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3

Complementarity: Contest or Collaboration?

Rod Rastan*

3.1. Introduction

Complementarity under the Rome Statute can be understood in two ways: as an admissibility principle governing case allocation between competing jurisdictions, and as a burden sharing principle for the consensual distribution of caseloads. Complementarity as admissibility posits the relationship between the ICC and States as a contest, leading one forum to exercise jurisdiction to the exclusion of the other. This is because the framework is case-specific: two forums cannot try the same case at once.

Complementarity as burden-sharing embraces a broader system-wide approach that promotes the concurrent assumption of jurisdiction by different forums. This is complementarity set against the problem of mass criminality, where the fear is not that the same person will be tried twice, but that the many will not be tried at all. It seeks to address the impunity gap created as a consequence of insufficient judicial coverage.

If admissibility focuses internally on the cases before the ICC, burden-sharing looks outward towards effecting universal compliance. Thus, predictably, the answer to the question, much like Niels Bohr's description of quantum phenomena, is both things at once, depending on the perspective adopted.[1] Both dimensions are necessary: limiting com-

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1 On Niels Bohr and the origin of the term 'complementarity' to describe the paradox of particle-wave duality in the field of quantum mechanics see Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Martinus Nijhoff, 2008, 1-5. On the twin aspects of complementarity see generally Carsten Stahn, "Complementarity: A Tale of Two Notions", *Crim.L.F.*, 2008, vol. 19, 87-113; El Zeidy, *op. cit.*, 298-306; William Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", *Harv. Int'l L.J.*, 2008, vol. 49, 53-108.

plementarity to a contest paradigm will prevent the realisation of the statutory goal to put an end to impunity and thereby contribute to the prevention of crimes.

This chapter provides an overview of complementarity as informed by the Court's judicial pronouncements and prosecutorial policies, examining how models of contests and collaboration interact. This is intended to serve as an introduction to the examination by other contributors to this volume of the 'horizontal' application of complementarity to guide the relationship between national criminal jurisdictions.

3.2. Complementarity as Contest

As an admissibility principle, complementarity forms part of the statutory scheme foreseen in article 17 for determining whether a particular case should be heard before the Court.[2] For this purpose, complementarity assumes the existence of an interested State or States with a competing claim to jurisdiction with the Court.[3] The assessment of complementarity as admissibility is designed to answer the question of who should exercise jurisdiction where two or more forums are seized of a case. As Pre-Trial Chamber II has observed "admissibility is the criterion allowing the Court to identify which cases, among those in respect of which it has jurisdiction concurrently with one or more national judicial systems, it is appropriate for it to investigate and prosecute under the complementarity

[2] The ICC Appeals Chamber has characterized the Statute's admissibility as "referable in the first place to complementarity (article 17(1)(a) to (b)), in the second to *ne bis in idem* (articles 17(1)(c), 20) and thirdly to the gravity of the offence (article 17(1)(d))"; *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–01/04–01/06-772, 14 December 2006, para. 23. Strictly speaking, the first three limbs of article 17(1) collectively embrace complementarity, since all three scenarios are set against the Court's powers to determine the genuineness of national proceeding *vis-à-vis* the case brought before the ICC, namely: cases that are subject to ongoing investigations or prosecutions (sub-paragraph (a)); cases that have been investigated, but not a decision has been taken not to prosecute (sub-paragraph (b)); and cases where prosecution has been completed (sub-paragraph (c)). Although *ne bis in idem* is referenced in 17(1)(c), it is dealt with proper under article 20.

[3] Jeffrey Bleich, "Complementarity", *Nouvelles Études Pénales*, 1997, vol. 13, 231. A ruling on admissibility may be prompted by a State with jurisdiction, an accused person, the Prosecutor or the Court on its own initiative; Article 19, ICC Statute.

regime".[4] According to the Statute, the rule by which such conflicts of jurisdictions are to be resolved is that the Court should declare a case before itself inadmissible in deference to genuine domestic proceedings in relation to that same case.[5] Accordingly, a case before the ICC may proceed in one of two circumstances: (i) where there is an absence of relevant domestic proceedings, or (ii) where such domestic proceedings are vitiated by an inability or unwillingness to conduct them genuinely.[6] The preference for genuine domestic proceedings applies irrespective of how a situation is brought before the Court, whether by the Prosecutor acting *proprio motu*, by a State or by the Security Council.[7] It coincides with the preamble affirmation "*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[8] At the same time, it is the Court that is vested with exclusive

4 *Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para. 46.

5 The term "genuine" was considered during negotiations of the Statute as the least subjective from a series of options including 'diligently', 'good faith', 'effectively' and 'sufficient grounds'; John Holmes, "The Principle of Complementarity", in Roy Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results*, Springer, 1999, 49.

6 As confirmed by the Appeals Chamber, "in 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. Accordingly, an absence of relevant domestic proceedings will render a case before the ICC admissible, subject to an assessment of gravity; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 78; Darryl Robinson, "The Mysterious Mysteriousness of Complementarity", *Criminal Law Forum*, 2010, vol. 21, 67-102.

7 The referral of a situation by the Security Council does not alter the basic framework of the complementarity regime. The only exemption under is the non-applicability of article 18. Thus, the Security Council cannot circumvent the complementarity thresholds of article 17, *e.g.*, by declaring that a State is unwilling or unable to genuinely investigate or prosecute: such a finding would be merely indicative and could not bind the ICC.

8 Preamble, para. 6, ICC Statute.

authority to rule on the question of forum allocation.[9] This assessment is ongoing: made on the basis of the underlying facts as they exist at the time,[10] and potentially subject to revision based on any change to those facts.[11]

As required by articles 15 and 53(1), complementarity must also be assessed at the stage before an investigation is launched in order to ensure the efficient allocation of judicial resources and to pre-emptively avoid future challenges.[12] Because at this stage a case will not yet have been formed in the sense of specific incidents, crimes and identified suspects, the assessment is predictive. Hence, the Office of the Prosecutor must at this stage consider the potential cases that would likely arise from an investigation into the situation, which can for example be construed in the light of its stated prosecutorial strategy of focusing on those who appear to bear the greatest responsibility for the most serious crimes.[13] PTC II in authorising the Prosecutor's *proprio motu* investigation into the Situation in the Republic of Kenya thus framed the parameters of such potential cases 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)".[14] The same considerations apply for the assessment of gravity at this stage.[15]

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9 *Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 45, 51.

10 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 56.

11 *Ibid*; *Prosecutor v. Kony et al.*, Judgment on Admissibility Appeal by Ad-Hoc Defence, ICC-02/04-01/05-408 OA3, 16 September 2009, para. 85. See also article 19(4)-(5) and 19(10), ICC Statute.

12 Articles 15 and 53(1), ICC Statute, Rule 48, ICC RPE. See also article 18.

13 *Prosecutorial Strategy 2009-2012* (ICC-OTP 2010).

