009), 44.

15 ibid.

16 ibid., 42.

17 See Mohamed M. Zeidy, "The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC," *International Criminal Law Review* 5 (2005): 100-10.; Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 629-30.; Claus Kreß, "'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy," *Journal of International Criminal Justice* 2 (2004): 944-48.

subject matter jurisdiction of the Court, 'must not go unpunished', and that their 'effective prosecution must be ensured, by taking measures at the national level.'[18] Hence, it is the duty of every State to exercise its criminal jurisdiction, over those responsible for international crimes.'[19]

According to this, it is clear the preamble imposes a positive obligation, not only to ensure 'effective prosecution', but also to ensure that it takes place at national level. And, in order to ensure effective prosecution at national level, 'measures' 'must' be taken.[20] The requirement that 'measures' must be taken, or 'effective prosecution must be ensured by taking measures,' implies that the State is obliged to take positive action. In other words, in the case of a waiver, initially, the State in question would be acting negatively, by deferring to the Court, without even attempting to take positive action towards repression. Furthermore, paragraph 6 of the Rome Statute comes into play to affirm this meaning, by considering that the States' action at the national level is a 'duty.' Thus, the question remains – how can a State waive its duty?

The practice of auto-referrals has been greatly disputed among scholars and practitioners, but according to the Chambers in the *Lubanga* case, and the *Katanga and Chui* case do not face legality concerns.[21] The question of whether the practice of auto-referral of state may be inconsistent with the concept of principle of complementarity, under the Rome Statute, was confirmed in the *Lubanga* case, that:

> [I]n the Chamber's view, when the President of the DRC sent the letter of referral to the Office of the Prosecutor on 3 March 2004, it appears that the DRC was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002. In the Chamber's view this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them.[22]

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18 Rome Statute, preamble, para. 4.

19 Ibid., preamble, para. 6.

20 Zeidy, "The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC," 100.

21 Klamberg, *Commentary on the Law of the International Criminal Court*, 179.

22 *Prosecutor v Thomas Lubanga Dyilo,* Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr.

In the same approach as the *Lubanga* case, the Trial Chamber II in the *Katanga and Chui* case identified the issue of self-referral in the complementarity regime, that:

> [A] State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case. The reasons for such a decision may be because the State considers itself unable to hold a fair and expeditious trial or because it considers that circumstances are not conducive to conducting effective investigations or holding a fair trial.[23]

With regard to the application of the principle of complementarity, an auto-referral has to be treated no differently than other State referrals.[24] At the stage of deciding whether or not to initiate an investigation, in accordance with article 53(1) of the Rome Statute, the Prosecutor's role is to consider whether the case is or would be admissible, and is mandatory rather than discretionary.

At present, state parties referred situations before the ICC are all auto-referrals. According to the jurisprudence of the Court, in the *Situation in the DRC,* the auto-referrals are consistent with the purpose of the complementarity regime. However, the auto-referrals start with the opposite point of view of the principle of complementarity, by identifying its unwillingness or inability to carry out the investigation or prosecution, instead of its willingness or ability. Nevertheless, the intervention of the Court in those situations does not replace national criminal jurisdictions, but it is complementary to those state parties.

Regarding this, similar to others, the complementarity test will be applied, in order to assess the auto-referrals of state parties.

3.2.2.2 Dynamic Application regarding the Auto Referrals

As one of the unanswered questions, with regard to the principle of complementarity under the Rome Statute, the practice of auto-referrals or self-referrals raised some

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Thomas Lubanga Dyilo, ICC Pre-Trial Chamber I, 24 February 2006, ICC-01/04-01/06-8-Corr (*Lubanga* Arrest Warrant Decision), para. 35.

23 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui,* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC Trial Chamber II, 16 June 2009, ICC-01/04-01/07-1213-tENG, paras. 79-80.

24 Kleffner, "Auto-Referrals and the Complementary Nature of the ICC," 48.

doubts. These were whether cases of auto-referrals render cases admissible, without the need to assess the proceeding requirement, and the unwillingness or inability requirement under the test of complementarity. Furthermore, this would be inconsistent with the purpose of the principle of complementarity.

In response to such unanswered questions, in the *Lubanga* case, the Pre-Trial Chamber I explained that the DRC stated in its letter of self-referral, that it was unable to undertake the investigation and prosecution of the crimes committed in the territory of DRC. Thus, the self-referral of the DRC is consistent with the purpose of the principle of complementarity, because, in this case, the ICC did not replace Congolese domestic courts, but was complementary to them.[25]

A similar approach has been employed in the *Katanga and Chui* case. This is when, in order to identify that a State considers itself unable to hold a fair and expeditious trial, the State may refer a situation concerning its territory to the Court. Therefore, this does not appear as a breach of the principle of complementarity. [26]

In this regard, in order to interpret auto-referrals, the ICC employed a dynamic approach by extending the origin of the principle of complementarity, with the contemporary issue concerning the self-referrals of state parties. The application reflects the procedural aspect of complementarity. This is when the Court focuses of the ultimate purpose of the principle, that the ICC shall supplement domestic courts and play its role as a court of last resort, in order to fill the gap, caused by the failure of the national judicial system.

3.2.3 Complementarity relating to the Security Council Referrals

As mentioned earlier, according to the Rome Statute, the Security Council may refer the situation to the ICC Prosecutor and, in practice, the Security Council referred the *Situation in Darfur, Sudan* and the *Situation in Libya* to the Prosecutor in 2005[27] and 2011,[28] respectively.

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25 *Lubanga* Warrant of Arrest Decision, para. 35.

26 *Katanga* Reason for Oral Decision, paras. 78-79.

27 UNSC Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on 31 March 2005, UN Doc S/RES/1593 (2005)

28 UNSC Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting, on 26 February 2011, UN Doc S/RES/1970 (2011)

3.2.3.1 Security Council Referral of the Situation in Darfur, Sudan

Referral to the ICC by the Security Council of the situation in Darfur, in Western Sudan, was proposed by the International Commission of Inquiry on Darfur, to the Secretary-General in February 2005. The Security Council resolution 1593(2005) determined that the situation in Sudan continues to constitute a threat to international peace and security. Then it decided to refer the situation to the ICC. Based on the Commission's view, it was said that resorting to the ICC would have, at least, six major merits:

> [F]irst, the Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under article 13 (b) of the Statute. The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute, to peace and stability in Darfur by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, *as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus is difficult or even impossible,* resort to the Court, the only truly international institution of criminal justice, would ensure that justice is done. The fact that trial proceedings would be conducted in The Hague, the seat of the Court far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the Court, backed up by that of the Security Council, might compel both leading personalities in the Sudanese Government and the heads of rebel groups to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the organ best suited for ensuring a veritably fair trial of those indicted by the Court's Prosecutor. Fifth, the Court could be activated immediately, without any delay (which would be the case if ad hoc tribunals or so-called mixed or internationalized courts were to be established). Sixth, the institution of criminal proceedings before the Court, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community. [29] (*emphasis* added)

With regard to the Report of the Commission, it claimed the Sudanese justice system was unable and unwilling to address the situation in Darfur, that:

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[29] Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Geneva, 1 February 2005, UN Doc S/2005/60, para. 572.

> Considering the nature of the crimes committed in Darfur and the shortcomings of the Sudanese criminal justice system, which have led to effective impunity for the alleged perpetrators, the Commission is of the opinion that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders. [30]

In addition, it stated that:

> *The Sudanese justice system is unable and unwilling to address the situation in Darfur*. That system has been significantly weakened during the past decade. Restrictive laws granting broad powers to the executive have particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in the Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of such 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 feared reprisals if they resorted to the national justice system. [31] (*emphasis* added)

According to the considerations of the Security Council, regarding the referral of the situation in Darfur to the ICC, the complementarity test was applied to find out the inability and unwillingness of the Sudanese justice system. Because of this, the difficulties, and impossibility of the prosecution at the national level, which have led to impunity for the perpetrators, fulfilled the criteria for determining those unable and unwilling to try the offenders. In this regard, in March 2005 after the discussions, the Security Council referred the *Situation in Darfur* to the Prosecutor.

In addition, with regard to the referral of the situation by the Security Council, the co-operation between the UN and the ICC was framed by article 17 of the Relationship Agreement, between the ICC and the UN.[32] When the ICC Presidency

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30 Ibid. para. 568.

31 Ibid. para. 586.

32 Agreement concerning the cooperation between the ICC and the UN, article 17 provides that:

Cooperation between the Security Council of the United Nations and the Court

1. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with

assigned the *Situation in Darfur, Sudan* to the Pre-Trial Chamber I, the provisions of article 17 of the Agreement concerning the co-operation between the ICC and the UN, was noted for further action of the situation.[33]

In the case of the Security Council referrals, the referred situation may be a situation, in which crimes were committed, in the territory of any non-Party to the Rome Statute. Hence, in order to carry out an investigation into a situation, referred by the Security Council, an *ad hoc* arrangement, or an agreement regarding the co-operation between a non-state party and the Court has to be achieved. When there is a failure to comply with obligations, deriving from such *ad hoc* instruments, the Court shall inform the Security Council. Similarly, in the case of a state party, the failure to comply with a request to cooperate by the Court, the Court also shall inform the Security Council.

In this regard, the co-operation between the Court and a state in question, has been highlighted as an important feature, determining whether to determine to proceed with an investigation by the Prosecutor, at this stage of the proceedings.

documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.

2. When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.
3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.

[33] *Situation in Darfur, Sudan,* Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I, ICC Presidency, 21 April 2005, ICC-02/05-1-Corr.; UNSC Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting, on 26 February 2011, UN Doc S/RES/1970 (2011).

3.2.3.2 Security Council Referral of the Situation in Libya

With regard to the *Situation in Libya,* the Libyan government is wilfully killing civilian protestors and probably committing other serious crimes, in its effort to maintain power. In response to these crimes, the UN has taken several appropriate steps.

The Human Rights Council (HRC) convened a special session on 25 February 2011, to look into the "Situation of human rights in the Libyan Arab Jamahiriya", and adopted a resolution A/HRC/RES/S-15/1, which strongly condemned the recent gross and systematic human rights violations committed in Libya. This included indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators. Some of these acts may also amount to crimes against humanity.[34]

The General Assembly, which had overwhelmingly elected Libya to a seat on the Human Rights Council in 2010, adopted a resolution to suspend Libya's rights of membership in the council.

Importantly, the Security Council also passed a resolution 1970 (2011), which condemned the violence and use of force against civilians, and deplored the gross and systematic violation of human rights. This included the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population, made from the highest level of the Libyan government. It deplored the gross and systematic violation of human rights, committed by the Libyan government, and imposed four binding measures, under article 41 of the UN Charter: (1) the referral of the *situation in Libya* to the OTP, for its consideration of an investigation of potential crimes against humanity; (2) the imposition of an arms embargo; (3) the imposition of the number of travel bans and asset freezes on certain individuals; and (4) the creation of the sanctions committee.[35]

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34 UNSC Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting, on 26 February 2011, UN Doc S/RES/1970 (2011)

35 Ibid

The referral of the *Situation in Libya*; this mainly focuses on the seriousness of the crimes, which have been committed in the territory. However, the resolution does not touch upon the issue of complementarity.

Similarly, according to the decision of the ICC Presidency, assigning the situation to the Pre-Trial Chamber I, the Relationship Agreement between the ICC and the UN, concerning the co-operation, also mentioned further co-operation between the ICC and a non-state party to the Rome Statute.[36]

3.3 Complementarity Determination at the Preliminary Examination Stage

Regarding preliminary proceedings at this stage, the Prosecutor conducts preliminary examinations, to determine whether a situation meets the legal criteria established by the Rome Statute, to warrant a full investigation. Once a situation is identified, the factors set out in article 53(1) (a)-(c) of the Rome Statute, establishing the legal framework for a preliminary examination, will be considered, to determine whether there is a 'reasonable basis to proceed' with an investigation into the situation. Thus, the Prosecutor shall consider jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.[37]

According to the complementarity test, national jurisdictions are meant to be the primary safeguards against impunity, responsible for investigating and prosecuting crimes under the Rome Statute. In this regard, a key goal of the preliminary examinations is to encourage governments to investigate and prosecute alleged grave crimes, committed on their territories or by their citizens. Therefore, the Prosecutor is responsible for determining, whether there is a reasonable basis to open a full investigation, considering the criteria established by the Rome Statute.

In practice, the stage of preliminary examination, consists of four phases of the proceedings: initial assessment; jurisdiction; admissibility; and interests of justice.

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36 *Situation in the Libyan Arab Jamahiriya,* Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I, ICC Presidency, 4 March 2011, ICC-01/11-1; UNSC Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting, on 26 February 2011, UN Doc S/RES/1970 (2011)

37 Office of the Prosecutor (OTP), Policy Paper on Preliminary Examinations, November 2013, para. 42; in this policy paper includes double jeopardy as a test under complementarity umbrella.

Phase 1 consists of an initial assessment of all information on alleged crimes, received under article 15 (communications). [38] In this phase, the OTP will start a preliminary investigation of a situation, that is not manifestly outside ICC jurisdiction. To perform this duty, the OTP collects and verifies the seriousness of all relevant information, needed to determine if there is a reasonable basis to proceed. This is coupled with a full investigation into alleged grave crimes, committed by individuals in a given state. The information gathered can include forensic evidence, satellite images, witness testimonies, government documents and orders, cell-phone interceptions, computer and email records, etc. The information should cover all the facts that are relevant to the assessment of criminal responsibility.

Phase 2 represents the formal commencement of a preliminary examination of a given situation, focussing on whether the preconditions for the exercise of jurisdiction under article 12 are satisfied, and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court.[39]

Phase 3 focuses on the admissibility of potential cases, in terms of complementarity and gravity, pursuant to article 17.[40] The complementarity analysis looks into whether relevant and genuine national proceedings already exist, in relation to cases already being considered for ICC prosecution. The ICC will only step in, if the state in question is not investigating or prosecuting those suspected of having committed atrocities. These investigations and prosecutions also have to be genuine. The OTP will specifically look for any investigative efforts, to find those most responsible for crimes under the Court's jurisdiction.

Phase 4 examines the interests of justice. In this phase, the Court will assess if there are reasons to believe that an investigation would not serve the interests of justice, taking into account the gravity of the crimes, and the interests of the victims. It is a balancing test, which might produce a reason not to proceed, even when jurisdiction and admissibility requirements are satisfied. Before deciding on whether to initiate a full investigation, the OTP must ensure that the states concerned and

38 Ibid., para. 78.
39 Ibid., para. 80.
40 Ibid., para. 82.

parties have all had an opportunity to provide information that they consider relevant. Once the OTP is convinced, that all criteria established by the Rome Statute have been fulfilled, it has a legal duty to open an investigation.

3.3.1 The Application of the Complementarity Test at the Preliminary Examination Stage

As mentioned earlier, apart from information available to the Prosecutor, the factors for the determination of the Prosecutor, under article 53(1), consist of both complementarity and gravity.[41]

In this regard, it follows the provisions of the Rome Statute, that the test of admissibility applies to different stages, starting with a 'situation' up to a concrete 'case.' The Pre-Trial Chamber II in the *Situation in Kenya,* observed the test of admissibility, in article 53(1)(b), that:

> [t]he opening clause of article 17 of the Statute also states that the "Court shall determine that a case is inadmissible where [...]" certain conditions have been met. Thus, according to a textual interpretation, admissibility should be assessed against the backdrop of a "case". However, the Chamber wishes to underline that the Statute is drafted in a manner which tends to solve questions related to admissibility at different stages of the proceedings up until trial. These stages begin with a "situation" and end with a concrete "case", where one or more suspects have been identified for the purpose of prosecution.[42]

While the wording of article 53(1)(b) suggests that the admissibility assessment under this subparagraph (b), relates to admissibility assessment of 'cases' under article 17, in any of these instances, the Prosecutor and the Pre-Trial Chamber operate within the parameters of an entire "situation", rather than in relation to a specific "case". The Pre-Trial Chamber II concluded that:

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41 Ibid., para. 52; *Situation in Côte d'Ivoire,* "Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", ICC Pre-Trial Chamber III, 15 November 2011, ICC-02/11-14-Corr, (*Côte d'Ivoire* Authorization Decision) paras. 192-206; *Situation in the Republic of Kenya*, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC Pre-Trial Chamber II, 31 March 2010, ICC-01/09-19-Corr (*Kenya* Authorization Decision), para. 40.

42 *Kenya* Authorization Decision, para. 41.

> The Chamber is therefore of the opinion that article 53(l)(b) of the Statute must be construed in its context, and accordingly, an assessment of admissibility during the article 53(1) stage should in principle be related to a "situation (admissibility of a situation). In this context, the Chamber notes that the use of the word "case" instead of "situation" in the text of article 53(l)(b) of the Statute could be explained as follows.[43]

Therefore, according to article 53(1)(b) of the Rome Statute, the Court has to apply the admissibility of a case under article 17, which is the criteria for the admissibility stage, throughout the preliminary examination stage. In the *Situation of Kenya,* the Pre-Trial Chamber II applied the admissibility of a case under article 17 within one or more potential cases, in the context of "situation", and echoed that:

> [t]he parameters of a potential case have been defined by the Chamber as comprising two main elements: (i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). Accordingly, the Chamber is required to review whether the information provided by the Prosecutor reveals that the Republic of Kenya or any third State is conducting or has conducted national proceedings in relation to these elements which are likely to constitute the Court's future case(s). If, upon review of the available information, the finding is in the negative, then the case would be admissible, provided that the gravity threshold under article 17(l)(d) of the Statute is met.[44]

In this regard, the Pre-Trial Chamber II employed a dynamic approach for identifying the two main elements of a potential case for the admissibility determination. The first element is the groups of persons involved, who are likely to be the object of an investigation for the purpose of shaping the future cases. And, the second element is the crimes within the jurisdiction of the Court, allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping future cases. In practice, the Chamber must review, whether the information provided by the Prosecutor, reveals that such State or other third state is conducting, or has conducted, national proceedings, concerning these elements which are likely to

43 Ibid., para. 45.
44 Ibid., paras. 183.

constitute the Court's future case(s). To this, Pre-Trial Chamber II in the *Situation in Kenya* stated that:

> [t]he Prosecutor initially submitted that, despite early indications of a desire by the Kenyan authorities to establish a special tribunal charged with conducting national proceedings concerning the post-election violence, a bill establishing such a tribunal has not been approved by the Kenyan Parliament to date, such that at present there is no domestic prosecution for the alleged crimes against humanity, nor is there any prospect of such prosecution. […] However, since there is a lack of pending national proceedings against "those bearing the greatest responsibility for the crimes against humanity allegedly committed", the Prosecutor submitted the possible case(s) to arise from his investigation into the situation "would be currently admissible"[45]

As for the second part of the admissibility assessment, it relates to gravity under article 17(l)(d) of the Statute. The Pre-Trial Chamber II, in the *Situation in Kenya*, stated that:

> [s]uch examination must be also conducted against the backdrop of a potential case within the context of a situation. This involves a generic examination of: (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation. In relation to the latter, the Chamber stated earlier that it is guided by factors such as the scale, nature, manner of commission, impact of crimes committed on victims and the existence of aggravating circumstances (i.e., qualitative dimension).[46]

According to the jurisprudence of the Pre-Trial Chamber II, the Chamber employed a broad approach, in assessing of admissibility at the preliminary examination stage of the *Situation in Kenya.* This could include quantitative and qualitative parameters, including factors such as (i) the scale of the alleged crimes (including geographic and temporal intensity), (ii) the nature of the unlawful behaviour, or of the crimes allegedly committed, (iii) the means employed for executing the crimes (manner of their commission) and (iv) the impact of the crimes and the harm caused to victims and their families.

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45 Ibid.
46 Ibid., paras. 188.

Subsequently, the same approach has been employed by the Pre-Trial Chamber III, in the *Situation in Côte d'Ivoire*; the Chamber observed that:

> [a]lthough Article 53(l)(b) of the Statute refers to the admissibility of a "case" under Article 17 of the Statute, the Chamber considers that at this early stage of the proceedings, given there is no case with identified suspects, a determination as regards admissibility involves consideration of one or more potential cases within the broader context of the "situation". The Chamber must conduct an initial admissibility examination in order to determine whether there is a "reasonable basis to proceed" with an investigation pursuant to Articles 15 and 53(l)(b) of the Statute and Rule 48 of the Rules.
>
> The Chamber considers that the concept of "potential cases" in the context of a situation, as identified by Pre-Trial Chamber II in the Situation of Kenya, involves two main elements: (i) the groups of individuals involved that are likely to be the focus of the investigation; and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation. [47]

Additionally, the complementarity determination at the preliminary examination stage is more general in nature, and relates to the overall conduct. In the *Situation in Kenya*, regarding to authorize a *proprio motu* investigation in Kenya, the Pre-Trial Chamber II concluded that there were no national investigations, regarding senior business and political leaders, regarding the serious criminal incidents which were likely to be the focus of the Prosecutor's investigation.[48] Similarly, in authorizing a *proprio motu* investigation in Côte d'Ivoire, the Pre-Trial Chamber III found that neither *Côte d'Ivoire,* nor any other state having jurisdiction, were conducting or had conducted national proceedings against individuals, or crimes, that are likely to constitute the Court's future case(s).[49]

3.3.2 The Role of the Prosecutor at the Preliminary Examinations Phase

At the preliminary examination stage, the OTP is responsible for determining whether there is a reasonable basis to proceed with an investigation into a situation, according to the criteria established by the Rome Statute, subject to appropriate judicial authorization. In determining this, the object and purpose of the principle of

47 *Côte d'Ivoire* Authorization Decision, paras. 192-206.
48 *Kenya* Authorization Decision, paras. 187
49 *Côte d'Ivoire* Authorization Decision, para. 206.

complementarity have to be taken into consideration. As reflected in the principle of complementarity, national jurisdictions have the primary responsibility to end impunity, for the crimes listed under the Rome Statute. However, in the absence of genuine national proceedings, the Prosecutor will seek to ensure that justice is delivered for crimes, within the jurisdiction of the Court.

Moreover, the OTP will conduct, based on its *proprio motu* powers under article 15 of the Statute, a preliminary examination of all situations that are not manifestly outside the jurisdiction of the Court. The goal is to collect all relevant information, necessary to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. If the OTP is satisfied that all the criteria, established by the Rome Statute for this purpose, are fulfilled, it has a legal duty to open an investigation into the situation.

In order to ensure the effective determination by the Prosecutor, in November 2013, the OTP delivered the Policy Paper on Preliminary Examinations, which is based on the Rome Statute, the ICC RPE, the Regulations of the Court (RoC), the Regulations of the Office of the Prosecutor, the Office's prosecutorial strategy and policy documents, and its experience over the first years of its activities. This Policy Paper describes the OTP's policy and practice, in the conduct of preliminary examinations, *i.e.*, how the Office applies the statutory criteria, to assess whether a situation warrants investigation.

According to the Policy Paper, in determining whether to open an investigation, article 53(1)(b) requires the OTP to consider whether the case is, or would be admissible, under article 17. However, as mentioned earlier, there is not yet a 'case' at this stage. Thus, the assessment of admissibility, which consists of the tests of complementarity and gravity, will take into account potential cases, that could be identified in the course of the preliminary examination. This would be based on the information available, and would probably arise from an investigation into the situation.

However, the determination on admissibility at this stage, is not a judgment or reflection on the national justice system as a whole. If an otherwise functioning

judiciary is not investigating or prosecuting the relevant case(s), the determining factor is the absence of relevant proceedings.[50]

3.3.3 Complementarity Determination in Practice at the Preliminary Examination Stage

After 17 years of the operation of the ICC, the OTP has conducted the preliminary examinations in a number of situations. This section aims at analysing the practice of the application of the principle of complementarity of the ICC of the situations, which have been initiated by the *proprio motu* power of the Prosecutor, namely: *Situation in Kenya; Situation in Côte d'Ivoire; Situation in Georgia, Situation in Burundi and Situation in Afghanistan*.

3.3.3.1 The Situation in Kenya

The situation in the Republic of Kenya has been under preliminary examination, since the violence erupted in the context of national elections, held on 27 December 2007. On 30 December 2007, the closely contested presidential elections in Kenya resulted in a declaration by the Electoral Commission of Kenya, that incumbent President Mwai Kibaki of the Party of National Unity (PNU) would be re-elected, in place of the main opposition candidate, Raila Odinga of the Orange Democratic Movement (ODM). This triggered a series of violent demonstrations and targeted attacks, in several locations within Kenya.[51]

3.3.3.1.1 The Prosecutor's Determination of the Complementarity Test

At the proceedings, the Prosecutor requested additional information from selected sources, for analysing the seriousness of the information received, namely: the Government of Kenya, the Kenya Human Rights Commission, the Kenya National

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50 OTP, Policy Paper on Preliminary Examinations, para. 46.

51 Human Rights Watch, "Ballots to Bullets Organized Political Violence and Kenya's Crisis of Governance", March 2008, https://www.hrw.org/sites/default/files/reports/kenya0308web.pdf, p. 4; International Crisis Group, "Kenya in Crisis",21 February 2008, https://d2071andvip0wj.cloudfront.net/137-kenya-in-crisis.pdf, p. 1.

Commission on Human Rights (KNCHR), and the opposition party, the Orange Democratic Movement (ODM).[52]

Based on the information received, the Prosecution has evaluated the information available, and has determined that the information received is reliable, and has concluded that it indicates that serious crimes were committed.[53] Concerning the complementarity test, the Prosecutor has decided, as follows:

- On 16 December 2008, the President and Prime Minister signed an agreement to establish a special tribunal, to conduct national proceedings on the post-election violence; however, the Kenyan Parliament did not approve the Bill. Therefore, there is no domestic prosecution for the crimes against humanity, allegedly committed in Kenya, nor is there any prospect that there will be.[54]
- There have been a limited number of proceedings for less serious offences, in connection with the crimes allegedly committed during the post-election violence in Kenya. However, most of the cases relating to minor offences such as malicious damage, theft, housebreaking, a bond to keep the peace, publishing the false rumours, and other criminal offences, such as possession of an offensive weapons, robbery with violence or assaulting a police officer.[55]
- Among the most prominent cases, the four accused of the so-called KIAMBAA case, charged with arson on the Kiambaa Church, in which 17 to 35 persons were burnt alive in Eldoret, were acquitted for lack of evidence, as a result of 'shoddy police investigations.'[56]
- There are no national investigations or proceedings pending against those bearing the greatest responsibility for the crimes against humanity, allegedly committed.[57]

52 *Situation in the Republic of Kenya,* Request for authorisation of an investigation pursuant to Article 15, ICC Pre-Trial Chamber II, 26 November 2009, ICC-01/09-3 (Kenya Authorisation Request), para 7.
53 Ibid., para. 23.
54 Ibid., para. 55.
55 Ibid., para. 54.
56 Ibid., para. 54.
57 Ibid., para. 55.

- The available information does not indicate the existence of national proceedings in relation to the post-election violence, in other States with jurisdiction.[58]

The Prosecutor evaluated the information and concluded that the situation would be admissible, and together with other criteria, the Prosecutor requested the authorization for opening the investigation into the *Situation in Kenya*.[59]

3.3.3.1.2 The Pre-Trial Chamber II's Application of the Complementarity Test

The Chamber reviewed whether the information provided by the Prosecutor reveals that Kenya, or any third State, is conducting or has conducted national proceedings with these elements, which are likely to constitute the Court's future case(s). Then the Chamber reviewed the available information, to assess the admissibility criteria: complementarity and gravity into the situation.

In this regard, the Chamber reviewed the available information and stated, as follows:

- The available information does not contravene the Prosecutor's conclusion that there is a lack of national proceedings in Kenya, or any third State for the main elements, which may shape the Court's potential case(s).[60]
- Several domestic investigations and prosecutions, concerning the post-election period, only related to minor offences. [61]
- The attempts to establish a special tribunal, to prosecute those who are responsible for the post-election violence, were frustrated. This serves as a further indication of inactivity on the part of the Kenyan authorities, to address the potential responsibility of those, who are likely to be the focus of the Court's investigation.[62]
- The available information shows some inadequacies or reluctance from the national authorities, to generally address the election violence, which, in any event, is not worth further scrutiny for the Court's assessment of admissibility.

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58 Ibid.
59 Ibid., para. 114.
60 *Kenya* Authorisation Decision, para 185.
61 Ibid.
62 Ibid.

This is, insofar, as the Chamber has already determined, that there is a lack of national investigations, in relation to the main elements, that may shape the Court's potential case(s).[63]

- The absence of national investigations, in relation to (i) the senior business and political leaders, associated with the ODM and PNU; and (ii) the crimes against humanity allegedly committed in the context of the most serious criminal incidents.

On 31 March 2010, the Pre-Trial Chamber II rendered its decision, authorizing the commencement of an investigation into the situation in Kenya, in relation to crimes against humanity, committed between 1 June 2005 and 26 November 2009.[64]

3.3.3.1.3 Complementarity Determination in the *Situation in Kenya*

According to the practice in the *Situation in Kenya,* the Prosecutor evaluated the information received to determine, whether there were national proceedings, with regard to the investigation of prosecuting the crimes, committed during the post-election violence in its territory. The Prosecutor found that there was no domestic prosecution for the crimes against humanity, allegedly committed in Kenya, nor was there any prospect that there would be. A limited number of proceedings were opened, in relation to minor offences, in connection to those crimes allegedly committed during the post-election violence. Therefore, there were no national investigations or proceedings pending, against those bearing the greatest responsibility for the crimes against humanity allegedly committed, and the available information did not indicate the existence of national proceedings, concerning the post-election violence in other states.

Regarding to this, the evaluation of the Prosecutor was based on the available information. The Prosecutor examined the existence of national investigations or prosecutions for those crimes. Based on the assessment, the available information did not indicate the existence the proceedings at national level, either in Kenya or other third states. Therefore, the Prosecutor determined that there was a reasonable basis to proceed with an investigation into the *Situation in Kenya.*

63 Ibid., para. 186.
64 *Kenya* Authorisation Decision.

The determination of the Pre-Trial Chamber II, to authorize the investigation, was that the same standard of assessment would be applied. The Chamber found that there was a lack of national proceedings in Kenya, or any third state, concerning the main elements which may have shapeed the Court's potential case(s). Thus, a number of domestic investigations and prosecutions, concerning the post-election period, only related to minor offences. The disapproval of the Kenyan Parliament, with regard to the Bill to establish a special tribunal, to prosecute those who were responsible for the post-election violence, indicated inactivity on the part of the Kenyan authorities. Based on available information, there was a lack of national investigations, in relation to the main elements that may have shaped the Court's potential case(s).

The assessment of the Chamber was also based on the existence of national investigations or prosecutions of crimes, committed during the post-election in Kenya. The information was taken into consideration, and it was found that there were no national proceedings, with regard to those crimes. Also, the disapproval of the draft to establish a special tribunal, indicated inactivity by Kenya.

To sum up, the determining factor is the absence of relevant proceedings at the national level of both Kenya and other States.

3.3.3.2 The Situation in Côte d'Ivoire

In 2002, a failed coup d'état led to the fragmentation of the Ivoirian armed forces, and resulted in a division of the country. At the culmination of the peace process, initiated after the 2002 crisis, the November 2010 election held particular significance for the future of Côte d'Ivoire.[65]

The first round of the election took place on 31 October 2010. Laurent Gbagbo of the *La Majorité Présidentielle* (LMP) alliance and Alassane Ouattara of the *Rassemblement des houphouëtistes pour la démocratie et la paix* (RHDP) alliance, were front runners. [66]

On 28 November, the second round of the presidential elections was held, in a climate of tension and mutual accusations.

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65 *Situation in the Republic of Côte d'Ivoire,* Request for authorisation of an investigation pursuant to article 15, ICC Pre-Trial Chamber III, 23 June 2011, ICC-02/11-3 (*Côte d'Ivoire* Authorisation Request), para 10.

66 Ibid. para 11.

On 2 December, the Chair of the Independent Electoral Commission announced the provisional results of the second round of the presidential elections, declaring that Alassane Ouattara had won the election. Later that day, the President of the Constitutional Council, overturned the decision of the Independent Electoral Commission, and declared Gbagbo victorious. Soon after, both candidates simultaneously declared themselves President of Côte d'Ivoire. Ouattara was quickly backed by the international community, as the sole legitimate president.[67]

The electoral crisis reignited large-scale violence in the country. Amid a rapidly deteriorating situation, the civilian death toll rose as did the flow of displaced persons, fleeing violence to other zones or neighbouring countries.[68]

3.3.3.2.1 The Prosecutor's Determination of the Complementarity Test

The situation in the Côte d'Ivoire has been under preliminary examination by the OTP, since the receipt on 1 October 2003, of a declaration from the Government of Côte d'Ivoire, in which it accepted the exercise of jurisdiction by the Court, in accordance with article 12(3) of the Rome Statute. The letter stated that:

> [P]ursuant to article 12(3) of the Statute of the International Criminal Court, the Government of Côte d'Ivoire accepts the jurisdiction of the Court for the purposes of identifying, investigating and trying the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002. Accordingly, Côte d'Ivoire undertakes to cooperate with the Court without delay or exception in accordance with Part 9 of the Statute. This declaration shall be valid for an unspecified period of time and shall enter into effect on being signed. [69]

During the examination, the Prosecutor received information from the Government of Côte d'Ivoire and NGOs. Later, on 30 March 2011, the OTP received resolution 1975 of the Security Council, which condemned 'the serious abuses and violations of international law in Côte d'Ivoire, including humanitarian, human rights and refugee law', and noted:

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67 Ibid. para 12.
68 Ibid. para 13.
69 Ibid. para 15.

> [C]onsidering that the attacks currently taking place in Côte d'Ivoire against the civilian population could amount to crimes against humanity and that perpetrators of such crimes must be held accountable under international law and noting that the International Criminal Court may decide on its jurisdiction over the situation in Côte d'Ivoire on the basis of article 12, paragraph 3 of the Rome Statute. [70]

On 4 May 2011, the Prosecutor received a further letter from President Ouattara, confirming his request that the Office of the Prosecutor conduct independent and impartial investigations into the most serious crimes committed since 28 November 2010, on the entire Ivorian territory. It was essential to ensure that the persons bearing the greatest criminal responsibility for these crimes were identified, prosecuted and tried before the ICC. [71]

President Ouattara further reiterated his commitment to providing full co-operation with the Office, in the course of these proceedings. The letter stated:

> For reasons you are aware of, the transfer of power following the presidential election of 31 October and 28 November 2010 could not occur in the peaceful manner I wished for. A serious crisis has ensued, during which it is unfortunately reasonable to be believe that crimes falling under the jurisdiction of the International Criminal Court have been committed. These crimes are of such gravity that I call for your assistance to make sure that the main perpetrators will not remain unpunished, hence contributing to restoring the rule of law in Côte d'Ivoire. (OTP translation) [72]

In examining the available information, the Prosecutor assessed the complementarity test, and reinstated the potential case criteria, and stated that:

> [T]he Prosecution's selection of the incidents or groups of persons that are likely to shape future case(s) is preliminary in nature and is not binding for future admissibility assessments, meaning that the Prosecution's selection on the basis of these elements for the purposes of defining a potential 'case' for this particular phase may change at a later stage, depending on the development of the investigation. [73]

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70 Security Council, Resolution 1975 (2011), Adopted by the Security Council at its 6508th meeting, on 30 March 2011.
71 *Côte d'Ivoire* Authorisation Request, paras. 16-21.
72 Ibid., para. 45.
73 Ibid., para. 52.

Upon the evaluation, the Prosecutor found that:

- The Government of Laurent Gbagbo provided information, proposing the attempted launching of investigations into acts of violence and breaches of the penal code, committed since 28 November 2010. However, the only relevant information provided pertains to an instruction given on 24 March 2011 by the Military Prosecutor of Abidjan (*Commissaire du Gouvernment du Tribunal Militaire d'Abidjan*), to the National Gendarmerie, to proceed with an inquiry into the alleged killing of women during a demonstration in Abobo, and the shelling of civilians in Abobo by security forces. The Prosecution has no information that this instruction has been acted upon, especially since there has been a change of Government, that has effectively occurred in the meantime and also the appointment of a new Military Prosecutor.[74]
- There is also additional information that the Prosecutor of Daloa has initiated preliminary investigations into the events, occurring in the region. The Prosecution has, to date, no information that these proceedings may focus on the persons bearing the greatest responsibility, for the most serious crimes, falling within ICC jurisdiction.[75]
- The Government of Côte d'Ivoire announced the creation of a national commission of inquiry into human rights violations, during the post-election crisis in Côte d'Ivoire. However, this commission has not conducted, and is not intended to conduct, criminal investigations against the persons bearing the greatest responsibility for the most serious crimes, that were committed in the context of the post-election violence in Côte d'Ivoire, falling within the jurisdiction of the Court. [76]
- There is no national investigations or proceedings pending in Côte d'Ivoire, against those bearing the greatest responsibility for the most serious crimes, allegedly committed in Côte d'Ivoire since 28 November 2010, falling within the jurisdiction of the Court.[77]

74 Ibid., para. 48.
75 Ibid., para. 50.
76 Ibid., para. 51.
77 Ibid., para. 52.

The Prosecutor also noted, regarding the possible existence of relevant national proceedings in other States with jurisdiction, that:

> [t]he Prosecutor is aware of the information that lawyers of Laurent Gbagbo, Jacques Verges and Roland Dumas, have lodged a complaint in France for crimes against humanity regarding the alleged massacre committed in Dekoué, Western Côte d'Ivoire on 29-30 March. The Prosecutor will seek clarification from the French authorities as to any procedural follow up on this complaint. The Prosecution will continue to assess the existence of national proceedings for as long as the situation remains under investigation, should the Chamber authorise the investigation.[78]

The Prosecutor evaluated the information and concluded that the situation would be admissible, and together with other criteria, the Prosecutor requested the authorization for opening the investigation into the *Situation in Côte d'Ivoire.*

3.3.3.2.2 The Pre-Trial Chamber III's Application of the Complementarity Test

The Chamber reviewed the information provided by the Prosecutor, regarding the question of whether Côte d'Ivoire or any other state was conducting or had conducted national proceedings. This was in relation to the individuals and crimes, that were likely to constitute the Court's future case(s), in this context.[79]

In order to evaluate the complementarity test, the Pre-Trial Chamber III stated, the following:

- The lawyers for Laurent Gbagbo have lodged a complaint in France, for crimes against humanity, committed in Duékoué on 29-30 March 2011.[80] However, investigations conducted by the French judicial authorities, are limited to two distinct incidents, and they do not relate to the most serious crimes under the jurisdiction of the Court.[81]
- The proceedings by the Abidjan Prosecutor refer to (a) economic crimes; (b) crimes against state security; and (c) so-called "blood crimes" (genocide, crimes against the civilian population and murders, killings and voluntary

78 *Côte d'Ivoire* Authorisation Decision, para. 194.
79 Ibid., para. 204.
80 Ibid., para. 195.
81 Ibid., para. 200.

injuries). The investigations of economic crimes focus on conduct, that is clearly different from the crimes, over which the ICC has jurisdiction.[82]

- In the investigations and proceedings by the Military Prosecutor in Côte d'Ivoire, the Prosecutor submitted that the individuals who are authorised to proceed with indictments already granted, do not fall in the category of those, who may bear the greatest responsibility for the most serious crimes, falling within the Court's jurisdiction. The Prosecutor further submitted that the Military Prosecutor was currently not investigating alleged crimes, committed by pro-Ouattara forces.[83]
- The Daloa Prosecutor, who is supervising and directing investigations into alleged crimes, committed in the west of Côte d'Ivoire, concerning the post-election violence, does not intend to prosecute or request warrants of arrests, before receiving further instructions on the overall prosecutorial strategy of the Ministry of Justice.[84]

After the evaluation, the Chamber concluded that:

> [u]nder complementarity and gravity, due to the absence of national proceedings against those appearing to be most responsible for the crimes committed during the post-election violence, and in light of the gravity of the acts committed, the Chamber is satisfied that there are potential cases that would be admissible in the situation in the Republic of Côte d'Ivoire, if the investigation is authorised.[85]

On 15 November 2011, the Pre-Trial Chamber III rendered its decision, which authorized the launching of an investigation into the situation in Côte d'Ivoire with respect to crimes, committed since 28 November 2010, within the jurisdiction of the Court.[86]

3.3.3.2.3 Complementarity Determination in the *Situation in Côte d'Ivoire*

According to the practice in the *Situation in Côte d'Ivoire,* the Prosecutor evaluated the information received from the Government, regarding the attempt to launch

82 Ibid., para. 197.
83 Ibid., para. 198.
84 Ibid., para. 199.
85 Ibid., para. 206.
86 Ibid., para. 204.

investigations into acts of violence, and breaches of the penal code committed during a specific period of time; however, it found that these were the proceedings inquiring into the alleged killing of women and the shelling of civilians in Abobo by security forces. There was no information that the preliminary proceedings were focussing on the persons, bearing the greatest responsibility, for the most serious crimes falling within ICC jurisdiction. According to the information, the creation of a national commission of inquiry for human rights violations, during the post-election crisis in Côte d'Ivoire, has not been conducted, and that it is not intended to conduct, criminal investigations against persons, bearing the greatest responsibility for the most serious crimes, falling within the jurisdiction of the Court, committed in the context of the post-election violence in Côte d'Ivoire. Hence, the Prosecutor found that there were no national investigations or proceedings pending in Côte d'Ivoire against those bearing the greatest responsibility for the most serious crimes falling within the jurisdiction of the Court, allegedly committed in Côte d'Ivoire since 28 November 2010.

The determination of the Pre-Trial Chamber III, with regard to authorizing the investigation, specified that the same standard of the assessment would be applied. The Chamber found that there were national proceedings in French for crimes against humanity, regarding the alleged massacre committed in Dekoué, Western Côte d'Ivoire; however, the investigations conducted by the French judicial authorities were limited to two distinct incidents, and they did not relate to the most serious crimes under the jurisdiction of the Court. In addition, the proceedings conducted at the national level of Côte d'Ivoire by the Abidjan Prosecutor regarding economic crimes, focused on conduct that was clearly different from the crimes over which the ICC had jurisdiction. Hence, the Chamber found that there was an absence of national proceedings, against those most responsible for the crimes, committed during the post-election violence.

The assessment of the Chamber has also drawn attention to the existence of national investigations or prosecutions of crimes, committed during the post-election period in Côte d'Ivoire. The information was taken into consideration, and it was found that there was an absence of national proceedings with regard to those crimes.

In conclusion, the determining factor is the absence of national proceedings at the national level in both Côte d'Ivoire, and other States.

3.3.3.3 The Situation in Georgia

The August 2008 armed conflict in Georgia had its roots in the disintegration of the Soviet Union. During the process of gaining its independence from the Soviet Union between 1989 and 1991, Georgia faced internal divisions, caused by the independence aspirations of South Ossetia, Abkhazia and Adjara, which had gained autonomous status, when Georgia was part of the Soviet Union.[87]

On 7 August 2008, the Georgian military launched an offensive to retake control of South Ossetia. The armed forces of the Russian Federation intervened on the side of South Ossetia, taking control on 10 August 2008 of localities in South Ossetia, and extending their control, thereafter, over a 20 km "buffer zone". This was established within parts of Georgian territory beyond the boundary of the South Ossetian administrative zone. Although a cease-fire agreement was brokered on 12 August 2008, crimes continued to be committed. In accordance with a subsequent agreement concluded on 8 September 2008, Russian troops withdrew behind the administrative border line of South Ossetia by 10 October 2008 at the latest.[88]

3.3.3.3.1 The Prosecutor's Determination of the Complementarity Test

The situation in Georgia has been under preliminary examination since 14 August 2008. The Prosecution has been in regular contact with the relevant actors, including the governments of Georgia and of the Russian Federation, in order to gather and verify information on alleged crimes committed, and the existence and genuineness of relevant national proceedings.

The prosecutor focused the preliminary examination, on the existence and genuineness of relevant national proceedings, in both Georgia and Russia.

With regard to national proceedings in Georgia, the Office of the Chief Prosecutor of Georgia (OCPG) has been the main body responsible for conducting the

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87 *Situation in Georgia,* Request for authorisation of an investigation pursuant to article 15, ICC Pre-Trial Chamber I, 17 November 2015, ICC-01/15-04-Corr2 (*Georgia* Authorisation Request), para 20.

88 Ibid., para 7.

investigation into alleged crimes, arising from the 2008 conflict.[89] The Georgian authorities, carried out some investigative activities in relation to the 2008 conflict from August 2008, until November 2014.

From the information, the Prosecutor found that:

- With regard to national proceedings in Georgia, two main obstacles, seem to have emerged (i) the lack of access to the territory of South Ossetia, and (ii) the reported absence of co-operation by the Russian Federation.[90]
- The investigations were delayed[91] and, later, the letter of the Government of Georgia informed the Prosecution that further progress regarding relevant national proceedings, related to the alleged crimes. This was prevented by "a fragile security situation in the occupied territories in Georgia and in the areas adjacent thereto, where violence against civilians is still widespread".[92]
- With regard to the national proceedings in Russia, the Russian authorities initiated an investigation of alleged crimes, related to the armed conflict on 8 August 2008. The national investigation fell exclusively under the mandate of the Investigative Committee of the Russian Federation.[93]
- The Investigative Committee has been able to identify potential suspects, allegedly responsible for the attack against the Russian peacekeepers, on 7 and 8 August 2008. The Russian authorities, however, informed the Prosecution that the prospects of further national proceedings were hampered by certain obstacles that the Russian authorities encountered, in the course of their investigation.[94]
- The Russian Federation informed the Prosecution that the lack of co-operation of the Government of Georgia, and the immunity enjoyed by senior officials of foreign states including those of Georgia, was an obstacle to genuine improvements in the national investigation.[95]

89 Ibid., para. 279.
90 Ibid., para. 290.
91 Ibid., paras. 295-301.
92 Ibid., paras. 303.
93 Ibid., paras. 304.
94 Ibid., paras. 316.
95 Ibid., para. 316.

- Following the change of government in Georgia, the Russian authorities further informed the Prosecution that these obstacles ceased to exist and no longer hampered the progress of the national investigation. Thus, the Investigative Committee has been conducting the investigation, with respect to the attack against the Russian peacekeepers.[96]
- With regard to national proceedings in the third state, the available information does not indicate that any national proceedings have taken place in any other states in relation to alleged crimes. They have been committed in the context of the Situation.[97]
- With regard to the proceedings in South Ossetia, the Prosecutor observed that South Ossetia was part of the territory of Georgia, and not a state, within the meaning of article 17. Nonetheless, the Prosecution observes that, according to the information available, the only proceedings conducted by the South Ossetian *de facto* authorities, in relation to the period under consideration concerns the arrested of 86 individuals for the charge of looting. Of the 46 suspects who received administrative penalties or fines for insult, petty theft, and similar non-criminal charges, the rest were reportedly awaiting trial. The information available indicates that no individuals have faced criminal proceedings in South Ossetia, for conduct which constitutes a crime, within the jurisdiction of the Court.[98]

Regarding this, the Prosecutor concluded that:

> [I]n the light of the indefinite suspension of national proceedings in Georgia, the Prosecution has concluded that the potential case of the forcible transfer of ethnic Georgians identified in [this Application] would be currently admissible. The potential case relating to the intentional directing of attacks against peacekeepers and peacekeeping facilities would be partially admissible at this stage. In relation to the attack against Georgian peacekeepers, the Georgian authorities have similarly indefinitely suspended their domestic proceedings, constituting State inaction. In relation to the attack against Russian peacekeepers, the competent Russian authorities are continuing to progress with their domestic investigations and these investigations do not appear vitiated at this stage by a lack of willingness or inability to do so genuinely. This assessment will be kept under review should an

96 Ibid., paras. 318-319.
97 Ibid., para. 321.
98 Ibid., para. 322.

> investigation be authorised. In relation to other alleged crimes for which it has been unable to arrive at a determination due to the insufficiency of the information available, the Prosecution will continue to assess the existence and genuineness of relevant national proceedings relating to such alleged conduct for as long as the situation remains under investigation, should an investigation into the situation be authorised.[99]

The Prosecutor evaluated the information and concluded that the situation would be admissible, and together with other criteria, the Prosecutor requested the authorization for opening the investigation into the Situation in Georgia.

3.3.3.3.2 The Pre-Trial Chamber I's Application of the Complementarity Test

The Chamber pointed out that, at this stage, the complementarity examination required an assessment of whether any state was conducting, or had conducted national proceedings in relation to the persons, or groups of persons as well as the crimes which appeared to have been committed. This depends on the information available at this stage, which together would be the subject of investigations and was likely to form the potential cases before the Court. If (some of) those potential cases are not investigated or prosecuted by national authorities, the criterion provided for in article 53(1)(b) of the Statute, with respect to complementarity, is satisfied. [100]

The Chamber reviewed the information provided by the Prosecutor, and stated that:

- With regard to the national proceedings in Georgia, the Georgian authorities informed the Prosecutor, in a letter dated 17 March 2015, that "further progress of relevant national proceedings, related to the alleged crimes, is prevented by 'a fragile security situation in the occupied territories in Georgia and the areas adjacent thereto, where violence against civilians is still widespread'".[101] The Chamber observed that this letter is relevant to the matter: there is, at present, a situation of inactivity, on the part of the Georgian

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99 Ibid., para. 323.

100 *Situation in Georgia,* Decision on the Prosecutor's request for authorization of an investigation, ICC Pre-Trial Chamber I, 27 January 2016, ICC-01/15-12 (*Georgia* Authorization Decision), para. 41.

