

INTERNATIONAL CRIMINAL COURT

COMPLEMENTARITY

Introduction

1. The term has been coined, based on the language of the preamble to the draft Statute of the International Law Commission, to reflect an aspect of the relationship between the International Criminal Court (ICC) and national authorities, including courts.
2. The intention is that all proper decisions by national authorities in connection with matters of interest to the ICC should be respected by the ICC and that no action should be taken by it in such cases. This principle applies not only to national decisions to prosecute or not to prosecute, and to court decisions of acquittal or conviction, but also to decisions by national authorities to seek assistance, including extradition, from another State and decisions by such another State to cooperate accordingly, particularly where that State is under an international obligation to do so.
3. It will be apparent that complementarity is, therefore, a constant in the arrangements for the ICC and needs to be taken into account at each point at which the respective roles of the ICC and national authorities can or do coincide. This paper considers various of the provisions in the draft ILC Statute in respect of which complementarity is relevant and suggests amendments designed to show how full and explicit provision about this issue might be made. There was widespread agreement about the importance of the complementarity principle expressed in last year's working group meetings and in the Sixth Committee in November 1995.

4. In recognition of this, this paper begins by considering the existing provisions in the draft ILC statute (paragraphs 5 - 20 below), considers a declaratory provision for addition to the statute (paragraphs 21 and 22 below) and identifies other options for giving effect to the complementarity principle in the statute (paragraphs 23 to 38 below). The way forward is for discussion.

The ILC draft statute

5. The ILC draft statute makes explicit provisions about complementarity in the Preamble and in article 35.

Preambular reference

6. The ILC draft reads,

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

7. The reference to trial procedures not being available or effective is not adequate. It does not clearly cover national investigations. In other respects it is unclear what "available" and "effective" mean. There is scope for uncertainty and dispute.

8. It does not clearly cover international co-operation.

9. It seems unlikely that the principle would be regarded as having been adequately dealt with if there is only a preambular reference. Nevertheless the text might be replaced, as follows:

"... Emphasising further that such a court is intended to be complementary to national criminal justice systems".

Article 35

10. Article 35 deals with the admissibility of a case before the court. A number of issues arise from the ILC draft.

11. The three grounds of admissibility in draft article 35 are to be approached by the court having regard to the complementarity principle in the preamble and the reference there to seriousness. The grounds are:

- (a) that the case has been investigated by a state with jurisdiction over it and a decision not to proceed with a prosecution is well founded;
- (b) that there is an ongoing national investigation taking place and there is no reason for the court to take action for the time being; and
- (c) the case is not of sufficient gravity to justify court action.

UK attitude to article 35 in 1995

12. The UK suggested during the April 1995 working group meeting that the emphasis in (a) and (b) should be reversed so that when the case is or has been the subject of national procedures the court has no role unless national decisions are inadequate. This would give proper recognition to the priority of national procedures whilst leaving the court free to proceed with cases where any national procedures were or are a sham.

13. The present text of article 35 can also be criticised because the grounds themselves are narrow. Paragraph (a) is confined to investigations which did not lead to prosecution. In addition, proper national decisions to discontinue the proceedings, acquit, convict of a lesser offence, sentence and pardon should be respected and the court's role ousted.

14. The UK has also argued that the ICC prosecutor should have a discretion to refuse to prosecute even though a prima facie case against an accused has been established and that the court should not be obliged to go ahead with every case over which it has jurisdiction, or which is not inadmissible, just because there is a prima facie case. These considerations belong to an examination of the powers of the prosecutor and the court generally rather than relating to complementarity, though they are worth recalling at this point.

15. The UK's other suggestion on article 35 was that other grounds of inadmissibility already in the draft ILC statute should be reflected in article 35, notably articles 42 and 55. It should be possible to make a challenge based on either provision at the start of the trial. However, an individual's and a state's ability to do so is limited under ILC draft article 35 to before the commencement of the trial. This needs to be adjusted. Although it would be possible for national procedures to be begun after a trial before the ICC has begun, it is suggested that no admissibility challenge based on national investigations should be possible after the start of the trial. Such a challenge could be brought at the start of trial. It is suggested that there should have been consultation between the prosecutor and the state before the prosecutor began his investigation. It would perhaps be an unusual case in which proper national decisions to investigate/prosecute were delayed beyond the start of a trial before the ICC.