14 *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, Case No. ICC-01/09-19, 31 March 2010, paras. 50 and 183.

15 *Ibid*, para.188.

The ICC complementarity regime is often contrasted with that of the ICTY and ICTR with the assertion that the principle of primacy exemplified by the *ad hoc* Tribunals has been reversed.[16] However, this confuses the issue of admissibility with that of primacy. Under the Rome Statute, while States retain *primary responsibility* for the investigation and prosecution of core crimes, once a case has been found admissible before the Court it is the ICC that has primacy over any concurrent domestic proceedings with respect to the same case. Had the Rome Statute created the reverse of the *ad hoc* Tribunals domestic primacy would have resulted in national judges entering determinative decisions on forum allocation, with the power to overrule a contrary finding of the ICC. Instead, the Rome Statute establishes the competence of the ICC judges to review the *bone fides* of national proceedings and, moreover, empowers the Court to recall cases previously deferred where it deems this appropriate.[17] Thus, while complementarity reflects the *primary*

[16] The ICC Appeals Chamber, *e.g.*, has referred to "the primacy of domestic proceedings vis-à-vis the International Criminal Court"; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 85. See also Mireille Delmas-Marty, "The ICC and the Interaction of International and National Legal Systems", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, 2002, 1916; Bartram Brown, "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals", *Yale Journal Int'l L*, 1998, vol. 23, 386; Mohamed El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", *Mich. J. Int'l L.*, 2002, vol. 23, 887-889; Stahn, see *supra* note 1, p. 91 and pp. 94-96. Compare Federica Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court", *Leiden Journal of International Law* (*LJIL*), 2006, vol. 19; Frederic Megret, "Why Would States Want to Join the ICC? A Theoretical Exploration Based on the Legal Nature of Complementarity", in Jann Kleffner and Gerben Kor (eds.) *Complementarity Views on Complementarity*, Asser Press, 2006, 23; Héctor Olásolo, "The Lack of Attention to the Distinction between Situations and Cases in National Laws on Co-operation with the International Criminal Court with Particular Reference to the Spanish Case", *LJIL*, 2007, vol. 20, 193–205.

[17] As Pre-Trial Chamber II has observed: "once the jurisdiction of the Court is triggered, it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case", a function which it recalls has been labelled "the 'fundamental strength' of the principle of complementarity"; ICC-02/04-01/05-377, 10 March 2009, para. 45.

responsibility of States, and the *preference* for genuine domestic proceedings, it does not enshrine their primacy.[18]

3.2.1. Unwilling or Unable

Where there is a concurrent exercise of jurisdiction over a case at the international and national level, the judges of the ICC will be required to enter an assessment as to the genuineness of the domestic proceeding in question. The criterion by which the Court is to enter this determination is set against two tests: unwillingness and inability.[19]

Although there is a wealth of commentary analysing the manner in which the Court should engage in its assessment of unwillingness and inability, the Court has only had limited resort to cases of contested juris-

[18] The *dicta* of the ICTY Appeals Chamber on the pre-requisite of primacy for the effective functioning of the Tribunal should be understood in this light, since the ICC judges posses in equal measure the competence to determine forum allocation over the objection of a State, based on an assessment of genuineness: "Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)). If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute", *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para. 58. Broadly speaking complementarity is a neutral notion referring to the existence of concurrent jurisdictions: primacy is not *in opposition* to complementarity, but merely describes one way by which conflicts between complementary forums are to be resolved; see Fausto Pocar, "Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY", *JICJ*, 2008, vol. 6, 655-665; Gioia, see *supra* note 16, 1115-7; Mohamed El Zeidy, "Admissibility in International Law", in *Handbook of International Criminal Law*, forthcoming, 2010.

[19] The term 'genuineness' attaches to the phrases "to carry out the investigation or prosecution" (article 17(1)(a)) and "to prosecute" (article 17(1)(b)) to the extent that they result from a State's inability or unwillingness as described in sub-paragraphs 2 and 3. See *Informal Expert Paper* (2003), paras. 21-23; El Zeidy, 2008, see *supra* note 1, 165; Kleffner, 2008, 114-115.

diction.[20] Among judicial determinations to date is the above noted observation of the Appeals Chamber that a finding of unwillingness or inability is not a pre-requisite for the admissibility of a case under article 17(1)(a), meaning that if a State is inactive in relation to the case before the ICC, the question of assess unwillingness or inability does not arise and the case will be rendered admissible, subject to a ruling on gravity.[21] Turning to article 17(1)(b), the Appeals Chamber has held that the provision comprises two cumulative elements: the case must have been investigated and the relevant State must have made a decision not to prosecute.[22] Where a State has investigated a case, but proceeds not to prosecute due to the surrender of the person to the ICC, this is not a "decision not to prosecute" within the meaning of article 17(1)(b).[23] Finally, with respect to the linkage to *ne bis in idem* in article 17(1)(c), Trial Chamber III has indicated that this provision is only engaged where there has been a national decision on the merits of the case resulting in a final decision or acquittal of the accused.[24]

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[20] To date, complementarity jurisprudence has been limited to a *proprio motu* examination triggered by the Pre-Trial Chamber pursuant to article 19(1) in *Prosecutor v. Joseph Kony et al.,* Pre-Trial Chamber II, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377 (10 March 2009), and the admissibility challenge brought by the defence in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009. As noted above, complementarity has also been considered in the context of *proprio motu* authorisation in *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, Case No. ICC-01/09-19, 31 March 2010; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, Case no. ICC-01/05-01/08-802, 24 June 2010.

[21] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 78.

[22] *Ibid*., para. 82

[23] *Ibid*., para. 83. A similar reasoning was followed by Trial Chamber III in its decision on admissibility in the *Bemba* case; see *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges ('*Bemba Admissibility Decision*'), Case no. ICC-01/05-01/08-802, 24 June 2010, paras. 239-242.

[24] *Bemba Admissibility Decision*, para. 248. See below section 3.2.2.

The Court is yet to develop guiding jurisprudence on the contours of the terms 'unwillingness' and 'inability'. Nonetheless, in examining the meaning of unwillingness, Trial Chamber III has held that, pursuant to article 17(2), the Court must consider whether: (i) the relevant individual is being shielded from prosecution, (ii) there has been unjustified delay that is inconsistent with an intention to bring the accused to justice and (iii) the proceedings lack independence and impartiality. If the State is unwilling to proceed with a case domestically in view of the relinquishment of its jurisdiction to the Court, and if none of the considerations specified in article 17(2) apply, the Chamber ruled that this is not 'unwillingness' within the meaning of article 17(1)(b).[25] In view of inability, although the Chamber did not elaborate on the parameters of its inquiry, it considered several factual indicia that rendered the domestic authorities unable to proceed with the case.[26] Finally, Trial Chamber III pronounced on the question of whose assessment is relevant for the purpose of the Court's own determination. In view of the varying assessments before it, the Chamber observed that under Article 17(l)(a) and (b) of the Statute "as regards unwillingness or inability, it is not the national courts' determination as to whether or not they are unwilling or unable genuinely to carry out the investigation or prosecution, but the State's unwillingness or inability, that is relevant. Whilst the State can no doubt take into consideration relevant observations made by the judiciary, it is not bound by them"; going on to emphasize that, nonetheless, "the ultimate determination on these matters is made by the ICC".[27]

[25] *Ibid*., paras. 243-244.