101 Ibid., para. 41.

competent authorities, and no national proceedings have rendered inadmissible, any potential cases arising out of the situation.[102]

- With respect to national proceedings in Russia, the Chamber found itself unable to determine that the national proceedings in Russia do not meet the requirements of article 17(1)(b) of the Statute. While the Chamber does not consider significant, for the purposes of a determination under article 17(1)(b), the Prosecutor's submission, to be in possession of evidence, contradicting the conclusion of the Russian judicial authorities, reasonable doubts, however, remain. These concern whether the Russian authorities' inability to access crucial evidence, i.e. to interview Georgian witnesses, constitutes inability, within the meaning of article 17 of the Statute. [103]

The Chamber concluded that:

> [t]he Chamber concurs with the Prosecutor that the ongoing national proceedings carried out so far by the Russian authorities reveal neither unwillingness nor inability on the part of the State. Therefore, the potential case in relation to the attack against Russian peacekeepers could be inadmissible and the Chamber approves the statement of the Prosecutor that she will "keep this assessment under review in the context of [the] authorized investigation". [104]

On 27 January 2016, the Pre-Trial Chamber I rendered its decision, which authorized the Prosecutor to proceed with an investigation of crimes, within the jurisdiction of the Court, committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008. [105]

3.3.3.3.3 Complementarity Determination in the *Situation in Georgia*

According to the practice in the *Situation in Georgia,* the Prosecutor evaluated the information received, to determine whether this required national proceedings in Georgia or in other states, for crimes arising from the 2008 conflict. Based on the

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102 Ibid., para. 46.
103 Ibid., para. 46.
104 Ibid., para. 46.
105 Ibid., para. 50.

information received, regarding the investigations in Georgia, the OCPG has faced obstacles to access to the territory of South Ossetia. The absence of co-operation from Russia, has meant that the investigations were delayed.

During the national proceedings in Russia, the Russian authorities initiated an investigation of alleged crimes, related to the armed conflict on 8 August 2008. However, the proceedings faced certain obstacles that the Russian authorities encountered in the course of their investigation. The lack of co-operation from the Government of Georgia, and the immunity enjoyed by senior officials of foreign States, including those of Georgia, constituted obstacles to genuine progress in the national investigation; hence, there are investigative activities going on at the national level in Russia.

Apart from this, there are no national proceedings in any other states, in relation to crimes alleged to have been committed in the context of the situation. In addition, during the proceedings conducted by the South Ossetian *de facto* authorities, in relation to the period under consideration, the individuals have faced criminal proceedings in South Ossetia. These are for conduct which constitutes a crime, within the jurisdiction of the Court. Thus, the Prosecutor has determined that there is a reasonable basis to proceed with an investigation into the *Situation in Georgia.*

The Pre-Trial Chamber II, has also determined, with regard to authorizing the investigation, the same standard of the assessment will be applied. The Chamber found a situation of inactivity on the part of the Georgian competent authorities, and no national proceedings have provided any potential cases. In addition, the Chamber has found itself unable to determine that the national proceedings in Russia are unsatisfactory, under article 17(1)(b), and reasonable doubts remain as to the inability to access crucial evidence by Russian authorities.

Regarding this, the assessment of the Chamber was also based upon the existence of national investigations, or prosecutions of crimes committed during the period in question. The assessment found that there were no national proceedings, with regard to those crimes.

To sum up, the determining factor is the absence of relevant proceedings, at the national level in Georgia, Russia and other states.

3.3.3.4 The Situation in Burundi

Since 26 April 2015, members of the Burundian Government, military personnel, namely the *Force de Défense Nationale* ("FDN"), the police, namely the *Police Nationale du Burundi* ("PNB") and the intelligence service, the *Service National de Renseignement* ("SNR") (together, referred to as the "security forces"), as well as members of the *Imbonerakure*, the youth wing of the ruling party, have been carrying out deliberate attacks against the civilian population. These have entailed the multiple commission of acts of murder, imprisonment, torture, rape, enforced disappearance and persecution, constituting crimes against humanity.[106]

The attacks have targeted specific categories of civilians, namely: actual or suspected protesters opposing President Pierre Nkurunziza's ("*President Nkurunziza*") third presidential term; actual or perceived members of the political opposition or opposition sympathizers, including journalists, members of civil society organizations and residents of neighbourhoods, associated with the opposition.[107] These attacks were carried out, pursuant to a state policy, to keep President Nkurunziza in power, by all means possible. These included suppressing protests, quelling dissenting views, and punishing persons, based on their actual or perceived affiliation with the political opposition.[108]

The large-scale commission of the crimes, the number of victims, and the organized and co-ordinated nature of the acts of violence, have established a reasonable basis to believe that the attacks were both widespread and systematic. Although the violence subsided in December 2015, related alleged acts of violence continue to be committed.[109]

3.3.3.4.1 The Prosecutor's Determination of the Complementarity Test

The Burundian authorities have established three commissions of inquiry, in response to the violent events, since April 2015. However, their findings have examined only a limited number of incidents, and focused on the criminal responsibility of actual or

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106 *Situation in Burundi,* Request for authorisation of an investigation pursuant to article 15, ICC Pre-Trial Chamber III, 15 November 2017, ICC-01/17-5-Red (*Burundi* Authorisation Request), para 2.

107 Ibid., para. 3.

108 Ibid., para. 4.

109 Ibid., para.5.

perceived members of the opposition, as 'insurgents' responsible for the violence.[110] In addition, they have also generally acquitted those members of the Government, the security forces or the *Imbonerakure*, of responsibility for the commission of crimes. The limited number of cases that the authorities have initiated into the death or abduction of civilians, appear to have focused on isolated acts and generally lack specificity. As such, the Prosecution has been unable to identify, at this stage, the relevant person(s) or to specifically the conduct under investigation.[111]

The Prosecutor found that:

- The Burundian authorities had established three commissions of inquiry, in response to the violent events, since April 2015. However, their findings had examined only a limited number of incidents and focused on the criminal responsibility of actual or perceived members of the opposition, as 'insurgents' responsible for the violence They had also generally acquitted members of the Government, the security forces and the *Imbonerakure* of responsibility for the commission of crimes. [112]
- The limited number of cases that the authorities had initiated into the death or abduction of civilians, appeared to have focused on isolated acts and generally lack specificity. As such, the Prosecution had been unable to identify at this stage, the actual contours of the relevant person(s) or to specific the conduct under investigation. [113]
- None of the domestic proceedings examined by the Prosecution reveal any past or ongoing criminal process, that sought to establish the criminal responsibility of members of the Burundian authorities, the security forces and/or the *Imbonerakure*. These parties appeared to bear the greatest responsibility for the alleged crimes.[114]
- The information available indicated inactivity by the Burundian authorities, in relation to the potential cases. [115]

110 Ibid., para.148.
111 Ibid.
112 Ibid.
113 Ibid.
114 Ibid., para 149.
115 Ibid., para 150.

- The Burundian authorities had cleared members of the security forces as alleged physical perpetrators of any wrongdoing. For the reasons set out below, the Prosecution believed that the inquiries conducted into these allegations were not conducted genuinely, but were undertaken for the purpose of shielding the persons concerned, from criminal responsibility.[116]
- Between April and December 2016, the Prosecutor General of Bujumbura (*Procureur Général de la Republique*) established three Commissions of Enquiry, to investigate specific incidents.[117] All three commissions were set up to identify alleged perpetrators for the purpose of criminal proceedings, and thus had the power to set up criminal investigations and prosecutions.[118]
- The information submitted by the Burundian authorities, indicated that the Prosecutor General had initiated a limited number of inquiries, in relation to certain crimes against civilians, allegedly carried out by members of the Burundian security forces and the *Imbonerakure*. Beyond asserting that investigations were ongoing, and providing respective case numbers, the Prosecution had, however, not received information on any concrete or progressive investigative steps taken, in relation to these cases, in response to its requests for information to the authorities.[119]
- The limited specificity and substantiation of domestic proceedings, combined with their apparent limited and fragmentary scope, within the context of the overall allegations, suggest that, according to the information available at this stage, the potential case and the accompanying annexes would remain admissible.[120]
- With regard to national proceedings in third states, the available information did not indicate any relevant national proceedings, had taken place in any other States with jurisdiction in relation to the potential case. [121]

116 Ibid.
117 Ibid, para. 151.
118 Ibid., para. 152.
119 Ibid., para 183.
120 Ibid.
121 Ibid., para 185.

The Prosecutor evaluated the information and concluded that the situation would be admissible, and, together with other criteria, the Prosecutor requested the authorization for opening the investigation into the *Situation in Burundi.*

3.3.3.4.2 The Pre-Trial Chamber III's Application of the Complementarity Test

The Pre-Trial Chamber III has evaluated the information received, and stated that:

- A national investigation, merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court. It is clear that, for the purposes of complementarity, an investigation must be carried out, with a view to conducting criminal prosecutions. Hence, national investigations that are not designed to result in criminal prosecutions, do not meet the admissibility requirements, under article 17(1) of the Statute. [122]
- The Commissions were established by the Prosecutor General and consisted either of policemen, or members of the Public Prosecutor's Office, who were, therefore, all apparently subordinate to the Prosecutor General. It is not clear to the Chamber why those Commissions were established, in this way instead of following the normal procedure in accordance with Burundian criminal procedural law. [123]

The Chamber observed that:

> [t]he establishment of the aforementioned Commissions and the proceedings before domestic courts, the Burundian authorities have remained inactive in relation to potential cases arising out of the situation in Burundi. The reason is that the documentation made available to the Chamber reveals that these Commissions and proceedings do not concern the same (groups of) persons that are likely to be the focus of an investigation into the situation in Burundi or that the Commissions have not undertaken tangible, concrete and progressive investigative steps. [124]

3.3.3.4.3 Complementarity Determination in the *Situation in Burundi*

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122 *Situation in Burundi*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC Pre-Trial Chamber III, 25 October 2017, ICC-01/17-9-Red (*Burundi* Authorisation Decision), para. 152.

123 Ibid., para 182.

124 Ibid., para 181.

According to practice in the *Situation in Burundi,* the Prosecutor evaluated the information received to determine the existence of national proceedings. The Prosecutor has found that the commission of inquiries examined only a limited number of incidents, and focused on the criminal responsibility of actual or perceived members of the opposition as 'insurgents' responsible for the violence. They ignored the alleged responsibility of members of the Government, the security forces or the *Imbonerakure* for the commission of crimes. Additionally, the limited number of cases that the authorities have initiated into the death or abduction of civilians, appears to have focused on isolated acts, and generally lack specificity. Thus, the Prosecution has been unable to identify at this stage, the actual person concerned or the specific conduct under investigation.

The Prosecutor also found that none of the domestic proceedings examined, sought to establish the criminal responsibility of members of the Burundian authorities, the security forces and/or the *Imbonerakure.* The information available indicated inactivity, by the Burundian authorities in relation to the potential cases. And the available information, did not indicate any relevant national proceedings, in any other states, in relation to the potential case.

With regard to this, the evaluation of the Prosecutor is based on the available information. The Prosecutor examined the existence of national investigations or prosecutions for those crimes. Based on this assessment, the available information did not indicate the existence of proceedings at national level, neither in Burundi nor in other third states. The Prosecutor, therefore, determined that there was a reasonable basis to proceed with an investigation into the *Situation in Burundi.*

The Pre-Trial Chamber II has determined, with regard to authorizing the investigation, that the same standard as in the assessment would be applied. The Chamber found that the national investigation focussed on the gathering of evidence, which did not lead to the inadmissibility of any cases before the Court. Therefore, national investigations, that are not designed to result in criminal prosecutions do not meet the admissibility requirements. Additionally, the Commissions were established by the Prosecutor General and consisted either of policemen or members of the Public Prosecutor's Office. There were people who were, therefore, all apparently subordinate to the Prosecutor General. The Commissions and the proceedings before

domestic courts and the Commissions have not undertaken tangible, concrete and progressive investigative steps. Clearly, the Burundian authorities have remained inactive, in relation to potential cases arising out of the situation in Burundi.

The assessment of the Chamber was also based on the existence of national investigations, or prosecutions of crimes committed in Burundi. In considering the information available, the Chamber concluded that the Burundian authorities had remained inactive.

To sum up, the determining factor is the absence of relevant proceedings at the national level in Burundi.

3.3.3.5 The Situation in Afghanistan

The armed conflict in Afghanistan has its roots in the 1978 coup d'état, that brought to power the communist People's Democratic Party of Afghanistan (PDPA). The PDPA's brief rule was characterized by massive repression, sparking local revolts and mutinies within the army.[125] Afghanistan has experienced more than 35 years of violent conflict. Since 2003, the armed conflict in the country has intensified, as an armed insurgency led by the Taliban movement has been waging a guerrilla-style war against the current government and the international forces supporting it, in an attempt to return to power. Since 2009, a number of civilians were reported to have been killed by parties to the armed conflict in Afghanistan. Civilians continued to suffer from a deteriorating security situation, and near-daily attacks in many parts of the country.[126]

3.3.3.5.1 The Prosecutor's Determination of the Complementarity Test

According to the available information received by the Prosecution, there were a number of the national inquiries; however, they did not appear to have had full investigatory powers, or conducted full criminal inquiries. Nonetheless, they generally appeared to have been established by the competent prosecutorial or judicial authorities, comprised of law enforcement personnel, and to have had some judicial

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125 *Situation in the Islamic Republic of Afghanistan,* Request for authorisation of an investigation pursuant to article 15, ICC Pre-Trial Chamber III, 20 November 2017, ICC-02/17-7-Red (*Afghanistan* Authorisation Request), para 3.

126 Ibid., paras 3 and 13.

and investigative powers, as well as the authority to identify cases for further criminal investigation.[127]

The Prosecutor found that:

- With regard to national proceedings in Afghanistan, the information available indicated that, at this stage, no national investigations or prosecutions had been conducted, or were ongoing, against those who appeared most responsible for the crimes, allegedly committed by members of the Taliban and affiliated armed groups.[128] Members of anti-government armed groups captured and detained in the context of the armed conflict have mainly been accused of committing crimes against the State, as codified in the 1976 Penal Code, the 1987 Penal Law on Crimes against Internal and External Security of the Democratic Republic of Afghanistan, and the 2008 Law on Combat against Terrorist Offences.[129]
- In 2005, the Government of Afghanistan adopted a national action plan on transitional justice, which included a series of actions, geared towards the "establishment of effective and reasonable accountability mechanisms." In addition, this plan stated that no amnesty should be provided for war crimes, crimes against humanity and other gross violations of human rights. It also set out other activities geared towards truth-seeking and documentation, and the promotion of reconciliation and national unity; however, the action plan remains unimplemented and appears to have become outdated.[130]
- In 2007, the Afghan Parliament passed a general amnesty, which came into force in 2009. The amnesty law provides legal immunity to all belligerent parties, including "those individuals and groups who are still in opposition to the Islamic State of Afghanistan," without any time limit, or any exception for international crimes.[131]
- In 2014, the Government of Afghanistan updated the country's Criminal Procedure Code, in order, inter alia, to exempt Rome Statute crimes from the

127 Ibid, para. 268.
128 Ibid., para 269.
129 Ibid., para 270.
130 Ibid., para 270.
131 Ibid., para 272.

ordinary statutes of limitations. The Government has also promulgated a new Penal Code which now explicitly incorporates Rome Statute crimes, and establishes superior responsibility as an available mode of liability. The Penal Code Bill was adopted by Afghanistan's parliament in May 2017.[132]

- The information available indicated that, at this stage, no national investigations or prosecutions had been conducted, or are ongoing, against those who appear most responsible for the crimes, allegedly committed by members of the Afghan National Security Forces (ANSF).[133] To date, the Afghan authorities appeared to have instituted only a very limited number of proceedings relating to the torture or cruel treatment of conflict-related detainees. Furthermore, those proceedings, were instituted only against low-level interrogators, direct perpetrators, and/or mainly their immediate superiors, and not against those who appear to be most responsible for such criminal conduct.[134]
- No national investigations or prosecutions had been conducted, or were ongoing in Afghanistan with respect to crimes allegedly committed by members of international forces. This was in line with the status of forces agreements, in place between Afghanistan and the United States (US), as well as between Afghanistan and the International Security Assistance Force (ISAF) troop-contributing countries, which provided for the exclusive exercise of criminal jurisdiction by the authorities of the sending State. [135]
- With regard to the national proceedings in the US, the Prosecutor did not receive, specific information on national proceedings, that it could rely on.[136] However, based on publicly available information, contained in open sources, the information available indicates that, at this stage, no national investigations or prosecutions had been conducted, or are ongoing, against those who appear most responsible for the crimes allegedly committed by members of the US

132 Ibid., para 273.
133 Ibid., para 276.
134 Ibid., para 277.
135 Ibid., para 289.
136 Ibid., para 290.

armed forces.[137] In addition, the information available indicated, that no national investigations or prosecutions have been conducted, or were ongoing against those who appeared most responsible for the crimes allegedly committed by members of the Central Intelligence Agency (CIA).[138]

- In relation to proceedings conducted in other States, criminal investigations are reportedly on-going in Poland, Romania, and Lithuania, regarding alleged crimes committed, in relation to the CIA detention facilities on their respective territories. [139]
- The Polish Prosecutor General's office initiated an investigation in 2008, of alleged Polish complicity in the CIA detention facility on its territory; nevertheless, the investigation has reportedly been delayed by a lack of US government co-operation. [140]
- In Romania, in May 2012 preliminary criminal proceedings were initiated, on behalf of one of the CIA detainees allegedly held in that country, Abd al Rahim al Nashiri. The Prosecutor's Office of Romania registered the complaint and initiated an investigation, that is reportedly still on-going. A complaint was subsequently submitted to the European Court of Human Rights, on behalf of the same detainee in August 2012.[141]
- In Lithuania, in January 2010, the Prosecutor General opened an investigation into allegations of illegal transportation and detention of CIA detainees on Lithuanian territory. An initial determination, in January 2014, by the national prosecutor to terminate the investigation was revoked, and an investigation was re-opened on 22 January 2015, following the release of the US Senate Report's findings, in relation to CIA-run detention facilities in Lithuania. As well as this, the Lithuanian Prosecutor General opened an investigation into allegations that the Lithuanian authorities participated in the transfer, secret detention, torture, and inhuman and degrading treatment of a CIA detainee. The scope of this investigation appears limited to Lithuanian nationals,

137 Ibid., para 299.
138 Ibid., para 312.
139 Ibid., para 329.
140 Ibid., para 330.
141 Ibid., para 331.

> accused of unlawful transportation of persons across the state border and abuse of office. However, the Lithuanian Government has stated that "it may be extended if sufficient factual data is collected, other significant circumstances emerge, or other alleged criminal offences are detected in the course of the criminal proceedings". [142] If the Chamber authorizes an investigation into the situation, the Prosecution will continue to assess the progress of any relevant national proceedings in order to determine whether they encompass the same persons. It will also determine if it is substantially the same conduct, as identified in the course of any investigations by the Prosecution, and if so, whether they are genuine.[143]

In this regard, the Prosecutor concluded that:

> [I]i is apparent that either no national investigations or prosecutions have been conducted or are ongoing against the persons or groups of persons set out in this [Request and its confidential *ex parte* annexes], or the information available is insufficient to identify the contours of any relevant national proceedings.[144]

The Prosecutor evaluated the information and concluded that the situation would be admissible, and together with other criteria, the Prosecutor requested the authorization for opening the investigation into the Situation in Afghanistan.

3.3.3.5.2 The Pre-Trial Chamber III's Application of the Complementarity Test

The Pre-Trial Chamber III evaluated the information received, and stated that:

- The Chamber considered that the available information clearly indicates that the proceedings conducted so far in Afghanistan, are limited in scope and did not target those who may bear the main responsibility, for the incidents reflected in the annexes to the Request. The potential cases arising from those incidents, are therefore deemed to be admissible. [145]

142 Ibid., paras 332-333.
143 Ibid., para 334.
144 Ibid., para 335.
145 *Situation in the Islamic Republic of Afghanistan,* Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of

- As regards the information about investigation efforts at the domestic level in the US, the Chamber noted that the information does not show that criminal investigations or prosecutions have been conducted, on the incidents, referred to and relied upon by the Prosecution.[146]

The Chamber observed that:

> [the Chamber believes that, notwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited.[147]

Finally, on 12 April 2019, the Chamber rejected the Request for the authorization of the Prosecutor, on the basis that it would not serve the interests of justice.

3.3.3.5.3 Complementarity Determination in the *Situation in Afghanistan*

According to the practice in the *Situation in Afghanistan,* the Prosecutor evaluated the information received to determine the existence of national proceedings. The Prosecutor found that there were no national proceedings in Afghanistan, the US, and other States, and, therefore, the case would be admissible before the ICC.

In determining of the Pre-Trial Chamber II, with regard to authorizing the investigation, the same standard of the assessment would be applied. The Chamber found that the proceedings conducted in Afghanistan were limited in scope and did not target those who may bear the main responsibility. Furthermore, the information did not show the existence of criminal investigations or prosecutions regarding the incidents referred to, and relied upon by the Prosecutor. In this regard, the complementarity test in this situation was applied, in order to assess the existence of the national proceedings, not only of the Afghan authorities and of the US, but also of other States such as Poland, Romania, and Lithuania. In addition, it found that the proceedings in other states in this situation, in particular, faced the obstacle of the

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Afghanistan, ICC Pre-Trial Chamber II, 12 April 2019, ICC-02/17-33 (*Afghanistan* Authorisation Decision), para. 77.

146 Ibid., para 79.

147 Ibid., para 181.

non-co-operation of the US with Poland, which hindered the effectiveness of the proceedings.

The assessment of the Chamber was also based the existence of national investigations or prosecutions of crimes committed in Afghanistan. Based upon the information available, the Chamber concluded that no national proceedings existed.

To sum up, the determining factor is the absence of relevant proceedings, at the national level of Afghanistan, the US and other states.

3.4 The Application of the Principle of Complementarity at the Preliminary Examination Stage

3.4.1 The Application of the Complementarity Test at the Preliminary Proceedings

According to the practice of the ICC proceedings at the preliminary examination stage, it was discovered that the principle of complementarity had been applied to the trigger mechanism, in particular, the referral mechanism of state parties and the Security Council. Also, the complementarity test has been applied explicitly, by the Prosecutor. According to this, complementarity is a criterion for the determination to proceed, with an investigation, into a situation by the Prosecutor, as well as the Pre-Trial Chamber, in the case where the investigation is initiated by the Prosecutor (*proprio motu*).

According to the practice of the ICC at this stage, the complementarity test has been determined by the Pre-Trial Chamber, and the results of the determination can be expressed, as set out in Table 4.

Table 4 Conclusion Complementarity Determination at the Preliminary Examination Stage

No.	**Situation**	**Criteria for Complementarity Test**			
		Inactivity	Activity	Unwillingness	Inability
1	Kenya	☒ no national proceedings			
2	Côte d'Ivoire	☒ no national proceedings			
3	Georgia	☒ no national proceedings			
4	Burundi	☒ no national proceedings			
5	Afghanistan	☒ no national proceedings			

Source: Author's own table.

The Table clearly shows that all situations are unable to fulfil the proceeding requirement of the complementarity test, at the preliminary examination stage of the ICC proceedings. The absence of national proceedings in all situations, means that the situation would be admissible before the Court. Concerning this, at the preliminary examination stage, there is no need to assess other criteria in the framework of the analysis.

However, apart from the finding that there were no national proceedings at the national level for all situations, it should be noted that, from the analysis of the assessment in all completed situations as well as in ongoing situations before the preliminary examinations stage, there are several difficulties, with regard to the application of the complementarity test.

The assessment of the complementarity test is not only limited to the existence of national proceedings of the State in question, but also includes national proceedings of other States. However, it was discovered that the proceedings in third States, in several situations, faced the problem of co-operation. For example, the Russian proceedings in the *Situation in Georgia* faced the problem of a lack of co-operation by the Government of Georgia. The immunity enjoyed by senior officials of foreign states, including those of Georgia, or the Polish proceedings in the *Situation in Afghanistan,* has been delayed by a lack of US government co-operation.

In addition, in several cases, the Prosecutor found that there were national proceedings. However, those proceedings governed the investigation, and prosecutions have been only responsible for a limited number of proceedings. Most of the cases relate to minor offences, in connection with the crimes allegedly before the ICC, such as the Kenyan, Ivorian, and Burundian proceedings, in the *Situations in Kenya, Côte d'Ivoire, and Burundi,* respectively.

3.4.2 The Application of a Potential Case at the Preliminary Proceedings

As mentioned earlier, apart from information available to the Prosecutor, the factors governing the determination of the Prosecutor, under article 53 of the Rome Statute, consist of both complementarity and gravity. This application is confirmed by the

wording of articles 13(a), 14(1), 15(5) and (6) and 18(1) of the Rome Statute.[148] In particular, the wording of article 53(1)(b) of the Rome Statute, points to an assessment, at a more general level, than that of a particular 'case' ('or would be admissible'). The Pre-Trial Chamber II in the *Situation in Kenya* offered several explanations for the peculiar wording of article 53(1)(b). Firstly, on the basis of the *travaux préparatoires* of the Rome Statute, it appears that 'case' was used in all drafts of article 17 at the Preparatory Committee. At the Rome conference, there was a 'prevailing trend', not to reopen the 'substance' of the admissibility provisions, drafted by the Preparatory Committee. Changing the terminology in article 53 would have required revisiting the terminology of article 17; hence, it was left unaltered. However, Pre-Trial Chamber II preferred a different explanation, and held that the reference to 'case' was deliberately left in all provisions on admissibility, leaving it up to the Court "to harmonize the meaning according to the different stages of the proceedings."[149] Thus, it is for the Chamber to construe the meaning of a 'case', within the context in which it is applied. In doing so, the Pre-Trial Chamber held that since "it is not possible to have a concrete case, involving an identified suspect, for the purpose of prosecution, prior to the commencement of the investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases, within the context of a situation".[150]

According to article 53(1)(b) of the Rome Statute, the Court has to apply the admissibility of a case, under article 17, which is the criteria for the admissibility stage through the preliminary proceedings. In the *Situation of Kenya*, the Pre-Trial Chamber II applied the admissibility of a case under article 17, within one or more potential cases in the context of "situation", and stated that:

> [t]he parameters of a potential case have been defined by the Chamber as comprising two main elements: (i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). Accordingly, the Chamber is required to review whether

148 *Kenya* Authorization Decision, para. 44.
149 Ibid., paras. 46-47.
150 Ibid., para. 48; *Côte d'Ivoire* Authorization Decision, para. 190.

> the information provided by the Prosecutor reveals that the Republic of Kenya or any third State is conducting or has conducted national proceedings in relation to these elements which are likely to constitute the Court's future case(s). If, upon review of the available information, the finding is in the negative, then the case would be admissible, provided that the gravity threshold under article 17(l)(d) of the Statute is met.[151]

In this regard, the Pre-Trial Chamber II employed a dynamic approach for identifying the two main elements of a potential case, for the admissibility determination in the stage of situation. These consist of (i) the groups of persons involved, that are likely to be the object of an investigation, for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court, allegedly committed during the incidents, that are likely to be the focus of an investigation for the purpose of shaping the future case(s). In practice, the Chamber must review, whether the information provided by the Prosecutor, reveals that such a State or other third State is conducting, or has conducted, national proceedings in relation to these elements. These are likely to constitute the Court's future case(s). With respect to this, Pre-Trial Chamber II in the *Situation in Kenya* stated that:

> [t]he Prosecutor initially submitted that, despite early indications of a desire by the Kenyan authorities to establish a special tribunal charged with conducting national proceedings concerning the post-election violence, a bill establishing such a tribunal has not been approved by the Kenyan Parliament to date, such that at present there is no domestic prosecution for the alleged crimes against humanity, nor is there any prospect of such prosecution. […] However, since there is a lack of pending national proceedings against "those bearing the greatest responsibility for the crimes against humanity allegedly committed", the Prosecutor submitted the possible case(s) to arise from his investigation into the situation "would be currently admissible"[152]

As for the second part of the admissibility assessment, it relates to gravity, under article 17(l)(d) of the Statute. The Pre-Trial Chamber II in the *Situation in Kenya*, stated that:

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151 *Kenya* Authorization Decision, para. 183.
152 Ibid.

> [s]uch examination must be also conducted against the backdrop of a potential case within the context of a situation. This involves a generic examination of: (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation. In relation to the latter, the Chamber stated earlier that it is guided by factors such as the scale, nature, manner of commission, impact of crimes committed on victims and the existence of aggravating circumstances (i.e., qualitative dimension).[153]

According to the jurisprudence of the Pre-Trial Chamber II, the Chamber employed a broad approach in assessing of admissibility at the preliminary examination stage of Kenya, that have may include quantitative and qualitative parameters, including factors such as (i) the scale of the alleged crimes (including geographic and temporal intensity), (ii) the nature of the unlawful behaviour or of the crimes allegedly committed, (iii) the means employed for executing the crimes (manner of their commission) and (iv) the impact of the crimes and the harm caused to victims and their families.

The same approach has been employed by the Pre-Trial Chamber III, in the *Situation in Côte d'Ivoire;* the Chamber observed that:

> [a]lthough Article 53(l)(b) of the Statute refers to the admissibility of a "case" under Article 17 of the Statute, the Chamber considers that at this early stage of the proceedings, given there is no case with identified suspects, a determination as regards admissibility involves consideration of one or more potential cases within the broader context of the "situation". The Chamber must conduct an initial admissibility examination in order to determine whether there is a "reasonable basis to proceed" with an investigation pursuant to Articles 15 and 53(l)(b) of the Statute and Rule 48 of the Rules.
>
> The Chamber considers that the concept of "potential cases" in the context of a situation, as identified by Pre-Trial Chamber II in the Situation of Kenya, involves two main elements: (i) the groups of individuals involved that are likely to be the focus of the investigation; and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation. [154]

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153 Ibid., para. 188.
154 *Côte d'Ivoire* Authorization Decision, paras. 192-206.

Normally, the admissibility encompasses the three grounds of inadmissibility under Article 17(1) (complementarity, gravity and *ne bis in idem*), which are exhaustive in nature. At the preliminary examination stage, the admissibility assessment firstly entails "an examination as to whether the relevant state(s) is/are conducting, or has/have conducted, national proceedings, in relation to the groups of persons and the crimes, allegedly committed during those incidents, which together would likely form the object of the Court's investigation". Secondly, if the answer to this question is negative, it includes an assessment of whether the gravity threshold is met or not. It is clear that the admissibility determination for the purpose of preliminary proceedings, relating to the initiation of an investigation, differs from the admissibility proceedings, concerning the determination of a concrete case.

In addition, the admissibility test at the preliminary examination stage, is more general in nature and relates to the overall conduct. This is compatible with the pre-investigative stage, such as the admissibility determinations in the *Situation in Kenya* and *Situation in Côte d'Ivoire.* In the *Situation in Kenya*, when making its decision on authorizing a *proprio motu* investigation in Kenya, the Pre-Trial Chamber II concluded that there were no national investigations, regarding senior business and political leaders, with regard to the serious criminal incidents which are likely to be the focus of the Prosecutor's investigation.[155] Similarly, in authorizing a *proprio motu* investigation in Côte d'Ivoire, the Pre-Trial Chamber III found that neither *Côte d'Ivoire* nor any other State having jurisdiction, was conducting, or had conducted, national proceedings against individuals or crimes. that were likely to constitute the Court's future cases.[156]

3.5 CHAPTER CONCLUSIONS

At the preliminary examination stage, the principle of complementarity is applied as a test for admissibility, under article 17 of the Rome Statute. Apart from the referrals by state parties and the Security Council, in which the principle of complementarity will be taken into consideration, the complementarity test will be applied, when making a preliminary admissibility ruling. This shall consider the factors in article 17, in

155 *Kenya* Authorization Decision, para. 187.
156 *Côte d'Ivoire* Authorization Decision, para. 206.

deciding whether authorize an investigation. In addition, the criteria in article 17 are also relevant, for the Prosecutor to initiate an investigation, under article 53(1)(b) of the Rome Statute, or to seek authorization to initiate for a *proprio motu* investigation under article 15, and for the decision to proceed with a prosecution under article 53(2). In this regard, in practice, the principle of complementarity is applied to the different objectives of the preliminary proceedings of the ICC.

According to the trigger mechanism, the first actor who applies the complementarity principle is a state party or the Security Council, in deciding to refer the situation to the Prosecutor of the ICC. This is because, at this stage a State in question, or the Security Council has to determine that the situation in a particular territory will meet the criteria of the failure of a national judicial system, either unwilling or unable to carry out the investigation or the prosecution. This occurred in the case of self-referrals of the DRC, Uganda, CAR and Mali, where the Government of those states referred the situations to the Prosecutor. This was based on the unwillingness or inability to prosecute the perpetrators at the national level.

Additionally, the practice of the ICC reflects the dynamic application of the principle of complementarity at this stage of the ICC proceedings. In particular, the question of auto-referrals, in which states referred the situation in their territory to the Prosecutor. The practice of the ICC has emphasised that the self-referrals, or auto-referrals, must comply with the principle of complementarity, even in states which declare their inability or unwillingness to carry out the national proceedings. The Chambers the ICC confirmed that the auto-referrals did not face legality concerns. According to the Chamber's view, the self-referrals were consistent with the ultimate purpose of the complementarity regime, that the ICC does not replace national criminal jurisdictions, but is complementary to them.

In the case of Security Council referrals, the Security Council resolution may identify those states which are unwilling or unable. This includes the question of the state in question to carry out the investigation or prosecution by the domestic courts, such as the particular reason of the Security Council in its decision to refer the *Situation in Darfur, Sudan* to the Prosecutor.

In practice at this stage, the principle of complementarity has been applied by the Prosecutor, as well as the Chamber of the ICC. In line with the preliminary

proceedings, the Prosecutor will apply the complementarity test, to decide whether there is a reasonable basis to proceed with an investigation of the situations. This includes not only those which are referred by the States or the Security Council but also those initiated by the Prosecutor, upon the authorization of the Pre-Trial Chamber, namely: the *Situation in Kenya; Côte d'Ivoire; Georgia; Burundi; and Afghanistan.*

At this stage, the Prosecutor, as well as the Pre-Trial Chamber, have applied the complementarity test into all situations. In order to analyse the application of the Court, the criteria set out by the framework of this dissertation, have been used to assess the practice of the Court.

The result of the study of the application of the principle of complementarity, at the preliminary examination stage, faced a key challenging, namely the issue of the absence of national proceedings of the states concerned, which permitted the authorizations, to launch the investigations into those situations.

In addition, the practice of the ICC also introduced some dynamic applications of the principle of complementarity, by creating several factors in a potential case, such as the scale of the alleged crimes, (including geographic and temporal intensity), the nature of the unlawful behaviour, or of the crimes allegedly committed, the means employed for executing the crimes, (manner of their commission), or the impact of the crimes and the harm caused to victims and their families. These can be used for determining the criteria of admissibility, under article 17 of the Rome Statute.

However, apart from the application of the complementarity test, at the preliminary examination stage, the complementarity test will be conducted throughout the admissibility stage. The details of such a practice will be discussed in the next chapter (Chapter IV).

CHAPTER IV COMPLEMENTARITY UNDER THE ICC APPLICATION AT THE ADMISSIBILITY STAGE

4.1 INTRODUCTION

As mentioned earlier, the principle of complementarity will be applied throughout the ICC proceedings at two main stages: the preliminary examination stage and the admissibility stage. In the previous chapter (Chapter III), the dissertation analysed the determination of the complementarity test at the preliminary examination stage, and scrutinized some dynamic applications of the complementarity test.

This chapter intends to continue the analysis of the determination of the complementarity principle at the admissibility stage of the ICC proceedings. As for the chapter structure, this consists of five subchapters. Apart from this introductory part (section 4.1), the second subchapter examines the practice of the principle of complementarity in the admissibility stage (section 4.2). The subchapter analyses the most relevant points of the starting point of the application of the complementarity test, when the absence of national proceedings existed. The requirements of proceedings and unwillingness or inability (inactivity, activity, unwillingness and inability) will be assessed throughout the cases before the ICC, namely: the cases of *Kony et al, Katanga, Bemba, Kenyatta et al, Ruto et al, Gaddafi, Al-Senussi,* and *Simone* (sections 4.2.1 – 4.2.8). In each case, the criteria set forth in Chapter II, (inactivity, activity, unwillingness, and inability) will be applied to analyse the practices of the ICC.

The fourth subchapter analyses the practices and dynamic application adopted by the ICC at the admissibility stage, in order to apply the complementarity test through the cases of the ICC (section 4.3). This subchapter examines the obstacle faced by the Court, as well as the dynamic application of the principle of complementarity at this stage of the proceedings (sections 4.3.1 – 4.3.4).

This chapter ends with chapter conclusions (section 4.4).

4.2 COMPLEMENTARITY DETERMINATION IN PRACTICE AT THE ADMISSIBILITY STAGE

The previous discussions provided a legal framework, with regard to the context of complementarity, in the test for admissibility of the ICC. As discussed earlier, the admissibility of a case as set out in article 17 of the Rome Statute lacks a clear definition of the term 'complementarity' and it contains some unclear provisions. Then, in practice, the ICC has decided to apply and interpret some of those vague provisions contained in this article.

A preliminary issue to be considered in the context of admissibility proceedings under article 17, is whether there exists any investigation or prosecution at the national level. Failure by the state concerned, to take any measure against any person, who is involved in the commission of crimes, falling within the jurisdiction of the ICC, renders the case admissible before the Court.

The complementarity test requires action to be taken by national authorities of a state which has jurisdiction over that case at national level. If one of the criteria, under article 17(1)(a) to (c) is satisfied, then it renders the case inadmissible before the ICC. If there are no national proceedings (inactivity), then the gravity test under article 17(1)(d), relating to gravity threshold will be taken into consideration, and the case will become admissible when the gravity threshold is reached.[1]

From 2002 to the present time, the ICC has gained experience in applying the complementarity test at the admissibility stage, in a number of cases. The diversity of the application of the complementarity determination, reflects the dynamic of the application of the principle of complementarity in its practice.

This subchapter analyses the complementarity determination at the admissibility stage in eight remarkable cases from 5 situations before the ICC, namely: the *Kony et al* case (Uganda) , the *Katanga* case (DRC),the *Bemba* case (CAR), the *Kenyatta et al* case (Kenya), the *Ruto et al* case (Kenya),the *Gaddafi* case (Libya), the *Al-Senussi* case (Libya), and the *Simone* case (Côte d'Ivoire), respectively.

[1] Klamberg, *Commentary on the Law of the International Criminal Court*, 206, fn. 16.

4.2.1 The *Kony et al* Case (Uganda)

4.2.1.1 Background of the Case

The Lord's Resistance Army (LRA) was an armed group, which had been carrying out an insurgency against the Government of Uganda and the Ugandan Army, (also known as the Uganda People's Defence Force ("UPDF") and local defence units ("LDUs") since, at least, 1987. The LRA had been directing attacks against both the UPDF and LDUs, and against civilian populations. And, in pursuing its goals, the LRA has engaged in a cycle of violence and had established a pattern of "brutalization of civilians" by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements. Abducted civilians, including children, were said to have been forcibly "recruited" as fighters, porters and sex slaves to serve the LRA, and to contribute to attacks against the Ugandan army and civilian communities.

Joseph Kony, Vincent Otti and other senior LRA commanders, are the key members of "Control Altar", the section representing the core LRA leadership, responsible for devising and implementing LRA strategy, including standing orders to attack and brutalize civilian populations.

Uganda referred the *Situation in the DRC* to the Prosecutor of the ICC.[2] The Prosecutor opened the investigation and filed an application for a warrant of arrest for Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.[3] The warrant of arrest for Kony and others, contained a number of counts of crimes against humanity and war crimes, allegedly committed after 1 July 2002 in northern Uganda.[4]

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2 Letter of Referral dated 16 December 2003 from the Government of Uganda.

3 *Situation in Uganda,* Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC Pre-Trail Chamber II, ICC-02/04-01/05-53, 27 September 2005; *Situation in Uganda,* Warrant of Arrest for Vincent Otti, ICC Pre-Trail Chamber II, ICC-02/04-01/05-54, 8 July 2005; *Situation in Uganda,* Warrant of Arrest for Okot Odhuambo, ICC Pre-Trail Chamber II, ICC-02/04-01/05-56, 8 July 2005; *Situation in Uganda,* Warrant of Arrest for Dominic Ongwen, ICC Pre-Trail Chamber II, ICC-02/04-01/05-57, 8 July 2005.

4 For details see ibid.

Table 5 *Information of the Defendants in Kony et al Case*

Defendant	**Position** (at time of arrest or summons)	**Charges**	**Current Status**
Joseph Kony	Commander-in-Chief of the LRA	Crimes against humanity and war crimes, allegedly committed after 1 July 2002 in northern Uganda.	At large
Vincent Otti	Deputy Army Commander of the LRA	Crimes against humanity and war crimes, allegedly committed after 1 July 2002 in northern Uganda.	Dead
Okot Odhiambo	Deputy Army Commander of the LRA	Crimes against humanity and war crimes, allegedly committed after 1 July 2002 in northern Uganda.	Dead
Dominic Ongwen	Vice-Chairman and Second-in-Command of the LRA	Crimes against humanity and war crimes, allegedly committed after 1 July 2002 in northern Uganda.	At large

Source: Author's own table, derived from the website of the ICC.

4.2.1.2 Admissibility Proceedings History

On 21 October 2008, the Pre-Trial Chamber II decided to initiate the proceedings, with regard to the admissibility of the case, pursuant to article 19(1), that the Court may, on its own initiative, determine the admissibility of a case, in accordance with article 17.[5] This is based on a consequence of a change in circumstances, of the proceedings at the national level of Uganda.

Later, the Chamber requested an observation on the admissibility of the case from Uganda, the Prosecutor, the counsel for the Defence, and victims who had already communicated with the Court, with respect to the Case, or their legal representatives.

On 10 March 2009, the Chamber rendered its decision on the admissibility of the case, that the case was admissible, under article 17 of the Rome Statute.[6]

Subsequently, the Defence filed an appeal against the Pre-Trial Chamber II's decision, requesting the Appeals Chamber to reverse the decision, and to suspend the

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5 *Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, ICC Pre-Trial Chamber II, ICC-02/04-01/05-320, 21 October 2008.

6 *Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* Decision on the admissibility of the case under article 19(1) of the Statute, ICC Pre-Trial Chamber II, 10 March 2009, ICC-02/04-01/05-377 (*Kony* Admissibility Decision).

present proceedings, under article 19(1), pending proper implementation of the defendants' right to effectively participate in the proceedings.[7]

Finally, on 16 September 2009, the Appeals Chamber issued the judgment on the appeal, confirming the decision of the Pre-Trial Chamber II, that the case was admissible. [8]

Table 6 Timeline of the Kony et al.Case's Admissibility Proceedings

Date	Admissibility Proceedings
16 December 2003	• Uganda referred the *Situation in Uganda* to the Prosecutor
13 May 2005	• The Prosecution filed the Application for a warrant of arrest for Kony and others
27 September 2005	• The Pre-Trial Chamber II issued a warrant of arrest for Kony
8 July 2005	• The Pre-Trial Chamber II issued a warrant of arrest for Otti, Odhiambo, and Ongwen
21 October 2008	• The Pre-Trial Chamber II initiated the proceedings under article 19(1) regarding the admissibility of a case
10 March 2009	• The Pre-Trial Chamber II rendered a decision on the admissibility of the case under article 19(1) of the Statute that that case is admissible
16 March 2009	• Defence appealed against the decision on the admissibility of the case under article 19 (1)
16 September 2009	• The Appeals Chamber rendered judgment on the appeal of the Defence against the decision on the admissibility of the case under article 19 (1) of the Statute of 10 March 2009, confirming the decision of the Pre-Trial Chamber II

Source: Author's own table, derived from the website of the ICC.

4.2.1.3 Complementarity Determination in the Kony et al. Case

4.2.1.3.1 The Assessment of Inactivity

According to the facts, this case has been brought before the Court, within the context of the Ugandan situation, and complies with article 17 of the Rome Statute. Uganda referred the situation to the Court on 16 December 2003. At that time, the Attorney

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7 *Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* Defence Appeal against "Decision on the admissibility of the case under article 19 (1) of the Statute" dated 10 March 2009, ICC Pre-Trial Chamber II, 16 March 2009, ICC-02/04-01/05-379, para. 31.

8 *Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC Appeals Chamber, 16 September 2009, ICC-02/04-01/05-408 (*Kony* Admissibility Judgment).

General of Uganda stated that "[U]ganda is willing and able to prosecute the alleged perpetrators of the atrocities allegedly committed in Northern and Western Uganda, during the preceding seventeen years. However, the Ugandan judicial system had been unable to secure their arrest, principally because those alleged perpetrators operated from bases in Southern Sudan, as such beyond the reach of Ugandan law." [9]

In addition, the Solicitor General of Uganda stated that "[t]he national judicial system of Uganda was widely recognized for its fairness, impartiality, and effectiveness".[10] However, the Government regarded the ICC as the most appropriate and effective forum for the investigation and prosecution, of those bearing the greatest responsibility for the crimes, within the referred situation. This view was based on several considerations, including (i) the scale and gravity of the relevant crimes; (ii) the fact that the exercise of jurisdiction by the Court, would be of immense benefit for the victims of these crimes, and would contribute favourably to national reconciliation and social rehabilitation; (iii) Uganda's inability to arrest the persons who might bear the greatest responsibility for the relevant crimes.[11]

On the basis of these considerations, the Solicitor General maintained that the Government of Uganda had not conducted, and did not intend to conduct national proceedings, against the persons most responsible for these crimes, so that the cases had to be dealt with by the ICC instead".[12]

In this regard, this illustrates the inactivity of Uganda and its willingness to refer the situation to the ICC, which is viewed as an appropriate forum for the prosecution.

After the referral, the circumstances in Uganda had changed considerably, in particular, during 2006-2008, when a series of peace talks between the government LRA leadership had been conducted, regarding the terms of a ceasefire and possible peace agreement. Both parties agreed that both formal justice procedures and the traditional *Mato Oput* ceremony of reconciliation would play a role, in order to ensure justice and reconciliation. A breakthrough in negotiations was reached when the "Agreement on Accountability and Reconciliation Between the Government of the

9 *Kony* Admissibility Decision, para. 37.
10 Ibid.
11 Ibid.
12 Ibid.

Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan" and its "Annexure to the Agreement on Accountability and Reconciliation" had been signed between the Government of the Republic of Uganda and the LRA, on 29 June 2007 and 19 February 2008, respectively.

Interestingly, the Annexure provides for the establishment of a special division within the High Court of Uganda (the "Special Division"), with jurisdiction to try individuals who are alleged to have committed serious crimes, during the conflict in Uganda. It also provides that the Government of Uganda shall ensure that serious crimes committed during the conflict are addressed, by either the Special Division, or traditional justice mechanisms and any other alternative justice mechanisms, established under the Agreement.[13] In addition, according to the statements of Uganda in its Response, regarding the implementation of the Agreement and the Annexure, the relationship between the Special Division and the ICC, concerning jurisdiction over the case, was that the Special Division was not meant to take over the work of the ICC, any individual for whom a warrant had been issued by the Special Division, would have to be brought before the special division of the High Court for trial.[14]

In the view of the Chamber, the statements made by Uganda, concerning the meaning and scope of the Agreement and the Annexure within the context of its responses to the Chamber, was ambiguous and lacked of clarity, regarding the respective powers of the Court and of the national judicial authorities.[15] The Chamber believed that lack clarity, regarding the judicial authority, which ultimately vested with the power to decide the venue where the case should proceed, amounted to "an ostensible cause impelling the exercise of *proprio motu* review".[16]

Therefore, in conclusion, in order to allow for the change of circumstances at the national level, after the referral, the issue of inactivity still remained.

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13 Ibid., para. 43.

14 *Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* Annex 2 to Report by the Registrar on the Execution of the "Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest", ICC Pre-Trial Chamber II, 28 March 2008, ICC-02/04-01/05-286-Anx2, para. 3.

15 *Kony* Admissibility Decision, para. 44.

16 Ibid.

4.2.2 The *Katanga* Case (DRC)

4.2.2.1 Background of the Case

A violent armed conflict between the Lendu, Ngiti, and Hema ethnic groups was consumed eastern DRC's Ituri province from 1999-2003. On 24 February 2003, the *Force de résistance patriotique d'Ituri* (FRPI, Patriotic Resistance Forces in Ituri) and the *Front des Nationalistes et Intégrationnistes* (FNI, National Integration Front) militias, consisting of Ngiti and Lendu rebels respectively, launched a reprisal operation against Hema civilians in Bogoro, a key strategic point on the road between the district capital Bunia and the Ugandan border. The *Hema-dominated Union des Patriotes Congolais* (UPC) had seized control of Bunia with Uganda's assistance in 2002.

Evidence from the attack shows murder, pillaging, destruction of property, sexual crimes, and the use of FRPI child soldiers. 200 civilians were killed, and following the attack, Hema civilians' property was pillaged, and women and girls from Bogoro were abducted, to serve as "wives" for combatants.