Revised article 35

16. A revised draft article 35 which takes account of these points follows below.

(1) A case is inadmissible before the court if -

(a) matters which include or comprise those in respect of which the complaint has been made are being investigated by a state with jurisdiction over them, unless the Court is satisfied that, in all the circumstances

(i) there has been and continues to be unconscionable delay in the conduct of the investigation, or

(ii) the investigation was instituted, or has been and is being conducted, in a way which clearly indicates an absence of good faith;

(b) proceedings relating to any matter which includes or comprises those matters in respect of which the complaint has been made are pending before any court in a state with jurisdiction over any such matter or an extradition request or request for

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international co-operation made by such a state is under consideration in another state unless the Court is satisfied that, in all the circumstances

(i) there has been and continues to be unconscionable delay in the conduct of the proceedings or the consideration of the request, or

(ii) the proceedings were instituted or are being conducted, or the request is being considered, in a way which clearly indicates an absence of good faith;

(c) the matters in respect of which the complaint is made have been investigated by a state with jurisdiction over them and that state has decided not to prosecute the accused or to prosecute him for an offence which is not an offence listed in article 20, a prosecution there has been discontinued or the accused has been acquitted, pardoned or convicted, unless the Court is satisfied that, in all the circumstances

(i) the national decision was not made in good faith, or

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(ii) where the accused was convicted of an offence other than one listed in article 20, or was acquitted of or pardoned in respect of any offence, the proceedings were not instituted, or the prosecution conducted, in good faith;

(d) the accused is not liable to be prosecuted before or punished by the court under article 55 of this statute; or

(e) the matters of which complaint has been made were not of exceptional gravity such as to justify further action by the court.

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(2) An application by the accused or a request by a state to the court to declare a case inadmissible under paragraph (1) may be made at any time before or at the commencement of the trial.

(3) The court may at any time and of its own motion declare a case inadmissible under paragraph (1) of this article.

17. Under paragraph (2), any state may seek to have a case declared inadmissible.

Implications for article 42

18. A revised draft article 35 along the lines above would have consequences for article 42. Article 42(1) and (3) would stand (though article 42(3) might be better in article 46(2)) but article 42(2) should be omitted. This paragraph is unsatisfactory in a number of respects, for example, in subparagraph (a) it is not clear what an "ordinary crime" is. Insofar as ordinary crime is a crime under national law, the assumption that it is an inadequate response to a complaint is unjustified. A national offence of murder would, for example, be just as serious as murder contrary to the Geneva Conventions. No account seems to be taken in the subparagraph of the circumstances in which a national decision is taken with the result that perfectly legitimate national decisions need not be respected so that an accused could be at risk of further proceedings. Subparagraph (b) goes wider than is desirable in allowing consideration to be given to an aspect of the fairness of national proceedings (the rights of the accused) which go wider than the objective of the article.

Implications for article 55

19. Article 55 would not require amendment only on account of the above revision to article 35.

Implications for article 36

20. An interested state for purposes of article 35(2), as revised, should have the right under paragraph (1) to be heard, as well as the accused and the complainant state.

New Provision

Declaratory Provision

Article 1

21. Draft article 1 provides:

"There is established an international criminal court ("the Court") whose jurisdiction and functioning shall be governed by the provisions of this Statute".

22. It is apparent by reason of the reference in article 1 to the Statute how important it is to consider adjustments to provisions in the statute dealing with the court's jurisdiction and how it is to function in order to reflect fully the complementarity principle. In addition, article 1 itself could be amended to include a reference to the principle, as follows:

"There is established an International Criminal Court ("the Court") which shall be complementary to national criminal justice systems. Its jurisdiction and functions shall be governed by the provisions of this Statute."

Article 4

23. Article 4(1) reads,

"The Court is a permanent institution open to States parties in accordance with this Statute. It shall act when required to consider a case submitted to it".

24. To reinforce the limitation on the court's jurisdiction and powers, one might add at the beginning of the second sentence of paragraph 1, "In accordance with the provisions of this Statute".

Article 26

25. Article 26(1) reads,

"On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for

a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency".

26. It is suggested that, whatever else might be done to this article, "under article 25" should be included after "complaint" in paragraph 1.