[26] The Chamber considered the cumulative effect of the submissions by the Central African Republic indicating that it did not have the capacity to conduct a trial of the kind before the ICC, given the human resources required, the number of cases pending before the national courts and the shortage of judges, as well as the budget of the Ministry of Justice. Other practical problems included the continued operations of the MLC militia and the consequent instability of the region; *Bemba Admissibility Decision*, paras. 245-246. See also discussion on unwillingness in the decision of Trial Chamber II in the *Katanga and Ngudjolo case*, although the requirement for the assessment was set aside on appeal; see *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), Case No. ICC-01/04-01/07-1213-tENG, 16 June 2009, paras. 74-95.

[27] *Bemba Admissibility Decision*, para. 247.

As the ICC develops jurisprudence on the application of the article 17 it is likely that national authorities may increasingly turn for reference to legal principles derived from the Court's rulings on admissibility.[28] This may include, for example, elaboration on the interpretation of genuineness, respect for due process, intent to shield a person from justice, unjustified delay, independence and impartiality, the applicability of amnesty exceptions, pardons, or conditional immunities, and whether national jurisdictions can be deemed unable due to an incomplete rendering of international offences in domestic law or other lacunae in the domestic process.

3.2.2. *Ne Bis in Idem*

The *ne bis in idem* rule is closely inter-related with complementarity determinations before the Court.[29] In particular, article 17(1)(c) cross-references article 20(3) to govern cases where a person has already been tried at a national level, but that trial is vitiated by a lack of genuineness.

Comparing each of the sub-paragraphs of the provision, article 20(1) provides that the conviction or acquittal of a person by the ICC will preclude a subsequent trial for the same conduct by the Court. The '*idem*' relates to the same conduct being re-tried under a different categorisation, that is, murder as a war crime being subsequently re-tried as a crime against humanity or genocide.[30]

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[28] Jann Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", *JICJ*, 2003, vol. 1, 86-113; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, 2004, 92, 102; Burke-White, 2005, 576.

[29] See footnote 2 above.

[30] The provision would be without prejudice to cumulative charging which, according to ICTY practice, has been permitted where the crimes charged protect different values or contain different elements; *Prosecutor v. Kupreskić et al., Decision on Defence Challenges to Form of the Indictment rendered in Kupreskić et al.* (15 May 1998). On cumulative charges at the penalty stages see *Prosecutor v. Tadić, Decision on Defence Motion on Form of the Indictment* (14 November 1995), 10. *Compare Prosecutor vs. Bemba*, Pre-Trial Chamber II, *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-01/05-01/08-424 (15 June 2009). The only exception to article 20(1) is for revision of a conviction or a sentence based upon newly discovered evidence, the discovered falsification of decisive evidence, or serious misconduct or serious breach of duty by one of the participating judges, in which case the Appeals Chamber may

Article 20(2) prevents the trial of an individual by another court for a crime that s/he has been already tried for by the ICC. In contrast to paragraph 1, the '*idem*' relates to the crime and not the conduct. Thus a person who has been tried by the ICC for rape as a war crime could be later tried for rape as a crime against humanity[31] or rape as an ordinary crime by another court. This corresponds to the right recognised in many national legal systems to prosecute an individual who has been tried abroad, and which is accompanied in most States with a deduction of sentence for previous time served abroad. The provision also reflects the fact that neither national nor international principles exist for the application of *ne bis in idem* across different jurisdictions.[32]

Corresponding to the rule that the Court must be final arbiter on the *bona fides* of national action when determining admissibility in any case before it, article 20(3) provides that the ICC may subject a person to a new trial for conduct for conduct also proscribed under article 6, 7 or 8 for which s/he has already been tried before another court, based on an assessment of genuineness.[33] Without such a provision, the exclusionary rule under article 20 could have enabled national authorities to avert the Court's jurisdiction by simply instituting sham domestic proceedings. As a result, any domestic proceedings must be genuine as exposed to the scrutiny of the ICC judges.

reconvene the original trial chamber, constitute a new one or itself rule on the matter; Article 84, ICC Statute.

31 Compare Christine Van Den Wyngaert and Tom Ongena, "*Ne bis in idem* Principle, Including the Issue of Amnesty", in Cassese, Gaeta and Jones, see *supra* note 16, 723 who suggest that the article 20(2) prevents another court from retrying any crime under article 5.

32 This has resulted in the complete non-recognition of foreign judgments by some States and limited recognition (deduction of sentence principle) by others; Wyngaert and Ongena, 2002, 708. See also Christine Van Den Wyngaert and Guy Stessens, "The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions", ICLQ, 1999, vol. 48, 779-804; see *infra* section 3.2.4.

33 The circumstances in which re-trial before the ICC would be permissible are where 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".

The '*idem*' that is protected under article 20(3) relates to "conduct also proscribed under articles 6, 7 or 8". This is because the Rome Statute is not a standard-setting instrument in the traditional sense of requiring domestication of the applicable crimes by way of implementing legislation. As such, the Statute does not set out to regulate how a State incorporates and represses the listed crimes.[34] As the preamble makes clear, the obligation of States in this area represents a pre-existing duty to exercise their criminal jurisdiction over those responsible for international crimes.[35] Therefore it is possible that the conduct may have been categorized differently from the Rome Statute.

This also means that oversight functions of the ICC in terms of *ne bis in idem*, and arguably in terms of complementarity, do not technically rely on the identical categorisation of crimes, but will apply instead to a case by case assessment of the adequacy of national repression of each of the proscribed conduct criminalised under the Rome Statute.[36] Nonetheless, as ICTR 11*bis* ruling in the *Bagaragaza* case illustrates, an ordinary crimes approach that does not adequately take into account the requisite mental and material elements to make out an international crime

[34] The Statute formally requires States Parties to adopt implementing legislation in three areas: to ensure that procedures are available under national law for all forms of co-operation foreseen in Part 9; to extend their criminal laws to include offences against the administration of justice (article 70); and to enforce fines or forfeitures ordered by the Court (article 109).

[35] According to the preamble, these are duties that are 'recalled' under the Rome Statute: they are not established by it *strictly speaking*; para. 6, Preamble, ICC Statute.