Germain Katanga was the alleged former leader of the FRPI. He was being held without trial in the DRC, when the ICC issued its arrest warrant in 2007. [17]

The DRC referred the *Situation in the DRC* to the Prosecutor of the ICC. [18] The Prosecutor opened the investigation and filed an application for a warrant of arrest for Katanga and, later, the Chamber issued a warrant for Katanga.[19] He was surrendered and transferred to The Hague on 18 October 2007, [20] to stand trial on six counts of war crimes, and three counts of crimes against humanity committed on 24 February 2003, during the attack on the village of Bogoro, in the Ituri district of the DRC. He first appeared before the ICC Pre-Trial Chamber I in October 2007.[21]

Katanga was surrendered by the DRC to the Court on 18 October 2007. He was charged with nine counts of war crimes, (including murder or wilful killing; cruel

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17 *Prosecutor* v. *Germain Katanga,* Warrant of Arrest for Germain Katanga (*Katanga* Arrest Warrant), ICC Pre-Trail Chamber I, ICC-01/04-01/07-1-US-tENG, 2 July 2007.

18 Letter of Joseph Kabila, dated 3 March 2004, ICC-01/04-01/06-39-AnxB1.

19 *Katanga* Arrest Warrant.

20 *Prosecutor* v. *Germain Katanga,* Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga, ICC Pre-Trial Chamber I, ICC-01/04-01/07-40, 22 October 2007.

21 *Katanga* Arrest Warrant.

or inhuman treatment; using, conscripting and enlisting children; sexual slavery; attacking civilians; pillaging; rape; outrages upon personal dignity and destroying or seizing the enemy's property), and four counts of crimes against humanity, (including murder, inhumane acts, sexual slavery and rape), allegedly committed during an attack on the village of Bogoro on 24 February 2003.

Table 7 *Information of the Defendant in the Katanga Case*

Defendant	**Position** (at time of arrest or summons)	**Charges**	**Current Status**
Germain Katanga	Commander of the FRPI	crimes against humanity and war crimes, allegedly committed on 24 February 2003, during the attack on the village of Bogoro, in the Ituri district of the DRC.	convicted

Source: Author's own table, derived from the website of the ICC.

4.2.2.2 Admissibility Proceedings History

On 6 July 2007, Katanga filed a motion, challenging the admissibility of a case. [22] Later, the Trial Chamber II conducted the hearing and dismissed the challenge to admissibility, finding that the national authorities had not opened any investigation into the attack, for which Katanga was being prosecuted before the Court, and declared that the case concerning Katanga is admissible before the court. [23]

Subsequently, on 22 June 2009, Katanga filed the appeal against the oral decision of the Trial Chamber II. [24]

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22 *Prosecutor* v. *Germain Katanga,* Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC Pre-Trial Chamber I, 6 July 2007, ICC-01/04-01/07-4, para.19.

23 *Prosecutor* v. *Germain Katanga* , Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC Trial Chamber II, ICC-01/04-01/07-4-T-67-ENG ET WT, 24 November 2009, p.10; *Prosecutor* v. *Germain Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC Trial Chamber II, 18 June 2009, ICC-01/04-01/07-1213-tENG (Reasons for *Katanga* Admissibility Decision).

24 *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui,* Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber *'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire'* ICC Appeals Chambers, 22 June 2009, ICC-01/04-01/07-1234

Finally, on 25 September 2009, the Appeals Chamber issued its judgment on the appeal, upholding the Trial Chamber's finding, that the case was admissible and dismissing the grounds of the appeal.[25]

Table 8 *Timeline of the Katanga's Admissibility Proceedings*

Date	Admissibility Proceedings
3 March 2004	• DRC referred the *Situation in the DRC* to the Prosecutor
25 June 2007	• The Prosecution filed the Application for a warrant of arrest for Katanga
2 July 2007	• The Pre-Trial Chamber I issued a warrant of arrest for Katanga
18 October 2007	• Katanga was transferred to The Hague
30 September 2008	• The Pre-Trial Chamber I confirmed the charges against Katanga
10 February 2009	• Counsel for Katanga filed a challenge to the admissibility of the case
12 June 2009	• The Trial Chamber II dismissed the challenge to admissibility and declared that the case against Katanga is admissible before the Court.
22 June 2009	• Katanga filed the appeal against the decision of the Trial Chamber II
25 September 2009	• The Appeal Chamber rendered judgment on appeal of Katanga against the decision on the admissibility of the case of the Trial Chamber II, upholding the Trial Chamber II's finding that case is admissible and dismissing the appeal

Source: Author's own table, derived from the website of the ICC.

4.2.2.3 Complementarity Determination in the Katanga Case

4.2.2.3.1 The Assessment of Inactivity

The evidence indicated that Katanga was one of several persons, under investigation for their alleged involvement in the commission of crimes against humanity, pillaging, and destruction of property between 2002 and 2005 in, among other locations, Bogoro.[26]

In the current case, at the time of the proceedings before the Trial Chamber, there were in the DRC no investigations or prosecutions of any crime, allegedly

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25 *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui,* Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC Appeals Chambers, 25 September 2009, ICC-01/04-01/07-1497,(*Katanga* Admissibility Judgment), para. 115.

26 Reasons for *Katanga* Admissibility Oral Decision, para. 70.

committed by the Appellant, at Bogoro or anywhere else in the DRC. Any investigation, that may have been ongoing regarding him, was closed when he was surrendered to the Court in October 2007. On 17 October 2007, the *Auditeur Général près la Haute Cour Militaire* at Kinshasa decided to close the judicial proceedings by the *Auditeur Général,* in respect of the Appellant, in order to facilitate the joinder of all proceedings before the ICC. [27] In this regard, the Appeals Chamber considered that article 17 (1) (a) did not present a bar to his prosecution before the ICC. [28]

According to article 17(1)(b) of the Statute, the provision comprised two cumulative elements, that had to be fulfilled, for a case to be inadmissible: the case must have been investigated, and the State, having jurisdiction, must have decided not to prosecute. In the instant case, the DRC did not make any decision not to prosecute Katanga, as required by the provision. On the contrary, throughout the proceedings before the Trial Chamber, the representatives of the DRC emphasised that they wished that Katanga be brought to justice. In addition, the *Auditeur Général* decided to close domestic proceedings against Katanga, and 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 Katanga to the Court, and to close domestic investigations against him, as a result of that surrender. The thrust of this decision was not that Katanga should not be prosecuted, but that he should be prosecuted, albeit before the ICC. Therefore, the Appeals Chamber stated that the decision not to prosecute, in terms of article 17(1)(b), does not cover decisions of a State to close judicial proceedings against a suspect, because of his or her surrender to the ICC.[29]

According to the Reasons for *Katanga* Admissibility Oral Decision, the Trial Chamber II stated that "[a]ccording to the Statute, the Court may only exercise its jurisdiction, when a state which has jurisdiction over an international crime, is either unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators."[30] The Trial Chamber found that there was inaction of State in question; however, the Trial Chamber decided that this represented the second form of unwillingness, under article 17(2) of the Rome Statute.

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27 *Katanga* Admissibility Judgment, para. 78.

28 Ibid., para. 80.

29 Ibid, paras. 82-83.

30 Reasons for *Katanga* Admissibility Decision, para. 74.

Additionally, the Chamber noted that the term 'unwillingness', was defined in article 17(2) of the Statute, and referred to unwillingness, motivated by the desire to obstruct the course of justice.[31]

Regarding this, the Trial Chamber found that there is also a "[s]econd form of 'unwillingness', which was not expressly provided for in article 17 of the Statute, [and which] aimed to see the persons brought to justice, but not before national courts."[32] The Chamber considered that this second form of unwillingness, was fully in line with the principle of complementarity, which was "designed to protect the sovereign right of States, to exercise their jurisdiction in good faith, when they wish to do so".[33]

Every State has a duty to exercise its criminal jurisdiction, over those responsible for international crimes, (as stipulated in the sixth paragraph of the preamble of the Rome Statute). Thus, the Trial Chamber considered that a State was still complying with its duties, under the complementarity principle "if it surrenders a suspect to the Court in good time".[34] Accordingly, a State may refer a situation to the Court, if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case.[35]

In this case, the Chamber assessed the willingness of the DRC, and noted that the submissions of the DRC confirmed that the DRC had not initiated any investigations, in relation to the Bogoro incident.[36] The DRC had emphasised its commitment to the fight against impunity, and had stated that the Chamber should reject the challenge, so as to be able to try the case. [37] On the basis of these statements, the Chamber found that there was a "clear and explicit expression of the unwillingness of the DRC to prosecute this case.[38] In addition, the DRC had not challenged the admissibility of the case, and had immediately surrendered Katanga to

31 Ibid, para. 77.
32 Ibid.
33 Ibid, para. 78.
34 Ibid, para. 79.
35 Ibid, para. 80.
36 Ibid, para. 93.
37 Ibid, para. 94.
38 Ibid, para. 95.

the Court.[39] In the view of the Trial Chamber, the DRC has, therefore, left it to the ICC, to try Katanga for the acts committed, on 24 February 2003 in Bogoro. [40]

Katanga argued in his appeal, that the Trial Chamber erroneously enlarged the definition of 'unwillingness' in a manner (1) not intended by the drafters of the Statute, and not in compliance with its objective and purpose; and (2) contrary to the fundamental values underlying the complementarity principle.[41]

With regard to the definition of unwillingness, the scope of unwillingness in article 17(2) of the Rome Statute is an exhaustive list, and leave no room for discretion to rely on forms of unwillingness, other than those described in the provision. Katanga argued that, according to the objective of the drafter of the Rome Statute, who made the best effort to give the most precise and objective definition to the concepts of unwillingness and inability, then article 17 had to strictly interpreted.[42] But, in this case, the Chamber interpreted article 17(2) more broadly.[43]

In addition, Katanga argued that the Trial Chamber's interpretation of complementarity principle, violated paragraph 6 of the preamble, and the fundamental values underlying the principle of complementarity, as inherent in the preamble, articles 1 and 17 of the Rome Statute. If states are granted an unconditional right not to prosecute, this would seriously jeopardize any encouragement of States to prosecute domestically, and thereby endanger the correct application of the principle of complementarity, and would negate the persisting and primary responsibility for states to prosecute international crimes.[44] This would be a violation of article 17, which affirms that an able and willing State should deal with cases, concerning international crimes in their own jurisdiction.[45]

Hence, the Appellant submitted that the Trial Chamber had committed a legal error, in its interpretation of 'unwilling', in article 17(2) of the Statute.[46]

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39 Ibid.
40 Ibid.
41 *Katanga* Admissibility Judgment, para. 61.
42 Ibid., para. 62.
43 Ibid., para. 62.
44 Ibid., para. 63.
45 Ibid.
46 Ibid., para. 64.

Regarding this, ground for appeal by Katanga, the Appeals Chamber considered the matter and stated that the question of unwillingness or inability of a State, having jurisdiction over the case, became relevant, only where, due to ongoing or past investigations or prosecutions in that state, the case appeared to be inadmissible.[47] In both articles 17(1)(a) and (b) of the Rome Statute, the question of unwillingness or inability, was linked to the activities of the State having jurisdiction.[48]

The Appeals Chamber explained that the interpretation of article 17(1)(a) and (b) of the Statute was confirmed by article 17 (2) of the Statute, that:

> [i]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, 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.[49]

It is only when the answers to these questions are in the affirmative, that one has to look at the second halves of sub-paragraphs (a) and (b), and to examine the question of unwillingness and inability. [50]

With regard to the interpretation of article 17(1), in the case of the inaction of national authorities, Katanga proposed that the in the case of inaction, the Court also has to consider the unwillingness or inability. The Appeals Chamber considered such a proposal for interpretation, and stated that:

> [S]uch 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

47 Ibid., para. 75.
48 Ibid., para. 76.
49 Ibid., para. 78
50 Ibid.

> 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. Impunity would persist unchecked and thousands of victims would be denied justice.[51]

With regard to the above judgment, the jurisprudence of the ICC, according the determination of complementarity (admissibility), consists of a two-step assessment, namely: (1) whether there is a national investigation or prosecution, in relation to the same case as the one before the ICC (the proceedings requirement); and (2) where such proceedings exist, whether they are vitiated by unwillingness or inability (the unwilling or unable requirement). Additionally, in the case of inaction, there is no need to consider the unwillingness and inability.[52]

4.2.2.3.2 The Assessment of Activity

The case has been decided on the basis of the inaction of Uganda; however, the ICC has also applied this criterion in its practice, in particular, the same-case criteria, which plays a role as an effective link in the existence of national proceedings.

According to the judgment of the Appeals Chamber, the Appeals Chamber had declined to rule on the correctness, or otherwise of the 'same conduct' component of the 'same person/same conduct' test, as this question was not decisive for the determination of that appeal. [53]

The Appeals Chamber stated, with regard to the 'same case', in this case, at the stage of issuing a warrant of arrest for Katanga, that:

> [w]hen, as in the present case, the existence of national proceedings is the sole reason for a possible finding of inadmissibility, it is a *conditio sine qua non* for such a finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court. In this regard, the Chamber finds that, on the basis of the evidence and information provided in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response,

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51 Ibid, para.79.

52 Ibid, para.78.

53 Ibid., para. 81.

> the proceedings against Germain Katanga in the [Democratic Republic of the Congo (hereinafter: "DRC")] do not encompass the *same conduct* which is the subject of the Prosecution Application.[54]

The Appeals Chamber noted that, in order to address in the current appeal, the correctness of the "same-conduct test", the determination of whether the same "case" is the object of domestic proceedings; however, at the time of the admissibility challenge proceedings before the Trial Chamber, there were no proceedings in the DRC against Katanga. Hence, the question of whether the "same-conduct test" is correct, is not relevant to the current appeal. [55]

4.2.2.3.3 The Assessment of Unwillingness

Katanga argued that in his appeal that the Trial Chamber confused the concepts of unwillingness and inability, and stated that the Prosecutor and the DRC have never questioned the substantive willingness of the DRC, to prosecute international crimes, and that the DRC said that it was not prosecuting him, because of inability and not unwillingness.[56] He argued that the wrong interpretation of unwillingness arose, as the Chamber persisted in confusing "the absence of objection by the DRC and the lack of willingness". In his view, there was a difference between the decision of a State, not to challenge the admissibility of a case, and unwillingness in terms of article 17(2) of the Statute. He continued to argue that there was a risk that the ICC would be burdened with cases, that could have been easily prosecuted elsewhere, thereby depleting the Court's resources, for other cases. [57]

However, the Appeals Chamber noted that:

> [t]he question of unwillingness or inability does not arise in the present case, because, at the time of the admissibility challenge, there were no domestic investigations or prosecutions against the Appellant; nor did the Congolese authorities, after investigation, decide not to prosecute him. For that reason, the

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54 *Prosecutor* v. *Germain Katanga,* Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain, ICC Pre-Trial Chamber I, 6 July 2007, ICC-01/04-01/07-4, para. 20.

55 *Katanga* Admissibility Judgment, para.81.

56 Ibid., para.89.

57 Ibid.

> Appeals Chamber sees no need to address the Appellant's arguments under the fourth ground of appeal. [58]

4.2.2.3.4 The Assessment of Inability

In Katanga's view, inability can be invoked only in very exceptional circumstances, and such exceptional circumstances cannot be shown in this case. Thus, it is not for the DRC to declare itself unable to prosecute and try the accused, but it is the responsibility of the Chamber to make such a determination. Hence, contrary to what the Trial Chamber suggests, it is not crucial that a State considers itself unable to prosecute and try the case domestically. [59]

The Appeals Chamber noted that, under this ground of appeal, Katanga criticized the interpretation of unwillingness by the Trial Chamber, that the Chamber confused unwillingness and inability, and argued that the DRC was not unable to prosecute him. The Appeals Chamber also explained that the question of unwillingness, or inability, did not arise in the present case. This was because, at the time of the admissibility challenge, there were no domestic investigations or prosecutions against Katanga; nor did the Congolese authorities, after investigation, decide not to prosecute him. For that reason, the Appeals Chamber saw no need to address this ground for an appeal.[60]

4.2.3 The *Bemba* Case (CAR)

4.2.3.1 Background of the Case

The government of the CAR referred the situation of crimes against humanity and war crimes, allegedly committed on the territory of the CAR since 1 July 2002, to the Prosecutor of the ICC, on 18 December 2004. [61] On 22 May 2007, the Prosecutor announced that he had decided to open an investigation into the situation in the CAR. The decision, by the Prosecutor, followed a thorough analysis of all available information, which led to the determination that the jurisdiction, admissibility, and interests of justice requirements of the Rome Statute, were satisfied. Following the

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58 Ibid, para.79.

59 Ibid.

60 Ibid., paras. 96-97.

61 ICC Press Release, '*Prosecutor receives referral concerning Central African Republic'*, The Hague, 7 January 2005, ICC-OTP-20050107-86-En.

opening of the investigation, the Court began the processes of identifying appropriate field premises in the CAR, and developing its outreach capabilities and strategy, regarding the situation.

Jean-Pierre Bemba Gombo was formerly President and Commander-in-Chief of the *Mouvement de libération du Congo*. He allegedly committed crimes, in various locations in the Central African Republic, in connection with a non-international armed conflict. Charges against Bemba were confirmed by Pre-Trial Chamber III on 15 June 2009. He was charged with three counts of war crimes (murder, rape, and pillaging), and two counts of crimes against humanity (murder and rape), in his capacity as a military commander under article 28 of the Rome Statute (Responsibility of commanders and other superiors)

On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest against Jean-Pierre Bemba Gombo, and requested Belgian authorities to provisionally arrest Bemba.[62] The warrant included two counts of crimes against humanity (including rape and torture), and four counts of war crimes (including rape, torture, outrages upon personal dignity, and pillaging). On 10 June 2008, the Chamber issued a new warrant of arrest, supplementing the initial counts with two counts of murder, as a crime against humanity, or war crimes.

In issuing the warrants, the Chamber concluded that there were reasonable grounds to believe that, in the context of a protracted armed conflict in the Central African Republic from about 25 October 2002 to 15 March 2003, *Mouvement de libération du Congo* (MLC) forces led by Bemba carried out widespread and systematic attacks against a civilian population. These involved rapes, torture, outrages upon personal dignity and pillaging. The Chamber further concluded that there were reasonable grounds to believe, that Bemba was responsible for these crimes, by virtue of being vested with *de facto* and *de jure* authority, by the members of the MLC, to take all political and military decisions.

Bemba was arrested by Belgian authorities on 24 May 2008, pursuant to the request for provisional arrest. On 10 June 2008, following the issuing of the new

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62 *Prosecutor* v. *Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, ICC Trial Chamber III, 24 June 2010, ICC-01/05-01/08-802 (*Bemba* Admissibility Decision), para. 21.

warrant of arrest, Pre-Trial Chamber III issued a request for arrest and surrender of him to Belgium.

Bemba was surrendered to the Court on 3 July 2008, and made an initial appearance before the judges of Pre-Trial Chamber III. A hearing on the confirmation of the charges against Mr. Bemba was currently scheduled to take place on 4 November 2008.

Table 9 *Information of the Defendant in the Bemba Case*

Defendant	**Position (**at time of arrest or summons)	**Charges**	**Current Status**
Jean-Pierre Bemba Gombo	President and Commander-in-chief of the MLC	crimes against humanity and war crimes, allegedly committed between 2002 and 2003 in CAR.	Acquitted

Source: Author's own table, derived from the website of the ICC.

4.2.3.2 Admissibility Proceedings History

The Counsel for Bemba filed an application, challenging the admissibility of the case, pursuant to articles 17 and 19(2) of the Statute, on the grounds of respecting complementarity between the work of the Court and judicial proceedings in the CAR. It was said that there was an alleged lack of the requisite level of gravity in the case and an alleged abuse of process.[63]

Subsequently, Trial Chamber III rendered the "Decision on the Admissibility and Abuse of Process Challenges", affirming that the case against Bemba before the ICC is admissible, and rejecting the challenge of admissibility of the case.[64]

After that, Bemba appealed against the decision of the Trial Chamber III and filed documents in support of the appeal.[65]

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63 *Prosecutor* v. *Jean-Pierre Bemba Gombo*, "Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute, ICC Trial Chamber III, 25 February 2010, ICC-01/05-01/08-704-Red3-tENG (*Bemba* Admissibility Application).

64 *Bemba* Admissibility Decision, para. 261.

65 *Prosecutor* v. *Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Oierre Bembe Gombo against the decision of Trial Chamber III on 24 June 2010 entitled "Decision on Admissibility and Abuse of Process Challenges", ICC Appeals Chamber, 19 October 2010, ICC-01/05-01/08-962 (*Bembe* Admissibility Judgment).

Eventually, the Appeals Chamber rendered its judgment on the appeal of Bemba against the decision of Trial Chamber III of 24 June 2010, regarding the admissibility and abuse of process challenges. It confirmed the Trial Chamber's decision, finding that when the Trial Chamber was presented with the question of whether the outcome of domestic judicial proceedings is equivalent to a decision not to prosecute, in terms of article 17 (1)(b), of the Rome Statute, the Trial Chamber should accept, *prima facie,* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence, indicating otherwise. In that situation, the case was admissible and the grounds of appeal could be dismissed. [66]

Table 10 *Timeline of the Bemba's Admissibility Proceedings*

Date	Admissibility Proceedings
18 December 2004	• CAR referred the *Situation in CAR* to the Prosecutor
23 May 2008	• The Prosecution filed the Application, for a warrant of arrest for Bemba
10 June 2008	• The Pre-Trial Chamber III issued a warrant of arrest for Bemba
15 June 2009	• The Pre-Trial Chamber II confirmed the charges against Bemba
10 February 2009	• Counsel for Bemba filed the challenge to the admissibility of the case
24 June 2010	• The Trial Chamber III rendered a decision, holding that the case against Bemba was admissible, and rejecting the challenge to the admissibility of the case
28 June 2010	• Bemba filed the notice of appeal against the decision of the Trial Chamber III
19 October 2010	• The Appeal Chamber rendered judgment on appeal of Katanga against the decision on the admissibility of the case of the Trial Chamber III, confirming the decision of the Trial Chamber III that case is admissible, and dismissing the appeal

Source: Author's own table, derived from the website of the ICC.

4.2.3.3 Complementarity Determination in the Bemba Case

4.2.3.3.1 The Assessment of Inactivity

Under article 17(1)(b) of the Rome Statute, with regard to paragraph 10 of the preamble and article 1, a case is considered inadmissible, when the case has been investigated by a state which has jurisdiction over it, and that state has decided not to

[66] Ibid., para. 136.

prosecute the person concerned. This is unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. Bemba contended that the case has been investigated by a Central African State, which has jurisdiction over it. It was putting forward the same allegations, as those which were the subject of the committal for trial, by the CAR *Cour de Cassation,* and the case was the subject of effective and genuine investigations and prosecution in the CAR. Thus, the inadmissible criteria, under article 17(1)(b) had been met in this case.[67]

In addition, according to the first criterion set out in article 17(1)(b), it has been established that the state had decided not to prosecute the person concerned, "unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute" and the "inability to prosecute" referred to in article 17(3), required evidence of a "total or substantial collapse or unavailability" of the national judicial system. In addition, there was no room for any other definition of the term 'inability'. The Rome Statute indicates that the only form of "inability" envisaged is the disintegration of national judicial systems. In this regard, diplomatic immunity, which by definition is temporary, or the presence of the suspect, specifically the accused, outside of the territorial jurisdiction of the CAR, should not be taken into account in assessing the "inability to prosecute" criterion.[68] Bemba maintained that the criteria of inability and unwillingness, under article 17, had not been met. [69]

According to the admissibility proceedings, the Trial Chamber III considered and stated that the first requirement of article 17(1)(a) did not apply to this particular case because the courts of the CAR and the State authorities had indicated unequivocally, that these proceedings in that country were concluded or discontinued, when the case was referred to the ICC. [70]

With regard to article 17(1)(b), the Trial Chamber III observed that the provision contained two cumulative elements: the case had to have been investigated and the relevant state must have made a decision not to prosecute.[71] As far as this case was concerned, it was investigated in the CAR. However, once the dismissal decision

67 *Bemba* Admissibility Application, paras 90-71, 73.
68 Ibid., paras 77-78.
69 Ibid., para. 82.
70 Ibid., para. 238.
71 Ibid., para. 240.

had been set aside, which brought the national proceedings to a halt, it was decided that the case should be referred to the ICC. This reflected the inability of the State. It was decided not to prosecute. Instead, the proceedings in the CAR were closed and ordered for severance, that approximately coincided with the referral to the ICC. Therefore, the first element of article 17(l)(b) was not met. [72]

In addition, according to the criteria under article 17(1)(b), the Trial Chamber found that the events which formed the basis of the charges, in this particular case, had been investigated by the CAR, which had jurisdiction over it. The Trial Chamber III observed that, in the Order of 16 September 2004, the Senior Investigating Judge (i) determined that the accused could not be prosecuted because he was Vice-President of the DRC, and accordingly enjoyed diplomatic immunity, and (ii) simultaneously proposed to dismiss the charges against Bemba, on the basis of insufficient evidence, and conclude that the Order of 16 September 2004 was not a final decision on the merits of the case. This was because, on the following day, 17 September 2004, the Deputy Prosecutor [...] entered a *prima facie v*alid appeal, as regards all accused. In the view of the Trial Chamber, once his dismissal decision had been set aside, decisions were taken by the appellate courts [...] which brought the national proceedings to a halt. In addition, the Trial Chamber further concluded that neither of the subsequent appellate judgments were decisions not to prosecute, within the meaning of article 17(1)(b) of the Statute, because "[t]hey were, instead, decisions closing the proceedings in the CAR [...], that approximately coincided with the referral to the ICC".[73]

Bemba argued that the Senior Investigating Judge's Order of 16 September 2004 was a final decision on the merits of the case, which was not subsequently amended by a valid appeal, and therefore constituted a decision not to prosecute. The Order of 16 September 2004 should be read, in conjunction with the Public Prosecutor of Bangui Regional Court's Application of 28 August 2004, in which the Public Prosecutor recommended dismissal of the charges against Bemba. He argued that the

72 Ibid., paras. 240-242.

73 Ibid., para. 46.

Trial Chamber erred, in deciding that a *prima facie* valid appeal was entered against the Order of 16 September 2004, and pertaining to all of the accused. [74]

The Appeals Chamber stated that, when considering the proceedings in the CAR, it discerned two important points. First, the relevant moment for the purposes of an admissibility challenge, which was clearly stated in the *Katanga* case, that:

> [G]enerally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17 (1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa.[75]

And, the second, for the purposes of article 17, the case that was brought against the accused in the CAR, was broadly the same as the prosecution has now brought before Trial Chamber III, except that the charges are inevitably different, (given the particular crimes within the ICC's jurisdiction: article 5 of the Statute), and the evidence has developed and changed, as a result of the investigation by the OTP. The conduct and underlying offences (murder, rape, pillage, etc.) are the same, as are many of the central events that are relied on. [76]

In the *Bemba* case, based upon the relatively extensive evidence apparently before the Senior Investigating Judge, it appears that this case was investigated in the CAR. However, once his dismissal decision had been set aside, decisions were taken by the appellate courts, (set out extensively above), which brought the national proceedings to a halt. In this context, it was necessary to bear in mind, that in the Katanga case, the Appeals Chamber concluded, on the effect of conclusions of this kind by national judicial authorities, that:

> [t]he provision (Article 17(l)(b)) must also be applied and interpreted in light of the Statute's overall purpose, as reflected in the fifth paragraph of the Preamble, namely "to put an end to impunity". If the decision of a State to close an investigation

74 Ibid., paras. 46-51.

75 *Katanga* Admissibility Judgment, para. 56.

76 *Bemba* Admissibility Decision, para. 218.

> 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 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. [77]

In addition, there is nothing to indicate that the Trial Chamber erred in its determination that there was no decision not to prosecute, within the meaning of article 17(1)(b) of the Statute. In the view of the Appeals Chamber, the Trial Chamber correctly relied on the judgments of the Court of Appeal of Bangui and the Court of Cassation, as indicating, *prima facie,* the current status of the judicial proceedings, in the case of *Etat Centrafricain c. Ange-Félix Patassé, et al.*[78]

In conclusion, the results of the criminal proceedings in the CAR were: to halt the proceedings and to refer the case to the ICC. Therefore, there was no current investigation or prosecution in the CAR under article 17(1)(a), and the State decided the accused should be prosecuted by the ICC. This was not a decision to not prosecute the person concerned under article 17(l)(b), and there has been no decision made on its merits by a competent court, under article 17(1)(c).

4.2.3.3.2 The Assessment of Unwillingness

Since the Chamber was not required to examine unwillingness, in case of inactivity, the criterion has not been taken into consideration by the Chamber in this case. However, the Chamber explained that, by this referral, the CAR indicated its "unwillingness" to prosecute the accused domestically - indeed, in oral submissions, the representative made it clear that, once it had entrusted the ICC with the case, it relinquished any willingness to prosecute the accused, on the territory of the CAR. This "unwillingness", as described during submissions, was not unwillingness according to the purposes of article 17(l)(b). [79]

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77 *Katanga* Admissibility Judgment, para. 83.

78 *Bemba* Admissibility Judgment, para. 74.

79 *Bemba* Admissibility Decision, para. 243.

Unwillingness, under article 17(2) of the Statute sets out certain criteria that the Court shall take into consideration, when making a determination on unwillingness, in a particular case. In essence, they are designed to ensure that the Court will focus on whether i) the relevant individual is being shielded from prosecution, ii) there has been an unjustified delay, that is inconsistent with an intention to bring the accused to justice, and iii) the proceedings lack independence and impartiality. None of these considerations apply in the present case. [80]

4.2.4 The *Kenyatta et al* Case (Kenya)

4.2.4.1 Background of the Case

On 26 November 2009, the Prosecutor requested authorization from Pre-Trial Chamber II to open an investigation into the situation in Kenya, noting that 1,220 persons had been killed, hundreds raped, with thousands of more rapes unreported, 350,000 people had been forcibly displaced and 3,561 had been injured. This was part of a widespread and systematic attack against civilians. On 31 March 2010, the Pre-Trial Chamber II authorized the Prosecutor to commence an investigation, covering alleged crimes against humanity, committed between 1 June 2005 and 26 November 2009.

Uhuru Muigai Kenyatta is a Kenyan politician and businessman, who is the fourth and current President of the Republic of Kenya. He served as the Member of Parliament for Gatundu South from 2002 to 2013. Currently, the party leader and a member of the Jubilee Party of Kenya, he was previously involved with The National Alliance and, before that, the Kenya African National Union.

In 2007, the incumbent President Mwai Kibaki of the Party of National Unity (PNU) was declared the winner in the closely contested Kenyan presidential election against Raila Odinga. Odinga and his opposition party, the Orange Democratic Movement (ODM), refused to recognize the election results, and widespread violence ensued, resulting in thousands of deaths, the displacement of over half a million people, as well as hundreds of victims of sexual assault.

Table 11 Information of the Defendants in the Kenyatta et al Case

[80] Ibid, para. 244.

Defendant	**Position** (at time of arrest or summons)	**Charges**	**Current Status**
Francis Kirimi Muthaura	Head of the Public Service and Secretary to the Cabinet and Chairman of the National Security Advisory Committee	Crimes against humanity allegedly committed during the 2007-2008 post-election violence in Kenya.	Case closed
Uhuru Muigai Kenyatta	Deputy Prime Minister and Minister of Finance	Crimes against humanity allegedly committed during the 2007-2008 post-election violence in Kenya.	Case closed
Mohammed Hussein Ali	Chief Executive of the Postal Corporation of Kenya (and Commissioner of the Kenya Police during the post-election violence)	Crimes against humanity allegedly committed during the 2007-2008 post-election violence in Kenya.	Case closed

Source: Author's own table, derived from the website of the ICC.

4.2.4.2 Admissibility Proceedings History

The ICC Prosecutor initiated the investigation into the *Situation in Kenya* with the authorization of the Pre-Trial Chamber II on 31 March 2010.[81] The ICC prosecutor suspected that Kenyatta was responsible for planning, financing, and coordinating violence against ODM supporters, as part of a common plan, along with Francis Muthaura, a former civil service chief, and Muhammed Hussein Ali, a former police chief. Thus, Kenyatta was charged with five counts of crimes against humanity: murder, deportation or forcible transfer, rape, persecution, and other inhumane acts.

On 8 March 2011, the Pre-Trial Chamber II decided to summons Kenyatta to appear before the Court.[82] And, later, the Pre-Trial Chamber II confirmed the charges against Kenyatta and moved the case to trial, so Kenyatta became the first sitting head of state to appear before the ICC during a Pre-Trial hearing.

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81 *Situation in the Republic of Kenya,* "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" ICC Pre-Trial Chamber II, 31 March 2010, ICC-01/09-19 (*Kenya* Authorization Decision).

82 *Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC Pre-Trial Chamber II, 8 March 2011, ICC-01/09-02/11-1 (*Kenyatta* Summons to Appear Decision).

On 30 May 2011, the Pre-Trial Chamber II rejected the requests, and determined that the case against Kenyatta was admissible before the ICC. [83] After that, Kenya filed an appeal against the decision of the Pre-Trial Chamber II. [84]

Finally, the Appeals Chamber rendered its judgment on the appeal of Kenya against the decision of Pre-Trial Chamber II, that the case was admissible, dismissing the grounds of appeal.[85]

Table 12 Timeline of the Kenyatta et al's Admissibility Proceedings

Date	Admissibility Proceedings
30 March 2010	• The Pre-Trial Chamber II authorized the Prosecutor to commence an investigation in Kenya
15 December 2010	• The Prosecutor requested the Trial Chamber II, to issue the summons to appear for Kenyatta
8 March 2011	• The Pre-Trial Chamber II issued the summons to appear for Kenyatta
31 March 11	• Kenya filed the challenge to the admissibility of the pursuant to article 19(2)(b) as to Kenyatta.
30 May 2011	• The Pre-Trial Chamber II issued the decision on the admissibility of the case, determining the case against Kenyatta was admissible.
6 June 2011	• Kenya filed the appeal against the decision of the Pre-Trial Chamber II.
30 August 2011	• The Appeals Chamber rendered a judgment on an appeal against the decision on the admissibility of the case of the Pre-Trial Chamber II, confirming the decision of the Pre-Trial Chamber II and dismissing the appeal.

Source: Author's own table, derived from the website of the ICC.

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83 Ibid.

84 *Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Appeal of the Government of Kenya against the '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 Appeals Chamber II, 6 June 2011, ICC-01/09-02/11-104.

85 *Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" ICC Appeals Chamber II, 30 August 2011, ICC-01/09-02/11-274 (*Kenyatta* Admissibility Judgment).

4.2.4.3 Complementarity Determination in the Kenyatta et al Case

4.2.4.3.1 The Assessment of Inactivity

Although the information, provided by the Government, confirmed that instructions were given to investigate the three suspects, subject to the Court's proceedings, nevertheless, the Government did not provide the Chamber, with any details regarding the asserted, current investigative steps undertaken. The Government of Kenya also stated that it had instructed the team of investigators to carry out exhaustive investigations, but it did not explain or show the Chamber that any concrete steps had been or were being currently undertaken in this respect. [86]

The Chamber lacked information, regarding dates when investigations had commenced against the three suspects, and whether the suspects were actually questioned or not, and if so, the contents of the police or public prosecutions' reports, regarding the questioning.[87]

The Government of Kenya also failed to provide the Chamber with any information, as to the conduct, crimes or the incidents for which the three suspects were being investigated or questioned about. [88]

The Appeals Chamber pointed out that, the admissibility of the case had to determine on the basis of the facts, as they existed at the time of the proceedings, concerning the admissibility challenge. Thus, in the absence of information, which substantiated Government of Kenya's challenge that there were ongoing investigations against the three suspects, up until the party filed its Reply, the Chamber considered that there remained a situation of inactivity. [89]

4.2.4.3.2 The Assessment of Activity

According to the admissibility proceedings in the *Kenyatta* case, the principle of complementarity had arisen, regarding the interpretation and application of the admissibility criteria, pursuant to article 17 of the Rome Statute. In particular, the interpretation of "the case is being investigated', and the 'same case/same conduct' were being examined.

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86 Ibid., para. 64.
87 Ibid., para. 65.
88 Ibid.
89 Ibid., para. 66.

According to Kenya's Admissibility Challenge, Kenya submitted that the Court had not yet authoritatively established the meaning of the word "case", in article 17(1) of the Statute. Kenya submitted that in the *Katanga* Admissibility Judgment, the Appeals Chamber had declined to rule on the findings of other Chambers of the Court, that in order for a case to be inadmissible, "national proceedings must encompass both the conduct and the person, that is to say, the subject of the case before the ICC", the so-called 'same person/same conduct' test that:

> The ICC case law has not authorhatively determined the meaning of the word "case" in Article 17(1). It is significant that for the purposes of authorising an investigation under Article 15 in respect of the Kenya Situation the Pre-Trial Chamber held that the admissibility of the case before the ICC must be determined by whether (i) the groups of persons that are the likely to be the object of an investigation by the ICC and (ii) the crimes that are likely to be the focus of such an investigation, are being investigated or prosecuted before the national courts. The Government accepts that national investigations must, therefore, cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC. The Kenyan national investigative processes do extend to the highest levels for all possible crimes, thus covering the present cases before the ICC. [90]

In the view of Kenya, the test should be applied to the Admissibility Challenge. According to that test, the national proceedings must "cover the same conduct in respect of persons at the same level, in the hierarchy being investigated by the ICC".[91]

In the *Kenyatta* Admissibility Decision, the Pre-Trial Chamber stated that Kenya might have misunderstood the admissibility test that:

> The criteria established by the Chamber in its 31 March 2010 Authorisation Decision were not conclusive but simply indicative of the sort of elements that the

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90 *Prosecutor* v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC Pre-Trial Chamber II, 31 March 2011, ICC-01/09-01/11-19 (*Kenya* Admissibility Application), para. 32.

91 *Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" ICC Appeals Chamber II, 30 August 2011, ICC-01/09-02/11-274 (*Kenyatta* Admissibility Judgment).

> Court should consider in making an admissibility determination within the context of a situation, namely when the examination is in relation to one or more "potential" case(s). At that stage, the reference to the groups of persons is mainly to broaden the test, because at the preliminary stage of an investigation into the situation it is unlikely to have an identified suspect. The test is more specific when it comes to an admissibility determination at the "case" stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. At this stage, the case(s) before the Court are already shaped. Thus, during the "case" stage, the admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings. [92]

The Pre-Trial Chamber explained that "the test is more specific when it comes to an admissibility determination at the 'case' stage. The Pre-Trial Chamber recalled that in the Lubanga case, Pre-Trial Chamber I stated, in express terms, that a determination of inadmissibility of a "case" requires that national proceedings [...] encompass both the person and the conduct which is the subject of the case before the Court. So far, the Court's jurisprudence has been consistent on this issue. However, the Government of Kenya claimed that the ICC case law has not authoritatively determined the meaning of the word 'case'. Citing the Judgement of 25 September 2009 Judgment, the Government asserted that the Appeals Chamber "decline[d] to make any ruling on the subject, [as] it did not endorse the findings of Pre-Trial Chambers, in the context of issuing warrants of arrest, since national proceedings must encompass both the conduct and the person, that is the subject of the case before the ICC".[93]

In Kenya's Reply on 16 May 2011, Kenya submitted, furthermore, that in any argument that there must be the identity of individuals as well as of subject matter. On 31 March 2011, the Chamber received the Application by the Government of Kenya challenging the admissibility, pursuant to article 19(2)(b) of the Rome Statute.[94] The

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92 *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"* ICC Pre-Trial Chamber II, 30 May 2011, ICC-01/09-01/11-96 (*Kenyatta* Admissibility Decision), para. 50.

93 *Prosecutor* v *Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC Pre-Trial Chamber I, 24 February 2006, ICC-01/04-01/06-8-Corr (*Lubanga* Arrest Warrant Decision), paras. 31, 37-39.

94 *Kenya* Admissibility Application.

Government argued that constitutional and judicial reforms, both recently enacted and anticipated, as well as the investigative processes, that are currently underway, were applicable. The process investigating crimes arising out of the 2007-2008 post-election violence, will continue over the coming months, and that steps were currently being taken. Those steps envisaged with respect to all cases at different levels, would be finalized by September 2011. In the Government's view, the investigation of the cases before the Court would be most effectively carried out, once the new Director of Public Prosecutions was appointed by the end of May 2011, and that currently, they are continuing under the Directorate of Criminal Investigations. During the proposed 6-month period, the Government will be undertaking investigations, and will be in a position to provide progress reports to the Chamber, by the end of July, August and September 2011

The Pre-Trial Chamber II reaffirmed the judgment of 25 September 2009, of the Appeals Chamber in the *Katanga* case, that the admissibility test, envisaged in article 17 of the Statute, has two main limbs: complementarity; and gravity.

With respect to the complementarity test, the Chamber emphasises that it concerns the existence or absence of national proceedings. Article 17(l)(a) of the Statute makes clear whether the Court shall determine that a case is inadmissible, when the case is being investigated or prosecuted by a state, which has jurisdiction over it. This is unless the state is unwilling or unable genuinely to carry out the investigation or prosecution. [95]

As to the gravity, since the Government of Kenya did not contest this element, the Chamber should confine its examination to the subject-matter, as defined in the Application, namely whether there were actually ongoing domestic proceedings (complementarity).

The Government of Kenya argued that it was currently investigating crimes arising out of the 2007-2008 Post-Election Violence. Thus, the Chamber considered that the applicable test, which adhered to the facts presented in the Application and the Reply is the one referred to in the first half of article 17(l)(a) of the Statute, namely whether the case was being investigated or prosecuted by a state which had jurisdiction over it.

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[95] *Kenyatta* Summons to Appear Decision.

The Chamber is satisfied that Kenya was a State which has jurisdiction over the present case. However, the remaining question is whether this case "is being investigated or prosecuted" by the State, within the meaning of article 17(l)(a) of the Statute. However, the Chamber lacked information, regarding dates when investigations had commenced against the suspects, so the Chamber considered that there remained a situation of inactivity. [96]

4.2.5 The *Ruto et al* Case (Kenya)

4.2.5.1 Background of the Case

On 31 March 2010, the Chamber issued its decision authorizing the Prosecutor to commence an investigation into the situation in Kenya. [97]

On 8 March 2011, Pre-Trial Chamber II issued summonses to appear to William Samoei Ruto, a suspended Minister of Higher Education, Science and Technology, Henry Kiprono Kosgey, a member of Parliament and Chairman of the Orange Democratic Movement (ODM), and Joshua Arap Sang, the head of operations at Kass FM in Nairobi, for their alleged roles in the committing of crimes against humanity, in connection with the post-election violence of 2007 and 2008.[98]

All three accused are allegedly members of ODM, one of the two political parties of Kenya's ruling coalition.

On 7 April 2011, the three suspects voluntarily appeared before Pre-Trial Chamber II. The confirmation of charges hearing was scheduled for 1 September 2011, when Pre-Trial Chamber II would consider the charges, namely, three counts of crimes against humanity (murder, forcible transfer of population and persecution).

Table 13 Information of the Defendants in the Ruto et al Case

Defendant	**Position** (at time of arrest or summons)	**Charges**	**Current Status**
William Samoei Ruto	Kenyan Minister of Higher Education,	Crimes against humanity, allegedly committed during	Case closed

96 Ibid., para. 66.

97 *Kenya* Authorization Decision.

98 *Prosecutor* v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC Pre-Trial Chamber II, 8 March 2011, ICC-01/09-01/11-1 (*Ruto* Summons to Arrear Decision).

Defendant	Position (at time of arrest or summons)	Charges	Current Status
	Science, and Technology (suspended), MP for Eldoret North (and during the post-election violence, MP for Eldoret North)	the 2007-2008 post-election violence in Kenya.	
Henry Kiprono Kosgey	Kenyan Minister of Industrialization, MP for Tinderet Constituency, ODM Chairman (and during the post-election violence, MP for Tinderet)	Crimes against humanity, allegedly committed during the 2007-2008 post-election violence in Kenya	Case closed
Joshua Arap Sang	Head of operations at Kass FM in Nairobi, Kenya (and during the post-election violence, a radio broadcaster)	Crimes against humanity, allegedly committed during the 2007-2008 post-election violence in Kenya.	Case closed

Source: Author's own table, derived from the website of the ICC.

4.2.5.2 Admissibility Proceedings History

The Chamber received the application by the Government of Kenya challenging the admissibility, pursuant to article 19(2)(b) of the Rome Statute. [99] After that, the Pre-Trial Chamber II rendered its decision on the application, rejecting the request of Kenya and determining that the case against Ruto was admissible before the Court. [100]

On 6 June 2011, Kenya filed an appeal against the decision of the Pre-Trial Chamber.[101] On 30 August 2011, the Appeals Chamber rendered its judgment,

[99] *Prosecutor* v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", ICC Pre-Trial Chamber II, 31 March 2011, ICC-01/09-01/11-19.

[100] *Prosecutor* v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* Decision on the Application on Behalf of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute, ICC Pre-Trial Chamber II, 30 May 2011, ICC-01/09-01/11-101 (*Ruto* Admissibility Decision).

[101] *Prosecutor* v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* "Judgment on the appeal of the Republic of Kenya against the decision of the Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application on Behalf of the Government of Kenya Challenging

rejected the application, considering that the application did not provide concrete evidence of ongoing national proceedings with respect to the person subject of the proceedings at the Court, and affirming the decision of the Pre-Trial Chamber, that the case is admissible.[102]

Table 14 Timeline of the Ruto et al's Admissibility Proceedings

Date	Admissibility Proceedings
30 March 2010	• The Pre-Trial Chamber II authorized the Prosecutor to commence an investigation in Kenya
15 December 2010	• The Prosecutor requested the Trial Chamber II to issue the summons to appear for Ruto
8 March 2011	• The Pre-Trial Chamber II issued the summons to appear for Ruti
31 March 11	• Kenya filed the challenge to the admissibility of the pursuant to article 19(2)(b), as to Ruto.
30 May 2011	• The Pre-Trial Chamber II issued the decision on the admissibility of the case, determining the case against Ruto was admissible.
6 June 2011	• Kenya filed the appeal against the decision of the Pre-Trial Chamber II.
30 August 2011	• The Appeals Chamber rendered judgment on an appeal against the decision on the admissibility of the case of the Pre-Trial Chamber II, confirming the decision of the Pre-Trial Chamber II, and dismissing the appeal.

Source: Author's own table, derived from the website of the ICC.

4.2.5.3 Complementarity Determination in the Ruto et al Case

4.2.5.3.1 The Assessment of Inactivity

In the *Ruto et al* case, the Pre-Trial Chamber II considered that, adhering to the fact presented in the Application and the Reply, the Government of Kenya was currently investigating crimes arising out of the 2007-2008 Post-Election Violence. The Chamber, therefore, was satisfied that the Republic of Kenya was a State which had jurisdiction over the present case, and it was conducting the investigation. Thus, this reflected the state's activity.

the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute", ICC Appeals Chamber, 30 August 2011, ICC-01/09-01/11-307 (*Ruto* Admissibility Judgment), paras 27, 48 and 86.

102 Ibid., para. 125.

4.2.5.3.2 The Assessment of Activity

In the admissibility proceedings in the *Ruto et al* case, the principle of complementarity has been applied, in order to interpret and apply the admissibility criteria, in particular, whether this case "is being investigated or prosecuted" by a state which has jurisdiction over it, within the meaning of article 17(l)(a) of the Rome Statute.

In the admissibility proceedings, the Pre-Trial Chamber II reaffirmed the previous jurisprudence, with regard to the admissibility test in the *Katanga* case, that the admissibility test, envisaged in article 17 has two main limbs: complementarity; and gravity. With respect to complementarity, the Chamber emphasised that it concerned the existence or absence of national proceedings. Article 17(l)(a), made clear that the Court should determine that a case was inadmissible when: (a) The case was being investigated or prosecuted by a State which had jurisdiction over it unless the state was unwilling or unable genuinely to carry out the investigation or prosecution.[103]

According to the decision of the Pre-Trial Chamber, 'same person/same conduct' test, was applied in deciding whether the case was admissible, under article 17(1)(a) of the Statute. The Pre-Trial Chamber noted that in the Judgment in *Katanga* case, the Appeals Chamber had declined to rule on the correctness, or otherwise, of the 'same conduct' component of the 'same person/same conduct' test, as this question was not decisive for the determination of that appeal. [104]

The Pre-Trial Chamber also stated that the Appeals Chamber in the *Katanga* case had only declined to rule on the 'same conduct' component of the test, and that the Pre-Trial Chamber could clearly infer that the Appeals Chamber ruled on part of the test, namely that a determination of the admissibility of a 'case' had to, at least, encompass the 'same person'.[105]

The Appeals Chamber stated that:

> [A]rticle 17 stipulates the substantive conditions under which a case is inadmissible before the Court. It gives effect to the principle of complementarity (tenth

103 *Katanga* Admissibility Judgment, para. 78.

104 Ibid., para. 81.

105 *Ruto* Admissibility Judgment, para. 56.

> preambular paragraph and article 1 of the Statute), according to which the Court "shall be complementary to national jurisdictions". Accordingly, States have the primary responsibility to exercise criminal jurisdiction and the Court does not replace but complements them in that respect. Article 17(1)(a) to (c) sets out how to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other. Consequently, under article 17(1)(a), first alternative, the question is not merely a question of 'investigation' in the abstract but is whether the *same case* is being investigated by both the Court and a national jurisdiction. [106]

In addition, the Appeals Chamber noted that:

> [a]rticle 17 applies not only to the determination of the admissibility of a concrete case (article 19 of the Statute), but also to preliminary admissibility rulings (article 18 of the Statute). Under rule 55(2) of the ICC RPE, the Pre-Trial Chamber, when making a preliminary admissibility ruling, shall consider the factors in article 17 in deciding whether to authorize an investigation. The factors listed in article 17 are also relevant for the Prosecutor's decision to initiate an investigation under article 53(1) of the Statute or to seek authorization for a *propio motu* investigation under article 15, and for the decision to proceed with a prosecution under article 53 (2) of the Statute.[107]

Thus, the meaning of the words 'a case is being investigated', in article 17(1)(a), 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, the parameters of the probable 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.[108] The relative vagueness of the parameters of the probable cases in the article 18 proceedings, is also reflected in rule 52(1) of the ICC RPE, 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.[109]

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,

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106 Ibid., para. 37.
107 Ibid., para. 38.
108 Ibid., para. 39.
109 Ibid.