27. At present there is explicit provision to preclude an investigation being undertaken into a complaint which has been received or a matter referred by the Security Council only where the prosecutor concludes that there is no basis for a prosecution and he decides not to initiate an investigation. One option would be to supplement the circumstances in which no investigation or prosecution is to take place so as to reflect in article 26 something of what appears in revised article 35 so precluding an investigation by the prosecutor into a complaint where an investigation etc is being or has been conducted in good faith by a competent national authority. This would make absolutely clear the limitation on the prosecutor's power to act. On the other hand there is little doubt that any such provision would be complex.

28. Draft article 26(4) at present requires the prosecutor to have regard to article 35 in concluding whether there is a sufficient basis for a prosecution. It would appear that "sufficient basis" means not only whether there is sufficient evidence on which to proceed but whether the case is admissible. Partly to confirm that understanding and partly to bring article 26(4) into line with changes to article 27 suggested below,

a small change to article 26(4) would be desirable. The result should be that the prosecutor would at the start make appropriate enquiries to establish if an investigation was or proceedings were under way in a state and, on learning then or later that to be so, that he would cease his own investigation. In those circumstances, no more fundamental change to article 26 is suggested.

29. Revised article 26(4) would read,

"If the prosecutor concludes that a case is inadmissible under article 35 or that there is no sufficient basis for a prosecution or that a prosecution would not be in the interests of justice, and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the matters and basis of the complaint and of the reasons for not filing an indictment."

30. The reference to "in the interests of justice" is intended to reflect a wide discretion on the part of the prosecutor to decide not to investigate comparable to that in (some) domestic systems, eg if the suspected offender was very old or very ill or if, otherwise, there were good reasons to conclude that a prosecution would be counter-productive. (The same point arises in revised article 27, see paragraph 32 below.)

Article 27

31. Although it is contemplated in the Commentary to article 27 that the Prosecutor or Presidency should have regard to article 35 in deciding respectively to file and to confirm an indictment, this is not spelt out in the article as it is, in the case of the Prosecutor's decision to prosecute, in article 26(4).

32. Article 27 might be amended to read,

*(1) If upon investigation the Prosecutor concludes that the case is admissible, that there is a prima facie case which the accused could be called on to answer and that it is desirable in the interests of justice that the case should proceed, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

(2) The Presidency shall examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court;

Article 52

34. No explicit obligation is imposed on a state under article 52 but the action which the court is able to take would be dependent upon revised article 35 as above. No change seems necessary.

Article 53

35. This imposes an obligation, under paragraph (2)(a) (certain genocide complaints) on a state party to arrest and transfer an accused person to the court. If the person was to be the subject of an extradition request from another state party in respect of the same matter, revised article 35 would apply. The case would be inadmissible.

36. Paragraph (2)(b) of article 53 does not give rise to a complementarity issue.

37. Paragraph 2(c) concerns all other cases. It leaves states free to decide how to proceed in relation to possibly competing extradition obligations and in itself is satisfactory. Paragraph (4), however, makes clear that priority should as far as possible be given to ICC requests. Paragraph (4) is of concern and should be omitted.

- (b) whether, having regard, inter alia, to the matters referred to in article 35, the case should on the information available be heard by the Court; and
- (c) whether it is desirable in the interests of justice that the case should proceed.

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9."

Article 51

33. This imposes an obligation on states to co-operate with the court in connection with its investigations and proceedings. However the Court should not be investigating a case or otherwise seeking a state's assistance if the case is inadmissible under article 35. It is for consideration whether to reflect this in article 51(1) which might read,

"States Parties shall, in a case which is not inadmissible under article 35, co-operate with the Court in connection with criminal investigations and proceedings under this Statute."

38. Article 53(5) makes provision for the case where the court's request concerns a person being dealt with for another crime. Revised article 35 will secure that article 53(5) will have the effect that this provision only applies to serious crimes unconnected to the matters being dealt with by the court or to national decisions about ICC crimes taken in bad faith. Presumably article 53(5) is, in such circumstances, satisfactory.

39. Paragraphs 33 to 38 above have considered these articles only in the context of the complementarity issue. Such limited consideration should not be interpreted as indicating that the United Kingdom is otherwise content with this part of the draft ILC Statute.