[36] For a more detailed discussion see Kleffner, 2008, 118-125; Rastan, "Situation and Case: Defining the Parameters of Complementarity", in Stahn and El Zeidy, forthcoming 2010. It should also be noted that while the *ne bis in idem* provision in the ICC Statute not does explicitly require any application of the deduction of sentence principle in the re-trial of a person for the same conduct before the ICC, article 79(2) provides that the Court may deduct any time spent in detention in connection with the conduct underlying the crime. The deduction of sentence principle appeared in earlier ILC (Art. 42(3)) and PrepCom (Art 12(3)) drafts, but was omitted during the final drafting stages on the view that its placement in the provision on *ne bis in idem* was superfluous, and could better be addressed under sentencing. Immi Tallgren and Astrid Reisinger Coracini suggest the absence of an explicit provision may have been an unintended omission of the final drafting process; '*Ne bis in* idem', in Triffterer, 2008, 697.

may fall foul of an admissibility determination before the ICC.[37] Accordingly, the Court's will need to examine a range of factors, including: submissions by the State as to how its legislative scheme would apply in practice; an assessment of any discernable lacunae in the applicable domestic law, both in terms of the range of available offences as well as the satisfaction of the requisite mental and material elements; whether the sentencing framework adequately reflects the gravity of the offence;[38] and whether the domestic crime in question is subject to defences not available under international law, to statutes of limitation, or to domestic immunities and/or amnesties.[39]

3.2.3. Gravity

The last factor that may determine the admissibility of a case before the ICC is gravity.[40] For States considering the exercise of extra-territorial jurisdiction the gravity of the case, whether in terms of its nature, its qualification, its severity or its broader impact, may act as a relevant indicator for determining whether the State should assert jurisdiction. For the ICC, gravity serves a different function to complementarity. While the former arises from contested jurisdiction, gravity is applied independently regardless of any concurrent action. It essentially serves as an internal filtering mechanism to determine which cases are worthy of being heard

[37] *Prosecutor v. Michel Bagaragaza*, Decision On Rule 11*bis* Appeal, Case No. ICTR-05-86-Ar11*bis* (30 August 2006). Compare *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Referral Decision (14 September 2005).

[38] The inclusion of a provision on sentencing discrepancies was expressly omitted during the drafting process due to the wide variations in national practice and the difficulty in arriving at an appropriate standard; see Draft article 19, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act* (A/Conf.183/2/Add.1, 1998). Earlier formulations were also included in the 1995 Siracusa Draft Statute and 1996 and 1998 PrepCom proposals. The failure to secure the language during negotiation of the article 17, however, does not mean that the Court is excluded from ruling on the issue. Thus, the Court could arguably examine national decisions resulting in a significantly lower sentence disproportionate to the applicable international offence, which could be examined as an indicator of whether such proceedings were designed to shield the person from criminal responsibility or were conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice for that crime.

[39] For example, non-applicability of statutes of limitation, article 29 ICC Statute; exclusion of defences of superior orders, article 33 ICC Statute.

[40] Article 17(1)(d), ICC Statute.

before the Court.[41] Thus, a case that has satisfied the criteria under article 17(1)(a)-(c) may nonetheless be found to be inadmissible due to deficit gravity.

In the first decision that sought to define gravity, Pre-Trial Chamber (PTC) I, in finding the warrant application against Bosco Ntaganda inadmissible, developed a mandatory set of criteria for its determination of admissibility.[42] The PTC required that: (i) the alleged conduct was either systematic or large-scale, the due regard paid to the social alarm caused to the international community; (ii) the person fell within the category of most senior leaders of the situation under investigation; and (iii) the person fell within the category of most senior leaders suspected of being most responsible, considering their own role and the role played by group or entity to which they belong in the overall commission of crimes within the jurisdiction of the Court in the relevant situation.

On appeal, the Pre-Trial Chamber's findings were overturned. The Appeals Chamber found it inappropriate to narrow the type of cases that could come before the Court by imposing restrictions on the exercise of jurisdiction by the Court as a matter of law. As the Appeals Chamber observed, "[t]he predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court".[43] While the Chamber affirmed what gravity

[41] As Batros states, "A declaration that a case is inadmissible on the basis that it is 'not of sufficient gravity to justify further action by the Court' is thus absolute, rather than relative"; Ben Batros, "The Evolution of the ICC Jurisprudence on Admissibility", in Stahn and El Zeidy, 2010, forthcoming.

[42] *Prosecutor v. Lubanga Dyilo* (Pre-Trial Chamber I), Decision on the Prosecutor's Application for Warrant of Arrest, Article 58, ICC-01/04-01/06, 10 February 2006, para. 64.

[43] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-169, under seal 13 July 2006; reclassified public 23 September 2008, paras. 69-79. As the Appeals Chamber observed, "[t]he particular role of a person or, for that matter, an organization, may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds"; *ibid*., para. 76.

is not, it did not define what it is.[44] This is perhaps understandable in the light of the role of the appellate chamber to provide sufficient flexibility for future jurisprudence to develop on the basis of case by case assessments.[45]

In the absence of guiding jurisprudence, the task of determining what constitutes gravity and applying it to individual cases has been left to the Office of the Prosecutor through its case selection strategy.[46] The general factors relevant for assessing gravity have been set out in the Regulations of the Office of the Prosecutor as including the scale of the crimes, their nature, manner of commission, and their impact.[47] This assessment includes both quantitative and qualitative considerations.[48] The appropriateness of the application of these factors has more recently been upheld by Chambers of the Court.[49]

The Office of the Prosecutor has also adopted a policy of focussing on those bearing the greatest responsibility for the most serious crimes, meaning it will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organised the alleged crimes.[50] The category could include persons situated in *de jure* or *de facto* hierarchical control as well as others who play a

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[44] *Compare* Separate and Partly Dissenting Opinion of Judge Georghios M. Pikis, Judgment on Appeal Against Arrest Warrant Decision, Case No. ICC-01/04-186 para. 40.

[45] Ben Batros, "The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC", *LJIL*, 2010, vol. 23, 343-362.

[46] In particular, the Prosecutor must consider gravity as part of the admissibility assessment under article 53(1)(b).

[47] Regulation 29(2), Regulations of the Office of the Prosecutor.

[48] See also Prosecution submissions in *Abu Garda*, *The Prosecutor v. Bahr Idriss Abu Garda*, Filing in the Record of Prosecution's Public Redacted Version of the Prosecutor's Application under Article 58, pursuant to the request contained in the Decision on the Prosecutor's Application under Article 58, dated 7 May 2009, ICC-02/05-02/09-16-Anx1, 20 May 2009, para. 173.

[49] *Prosecutor v. Abu Garda* (Pre-Trial Chamber I), Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 31; *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, Case No. ICC-01/09-19, 31 March 2010, para. 62.