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.[110]

In this particular case, the appeal was brought, under article 19(2)(b), in relation to a case in which a summons to appear had been issued, against specific suspects for specific conduct. Accordingly, as regards the present appeal, the 'case' in the terms of article 17(1)(a), was the case as defined in the summons. This case was only inadmissible before the Court, if the same suspects were being investigated by Kenya, for substantially the same conduct. The mere preparedness to take such steps or the investigation of other suspects was not sufficient. This is because, unless investigative steps were actually taken, in relation to the suspects who were the subject of the proceedings before the Court, it could not be said that the same case was (currently) under investigation by the Court and by national jurisdiction. There is, therefore, no conflict of jurisdictions. It should be emphasised, however, that determining the existence of an investigation must be distinguished, from assessing whether the state was "unwilling or unable genuinely to carry out the investigation or prosecution". This was the second question to consider, when determining the admissibility of a case. For assessing, the Appeals Chamber concluded that whether the state was indeed investigating, the genuineness of the investigation was not at issue; what was at issue was whether there were investigative steps.[111]

Kenya sought to dispute this conclusion, by suggesting that a national jurisdiction may not always have the same evidence available as the Prosecutor, and therefore might not be investigating the same suspects as the Court.[112] The Appeals Chamber stated that:

> [t]his argument is not persuasive for two reasons. First, if a State does not investigate a given suspect because of lack of evidence, then there simply is no conflict of jurisdictions, and no reason why the case should be inadmissible before the Court. Second, what is relevant for the admissibility of a concrete case under articles 17 (1) (a) and 19 of the Statute is not whether the same evidence in the Prosecutor's possession is available to a State, but whether the State is carrying out

110 Ibid.

111 Ibid., para. 43.

112 Ibid.

steps directed at ascertaining whether these suspects are responsible for substantially the same conduct as is the subject of the proceedings before the Court. [113]

4.2.6 The *Gaddafi* Case (Libya)

4.2.6.1 Background of the Case

Since the 1969 coup d'état, Libya adopted a legal system that conferred on Muhammad Gaddafi absolute power and authority. Muhammad Gaddafi relied on his inner circle, mainly members of his family, whom he had placed in strategic positions, to implement a systematic policy of suppressing any challenge to his authority. Muhammad Gaddafi authorized his second eldest son Saif al-Islam Gaddafi (Gaddafi) to act as *de facto* prime minister, and, of crucial importance, to control the finances.

In 2011, the main opposition group, the National Transitional Council (NTC), which was recognized by some Western nations as the legitimate government of Libya, entered Tripoli. Muammar Gaddafi was forced to go into hiding, before being captured and killed. The NTC took control of the country and, in August 2012, handed over power to Libya's newly elected parliament, the General National Congress, which was sworn in in November 2012.

During that period of time, many human rights were violated, for example, torture and enforced disappearances, and violations of international humanitarian law, such as targeting civilians or medical units, were reported. Later, on 25 February 2011, the Human Rights Council established the International Commission of Inquiry, to investigate all alleged violations of international human rights law in Libya. The Commission reached the conclusion that international crimes, especially crimes against humanity and war crimes had been committed in Libya, by both the government and the rebel forces.

Table 15 Information of the Defendant in the Gaddafi Case

Defendant	**Position** (at time of arrest or summons)	**Charges**	**Current Status**
Saif al-Islam Gaddafi	Honorary chairman of the Gaddafi International Charity and Development Foundation	crimes against humanity and war crimes, allegedly committed in 2011 in Libya	At large

[113] Ibid., paras. 40-41.

Defendant	Position (at time of arrest or summons)	Charges	Current Status
	and acting as the Libyan *de facto* Prime Minister		

Source: Author's own table, derived from the website of the ICC.

4.2.6.2 Admissibility Proceeding History

The Security Council, acting under Chapter VII of the UN Charter, unanimously adopted Resolution 1970, referring the situation in Libya since 15 February 2011 to the Prosecutor of the ICC on 26 February 2001.[114]

After the preliminary examination, an investigation was opened. Later, the Prosecutor filed his application under article 58, requesting the issuing of warrants of arrest for Gaddafi, for their alleged criminal responsibility for the commission of crimes against humanity, of murder and persecution of civilians from 15 February 2011 onwards, throughout Libya. This included crimes in, *inter alia*, Tripoli, Benghazi, and Misrata, by the Libyan state apparatus and the Security Forces, in violation of article 7(l)(a) and (h), and as principals to these crimes, in accordance with article 25(3)(a).[115]

Next, the Pre-Trial Chamber I decided that the case against Gaddafi fell within the jurisdiction of the Court[116], and decided to issue warrants of arrest against Gaddafi for his alleged responsibility for crimes against humanity, committed in Libya from 15 February 2011 until, at least, 28 February 2011.[117]

Libya filed a challenge to the admissibility of the case against Gaddafi, and requested the Chamber to postpone the execution of the surrender.[118] These

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114 UNSC Res. 1970 (26 February 2011) UN Doc S/RES/1970.

115 *Situation in the Libyan Arab Jamahiriya*, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, ICC Pre-Trial Chamber I, 16 May 2011, ICC-01/11-4-Red (*Libya* Article 58 Application).

116 *Situation in the Libyan Arab Jamahiriya*, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC Pre-Trial Chamber I, 27 June 2011, ICC-01/11-01/11-1 (*Libya* Article 58 Decision).

117 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Warrant of Arrest for Saif Al-Islam Gaddafi, ICC Pre-Trial Chamber I, 27 June 2011, ICC-01/11- 01/11-3; *Libya* Article 58 Decision.

118 *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC Pre-Trial Chamber I, 1 May 2012, ICC-01/11-01/11-130-Red (*Libya* Admissibility Challenge).

challenges were based on the fact that the Libyan national judicial system was actively investigating Gaddafi for his alleged criminal responsibility, for multiple acts of murder and persecution, committed, pursuant to, or in furtherance of state policy, amounting to crimes against humanity. These acts, allegedly committed as part of a widespread or systematic attack against Libyan civilians, included but were not limited to crimes committed in Tripoli, Benghazi, and Misrata, during the period from 15 February 2011 until the liberation of Libya. [119]

Moreover, the national proceedings, concerning these matters, were consistent with the Libyan Government's commitment to post-conflict transitional justice and national reconciliation. It reflected a genuine willingness and ability to bring the persons concerned to justice, in furtherance of building a new and democratic Libya, governed by the rule of law. To deny the Libyan people this historic opportunity to eradicate the long-standing culture of impunity, would be manifestly inconsistent with the object and purpose of the Rome Statute, which accords primacy to national judicial systems. [120]

Subsequently, the Pre-Trial Chamber I rendered its decision of 31 May 2013, on the Admissibility of the Case against Gaddafi, rejecting Libya's admissibility challenge, and determining that the case against Gaddafi be admissible.[121]

Libya filed its appeal against the decision of the Pre-Trial Chamber, requesting the Appeals Chamber to reverse the decision, and to determine that the case against Gaddafi was inadmissible.[122]

Eventually, the Appeals Chamber confirmed the decision of the Pre-Trial Chamber and dismissed the appeal of Libya.[123] However, Judge Anita Ušacka

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119 Ibid., para.1.

120 Ibid, para. 2.

121 *Prosecutor* v**.** *Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC Pre-Trial Chamber I, 31 May 2013, (*Gaddafi* Admissibility Decision) ICC1/11-01/11-344-Red, paras. 219-220.

122 *Prosecutor* v**.** *Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* The Government of Libya's Appeal against Pre-Trial Chamber I's *'Decision on the admissibility of the case against Saif Al-Islam Gaddafi',* ICC Appeal Chambers, ICC-01/11-01/11-350, 7 June 2013, https://www.icc-cpi.int/CourtRecords/CR2013_04133.PDF, para. 11.

123 *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the Decision on Pre-Trial Chamber I of 31 May 2013 Entitles 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi' (*Gaddafi* Admissibility Judgment'), ICC Appeal Chamber, 21 May 2014, ICC-01/11-01/11-547-Red, para. 215.

appended a dissenting opinion to this judgment, in particular, the application of the complementarity test.[124]

Table 16 Timeline of the Gaddafi's Admissibility Proceedings

Date	Admissibility Proceedings
26 February 2011	• UNSC referred the *Situation in Libya* to the Prosecutor
3 March 2011	• The Prosecutor opened an investigation
16 May 2011	• Prosecutor submitted the Prosecutor's Application, pursuant to article 58 as to Gaddafi.
27 June 2011	• Pre-Trial Chamber issued a warrant of arrest for Gaddafi
1 May 2012	• Libya filed a challenge to the admissibility of the case against Gaddafi.
31 May 2013	• The Pre-Trial Chamber I issued the decision on the admissibility of the case against Gaddafi, finding the case against Gaddafi to be admissible.
7 June 2013	• Libya filed the appeal against the decision of the Pre-Trial Chamber I
21 May 2014	• The Appeals Chamber rendered judgment on an appeal, against the decision on the admissibility of the case of the Pre-Trial Chamber I, confirming the decision and dismissing the appeal.

Source: Author's own table, derived from the website of the ICC.

4.2.6.3 Complementarity Determination in the Gaddafi Case

4.2.6.3.1 The Assessment of Activity

In order to make an assessment of the first limb of the two-prong test, the 'case', within the meaning of article 17 of the Statute is characterized by two components: the person and the conduct. Thus, both components are needed for classification. The analysis in the *Gaddafi* case seeks to determine whether the Libyan and the ICC investigations cover the '*same'* case.

To prove this, the evidence, presented in support of the admissibility challenge, must demonstrate that the Libyan authorities are taking concrete and progressive investigative steps, in relation to such cases.[125] In addition, for a case to be inadmissible before the Court, national proceedings must encompass both the person and the conduct, which is the subject of the case before the Court. For a case to

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124 *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Dissenting Opinion of Judge Anita Ušacka, ICC Appeal Chamber, 21 May 2014, ICC-01/11-01/11-547-Anx2 (Judge Anita Dissenting Opinion).

125 *Gaddafi* Admissibility Decision, para. 73.

be inadmissible, under article 17(1)(a) of the Statute, the national investigation must be carried out on the same individual and substantially the same conduct, as alleged in the proceedings before the Court.[126]

In considering the determination of what is substantially the same conduct, as alleged in the proceedings, the Court's conclusions will vary according to the concrete facts and circumstances of the case and, therefore, the investigation requires a case-by-case analysis.[127] Because of this, the conduct allegedly under investigation by Libya, must be compared to the conduct attributed to Gaddafi in the warrant of arrest issued against him by the Chamber, as well as regarding the Chamber's decision on the Prosecutor's application, for the warrant of arrest. [128]

In addition, the assessment of domestic proceedings should focus on the alleged conduct and not its legal characterization. In this regard, a domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient. But, in this case, Libya's lack of legislation in criminalizing crimes against humanity, does not render the case admissible before the Court.[129]

However, many documents contain no information of relevance to the determination, as to whether the same conduct, as that covered by the Article 58 Decision is under investigation in Libya. The Chamber, therefore, conducted an analysis of the evidence and the material submitted, with a view to determining, in turn: (i) whether Libyan legislation sufficiently captures the same conduct for which the suspect is charged before this Court; and (ii) whether an investigation against Gaddafi for the same conduct, as that alleged in the proceedings before the Court, is ongoing at the domestic level.[130]

The Chamber observed that the crimes, with which Libya intends charging Gaddafi under Libyan legislation, do not cover all aspects of the offences covered by the Rome Statute. But these offences, together with the provisions under articles 27 and 28 of the Libyan Criminal Code, may sufficiently encapsulate Gaddafi's use of

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126 *Kenyatta* Admissibility Judgment, para. 39.
127 *Gaddafi* Admissibility Decision, para. 77.
128 Ibid., para. 78.
129 Ibid., para. 88.
130 Ibid., para. 107.

his control over the Libyan State apparatus and Security Forces, to kill and persecute hundreds of civilian demonstrators, or alleged dissidents to Muammar Gaddafi's regime, between 15 until, at least, 28 February 2011, as alleged in the Warrant of Arrest. [131]

In order to apply the same-conduct test, the Chamber analysed (i) documents; (ii) summary of witness statements; (iii) three witness statements; and (iv) intercepts.[132] The Chamber considered that the evidence presented, satisfactorily demonstrates that a number of progressive steps directed at ascertaining Gaddafi's criminal responsibility, have been undertaken by the Libyan authorities and that an "investigation" is currently ongoing at the domestic level. [133] However, Libya is required to substantiate that its investigation covers the same conduct, as that alleged in the warrant of arrest, under article 58. The Chamber was not persuaded that the evidence presented sufficiently demonstrated that Libya was investigating the same case, as that before the Court.[134]

Interestingly, in this judgment, Judge Anita Ušacka appended her dissenting opinion, with regard to the same case/same conduct test, in particular, to the interpretation of the first part of article 17(1)(a).[135]

According to her opinion, the first limb of article 17(1)(a) relies on the same person/same conduct test. In order to compare a case before the Court and a domestic case, multiple criteria must be used, that were assessed by reference to the concrete circumstances of each specific case.[136]

Therefore, in the *Gaddafi* case, "conduct" was one of the essential elements in deciding whether the "case before the Court" was being investigated, or prosecuted by Libyan domestic authorities. She explained that the concept of "conduct" in this case:

> "[c]onduct" should be understood much more broadly than under the current test. While there should be a nexus between the conduct being investigated and prosecuted domestically and that before the Court, this 'conduct' and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same

131 Ibid., para. 113.
132 Ibid., paras. 114-131.
133 Ibid., para. 132.
134 Ibid., para. 134.
135 Judge Anita Dissenting Opinion, paras. 47-65.
136 Ibid., para. 58.

> material and mental elements of the crimes before the Court and also does not need to include the same acts attributed to an individual under suspicion.[137]

In this regard, she argued that the goal of fighting impunity was also achieved, even if it was not exactly the same conduct. and explained that:

> [b]efore the Court is under investigation by Libya, but if the suspect's link to the use of the Security Forces in Libya and their consequences are the subject of the investigation of the Libyan authorities. Beyond that, the domestic investigations might even potentially focus on subsequent time periods, if the crimes allegedly committed through the use of Security Forces are considered by the domestic authorities to be graver than those on which the Court's investigations concentrate.[138]

Regarding this, the genuine will of Libya, to carry out investigations and prosecutions, which is another criterion of the complementarity scheme, was clearly expressed. This manifested itself in a progressive process of investigating and prosecuting, as exemplified in this case by the concrete actions taken by Libya.[139] Hence, in her opinion, the Pre-Trial Chamber erred in imposing the burden of proof solely on Libya, and in its evidentiary standards when assessing the materials relevant to Libya's investigations, in order to establish whether Libya is investigating or prosecuting the case before the Court. Hence, in her opinion, this did not comply with article 17 (1) (a), of the Statute and the principle of complementarity.[140]

4.2.6.3.2 The Assessment of Inability

The Trial-Chamber I considered that the ability of a State genuinely to carry out an investigation or prosecution must be assessed, in the context of the relevant national system and procedures. In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Gaddafi, in accordance with the substantive and procedural law applicable in Libya.[141]

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137 Ibid., para. 58.
138 Ibid., para. 59.
139 Ibid., para. 60.
140 Ibid., para. 78.
141 Ibid., para. 200.

In this case, the Pre-Trial Chamber noted that the Libyan Code of Criminal Procedure regulates the four phases of Libyan criminal proceedings, investigation, accusation, trial, and appeal. Under Libyan criminal procedural law, the defendant has a right to a lawyer during the investigation phase of the case, both in interviews with the Prosecutor-General and when confronted by witnesses. In addition, other rights of the accused have been guaranteed under Libyan criminal procedural law, as well as Libya's Constitutional Declaration. [142]

However, the Pre-Trial Chamber I recognised that although the authorities for the administration of justice may exist, and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system, for the purpose of the case against Gaddafi. In this regard, the Pre-Trial Chamber I stated that:

> [A]s a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of Mr. Gaddafi's custody from his place of detention under the Zintan militia into State authority and there is no concrete evidence that this problem may be resolved in the near future. Moreover, the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally, the Chamber has noted a practical impediment to the progress of domestic proceedings against Mr. Gaddafi as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect.[143]

4.2.7 The *Al-Senussi* Case (Libya)

4.2.7.1 Background of the Case

Abdullah Al-Senussi is the brother-in-law of Muammar Gaddafi, who ruled Libya from 1969 to 2011. He was chief of Libya's Military Intelligence until at least 20 February 2011, and part of Gaddafi's entourage. He was allegedly involved in the massacres after the Tunisian and Egyptian revolutions, of about 500 demonstrators. they were gathered together, in front of the police headquarters in Benghazi, protesting against the arrest of Fathi Terbil, a Libyan lawyer, representing relatives of prisoners allegedly massacred at Abu Salim prison. Senussi allegedly ordered the

142 Ibid., paras. 201-202.
143 Ibid., para. 215.

violent response against the demonstrators. Hundreds of them were killed, wounded, arrested or imprisoned.

Table 17 Information of the Defendant in the Al-Senussi Case

Defendant	**Position** (at time of arrest or summons)	**Charges**	**Current Status**
Abdullah Al-Senussi	Colonel in the Libyan Armed Forces and head of Military Intelligence	crimes against humanity and war crimes allegedly committed in 2011 in Libya	Case closed

Source: Author's own table, derived from the website of the ICC.

4.2.7.2 Admissibility Proceedings History

The Security Council, acting under Chapter VII of the UN Charter, unanimously adopted Resolution 1970, referring the situation in Libya since 15 February 2011, to the Prosecutor of the ICC on 26 February 2001.[144]

After the preliminary examination, an investigation was launched. Later, the Prosecutor filed his application under article 58 of the Statute, requesting the issuing of warrants of arrest for Gaddafi, for their alleged criminal responsibility for the commission of crimes against humanity of murder and persecution of civilians from 15 February 2011 onwards. These took place throughout Libya in, *inter alia*, Tripoli, Benghazi, and Misrata, by the Libyan State apparatus and the Security Forces, in violation of article 7(l)(a) and (h), and as principals to these crimes, in accordance with article 25(3)(a).[145]

Next, the Pre-Trial Chamber I decided that the case against Al-Senussi fell within the jurisdiction of the Court,[146] and decided to issue warrants of arrest against him for his alleged responsibility for crimes against humanity, committed in Libya, from 15 February 2011 until, at least, 28 February 2011.[147]

144 UNSC Res. 1970 (26 February 2011) UN Doc S/RES/1970.
145 *Libya* Article 58 Application.
146 *Libya* Article 58 Decision.
147 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Warrant of Arrest for Abdullah Al-Senussi, ICC Pre-Trial Chamber I, 27 June 2011, ICC-01/11-01/11-3.

Then, Libya filed the "Application on behalf of the Government of Libya, relating to Abdullah Al-Senussi, pursuant to Article 19 of the ICC Statute". [148] On 11 October 2013, the Pre-Trial Chamber issued the "Decision on the admissibility of the case against Abdullah Al-Senussi", deciding that the case against Al-Senussi was inadmissible before the Court. [149]

Counsel for Al-Senussi filed the appeal, against the decision of the Pre-Trial Chamber I, requesting the Appeals Chamber to reverse the decision of the Pre-Trial Chamber, and determine that the case against Al-Senussi was admissible before the Court. [150]

Eventually, the Appeals Chamber issued its judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013, entitled "Decision on the admissibility of the case against Abdullah Al-Senussi, confirming the Decision of the Pre-Trial Chamber I.[151] The case against Al-Senussi, was declared inadmissible before the ICC, due to national proceedings in Libya, regarding the same crimes.

Table 18 Timeline of the Al-Senussi's Admissibility Proceedings

Date	Admissibility Proceedings
26 February 2011	• UNSC referred the *Situation in Libya* to the Prosecutor
3 March 2011	• The Prosecutor opened an investigation
16 May 2011	• Prosecutor submitted the Prosecutor's Application, pursuant to article 58 as to Al-Senussi.
27 June 2011	• Pre-Trial Chamber issued a warrant of arrest against Al-Senussi
2 April 2013	• Libya filed a challenge to the admissibility of the case against Gaddafi.

148 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC Pre-Trial Chamber I, 2 April 2-13, ICC-01/11-01/11-1307-Conf-Red.

149 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Abdullah A-Senussi, ICC Pre-Trial Chamber I, 11 October 2013, ICC-01/11-01/11-466-Red (*Al-Senussi* Admissibility Decision).

150 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi" and Request for Suspensive Effect, ICC Appeals Chamber, 17 October 2013, ICC-01/11-01/11-468-Red, para. 32.

151 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC Appeals Chamber, 24 July 2014, ICC-01/11-01/11-565 (*Al-Senussi* Admissibility Judgment).

Date	Admissibility Proceedings
11 October 2013	• The Pre-Trial Chamber I issued the decision on the admissibility of the case against Al-Senussi, finding the case against Al-Senussi was inadmissible.
17 October 2013	• Al-Senussi filed the appeal against the decision of the Pre-Trial Chamber I
21 July 2014	• The Appeals Chamber rendered judgment on an appeal against the decision on the admissibility of the case of the Pre-Trial Chamber I, confirming the decision.

Source: Author's own table, derived from the website of the ICC.

4.2.7.3 Complementarity Determination in the Al-Senussi Case

4.2.7.3.1 The Assessment of Activity

In order to determine the same case, the Pre-Trial Chamber I, in this situation, asserted that Libya had to demonstrate that: a) a person subject to the domestic proceedings, was the same person, against whom, the proceedings before the Court were being conducted, and b) the conduct that was subject to the national investigation, was substantially the same conduct that was alleged in the proceedings before the Court.[152]

In this regard, the parameters of the conduct, as alleged in the case before the Court, were set out in the warrant of arrest, and that a case-by-case analysis was required to determine, whether the domestic investigation covered the same case, as the one before the Court.[153]

To decide on what constituted the same case, the Pre-Trial Chamber stated that the jurisprudence of the Court required that:

> [t]he alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters, but not that such conduct be invariably composed of one or more 'incidents' of a pre-determined breadth. Indeed, whether *in concreto* any discrete "incident" or "event", purportedly having narrower factual parameters, is identified because it overlaps fully with the alleged conduct or instead because it is of assistance to prove the alleged conduct to the requisite threshold without however exhausting it, will ultimately depend on the specificities of each case.[154]

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152 *Al-Senussi* Admissibility Decision, para. 65.

153 Ibid., para. 66.

154 Ibid., para. 75.

Regarding this, the incidents or events do not represent unique manifestations of criminal conduct, but are rather illustrative and non-exhaustive examples of discrete criminal acts.

4.2.7.3.2 The Assessment of Unwillingness

In this case, the Pre-Trial Chamber I addressed the issue of the lack of legal representation. According to the facts, Al-Senussi had been interrogated on several occasions in the absence of a lawyer and had been confronted with evidence against him, without the benefit of legal advice. [155] The Defence argued that the lack of counsel in domestic proceedings had led to a finding of willingness.

The Appeals Chamber considers that denying a suspect access to a lawyer may, depending on the specific circumstances, be relevant to a finding that domestic proceedings "are not being conducted independently or impartially, and they [...] are being conducted in a manner which [...] is inconsistent with an intent to bring the person concerned to justice", (article 17 (2) (c) of the Statute), and that thiswill result in a finding of unwillingness. Nevertheless, the Appeals Chamber recalled that, in the context of admissibility proceedings, the Court was not primarily called upon to decide whether, in domestic proceedings, certain requirements of human rights law or domestic law were being violated. Rather, what was at issue, wass whether the state was genuinely willing to investigate or prosecute.[156]

In the view of the Appeals Chamber, the lack of counsel violates human rights of Al-Senussi, but such a violation would not reach the high threshold of finding that Libya is genuinely unwilling to investigate or prosecute. [157]

4.2.7.3.3 The Assessment of Inability

The determination as to whether Libya was genuinely unable to conduct the proceedings against Al-Senussi, on the basis that Libya was unable to obtain the necessary evidence and testimony was as a result of the total, or substantial collapse, or unavailability, of its national judicial system.

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155 Ibid., para. 230.

156 *Al-Senussi* Admissibility Judgment, para. 189.

157 Ibid., para. 190.

The Pre-Trial Chamber I considered that that Al-Senussi was already in the custody of the Libyan authorities. Then, Libya was not "unable to obtain the accused". This ground, explicitly identified in article 17(3), as one of the aspects that may warrant a finding of inability, was therefore not applicable to the present case.[158]

4.2.8 The *Simone* Case (Côte d'Ivoire)

4.2.8.1 Background of the Case

Simone Gbagbo is the President of the Parliamentary Group of the Ivorian Popular Front (FPI), and is a Vice-President of the FPI. As the wife of Laurent Gbagbo, the President of Côte d'Ivoire from 2000 to 2011, she was also Côte d'Ivoire's former first lady, prior to their arrest by pro-Ouattara forces. She is suspected of involvement in former Ivorian president Laurent Gbagbo's alleged campaign of violence, in order to retain power, following the country's 2010 presidential election. She was an alleged key member of the former president's inner circle, along with fellow ICC suspect Charles Blé Goudé, who is said to have orchestrated a series of attacks across Côte d'Ivoire, against civilian supporters of the president-elect Alassane Ouattara. The ethnically charged conflict spanned at least five months, and left more than 3,000 civilians dead, 150 women and girls raped or sexually assaulted, and over 100,00 displaced.

Table 19 *Information of the Defendant in the Simone Case*

Defendant	**Position** (at time of arrest or summons)	**Charges**	**Current Status**
Simone Gbagbo	Ivorian national, President of the FPI and a Vice-President of the FPI	allegedly committed during the 2010-2011 post-election violence in Côte d'Ivoire	At large

Source: Author's own table, derived from the website of the ICC.

4.2.8.2 Admissibility Proceedings History

On 29 February 2012, the Pre-Trial Chamber III issued a warrant of arrest against Simone for her alleged criminal responsibility, within the meaning of article 25(3)(a) of the Statute, for the crimes against humanity of (i) murder under article 7(1)(a); (ii)

158 *Al-Senussi* Admissibility Decision, paras. 293-294.

rape and other forms of sexual violence under article 7(1)(g); (iii) other inhumane acts under article7(1) (k); and (iv) persecution under article 7(1)(h) of the Rome Statute, committed in the territory of Côte d'Ivoire between 16 December 2010 and 12 April 2011.[159]

Later, the Pre-Trial Chamber III issued the decision on the Prosecutor's application for a warrant of arrest against Simone Gbagbo",[160] in which it found that the conditions established by article 58(1), for the issuing of a warrant of arrest against Simone, were met.[161] Later, the Registrar notified Côte d'Ivoire of the warrant of arrest and requested the arrest and surrender of Simone to the Court.[162]

Côte d'Ivoire filed an admissibility challenge, submitting that on 6 February 2012, domestic proceedings had been instituted against Simone, based on allegations similar to those made in the case before the Court, on 30 September 2013.[163] In this regard, Côte d'Ivoire also submitted that it was willing and able to try Simone for those crimes.[164]

The Pre-Trial Chamber I issued the decision, rejecting Côte d'Ivoire's admissibility challenge.[165] Subsequently, Côte d'Ivoire filed its appeal against the decision of the Pre-Trial Chamber I, requesting that the Appeals Chamber reverse the decision, allow its challenge and determine that the case against Simone is inadmissible before the Court.[166]

159 *Prosecutor* v. *Simone Gbagbo,* Warrant of Arrest for Simone Gbagbo, ICC Pre-Trial Chamber III, 29 February 2012, ICC-02/11-01/12-1.

160 *Prosecutor* v. *Simone Gbagbo,* Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, ICC Pre-Trial Chamber III, 2 March 2012, ICC-02/11-01/12-2-Red.

161 *Prosecutor* v**.** *Simone Gbagbo,* Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC Appeals Chamber, 27 May 2015, ICC-02/11-01/11/12 OA (*Simone* Admissibility Judgment), para. 4.

162 Ibid., para. 5.

163 Ibid., para. 7.

164 Ibid.

165 *Prosecutor* v**.** *Simone Gbagbo,* Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC Pre-Trial Chamber I, 11 December 2014, ICC-02/11-01/11/12 (*Simone* Admissibility Decision).

166 *Simone* Admissibility Judgment, para. 15.

Finally, the Appeals Chamber issued the Judgment, on the appeal of Côte d'Ivoire's against the decision of the Pre-Trail Chamber, rejecting the ground on appeal, and confirming the decision of the Pre-Trial Chamber I.[167]

Table 20 Timeline of Simone's Admissibility Proceedings

Date	Admissibility Proceedings
3 October 2011	• The Pre-Trial Chamber III authorized the Prosecutor to commence an investigation in Côte d'Ivoire
7 February 2012	• The Prosecutor filed an application for a warrant of arrest against Simone
29 February 2012	• The Pre-Trial Chamber II issued a warrant of arrest against Simone
2 March 2012	• The Pre-Trial Chamber III issued the decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone
19 March 2012	• The Registrar notified Côte d'Ivoire of the warrant of arrest against Simone
30 September 2013	• Côte d'Ivoire filed a challenge to the admissibility of the case.
11 December 2014	• The Pre-Trial Chamber I issued the decision on the admissibility of the case against Simone, rejecting the Côte d'Ivoire's challenge to the admissibility of the case against Simone.
17 December 2014	• Côte d'Ivoire filed the appeal against the decision of the Pre-Trial Chamber I
27 May 2015	• The Appeals Chamber rendered judgment on an appeal against the decision on the admissibility of the case of the Pre-Trial Chamber I, confirming the decision of the Pre-Trial Chamber I.

Source: Author's own table, derived from the website of the ICC.

4.2.8.3 Complementarity Determination in the Simone Case

4.2.8.3.1 The Assessment of Activity

According to the *Simone* Admissibility Decision, the Pre-Trial Chamber I recalled that:

> [i]n considering an admissibility challenge brought under article 17(1)(a) of the Statute two questions shall be addressed: (i) whether, at the time of the proceedings in respect of an admissibility challenge, there is an ongoing investigation or prosecution of the case at the national level; and, in case the answer to the first question is in the affirmative, (ii) whether the State is 'unwilling' or 'unable' to

[167] See ibid.

> genuinely carry out such investigation or prosecution within the terms further elaborated in articles 17(2) and 17(3) of the Statute. [168]

The Pre-Trial Chamber I found that it was not satisfied that Côte d'Ivoire's domestic authorities were taking tangible, concrete and progressive investigative steps into Simone's criminal responsibility for the crimes alleged, in the proceedings before the Court, nor that they were prosecuting her for these alleged crimes. [169]

The Pre-Trial Chamber considered that, since the answer to the first question was not in the affirmative, it was, therefore, unnecessary to set out the Chamber's understanding of the criteria of unwillingness and inability, within the meaning of article 17(1)(a), and as detailed in article 17(2) and (3) of the Statute. [170]

The Pre-Trial Chamber I held that for a state to discharge its burden of proof that there is currently no situation of 'inaction' at the national level, it needs to substantiate fact the that an investigation or prosecution is in progress at this moment.[171]

In considering the argument of Côte d'Ivoire, regarding the applicable legal test, the Appeals Chamber recalled that:

> [t]he purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favour of domestic jurisdictions does not contradict this conclusion. Although article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level.[172]

In this regard, the presumption of domestic jurisdictions only applies, where it has been shown, that there are, (or have been) investigations and/or prosecutions at the national level.[173]

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168 *Simone* Admissibility Decision, para. 27, referring to *Katanga* Admissibility Judgment, paras. 1, 75-79.
169 Ibid., para. 36.
170 Ibid.
171 Ibid., para. 35.
172 *Ruto* Admissibility Judgment, para. 43.
173 *Simone* Admissibility Judgment, para. 59.

The Pre-Trial Chamber I held that the investigative activities, undertaken by the Ivorian judicial authorities, were "sparse and disparate".[174] The Pre-Trial Chamber found that the relevant investigative activities were very limited. It noted that in the last 20 months of investigations, the steps taken at determining Simone's responsibility for the alleged crimes, appear to be limited to one single activity.[175] In this regard, it concluded that the investigative activities by the domestic authorities were insufficient, lacking in progression, disparate in nature and purpose, to the extent that the overall factual parameters of the alleged domestic investigations remain indiscernible".[176]

The Pre-Trial Chamber was unable to establish whether these limited steps undertaken at the national level, were together directed at ascertaining Simone's criminal responsibility for the same conduct, as that alleged in the proceedings before the Court.[177] The Pre-Trial Chamber concluded that the documentation provided by Côte d'Ivoire, "only contains generic descriptions of the crimes alleged and provides extremely vague information as to the factual parameters of the purported investigations".[178] In addition, the information available to it, on the scope of the national proceedings against Simone, was also unclear, with respect to the crimes that were allegedly being pursued.[179]

The Appeals Chamber held in the *Gaddafi* case that "the contours of the case being investigated domestically […] must be clear" irrespective of the stage of the investigation. [180] It has also affirmed that:

> [i]f a State is unable to present such parameters to the Court, no assessment of whether the same case is being investigated can be meaningfully made. In such circumstances, it would be unreasonable to suggest that the Court should accept that an investigation, capable of rendering a case inadmissible before the Court, is underway.[181]

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174 Ibid., para 65.
175 Ibid., para 69.
176 Ibid., para 70.
177 Ibid.
178 Ibid., para 71.
179 Ibid., para 75.
180 *Gaddafi* Admissibility Judgment., paras 83-84.
181 Ibid., para 84.

The Appeals Chamber noted that, in order to determine the subject matter of the investigative activities, the Pre-Trial Chamber considered all of the documents presented by Côte d'Ivoire, in support of its argument. This stated that the parameters of the domestic investigations were "specific and clear". [182]

The Pre-Trial Chamber found the information, regarding the domestic investigations vague[183], and concluded that:

> [i]n essence, the only information available to the Chamber is that the opened investigations concern crimes against individuals allegedly committed by [Ms] Gbagbo and others in the time frame and context of the 2010-2011 postelectoral violence in Abidjan. However, the facts underpinning the charges against her and the underlying criminal acts that the national authorities have purportedly investigated since 6 February 2012 remain unclear and undefined.[184]

In this regard, the Appeals Chamber noted that, Côte d'Ivoire does not point to any information, that could have enabled the Pre-Trial Chamber to determine with clearly which crimes were actually being investigated.[185] For these reasons, the Appeals Chamber considered that Côte d'Ivoire had failed to demonstrate that it was unreasonable for the Pre-Trial Chamber to conclude that, on the basis of the available documentation, the factual parameters of the case, or cases being investigated domestically, were unclear. Accordingly, Côte d'Ivoire's argument on this point was rejected.[186]

In addition, according to the *Simone* Admissibility Decision, the Pre-Trial Chamber I noted that three sets of proceedings, running in parallel, were opened against Simone in Côte d'Ivoire.[187] In the first set, Simone was charged with economic crimes, which were clearly of a different nature to those giving rise to her criminal responsibility, as alleged in the case before the Court.[188] The second set of proceedings instituted against Simone, concerned alleged crimes against the state. It was found that it did not cover the same conduct that was alleged in the case before

182 *Simone* Admissibility Decision, paras. 72-75.
183 Ibid., para. 70.
184 Ibid., para. 71.
185 *Simone* Admissibility Judgment, para. 91.
186 Ibid., para. 92.
187 *Simone* Admissibility Decision, para. 46.
188 Ibid., para. 47.

the Court.[189] And, the final set of proceedings, instituted against Simone in Côte d'Ivoire, concerned crimes against individuals, in which the Pre-Trial Chamber concluded that "these are crimes of the same nature as those alleged in the case before the Court, and must be considered in further detail.[190]

However, the documentation provided did not demonstrate that concrete, tangible and progressive investigative steps were being undertaken by the domestic authorities of Côte d'Ivoire in order to ascertain Simone's criminal responsibility, for the same conduct as that alleged in the proceedings before the ICC.[191]

Hence, the Pre-Trial Chamber concluded that Côte d'Ivoire had not demonstrated that the case against Simone, alleged in the proceedings before the Court, was currently subject to domestic proceedings, within the meaning of article 17(1)(a) of the Statute.[192]

4.3 Dynamic Application of the Principle of Complementarity at the Admissibility Stage

The concept of the principle of complementarity appears in article 17, which set out the framework of substantive complementarity, as one of the tests for admissibility of a case before the ICC. However, the term "complementarity" does not appear elsewhere in the provisions of the Rome Statute, as discussed in the previous chapter.

The relevant terms of article 17(1) of the Rome Statute are set out in sections (a) to (d), explaining the grounds for regarding a case admissible. In the context of admissibility proceedings, as set out by this provision, the tests for complementarity apply to a state which has jurisdiction. Additionally, the same article explains that such states fall within the category of a state which has jurisdiction. This needs to be considered in any analysis for the purposes of complementarity determination.[193] If one of the conditions relating to complementarity is satisfied, then it renders the case inadmissible before the ICC.

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189 Ibid., para 49.
190 Ibid., para 50.
191 Ibid., para 78.
192 Ibid., para 79.
193 Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 340.

A preliminary issue to be considered in this context, appears as a scenario for the tests of admissibility. This is whether there exists any investigation or prosecution going on at the national level. This is because the failure to take any measure against those involved in the commission of crimes, falling within the jurisdiction of the ICC by a state, renders the case admissible before the Court.[194]

Nevertheless, the complex structure of article 17(1) is represented by each section, containing both conditions and exceptions. If none of the conditions of inadmissibility are satisfied, the case remains admissible.[195] In this regard, the exception of unwilling or unable does not come into play at all, because this exception is applied to evaluate national proceedings. [196]

Furthermore, article 17 reflects the concept of complementarity; however, in practice, the interpretation of such complementarity provisions has become a debatable issue. Examples of this include the meaning of a term, the interplay of provision, the underlying purpose or the weight to be given to textual of functional considerations.[197] As a result of this, in practice, the basic features of the principle of complementarity have already been elaborated on, in the early case law of the ICC and are being routinely referred to.

Therfore, the Rome Statute in itself does not define the term complementarity, as well as other terms contained in these provisions, and this leads to misunderstandings, concerning the application of substantive complementarity. The principle of complementarity in article 17(1), particularly headings (a) and (b) of the Rome Statute, limits the exercise of jurisdiction of the ICC. In this regard, the ICC cannot exercise its jurisdiction over a case, when the matter is being, or has been properly dealt with, at a national level.[198]

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194 Klamberg, *Commentary on the Law of the International Criminal Court*, 206.

195 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 601.

196 Darryl Robinson, "The Inaction Controversy: Neglected Words and New Opportunities," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Cambridge University Press, 2011), 467-68.

197 ibid., 461.

198 Schabas, *An Introduction to the International Criminal Court*, 85.

During 2002-2018, the ICC has considered and rendered its decisions in relation to complementarity determination in 8 cases from 6 situations, as analysed in the previous subchapter. The results of the analysis are laid out in Table 21.

Table 21 Conclusion of Complementarity Determination at the Admissibility Stage

No.	Case	Criteria for Complementarity Test			
		Inactivity	**Activity (same case)**	**Unwillingness**	**Inability**
1	*Kony et al* Uganda	☒ no national proceedings			
2	*Katanga* DRC	☒ no national proceedings			
3	*Bemba* CAR	☒ no national proceedings			
4	*Kenyatta et al* Kenya	☒ no national proceedings			
5	*Ruto et al* Kenya	☑ national proceedings	☑ same person ☒ same conduct		
6	*Gaddafi* Libya	☑ national proceedings	☑ same person ☒ same conduct		
7	*Al-Senussi* Libya	☑ national proceedings	☑ same person ☑ same conduct	☑ willing	☑ able
8	*Simone* Côte d'Ivoire	☑ national proceedings	☑ same person ☒ same conduct		

Source: Author's own table.

According to the Table, the ICC applied the principle of complementarity, at the admissibility stage of all eight cases. It found that seven out of eight cases had not fulfilled the proceedings requirement. This was based on the absence of proceedings at the national level, and the unsatisfactory nature of the same-case test. Only one case fulfilled both requirements of complementarity test. However, the practice regarding the abovementioned cases, reflects a dynamic application of the principle of complementarity, in all criteria of the complementarity test. This subchapter examines the dynamic application of the principle of complementarity, in each criterion of the test. The analysis in this subchapter will show some practical obstacles to the Court's determination.

4.3.1 Complementarity *vis-à-vis* Inactivity

A preliminary issue to be considered, in the context of the application of the principle of complementarity, at the admissibility proceedings, is whether there exists any investigation or prosecution at the domestic level for those crimes listed under the jurisdiction of the ICC. Failure by a State concerned to take any measures against any person, who is involved in the commission of crimes, falling within the jurisdiction of the ICC, renders the case admissible before the Court.

All three scenarios, concerning the principle of complementarity, under article 17(1)(a) to (c) of the Rome Statute require action taken by national authorities of a State, which has jurisdiction over that case at national level. If one of the three scenarios is satisfied, then it renders the case inadmissible before the ICC. If any of the first three scenarios is not met (or if a state remains inactive), then the gravity threshold under article 17(1)(d), will be taken into consideration, and the case will become admissible when the gravity threshold is satisfied.[199]

The admissibility proceedings were affirmed by the jurisprudence of the ICC in the *Lubanga* case. The decision of the Pre-Trial Chamber I on a warrant of arrest, held that:

> [t]he admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained *inactive* in relation to that case or are unwilling or unable, within the meaning of article 17(l) (a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.[200]

In the *Lubanga* case, the Prosecutor filed the application for a warrant of arrest, pursuant to article 58, requesting the issuance of a warrant of arrest for Thomas Lubanga Dyilo. This was for the alleged practice of *the Union des Patriotes Congolais* (the "UPC")/ *Forces Patriotiques pour la Libération du Congo* (the "FPLC") of enlisting into the FPLC, conscripting into the FPLC and using to

199 Klamberg, *Commentary on the Law of the International Criminal Court*, 206, fn. 16.

200 *Prosecutor* v. *Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC Pre-Trial Chamber I, ICC-01/04-01/06-8 (*Lubanga* Article 58 Decision), para. 29.

participate actively in hostilities, children under the age of fifteen). These crimes were committed in connection with that armed conflict. The Pre-Trial Chamber I of the ICC considered that the test for admissibility, stipulated by article 17, contains two parts. The first part of the admissibility test is provided by article 17(1)(a)-(c), which concerns the principle of complementarity. The three headings are connected to the national proceedings of concerned States, while the second part of the proceedings concerning the gravity threshold (article 17(1)(d)), which plays the role as a second step of the test.

In addition, according to the jurisprudence of the ICC in the *Lubanga* case, the Pre-Trial Chamber I delivered its decision, that:

> [t]he national investigations, prosecution, and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained *inactive* in relation to that case or are unwilling or unable, within in the meaning of article 17(1)(a) to (c), 2 and 3 of the Statute.[201]

In addition, there is a footnote referring to the decision in the *Lubanga* case, that the words '*remained inactive in relation to that case',* that reads 'Interpretation *a contrario* of article 17, paras (a) to (c) of the Statute'.[202] It concluded that 'Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.'[203]

According to the above jurisprudence in the *Lubanga* case, the term 'inactive' was first introduced into the complementarity system of the ICC, and it became one of the most controversial issues in the practice of the ICC. In addition, the Court has introduced a primary consideration of whether there is inaction, on the part of State in question, without having to decide upon whether that State is unwilling or unable to exercise jurisdiction under the principle of complementarity, pursuant to the Rome Statute. Without any provision in the context of the principle of complementarity, with regard to 'inactive' or 'inactivity' or 'inaction,' the application and interpretation of those terms, clearly one of the most controversial issues in the practice of the ICC between 2002 – 2018, is the intention of this subchapter.

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201 Ibid., para. 29, fn. 19.
202 Ibid., 40.
203 Ibid., para. 29.

4.3.1.1 Inactivity in Practice

4.3.1.1.1 Admissibility Test as the Two-Prong Test

The complex structure of article 17(1), in relation to the principle of complementarity, is represented by the three headings (a) to (c), and contains both conditions and exceptions. If none of the conditions of inadmissibility are satisfied, the case remains admissible.[204] In this regard, the exception of unwillingness or inability, does not come into play at all, because this exception is applied to evaluate national proceedings. [205] In addition, in practice, the interpretation of such texts has become controversial, for example, on the meaning of a term, the interplay of provision, i.e., the underlying purpose or the weight given to texts of functional considerations.[206] As a result, in the early case law of the ICC, the basic features of the principle of complementarity have already been discussed and are being referred to, in a routine manner.

The principle of complementarity is reflected in the admissibility test of a case before the ICC, which has seen, on countless occasions, assertions such as:

- "under the principle of complementarity, [the ICC] will assert jurisdiction only if a State is unwilling or unable to investigate or prosecute an alleged offence itself".[207]
- "No case is admissible, where a country is willing and capable of conducting its own prosecution".[208]
- "Pursuant to article 17(1) of the Statute, a State's 'unwillingness' or 'inability' are the factors triggering the admissibility of a case, once a situation has been referred to the ICC".[209]

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204 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 601.

205 Robinson, "The Inaction Controversy: Neglected Words and New Opportunities," 467-68.

206 ibid., 461.

207 Julie B. Martin, "The International Criminal Court: Defining Complementarity and Diving Implications for the United States," *Loyola University Chicago International Law Review* 4 (2006): 107.

208 H. Abigail Moy, "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity," *Harvard Human Rights Journal* 19 (2006): 273.

- "Under the principle of complementarity, the ICC will act, only when national courts are unable or unable to exercise jurisdiction".[210]

Regarding this, to describe complementarity as 'unwillingness' and 'inability' has become the central and indispensable requirements for admissibility.[211] Hence, under the principle of complementarity, a case rendered inadmissible must be shown to be an example of 'the case is being investigated or prosecuted by a State, with jurisdiction over it' or 'the person concerned has already been tried for conduct, which is the subject of the complaint'.[212]

Moreover, the description of the admissibility test is so generally known and firmly entrenched that even the most careful and knowledgeable scholars recite it as the content of article 17, usually by citing article 17 as if it stated such a proposition.[213] It is, by no means, the entire legal community that misquotes article 17; on the contrary, many scholars include and apply the proceedings requirement in their analyses.[214]

According to this understanding, the popular belief of the admissibility test is a one-step test, which focuses on unwillingness and inability as the entirety of the test.[215] In other words, the admissibility test requires the quoting of either unwillingness or inability as the *sine qua non* prerequisite, for any case to be admissible. Interestingly, it does not matter whether a State is actually investigating or prosecuting the case, or has done so. In addition, the provision of article 17 does

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209 Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1106.

210 Coalition for the International Criminal Court, "Questions and Answers on the International Criminal Court," https://www1.essex.ac.uk/armedcon/story_id/000124.pdf.

211 Darryl Robinson, "The Mysterious Mysteriousness of Complementarity," *Criminal Law Forum* 21, no. 1 (2010): 72.

212 "The Inaction Controversy: Neglected Words and New Opportunities," 465.

213 For example, see William A. Schabas, "Complementarity in Practice: Some Uncomplimentary Thoughts," *Criminal Law Forum* 19 (2008): 23.; Zeidy, "From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *Bis* of the Ad Hoc Tribunals," 412-13.

214 See Holmes, "Complementarity: National Courts Versus the ICC," 673.; William Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice," *Criminal Law Forum* 19, no. 1 (2008): 64.; Carsten Stahn, "Complementarity: A Tale of Two Notions," ibid.: 105.; Olásolo, "The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor," 136.

215 Robinson, "The Mysterious Mysteriousness of Complementarity," 73.

not mention or imply inaction, that was not caused by unwillingness or inability of the national system.[216]

Academically, according to the idea of the principle of complementarity, it is clear that the ICC will step in to exercise its jurisdiction, only when the 'unwilling or unable requirement has been satisfied. Then the first relevant question is whether a State is investigating or prosecuting the case, or has done so, the so-called 'proceedings requirement'. Where there are no such national efforts at all, the case of national proceedings is not a gloss or innovation.[217] In this regard, to satisfy the proceedings requirement of complementarity, it is necessary to distinguish the action and inaction of a state concerned.

In theory, to comply with the above conditions, the wording contained in article 17 expressly and unambiguously provides that a case is admissible, under article 17(1)(a), and that (b) it is not a one-step test regarding being unwilling or unable, but also contains a two-step test, which must be passed initially, and which is the answer, with regard to the action or inaction of the States.[218]

Correspondingly, the practice of the ICC of interpreting the admissibility test, based on the actions of concerned states, is that the two-prong test shall be applied, in the consideration of the admissibility of a case. This practice was reaffirmed by a number of cases at the ICC, in particular, in the *Katanga and Chui* case. The judgment of the Appeals Chamber in this case, set this kind of test by considering the distinction between inaction and domestic action, that:

> [I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, 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.[219]

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216 Mahnoush H. Arsanjani and W. Michael Reisman, "The Law-in-Action of the International Criminal Court," *American Journal of International Law* 99 (2005): 396.