[50] *Paper on some policy issues before the Office of the Prosecutor* (ICC-OTP 2003); *Prosecutorial Strategy 2009-2012* (ICC-OTP 2010).

major causal role in the commission of crimes or exceptionally notorious perpetrators who may not occupy a hierarchical position. The Office of the Prosecutor has stated that this principle is applied as a general rule in recognition that in some cases the focus of an investigation may go wider if investigation of certain type of crimes or those officers lower down the chain of command is necessary for the whole case.[51]

As can be seen, the factors applied by the Prosecutor, though different in some respects, are not entirely alien to those applied in the overturned decision of PTCI in the overturned *Ntaganda* decision. At issue in the appeal, essentially, was not so much which factors are relevant for determining gravity, but rather the nature of this assessment. The PTC had interpreted gravity as a narrow legal threshold for ascertaining which cases should be admissible before the ICC. By contrast, the Prosecutor's Office had applied gravity to guide the exercise of prosecutorial discretion. It had applied gravity in the light of such discretion to identify Bosco Ntaganda, Deputy Chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo*, as among those bearing the greatest responsibility pursuant to its stated prosecutorial policy. The PTC examined the same individual and rejected the case for not meeting statutory legal thresholds of gravity. The Appeals Chamber judgment appears to indicate that once base-line parameters of gravity have been met deference should be given to the Prosecutor's choice in identifying suspects warranting prosecution. This suggests that while gravity should not be construed narrowly as a legal threshold for the purpose of admissibility, it may have a broader function in guiding the exercise of discretionary powers in order to identify and prioritize the selection of cases.[52]

3.2.4. Forum Determination

Admissibility is framed primarily as a contest between the Court and a State with jurisdiction. Nonetheless, several questions that may arise in the future, and which may have analogies at the inter-State level, remained unanswered. For example, what if there are multiple contestations of jurisdiction: how should the Court determine forum allocation where

[51] *Ibid.*

[52] Apart from admissibility, considerations of gravity also apply for determining the gravity of the crime and the individual circumstances of the convicted person for the purpose of sentencing; article 78(1), ICC Statute, rule 145, ICC RPE.

there are two or more competing claims? The challenging States may have different bases of jurisdiction (active personality vs. passive personality) or overlapping claims (conduct spanning two territories). What should the Court do where various grounds of jurisdiction interweave? Should the ICC in principle prioritise certain claims over others? The Statute itself does not prioritise jurisdictional bases for the purpose of admissibility. Article 19 merely provides that a challenge to the jurisdiction of the Court or the admissibility of a case may be brought by "[a] State which has jurisdiction over a case", leaving for States to regulate how their courts may exercise their jurisdiction.[53]

At the inter-State level there is no general rule of international law establishing a hierarchy between the various bases of jurisdiction where different national authorities want to prosecute the same conduct.[54] This arises from the prerogatives of State sovereignty as well as considerations relating to variable access to evidence. Since the failure to prove an offence or the imposition of lesser penalties in one jurisdiction may have arisen from the absence of evidence that may be available in another jurisdiction, it has generally been deemed unreasonable for a national court to be definitively bound by decisions delivered in a foreign jurisdiction.[55] Accordingly, multilateral instruments dealing with extradition or the transfer of proceedings in criminal matters normally leave the requested State with discretion to evaluate the circumstances on

[53] Article 19(2)(b), ICC Statute. See also article 18(1) and article 90 discussed *infra* at footnote 60.

[54] A notable exception is the application of rule at the European level; article 9, *European Convention on Extradition*, ETS no. 024 (13 December 1957); articles 53-55, *European Convention on the International Validity of Criminal Judgments*, ETS No. 070; articles 35-37, *European Convention on the Transfer of Proceedings in Criminal Matters*, ETS No. 073. On whether the territorial principle enjoys priority under customary international law see Cedric Ryngaert, *Jurisdiction in International Law*, Oxford University Press, 2008, 27-31.

[55] *Additional Protocol to the European Convention on Extradition - Explanatory Report*; [1975] COETSER 2 (15 October 1975), para. 19. As the Report notes, in the context of the European Convention on Extradition, "[t]he recognition of a foreign judgment clearly presupposes a certain degree of confidence in foreign justice"; *ibid*., para. 22.

pragmatic grounds, without establishing any hierarchical order between concurrent jurisdictions.[56]

Territorial jurisdiction is widely held to be the strongest and primary basis for jurisdiction.[57] Legal doctrine normally grants preference to the place where the offence took place subject to genuine ability and willingness. Prosecution in the territorial State will normally have several advantages, including the convenience to the parties, cost-effectiveness and procedural efficiency.[58] The proximity of the courts to the events, moreover, may enable a better appreciation of the socio-political, historical, cultural context of the case, and may more readily contribute to restorative justice and to domestic legitimacy and acceptance. It may also better contribute to public debate and deliberation, and heighten pedagogical initiatives to deter the future recurrence of violence and to inculcate a culture of accountability. Other valid reasons, however, may militate against assigning priority to the State where the crime occurred. The State of nationality of the accused or of the victim may have equally compelling arguments for prosecuting the case. Granting primacy to the territorial State may risk creating priority claims to ownership, which could be linked to concepts of sovereignty and non-intervention in order to limit action by other States.[59] Practical factors, moreover, may dictate the choice, such as the presence of the victim and the accused, perhaps by way of asylum, in another country. Finally, as with admissibility proceedings before the ICC, there may be a determination that the territorial State is unwilling to genuinely prosecute or it may be unable to do so.

The silence of the Rome Statute on which domestic jurisdiction should be granted priority when there are competing admissibility challenges means that the issue is likely to be treated on a case by case

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[56] See, *e.g.*, article 8, *European Convention on the Transfer of Proceedings in Criminal Matters*.

[57] Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th Edition, Longman, 1992, 458.

[58] M. Cottier in H. Fischer, C. Kreß and S.R. Lüder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments 2*, Verlag Arno Spitz, 2004, 851.

[59] Ward Ferdinandusse, "The Interaction of National and International Approaches in the Repression of International Crimes", *EJIL*, 2004, vol. 15, 1050.

basis.[60] The ICTY Appeals Chamber has similarly ruled against that the notion of any predetermined hierarchy between domestic jurisdictions for the transfer of cases under rule 11*bis* proceedings, holding that "[a] decision of the Referral Bench on the question as to which State a case should be referred (vertical level, *i.e.* between the International Tribunal and individual States) must be based on the facts and circumstances of each individual case in light of each of the prerequisites set out in Rule *11bis*(A) of the Rules".[61] As the Appeals Chamber went on to observe, "attempts among States to establish a hierarchy of criteria for determining the most appropriate jurisdiction for a criminal case, where there are concurrent jurisdictions on a horizontal level (*i.e.* among States), have failed thus far. Instead, States have agreed on various criteria and opted to give weight to certain criteria over others depending on the circumstances of a particular case".[62] Accordingly, the ICTY Appeals Chamber has

[60] See M. Morris, "Complementarity and Its Discontents: States, Victims, and the International Criminal Court", in Dinah Shelton (ed.) *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, Hotei, 2000, who points out that "the ICC Treaty articulates no principles or policies to govern … decision making on fundamental issues". Turning by analogy to article 90 which deals with competing cooperation requests for extradition and surrender does not provide much guidance as it relies in large part on traditional rules in extradition treaties: States Parties are to prioritise claims based *inter alia* on "The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought". Several criteria, moreover, would appear incompatible with admissibility proceedings, such as prioritising a claim based on the respective date of receipt or on the basis of whether the challenging forum is a State Party.