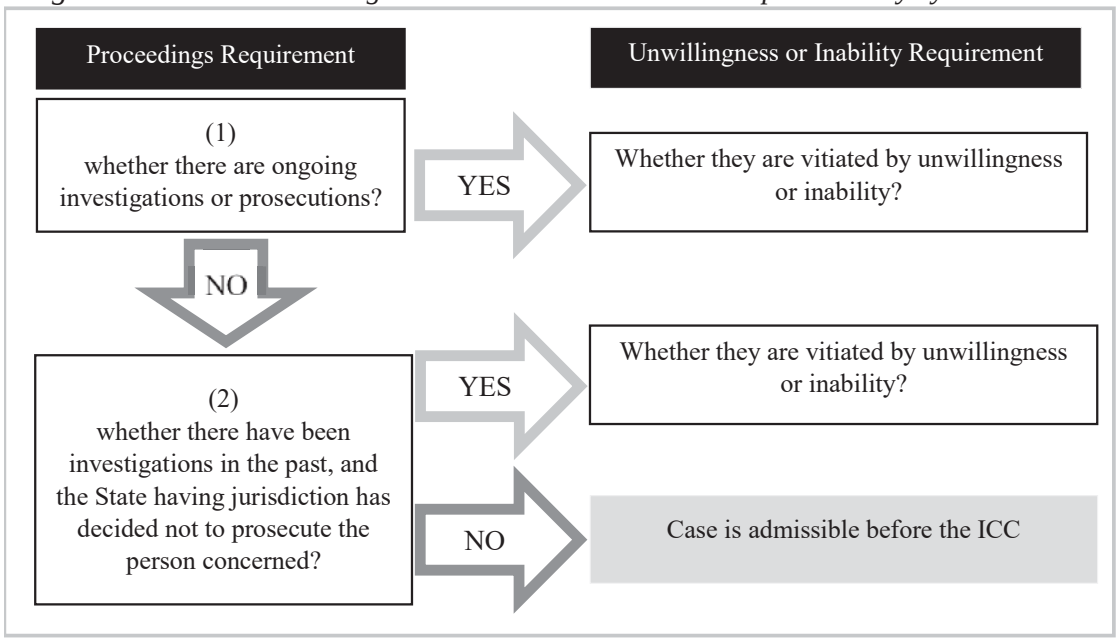
217 Robinson, "The Inaction Controversy: Neglected Words and New Opportunities," 462.

218 ibid.

219 *Katanga* Admissibility Judgment, para 78.

With regard to the above judgment, the jurisprudence of the ICC, with regard to the determination of complementarity, entails a two-step assessment, namely: (i) whether there is a national investigation or prosecution, in relation to the same case, as the one before the ICC (the proceedings requirement); and (ii) where such proceedings exist, and whether they are vitiated by unwillingness or inability (the unwillingness or inability requirement),[220] as detailed in Diagram 11.

Diagram 11 The Two-Prong Test under the Substantive Complementarity System



Source: Author's own diagram, derived from the jurisprudence of the ICC.

Apart from the *Lubanga* case and the *Katanga and Chui* case, the two-prong test has been reaffirmed by several Chambers of the ICC, such as the *Harun and Kushayb* case, or the *Al Bashir* case. [221]

Regarding this, it is worth mentioning that the two-prong test reflects the dynamic approach of the ICC, in applying the principle of complementarity, by

220 Abdou, "Article 17 Issues of Admissibility " 206.

221 See, for instance, *Lubanga* Article 58 Decision, para. 29.; *Prosecutor* v. *Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"),* Decision on the Prosecution Application under Article 58(7) of the Statute ICC Pre-Trial Chamber I, 27 April 2007, ICC-02/05-01/07-1-Corr, (*Harun and Kushayb* Article 58(7) Decision), paras. 19-25; *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC Pre-Trial Chamber I, ICC-02/05-01/09-3, (*Al Bashir* Arrest Warrant Decision), paras. 48-49,

setting up the primary question of the system of the complementarity under this article. This requires national proceedings, in relation to the case, being confirmed by the jurisprudence of the ICC. The requirement of the complementarity test has been divided into two requirements: proceedings and; unwillingness or inability, and the proceeding requirement has become a prerequisite condition for the complementarity system.

4.3.1.1.2 Inactivity concerning the Proceedings Condition Test

As previously stated, the text of article 17 contains two requirements to fulfil (the two-prong test: the proceedings requirement and the unwilling or unable requirement). In this regard, an unambiguous first question is whether a state is investigating or prosecuting the case, or has done so, according to article 17(1)(a), or whether a State has been investigated and has decided not to prosecute the person concerned, pursuant to article 17(1)(b).[222] The second question is whether a state concerned is unwilling or unable to carry out the investigation or prosecution.

Article 17 states that a case is admissible, unless the State is unwilling or unable genuinely to carry out the proceedings. In practice, one of the most controversial issues concerning the principle of complementarity is when there are no national proceedings taking place, in relation to that case. The inaction situation will authorize the ICC to proceed. Accordingly, the interpretation of the principle of complementarity needs to comply with the interpretive rule of the VCLT. This states that a treaty is to be read 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light for its object and purpose.'[223] The context referred to includes the preamble and any agreement and instrument, which were adopted in connection with the conclusion of the treaty.[224] In

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222 Robinson, "The Inaction Controversy: Neglected Words and New Opportunities," 462.

223 Vienna Convention on the Law of Treaties (23 May 1969), entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331, article 31(1) provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

224 Gates, "The Principle of Complementarity: The Admissibility of Cases before the International Criminal Court," 9.

this regard, there are two ways of interpreting the principle of complementarity: negatively and positively approaches.[225]

On the one hand, there is the 'negative' interpretation of the complementarity principle. This approach means that the Court's jurisdiction is limited to cases, where a state has been proven unwilling or unable, for the purposes of the Rome Statute, to genuinely carry out a proceeding.[226] According to this interpretation, the Court has to be satisfied that a state is either unwilling or unable in any situation or case, including where a State had remained inactive. Therefore, if article 17's unwillingness or inability criteria cannot be satisfied, the Court must then declare a situation or case, even in the absence of domestic proceedings, inadmissible.[227]

On the other hand, the 'positive' or 'dynamic' interpretation (see section 3.2.2) of the complementarity principle asserts that article 17(2) and article 17(3), which spell out the unwillingness and inability conditions, only become relevant when a State had exercised its jurisdiction. A situation or case will be admissible, in the absence of any domestic investigation or prosecution. The unwillingness or inability criteria will only be applied, if a state has initiated proceedings, in order to determine whether the ICC has the authority, to take over a state's endeavour to investigate or prosecute.[228]

The language of article 17 does not mention 'inaction', nor spell out in positive terms whether those cases, where no jurisdiction was exercised, are presumed admissible.[229] The question is which interpretation will be used, in cases of inaction where no state has initiated an investigation. This is with regard to a situation, involving an alleged crime, or crimes within the jurisdiction of the ICC.

In fact, the term 'inaction' did not exist in the Rome Statute. However, in 2003, the OTP and an experts' group report commissioned by the OTP, with regard to

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225 Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *American Journal of International Law* 99, no. 2 (2005): 413.

226 ibid.

227 Gates, "The Principle of Complementarity: The Admissibility of Cases before the International Criminal Court," 21.

228 Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," 413.

229 Gates, "The Principle of Complementarity: The Admissibility of Cases before the International Criminal Court," 22.; Arsanjani and Reisman, "The Law-in-Action of the International Criminal Court," 392.

the principle of complementarity in practice, has proposed the idea that the complementarity test was satisfied by inactivity, rather than by an overt manifestation of a State's unwillingness or inability to proceed.[230] The concrete output of such a task, appeared as the OTP' Informal Expert Paper report, which observed that:

> Although it is common to emphasize the "unwilling or unable" test in Article 17, the Article in fact deals with three logically distinct circumstances.
>
> First, the most straightforward scenario is where no State has initiated any investigation (*the inaction scenario*). In such a scenario, none of the alternatives of Arts. 17(1)(a)-(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the clear terms of Article 17.
>
> Second, it is only where a State is investigating or prosecuting, or has already completed such a proceeding, that Articles 17(1)(a)-(c) are engaged. In such circumstances, the case will be inadmissible, unless the exceptions in those provisions are established.
>
> Third, this inadmissibility is displaced where it can be shown that the proceedings are not genuine, because the State is either unwilling or unable to carry out genuine proceedings. Thus, the issues of "unwilling", "unable" and "genuine" only arise where a State purports to be handling the matter, but there are reasons to believe that a genuine proceeding will not result.[231] (*emphasis* added)

According to the OTP's Informal Expert Paper report, the Prosecutor applies the dynamic interpretation of article 17 in the inaction scenario, when *"there is no impediment to admissibility"*. In this case, it is not necessary to examine the unwillingness or unable requirement.

According to the practice of the ICC, the concept of inaction was first expressly accepted by the jurisprudence of the ICC, in the *Situation in Uganda,* as relevant, in the authorizing the issuance of arrest warrants. The Pre-Trial Chamber, assigned to the case, involved a letter of 28 May 2004, from the Government of Uganda that:

> [t]he Government of Uganda has been unable to arrest … persons who may bear the greatest responsibility" for the crimes within the referred situation; that "the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility" for those crimes; and that the Government

230 Schabas and Zeidy, "Article 17 Issues of Admissibility," 797.
231 Prosecutor, "OTP Informal Expert Paper," para. 18.

> of Uganda *"has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible"*.[232] (*emphasis* added)

Incidentally, in the *Situation in Uganda*, the Court authorized a warrant of arrest for Joseph Kony, the leader of the Lord's Resistance Army (LRA), a guerrilla group that formerly operated in Uganda, based on the inactivity of the national proceedings.[233]

Subsequently, in the *Lubanga* case, the concept of inactivity was endorsed. Therefore, the case would be admissible only if those states, with jurisdiction over it had remained inactive to the case.[234]

With regard to the above decision, the Court decided to adopt a positive (dynamic) approach, that in the absence of any acting state, the case would be admissible regardless of the analysis of unwillingness or inability of the Chamber.

According to the jurisprudence in the *Lubanga* case, the Pre-Trial Chamber employed a dynamic application of the principle of complementarity. The Chamber decided the admissibility of the case in question, based on the absence of any acting State. Regarding this the case would be admissible, regardless of making any analysis of unwillingness or inability.[235]

The authority of this decision, confirming that it is to be applied in future decisions, is laid down under article 21(2) of the Rome Statute, which provides that the Court may apply principles and rules of laws, as interpreted in its previous decision.

Apart from the *Lubanga* case, the practice of the ICC, with regard to inactivity, appeared in the *Katanga and Chui* case. In this case, this confirmed the jurisprudence in the *Lubanga* case that:

> [I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, 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

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232 *Situation in Uganda,* Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, ICC Pre-Trial Chamber II, 17 September 2005, ICC-02/04-53, para. 37.

233 Ibid., paras. 48-49.

234 *Lubanga* Article 58 Decision, para. 29.

235 Ibid., para. 40.

> 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) of the Statute. [236]

Interestingly, the judgment in the *Katanga and Chui* case did not only reiterate the previous jurisprudence in the *Lubanga* case, but also the judgment of the Appeals Chamber applied the proceedings requirement in practice. This means that only when the answer to such question affirms the fulfillment of the proceedings requirement, can the second question of the unwillingness and inability be examined. If the proceedings requirement is not fulfilled, then the case is admissible before the Court, regardless of the question of unwillingness or inability. In this regard, the Appeal Judgment has introduced a primary consideration. This refers to whether there is inaction on the part of the State which has jurisdiction, without having to decide upon whether that State is unwilling or unable to exercise its jurisdiction, according to the principle of complementarity, pursuant to the Rome Statute.

Similarly, in the *Abu Garda* case, regarding the decision on the confirmation of charges, the Chamber bore that in mind, according to the information provided by the Prosecutor and delivered the similar conclusion that:

> [N]o State with jurisdiction over the case against Mr. Abu Garda is acting, or has acted, in the manner described in article 17 of the Statute in relation to the facts alleged in this case. Accordingly, in the absence of any State action, it is not necessary to address any issue relating to the unwillingness or inability of any given State to investigate or prosecute the case.[237]

To comply with such an approach, one of the most irregular aspects of the debate concerned the 'inactivity', where there is no national effort at all. The ICC employed a dynamic approach, with regard to interpreting the principle of complementarity. In the case of lack of any action by states concerned, the ICC did not have to determine the question of the second halves of the sub-paragraphs (a) and (b), concerning the

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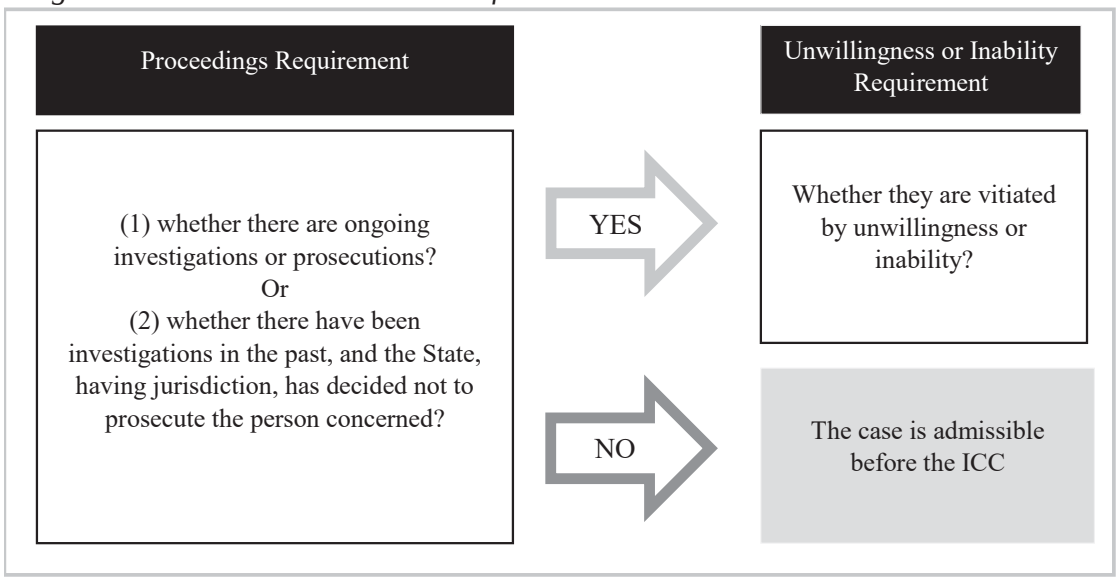
236 *Katanga* Admissibility Judgment, para 78.

237 *Prosecutor* v. *Bahar Idriss Abu Garada,* Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, ICC-02/05-02/09-243-Red, para 29.

unwilling or unable requirement. The scenario of inactivity is illustrated in Diagram 12.

Diagram 12 *The Inaction Scenario before the ICC*



Source: Author's own diagram, derived from the jurisprudence of the ICC.

According to the approach employed by the Chambers, as mentioned above, the Chambers applied the dynamic interpretation of the principle of complementarity. This was done by deciding to fulfill the condition, in the absence of any action in national proceedings by any state with jurisdiction over the case, being regarded as inactive, in relation to the case. As a result, there was no need to examine the exceptions of unwilling or unable, under the principle of complementarity. Hence, the case in question, would be admissible before the Court.

4.3.1.1.3 Inactivity as the Second Form of Unwillingness

As well as in previous jurisprudence in the *Katanga and Chui* case, inactivity was put forward, in a different interpretation of article 17(1), by the Pre-Trial Chamber II of the ICC. In this case, the Chamber decided that a case shall be determined admissible, only if the relevant state was deemed unwilling to carry out the proceedings**.** In this approach, the absence of any action of the state, which had jurisdiction related to

being unwilling to carry out the investigation, or prosecution, in the wordings of article 17(1).

The reasons for the oral decision of the Pre-Trial Chamber II in the *Katanga* were that:

> [t]he Statute makes explicit provision for the case of a State which has no intention of bringing a person to justice, because it wants to shield that person from criminal responsibility. This is unwillingness motivated by the desire to obstruct the course of justice. There is also the case of a State which may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her. This second form of "unwillingness", which is not expressly provided for in article 17 of the Statute, aims to see the person brought to justice, but not before national courts. The Chamber considers that a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in article 17.[238]

The Chamber argues in its decision, that there are two types of unwillingness envisaged by article 17, one explicit and the other implicit. Inactivity is the second form of unwillingness, aiming at bringing the accused to justice before the international court. The Chamber, stated that:

> [i]t appears to the Chamber that this second form of "unwillingness" is in line with the object and purpose of the Statute, in that it fully respects the drafters' intention "to put an end to impunity", while at the same time adhering to the principle of complementarity. This principle is designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so. As holder of this right, the State may waive it, just as it may choose not to challenge the admissibility of a case, even if there are objective grounds for it to make a challenge.[239]

According to this, the Chamber interpreted that, under the principle of complementarity, states have a sovereign right to exercise their jurisdiction in good faith. However, states may waive their right and refer the situation to the ICC, and may choose not to challenge the admissibility of a case.

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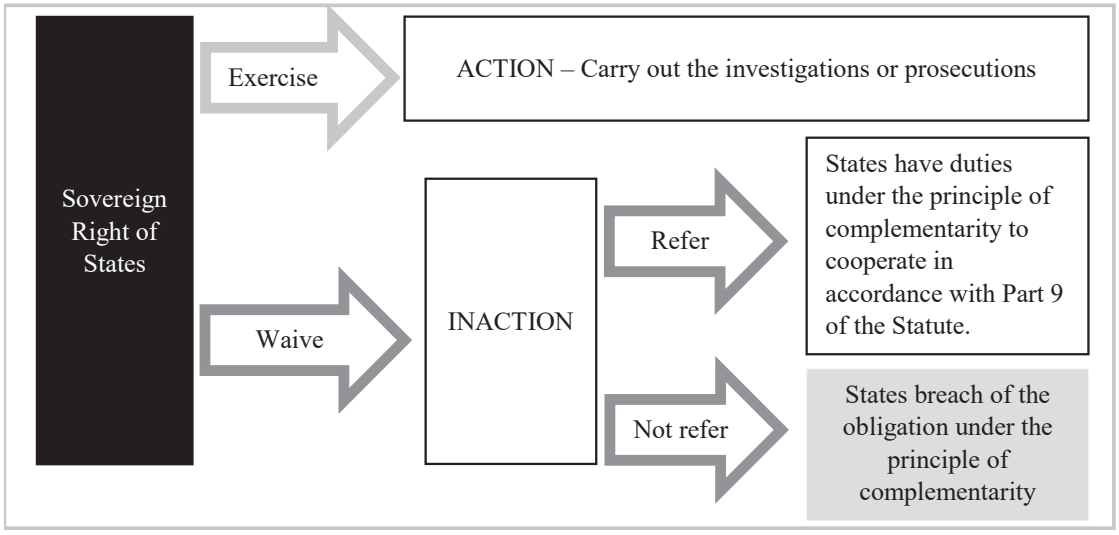
238 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC Pre-Trial Chamber II, ICC-01/04-01/07-1213-tENG, para 77.

239 Ibid., para 78.

Additionally, the Chamber reminds States to fulfill their duties, to exercise their criminal jurisdictions, over those responsible for international crimes, pursuant to the preamble of the Rome Statute. They have to comply with their duties, under the principle of complementarity, to cooperate in accordance with Part 9 of the Rome Statute, by surrendering the suspect to the Court. This makes it possible to carry out an investigation or prosecution.[240] In the case where a state decides not to investigate or prosecute a particular case without any referral to a situation, which has arisen in its territory, to the Court, it would be in breach of the principle of complementarity.[241] Regarding this, such a decision means that the state considers itself unable to hold a fair and expeditious trial, or because it considers that circumstances are not favourable for conducting effective investigations, or for holding a fair trial.[242] This practice of the ICC, regarding inactivity considered as inaction by a state, is the second form of unwillingness, illustrated in Diagram 13.

Diagram 13 *Inaction as the Second Form of Unwillingness*



Source: Author's own diagram, derived from the jurisprudence of the ICC.

240 Ibid., para 79.
241 Ibid., para 80.
242 Ibid.

Subsequently, the decision of the Pre-Trial Chamber II in the *Katanga and Chui* case was reaffirmed by the Appeals Chamber. The judgment of the Appeals Chamber states that:

> [t]he term "unwillingness" was defined in article 17 (2) of the Statute and referred to "unwillingness motivated by the desire to obstruct the course of justice". The Trial Chamber found that there is also a *"second form of 'unwillingness', which is not expressly provided for in article 17 of the Statute*, aims to see the persons brought to justice, but not before national courts." The Trial Chamber considered that this second form of unwillingness was fully in line with the principle of complementarity, which was "designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so". Noting the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (the sixth paragraph of the Rome Statute), the Trial Chamber considered that a State was still complying with its duties under the complementarity principle "if it surrenders a suspect to the Court in good time."[243] (*emphasis* added)

With regard to the judgment of the Appeals Chamber, the inaction of the state with jurisdiction was also motived by the desire to obstruct the course of justice. To comply with the objective, the ICC wished to put an end to impunity and to attain the objectives of the principle of complementarity. This is designed to respect states sovereignty, with regard to the exercise of national criminal jurisdiction, which pertains to every state's duty to exercise regarding international crimes. The inaction of any state concerned may well mean impunity for the perpetrators of international crimes. Therefore, the intervention of the ICC to exercise its jurisdiction would occur, and the case in question would then be admissible before the Court. Therefore, the states with jurisdiction have to cooperate with the ICC, by surrendering the accused, and transferring them to the Court. Thus, they fulfill their duties, under the principle of complementarity.

4.3.1.1.4 Inactivity in the Context of Unwillingness or Inability

As discussed earlier, the concept of inactivity was endorsed by the jurisprudence of the ICC, even though the terms 'inaction' or 'inactivity' or 'inactive' do not appear in

243 *Katanga* Admissibility Judgment, para. 59.

the Rome Statute. The concept of inactivity has been framed by the decisions and judgments of the Chambers of the ICC. Nevertheless, the practice of those Chambers reflects the uncertainty in interpretation of the term in question. In particular, there is the issue of ambiguity, as to whether the inaction of a state in question renders a case admissible before the ICC.

The controversial question of uncertainty of interpretation of inactivity, was settled in the *Katanga and Chui* case, as reflected in the judgment of the Appeals Chamber, that:

> [i]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, 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) of the Statute. This interpretation of article 17 (1) (a) and (b) of the Statute also finds broad support from academic writers who have commented on the provision and on the principle of complementarity.'[244]

Additionally, the Appeals Chamber continued to state that:

> [T]he Appeals Chamber is therefore not persuaded by the interpretation of article 17 (1) of the Statute proposed by the Appellant, according to which unwillingness and inability also have to be considered in case of inaction. 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

244 Ibid., para. 78.

> 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.'[245] (*emphasis* added)

In this regard, article 17(1), as a whole, requires the Court to initially check the existence or absence of proceedings requirements, before making its determination on the inadmissibility of the given cases.[246] If there is the absence of action by the state in question, there is no need to examine a State's unwillingness or inability, under article 17(2) and (3). The initial questions to ask for these two scenarios are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, when the state, having jurisdiction, has decided not to prosecute the person concerned. If there are no state investigations or prosecutions, the question of unwillingness or inability does not arise. In addition, the Appeals Chamber also emphasised that, in its interpretation of article 17(1), that the Court does not have to consider unwillingness and inability. In a case of inaction, this would comply with the objectives of the Rome Statute.

The Appeals Chamber also made a similar pronouncement, in the *Ruto at. Al* case in 2011. The judgment, stated that:

> [I]t should be underlined, however, that determining the existence of an investigation must be distinguished from assessing whether the State is 'unwilling or unable genuinely to carry out the investigation or prosecution", which is the second question to consider when determining the admissibility of a case.[247]

Another problematic issue concerning inactivity, is that the assessment of admissibility is based on the notion of inactivity. This makes the demarcation line between inactivity and unwillingness or inability, difficult to discern, because of the overlapping of the criteria of inaction, and those of unwillingness or inability.[248]

In the *Katanga and Chui* case, the Appeals Chamber established an important distinction between inaction on one hand, and unwillingness or inability on the other.

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245 Ibid., paras 79, 85 and fn. 169.

246 Schabas and Zeidy, "Article 17 Issues of Admissibility," 798.

247 *Ruto* Admissibility Judgment, para. 41.

248 See Schabas and Zeidy, "Article 17 Issues of Admissibility," 803-04.

In this respect, it classified the terms 'unwillingness' and 'inability', under article 17, as referring to a situation that only arises after the opening of a formal investigation. This was done by the State having jurisdiction over the case, while inaction denoted the absence of any investigative step. It stated that:

> [I]n both article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability is linked to the activities of the State having jurisdiction. Article 17 (1) (a) links the unwillingness or inability to the investigation or prosecution: "unless the State is unwilling or unable genuinely to carry out *the investigation or prosecution*" (emphasis added). The use of the definite article "the" instead of the indefinite "a" emphasises that reference is made to an investigation or prosecution that is actually ongoing. Similarly, in article 17 (1) (b), unwillingness and inability refer to the decision of a State, after investigation, not to prosecute the person concerned: "unless *the decision* resulted from the unwillingness or inability of the State genuinely to prosecute" (*emphasis* added).[249]

In this case, the Chamber explained that unwillingness or inability were derived from an actual ongoing investigation, or prosecution, (article 17(1)), or refer to the decision not to prosecute. This was after an investigation of a state had taken place.

Subsequently, the interpretation of inaction in the context of unwillingness or inability, was reaffirmed in the *Al-Senussi* case, and was reflected in the decision of 5 March 2015 of the Pre-Trial Chamber I on the admissibility of the case against Al-Senussi. It recognized that:

> [T]he Chamber recognizes that the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked. Therefore, the evidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness. 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.[250]

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249 *Katanga* Admissibility Judgment, para 76; Klamberg, *Commentary on the Law of the International Criminal Court*, 206-07.

250 *Al-Senussi* Admissibility Decision, para 210.

In the same way, in the *Simone Gbagbo* case, as reflected in the decision of 11 December 2014 of the Pre-Trial Chamber I, on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, it was argued in similar terms, that:

> [C]onsiderations with respect to the quantity and quality of the alleged investigative steps may therefore be relevant to the determination of whether an "investigation" is indeed being conducted, like they may be to the assessment of the genuineness of the concerned investigation in order to establish, as the case may be, whether the State is "unwilling" or "unable" to carry it out.[251]

In this regard, according to the jurisprudence of the ICC, the unwillingness or inability requirement will only come into play, when there is an affirmative finding, on the part of the Court that national proceedings are underway. In this case, the Court also needs to test the quality of such proceedings, as conducted the State's national authorities.[252] In case of the inaction of the States, not all inaction will lead to a proceeding before the ICC, particularly because the Court retains the discretion to initiate cases, in accordance with the Statute. A finding of inaction will however not prevent the Court, from asserting jurisdiction in the case before it.

4.3.1.2 Dynamic Interpreting of 'Inactivity'

Article 17 of the Rome Statute deals with the activity of the state, affirming that the case is admissible unless the state is unwilling or unable genuinely to carry out the proceedings. The provision says nothing about the inactivity of the state. Then, the question of the absence of national proceedings at the national level or the inaction scenario, becomes a controversial issue, concerning the application of the principle of complementarity.

The OTP, in its Informal Expert Paper, has developed that the complementarity test is satisfied by inactivity.[253] Regarding this, there is no need to examine the factors of unwillingness or inability, and the case is admissible before the ICC.

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251 *Simone* Admissibility Decision, para. 30.

252 Schabas and Zeidy, "Article 17 Issues of Admissibility," 799.

253 OTP, "Informal Expert Paper," para. 18.

In the *Situation on Uganda*, the inactivity of the State has been issued by the ICC Pre-Trial Chamber II, in order to authorize the issuance the warrant of arrest for Kony that "[t]he Government of Uganda has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible". [254]

Later, the same dynamic approach has been employed in the *Lubanga* case, where the Pre-Trial Chamber I interpreted that "[s]uch case would be admissible, only if those states with jurisdiction over it have remained inactive, in relation to that case or are unwilling or unable…"[255]

This dynamic interpretation of the term 'inactivity' has been followed in the *Katanga and* Chui case. The ICC Pre-Trial Chamber II interpreted the inaction as a second form of unwillingness of the stage, that "[T]his second form of "unwillingness', which is not expressly provided for in article 17 of the Rome Statute, aims to see the person brought to justice, but not before national courts." [256] Moreover, the ICC Appeal Chambers, in the same case, has not only repeated the precedent in the *Lubanga* case, but it interpreted that "[i]n the case of inaction, the question of unwillingness or inability domes not arise…".[257] Regarding this, in the case of inaction, the case is admissible before the Court, regardless of the question of unwillingness or inability.

According to the abovementioned jurisprudence of the ICC with regard to inactivity, the Chambers of the ICC have applied the principle of complementarity dynamically, in the context of inactivity. The jurisprudence confirms the importance of national proceedings concerning the cases at hand; the proceedings before the ICC is a supplementary means and it will move forward only when the state in question has not conducted, or does not intend to conduct, the investigation or prosecution of the persons most responsible, at the national level. Hence, to serve this ultimate aim of the international criminal justice, and in order to put an end to impunity, the dynamic application concerning the absence of any acting Stage (the inactivity scenario) would be admissible before the ICC has been applied.

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254 *Kony* Warrant of Arrest, para. 37.

255 *Lubanga* Arrest Warrant Decision, para 39.

256 *Katanga* Reason for Oral Decision, para. 77.

257 *Katanga* Admissibility Judgment, para. 59.

4.3.2 Complementarity with regard to Activity

Certainly, the Rome Statute contains the provision, concerning the action of States. However, in practice, the questions, with respect to the activity, have become one of the ambiguity issues. The Court has applied the principle of complementarity, in the context of the action of states, which have jurisdiction over the cases in question, in the admissibility proceedings, as follows.

4.3.2.1 Activity in Practice

4.3.2.1.1 The 'Case' as a Primary Question of Activity

The first two subparagraphs of article 17 of the Rome Statute, stipulates that the Court shall determine that a case is inadmissible, where a *'case'* is '*being investigated or prosecuted'* and *'have been investigated'*, respectively. Due to the discussion in the previous subchapter, if there is no state investigating or prosecuting the case, the criteria of inadmissibility will not be applied to that case.[258] Thus, one can conclude that, in the absence of national investigations or prosecution, cases are admissible, without requiring the fulfilment of the criteria of unwillingness or inability.[259] Only when domestic proceedings exist, is it necessary to determine whether the state concerned is willing or able to genuinely carry out the investigation or prosecution. According to this, in most of the cases before the ICC, the Chambers have not discussed unwillingness or inability as the first priority. Nevertheless, the Chambers have to discuss the existence of domestic proceedings of the 'same case', as defined by the Chamber.

Hence, an assessment of unwillingness or inability is required, only if there are domestic proceedings in the same case, as the one before the ICC. This is based upon the common term of 'case', which is defined as the first component of article 17(1)(a) to (c), and which has become more important. However, the definition of 'case' was never fully explained, neither during the negotiations, nor in the first commentaries on

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258 Nouwen, "Fine-Tuning Complementarity," 209.

259 ibid., see also Prosecutor, "OTP Informal Expert Paper," 7-8.

the Rome Statute.[260] In addition, the term 'case' differs from the term 'situation', at the preliminary examination stage, as stipulated in the Rome Statute.

According to the practice of the ICC, the Court draws the distinction between situations and cases in the *Situation in DRC,* as reflected in the decision of the Pre-Trial Chamber I. It observed that cases comprised specific incidents, during which one or more crimes within the jurisdiction of the Court appeared to have been committed by one or more identified suspects. These entail proceedings that took place after the issuing of a warrant of arrest, or a summons to appear.[261] In contrast, the term 'situation', under the Rome Statute and the ICC REP[262], denoted the confines within which, the Court determines whether there is a reasonable basis to initiate an investigation, and the jurisdictional parameters of any ensuring investigation. The characteristics of a situation were further elaborated by the same decision on 17 January 2006 of the Pre-Trial Chamber I in the *Situation in DRC.* Situations were generally defined, in terms of temporal, territorial and, in some cases, personal parameters. These require the proceedings, envisaged in the Statute, to determine whether a particular situation should give rise to a criminal investigation, as well as the investigation as such.[263]

According to this, 'case' involves a higher level of specificity than 'situation', entailing specific incidents, during which, one or more crimes within the jurisdiction of the Court, seem to have been committed, by one or more identified suspects.

In addition, the same Chamber added further guidance to the meaning of the term 'case', in its decision on the application for a warrant of arrest against Lubanga. The Chamber first conducted a preliminary assessment of admissibility as to whether

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260 For example, Otto Triffterrer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article.* (Baden: Nomos, 1999); Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002); Nouwen, "Fine-Tuning Complementarity," 209.

261 *Situation in the Democratic Republic of the Congo,* Decision on Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6), Pre-Trial Chamber I, 17 January 2006, ICC-01/04-101-tEN-Corr (*DRC* Decision on Applications for Participation), para. 65.

262 Rome Statute, articles 15, 53(1)(a); ICC REP, rule 48.

263 *DRC* Decision on Applications for Participation, para. 65.

there were any relevant national proceedings in the DRC.[264] At that time, *Lubanga* was in the custody of the DRC authorities, pursuant to unrelated serious offences of crimes against humanity, genocide, murder, illegal detention and torture. In the first DRC case, the Pre-Trial Chamber I issued an arrest warrant against *Lubanga*, for the charges of the war crimes of enlisting children under the age of fifteen; the war crime of conscription of children under the age of fifteen; and the war crime of using children under the age of fifteen, for military purposes.[265]

In this case, the Pre-Trial Chamber I briefly reflected on the statement in the DRC referral letter of 2004[266], that it was unable to investigate and prosecute. It delivered its decision by concluding that an ability assessment was not even necessary, since the Congolese case against *Lubanga* was not the same as the OTP's case. In addition, the Pre-Trial Chamber I observed that, since the domestic charges against *Lubanga* did not correspond to the allegations brought before the ICC, the DRC could not be considered to be acting in relation to the same specific case.[267] As the Chamber stated that:

> [I]t is *a condition sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.[268]

In this regard, the domestic charges against *Lubanga* did not involve the conduct with which the Prosecutor of the ICC had charged him. The Chamber observed that:

> [t]he warrant of arrest issued by the competent DRC authorities against Mr Thomas Lubanga Dyilo contain no reference to his alleged criminal responsibility for the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participating actively in hostilities children under the age of fifteen between July 2002 and December 2003.[269]

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264 *Lubanga* Arrest Warrant Decision, paras. 30-40.

265 *Prosecutor* v. *Thomas Lubanga Dyilo*, Warrant of Arrest, Pre-Trial Chamber I, 10 February 2006, ICC-01/04-01/06-2-tEN, para. 5.

266 Letter of Joseph Kabila, dated 3 March 2004, ICC-01/04-01/06-39-AnxB1.

267 *Lubanga* Article 58 Decision, paras. 38-39.

268 *Lubanga* Arrest Warrant Decision, para. 31.

269 Ibid, para. 38.

As a result, the Pre-Trial Chamber I held that, the DRC cannot be considered to be acting, in relation to the specific case before the Court.[270] The Chamber reached the conclusion that neither the DRC, nor any other state with jurisdiction over the case against *Lubanga,* is acting, or has acted, in relation to such case. Therefore, the Chamber need not make any analysis of unwillingness or inability.[271] Consequently, the case was admissible, since none of the grounds for inadmissibility applied.

The Pre-Trial Chamber reached the same conclusion, when issuing an arrest warrant for the second person in the *Situation in the DRC*, Germain Katanga. This was even though he had been detained domestically, on the basis of an arrest warrant, on charges of crimes against humanity and the ICC Prosecutor also charged himself for these crimes. In this case, the Pre-Trial Chamber found that 'the proceedings against Germain Katanga in the DRC did not encompass the same conduct, which was the subject of the Prosecution Application'. Subsequently, the Chamber applied the same logic to the arrest warrant for *Mathieu Ngudjolo Chui*, who had also been charged with crimes domestically.[272]

The same case test has been subsequently adopted by the prosecution, and has been recalled by the Pre-Trial Chamber I in the case of *Harun and Kushayb,* which rendered its decision of 27 April 2007, concerning the same case test. This stipulated that a case was admissible if the case before domestic court did not encompass the same person and conduct, which were subject to the case before the ICC.[273] Moreover, in the case of *Kony et al,* the Pre-Trial Chamber II stated in its decision of 10 March 2009, concerning the admissibility assessment, that:

> [A]cting against a different factual background, …, pointed out that "for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court". Since the warrants of arrest issued in the DRC contained no reference to the charges brought by the Prosecutor and no other State with

270 Ibid, para. 39.

271 Ibid, paras. 39-40.

272 Nouwen, "Fine-Tuning Complementarity," 210.

273 *Harun and Kushayb* Article 58(7) Decision, para. 24. The Pre-Trial Chamber I stated that "The Chamber is of the view that for a case to be admissible, it is a condition *sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court."

> jurisdiction was investigating, prosecuting or had investigated and prosecuted the same crimes, the case was considered admissible.[274]

Similarly, the same case concept was also mirrored broadly in the Pre-Trial Chamber III ruling in the case of *Bemba*, where the Chamber considers that:

> [t]here is nothing to indicate that he is already being prosecuted at the national level for the crimes referred to in the Prosecutor's Application.[275]

The similar approach was employed in the cases of *Al Bashir* and *Abu Garda.* The preliminary references to admissibility, in the case of *Al Bashir,* the decision of the Pre-Trial Chamber I on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, as delivered on 4 March 2009, stated that:

> [i]n the view of the Chamber, the materials presented by the Prosecution in support of the Prosecution Application offer no indication that: (i) national proceedings may be conducted, or may have been conducted, at the national level against Omar Al Bashir for any of the crimes contained in the Prosecution Application… [276]

While in the *Abu Garda* case, the Pre-Trial Chamber I delivered its decision on the Prosecutor's Application, under Article 58 of 7 May 2009, stating that:

> [t]he instant application was made on a confidential and *ex parte* basis. Particularly since the Prosecutor has indicated that there are no national proceedings in relation to the case, the Chamber sees no ostensible cause or self-evident factor compelling it to exercise its discretion to review the admissibility of the case proprio motu at the instant stage of the proceedings. As a result, the Chamber declines to use its discretionary proprio motu power to determine the admissibility of the case against Abu Garda at this stage.[277]

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274 *Kony* Admissibility Decision, paras. 17-18.

275 *Prosecution* v. *Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC Pre-Trial Chamber III, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 21.

276 *Al Bashir* Arrest Warrant Decision, para. 50.

277 *Prosecutor* v. *Bahr Idriss Abu Garda,* Decision on the Prosecutor's Application under Article 58 (*Abu Garda* Article 58 Decision) Pre-Trial Chamber I, 7 May 2009, ICC-02/05-02/09-1, para. 4.

In order to exercise the jurisprudence of the ICC with regard to the primary question for the complementarity system, in the case of activity, as to when proceedings requirement is fulfilled by the concrete action of a State, then it is necessary for the ICC to determine the unwilling or unable requirement. This entails whether the State concerned is willing or able genuinely to carry out the investigation or prosecution.

In the consideration of activity, the Court employs the same approach, as of inactivity. It means that the Court has to focus on the proceedings requirement, before going to the next requirement of unwillingness or inability. Then, the jurisprudence of the Court shows that the term 'case' has become a primary question for the Court, in considering the proceedings requirement. Moreover, according to the practice of the ICC, the Chambers of ICC employed the same approach. This means that the cases have not been discussed, regarding the unwillingness or inability of the State in the first place. However, the Chambers have to discuss the existence of domestic proceedings of the same 'case', as defined by the Chamber. In this regard, the 'case', before the national court becomes the primary question for activity in the complementarity system.

4.3.2.1.2 The Notion of 'Sameness'

As discussed earlier, the term 'case' has become the primary question for the inquiry of the ICC complementarity regime, in the case where the action of the State exists (activity). According to the Rome Statute, there are three possibilities, which the 'case' appears to admit before the Court: (1) during pre-investigative and investigative stages (the phase of preliminary examination of the OTP); (2) at the moment the Prosecutor makes an application for an arrest warrant or summons to appear; or (3) when the Pre-Trial Chamber issues a decision regarding an arrest warrant or summons to appear. In all these situations, the concept of the case will be taken into consideration.

The earliest stage, at which the Rome Statute refers to, the concept of the case is in article 15[278] and 53,[279] and rule 48 of the Rules of the ICC REP,[280] in the context

278 Rome Statute, article 15(4).

279 Ibid, article 53(1).

280 ICC RPE, rule 48.

of the Prosecutor's determination. This concerns whether there is a reasonable basis to open an investigation.[281] As part of this process, the question of whether 'the case is, or would be admissible, under article 17' must be considered.[282]

Regarding the requirement under the complementarity test, as discussed earlier, article 17(1)(a) and (b) of the Rome Statute refers to national investigation, and prosecution that might render a case inadmissible before the ICC. In these scenarios, several key questions have arisen, regarding what kind of national activity would amount to an investigation, for the purpose of an admissibility challenge? And, what activity at the national level would give rise to the level of prosecution required, in order to trigger the admissibility provision? Hence, to satisfy the complementarity requirement, any investigation of a situation must also cover both the person and the conduct, which appear to be within the Court's mandate.

According to the practice of the ICC, the mandate of the Court, with regard to the notion of the same-case, was identified in its decision in the *Lubanga* case. The Pre-Trial Chamber held that:

> [f]or a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and conduct.[283]

In addition, in the *Lubanga* case, the case was decided to be admissible, despite the fact that the relevant authority had initiated an investigation, and had even issued a warrant of arrest against the accused for crimes. Some of these appear to be within the Court's jurisdiction, but differed from those which the Prosecutor alleged, had been committed, in relation to the case in question.[284] Hence, the domestic proceedings did not encompass the conduct that the Prosecutor alleged. Because to this, this decision introduces the notion of the sameness, in relation to considering the complementarity requirement, that the case in question at the domestic level had to relate to the same person and conduct as of the ICC.

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281 Rastan, "What Is a 'Case' for the Purpose of the Rome Statute " 440-41.

282 ibid., 441.

283 *Lubanga* Arrest Warrant Decision, para. 23,

284 Gates, "The Principle of Complementarity: The Admissibility of Cases before the International Criminal Court," 37.

Also, the Pre-Trial Chambers have, or seem to have, chosen to argue that the domestic proceedings did not concern the same 'case' as the OTP's. This was rather than admitting that there were domestic proceedings, and then going into the question, as to whether the relevant domestic authorizes were able and willing, genuinely, to conduct these proceedings.[285] This evasion of politically sensitive questions has resulted in a strict definition of a case, that could entirely undermine complementarity.[286]

In the *Situation in Darfur*, the issue of the 'same case' emerged in the *Harun and Kushayb* case. The decision of the Pre-Trial Chamber I held that the definition, as well as the requirements, as asserted by the Prosecutor, were that the domestic case must concern, not only the same 'conduct' and 'person', but also the same 'incident', for it to be the same case.

According to the facts, *Ali Kushayb* was in domestic detention when the Chamber agreed with the Prosecutor's request for a summons to appear. Domestic investigations were ongoing into five separate incidents in five communities, involving attacks accompanied by looting, burning houses, killing and forced disappearance. The ICC Prosecutor, in turn, accused *Kushayb* of having committed war crimes and crimes against humanity, charging him with killing, rape, torture, persecution, forcibly displacing civilians, depriving civilians of their liberty, pillaging and destroying property. One of the incidents, involved the same locality, as one of the incidents under domestic investigations. The Prosecutor, however, pointed out that the domestic investigations into that incident, made no mention of rape or other inhuman treatment, that:

> [I]t is noted that both the Prosecution and the JIC are investigating crimes committed in Arawala. The Prosecution investigation relates to events in or around December 2003 and refers to the killing of 26 people, as well as multiple rapes and notorious examples of inhumane treatment. The JIC is investigating an incident of 5 November 2003 in relation to an unspecified number of killings. It makes *no mention of rape or other inhumane treatment*. The Prosecution does not conclude

285 Nouwen, "Fine-Tuning Complementarity," 211.

286 ibid.

> that the JIC investigation relates to the same incident at this point.[287] (*emphasis* added)

The Prosecutor concluded that the case was admissible before the ICC, because the domestic investigations did not relate to the same conduct, which was the subject of the case before the Court:

> [t]he Prosecution respectfully submits that the investigations currently being carried out by the relevant Sudanese authorities do not encompass the same persons and the same conduct which are the subject of the case before the Court. To the extent that the investigations do involve one of the individuals named in this application, they do not relate to the same conduct which is the subject of the case before the Court: the national proceedings are not in respect of the same *incidents* and address a significantly narrower range of *conduct.* Therefore, the Prosecution considers there is no reason to believe the case is inadmissible.[288] (*emphasis* added)

In this case, the Prosecutor added criteria for an investigation, that amounted to an investigation into the same case, namely the same incident. However, the decision of the Pre-Trial Chamber I did not include this extra requirement. It only repeated the criterion it had used in *Lubanga* case, that:

> [f]or a case to be admissible, it is a condition *sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court.[289] (*emphasis* added)

As a consequence, national prosecutors wishing to avoid ICC intervention were bound to select the persons, and conduct, involving an incident that the ICC would prosecute. However, in practice, after a referral, if the criteria in article 53 of the Rome Statute were fulfilled, the Prosecutor had to investigate and prosecute. Regarding this, the Prosecutor had much discretion, because it was difficult for the judges to force him to take a decision to investigate, or prosecute or to overturn a decision not to.[290]

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287 *Situation in Darfur, Sudan,* Prosecutor's Application under Article 58(7), ICC Pre-Trial Chamber I, ICC-02/05-56, 27 February 2007, para. 265.

288 Ibid., para. 267.

289 *Harun and Kushayb* Article 58(7) Decision, para. 24.

290 Nouwen, "Fine-Tuning Complementarity," 211.

For example, in the *Lubanga* case, the Prosecutor could, and did decide, to charge *Lubanga,* instead of the more notorious *Laurent Nkunda Batware* (or 'The Chairman').[291] He decided to charge *Lubanga* with only a war crime (enlisting and conscripting children, under the age of 15, as soldiers and using them to participate actively in combat), between September 2002 and August 2003. *Lubanga*'s UPC forces also carried out the widespread killing, rape, and torture of thousands of civilians throughout Ituri), also committing crimes against humanity as had been done domestically. One has to conclude that, even if national prosecutions involved persons with greater responsibility, different and, arguably, more serious crimes and different incidents, the OTP's case would still be admissible.[292]

Subsequently, the ambiguous question of the same case was settled by the decision of Pre-Trial Chamber I, in the case of *Al-Senussi,* where the basic principle was set out that the interpretation of the requirement that, "the case is being investigated or prosecuted by a State which has jurisdiction over it", within the meaning of article 17(1)(a) of the Statute, as follows:[293]

> [F]or the purposes of the present decision, the Chamber adheres to the same approach, and, more specifically, considers that the following principles form part of the legal framework also applicable to the present case:
>
> (i) in accordance with consistent jurisprudence of the Court, a determination of admissibility is case-specific, the constituent elements of a case before the Court being the "person" and the alleged "conduct"; accordingly, for the Chamber to be satisfied that the domestic investigation covers the same "case" as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court;
>
> (ii) the expression "the case is being investigated" must be understood as requiring the taking of "concrete and progressive investigative steps" to ascertain whether the person is responsible for the conduct alleged against him before the Court; as held by the Appeals Chamber, these investigative

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291 Laurent Nkunda Batware, or 'The Chairman' is a former General in the Armed Forces of the Democratic Republic of Congo (DRC) and is the former warlord (leader of a rebel faction) operating in the province of Nord-Kivu, sympathetic to Congolese Tutsis and the Tutsi-dominated government of neighboring Rwanda.

292 Nouwen, "Fine-Tuning Complementarity," 211.

293 *Al-Senussi* Admissibility Decision, para 66.

steps may include "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses";

(iii) the parameters of the "conduct" alleged in the proceedings before the Court in each individual case are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question, in the present case the Warrant of Arrest; consequently, "the determination of 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"[294]

(iv) the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation. Indeed, "[t]he question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge"[295] and "a domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient…"

According to this decision, the jurisprudence of the ICC confirms that the determination of admissibility must constitute elements of the "person" and his alleged "conduct." The domestic investigation must be the same "case" as at the ICC: (1) the person subject to the domestic proceedings is the same person against whom, the proceedings before the Court are being conducted; and (2) the conduct that is subject to the national investigation is, substantially, the same conduct that is alleged in the proceedings before the Court. In addition, the determination in each individual case requires a case-by-case analysis.

According to above-mentioned jurisprudence, those practices reflected the dynamic of the application of the principle of complementarity of the ICC. They also mirrored the attempt of the Court, in answering the question of the 'sameness' of the cases in question in the complementarity system. The technique of a case-by-case analysis can also confirm the broad application of the principle of complementarity, applied by the Court, in which it is possible to take all related evidence into consideration in the admissibility proceedings.

294 *Gaddafi* Admissibility Decision, para. 77.

295 Ibid., para. 85.

4.3.2.1.3 The Potentiality of the Case

As discussed in the previous session, the affirmative finding on the part of the Court that national proceedings are taking place, renders a case inadmissible, only in so far as the investigation, prosecution or trial is proven by evidence, and targets the same 'case', which is the subject of the Court's consideration.[296] Hence, not every investigation, prosecution or trial conducted at the national level will satisfy the first three scenarios, under article 17(1)(a) to (3) of the Rome Statute, for the purpose of securing a decision of inadmissibility, in favour of the State concerned.