[61] *Prosecutor v. Gojko Janković*, Referral Appeals Decision, IT-96-23/2-AR11bis.2, 15 November 2005, para. 33.

[62] *Ibid*. para. 34. See also *Prosecutor v. Mejakić et al*., Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, IT-02-65-*AR11bis*, 7 April 2006, paras. 43-44. The Referral Bench in *Mejakić* similarly noted, "it has not been shown that there is an established priority in international law in favour of the State in whose territory a crime was committed. International extradition treaties, whether multilateral or bilateral, offer some analogy, but these do not typically provide for primacy of any one ground of jurisdiction. In domestic jurisdictions, the question is often regulated by statute and there is no universal provision or practice"; *Prosecutor v. Mejakić et al*., *Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis (20 July 2005). See also inconclusive post-WWII discussions between the United Nations War Crimes Commission and its affiliated National Offices over which country should enjoy priority in situations of competing extradition requests for

affirmed that the determination of the Tribunal should be based on pragmatic considerations based on an assessment of which State has a "significantly greater nexus".[63]

The Princeton Principles on Universal Jurisdiction provide a non-exhaustive set of criteria based on an aggregate balance of multilateral or bilateral treaty obligations; the place of commission of the crime; the nationality connection of the alleged perpetrator to the requesting State; the nationality connection of the victim to the requesting State; any other connection between the requesting State and the alleged perpetrator, the crime, or the victim; the likelihood, good faith, and effectiveness of prosecution in the requesting State; the fairness and impartiality of the proceedings in the requesting State; convenience to the parties and witnesses, and the availability of evidence in the requesting State; and the interests of justice.[64]

At the same time, subsidiarity has been proposed as an effective vehicle of resolving competing jurisdictional claims. This would accord forum determination to a foreign State only where the State with a stronger nexus fails to adequately deal with a particular case. As applied in the area of international crimes to date Spanish and German courts have applied subsidiarity as a principle of judicial restraint to hold that their national courts are only able to exercise universal jurisdiction if the State that has a direct link (on the basis of territoriality or active personality) fails to do so, or does not do so genuinely.[65] The principle has been compared to the operation of complementarity between States.[66]

Eurojust, the European Union's judicial cooperation body, following consultations with practitioners and institutional representatives, has provided the most detailed guidance to date for deciding which jurisdiction should prosecute in those cross-border cases where

the prosecution of Axis war criminals; *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, 156.

63 *Janković* Referral Appeals Decision, para. 37.

64 Principle 8, *Princeton Principles on Universal Jurisdiction*, Princeton University Press, 2001.

65 Ryngaert, 2008, see *supra* note 54, 211-218; Ryngaert, Chapter 6 in this volume.

66 *Ibid*; Xavier Philippe, "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?", International Review of the Red Cross No. 862, 2006, vol. 88.

there is a possibility of a prosecution being launched in two or more different jurisdictions.[67] The Guidelines have been designed to provide reminders to EU Member States and to define the issues that are important when such decisions are made; with emphasis being laid that the priority and weighting to be given to each factor in the below matrix will be different in each case, bearing in mind the facts and merits of each individual case.

Factors to be taken into consideration according to the Eurojust Guidelines include: the identification of each jurisdiction where a prosecution is not only possible but also where there is a realistic prospect of successfully securing a conviction; the preliminary presumption that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained; the possibility of a prosecution in the jurisdiction where the accused in located and whether extradition proceedings or transfer of proceedings are possible; the capacity of the competent authorities in one jurisdiction to extradite or surrender a defendant from another jurisdiction to face prosecution in their jurisdiction; in complex cross border cases where the criminality occurred in several jurisdictions, the possibility, practicability and efficiency for dealing with all the prosecutions in one jurisdiction;[68] the willingness of a witness to travel and give evidence in another jurisdiction, or the possibility of receiving their evidence in written form or by other means such remotely (by telephone or video-link); the possibility of one jurisdiction being able to offer a witness protection programme not available in another; the length of time which proceedings will take to be concluded in a jurisdiction, in view of avoiding delays (not a lead factor and to be considered where other factors are balanced); the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another, including the possibility of claiming compensation; given that evidence is collected in different ways and often in very different

[67] *Eurojust Guidelines, Annual Report 2003, Making the Decision - "Which Jurisdiction Should Prosecute?"*; available at http://www.eurojust.europa.eu/press_annual_report_2003.htm

[68] As the Eurojust guidelines note: "In such cases prosecutors should take into account the effect that prosecuting some defendants in one jurisdiction will have on any prosecution in a second or third jurisdiction. Every effort should be made to guard against one prosecution undermining another"; *ibid.*

forms in different jurisdictions, the availability of evidence in a form that would render it admissible and acceptable before the courts of the jurisdiction; and the possible effects of a decision to prosecute in one jurisdiction rather than another and the potential outcome of each case, including the liability of potential defendants and the availability appropriate offences and penalties.

Factors that the Eurojust Guidelines suggest should not be taken into consideration include prosecution in one jurisdiction rather than another simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another. The relative sentencing powers of courts in the different potential prosecution jurisdictions, similarly, must not be a primary factor in deciding in which jurisdiction a case should be prosecuted, although it should be ensured that the potential penalties available reflect the seriousness of the criminal conduct. Prosecution should also not be undertaken in one jurisdiction rather than another only because it would result in the more effective recovery of the proceeds of crime, noting that reliance should instead be placed on the most effective use of international cooperation agreements in such matters. The cost of prosecuting a case, or its impact on the resources of a prosecution office, moreover, should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another when all other factors are equally balanced, and that competent authorities should not refuse to accept a case for prosecution in their jurisdiction because the case does not interest them or is not a priority the senior prosecutors or the ministries of justice.