Depending on the particular stage of the proceedings, the scope and the level of assessment of a case before the Court varies. At the early stage of the proceedings, namely in the course of investigating the entire *situation* referred to the Court, by a State Party, pursuant to articles 13(a) and 14(1) of the Rome Statute,[297] or the Security Council acting under Chapter VII of the UN Charter,[298] or the Prosecutor acting *proprio motu,*[299] the admissibility assessment will be in the context of a potential case.[300]

The idea of the potentiality of the case was introduced for the first time in the *Situation in Kenya,* as referring to in the decision of the Pre-Trial Chamber II on the Authorization of an Investigation into the *Situation in Kenya*.[301] The rationale underlying the assessment of admissibility, in the context of a potential case, is that at the early stage of the investigation into a situation, it is unlikely that suspects will have been identified, or that the precise conduct or its legal characterization will be very clear. This does not mean that, in the early stages of an investigation, a certain level of precision is not required.[302]

The idea of a potential case was defined in the decision of the Pre-Trial Chamber II, that:

296 Schabas and Zeidy, "Article 17 Issues of Admissibility."
297 Rome Statute, article 13(a) and 14(1).
298 Ibid., article 13(b).
299 Ibid., articles 13 and 15.
300 Schabas and Zeidy, "Article 17 Issues of Admissibility," 801.
301 *Kenya* Authorization Decision, para. 48.
302 Schabas and Zeidy, "Article 17 Issues of Admissibility," 800.

> [T]he reference to a 'case' in article 53(l)(b) of the Statute [same as reflected in article 17] does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term 'case' in the context in which it is applied. The Chamber considers, therefore, that since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation.[303]

In addition, the Chamber stated that the assessment of admissibility, whether of actual or potential cases, cannot be conducted in the abstract. And it also provided the criteria to be applied, in the assessment of a potential case at the situation phase, so that:

> [A]dmissibility at the situation phase should be assessed against certain criteria defining a 'potential case' such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[304]

Subsequently, in the *Ruto et al.* case, the Appeal Chamber delivered its judgment on the appeal of the Republic of Kenya, against the decision of Pre-Trial Chamber II. It did this by adopting the same line of reasoning, when it said that:

> [T]he 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.[305]

The admissibility assessment should be more precise and rigorous, after the Prosecutor has conducted his/her investigation, (in the context of articles 15 and 53(1)

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303 *Kenya* Authorization Decision, para. 48.

304 Ibid., paras 49-50.

305 *Ruto* Admissibility Judgment), para. 39.

of the Rome Statute), and is in a position to request the relevant Pre-Trial Chamber, to issue a warrant of arrest. The warrant of arrest or summons to appear, should be issued under article 58,[306] or the charges brought by the Prosecutor, and confirmed by the Pre-Trial Chamber, should be issued under article 61.[307] Article 58 of the Rome Statute 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.[308]

At this stage, admissibility is assessed against a concrete case, where there is an actually identified suspect, and particular criminal conduct, known to the Court.[309] Hence, the defining elements of a concrete case before the Court are the individual and the alleged conduct.[310] Although article 20(3), together with article 90(1) of the Rome Statute,[311] refer to the 'same person/ and the 'same conduct' which confirms that this is the correct test,[312] the Appeals Chamber, surprisingly deviated from the language of the Rome Statute. It added the word 'substantially', without providing any explanation, regarding the legal basis or the rationale for this action.[313]

The scope of 'substantially the same conduct' was classified in the *Gaddafi* case, as relevant in the judgment of the Appeals Chamber on the appeal of Libya against the admissibility decision of the Pre-Trial Chamber, that:

> In relation to whether "substantially the same conduct" is being investigated by Libya, the Appeals Chamber has already stated above that the conduct that defines the "case" as referred to in article 17 (1) (a) of the Statute, *in situations such as the present, is both that of the suspect (Mr. Gaddafi) and that described in the incidents under investigation which is imputed to the suspect.* It does not seem to be in dispute that the same conduct in relation to Mr. Gaddafi must be under investigation. However, the question arises as to the extent to which it must be

306 Rome Statute, article 58.

307 Ibid., article 61(7).

308 *Ruto* Admissibility Judgment, para. 40.

309 Schabas and Zeidy, "Article 17 Issues of Admissibility," 800.

310 *Ruto* Admissibility Judgment, para. 40.

311 Rome Statute, articles 20(3) and 90(1).

312 *Kenyatta* Admissibility Judgment, para. 47; Rastan, "Situation and Case: Defining the Parameters," 421, 44.

313 *Ruto* Admissibility Appeal Judgment, para. 63; the Appeals Chamber noted that "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."

> shown that the same incidents must be under investigation by both the Prosecutor and the State in question, the conduct alleged in those incidents being an integral part of the case against the suspect.[314] (*emphasis* added)

In this case, it was Gaddafi's use of the Security Forces to commit the crimes, and they were direct perpetrators, in the course of the various incidents, described in the arrest warrant decision. The Appeals Chamber's reference to the imputation of the conduct of the physical perpetrators to the suspect indicates, initially that the Appeals Chamber requires that the domestic authorities investigate and charge, on the basis of the same mode of liability.[315]

Hence, the assessment of admissibility by the Court should be sufficient, for the relevant state, to charge on the basis of different modes of liability, in so far as the investigation captures the core conduct of the suspect, as framed by the ICC Prosecutor.[316] In addition, the Appeals Chamber's wording also indicates that an admissibility determination before the Court is incident-specific, and that the question of the sameness of cases depends on the degree of overlap, between the incidents investigated by the Court, and those carried out at the national level. Since the Appeals Chamber added the term 'substantially' to the test, it becomes clear that the question of investigating all the incidents, subject to the Prosecutor's case, is no longer required.[317]

4.3.2.2 Dynamic Approach on 'Activity'

The question of the activity of the state in question has become an issue of ambiguity in the ICC proceedings. According to article 17 of the Rome Statute, the primary question of the provisions requires the existence of national proceedings: this means a case is being investigated or prosecuted; or, a case has been investigated at the national level. In this regard, if national proceedings exist, then it is necessary to assess the unwillingness or inability requirement.

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314 *Gaddafi* Admissibility Judgment, paras. 62 and 70.

315 Schabas and Zeidy, "Article 17 Issues of Admissibility," 801.

316 ibid.

317 ibid.

With limited provisions regarding the activity, the ICC has experienced difficulties, in assessing the activity of the State in question, into a number of cases before the Court.

In the *Lubanga* case, the Pre-Trial Chamber I decided that the Congolese case against Lubanga at the national level, was not the same as the case before the ICC. The Chamber employed the dynamic approach and observed that the national proceedings had to encompass both the person and the conduct which was the subject of the case before the Court. [318]

The dynamic interpretation in the *Lubanga* case introduced the notion of the same case and set up the same case test, for assessing the activity in case of the national proceedings existed. In considering the activity, the Court same case test had to be satisfied before moving to test the next requirement of unwillingness or inability. Subsequently, the notion of the same case has been adopted, and has been confirmed by the practice of the ICC Chambers in assessing the existing national proceedings of the state in question, in every case before the ICC.

In order to determine the same case test, in the *Kony et al.* case and the *Bemba* case, the ICC mainly focused on the warrant of arrest issued by national authorities, which had to contain the charges brought by the Prosecutor's Application.[319]

Moreover, in the *Al Bashir* case, the Chamber examined the same case and stated that the proceedings at the national level, may be conducted, or may have been conducted, for any of the crimes contained in the Prosecutor's Application before the ICC.[320]

Later, the question of the legal framework of the same case test, has been clearly classified by the Chambers in the *Al-Senussi* case and the *Gaddafi* case. The Chamber in the *Al-Senussi* case stated that, in the domestic investigation covering the same case, it had to be demonstrated that (a) the person subject to the domestic proceedings was the same person against whom the proceeding before the Court were being conducted; and (b) the conduct that was subject to the national investigation was substantially the same conduct, that was alleged in the proceedings before the

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318 *Lubanga* Warrant of Arrest, para. 5.

319 *Kony* Admissibility Decision, paras. 17-18; *Bemba* Warrant of Arrest Decision, para. 21.

320 *Al Bashir* Warrant of Arrest Decision, para. 50.

Court. Regarding this, the criteria of the same case requirement have been outlined explicitly.[321]

Additionally, the Chamber also ascertained that, in order to demonstrate that the case was being investigated, the concrete and progressive investigative steps (including interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses) had to be taken into consideration.[322] Therefore, to determine 'substantially the same conduct', the Chamber in the *Gaddafi* case required the concrete facts and circumstances of the case, based on a case-by-case analysis.[323]

Apart from the same case test, in order to assess the activity of the state, the ICC introduced the notion of a potential case into the proceedings. The concept of a potential case was developed by the interpretation of the term 'case', in article 53(1)(b), that required the Prosecutor to consider that the concrete case was or would be admissible, under article 17. This notion was first presented in the *Situation in Kenya*. The Trial Chamber II considered that, at the preliminary examination stage, it was not possible to have a concrete case, involving an identified suspect, for the purpose of prosecution. Hence, in the context of a situation, the case refered to admissibility of one or more potential cases. [324]

Furthermore, the criteria of a potential case had been divided by the jurisprudence of the Court such as (1) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping future cases; and (2) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping future cases.[325]

At the admissibility stage, the complementarity test was assessed against a concrete case with an actually identified suspect and precise criminal conduct. Hence, the same person and the same conduct could be tested correctly.

To assess the same person test, the person before the national proceedings must be the same person as the one named in the request of the Prosecutor. However,

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321 *Al-Senussi* Admissibility Decision, para. 66

322 Ibid.

323 *Gaddafi* Admissibility Decision, para. 77.

324 *Kenya* Authorization Decision, para. 48.

325 Ibid., paras. 49-50.

the assessment of the same conduct is more complicated. The *Al-Senussi* case introduced the concept of 'substantially the same conduct", without scope of the application and a lack of criteria regarding the interpretation.

Subsequently, in the *Gaddafi* case, the Appeals Chamber interpreted and classified the scope of 'substantially' the same conduct, that the conduct described in the incidents under investigation which is imputed to the suspect.[326] In order to assess this more easily, national authorities are required to investigate and charge, on the basis of the same mode of liability. However, it should be sufficient, if the state charges on the basis of different modes of liability, at the national level, as long as the investigation reveals the core conduct of the suspect, as framed by the ICC Prosecutor.[327]

The dynamic interpretation of substantially the same conduct, in the *Gaddafi* case, makes clear that, in investigating all the incidents, subject to the case before the ICC, by the national authorities, it is no longer necessary to test the same conduct under the complementarity regime.

4.3.3 The Inquiry of Unwillingness

The unwilling or unable requirement comes into play, if it has been proven that the same case is, at least, being investigated by the relevant state, with jurisdiction over that case (proceeding requirement). Then, these criteria become relevant, in order to consider the quality or seriousness of the purported investigation.[328]

The question of unwillingness or inability will be taken into consideration, when the domestic proceedings in the case exist, and it is necessary to determine whether the state concerned is willing and able, genuinely to carry out those proceedings. Therefore, the assessment of complementarity, under the unwilling or unable paradigm, will be processed. Logically, if there is no State investigating or prosecuting the same case as of the ICC, then none of the criteria of inadmissibility applies. Therefore, the cases are admissible, without requiring, as a matter of law, a

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326 *Gaddafi* Admissibility Judgment, paras. 62 and 70.

327 Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, 73.

328 Schabas and Zeidy, "Article 17 Issues of Admissibility," 803.

determination of unwillingness or inability.[329] Regarding this, because there were no domestic proceedings, at least not in the same 'case', as defined by the Chambers, then, most Chambers of the ICC have not discussed unwillingness or inability, when assessing admissibility.

The practice of the ICC, in the application of the principle of complementarity, between 2002-2018, faced the problem, with regard to the unwilling or unable requirement, in a number of cases. This subchapter scrutinizes the application of substantive complementarity by the ICC, in order to determine the unwillingness or inability to act, by the states concerned.

4.3.3.1 Unwilingness in Practice

4.3.3.1.1 The Analysis of the Lack of Legal Representation

The unwilling or unable requirement, and the principle of complementarity of the ICC, contain some linkages. With regard to the condition of unwillingness or inability under the complementarity regime, it is classified in articles 17(2) and 17(3) of the Rome Statute, respectively.

As discussed previously, the provision of article 17(2) identifies the criterion of unwillingness, by referring to '*the principle of due process recognized by international law',* and follows this, by discussing widely known concepts in international human rights law: shielding; unjustified delay; independence and impartiality. Furthermore, article 21(3) of the Rome Statute sets out, that the application and interpretation of the law of the Court, must be consistent with internationally recognized human rights standards. However, because of the lack of the definition of 'internationally recognized human rights,' the application and interpretation of the ICC shall comply with the major international human rights treaties. This means that civil and political rights are recognized by the ICCPR, as fundamental rights of the accused in criminal justice, including the right to access legal representation.[330] Importantly, the standard rules of treaty interpretation, under

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329 Nouwen, "Fine-Tuning Complementarity," 209.

330 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976 (ICCPR), article 14(3)(d). It provides that:
In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: […] (d) To be tried in his presence, and to defend

the VCLT, require that complementarity should be applied consistently, with any relevant rules of other international obligations.[331] Hence, when the Court assesses whether a case is admissible, it should consider whether the State is complying with its international human rights obligations, as recognized as customary international law, including the right to a fair trial.[332]

The question of the violation of human rights (due process guarantees) at the domestic level, and its relation to the admissibility of the proceedings before the ICC, was widely foreseen in the practice of the ICC, particularly in the *Gaddafi* case, and the *Al-Senussi* case. Here, the question of the lack of a legal representative, or the right to access to legal counsel at the national level, has been highlighted. In both cases, the Court assessed whether the concerned State was "unwilling or unable to carry out the investigation or prosecution", pursuant to article 17(1)(a). To consider the ability of a state to genuinely carry out the proceedings, the Pre-Trial Chamber I assessed the relevant national system and procedure.[333] In this respect, the ability to investigate or prosecute the accused, under the substantive and procedural law applicable in Libya. must be ascertained before the Court.

Unwillingness criteria, under article 17(2) of the Rome Statute, identify those situations in which the State intends to shield an individual from criminal responsibility. A State's failure to respect the fair trial standards, recognized under international law, does not result in unwillingness. However, where such a failure

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himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

See also, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), article 6(3)(c); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), article 8(2)(d); African Charter of Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986), article 17(1)(c); Arab Charter of Human Rights (adopted 15 September 1994, entered into force 15 March 2008) article 16(3); ASEAN Human Rights Declaration (AHRD) (adopted 18 November 2012), principle 20.

331 VCLT, article 31(3)(c).; see Kendall, "The Right to Access Legal Representative and Admissibility to the International Criminal Court: Walking the Tightrope between Legitimacy and Effectiveness," 311.

332 For more detail see Robinson, "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY," 5-7.

333 *Gaddafi* Admissibility Decision, para. 200.

translates into violations so grave, that a trial cannot be considered a trial at all, then unwillingness can be declared. This will occur, for instance, when a State is "all too willing"[334] to prosecute some individuals, so that the trial against them is a mere farce, quite inappropriate to reach a foregone conclusion.[335]

The ICC had the first opportunity to let the doctrinal approaches be tested in practice came in the *Al-Senussi* case. On 27 June 2011, the Pre-Trail Chamber I issued a warrant of arrest for Al-Senussi for the commission, as an indirect perpetrator, of murder and persecution, as crimes against humanity, in Benghazi during 15-20 February 2011.[336] Later, in April 2013, Libya filed an admissibility challenge, under article 19 of the Rome Statute, claiming that its judicial system was actively investigating Al-Senussi, and his case was therefore inadmissible before the ICC.

The Pre-Trial Chamber I, in this case, had to deal with the arguments of the defence, alleging that the domestic proceedings against the defendant were being conducted in violation of his fundamental rights. The defence pointed to unjustified delays, lack of legal representation, and lack of independence and impartiality, and the case should, therefore, have been held before the ICC.

In the *Al*-Senussi case, the Defence argued that Al-Senussi could not benefit from legal representation in the national proceedings of Libya. In this regard, this circumstance warranted both a finding of inability and unwillingness. On the ground of unwillingness, that the lack of legal representation supported a finding, that Libya was not willing to provide such protections to the accused.[337]

Libya confirmed that Al-Senussi did not have legal representation in the national proceedings, and admitted that the sensitivity of the case and the security situation was such that there had been some delay in achieving this. Libya further submitted that the Ministry of Justice was cognizant of the need to ensure that Al-Senussi appointed a local lawyer, by virtue of a formal power of attorney, and would

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334 Frédéric Magret and Marika Gilles Samson, "Holding the Line on Complementarity in Libya: The Case for Tolerating Flowed Domestic Trials," *Journal of International Criminal Justice* 11 (2013): 572.

335 Tedeschini, "Complementarity in Practice: The ICC's Inconsistent Approach in the *Gaddafi* and *Al-Senussi* Admissibility Decisions," 94.

336 *Prosecutor* v**.** *Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on Warrant of Arrest for Abdullah Al-Senussi, Pre-Trial Chamber I, 21 June 2011, ICC-01/11-01/11-4.

337 *Al-Sanussi* Admissibility Decision, para. 230.

be taking further steps to facilitate the appointment of such a lawyer, in the near future. In addition, Libya indicated that it was expected that the execution of a formal power of attorney would be carried out, by the order of the Accusation Chamber, in the very near future.[338]

Later, the Court confirmed the position presented by the Prosecutor, and Libya and emphasised that alleged violations of the accused's procedural rights were not, *per se,* grounds for a finding of unwillingness or inability. According to the decision of the Pre-Trial Chamber I on decision regarding the admissibility of the case against Al-Senussi, it was stated that:

> [t]he Chamber emphasises that alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute. In particular, as far as the State's alleged unwillingness is concerned, the Chamber is of the view that, depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute unwillingness only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice.[339]

According to this decision, the violation of procedural rights would be relevant, only when it is inconsistent with the intention to bring the defendant to justice. In conclusion, the Pre-Trial Chamber I ruled that the case against Mr. Al-Senussi was inadmissible before the Court, pursuant to Article 17(1)(a) of the Statute.

Al-Senussi subsequently filed an appeal, based upon three grounds, the first one of which concerned the lack of contact between Al-Senussi and his legal counsel. Regarding this, it would be a clear breach of his human rights, and against all standards of due process under Libyan law and international law.[340] Subsequently, the Appeals Chamber, rejected this argument, with reference to examples in the

338 Ibid., para. 232.
339 Ibid., para. 235.
340 *Al-Senussi* Admissibility Judgment), para. 140.

admissibility proceedings before the ICC and stressed that internationally recognized human rights did not necessarily extend to all rights, provided in article 67 of the Rome Statute, (i.e. rights of the accused during the trial stage), to persons who had not yet been surrendered to the Court.[341]

The Appeals Chamber pointed out that the Court was not primarily called upon to decide, whether in domestic proceedings, certain requirements of human rights law or domestic law were being violated, in the judgment of the Appeals Chamber on the appeal of Al-Senussi, against the admissibility decision of the Pre-Trial Chamber I. It clearly stated that:

> [t]he Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. Rather, what is at issue is whether the State is willing genuinely to investigate or prosecute. In the context of article 17 (2) (c) of the Statute, the question is whether the failure to provide a lawyer constitutes a violation of Mr Al-Senussi's rights which is "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed [...] to be 'inconsistent with an intent to bring [Mr. Al-Senussi] to justice."[342]

It is debateable whether, failing to provide the accused with any form of legal representation, can be considered a violation "egregious" enough to impinge upon the genuineness of a trial, thereby preventing the Court from declaring a case inadmissible.[343] It was submitted that such a flaw should definitely represent too much of an impediment, for a proper prosecution intended to deliver "justice"[344] to be undertaken.

In addition, the Appeals Chamber considered whether the lack of counsel in domestic proceedings should have led to a finding of unwillingness, under article 17(2)(c) of the Rome Statute. The Chamber considered that:

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341 Ibid., para. 147.
342 Ibid., para. 190.
343 Tedeschini, "Complementarity in Practice: The ICC's Inconsistent Approach in the *Gaddafi* and *Al-Senussi* Admissibility Decisions," 95.
344 ibid.

> [d]enying a suspect access to a lawyer may, depending on the specific circumstances, be relevant to a finding that domestic proceedings "are not being conducted independently or impartially, and they [...] are being conducted in a manner which [...] is inconsistent with an intent to bring the person concerned to justice" (article 17 (2) (c) of the Statute) and result in a finding of unwillingness. The Appeals Chamber notes the Defence's submissions in this regard, and, in particular, the references to human rights jurisprudence suggesting that the right to a fair trial will often include the right to access to a lawyer also in the early stages of the proceedings. Nevertheless, the Appeals Chamber recalls that, in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. [345]

Regarding this, the ICC Statute is targeted at preventing impunity, and it is clearly in this spirit that the 'intent to bring the person concerned to justice', in article 17(2)(c), is meant. Hence, the use of the word 'justice' here encompasses the broad idea that the goal is indeed to make the person criminally accountable, not to actually defeat the goals of the criminal process, by an entirely illusory process.[346] The assessment by the ICC is not an exercise in evaluating domestic human right norms, and procedures, in and of themselves, but instead, it is a question of determining whether something that can recognizably be described as a trial has occurred.[347] Therefore, the absence of access to any legal representation, in the list of elements, potentially indicates that a trial is too flawed and can be considered a farce and totally invalid.[348]

In addition, the Appeals Chamber also stated that:

> [t]he fact that admissibility is not an enquiry into the fairness of the national proceedings *per se* does not mean "that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness".
>
> At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear

345 *Al-Senussi* Admissibility Judgment, para. 190.

346 Magret and Samson, "Holding the Line on Complementarity in Libya: The Case for Tolerating Flowed Domestic Trials," 586.

347 ibid.

348 Tedeschini, "Complementarity in Practice: The ICC's Inconsistent Approach in the *Gaddafi* and *Al-Senussi* Admissibility Decisions," 95.

> that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all.[349]

Hence, the Chamber proceeded to specify that these kinds of violations, indicating inconsistency with the intent to bring a person to justice, would be relevant for the purpose of assessing unwillingness.[350]

Finally, the Appeals Chamber stressed that such violations, (e.g. lack of legal representation during the admissibility proceedings), would not reach the high threshold, for finding that Libya is genuinely unwilling to investigate or prosecute Al-Senussi.[351]

The judgment of the Appeals Chamber in the *Al-Senussi* case overturned the Pre-Trial Chamber's decision on this ground, ruling the case admissible, because of Libya's unwillingness to prosecute. This was further supported by the fact that "far from trying and failing to provide Al-Senussi with an attorney, [Libya] has done everything in its power to prevent him from obtaining one".[352]

In the light of the above facts, the Appeals Chamber further observes that:

> [i]t was both relevant and appropriate for the Pre-Trial Chamber I to have considered the investigative steps that had been undertaken by Libya, as well as the progression of the domestic proceedings, as part of its assessment as to whether Libya was willing genuinely to investigate and prosecute Mr. Al-Senussi. Furthermore, the Pre-Trial Chamber appropriately emphasised that "only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber" could form a ground for a finding of unwillingness or inability," and it correctly found that "alleged violations of the accused's procedural rights are not per se grounds for a finding of unwillingness or inability under article 17 of the Statute."[353]

As well as the *Al-Senussi* case, the ICC had to deal with the argument on the issue of the lack of legal representation, and the unwillingness of the national judicial system, in the case against *Gaddafi*.

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349 *Al-Senussi* Admissibility Judgment, paras. 229-230
350 Ibid., para. 230(3).
351 Ibid., para. 191.
352 Heller, "PTC I's Inconsistent Approach to Complementarity and the Right to Counsel".
353 *Al-Senussi* Admissibility Judgment, para. 231.

In the *Gaddafi* case, the Defence pointed out that the national judicial system of Libya was inconsistent in its intent to bring Gaddafi to justice. This included not facilitating his right to legal representation and access to a lawyer, in connection with the domestic investigation.[354]

According to the facts in the Admissibility Hearing, the Libyan Government confirmed that Gaddafi has not exercised his right to appoint counsel. However, in response to a query from the Chamber, as to the concrete steps that had been taken in order to secure independent legal representation for Gaddafi, Libya indicated that the Libyan Ministry of Justice officials had engaged high-level contacts with the Libyan Law Society and the Popular Lawyer's Office. This had been done, in order to find a suitably qualified lawyer and a committed highly qualified counsel, or a team of defence counsels, to represent him during his forthcoming trial. Later, Libya added that it was in the process of approaching the Bar Associations of Tunisia and Egypt, in order to obtain suitably qualified and experienced counsel, who would be permitted, together with a Libyan lawyer, to represent Gaddafi.[355]

Then, on 7 June 2013, Libya filed its appeal against the admissibility decision, requesting the reversal of this decision and determining that the case against Gaddafi was inadmissible. However, the issue of the lack of legal representation was not an adequate reason. The Prosecutor notes that Libya did not make an express request for the determination of this issue, and that, in any event, the Pre-Trial Chamber did state its position, regarding the burden and standard of proof. The Appeals Chamber considered that the Pre-Trial Chamber did not act unreasonably.[356]

One problematic issue that arose during these two remarkable cases, was that the argument that the Pre-Trial Chamber's findings in the *Al*-Senussi case were inconsistent, with those that it had made in the Gaddafi case, which then led to different verdicts in those two cases. Regarding this issue, the Appeals Chamber noted in the *Al-Senussi* case, that:

> [t]he fact that the findings in that decision may differ from those in the Impugned Decision does not *per se* illustrate that the findings in the latter were unreasonable.

354 *Gaddafi* Admissibility Decision, para. 161.
355 Ibid., para. 213.
356 *Gaddafi* Admissibility Judgment, para**.** 203.

> Nevertheless, the Appeals Chamber would note that, in its view, the main distinguishing factor between the two cases is the fact that the central authorities were unable to obtain Mr. Gaddafi. In this respect, it notes that the Pre-Trial Chamber, in the Gaddafi Admissibility Decision, referred to the fact that the Libyan authorities did not have custody over Mr. Gaddafi. In the Appeals Chamber's view, although not stated expressly in that decision, it is implicit that if the central authorities were unable to obtain Mr. Gaddafi for purposes of his trial in that case, guaranteeing that a lawyer would be appointed would be considerably more difficult than in the present case. Thus, while the Appeals Chamber is not called upon in the present appeal to determine the correctness of the findings made in the Gaddafi Admissibility Decision, it finds sufficient differences between that decision and the case at hand. Accordingly, the Defence's arguments in this regard are dismissed.[357]

In the *Al-Senussi* case, Libya continued to face substantial difficulties in exercising its judicial powers fully throughout its entire territory, thus rendering its national system "unavailable" according to the terms of article 17(3) of the Statute. As a consequence, Libya was "unable to obtain the accused" and the necessary testimony, and was also "otherwise unable to carry out [the] proceedings", in the case against Gaddafi, in compliance with its national laws.[358]

Interestingly, in the view of the Appeals Chamber, the lack of access to a lawyer during the investigation stage of the proceedings, violated Al-Senussi's right to a fair trial, and provisions of Libyan law; however, such violations would not reach the high threshold, for finding that Libya was genuinely unwilling to investigate or prosecute Al-Senussi.[359]

According to the practice of the ICC in the *Gaddafi* and *Al-Senussi* cases, the assessment of the fulfilment of the unwillingness or inability requirement, with regard to the lack of legal representation, cannot be based solely on the consideration of the violation of the rights of the accused. All related circumstances of each case must also be taken into consideration, as occurred in these two remarkable cases. This jurisprudence also reflected the dynamic application of the principle of complementarity, by the ICC in practice.

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357 *Al-Senussi* Admissibility Judgment, para. 203.
358 Ibid., para. 205.
359 Ibid., para. 191.

4.3.3.1.2 The Determination of Unwillingness

It is clear that unwillingness is one exception for the intervention into the domestic criminal justice system, under the ICC Complementarity regime, pursuant to article 17(1)(a) and (b).

In practice, the interpretation of the term 'unwillingness', in such provisions, is confirmed by article 17(2) of the Rome Statute. In the *Katanga* case, the decision of the Trial Chamber II, stated that:

> [t]he Statute makes explicit provision for the case of a State which has no intention of bringing a person to justice, because it wants to shield that person from criminal responsibility. This is *unwillingness motivated by the desire to obstruct the course of justice*. There is also the case of a State which may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her.[360] (*emphasis* added)

In addition, the judgment of 29 September 2009 of the Appeals Chamber in the *Katanga and Chui* case, stated that:

> [a]rticle 17 (2) (a) refers to "proceedings [that] were or are being undertaken at the national level". The same holds true with respect to subparagraph (b), which uses the verb "has been" in conjunction with the phrase "unjustified delay in the proceedings" to indicate that the test of unwillingness applies to proceedings that have already started. Finally, sub-paragraph (c) also speaks of "proceedings [that] were not or are not being conducted independently.[361]

Moreover article 17(2) gives three scenarios, guiding the Court's determination with respect to unwillingness; however, the application and interpretation of 'unwillingness' have revealed practical problems. According to article 17(2) of the Statute, the three factors which can ground the finding of unwillingness are, namely, the initiation of criminal proceedings for the purpose of shielding the accused, the conduct of the proceedings, in a manner that results in unjustified delays, and the lack of independent and impartial proceedings.[362]

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360 Reasons for *Katanga* Admissibility Decision, para. 77.

361 *Katanga* Admissibility Judgment, para. 77.

362 Klamberg, *Commentary on the Law of the International Criminal Court*, 214.

With regard to *unjustified delay*, the ICC had to deal with this issue in a number of cases. In the *Gaddafi* case, the Pre-Trial Chamber I, emphasised that:

> [t]he question relevant to complementarity is not whether the person has been investigated within a reasonably expeditious timeframe, but whether "[t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice".[363]

In addition, in the same decision, the Chamber also underlined the interpretation of the threshold of unjustified delay, by reference to the preparatory works, that:

> "[u]njustified delay" establishes a higher threshold than "undue delay" and suggests that guidance as to the interpretation of what constitutes an unjustified delay may be sought from the jurisprudence of the European Court of Human Rights.[364]

Later, in the decision of 11 October 2013 of the same Chamber on the admissibility of the case against Abdullah Al-Senussi, it was stated that:

> [u]njustified delay in the national proceedings is a factor which can ground, in accordance with article 17(2)(b) of the Statute, a finding on unwillingness, provided that such unjustified delay is, in the circumstances of the case, "inconsistent with the intent to bring the person to justice". This is in line with the rest of article 17(2) of the Statute, which mandates the Chamber to examine factual circumstances with a view to ultimately discerning the State's intent as concerns its ongoing domestic proceedings against the specific individual.[365]

Furthermore, in the same decision, the Chamber considered factual allegations presented by the Defence, which indicated the existence of unjustified delays, in the proceedings against Al-Senussi. This is inconsistent with the intent to bring him to justice, and the Court may consider all relevant information, including "[t]he chronology of the domestic proceedings and the complexity of the domestic case. Indeed, the Chamber is of the view that the determination of whether there has been

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363 *Gaddafi* Admissibility Decision, para**.** 191.

364 Ibid.

365 *Al-Senussi* Admissibility Decision, para 223.

any such unjustified delay, must be made not against an abstract ideal of "justice", but against the specific circumstances regarding the investigation concerned."[366]

In the determination of unwillingness, *the lack of independent and impartial national criminal proceedings,* renders the case admissible before the ICC. In order to assess this requirement, one has to look at the manner in which the proceedings are being conducted and whether, in the circumstances of the case, there exists a lack of independence and impartiality, that is inconsistent with the intent to bring the person concerned to justice.

Article 17(2)(c) provides that the lack of independent and impartial national proceedings renders the case admissible before the ICC. In order to assess this requirement, one has to look at the manner, in which the proceedings are being conducted and whether, in the circumstances of the case, there exists a lack of independence and impartiality that is inconsistent with the intent to bring the defendant to justice. The main difficulty concerning the interpretation of this provision, relates to whether the Court can find a State unwilling, on the ground that national proceedings violate due process. This is because the chapeau of article 17(2) explicitly refers to the "principles of due process, recognized by international law".

This issue arose in the context of the *Al Senussi* admissibility challenge, where the defence argued that the defendant's procedural rights had been violated throughout the domestic investigation. On this specific issue, the Pre-Trial Chamber I indicated that:

> [i]n principle, "violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness", and that, depending on the specific circumstances of each case, "certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings".[367]

The Chamber appears to have rejected the defence argument, that a state could be found "unwilling", on the sole ground that the proceedings violate the principles of

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366 Ibid.

367 *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC Pre-Trial Chamber I,7 December 2012, ICC-01/11-01/11-239, para. 235.

due process. Instead, the Chamber has embraced an interpretation which requires that the alleged due process violations be specifically linked to the two prongs of article 17(2)(c), namely the absence of an intent to bring the defendant to "justice", as well as the lack of independence and impartiality of the proceedings.

In any event, the fact that the chapeau of Article 17(2)(c) specifically refers to the "principles of due process, recognized by international law" suggests that due process considerations constitute an important factor, and should, therefore, guide the analysis of all the criteria of unwillingness. The negotiating history of the Statute shows that the drafters included this reference, in order to introduce an element of objectivity into the assessment of unwillingness, and reduce the subjectivity, inherent in the assessment of the intent of domestic authorities.[368]

4.3.3.2 Dynamism of 'Unwillingness'

When the first requirement of the complementarity test (proceedings requirement) has been satisfied, the second requirement of the test requires the assessment of unwillingness or inability. According to the ultimate goals of international criminal justice, it requires the proceedings to taken place before the domestic forums. The ICC as a court of last resort, will step in to intervene only if the national proceedings fail. If there was by unwillingness by the state concerned to carry out the proceedings, the case would be admissible before the ICC. Article 17(2) of the Rome Statute provides criteria to determine unwillingness in a particular case, namely: shielding the person concerned from criminal responsibility; an unjustified delay; and lack of independence or impartiality. According to the Rome Statute, all three criteria of unwillingness must be consistent with the principle of due process, as recognized by international law. Additionally, the application and interpretation of the Rome Statute must be consistent with internationally recognized human rights.

In practice, the ICC employed a dynamic approach in interpreting unwillingness of the State concerned (Libya), in the *Al-Senussi* case and the *Gaddafi* case. In both cases, the question of the lack of legal representation or the right to access to legal counsel at the national level, were raised during the proceedings.

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368 Holmes, "The Principle of Complementarity," 50.

Additionally, the question of when a state is "all too willing" to prosecute the person concerned, was also raised.

In the *Al-Senussi* case, the Appeal Chamber determied that denying the right to access to legal representation of the accused in this case, was inconsistent with an intent to bring the person concerned to justice. The Court recalled that in the context of admissibility proceedings, the Court was not a primary called upon to decide, whether in domestic proceedings, certain requirements of human rights law, or domestic law are being violated.[369] The Chamber emphasised that the due process rights violation in this case would not reach the high threshold for finding that Libya is genuinely unwilling to investigate or prosecute Al-Senussi and concluded that case was inadmissible before the ICC.

Similarly, in the *Gaddafi* case, the question of the lack of legal representation, *versus* the unwillingness of Libyan judicial system, was raised. In this case, the argument of the Defence followed the steps taken in the *Al-Senussi* case, that the violation of the right to access to a lawyer at national level, would be inconsistent with an intent to bring Gaddafi to justice. Finally, the Appeals Chamber rendered the case was admissible before the ICC.

The inconsistent results in the *Al-Senussi* and *Gaddafi* admissibility decisions case were questioned. In both cases, the ICC employed a dynamic approach in order to determine the unwillingness of the State concerned. The Appeal Chamber in the *Al-Senussi* case explained that the main difference between two cases was the factual factors. Al-Senussi was already in custody of the Libyan authorities, whereas the national authorities were unable to obtain custody of Gaddafi to bring him to trial. Therefore, the guarantee of an appointed lawyer for Gaddafi would be more difficult to enforce than in the Al-Senussi case. [370]

In this regard, therefore, the ICC emphasised that in both cases, the admissibility decision derived from different factual considerations. However, future cases on complementarity will raise new issues that will require the jurisprudence of the Court to develop. Thus, adopting consistent approaches can provide a meaningful clarification of the complementarity regime.

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369 *Al-Senussi* Admissibility Judgment, para. 190.

370 Ibid., para. 203.

Interestingly, the legitimacy of the ICC arises from its complementarity to domestic jurisdiction.[371] Hence, the inconsistency between the *Gaddafi* case and the *Al-Senussi* case not only represents the conflicting constructions given to provide the suspect with legal counsel, but also the dynamic application of the principle of complementarity, which would challenge the legitimacy of the Court in order to complement national criminal jurisdictions.

4.3.4 Inability of National Justice System

4.3.4.1 Inability in Practice

Article 17(3) of the Rome Statute identifies the criteria for inability to investigate or prosecute the perpetrator of international crimes, within the jurisdiction of the ICC. In practice, the precedent exists within the ICC jurisprudence in the *Gaddafi and Al-Senussi* case, where a state was found to be lacking the requisite ability to genuinely carry out an investigation.

According to the *Gaddafi* admissibility challenge, the Pre-Trial Chamber concluded that Libya was unable to investigate or prosecute the case. This finding was made, after the Chamber had considered the substantial difficulties faced by the national authorities, in exercising judicial powers "across the entire territory." The Pre-Trial Chamber I stated that:

> [d]ue to these difficulties, which are further explained below, the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus "unavailable" within the terms of article 17(3) of the Statute. As a consequence, Libya is "unable to obtain the accused" and the necessary testimony and is also "otherwise unable to carry out [the] proceedings" in the case against Mr. Gaddafi in compliance with its national laws, in accordance with the same provision.[372]

In this case, the Chamber classified the term "unavailability" of the national judicial system, which is a criterion of inability under article 17(3). The unavailability, in this

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371 Vesselin Popovski, "Legality and Legitimacy of International Criminal Tribunals," in *Legality and Legitimacy in Global Affairs*, ed. Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (New York: Oxford University Press, 2012), 405.

372 *Gaddafi* Admissibility Decision, para. 205.

case, consists of (i) the inability to obtain the accused; (ii) inability to obtain testimony; and (iii) being otherwise unable to carry out its proceedings.

Regarding *the inability to obtain the accused*, the Chamber noted that Libya had not yet been able to secure the transfer of Gaddafi, from his place of detention under the custody of the Zintan militia, to state authority. In response to a specific request for clarification from the Chamber, the Libyan representatives indicated that the transferring to a detention facility in Tripoli, was still ongoing. It estimated that the transfer would take place before the earliest possible estimated commencement date of the trial in May 2013, and that the national security proceedings in Zintan would also be transferred to the Tripoli court at this point, if they proceeded to trial.[373]

Accordingly, the Chamber had no doubt that the central government is deploying every effort to obtain Gaddafi's transfer but, in spite of Libya's recent assurances, no concrete progress to this effect had been made. However, the Chamber was not persuaded that this problem would be resolved in the near future, and no evidence had been produced in support of that contention. The Chamber noted that:

> [t]he submissions of Libya that *in absentia* trials are not permitted under Libyan law when the accused is present on Libyan territory and his location is known to the authorities. As a result, without the transfer of Mr. Gaddafi into the control of the central authorities, the trial cannot take place. [374]

With regard to *inability to obtain testimony*, the Chamber was also concerned about the lack of capacity to obtain the necessary testimony, due to the inability of judicial and governmental authorities to assert control, and provide adequate witness protection. The Chamber noted, in this regard, that it had been reported that conflict-related detainees, including senior former regime members, had not been protected from torture and mistreatment in detention facilities. The Chamber stated that:

> [s]trong concerns have been raised at the highest levels of the Libyan Government by United Nations Support Mission in Libya about instances of torture and death from torture in detention centres that had been brought to its attention. The

373 Ibid., para. 206.
374 Ibid., para. 207.

> Government has been urged to commence State inspections and assume full control over detention facilities as soon as possible.[375]

According to the Chamber's view, the lack of full control over certain detention facilities had a direct bearing on the investigation against Gaddafi. In this regard, Libya envisaged taking the statements of two witnesses in Gaddafi's case. In response to a subsequent request for clarification by the Chamber, the Libyan government stated that it had not been possible for the Libyan prosecuting authorities to conduct interviews with these two individuals. This was because they were currently being held in detention facilities, which were not yet under the control of the Libyan government. The Chamber noted that:

> [t]he various submissions received during the admissibility proceedings in regard to witness protection programmes under Libyan law. Libya has indicated that the measures for witness protection applicable at pre-trial can be continued at trial as it is within the discretionary powers of the trial judge to receive evidence in whatever form he or she deems appropriate. However, further to its submission that trial judges have discretionary powers to order protective measures, Libya has presented no evidence about specific protection programmes that may exist under domestic law. It is unclear, for instance, whether the domestic law provides for the immunity of statements made by witnesses at trial. In addition, it is unclear whether witnesses for the suspect may effectively benefit from such programmes. As such, the Libyan Government has failed to substantiate its assertions that it envisages the implementation of protective measures for witnesses who agree to testify in the case against Mr. Gaddafi. Therefore, and in light of the circumstances, the Chamber is not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures.[376]

Concerning *otherwise unable to carry out its proceedings*, this case underlined the need for the appointment of a defence counsel. As discussed previously, the Libyan Government submitted that the suspect had not exercised his right to appoint counsel, as set out in article 106 of the Libyan Code of Criminal Procedure. The Chamber noted that this position was confirmed by the Libyan Government that the attempts to secure legal representation for Gaddafi have appropriately failed. That Chamber noted in this issue, that:

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375 Ibid., para. 209.
376 Ibid., para. 214.

> The Chamber notes that Libya has recently submitted that the interrogation of Mr. Gaddafi without the presence of his counsel is not a breach of Libyan law, as the presence of counsel during interrogations pursuant to article 106 of the Libyan Code of Criminal Procedure is only required where counsel has been appointed. However, the Chamber is concerned that this important difficulty appears to be an impediment to the progress of proceedings against Mr. Gaddafi. If this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system, including those enshrined in articles 31 and 33 of its 2011 Constitutional Declaration.[377]

In conclusion, although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system, for the purpose of the case against Gaddafi. In the view of the Chamber, Libya is unable to secure the transfer of Gaddafi from his place of detention, under the Zintan militia, to state authority, and there is no concrete evidence that this problem may be resolved in the near future. Moreover, the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally, the Chamber has noted a practical impediment to the progress of domestic proceedings against Gaddafi, as Libya has not shown whether and how it will overcome the existing difficulties, in securing a lawyer for the suspect.[378] In this regard, the unavailability of the Libyan judicial system can be assumed, as can the inability of Libya to carry out the investigation and the prosecution of Gaddafi.

Before the Appeals Chamber, the issue of unavailability was submitted, as one of the four grounds of appeal in this case. Libya alleged that the Pre-Trial Chamber erred, in fact and in law, in finding that, due to the unavailability of its national judicial system, Libya was unable to obtain custody of the accused or the necessary evidence and testimony. Therefore, it was otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute.[379] The Appeals Chamber has concluded that the Pre-Trial Chamber, and did not err in finding, that Libya had not satisfied the Pre-Trial Chamber that it is investigating the same case. Accordingly, the

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377 Ibid.
378 Ibid., para. 215.
379 Ibid., para. 212.

Appeals Chamber will not proceed to consider the arguments, raised on this basis, regarding the appeal.[380]

The issue of inability was also raised in the *Al-Senussi* case, where the Pre-Trial Chamber I also determined that the national authorities lacked the capacity to obtain the necessary testimony. Instead they relied mainly on the absence of evidence, showing the existence of witness protection programs, or other measures for witness protection[381]

Finally, the Chamber considered whether the words "otherwise unable to carry out proceedings" might be interpreted, so as to include the inability of a state to secure legal representation for the defendant. Though the lack of legal representation was not explicitly provided for as a form of inability, it nevertheless constituted an impediment to the conduct of genuine proceedings. In this respect, the Chamber held the view that the ability requirement must be assessed, in accordance with the substantive and procedural domestic laws.[382] The Libyan Government could not confirm that a lawyer had been appointed to represent the accused, at any stage of the domestic proceedings. The Chamber considered that such a failure contravened the Libyan Code of Criminal Procedure, which specified that no trial could take place without proper legal representation.[383] Here, the inability, therefore, arose from the legal obstacles, posed by national law.

4.3.4.2 Inability's Dynamism

The ICC does not have much experience in applying the factor of inability, pursuant to article 17(3) of the Rome Statute, in the *Gaddafi* case. Three factors of inability were classified due to the facts of the case during the proceedings, and it was decided that the absence of concrete progress to obtain custody of the accused and the lack of sufficient evidence, were not enough to guarantee the ability to obtain custody of the accused in the near future.[384]

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380 Ibid., para. 214.
381 Ibid., para. 205.
382 Ibid., para. 200.
383 Ibid., para. 214.
384 Ibid., para. 207.

The Court, in the *Gaddafi* case, was concerned that the lack of capacity to obtain the necessary testimony, due to the inability of judicial and governmental authorities, to ascertain control and provide adequate witness protection, and it stated that the lack of full control over certain detention facilities had a direct bearing on the investigation against Gaddafi.

Unable to carry out its proceedings, this Court pointed out at the right to appoint counsel, as set out in the Libyan Code of Criminal Procedure. The Chamber noted that this position was confirmed by the Libyan government, after the attempts to secure legal representation for Gaddafi had apparently failed.

In this regard, the Chamber noted that Libya had not shown whether and how it would overcome the existing difficulties in securing a lawyer for the Gaddafi. Therefore, it could be assumed that the Libyan judicial system was unavailable to carry out the investigation and prosecution of Gaddafi.

Similarly, in the *Al-Senussi* case, the Chamber classified the "otherwise unable to carry out proceedings" that the inability, therefore, arose from the legal obstacles posed by national law.

In this regard, one must conclude that the ICC interpreted dynamically of criteria of inability, by taking the facts in each particular case into consideration.

4.4 CHAPTER CONCLUSIONS

The jurisprudence of the ICC, at the admissibility stage of ICC proceedings, draws a clear picture, for the application of the principle of complementarity. The practice devised several approaches, in order to apply the complementarity test for concrete cases. Pursuant to article 17(1) of the Rome Statute, it seems to be that unwillingness or inability are central requirements for the admissibility test. Then the one-step test focuses on unwillingness and inability as essential requirements. However, according to the jurisprudence of the ICC, the language of article 17 is not a one-step test regarding unwillingness or inability. However, it contains a two-step test (two-prong test), which is the matter, regarding the action or inaction of the States that must be satisfied initially. The ICC applied the principle of complementarity and specified that the complementarity test consisted of proceedings and unwillingness or inability

requirements. Only when the proceedings requirement was fulfilled, would the unwillingness or inability of the States would be taken into consideration.

In the practice of the ICC, the Court employs a dynamic application of the principle of complementarity, by introducing a primary consideration of whether there was inaction on the part of the state in question. This was done without having to decide whether that state was unwilling or unable to exercise jurisdiction, under the principle of complementarity, pursuant to the Rome Statute. Regarding this, in the absence of any acting state, the Court needed not to make any analysis of unwillingness or inability. As a result, the case in question would be admissible before the ICC.

Not only being introduced by the jurisprudence of the ICC, the question of inactivity was also taken into consideration by the several ICC Chambers. The inactivity was interpreted as a second form of unwillingness, aimed at bringing the accused to justice before an international criminal institution. According to the principle of complementarity, it was designed to protect the sovereign right of states to exercise their jurisdiction; however, as a right holder, the state was permitted to waive this right and decide not to investigate, or prosecute, a particular case and refer a particular situation on its territory to the ICC.

With regard to the complementarity determination at the admissibility stage, the Court applied the complementarity test, and analysed the criteria of the test, examining the facts of each case before the Court. In eight cases, it found that 4 cases entailed the problem of the absence of national proceedings (*Kony et al, Katanga, Bemba,* and *Kenyatta et al).* as already noted in the complementarity determination at the preliminary examination stage, as discussed in Chapter III of this dissertation. State inaction still remains the main obstacle to the application of the principle of complementarity.

However, at this stage, the analysis shows that even though there were national proceedings, those cases faced the problem of meeting the requirements under the same-case test. All 4 cases have been tested by the same-case criteria (same person and same conduct). The study found that 3 out of 4 cases (*Ruto et al, Gaddafi* and *Simone*) could not fulfil the same conduct criteria. Only the one case of *Al-*

Senussi did this, since the requirements under the complementarity test have been fulfilled and the case was inadmissible before the Court.

In spite of the fact that, most of the cases were unable to meet the requirements of the complementarity test, the Court has employed the dynamic application of the principle of complementarity in its proceedings.

With regard to the proceedings requirement, article 17(1), as a whole requires the Court to initially check the existence or absence of proceedings requirements, before making its determination on the inadmissibility of the given cases. If there is the absence of action by the state in question, there is no need to examine a State's unwillingness or inability, under article 17(2) and (3). In addition, not all inaction by the states will lead to proceedings before the ICC, because the Court retains the discretion to initiate cases, in accordance with the conditions and exceptions as stipulated in the Rome Statute. Thus, any inaction will, not prevent the Court from asserting jurisdiction in the case before it.