As the discussion above suggests, competing domestic jurisdictional claims before the ICC may be determined by comparative analysis of the nexus between the crime and each challenging State as well as pragmatic considerations. The process of indentifying the willingness and ability or the challenging State(s) may also serve to filter the most appropriate forum for a deferral based on such factors as the adequacy of witness protection, the safety and security of judges and lawyers, and the independence of the judicial process from political interference. As with all decisions related to forum allocation, such decisions may prove controversial, particularly in volatile conflict or post-conflict political settings where the States directly affected by the conflict

bring competing claims.[69] Nonetheless, as described in section 3.3. below, the problem most often faced by international courts is not the competing activism of several national jurisdictions, but the prevalence of impunity as a result on domestic inactivity.[70]

3.2.5. Collaboration Within Contest

Although complementarity as admissibility posits a contest model, there remains significant scope for collaboration even within this paradigm. Such collaboration lies not in the realm of admissibility litigation, but of case selection. This seeks to avoid unnecessary litigation with States by reserving investigative and prosecutorial activities for where it appears clearly appropriate. Thus, the ICC Prosecutor's Office has stated, as a general rule, it will seek to investigate and prosecute cases only in "a clear case of failure to act by the State or States concerned". This has been expressed under a policy of "[c]lose co-operation between the Office of the Prosecutor and all parties concerned … to determine which forum may be the most appropriate to take jurisdiction".[71] The approach calls for

[69] See, *e.g.*, the case of the *Vukovar Three*, relating to one of the most notorious episodes of the Croatian war, where the ICTY Prosecutor's rule 11*bis* motion provoked competing claims for transfer from Croatia (the territorial State) and Serbia and Montenegro (the State of nationality of the accused), with approximately equivalent degrees of political willingness and domestic capacity to prosecute the accused. Several other practical factors were considered by the Referral Bench including the impact on the effected population and local reconciliation in Croatia v. the judicial efficiency of joining the case with ongoing related domestic proceedings against several co-perpetrators on trial in the *Ovčara* case in Belgrade. The Prosecutor ultimately decided to withdraw the motion after concluding that "any decision by the Chambers to transfer it would provoke deep resentment in one or the other country considered for the transfer" and "would not be in the interest of justice". The case was therefore retained by the Tribunal, an option that will likely not be open to the ICC Prosecutor in a contested admissibility proceeding. *Prosecutor v. Mejakić et al*., *Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis (20 July 2005); *Address by ICTY Prosecutor to the Security Council* (13 June 2005) CDP/MOW/977-e.

[70] See below section 3.3.1.

[71] *Policy Paper* (ICC-OTP 2003), p. 2: "To the extent possible the Prosecutor will encourage States to initiate their own proceedings. As a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned. / Close co-operation between the Office of the Prosecutor and all parties concerned will be needed to determine which forum may be the most appropriate to take jurisdiction in certain cases, in par-

partnership and dialogue, encouraging genuine national proceedings, while remaining vigilant should such efforts fail.[72] At the same time, the statutory regime itself foresees a system of early notice, interaction and dialogue with States to ascertain the existence of or possibility for relevant national proceedings.[73]

The early practice of the Court demonstrates that situations have been opened and cases brought forward primarily where domestic authorities have remained inactive in relation to persons bearing the greatest responsibility for the most serious crimes. Such inactivity has occurred: (i) where the State has determined itself unable to conduct proceedings and has either invited the Court to exercise jurisdiction (Democratic Republic of Congo, Uganda, Central African Republic) or expressed its readiness to cooperate (Kenya); or (ii) where the State authorities are allegedly complicit in the commission of crimes (Darfur, Sudan). This also explains why to date there have been no challenges to the jurisdiction of the Court or the admissibility of its cases by States: because they agree with the exercise of jurisdiction by the Court or, in respect of Darfur, they refuse to recognise the Court's jurisdiction by lodging a formal challenge before it.

Contests, of course, can never be ruled out. A State that initially welcomes the exercise of ICC jurisdiction may, possibly due to a change of circumstance, later bring a challenge with respect to a particular case. A recalcitrant State, similarly, may launch relevant domestic proceedings that will require judicial examination. In other, less clear-cut situations, such as in Colombia, there may be national proceedings, but aspects of their genuineness or the focus of their case selection strategy may require further preliminary examination or possibly a ruling from the Court.[74]

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ticular where there are many States with concurrent jurisdiction, and where the Prosecutor is already investigating certain cases within a given situation".

[72] *Informal expert paper: The principle of complementarity in practice* (ICC-OTP 2003), 3-4.

[73] Article 18, ICC Statute; rules 44, 51-54, ICC RPE; *Prosecutorial Strategy 2009-2012*, paras. 38-39. See also Jann Kleffner, "Complementarity as a Catalyst for Compliance", in Jann Kleffner and Gerben Kor (eds.), *Complementarity Views on Complementarity*, Cambridge, 2006, 82; Federica Gioia, "Comments on Chapter 3 of Jann Kleffner", *ibid*. 108-110; Stahn, 2008, 106.

[74] Annual Report of the International Criminal Court to the United Nations, A/64/356 (17 September 2009), para. 47.

In sum, while complementarity as admissibility rests on an assumption of contested jurisdiction, contests with States can be reduced through the effective exercise of prosecutorial discretion and cooperation. The next section takes this framework one step further to describe how the Court can collaborate with States not just in relation to its own cases, but also to promote cases at the national level. In line with the thematic focus on this volume, the emphasis is primarily on what measures States can take, individually or collectively, to combat impunity.

3.3. Complementarity as Collaboration

Complementarity as a collaborative principle is based on a burden-sharing perspective.[75] From this standpoint, the Rome Statute creates not only a court, but a system for the enforcement of core crime norms between national and international authorities.[76] The overarching goal of this system – to put an end to impunity and so contribute to the prevention of crimes – can only be achieved by collaboration between the ICC and national courts.[77]

This statement is informed by both conceptual and practical realisations. As a permanent body, it would be clearly undesirable for the Court to replace the routine functioning of national bodies: this would offend both the duty as well as the right of States. The preamble to the Rome Statute recalls that the primary duty to exercise criminal jurisdiction over international crimes rests with States, not international institutions. States have pre-existing duties "to exercise [their] criminal

[75] See C. Stahn, "*Complementarity: A Tale of Two Notions*", *Crim.L.F.*, 2008, vol. 19, 87-113, who refers to a managerial approach; see similarly J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford, 2008, 326-331; W. Burke-White, "*Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*", *Harv. Int'l L.J.*, 2008, vol. 49, 53-108.

[76] "The Rome Statute created a comprehensive and global criminal justice system", *Address by Luis Moreno-Ocampo, Prosecutor of the ICC, Building a Future on Peace and Justice* (Nuremberg, 26 June 2007). The UN Secretary-General has also described the ICC as "the centrepiece of our system of international criminal justice"; *Remarks at the General Debate of the Sixth Assembly of States Parties to the Rome Statute of the International Criminal Court* (3 December 2007); echoed by *EU Presidency Statement - United Nations General Debate, International Criminal Court: Sixth Session of the Assembly of States Parties* (3 December 2007).

[77] Preamble, para. 4, ICC Statute.

jurisdiction over those responsible for international crimes".[78] This may derive from treaty and/or customary obligations derived, *inter alia*, from the Hague Conventions[79], the Charter of the IMT at Nuremberg[80], the Genocide Convention,[81] the Geneva Conventions and the Additional Protocols,[82] as well as specific treaty regimes prohibiting international crimes such as the slavery,[83] apartheid,[84] and torture.[85] The responsibility of States in this area is not dependent on what the ICC does: States have duties to exercise criminal jurisdiction irrespective of the situations before the ICC. As a matter of right, moreover, the exercise of criminal jurisdiction over a territory is reflective of one of the most traditional aspects of sovereignty.[86] A permanent international body with unlimited powers to deny States the exercise of their sovereign powers would offend basic principles of non-intervention. As a rule, thus, the exercise of an international jurisdiction should remain the exception, to be triggered where warranted by the circumstances: based on an assessment of the inaction of national courts or otherwise their unwillingness or inability to genuinely conduct proceedings for the most serious crimes of international concern.[87]

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78 Preamble, para. 6, ICC Statute.