According to the action of states which have jurisdiction over the cases, the jurisprudence of the ICC, regarding the application of the principle of complementarity, shows that the 'case' has become the primary question of the proceedings requirement. The Court has to answer the question of the 'sameness' of the cases before the ICC, and the national proceedings. In order to do this, the Court has to carry out a case-by-case analysis, by taking all related evidence into consideration. In addition, the idea of 'potential case' and the concept of 'substantially' has been devised by the jurisprudence of the Court, for consideration of 'the same case' in practice.

In the assessment on unwillingness or inability requirement, the ICC undertook to assess a number of questions, in particular, the determination as to whether the lack of legal representation, would violate the accused's procedural rights at the national level. This can satisfy the unwillingness or inability of the state in question, and can render the case admissible before the ICC. In this regard, the ICC created the criteria for its consideration, such as the unavailability of a national system, under article 17(3) of the Statute, or the inability to obtain custody of the accused. This enabled it to assess the possibility of carrying out the proceedings at the national level.

However, the practice of the ICC during 2002 – 2018 does not cover every practical aspect of the principle of complementarity. Some practical gaps and some challenges to the application of the principle of complementarity still remain. These challenges will be discussed in detail, in the next chapter (Chapter V).

CHAPTER V CHALLENGES TO THE APPLICATION OF THE ICC'S PRINCIPLE OF COMPLEMENTARITY

5.1 INTRODUCTION

As discussed earlier, it is generally accepted that the principle of complementarity lies at the heart of the entire ICC mechanism. The principle itself balances the two autonomous system: the ICC and domestic courts. The examination in Chapter III and Chapter IV found that the application of the principle of complementarity, at both the preliminary examination stage and the admissibility stage, the Court adopted a dynamic approach in order to determine the complementarity test pursuant to article 17 of the Rome Statute

This chapter aims to examine the challenges to the application of the principle of complementarity, in actual practice, influencing the effectiveness of the application of the principle of complementarity, which may also affect the credibility and legitimacy of the entire ICC system.

This chapter consists of five subchapters. Apart from this introduction (section 5.1), the second subchapter focuses on the discussions of the consistent and inconsistent application of the principle of complementarity by the Court, which is one of the most challenging aspects of complementarity in practice (section 5.2). This subchapter examines the most controversial issue, regarding the consistency and inconsistency of the practices of the Court, in order to determine the complementarity test (sections 5.2.1-5.2.2)

The third subchapter examines the challenging issue, regarding the application of the complementarity test, in order to determine the existence of national proceedings (section 5.3). This subchapter deals with the new forms of national proceedings, namely: the alternative justice mechanism, and the proceedings carried out by non-State actors; and the zealousness of the national proceedings, in particular, the prosecution of the crime of aggression (sections 5.3.1-5.3.2).

The fourth subchapter analyses the issues of cooperative challenges (section 5.4). This consists of the challenging aspect of the co-operation with the Court of the

state concerned, and the inter-states cooperation, to ensure the effective application of the principle of complementarity (sections 5.4.1– 5.4.3).

This chapter ends with chapter conclusions (section 5.5).

5.2 THE CONSISTENCY *VERSUS* INCONSISTENCY OF THE APPLICATION

As discussed earlier, the goal of the establishment of the ICC is to ensure the ultimate purpose of international criminal justice, in order to put an end to impunity for the most serious crimes that are of concern to the international community as a whole. While, essentially being an adjudicative institution, the ICC has to play its role to promote and establish the rule of law, though its functioning. In this regard, the operation of the Court, including the application of the principle of complementarity should show respect for the principle of the rule of law. According to this, the application of the principle of complementarity throughout the jurisprudence of the Court should be fair, consistent and predictable.

In previous two chapters (Chapter III and Chapter IV), the application of the principle of complementarity, at both the preliminary examination stage and the admissibility stage, had been scrutinized in situations and cases during 2002 -2018 before the ICC. The results of the analysis show that the Court adopted a dynamic approach to conduct the determination of complementarity. The criteria of complementarity had been assessed, and the jurisprudence of the Court introduced a number of concepts, concerning the application of the principle, such as inactivity, the same-case test or a potential case. These particular concepts have been applied and developed, throughout the jurisprudence of the Court until the present.

However, until the present, the ICC has employed not only a consistent approach for assessing the complementarity test, but also, in some cases, on inconsistent approach has been adopted. This subchapter will examine the consistency and inconsistency of the application of the principle of complementarity by the ICC, which weakens the effectiveness of the application of the principle in practice.

5.2.1 The Consistent Application of the Principle of Complementarity

As discussed in Chapter II, the ultimate purpose of the principle of complementarity is to strike a balance between national sovereignty, and the interests of the international

community, in combating impunity for international crimes. The ICC will act as a court of last resort. A case will be admissible before the ICC, only when the domestic courts have failed to investigate and prosecute a case, or demonstrated unwillingness or inability to do so, in a genuine manner, according to the principle of complementarity.

According to the practice of the ICC during 2002-2018, the Court has adopted a dynamic approach, in order to apply the principle of complementarity. A number of ideas have been introduced and developed by the jurisprudence of the Court, for the purpose of enhancing the effectiveness of the application of the principle of complementarity. As discussed earlier, according to the UN General Assembly resolution, the ICC's operation must strengthen and promote the rule of law. In this regard, the work of the ICC should be fair, stable, and predictable. As a result, the operation of the entire ICC system, in particular, the application of the principle of complementarity should promote a consistent approach in its functioning. As discussed previously, the operation of the Court should be fair, stable and, especially, predictable. This means that the functioning of the Court should be consistent. Inconsistency of the application may challenge not only the effectiveness of the application of the principle of complementarity, but also the credibility and legitimacy of the entire ICC system.

According to the practice of the ICC, the dynamic application has been adopted by the Court consistently in order to determine the complementarity test at both preliminary examination and the admissibility stages of the ICC proceedings, in particular, concerning the concepts of 'inactivity', the same-case test, and the idea of a potential case.

5.2.1.1 The State's Inaction

The Rome Statute provides nothing concerning inactivity. The concept of inactivity was first introduced by the jurisprudence of the ICC in the *Situation in Uganda,* when the Pre-Trial Chamber II issued a warrant of arrest for Joseph Kony, the leader of the LRA, based on the inactivity of Ugandan national proceedings.

In the *Lubanga* case, the concept of inactivity was endorsed in so far that the case would be admissible, only if those states, with jurisdiction, had remained inactive

to the case. The Chamber adopted dynamic application the principle of complementarity, that the absence of any state's action renders the case admissible before the ICC.

The application of the principle of complementarity, concerning the situation of inactivity, has been adopted consistently in the later situations and cases. At the preliminary examination stage, the concept of inactivity appeared as a criterion for complementarity determination. The Pre-Trial Chamber assesses the criteria of complementarity, in order to decide whether to authorise the OTP to proceed with an investigation into a situation.

According to the analysis of complementarity determination at the preliminary examination stage in Chapter III, the criterion of "the absence of national proceedings" (inactivity) was applied to all situations. The result of the analysis shows that there were no national proceedings in the situations in *Kenya, Cote d'Ivoire, Georgia, Burundi,* and *Afghanistan.* As a result, in those situations, there was a situation of inactivity.

At the admissibility stage, the concept of inactivity was also adopted constantly in most of the cases before the ICC, namely, the *Kony et al.* case, the *Katanga and Chui* case, the *Bemba* case, the *Kenyatta et al.* case, the *Gaddafi* case, the *Al-Senussi* case, and the *Abu Garda* case. According to jurisprudence in these cases, the inactivity was applied in order to assess the existence of national proceedings, which dealt with these cases at the national level.

5.2.1.2 The Same-Case Test

The concept of the same-case was identified in the *Lubanga* case, that, in order to assess the existence of national proceedings, such proceedings at the national level must include both the person and the conduct. In this regard, it decided that the same-case test consists of the same person and the same conduct.

The concept of same case has been reaffirmed consistently by the decisions in the *Ruto et al.* case, the *Gaddafi* case, the *Al-Senussi* case and the *Simone* case, that the same case test must constitute elements of the person and his alleged conduct. According to this, the domestic investigation or prosecution must be the same case as at the ICC. This means that the person subject to the domestic proceedings, is the

same person, against whom, the proceedings before the ICC, are being conducted, and the conduct that is subject to the national proceedings is, substantially, the same conduct that is alleged in the proceedings before the ICC.

According to the practice in the *Gaddafi* case, the concept of the same-conduct test was developed through the jurisprudence of the Pre-Trial Chamber, in which the Court had to assess whether the national proceedings focussed on the alleged conduct, and not on its legal characteristics. Therefore, when it covers the same conduct, a domestic investigation or prosecution for ordinary crimes is sufficient.[1] Accordingly, Libya's lack of legislation penalising crimes against humanity did not, *per se,* result in admissibility before the Court. [2] In addition, the national investigation does not need to cover all the events mentioned in the arrest warrant. But it must concern the same general type of alleged conduct, i.e. Gaddafi's control over the state apparatus and Security Forces to deter, even using lethal force, the demonstrations of civilians against the regime.[3]

However, the Pre-Trial Chamber found that, it was impossible to identify the precise scope of the domestic investigation. While progressive steps to bring Gaddafi to justice had been undertaken, Libya failed to prove that it was investigating the same case already before the Court. The same-conduct test can be put forward, to assess whether a domestic investigation existed. In the case of *Al-Senussi,* the Court also considered the same element, as it did in the *Gaddafi* case.

5.2.1.3 A Potential Case

The concept of a potential case was explained as one of the factors, to assess a particular case for the complementarity determination of the Court, under article 53(1)(b) of the Rome Statute. The concept was applied, at the preliminary examination stage, in the *Situation in Kenya*, when the Court decided to authorize the Prosecutor to proceed, with an investigation into the situation. The parameters of a

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1 Tedeschini, "Complementarity in Practice: The ICC's Inconsistent Approach in the *Gaddafi* and *Al-Senussi* Admissibility Decisions," 82.

2 *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the Decision on Pre-Trial Chamber I of 31 May 2013 Entitles 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', ICC Appeal Chamber, 21 May 2014, ICC-01/11-01/11-547-Red (*Gaddafi* Admissibility Judgment), paras. 85-88.

3 Ibid., para. 133.

potential case compose of two main elements: (i) the groups of persons involved who are likely to be the object of an investigation, for the purpose of shaping future cases; and (ii) the crimes within the jurisdiction of the Court, allegedly committed during the incidents, which are likely to be the focus of an investigation for the purpose of shaping future cases.[4]

The same approach has been employed by the Chambers of the ICC at the preliminary examination stage, in order to assess a potential case, in each situation brought before the Court.

At the admissibility stage, the elements of a potential case were applied in the *Ruto et al.* case. However, at this stage, the Court focussed on an actually identified suspect, and particular criminal conduct. Thus, in practice, the dynamic application was employed, to define a concrete case before the Court, consisting of the individual and the alleged conduct. [5]

According to above-mentioned practices of the ICC, it was discovered that the dynamic approach had been adopted by the Court, in order to develop the concept of inactivity, regarding the same-case test, and a potential case. Importantly, according to these practices, the Court applied the principle of complementarity, by reaffirming the prior jurisprudence and applied more classifications or explanations of the concepts, to make the concepts more clearly and more practical.

These consistent practices of ICC, concerning the application of the principle of complementarity, reveals the predictability of the ICC operation, to uphold the rule of law in the international community.

5.2.2 The Inconsistent Application of the Principle of Complementarity

As discussed earlier in section 3.2.3, the operation of the ICC had to ensure the rights of the accused equally and consistently. According to the analysis in Chapter III and IV, the Court employed a dynamic application of the complementarity provisions,

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4 *Situation in the Republic of Kenya*, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC Pre-Trial Chamber II, 31 March 2010, ICC-01/09-19-Corr (*Kenya* Authorization Decision), para. 183.

5 *Prosecutor* v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* "Judgment on the appeal of the Republic of Kenya against the decision of the Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application on Behalf of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute", ICC Appeals Chamber, 30 August 2011, ICC-01/09-01/11-307 (*Ruto* Admissibility Judgment), para. 40.

both at the preliminary examination stage and the admissibility stage. In majority of the cases, the Court has consistently applied the principle of complementarity, to determine the criteria for admissibility. However, it was discovered that, in practice, the activities of the ICC during 2002-2018 reflected an inconsistent application of the principle by the Court. In this regard, the Court adopted inconsistent approaches, to apply the complementarity determination, in particular in three main issues of the principle of complementarity, namely, the same-conduct test, the inability test, and the lack of legal representation, in the cases of *Gaddafi* and *Al-Senussi.*

5.2.2.1 The Lack of Legal Representation

The issue of the lack of legal representation, or the right to legal representation, is one very problematic aspect of the Pre-Trial Chamber's admissibility decisions between the *Gaddafi* case and the *Al-Senussi* case. According to these the cases, they are about the right to legal representation of the accused at the national level. The right to counsel, in the decision in the *Al-Senussi* case, is completely inconsistent with the decision in the *Gaddafi* case.

In the *Gaddafi* case, the Pre-Trial Chamber considered the fact that the accused was still without a legal representation. Libya had described the efforts of Ministry of Justice officials, to find a suitably qualified attorney. The Chamber noted Libya's submission that the interrogation of Gaddafi, without the presence of his counsel, was not a breach of Libyan law, as the presence of counsel during interrogations, pursuant to the Libyan Code of Criminal Procedure (LCCP), is only required where counsel has been appointed. The Chamber considered the failure to nominate an attorney, was an impediment to the progress of the proceedings. Its conclusion leaves no doubt as to whether the lack of legal representation constituted a ground to declare inability. Moreover, the Chamber held that, if this impediment was not removed, a trial could not take place, in accordance with the rights and protections of the Libyan national justice system. In this case, the Pre-Trial Chamber I held that

Libya's failure to provide Gaddafi with legal representation meant that it was "unable" to prosecute him, according to article 17(3) of the Rome Statute.[6]

In the *Al-Senussi* case, Libya also failed to appoint a legal attorney to represent Al-Senussi. The Pre-Trial Chamber recalled that "the admissibility of a case may be determined, in the light of the circumstances, existing at the time of the admissibility proceedings." However, it continued by arguing that its task was to "determine whether the (…) circumstances [were] such, that a concrete impediment to the future appointment of counsel [could] be identified".

The Chamber observed that Al-Senussi was, instead, imprisoned in Tripoli by the central government. Libya submitted that several local lawyers had indicated their willingness to represent Al-Senussi, without having been given a formal power of attorney. In addition, the difficulty in securing legal representation was going to be overcome by order of the Accusation Chamber. The Pre-Trial Chamber claimed not to see any reason to boring into question the information provided by Libya, and to be unable to conclude that the case was going to be impeded from proceeding further, on the grounds that Libya was unable to provide the accused with an attorney.

In the *Al-Senussi* case, the Pre-Trial Chamber argued that Libya's ongoing failure to provide Al-Senussi with counsel, did not render Libya unable to prosecute him. This is because the LCCP only categorically requires a defendant to have counsel at a trial. The proceedings in the case, at national level, had not reached the trial stage, so Libya was not yet unable to prosecute Al-Senussi.

In this regard, these two cases both aim at bringing the accused to justice, which is the ultimate purpose of international criminal justice. However, in the ICC proceedings against those persons concerned, must comply with the principle of the rule of law principle. In this regard, the practice of the Court should be fair, consistent and predictable. According to this, the Pre-Trial Chamber in the *Al-Senussi* case should have concluded, that, since at the time of the admissibility decision, the defendant had not been provided with an attorney, the proceedings against him could

6 *Prosecutor* v**.** *Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC Pre-Trial Chamber I, 31 May 2013, (*Gaddafi* Admissibility Decision) ICC1/11-01/11-344-Red, paras. 213-214.

not have continued, as asserted in the *Gaddafi* case. The reasoning that Libya might provide Al-Senussi with counsel, prior to trial should have been deemed irrelevant.

5.2.2.2 The Two-Prong Test

The concept of the two-prong test was first introduced by the jurisprudence in the *Katanga and Chui* case. The judgment of the Appeals Chamber held that the complementarity provision under article 17 of the Rome Statute, is not a one-step test, but that it contains a two-step test. The first step is the determination of the proceedings requirement, which concerns the assessment of the existence of national proceedings. If there are no national proceedings (the inactivity scenario), the case will be admissible before the Court. However, if there are national proceedings, the same-case test will be applied. Only when the proceedings requirement is satisfied, will the unwillingness or inability requirement be applied.

In the *Katanga* case, the Appeals Chamber asserted that unwillingness and inability should be addressed, only when the same case test has been satisfied: "[t]o do otherwise would be to put the cart before the horse". Nevertheless, in the *Gaddafi* case, the Pre-Trial Chamber adopted a different approach, turning to address inability, even though the same case has not been satisfied. The Chamber dismissed the admissibility challenge, because Libya was found to be unable to proceed against Gaddafi.

Even the Pre-Trial Chamber reached the conclusion, on the ground of the same case test; however, it should be emphasised that the addressing of unwillingness and inability was not necessary. Additionally, the Pre-Trial Chamber, in this case, adopted a different approach, in order to testify the complementarity test against Gaddafi. The assessment of the unwillingness or inability in this case, would not make sense for the ICC because the sameness of the case had not been established.

According to this case, the Court adopted an inconsistent approach, concerning the two-prong test, in order to determine the complementarity test. This would also challenge the credibility of the entire ICC proceedings.

5.3 THE EXISTENCE OF NATIONAL PROCEEDINGS

As discussed earlier, the principle of complementarity lies at the heart of the entire ICC system. Nevertheless, the complementarity provisions under the Rome Statute contain some vague provisions, with regard to the application of such a principle. As a result, in practice, the Court had to adopt the dynamic approach to apply the provision some unclear legal terms.

According to the practice of the ICC, concerning complementarity determination at both the preliminary examination stage and the admissibility stages in Chapter III and Chapter IV, it was discovered that the Court employed the dynamic application, in order to assess the complementarity test throughout the situations, and cases before the Court. In particular, the study established that the absence of national proceedings acted as one of the key obstacles to achieving the purposes of the ICC complementarity system. This subchapter examines the challenge to the application of the principle of complementarity by the ICC, with regard to the interpretation of the proceedings, at the national level, to satisfy the complementarity test by the ICC.

5.2.3 Analysis of the Challenges of the Inconsistent Application and the Rule of Law

The practices of the ICC, during 2002-2018, highlight the importance of the role of the ICC in balancing the objectives of the rule of law and of the international criminal justice, throughout its functioning. According to this, in order to have respect for and promotion of the rule of law and justice, the operation of the ICC should accord predictability and legitimacy to its actions. This includes the application of the principle of complementarity during the ICC proceedings. In this regard, the consistent approach must be employed, to guarantee the predictability and legitimacy of its operation.

As discussed in Chapter II, the ultimate purpose of the principle of complementarity is to strike balance between national sovereignty, and the interests of the international community in combating impunity for international crimes. The ICC will act as a court of last resort. A case will be admissible before the ICC, only when the domestic courts have failed to investigate and prosecute a case, or demonstrated

an unwillingness or inability to do so, in a genuine manner, according to the principle of complementarity.

The legitimacy of the Court is founded on its complementarity to domestic courts. According to this principle, the ICC can be a solution to the "international-domestic tribunal dilemma"[7] , since the ICC only steps in when the domestic courts fail. However, the ICC, by its mere existence, helps domestic courts to adopt higher international standards of due process, fair trial, victim protection, independence from political pressures, and so on.[8] Regarding this, the Rome Statute is not only establishing an innovative international court, but it is also laying down a criminal code, embodying a well reasons set of international law.[9]

Apart from gauging the legitimacy of the ICC through the lens of the origin of its power or its function of institutional design, the legitimacy of the ICC also can be evaluated by its performance, or the exercise of its power.[10] This dimension of legitimacy evaluates by means of the procedural aspect, based on the justification by means, approaches or theories, as applied by the Court during its proceedings.[11]

According to majority of the cases before the ICC, the purposes of both pillars, the rule of law and justice, have been reserved. The consistent approach has been adopted, in order to assess the complementarity. However, it was discovered that, in some cases, the Court's operations have been criticised on the issue of inconsistent approach.

In this regard, inconsistency of the application of the principle of complementarity, employed by the Court, may lead to the achievement of the ultimate goal, i.e., international criminal justice in fighting against impunity. However, the inconsistent nature of the practice of the Court, in applying the principle of complementarity may affects its role in promoting and establishing the rule of law.

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7 Popovski, "Legality and Legitimacy of International Criminal Tribunals," 405.

8 ibid.

9 Arsanjani and Reisman, "The Law-in-Action of the International Criminal Court," 389.

10 Jean d'Aspremont and Eric De Brabandere, "The Complementarity Faces of Legitimacy in International Law: The Legitimacy of Origin and Legitimacy of Exercise," *Fordham International Law Journal* 34, no. 2 (2011): 190.; Emilia Justyna Powell, "Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts," *Foreign Policy Analysis* (2012): 8-9.

11 Hitomi Takemura, "Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court," *Amsterdam Law Forum* 4, no. 2 (2012): 5.

Additionally, this inconsistency may also challenge the legitimacy and credibility of the entire ICC system.

Therefore, in order to balance both pillars of justice and the rule of law, the ICC must not only adopt a dynamic approach for determining the principle of complementarity, but also such a dynamic application should be consistent, to represent the predictability and legitimacy of the operation of the principle of complementarity.

5.3 THE PROCEEDINGS AT THE NATIONAL LEVEL

5.3.1 The Existence of National Proceedings

According to the practices of the ICC, in determining the proceedings requirement, the majority of the situations and cases have faced quite similar problems such as that of the absence of proceedings, at the national level as analysed in Chapter III and Chapter IV.

According to those practices, there are several circumstances that challenge the assessment of the proceedings requirement to the complementarity test. This section aims at analysing one of the key practical challenges, in order to assess the existence of national proceedings. This section intends to analyse whether the new forms of alternative justice mechanism of States, and the proceedings at the national level, carried out by non-state actors (NSAs), can fulfil the proceedings requirement of the existence of national proceedings, with regard to the complementarity test.

5.3.1.1 An Alternative Justice Mechanism in the ICC Complementarity Regime

The ICC gives priority to national justice processes and embraces the primacy of each state, in securing accountability for international crimes.[12] Because of this, when a state prosecutes an international crime on its own, the ICC lacks the power to do so; when a state investigates, and concludes that it does not have grounds to prosecute, the ICC similarly lacks the power to proceed.[13] However, the Rome Statute left the question unanswered, as to what happens to ICC jurisdiction, when the state proceeds

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12 Martha Minow, "Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court," *Harvard International Law Journal* 60, no. 1 (2019): 5.

13 ibid.

with a response, other than adversarial criminal litigation. For example, the country may undertake domestic fact-finding and conflict resolution processes, aimed at promoting forgiveness and restoration of community relation, rather than criminal prosecution and punishment. [14]

In addition, the innovative developments in the fight against impunity, such as a truth commission, and the expansion of transitional justice, as a field of study, contributed immensely to widening the scope of the concept, and practice, of accountability for serious crimes.[15] As a result, increasing interest has focussed on so-called 'alternative forms of justice', as well as the local arrangements of accountability, some of which may actually constitute tradition-based forms of justice.[16]

At the outset, there are several terms defined in these national justice procedures, such as 'restorative justice',[17] alternative justice',[18] 'community-based justice'.[19] However, for the coherence of the discussion, this dissertation will use the term 'alternative justice mechanism' to represent those varieties of justice procedures.

The increasing emergence of alternative justice mechanisms in the international community, challenges the application of the principle of complementarity. In order to interpret these kinds of proceedings, within the realm of the national proceedings, it is necessary to examine those cases, which are being investigated, pursuant to article 17(1)(a) of the Rome Statute; and also those which have been investigated, and, where it has been decided not to prosecute, pursuant to

14 ibid.

15 Marta Valiñas, "Interpreting Complementarity and Interests of Justice in the Presence of Restroactive-Based Alternative Forms of Justice," in *Future Perspective on International Criminal Justice* ed. Carsten Stahn and Larissa van den Herik (The Hague: T.M.C. Asser Press, 2010), 268.

16 ibid.

17 Steven C. Roach, "Legitimising Negotiated Justice: The International Criminal Court and Flexible Governance," *International Journal of Human Rights* 17, no. 5-6 (2013): 619-32.

18 Gordon, "Complementarity and Alternative Justice," 621-702.; Linda M. Keller, "Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms," *Connecticut Journal of International Law* 23 (2008): 209-79.;Gregory S. Gordon, "Complementarity and Alternative Forms of Justice: A New Test for the ICC Admissibility," in *The International Criminal Court and Complementarity: From Theory to Practice -Volume 2*, ed. Carsten Stahn and Mohamed M. El Zeidy (Cambridge: Cambridge University Press, 2011), 745-806.

19 Michael A. Newton, "A Synthesis of Community-Based Justice and Complementarity," in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian de Vos, Sara Kendall, and Carsten Stahn (Cambridge: Cambridge University Press, 2015), 122-44.

article 17(1)(b) of the Rome Statute; or, of those, which has been tried, pursuant to article 17(1)(c) of the Rome Statute.

In this respect, it is a challenge to the ICC, if perpetrators of extreme human rights violations are dealt with by alternative justice procedures in their home countries, rather than being criminally prosecuted at the ICC. Certain commentators believe that alternative justice mechanisms, such as the customary local procedure (*i.e.*, *Shalish* in Bangladesh; *Gacaca* in Rwanda; *Naha Biti Boot* in Timor Leste; *Kgotla* in Botswana; *Katarunggang Pambarangay* in the Philippines and *Mato Oput* in Uganda),[20] truth commissions, lustration, reparations and amnesties can relieve the ICC of its obligation to investigate, or prosecute under the complementarity principle.[21]

The growing interest in these alternative justice mechanisms, has resulted from a recognition of the limited contribution of prosecutions, in the aftermath of mass violence, and from a recognition of the particular suitability of these procedures, in achieving some of the key goals of these societies. There are, namely: board process of truth-seeking and truth-telling; and social repair. There is also a growing awareness of the importance of the broad involvement of the population, at the national and local level in judicial processes.[22] In fact, those alternative justice mechanisms are normally associated with the wide and active participation of the individuals, concerned in the design and implementation of the justice mechanisms; They are regarded as home-grown, and rooted in local culture, and, thus much closer and much more meaningful to the individuals and communities they aim to served.[23]

A state may, instead, turn to customary local conflict-resolution processes, cantering on repairing human relationships and the community, by, providing restitution to victims, including reparations made by offenders' family members or

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20 See generally Gordon, "Complementarity and Alternative Justice," 621-702.

21 See generally "Complementarity and Alternative Forms of Justice: A New Test for the ICC Admissibility," 752-75.

22 Valiñas, "Interpreting Complementarity and Interests of Justice in the Presence of Restroactive-Based Alternative Forms of Justice," 270-71.

23 Diane F. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency," *International Journal of Transitional Justice* 1 (2007): 19.; Valiñas, "Interpreting Complementarity and Interests of Justice in the Presence of Restroactive-Based Alternative Forms of Justice," 270-71.

communities, seeking to assist survivors.[24] Other responses to mass atrocities include stripping named wrongdoers of public offices and benefits, establishing memorials recognizing victims, and engaging in religious or cultural rituals.[25] In addition, the state may grant an amnesty to wrongdoers, as a means of putting the past behind everyone, or as a mechanism to help secure a peaceful transition. [26]

The alternative justice mechanism is not an abstract question, since these domestic alternatives have challenged the complementarity determination of the ICC on several occasions. The ICC proceeds with investigations and warrants of arrest, arising from atrocities in *Situation in Darfur, Sudan.* However, the scope of that disaster, as well as the obstacles to arresting the indicted leaders, underscores concrete calls for domestic alternatives.[27]

This is true regarding the *Situation in Uganda,* which was referred by the Ugandan Government to the Prosecutor in 2004. After the self-referral, the national government attempted to try the perpetrators at a national war crimes court, pursuant to the Juba Peace negotiations, (in 2006 and 2008). One of the most interesting issues, which arose, during the negotiations, was the formidable challenge of reconciling international and local justice.

Regarding this, the issue is whether the ICC will be able to fully accommodate local officials' proposed plans to adapt *Mato Oput* – a local justice mechanism, designed to promote reconciliation through voluntary truth-telling and ritual acts. Is this acceptable to the ICC and its international standards of justice?[28]

Actually, it is important to stress that the complementarity principle does not exclude local demands for justice. And, in fact, the ICC has formally pledged to accommodate such demands under the complementarity principle. However, it has

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24 Minow, "Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court," 6.; Gordon, "Complementarity and Alternative Justice," 634-59.

25 Minow, "Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court," 6.

26 ibid., 6-7.

27 ibid., 7.

28 Roach, "Legitimising Negotiated Justice: The International Criminal Court and Flexible Governance," 626.

done little to assuage concerns that it would compromise the evidential standards of international justice.[29]

Subsequently, there was the *Situation in Libya*, which was referred to the Prosecutor by the Security Council in 2011. In the admissibility proceedings of the *Gaddafi* case before the ICC Appeals Chamber, Judge Anita Ušacka appended her dissenting opinion, with regard to the interpretation of the first limp of article 17(1)(a). This stated that the criteria of the complementarity test as the first part of article 17(1), is the clearly expressed, and genuine will of a state, to carry out investigations and prosecutions. This reveals itself in a through process of investigating and prosecuting, as exemplified in this case, by the concrete actions taken by Libya.[30] However, Judge Ušacka also observed the development of this criterion, in future cases, that:

> [a]dmissibility will raise new issues that will require the jurisprudence of the Court to develop further, and possibly add more confined and new elements to the test relevant to the first limb of article 17 (1) (a) of the Statute, such as the persons at issue, the range of the sentence/s and *alternative forms of justice*.[31] (*emphasis* added)

In this regard, this includes the alternative forms of justice, in particular, the restorative justice in post-conflict societies. This concept is developing gradually, and this mechanism is set to challenge the application of the principle of complementarity, in the near future.

The first requirement of the complementarity test, under article 17 of the Rome Statute, requires the existence of national proceedings, in carrying out either investigations or prosecutions. It appears to be more and more accepted that the notion of investigations, in article 17(1)(a), includes judicial (criminal) investigations and non-judicial investigations.[32] The requirements of a decision not to prosecute in article 17(1)(b), means that there needs to be, at least, the possibility of prosecution,

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29 ibid., 626-27.

30 *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Dissenting Opinion of Judge Anita Ušacka, ICC Appeals Chamber, 21 May 2014, ICC-01/11-01/11-547-Anx2, para. 59.

31 Ibid.

32 Carsten Stahn, "Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court," *Journal of International Criminal Justice* 3 (2005): 711.

after the (non) judicial investigation.[33] Furthermore, in the case where there is a judicial or a quasi-judicial investigation, with the aim of determining the individual criminal responsibility of the accused, the process may end with a sanction. This may be something other than imprisonment, or with a minimal imprisonment term, and both may be regarded by some as a quasi-pardon. [34]

This dilemma has been examined, and it has been advocated that the Court should focus on more theoretical considerations, such as whether domestic procedures facilitate retribution, deterrence, expression of differing viewpoints (expressivism), and restorative justice to a similar extent as international prosecution. This is because these advanced alternative justice mechanisms involve some practical considerations, such as the extent of punishment, which falls short of incarceration, victim participation, redress, and general societal reconciliation.[35]

If the domestic alternatives are similar to the existence of national proceedings, in accordance with the criteria of the complementarity test, then the analysis of the unwillingness or inability requirement of the complementarity test will be applied. The criteria of analysis whether the state was unwilling genuinely to carry out the investigation and prosecution, are laid down in article 17(2) of the Rome Statute.

Determining the unwillingness of a state concerned, to genuinely carry out an alternative justice mechanism is certainly not an easy task. The criteria, under article 17(2), refer to the aim of authorities (purpose and intent), which add considerable complexity to the question.[36] Determining whether a delay in the proceedings is unjustified, or whether the organ conducting the proceedings is acting independently and impartially, might be easier to prove. The objectives of the decision-making authorities are always more difficult to assess.[37]

Additionally, according to the OTP's informal expert paper on the principle of complementarity, article 17 gives the ICC the possibility to 'assess the *objective*

33 ibid., 711-12.;
34 Valiñas, "Interpreting Complementarity and Interests of Justice in the Presence of Restroactive-Based Alternative Forms of Justice," 274.
35 Keller, "Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms," 265-76, 97.
36 Valiñas, "Interpreting Complementarity and Interests of Justice in the Presence of Restroactive-Based Alternative Forms of Justice," 275.
37 ibid.

quality of national proceedings.'[38] Therefore this assessment must rely on objective criteria, and should be based on '*procedural* and *institutional* factors, not on the substantive outcome.'[39]

In order to assess the quality of alternative justice mechanisms as national proceedings under the test of complementarity, a set of considerations grounded in the restorative justice philosophy, have to be taken into account, when interpreting article 17 of the Rome Statute. These consist of broad and active participation of local communities and individuals; a broad inquiry into facts; the type of accountability applied; reparation measures; respecting the rights of victims; and contributions to social repair.[40]

In this regard, this is a challenge to the application of the complementarity, determining whether the Court should adopt the dynamic approach to apply that this new form of national justice can fulfil the requirements of the tests of the complementarity principle.

5.3.1.2 Proceedings Carried Out by Non-State Actors at the National Level

A solid argument on the complementarity of the ICC with the courts of non-state armed groups (NSAGs), needs to rely on a preliminary limiting of the actors concerned. In general, the principle of complementarity is understood to be relevant, only when criminal proceedings are carried out by states. This does not include comparable proceedings, carried out by non-state entities, in particular, NSAGs.

Criminal prosecutions carried out by the courts of NSAGs, are an even more telling reality, which raises several legal dilemmas, in addition to the exercising of criminal concurrent jurisdiction, under the principle of complementarity with the ICC.

Entities which exercise, or have exercised, in the recent past, some form of prosecution include, but are not limited to: the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka; the Farabundo Mart National Liberation Front (FMNLF) in El Salvador; the Taliban in Afghanistan, after losing control of the government; the

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38 Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity inn Practice" (2003), para 22.

39 Ibid., para. 46.

40 Valiñas, "Interpreting Complementarity and Interests of Justice in the Presence of Restroactive-Based Alternative Forms of Justice," 287.

Maoist insurgents (CPN-M) in Nepal; the Revolutionary United Front (RUF) in Sierra Leone; various groups of rebels involved in the armed conflict in Syria; the National Democratic Front of the Philippines (NDFP), and the Moro Islamic Liberation Front (MILF) in the Philippines; the National Movement for the Liberation of Azawad (MNLA) in Mali; the Armed Forces of the Forces Nouvelles (FAFN) in Ivory Coast; the Islamic State (IS) in Iraq and Syria; the Free Aceh Movement (GAM) in Indonesia; the Sudan People's Liberation Movement (SPLM) in South Sudan; the Movement for the Liberation of the Congo (MLC) in the Democratic Republic of the Congo; the Kosovo Liberation Army (UÇK-KLA) in Kosovo; the People's Defence Forces (HPG) in Turkish Kurdistan; the Naxalites in India; the Republic of Biafra in Nigeria; the Revolutionary Armed Forces of Colombia (FARC); the National Liberation Army (ELN) in Colombia; the Karen National Union (NKU) in Myanmar; and the National Resistance Army (NRA) in Uganda.[41]

The issue of the role of non-state entities in legal proceedings, emerged for the first time in the *Al-Werfalli* case, in the *Situation in Libya,* in which the ICC issued a warrant for the arrest of Mahmoud Mustafa Busayf Al-Werfalli, a senior commander in the elite military unit in Libya, known as the Al-Saiqa Brigade.[42] A few days later, General Khalifa Haftar, the leader of the Libyan National Army (LNA) had reportedly ordered Al-Werfalli's arrest, and he had since been detained and investigated by the Libyan Military Prosecutor, on the identical charge of war crimes.[43]

In the meantime, Al-Werfalli remained at large, held command positions and was involved in further incidents: in January 2018, new videos showed him executing 10 blindfolded prisoners, in front of a mosque in Benghazi. Following this, Al-Werfalli appearently handed himself over to the military police, but was released shortly afterwards. Al-Werfalli remained at large, held command positions and was involved in further incidents. In January 2018, there was a new video investigation.[44]

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41 Alessandro Mario Amoroso, "Should the ICC Assess Complementarity with Respect to Non-State Armed Groups?: Hidden Questions in the Second Al-Werfalli Arrest Warrant," *Journal of International Criminal Justice* 0 (2019): 11.

42 *Prosecutor* v. *Mahmoud Mustafa Busayf Al-Werfalli,* Warrant of Arrest, ICC Pre-Trial Chamber I, 15 August 2017, ICC-01/11-01/17-2 (*Al-Werfalli* Warrant of Arrest).

43 Amoroso, "Should the ICC Assess Complementarity with Respect to Non-State Armed Groups?: Hidden Questions in the Second Al-Werfalli Arrest Warrant," 2.

44 ibid., 4-5.

In a statement, the ICC Prosecutor expressed dismay at the open defiance of the Court's authority, by the leadership of the LNA.[45]

As a result, on 4 July 2018, the Pre-Trial Chamber I issued a second warrant of arrest, adding the crimes of January 2018, to the charges already brought against Al Werfalli.[46] The Chamber, in a new declaration, decided this time to exercise its discretion to address the admissibility of the case at the pre-trial stage, pursuant to article19(1) Rome Statute. The relevant paragraphs contain an unprecedented ruling: the judges determined that the proceedings allegedly initiated by the LNA authorities against Al-Werfalli, did not render the case inadmissible before the ICC, because they failed the test of 'tangible, concrete and progressive investigative steps', as required by the Court's case-law,[47] that:

> [t]he proceedings allegedly initiated against Mr. Al-Werfalli in Libya do not render the case against him inadmissible before this Court. The Chamber finds that irrespective of whether the entity exercising authority in the territory controlled by the LNA can be considered a State for the purposes of article 17 of the Statute, there remains a situation of inactivity. The Chamber recalls that for a case to be considered as "being investigated" within the meaning of article 17(1)(a) of the Statute, tangible, concrete and progressive investigative steps must have been taken. Based on the limited available information, the Chamber considers that the investigation has not complied with these requirements.[48]

Regarding this, the Chamber found that, irrespective of whether the entity exercising authority in the territory controlled by the LNA could be considered a state, for the purposes of article 17 of the Statute, there still remained a situation of inactivity.

The provisions in the Rome Statute state that the ICC shall be complementary to national criminal jurisdictions.[49] There is little doubt that the drafting history of the

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45 Office of the Prosecutor (OTP), Statement of ICC Prosecutor, Fatou Bensouda, condemns recent violence in Benghazi, Libya, 16 January 2018, https://www.icc-cpi.int/Pages/item.aspx?name=180126-otp-stat.

46 *Prosecutor* v. *Mahmoud Mustafa Busayf Al-Werfalli,* Second Warrant of Arrest, ICC Pre-Trial Chamber I, 4 July 2018, ICC-01/11-01/17-13 (*Al-Werfalli* Second Warrant of Arrest).

47 *Prosecutor* v**.** *Simone Gbagbo,* Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC Pre-Trial Chamber I, 11 December 2014, ICC-02/11-01/11/12 (*Simone* Admissibility Decision), para. 65.

48 *Al-Werfalli* Second Warrant of Arrest, para. 27.

49 Rome Statute of the International Criminal Court (Rome Statute), preamble, para. 10 and article 1.

preamble and article 1 of the Rome Statute suggest that the minds of its drafters, were heavily tilted towards state proceedings, not the proceedings carried out by NSAGs.[50]

Based on this understanding, the complementarity test, under article 17, presents two scenarios: article 17(1)(a) and (b) on the one hand, and article 17(1)(c) on the other hand. According to article 17(1)(a) and (b) the proceedings carried out by NSAGs, are far from that which is being investigated or prosecuted, or those that have been investigated but not prosecuted. In this situation, the provisions were quite clear, that the NSAGs proceedings would fall outside the ambit of this complementarity test.[51] These investigations, or prosecutions, or decisions not to prosecute have to be those of a 'state'. In this regard, there is no obstacle to the admissibility of such a case, if such an investigation, prosecution, or decision not to prosecute, were that of an NSAG. This is regardless of whether or not such proceedings meet the requirements of willingness and ability, which flow from a converse reading of article 17(2) and (3) of the Rome Statute.[52]

On the contrary, the *ne bis in idem* scenario, as stipulated in articles 17(1)(c) and 20(3), regulate the situation in which a person has been tried 'by another court', but do not require the trial to take place in a national court. That wording suggests that the exception to the *ne bis in idem* principle, pertains to any 'other court', regardless of whether that court is one of a state, or a non-state entity.[53] In this respect, trials in courts established and operated by NSAGs could constitute a bar to admissibility, provided that the proceedings were not conducted for the purpose of shielding, and were also conducted independently or impartially. [54]

As a result, in a situation involving allegations that an individual committed both the crime of aggression and a war crime, most domestic courts would be able to

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50 For details see Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 70-95.

51 "The Law and Policy of Complementarity in Relation to 'Criminal Proceedings' Carries out by Non-State Organized Armed Groups," in *The International Criminal Court and Complementarity: From Theory to Practice Volume 1*, ed. Carsten Stahn and Mohamed M. El. Zeidy (Cambridge: Campridge University Press, 2011), 716-17.

52 ibid., 717.

53 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 125.

54 "The Law and Policy of Complementarity in Relation to 'Criminal Proceedings' Carries out by Non-State Organized Armed Groups," 718.

prosecute the latter crime, but not the former one. The same person/same conduct test would then support the ICC's assertion of jurisdiction, if and when the ASP decides to activate the aggression amendments. Pre-empting domestic court jurisdiction, under these circumstances, might ultimately undermine the very purpose behind the principle of complementarity, which intends to promote genuine domestic prosecutions of international crimes.[55]

5.3.2 The Zealousness of the Proceedings at the National Level

According to the analysis of the jurisprudence of the ICC, in determining the unwillingness or inability requirements, there are a small number of cases, in which this requirement has been rose for assessing the complementarity test. According to those practices, there are several situations that challenge the assessment of the unwillingness or inability requirement to the complementarity test. This section aims at analysing crucial practical challenges, in order to assess the unwillingness of the State concerned or the inability of the national justice system. This section leads on to an analysis of whether the "too all willing" of the state concerned satisfies the test under the complementarity system, in particular, this refer to the case of the application of the complementarity over the case of the crime of aggression.

5.3.2.1 The Overzealous National Prosecutions

According to article 17 of the Rome Statute, the unwillingness of the states concerned and the inability of the national judicial system, are criteria governing the complementarity test. The complementarity provisions provide the definitions of unwillingness and inability, in articles 17(2) and 17(3) of the Rome Statute, respectively.

This unwillingness covers three situations: (1) when domestic courts prosecutions are shielding the person from justice; (2) when there is an unjustified delay; or (3) when proceedings lack independence or impartiality, inconsistent with an intent to bring the person concerned to justice.[56]

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55 Beth Van Schaack, "Har in Paren Imperium Non Habet: Complementarity and the Crime of Aggression," *Journal of International Criminal Justice* 10, no. 1 (2012): 134-35.

56 Rome Statute, article 17(2).

Inability applies when domestic courts lack the capacity to carry out prosecutions, and is evaluated, using three factors: (1) whether there has been a total or substantial collapse or unavailability of domestic courts; (2) whether the State is unable to obtain custody of the accused or necessary evidence and testimony; and (3) whether domestic courts are otherwise unable to carry out proceedings.[57]

However, one interesting question arises, regarding the unwillingness or inability requirements. This is whether article 17 would also cover the situation, where domestic courts are "all too willing" to prosecute. This means the domestic courts are failing to adhere to fair trial protections, out of overzealousness to prosecute.[58] This situation might be thought of as a "victor's justice" problem.[59]

The preliminary problem with this challenge is whether, the overzealous prosecutions of domestic courts, fall within the situation of unwillingness, or inability, under article 17 of the Rome Statute. This challenge would, according to article 17, cover an overzealous national trial, that lacks due process such that the case would remain admissible before the ICC.[60] In other words, is a case admissible under article 17, if the Court determines that the state asserting jurisdiction over it, will not provide the defendant with due process? [61]

In such a scenario, this is the opposite of unwillingness of the state concerned. The domestic courts are "all too willing" to investigate and prosecute. As seen in the *Gaddafi* case and the *Al-Senussi* case, the Libyan authorities delivered their decisions that these individuals should be prosecuted domestically, despite the issuance of ICC arrest warrants against them. [62]

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57 Ibid., article 17(3).

58 Jennifer Trahan, "Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?-Considering the Problem of "Overzealous" National Court Prosecutions," *Cornell International Law Journal* 45 (2012): 583.

59 Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 597.

60 Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," 257.; Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 612.

61 Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," 257.

62 Trahan, "Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?-Considering the Problem of "Overzealous" National Court Prosecutions," 584.

There is a reason to believe that, article 17 does not cover the situation of overzealous domestic court prosecutions.[63] As mentioned earlier, pursuant to article 17(2), unwillingness covers only three situations of shielding, unjustified delay and lack of independence or impartiality. The overzealousness of national prosecutions would mean the opposite of shielding the person from justice, and would not cause unjustified delay. The overzealous prosecutions would meet the situation of proceedings, that lack independence or impartiality; however, it is hard to argue that "all too willing" national prosecutions fall within the meaning of unwillingness because the unwillingness, under article 17(2), applies only "to the admissibility of a case, where these criteria worked in favour of the accused. [64]

However, the overzealous prosecutions do not meet any criteria for inability, under article 17(3) of the Rome Statute. It would not mean the total or substantial collapse or unavailability of the domestic courts. In this situation, the state would be able to obtain custody of the accused or necessary evidence or testimony; rather, the State would have custody of the accused, and be quite willing to gather necessary evidence and testimony. In addition, the domestic court would be able to carry out the proceedings; indeed, they would be able to carry them out, just not with the required due process. Hence, the overzealous national prosecutions do not meet the criteria of inability.

In conclusion, there is a reason to believe that article 17 would not cover the overzealousness of domestic court prosecutions, of genocide, crimes against humanity and war crimes.

5.3.2.2 The Overzealous Prosecutions of the Crime of Aggression

According to the principle of complementarity, it is assumed that States have both prescriptive and adjudicative jurisdiction over conduct, that attains the level of an international crime, under the jurisdiction of the ICC. According to this concept, States are required to have incorporated the relevant international crimes into their domestic codes, or to have penalized analogous and other offences, such as murder,

63 Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," 257.

64 ibid.; Benzing, "The Complementarity Regime of the International Criminal Court; International Criminal Justice between State Sovereignty and the Fight against Impunity," 597.

rape, and torture. However, under the concept of jurisdiction assumes an available basis of jurisdiction, such as territoriality, nationality or even universality principle jurisdiction.[65] However, there are a small number of states which can prosecute this crime domestically, upon any jurisdictional basis[66], and most atrocity crimes and ordinary domestic crimes do not proscribe the same conduct, as the crime of aggression.

As a result, in a situation involving allegations that an individual committed both the crime of aggression and a war crime, most domestic courts would be able to prosecute the latter crime, but not the former one. The same person/same conduct test would then support the ICC's assertion of jurisdiction, if and when the ASP decides to activate the aggression amendments. Pre-empting domestic court jurisdiction, under these circumstances, might ultimately undermine the chief objective of the principle of complementarity, which intends to promote genuine domestic prosecutions of international crimes.[67]

In practice, most domestic courts lack jurisdiction over the crime of aggression and there is little pure jurisprudence involving the crime. The only exception to this is found in some post-World War II cases, whose jurisdictional basis is contested, and which offer an uncertain precedent for the notion that domestic courts can, and indeed should, prosecute the crime of aggression.[68]

The post-World War II proceedings inspired a number of states to incorporate international crimes into their domestic penal codes. Crimes against peace, however, are not well represented in this endeavour. To the extent that domestic codes do contain a provision on the crime of aggression, in most cases prosecutions are limited to territoriality, or nationality principles of jurisdiction. A few States permit the exercise of universal jurisdiction over all crimes that are prohibited by customary international law, universal jurisdiction, or those which threaten the peace and

65 See generally Clark, "Complementarity and the Crime of Aggression," 721-44.

66 Astrid Reisinger Coracini, "Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime," in *The Emerging Practice of the International Criminal Court*, ed. Carsten Stahn and Göran Sluiter (Leiden: Koninklijke Brill nv, 2009), 735.

67 Schaack, "Har in Paren Imperium Non Habet: Complementarity and the Crime of Aggression," 134-35.

68 ibid., 137.

security of humankind.[69] And, only a handful of states are specifically empowered to assert universal jurisdiction over the crime of aggression.

In addition, after the 2010 Review Conference, one of the most interesting consequences was the supplementary articles, on the definition of, and conditions for the ICC's exercise of jurisdiction over the crime of aggression, in the Rome Statute. As a result, the existing Rome Statute's complementarity regime remained intact, and would apply to the crime of aggression. In fact, the crime of aggression differed from the other three crimes, under the jurisdiction of the ICC.

Clearly, the crime of aggression involves, at least, two states: the aggressor state(s) and the victim state(s).[70] However, for other crimes under the jurisdiction of the ICC, it is possible that the nationals of one State could commit genocide, war crimes or crimes against humanity in the territory of another state, making the situation more analogous to the crime of aggression. However, most of the cases dealt with, up to the present, involve crimes committed by someone within one country, against nationals of that country such as the situations in *Sudan*, *Uganda*, *Kenya*, and *Libya*. This means the warrants or voluntary summonses to appear, refer to charges for crimes committed in the territory of a particular state.

In general, the idea of the concept of the principle of complementarity recognises the domestic courts, serving as one of the most important features of the trials. In this case, the potential of domestic courts, in prosecuting the political or military leader of an aggressor state, can challenge the effectiveness of the complementarity mechanism of the ICC, in, at least, one of following three possible scenarios.[71]

With regard to scenario one: the political or military leader of the aggressor state(s) is captured and tried in the victim state. Then, the victim state courts would probably be all too willing, to try the captured political or military leader of the aggressor state.

Regarding scenario two, the political or military leader of the aggressor state is tried in the aggressor state, when there has not been a change of regime (which would

69 ibid., 143.
70 Trahan, "Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?-Considering the Problem of "Overzealous" National Court Prosecutions," 587.
71 ibid., 589.

seem unlikely). Thus, the leaders of the aggressor state (while still in office) would, most likely, not be tried at all in the aggressor state's courts. In addition to this, the domestic trial might even be precluded by domestic immunity laws, the "act of state" doctrine and/or the "political question" doctrine.

In scenario three, the political or military leader of the aggressor state is tried in the aggressor state after a change of regime. In this case, the former leaders of the aggressor state, once out of the office, and/or after regime change, could be tried in the aggressor state's courts, but, probably again, would not be tried very aggressively, if at all.

According to above-mentioned three possible scenarios for the prosecution of the crime of aggression at the national level, there are very different incentives. However, in the second and third scenarios, the main concern would probably be that the domestic trials, would either be sham trials or non-existent ones. In these two scenarios, such trials would certainly not preclude ICC prosecutions—assuming ICC jurisdiction exists, and assuming that national court crime of aggression prosecutions are possible, under domestic crime of aggression legislation—[72] because sham or non-existent trials would be covered by the terms, "unwilling" or "unable", in article 17 of the Rome Statute.[73]

Interestingly, in the first scenario, when the political or military leader of the aggressor state, is captured and tried by a court of the victim state, then such a court would be "all too willing" to try that leader.[74] In this scenario, the political or military leader of the aggressor state captured in the victim state, could be tried for the crime of aggression in a trial, which was unfair to him or her, and there would be no mechanism for the ICC to try the case.[75] Even if the ICC were to issue an arrest warrant against the political or military leader of the aggressor state, the case would be inadmissible before the ICC, because national courts, are willing and able to

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72 Coracini, "Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime," 734-36, n.57-72.

73 Trahan, "Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?-Considering the Problem of "Overzealous" National Court Prosecutions," 589-90.

74 ibid., 590.

75 ibid.

prosecute, would most likely succeed. Importantly, none of the three criteria for "unwillingness" [76] would be satisfied:

(i) Shielding: there would not be a national prosecution shielding the person from justice, instead, the opposite (a national prosecution meting out unduly harsh justice);

(ii) Unjustified delay: there would not be an unjustified delay—but perhaps unjustified haste; and

(iii) Lack of independence or impartiality: there might be a "lack of independence or impartiality, so that there was no intention of bringing the person to justice," it would not be because the national court was "unwilling".[77]

In addition, the three criteria for evaluating "inability" [78] would not be satisfied either:

(i) Total or substantial collapse or unavailability: there would not be the "total or substantial collapse or unavailability" of national courts, on the contrary, national courts would be operational;

(ii) Inability to obtain custody of the accused, or the necessary evidence: the state would not be in a position to obtain custody of the accused or necessary evidence, to the contrary, the national court would have custody of the accused and would be zealously, (perhaps over-zealously), gathering evidence; and

(iii) Otherwise unable to carry out the proceedings: the victim State's court would not be otherwise "unable to carry out prosecutions", rather, they would be carrying them out with too much zeal.[79]

in this regard, there is no channel for the ICC to try the crime of aggression, which is currently part of the ongoing process, before the victim States' court.

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76 Rome Statute, article 17(2).

77 See Trahan, "Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?-Considering the Problem of "Overzealous" National Court Prosecutions," 583-86.

78 Rome Statute, article 17(3).

79 See Trahan, "Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?-Considering the Problem of "Overzealous" National Court Prosecutions," 583-86.

In the above discussion, the prosecution of the crime under the jurisdiction of the Court, in the complementarity regime of the ICC is a challenging one. According to the mechanism of the complementarity regime, the impartiality of the exercise of national criminal jurisdiction over those crimes, in particular, the question of overzealous national court prosecution.

Hence, without any provision regarding overzealousness in the state's willingness, the satisfying of the unwillingness or inability requirement, in order to meet the situation of the "all too willing" or "overzealousness", challenges the Court to employ the dynamic approach for assessing the complementarity test, in each particular case.

5.2.3 Analysis of the Challenges of the Proceedings at the National Level

With regard to the above discussion, the question of the proceedings, at the national level, challenge the effective application of the principle of complementarity by the Court. The analysis reveals the new forms of national proceedings both in the alternative justice mechanisms and the proceedings carried out by NSAGs. Regarding both situations, the increasing emergence of local arrangements of accountability and criminal prosecutions carried out by the courts of NSAGs raise several legal dilemmas, in particular their relationship to the application of the principle of complementarity.

The alternative justice mechanism challenges the existence of national proceedings, while the criminal prosecutions, carried out by the courts of NASGs, challenge the principle of *ne bis in idem.* However, the practice of the Court shows that this new form of justice mechanism requires the Court to develop further restrcitions and elements, to the test of proceedings requirement of the complementarity criteria.

With regard to the role of NSAGs' courts, further jurisprudence of the Court is required, in order to identify this kind of this prosecution, in the contest of *ne bis in idem,* pursuant to article 17(1)(c) of the Rome Statute.

In conclusion, the proceedings requirement of the complementarity test, in particular, the existence of national proceedings, challenges the application of the principle of complementarity. According to this, the jurisprudence of the Court is

required to develop further elements of the first limb of article 17(1)(a) of the Rome Statute, to present this new challenge to the effective application of the principle of complementarity.

Moreover, in practice, overzealous domestic trials that are "all too willing," also challenge the effectiveness of the application of the principle of complementarity, as seen in the cases in the *Situation in Libya*. This challenge is related to the justice problem. The all too willing to carry out the investigation or prosecution, fall within the context of unwillingness or inability, under article 17 of the Rome Statute. The overzealous national prosecutions challenge the application of the principle of complementarity, because they would be examples of proceedings that lack independence or impartiality, particularly, in the case of the crime of aggression.

In this regard, the study shows several measures to assess the complementarity test, in the case of overzealousness in national prosecutions. The Court should adopt a dynamic approach, in order to interpret article 17 of the Rome Statute liberally, so that domestic prosecutions that are "all too willing" to investigate and/or prosecute, remain admissible before the ICC. This is assuming there is jurisdiction for both national and ICC prosecutions, to be able to interpret the language of article 17 to reach this result.

According to article 17, the overzealous prosecutions do not appear in the meaning of "unwillingness" under article 17(2) or "inability" under article 17(3). In this regard, the judges should interpret "overzealous prosecutions", within the scope of unwillingness that "proceedings . . . not . . . being conducted independently or impartially", pursuant to article 17(2)(c) of the Rome Statute.[80]

The dynamic approach should be adopted, to apply the provision of article 17(3). The provision lists three factors for determining "inability", and none appears to include due process concerns.[81] Additionally, the phrase "having regard to the principles of due process recognized by international law" is recognised as imposing a due process requirement, but that phrase is in article 17(2)(a)(b) and (c). Therefore, the judge should read article 17(3), to include the inability to conduct fair trials.

[80] ibid., 594-600.
[81] ibid., 580-85.

Overzealous prosecutions would violate the due process requirements of the term "inability".

In addition, the amendment of article 17(1)(a) and article 20(3), to address national court prosecutions, that are "all too willing" to prosecute.[82]

Last but not least, as discussed earlier, complementarity would not a suitable tool for the crime of aggression prosecutions, because the international criminal mechanism should be an appropriate one for the prosecutions. Hence, to make the crime of aggression prosecutions not subject to the ICC's complementarity regime, it

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[82] Some proposals for the amendment have been done. For example, the proposal of Professor Jennifer Trahan by adding following language *(italics)* as follows:

Article 17:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
   a. the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution, *or [with regard to the crime of aggression] the State is all too willing to carry out the investigation or prosecution;*

. . . .

4. In order to determine "all too willing" in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether:

The proceedings were not or are not being conducted independently or impartially, or they were or are being conducted in a manner which, in the circumstances, is inconsistent with a genuine intent to bring the person concerned to justice.

Article 20

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
   (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
   (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law *or* were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice

The modification of article 17 applies solely to the crime of aggression, the impact to the ICC's workload would not be as dramatic. [82] In addition, the proposal also amends the *"ne bis in idem"* provision under article 20(3) of the Rome Statute by changing the "and" in article 20(3)(b) to an "or". With this regard, domestic court proceedings that were not independent or impartial (even if not designed to shield the person from justice) would not preclude the ICC from acting. It also might be possible to read unduly harsh national court prosecutions as not independent or impartial and "inconsistent with an intent to bring the person concerned to justice," in which case no amendment would be required. See ibid., 598-99.

should adopt a primacy regime, as taken by the ICTY and ICTR to the crime.[83] Then, if there were national investigations or prosecutions running parallel to ICC investigations, or prosecutions for the crime of aggression, and the ICC chose to pursue the case, it would simply be entitled to do so.

5.4 CHALLENGE TO THE COOPERATIVE

As mentioned earlier, the ICC is dependent on national support, for such essential processes as the preservation of crimes scenes; the production of evidence; the protection and relocation of witnesses; the tracing and freezing of assets; and the delivering of suspects. Hence, the providing of co-operation in good faith, can lead to criminal proceedings, that result in the discovery of the truth.[84] None of the cases would have been possible, without active state assistance, as envisaged by the Rome Statute. Hence, failure to cooperate can deadlock the entire judicial process.

In general, even if there is a state that does not 'cooperate fully', as required by the article 86 of the Rome Statute, or Chapter VII of the UN Charter, it might cooperate selectively: providing partial co-operation for some requests.[85] In addition, in the *Kenyatta* case, Kenya claimed to be co-operating, but was unduly delaying or drawing out the provision of assistance, by pleading the need for resolution of complex legal, operational or bureaucratic processes.[86] Furthermore, in the *Al Bashir* case, Sudan pleaded that the provisions of the Statute themselves were unclear, thereby evading its duty to cooperate. [87]

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83 Schaack, "Har in Paren Imperium Non Habet: Complementarity and the Crime of Aggression," 155.

84 Rod Rastan, "Can the ICC Function without State Compliance?," *Forthcoming Margaret M. deGuzman and Valerie Oosterveld (eds.) The Elgar Companion to the International Criminal Court* Available at SSRN: https://ssrn.com/abstract=3332497 (2019): 3.

85 ibid., 6.; see *Prosecutor* v. *Uhuru Muigai Kenyatta,* "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC Trial Chamber V(B), 3 December 2014, ICC-01/09-02/11-982, paras. 48, 60-62, https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF

86 *Prosecutor* v. *Uhuru Muigai Kenyatta,* "Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC Trial Chamber V(B), 19 September 2016, ICC-01/09-02/11-1037, https://www.icc-cpi.int/CourtRecords/CR2016_06654.PDF

87 *Prosecutor* v. *Omar Hassan Ahmed Al Bashir,* "Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute", ICC Pre-Trial Chamber II, 17 March 2017, ICC-02/05-01/09-290.

Additionally, if the State is unable, rather than unwilling, to cooperate, there is no external agency, that might be capable of remedying the situation.[88] In this regard, a suspect, wanted by the Court, might be beyond the operational reach of the national authorities, or the combined multilateral effort of several armed forces. The territory, where witnesses and evidence are located, might lie in unstable governance zones, in the midst of ongoing armed conflict, or in territory controlled by non-state actors. Relevant data, such as official or commercial records, might be damaged or destroyed, or prove unreliable or incomplete. It is possible that the internal structures of a government administration might be so fractured and uncoordinated, as to frustrate the state's practical ability to respond to co-operation requests, rendering it capable of rendering only passive assistance. [89]

5.4.1 Co-operation between the States and the ICC

Pursuant to the provisions in Part 9 of the Rome Statute concerning co-operation, state parties have voluntarily accepted to be bound by certain obligations, to cooperate fully with the Court in the investigation and prosecution of crimes, within the jurisdiction of the ICC. As a result, state parties have a duty to cooperate with the ICC.[90] Furthermore, the same duties are demanded of non-state parties that, have voluntarily lodged a declaration, accepting the exercise of jurisdiction by the Court, pursuant to article 12(3) of the Rome Statute.

In addition, in the case of Security Council referrals, such duties may be transferred to any UN member state, placed under an obligation to cooperate fully with the Court, by virtue of an imposed obligation. This is confirmed, by the decision of the Pre-Trial Chamber I in the case of *Gaddafi and Al-Senussi.* The Chamber stated that:

> 28. Furthermore, the Court has consistently held that the legal framework of the Statute applies in the situations referred by the Security Council in Libya and Darfur, Sudan, including its complementarity and co-operation regimes.
> 29. This interpretation is in line, inter alia, with article 1 of the Statute, which provides that "[t]he jurisdiction and functioning of the Court shall be governed

88 Rastan, "Can the ICC Function without State Compliance?," 7.
89 ibid.
90 ibid., 2.

> by the provisions of the Statute"; article 13 of the Statute, which states that "[t]he Court may exercise its jurisdiction [...] in accordance with the provisions of the Statute", regardless of how the exercise of jurisdiction is triggered in the particular situation; and article 21, which mandates the Court to apply, "in the first place", the Statute, Elements of Crimes and its Rules of Procedure and Evidence.
>
> 30. For the above reasons, the Chamber concludes that Part IX of the Statute, including article 95, applies in principle to the current case.[91]

In such circumstances, even states that are not signatories to the Rome Statute, which normally cannot be bound to the terms without consent, [92] are also obligated to undertake those duties to cooperate with the ICC. This is because the relevant treaty, in this regard, is the UN Charter, and all UN member states have consented to be bound by the obligations, to accept and carry out decisions of the Security Council, and to undertake their obligations under the UN Charter. This takes precedence over any other competing international obligation.[93] This applies, for instance, in the case of two non-state parties like Sudan and Libya.

In the *Situation in Sudan,* the Security Council decided that:

> [t]hat the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.[94]

Additionally, the same approach has been adopted in the *Situation in Libya,* in which the Security Council decided that:

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91 Prosecutor v. *Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi,* "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute, Al-Islam Gaddafi and Al-Senussi" ICC Pre-Trial Chamber I, 1 June 2012, (ICC-01/11-01/11-163), paras. 28-30.

92 Vienna Convention on the Law of Treaties, 1969, article 34 provides that:
A treaty does not create either obligations or rights for a third State without its consent.

93 Rod Rastan, "Testing Co-Operation: The International Criminal Court and National Authorities," *Leiden Journal of International Law* 21 (2008): 431.; "The Responsibility to Enforce - Connecting Justice with Unity," in *The Emerging Practice of the International Criminal Court*, ed. Carsten Stahn and Göran Sluiter (Leiden: Koninklijke Brill nv, 2009), 164.

94 UNSC Res. 1593 (31 March 2005) UN Doc S/RES/1593, para. 2.

> [t]he Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor. [95]

This session aims at examining the co-operation challenge, in order to apply the principle of complementarity. The result of the following analysis in this subchapter, will lead to positive measures, for ensuring the effectiveness of the application of the principle of complementarity of the ICC.

5.4.1.1 Inability or Unwillingness of States Concerned to Cooperate with the ICC

According to article 57(3)(d) of the Rome Statute, the Pre-Trial Chamber can authorize the Prosecutor to directly undertake any investigative steps, without recourse to the ordinary mechanisms of State co-operation. Thus, when the Court is faced with a state that is unable to cooperate, the ICC can authorize itself to directly execute the full range of co-operation measures envisaged under the Statute, including those that involve compulsory measures. [96] For instance, in article 54(2), there is a provision which defines the exception to the application of Part 9, for the conduct of the Prosecutor's investigation, on the territory of a state. [97]

Importantly, according to the complementarity standard in article 17(3), the state must be a supreme authority, and any component of its judicial system must be willing to execute the request for co-operation under Part 9. In this regard, one limb of the complementarity contradiction has to be addressed.

Additionally, in some situations, these functions might be capable of delegation to a third-Party, with a legal mandate to recognize and execute the Court's order's – such as an international peacekeeping or peace enforcement operation or foreign troops deployed with the territorial state's consent. Rule 115 of the ICC REP asserts that the views of the territorial state will be sought by the Pre-Trial Chamber, prior to its issuing an order. Essentially, the rule preserves the final authority for the Court, ostensibly to prevent a situation of stasis, by stating that the Pre-Trial Chamber

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95 UNSC Res. 1970 (26 February 2011) UN Doc S/RES/1970, para. 5.
96 Rome Statute, article 57(3)(d).
97 Ibid., article 54(2).

'shall, whenever possible, inform and invite views from the state party concerned', and requiring merely that it 'take into account any views expressed by the state party concerned', rather than being bound by them. For example, in the *Situation in DRC*, the *Situation in Cote d'Ivoire*, the *Situation in Mali* and the *Situation in CAR*, the ICC has been able, through the joint agreement of the UN and the territorial State, to impose a number of compulsory forms of judicial assistance. These would otherwise have been made unavailable to the Court, given to the prevailing security situation and the limits of governmental capacity. This includes such measures as military support, assistance in tracing witnesses, preservation of physical evidence, searches and seizures, securing of crime scenes, and arrests.[98]

In the situation of an unwilling state, state co-operate of State is regulated less clearly than that of an unable state. Although the Court may refer non-compliance to the ASP, and/or the Security Council, the Rome Statute does not appear to mention what else the Court could do.

When comparing the ICC with the *ad hoc* Tribunals, which were subsidiary bodies of the Security Council, it was decided that they could overcome the question of the unwillingness of State to cooperate, by using force. For instance, the ICTY benefitted from strong enforcement which enabled it directly to carry out compulsory measures, such as the seizure of evidence or the arrest of fugitives, even when the competent national authorities were uncooperative. However, this power was not because of its mandate under Chapter VII of the UN Charter, but was based on the Agreement on Civilian Implementation of the Peace Settlement, held in Dayton on 21 November 1995, and the Conclusions of the Peace Implementation Conference, held in Bonn on 10 December 1997. These Agreements empowered an internationally

98 See e.g., Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, UNTS II-1292; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in Cote d'Ivoire (UNOCI) and the International Criminal Court, UNTS II-1371; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the International Criminal Court, UNTS II-1374; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and the International Criminal Court, UNTS II-1379.

appointed High Representative, to exercise certain executive political authorities to ensure implementation of the civilian aspects of the Agreement on the Military Aspects of the Peace Settlement. [99] Importantly, a multinational NATO-led military presence was there, to ensure compliance with the military aspects of the peace agreement. [100]

With respect to the *Situation in Sudan* and *Situation in Libya*, the situations, referred by the Security Council under Chapter VII conditions, have failed to give the ICC heightened compliance rates. The solution for dealing with an unwilling State, that refuses to cooperate with the ICC, will be recourse to a supranational authority, with the full range of executive and enforcement powers.[101]

The operation of the ICTY involved co-operation, and recognition of the criteria for progress, in such vital processes as the European Union's Stabilization and Association Process, NATO's Partnership for Peace Program, or the lifting of economic sanctions, and the rendering of financial assistance by the World Bank and the US. [102]

To implement this model, unified collective action is required by a body, upon which the requested state's national self-interest is dependent. The example of collective (or regional) unanimity, that coalesced around the work of the ICTY, gives a concrete demonstration of what is possible – when the necessary unity in thought and action, in global undertakings, can be obtained.[103]

5.4.1.2 The Absence of Competent Authorities

In some circumstances, the states concerned are willing to cooperate with the ICC; however, a challenge has emerged, caused by the problem of the absence of competent state authorities. This situation might be in relation to territory, that is

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99 Annex 10, Agreement on Civilian Implementation; Bonn Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton 21 November 1995 https://www.icj-cij.org/files/case-related/91/13413.pdf ; Conclusions of the Peace Implementation Conference held in Bonn on 10 December 1997, Bosnia and Herzegovina 1998: Self-sustaining Structures, http://www.ohr.int/?p=54133

100 Annex 1-A, Agreement on the Military Aspects of the Peace Settlement in General Framework Agreement for Peace Bosnia and Herzegovina, Dayton 21 November 1995 https://www.icj-cij.org/files/case-related/91/13413.pdf

101 Rastan, "Can the ICC Function without State Compliance?," 14.

102 "The Responsibility to Enforce - Connecting Justice with Unity," 165-69.

103 "Can the ICC Function without State Compliance?," 16.

controlled by an armed group, or a breakaway administration, or when it is under belligerent occupation. Here, the state concerned might also be held to be unable to cooperate, due to the 'unavailability of its national judicial system'. However, it is not entirely clear whether this scenario is envisaged in article 57(3)(d),[104] which foresees the Pre-Trial Chamber, filling the vacuum left by the absence of any competent authority. In these cases, an authority, capable of giving the request effect, may exist, but not a legitimate one. Hence, the question, therefore, arises, whether and how the Court can address itself to such *de facto* authorities?

At the ICTY, this issue was resolved early on. Its rules were revised to define the term 'state', as 'a state member or non-member of the UN, or a self-proclaimed entity, *de facto* exercising governmental functions, whether recognized as a state or not'.[105] This enabled the Tribunal to assert that it had the competence to directly address the 'entity' level authorities of *Republika Srpska,* within the State of Bosnia and Herzegovina, for the production of records held by its Defence Ministry. [106]

According to the ICC, there is no such definition in its ICTY Statute and Rules. In the only case where the issue has arisen, the Prosecutor, arguing on the basis of article 57 and the Court's inherent powers, sought to have the ICC's arrest and surrender request served on a non-state militia, the *Abu-Bakr al-Siddiq Battalion*. It was believed, at the time to be holding Gaddafi in Zintan, Libya. The decision stated that:

> [t]he Prosecutor states that the Libyan State authorities confirmed their inability to execute the request for arrest and surrender of Mr. Gaddafi, as he remains beyond

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104 Rome Statute, article 57(3)(d) provides that:

Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

105 ICTY RPE, IT/32/Rev. 50, 8 January 2015, rule 2 provides that:

[S]tate: (i) A State Member or non-Member of the United Nations;
(ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or
(iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not.

106 *Prosecutor* v. *Radislav Krstic,* "Binding Order to the Republika Srpska for the Production of Documents", ICTY Pre-Trial Chamber I, 12 March 1999, Case No. IT-98-33-PT.

> the reach of the Libyan State […] Mr. Gaddafi is held "in Zintan in custody of the Abu-Bakr al-Siddiq Battalion (falling under the leadership of the Zintan Revolutionaries' Military Council), which is commanded by Mr. AL-'ATIRI" 11 and that Libya has not been in a position to secure Mr. Gaddafi's transfer from his place of detention under the custody of the Zintan militia into State authority.
>
> In light of this situation, the Prosecutor suggests that the Chamber rely on its powers under article 57(3)(a) and/or (d) of the Rome Statute (the "Statute") or its inherent powers to order the Registrar to transmit the request for arrest and surrender of Mr. Gaddafi to Mr. AL-'ATIRI, Commander of the Abu-Bakr al-Siddiq Battalion, the *de facto* local authorities in Zintan.[107]

In this case, the Pre-Trial Chamber I rejected the motion, holding that the Rome Statute comprehensively regulates the channel for the transmission of co-operation requests. It stated that while a state may designate more than one channel, or agree to for the Court to directly address a co-operation request to local authorities, 'the Court cannot but deal with the de jure government, and cannot direct its co-operation requests to any other non-state entity, claiming to represent the state'.[108]

This ruling seeks to secure access to, and assistance from, areas controlled by non-state actors, such as the *de facto* South Ossetian administered territory in Georgia, or the Taliban controlled areas of Afghanistan. The Court will have to determine whether it practically has the means and powers to address non-state actors. Part of the answer may lie in the Court's ability to secure the consent of the *de jure* authorities, for the channelling of certain requests to those *de facto* bodies, as anticipated in the Chamber's ruling. [109]

Because of this, if the ICC is unable to either (i) secure the consent of the *de jure* authorities to enable it to seek their co-operation with *de facto* authorities, or (ii) accept a broader interpretation of its own powers. The Court may be, in practice, unable to conduct investigations, or carry out activities on territory that is under hostile control, even when the *de facto* authorities concerned, agree to cooperate and permit it access.

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107 *Prosecutor* v. *Saif Al-Islam Gaddafi,* "Decision on the Prosecutor's 'Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami AL-'ATIRI, Commander of the Abu-Bakr Al Siddiq Battalion in Zintan, Libya'", ICC Pre-Trial Chamber I, 21 November 2016 ICC-01/11-01/11-634-Red), paras. 6-7.

108 Ibid., para. 15.

109 Ibid., paras. 15-16.

5.4.1.2 Inconsistent Co-operation with the ICC

According to the complementarity rules of the ICC, inconsistent co-operation mainly relates to the Court's Chambers and its organs such as the OTP or the Defence. However, in practice, other several actors are able to take part in the ICC complementarity system, in particular, the states in question. The analysis of the practices of the Court, in order to apply the principle of complementarity has faced challenging issues, with regard to the inconsistent approach of the states concerned.

In order to uphold the rule of law of the ICC, the co-operation between the Court and the states, in particular, state parties, is very important. In the operation of the ICC, the role of the state concerned in the complementarity system is a key feature to ensure success.

According to the principle of the rule of law, the role of promoting and establishing the rule of law is not only dependent on the Court and its functioning, but also depends on the role of the states concerned. The co-operation with the Court of the state concerned has become an important factor in order for the ICC to function successfully and predictably.

The practice of the ICC complementarity system shows inconsistent interaction of the state concerned and the ICC, in particular, the case of Côte d'Ivoire.

With regard to the *Situation in Côte d'Ivoire,* the interaction between Côte d'Ivoire and the ICC started in 2003, when President Laurent Gbagbo submitted a declaration accepting the ICC's jurisdiction. Later on, in December 2010, the newly elected President Alassane Ouattara confirmed the validity of the declaration, and asked the ICC to investigate crimes committed since March 2004, guaranteeing the country's commitment to fully cooperate with the Court.

The ICC subsequently issued three warrants of arrest for the former President Laurent Gbagbo, former First Lady Simone Gbagbo and a former Minister of the Gbagbo government, Charles Blé Goudé. In practice, the government of Côte d'Ivoire applied a different approach in its interaction with the ICC between the *Simone* case and the *Blé Goudé* case.

The warrant of arrest for Blé Goudé was issued on 21 December 2011, and unsealed on 30 September 2013. Later, on 22 March 2014, the government of Côte d'Ivoire surrendered Blé Goudé to the ICC and he is currently in the Court's custody.

The ICC held Blé Goudé's confirmation of charges hearing and confirmed the four charges of crimes against humanity: murder, rape, persecution and other inhumane acts, allegedly committed in the context of post-electoral violence in Côte d'Ivoire, between 16 December 2010 and 12 April 2011.[110]

The warrant of arrest for Simone was issued by the ICC. She is allegedly responsible for four counts of crimes against humanity: murder, rape and other sexual violence, persecution, and other inhumane acts. Meanwhile, the Côte d'Ivoire government filed an admissibility challenge, on the ground that it was being investigated and prosecuted by its domestic courts, as stipulated in article 17(1)(a). [111] Moreover, the country argued that the national proceedings were not undertaken with the purpose of shielding Simone from her criminal responsibility. In relation to the inability criterion, the country argued that even though the national judicial system had been affected by the post-electoral violence, there had been a substantial improvement since the crisis, and domestic courts and judicial institutions had reopened throughout the country.[112]

However, the Court subsequently concluded that the investigative activities undertaken by the national authorities were 'sparse and disparate.'[113] It, therefore, rejected Côte d'Ivoire's admissibility challenge, and ordered the immediate surrender of Simone.[114]

At the appeal proceedings, the Appeals Chamber rejected Côte d'Ivoire's appeal, and confirmed the Pre-Trial Chamber decision.[115]

In the same time, the Ivorian authorities convicted Simone on charges related to crimes, committed during the 2010-2011 post-election violence. Simone was sentenced to 20 years imprisonment for crimes against the state. And later, on 28

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110 *Prosecutor* v**.** *Charles Blé Goudé,* Decision on the confirmation of charges against Charles Blé Goudé, ICC Pre-Trial Chamber I, 12 December 2014, ICC-02/11-02/11-186 (*Blé Goudé* Admissibility Decision).

111 *Prosecutor* v**.** *Simone Gbagbo,* Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC Appeals Chamber, 27 May 2015, ICC-02/11-01/11/12 OA (*Simone* Admissibility Judgment).

112 Ibid., paras. 1-22.

113 Ibid., paras. 40-43.

114 *Prosecutor* v**.** *Simone Gbagbo,* Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC Pre-Trial Chamber I, 11 December 2014, ICC-02/11-01/11/12 (*Simone* Admissibility Decision), para. 65.

115 Ibid., paras. 79-80.

March 2017, the Ivorian court acquitted Simone of crimes against humanity, the same charges that she is currently facing at the ICC.

The *Simone* case is the only case that the government of Côte d'Ivoire challenged and did not provide fully co-operation. For the other two cases, the *Gbagbo* and the *Blé Goudé,* the government did not challenge and provided full co-operation with the Court.

In September 2013, the government filed Simone's admissibility challenge, arguing for a substantial improvement of the national judicial system and the ability to investigate and prosecute the case. Nevertheless, the following year, the government surrendered Blé Goudé to the Court and the assessment of national judicial system, that led to the filing of the admissibility challenge in the case of *Simone.* This was inconsistent with the surrendering of Blé Goudé to the Court in a few months later.

Furthermore, the Ivorian government challenged the admissibility of the *Simone* case, arguing for the ability and willingness to deal with the case domestically, while, at the same time, agreeing to surrender Blé Goudé, regardless of the ability and willingness of the state's authorities to deal this case at the national level.

This inconsistent approach in the practice of the Ivorian government may challenge the complementarity determination of the Court, when the country is willing and able to investigate and prosecute one case, and unwilling and unable to investigate and prosecute the other case. The inconsistent approach by the state in question, should be expected to provide the same result, and not lead to a contradictory assessment by the Ivorian judicial system.

5.4.2 The Lack of Inter-State cooperation

Inter-state cooperation is also linked to the complementarity concept. Effective complementarity requires not only the denying to impunity by criminalizing international crimes, but also the ability to effectively investigate or prosecute them. An essential element for effective investigation and successful prosecution of those committing international crimes is interstate co-operation.[116]

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116 Tladi, "Complementarity and Cooperation in International Criminal Justice: Assing Initiatives to Fill the Impunity Gap," 4.

According to the study of the practice of the ICC, at the preliminary examination stage in Chapter III, there are many examples where a lack of co-operation is an impediment to the investigation or prosecution. A good example is the lack of co-operation of the Georgian authorities to the Russian proceedings, with regard to the crimes committed in the *Situation in Georgia* (section 3.3.3.3) or the lack of co-operation between the US and the Polish authorities in relation to the criminal investigation into the crimes committed in the *Situation in Afghanistan* (section 3.3.3.5)

As mentioned in the previous section, the Rome Statute provides for state parties to cooperate fully with the Court in its investigation and prosecution of crimes, within the jurisdiction of the Court. The statute lists various forms of co-operation that a state is obligated to provide. Thus, the importance of co-operation for the Rome Statute, system is also reflected in the fact that all domestic legislation involving the Rome Statute, includes a robust co-operation regime.[117]

In this regard, the co-operation regime under the Rome Statute is only vertical in nature. This means that the state parties give precedence to their domestic system. In this sense, it only applies between the ICC and the state parties.

The Rome Statute does not, however, include a horizontal obligation for states to cooperate with one another, in the investigation or prosecution of international crimes. The only provision for inter-state cooperation relates in cases of competing requests, or, in other words, those cases where the ICC has made a request for co-operation from a state party, and, at the same time, another state, whether a party to the statute or not, has made a similar request.[118]

In practice, the national-level prosecution can benefit from inter-state cooperation, in particular, in cases where the state, where the investigation and prosecution are taking place, is not the place where the crimes occurred.[119]

With regard to the Rome Statute regime, the system is based on the principle of complementarity. The ICC plays its role, in order to complement national systems, in exercising criminal jurisdictions. Thus, inter-state cooperation would greatly

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117 ibid., 5.
118 Rome Statute, article 90.
119 Tladi, "Complementarity and Cooperation in International Criminal Justice: Assing Initiatives to Fill the Impunity Gap," 5.

increase a state's capacity to investigate international crimes and prosecute their perpetrators.

Therefore, it is clear there is a legal gap with respect to inter-state cooperation. This gap challenges the complementarity regime in order to ensure the effective national investigation and prosecution.

5.4.3 Analysis of the Challenge to Co-operation

According to the operations of the ICC, the Court had, increasingly, to operate in high-risk environments, characterized by unstable governance and conflict. It faces the prospect that it will not be able to secure co-operation from some, or all of the States, that would ordinarily be best placed to assist it.[120] In this situation, it is difficult to see how the ICC can simultaneously fill the gap left by states' unwillingness or inability, while, at the same time, requiring the co-operation of those same States to be effective.[121] Hence, the ability of the Court to cooperate with states, both parties and non-parties, is the key feature for ensuring the effectiveness of the ICC. However, in practice, such a situation is challenged when the Court fails to cooperate with those States. It appears that non-cooperation with the ICC would challenge the function of the principle of complementarity of the ICC. In particular, a significant number of cases have stalled, due to the lack of arrests, or as a result of proceedings being prematurely terminated, after confirmation of evidentiary inadequacies, coupled with findings of non-compliance, and/or witness interference.[122]

In order to ensure the effectiveness of the application of the principle of complementarity, the negotiated bilateral co-operation agreement should be drawn up to address all aspects of the Court's activities, but it is not limited to the following issues

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120 Rastan, "Can the ICC Function without State Compliance?," 8.

121 See for example Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 229-31.; Robert Cryer, "Darfur: Complementarity as the Drafters Intended?," in *The International Criminal Court and Complementarity: From Theory to Practice -Volume 2*, ed. Carsten Stahn and Mohamed M. El Zeidy (Cambridge: Cambridge University Press, 2011), 1118.; Marlies Glasius, "A Problem, Not a Solution: Complementarity in the Central Africa Republic and Demicratic Republic of the Congo," ibid., 1218-20.

122 Rastan, "Can the ICC Function without State Compliance?," 5.

- Exchanging of knowledge, expertise, and good practices, and related initiatives both at the ICC, and at the national level, concerning the operation of the complementarity system, and strengthening the capacity of domestic jurisdiction and judicial assistance;
- Exchanging of information between the Court, state parties and other stakeholders, including international organisations and civil society, aimed at strengthening domestic jurisdiction and practices, on strategic and sustainable efforts to strengthen national capacity to investigate and prosecute Rome Statute crimes. This means the strengthening of access to justice for victims of such crimes, including giving international development assistance;
- Encouraging inter-state cooperation regarding the strengthening national capacity to investigate and prosecute Rome Statute crimes; including engaging international, regional and national actors in the justice field, as well as civil society, in exchange of information.

5.5 CHAPTER CONCLUSIONS

According to the practices of the ICC during 2002 – 2018, the Court has faced, or continued to face, several challenges to the application of the principle of complementarity.

The practice of the ICC reflects the inconsistency of the application of the principle of complementarity. In order to promote the rule of law, the operation of the Court should be consistent and predictable. Thus, this inconsistent application of the principle of complementarity challenges not only the effectiveness of the principle itself, but also the credibility and legitimacy of the entire Court system.

The challenge to the application of the principle of complementarity appears as the interpretation of the existence of national proceedings, under article 17 of the Rome Statute. The emergence of new forms of alternative justice mechanisms challenges the Court's considerations, to apply these new forms of national justice as the proceedings in the ambit of article 17. In line with the dissenting opinion of Judge Ušacka in the *Gaddafi* case, the ICC has to develop the scope of the criteria of the proceedings at the national level, to deal with future cases coming before the Court.

This is in order to determine the genuineness of new forms of national justice mechanisms.

In addition, the proceedings at the national level, carried out by other entities other than the state such as the proceedings of NSAGs in the *Werfalli* case, may not fulfil the criteria of ongoing proceedings, under article 17 (1)(a), and the past proceedings under article 17(1)(b). However, it challenges the complementarity determination of the Court that these kinds of proceedings may fulfil the criteria, under the principle of *ne bis in idem,* under article 17(1)(c), which renders the case inadmissible before the Court.

Importantly, the question of overzealousness regarding the unwillingness and inability requirements, also challenge the application of the principle of complementarity of the Court. The overzealousness or all too willing prosecutions of the sates concerned, also challenge the effectiveness of the complementarity determination of the Court, in particular in the case of the crime of aggression.

One last challenge to the application of the principle of complementarity is the challenge of co-operation with the ICC. Even if the all state parties were obligated to cooperate with the ICC, in order to obtain their consent, the non-state parties would have to be bound by such obligations in the Security Council referred situation. this is mainly based on consent, being member states of the UN. However, in actual practice, the issue of non-co-operation still remains, in particular, the inability or unwillingness to cooperate; and the absence of competent authorities.

As a result, to deal with these challenges, the ICC should take measures to ensure the effectiveness of the application of the principle of complementarity.

CHAPTER VI CONCLUDING REMARKS

Since 1998 when the ICC, the first permanent international criminal institution, was established at the Rome Conference, the context of international criminal justice has been changing dramatically. The ICC is deemed to be complementary to national criminal jurisdictions. This complementarity system was conceived, and has regulated the interplay between the two autonomous systems of international and national mechanisms, by harmonizing national sovereignty and the interests of the international community, to pursue the ultimate goal of the international criminal justice. This is intended to put an end to impunity for the most serious crimes of international law.

In the same time, according to the Declaration on the rule of law at national and international levels, the ICC, as an international adjudicative mechanism, has a mandate to promote and establish the rule of law though its functioning. As a result, the work of the ICC should be fair, stable and predictable. The rule of law principle must be ensured throughout the operation of the entire ICC system. In this regard, the application of the principle of complementarity by the Court must be conducted consistently, in order to accord predictability and legitimacy to its operation.

The principle of complementarity lies at the heart of the entire ICC system. The principle is reflected, in the Rome Statute, as the criteria for admissibility, set forth in article 17. This allows the ICC to determine if a case is inadmissible, or if the domestic court is willing or able genuinely to carry out the investigation or prosecution. The principle itself is not a static, but an evolving concept. In order to ensure the maintenance of international criminal justice, the application of this principle relates to the dynamism of the facts, on a case-by-case basis, which is liable to changes in circumstances. Thus, the principle of complementarity should be applied dynamically. In addition, to ensure the respect for, and promotion of the rule of law, the dynamic approach employed by the ICC should be consistent, in order to accord the predictability and legitimacy of the operation of the principle of complementarity.

The main thrust of this dissertation is to analysis the application of the principle of complementarity by the ICC, during 2002-2018. In this regard, the practice of the Court concerning the complementarity determinations, at both the preliminary examination stage, and the admissibility stage, was taken into consideration.

The results of the study show that the Court adopted a dynamic approach in order to determine complementarity criteria in each situation, and in any case before the Court both at the preliminary examination stage and the admissibility stage of the ICC proceedings.

The dynamic application of the principle of complementarity introduced a number of concepts as well as ideas, with regard complementarity in practice. A number of concepts have emerged, which have been applied and developed through the jurisprudence of the Court. For example, the application of complementarity in the scenario of inactivity, which refers to the absence of national proceedings of the states concerned. This includes the assessment of the same-case test in the context of an activity scenario, a concept of a potential case, and the determination of unwillingness of the state concerned, or inability of its national justice system.

6.1 DEFINING THE SCHEME OF THE PRINCIPLE OF COMPLEMENTARITY

Theoretically, the concept of complementarity emphasizes all state parties exercise their jurisdiction to investigate or prosecute crimes under the jurisdiction of the Court, and the ICC plays its role as a court of last resort. Accordingly, the Court refrains from exercising its authority over criminal acts, falling within the scope of its jurisdiction. Therefore, the first priority of the prosecution belongs to domestic courts. The exercise of jurisdiction of the ICC is the last resort, which affirms that a case is inadmissible before the ICC, only if the national proceedings have been launched for the purpose of shielding the accused from accountability or are otherwise a sham.

The principle is generally acknowledged as the heart of the entire ICC system; however, there is no explicit definition of the term ‘complementarity’ in the Rome Statute; however, the concept of complementarity is revealed, according to the criteria for admissibility, set forth in article 17 of the Rome Statute. This allows the ICC to determine that a case is inadmissible if the domestic court is willing or able to

genuinely carry out the investigation or prosecution. Moreover, the concept of complementarity is also reflected in the procedural mechanism of the ICC, concerning the triggering mechanism and the admissibility proceedings. However, the test of complementarity relates to the process and the facts are dynamic, which means that possible changes in circumstance can occur. Thus, the application of the principle of complementarity should be a dynamic application.

The analysis of legal provisions under Chapter II of this dissertation showed that the lack of the clear definition of complementarity, and limited provisions, with regard to the operation of the principle of complementarity, still left some unanswered questions regarding the application of the principle of complementarity. Some of its provisions are, in fact, quite ambiguous, in particular, definitions and content of such a principle. Consequently, in practices of the ICC, the application of the principle of complementarity, in the determining of whether the state fails to take any action to render justice, in which the ICC has to assess the issues of unwillingness and inability to act has become a controversial issue. Because of this, the principle of complementarity has not yet reached its full potential. It has been commented by scholars that complementarity still has a different meaning to different audiences. Hence, the different points of view from various angles influence the application of the principle of complementarity, which may lead to ambiguous conclusions.

6.2 Reunifying the Dynamic Application of the Principle of Complementarity

According to article 17 of the Rome Statute, the complementarity maxim is the unwillingness or inability to carry out the investigation or prosecution by the domestic court. Therefore, the primary issue, in the context of admissibility proceedings, is the existence of any investigation or prosecution at the national level. A case would be admissible only if the state fails to try, being either unwilling or unable to do so. In the *Lubanga* case, the Pre-Trial Chamber I interpreted and affirmed that the case would be admissible, even if inactivity existed in relation to such case.

According to the complementarity principle, any action taken by national authorities of a state in any case at the national level, is related to ‘unwillingness’ or ‘inability’, and this has become the central and indispensable requirements for

admissibility. In the *Katanga and Chui* case, the Appeals Chamber adopted the dynamic approach by interpreting admissibility as a 'two-prong test', based on the distinction between inaction and domestic action (the proceedings requirement). In this regard, the Court has a primary consideration of whether there is inaction on the part of State in question and the second criterion is based on unwillingness and inability (the unwillingness or inability requirement).

In the case of the absence of any acting State, in the *Lubanga* case, the *Katanga and Chui* case, and the *Abu Garda* case, the Chambers adopted a dynamic approach by holding that only when the proceedings requirement was fulfilled then would the unwilling or unable requirements be examined. Regarding this, if the proceedings requirement was not fulfilled, then the case was admissible, regardless of the analysis of the unwilling or unable requirement.

In addition, the *Katanga and Chui* case also put forward the concept of 'inactivity', that inactivity is the second form of unwillingness, which is the implicit one, aiming at bringing the accused to justice before the ICC. The inaction of the s which has jurisdiction is also motivated by the desire to obstruct the course of justice, which may result in impunity for the perpetrators of international crimes.

In addition, the ICC also developed a same-cast test and sets a high threshold for inadmissibility. The notion of 'sameness' had been invented through the *Lubanga* case and the *Al Kushayb,* namely case that the domestic case must concern not only the same conduct and person but also the same incident for it to be the same case. Additionally, for assessing the admissibility of a case, the potentiality of the case should be a criterion for the assessment.

With regard to the unwillingness or inability requirement, in the *Gaddafi* case and the *Al-Senussi* case, the examination of this requirement took place, determine the lack of legal representation during the investigation stage before the national proceedings. This was done by stating that the violation of the right to a fair trial of the accused at domestic courts did not reach the high threshold for fulfilling the unwilling or unable requirement. Nevertheless, all related circumstances must be taken into consideration by the Court.

6.3 COMPLEMENTARITY CHALLENGING

To achieve the purposes of both two pillars of the ICC, justice and the rule of law, the operation of the ICC must ensure that there is the respect for and the promotion of the rule of law throughout all its activities, including the application of the principle of complementarity during its proceedings. This means that the complementarity determination must be conducted consistently, in order to give it predictability and legitimacy.

According to the practice of the ICC, the Court employed the consistent approach, in order to determine the criteria of complementarity. However, there were some inconsistent approaches adopted in the admissibility decisions in the *Gaddafi* case and the *Al-Senussi* case. The analysis pointed out the inconsistencies affecting the two cases, concerning the question of the lack of legal representation. In addition, in the *Gaddafi* case, the inconsistency of the concept of the two-prong test, was adopted in order to assess the unwillingness or inability requirement.

According to the practices of the ICC, the Court has to spell out in practice many aspects of complementarity, left undefined by the Rome Statute. This task of the Court can only be performed through elaborating a coherent approach to similar issues. Failing to do so leaves several unanswered key questions concerning the application of the principle of complementarity and undermines the predictability of the proceedings, at both the preliminary examination stage and the admissibility stage. These days, the ICC is already being targeted by several accusations related to it being excessively politically influenced, by bodies such as the Security Council. Acting inconsistently in similar situations entails another risk for the Court, that of attracting fresh criticism, regarding the credibility and legitimacy of the entire ICC system.

According to this, to achieve the ultimate purposes of justice and the rule of law, the ICC must avoid unjustified departures from its previous jurisprudence, when cases present similar circumstances, as occurred with the *Gaddafi* case and the *Al-Senussi* case in their admissibility decisions. The operation of the ICC must be concerned with the consistency of its activities. In this regard, the application of complementarity, the dynamic approach must be adopted for the assessment of the principle of complementarity. Moreover, the complementarity determination must be

conducted consistently, in order to ensure the predictability and legitimacy of the entire Court system.

6.4 Measures to Ensure the Effectiveness of the Application of the principle of Complementarity

The study of the application of the principle of complementarity shows that most of the cases before the ICC faced the problem of inactivity, which concerns the initial question of whether there are national proceedings, to bring the perpetrators of international crimes to justice at the national level. The findings of the study show that, in most of the situations and cases before the ICC, there were no proceedings against those responsible for international crimes, listed under the Rome Statute. This was true at the national level, and also for the domestic courts of state concerned, and of the third states.

With regard to national proceedings, the Rome Statute affirms that the most serious crimes of concern to the international community as a whole, must not go unpunished and the effective prosecution must be ensured, by taking measures at the national level, and by enhancing international co-operation. It calls upon every State to exercise its criminal jurisdiction over those responsible for international crimes. In addition, the Declaration on the Rule of Law also reaffirms, by means of strengthening national judicial systems and institutions, and stressing the importance of stronger international co-operation. To achieve the existence and the effectiveness of national proceedings, in particular, in dealing with the same crimes, as before the ICC, appropriate measures need to be adopted at the national level, and international co-operation and judicial assistance need to be strengthened. This should ensure that national legal systems are willing and able genuinely to carry out investigations and prosecutions of such crimes, as follows:

- Legal measures:
    - To enhance the capacity of domestic courts as the appropriate forum for the prosecution of the most serious crimes of international concern, the states should implement the Rome Statute, in accordance with internationally recognized fair trial standards.

- To ensure effective enforcement of domestic criminal law, in order to investigate and prosecute ICC crimes, states must incorporate the crimes set out by the Rome Statute, as punishable offences under their domestic laws.
- Overzealous national court prosecutions are inconsistent with a genuine determination to bring the person concerned to justice. The 'all too willing' to investigate or prosecute may be determined that the proceedings are not being conducted independently or impartially. Therefore, the complementarity provision of the Rome Statute, in particular, articles 17, and 20, should be amended to address the overzealous national court prosecutions, that are 'all too willing' to prosecute in the complementarity system.

- Co-operation measures:
  - To engage in strengthening the capacity of domestic jurisdictions, the inter-state cooperation, either bilaterally or multilaterally, should be promoted to enable states to genuinely prosecute Rome Statute crimes.
  - To strengthen national jurisdictions, with regard to investigating and prosecuting crimes under the jurisdiction of the ICC, into existing and new technical assistance programmes and instruments. This would strongly encourage further efforts, foster co-operation with the UN, international and regional organizations, States and civil society in stressing capacity-building activities should be implemented.
  - To ensure access to justice and to enhance empowerment of victims at national level. The co-operation with the Court, inter-state cooperation, including engaging international, regional and national actors in the judicial sector, as well as civil society should be enhanced, in order to, encourage the exchange of information and to foster practices on strategic and sustainable efforts to strengthen the national capacity to investigate and prosecute ICC crimes, and the strengthening of access to justice for victims of such crimes, including through international development assistance.

In conclusion, the principle of complementarity is not rigid, but flexible, Therefore, the application of this principle should be dynamic, to serve the purpose of the principle, enshrined by the provisions of the Rome Statute, and in the Declaration of the rule of law. However, the inconsistency in the application of the principle of complementarity, does not only weaken the rule of law of the Court, but also the credibility and legitimacy of the entire Court system. In this regard, a consistent approach employed by the Court should be taken into consideration as a criterion of the dynamic application of the principle of complementarity.

However, to avoid deadlock in the ICC complementarity system, co-operation with the ICC, bilaterally or multilaterally, to ensure the investigation or prosecution of international crimes, would undoubtedly contribute to the success of the application of complementarity, and the effectiveness of the operation of the ICC.

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