79 *Hague Convention (IV) Respecting the Laws and Customs of War on Land* and *Regulations* (1907).

80 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.*

81 *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

82 *Geneva Conventions*,(1949); *Additional Protocol I and II* (1979).

83 *Slavery Convention* (1926); and *Amending Protocol* (1953).

84 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973).

85 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).

86 As the Permanent Court of Arbitration recognised in 1928, "[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State"; *Island of Palmas Case (Netherlands v. U.S.)*, PCA (1928), 2 UN Rep. Int'l Arbitral Awards, 829.

87 The exceptionality of international intervention is arguably justified also by the differential cost of holding trials at the international and national levels and the need to provide for an effective system for the delivery of justice; *Report of the Secretary-*

Practical considerations, moreover, dictate that even where an international court does act, the reality is that it cannot carry on the entire burden. The focus of international courts, whether as a matter of law or policy, will tend to rest on those bearing the greatest responsibility and on the most serious incidents of crimes.[88] Thus, even with an international process focussing on the top strata of criminal activity, most potential perpetrators will simply not be the subject of international proceedings. This assumes, however, that national legal systems have the capacity and political will to enforce their corresponding duty. Where domestic authorities cannot fulfil their complementary role a gap may persist in the enforcement of core international crimes at the national level. As Madeline Morris pointed out over a decade ago in relation to the ICTR:

> Clearly the rational for a regime of "stratified-concurrent jurisdiction," in which the international tribunal prosecutes (or strives to prosecute) the leaders, leaving to national governments the rest of the defendants, cannot rest on a view of international tribunals as supplements or substitutes for reluctant, ineffective, or incapacitated national courts. Having an international tribunal try a few top-level defendants while leaving the staggering bulk of the caseload to the national courts would not necessarily be a sensible strategy for an incapacitated or unwilling national judicial system.[89]

The Rome Statute will equally fall short of its goal to end impunity if it merely creates an instrument to replace failed national courts. This has profound implications. It means that the role of domestic jurisdictions can never be set aside in sole favour of international trials. The system will fail unless there is complementary national action. If the States

General: The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, para. 42.

88 *Paper on some policy issues before the Office of the Prosecutor* (ICC-OTP 2003); *Prosecutorial Strategy 2009-2012*; ICTY Rule 28; Art. 1, Statute of the Special Court for Sierra Leone; Art.1 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). The availability of State or diplomatic immunity for certain incumbent State officials before national courts also supports the focus of international courts on leadership crimes.

89 Madeline Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda", *Duke Jrn'l Comp. IL*, 1997, vol. 7, 367.

directly affected by the crimes are inactive or otherwise unwilling or unable to proceed genuinely with complementary trials, the responsibility will fall to the international community to foster the conditions necessary to enable proceedings to take place in those territories or by third States.[90]

The concept of burden sharing is of course not new. It served as the model after World War II by which the Allies divided caseloads between the leadership at the international level while leaving the bulk of cases to be processed through military or criminal tribunals established in the territory where the crime occurred.[91] It is estimated that apart from the principals who were tried at the International Military Tribunal (IMT) in Nuremberg, collectively the U.S. convicted 1,814 persons, the UK 1,085, France 2,107, and the Union of Soviet Socialist Republic ('USSR') an

[90] On the notion of a collective responsibility to enforce core crimes norms see R. Rastan, "The Responsibility to Enforce: Connecting Justice with Unity" in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2009, 163-182.

[91] The 1945 London Agreement distinguished between the "case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies" (*i.e.*, the IMT) and others who were to be prosecuted according to 1943 Moscow Declaration: "those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein"; *Declaration Concerning Atrocities Made at the Moscow Conference* (30 October 1943); *Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis* (8 August 1945). This was meant to be given legislative effect in each of the Allies respective zones of occupation through Allied Control Council Law No. 10 (3 Official Gazette Control Council for Germany (1946), 50-55), although formally CCL No.10 derived its legal basis from the authority of the four occupying powers acting as the surrogate government of Germany, with jurisdiction asserted on the basis of territoriality. See generally United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948; Robert Woetzel, *The Nuremberg Trials in International Law*, Stevens, 1962; Otto Triffterer, "Preliminary Remarks: The permanent ICC - Ideal and Reality", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck, 2008, 34; Dominic McGoldrick, "Criminal Trials Before International Tribunals", in Dominic McGoldrick, Peter Rowe, and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart, 2004, 14-21; Darryl Mundis, "Completing the Mandates of the *Ad hoc* International Criminal Tribunals: Lessons from the Nuremberg Process?", *Fordham Int'l L J*, 2005, vol. 28, 591-615.

inestimable figure; with a number of adjacent trials held in other Allied countries such as Australia, Kuomintang China, Greece, the Netherlands and Poland,[92] with the vast majority of WWII war crimes trials being processed through the national courts of the Federal Republic of Germany.[93] A division of labour similarly occurred after the International Military Tribunal for the Far East in Tokyo, with estimates that between 1945-1951 Allied military tribunals passed the death penalty on 920 Japanese from some 3,000 sentenced.[94] We would no doubt find it difficult today to accept that responsibility of international community in response to the atrocities of WWII would have been discharged by charging only 24 persons in Nuremburg[95] and 28 persons in Tokyo[96] had there not been any complementary proceedings at the national level.[97]

Burden sharing is evident also in the former Yugoslavia and Rwanda, although this was less as a feature of original design and more a result of evolving contextual factors. The ICTY and ICTR were endowed with primacy in view of Security Council's assessment at the time over the unwillingness of the courts in the former Yugoslavia to hold impartial

92 Woetzel, *op. cit.*; See also United Nations War Crimes Commission, *op. cit*.

93 Adalbert Rückerl, *NS - Verbrechen vor Gericht. Versuch einer Vergangenheits-bewältigung*, Müller, 1984. See generally Erich Haberer, "History and Justice: Paradigms of the Prosecution of Nazi Crimes", *Holocaust and Genocide Studies*, 2005, vol. 19, 487-519.

94 P. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951*, University of Texas Press, 1987, xi. In contrast to Germany, very few cases were prosecuted by domestic authorities in Japan.

95 Of the 24 persons charged, 22 were tried: 12 were sentenced to death by hanging (including Martin Bormann who was tried *in absentia*); three to life imprisonment; four received sentences of between ten and twenty years; three were acquitted; one committed suicide before trial; and one was declared medically unfit; see Morten Bergsmo, Catherine Cissé and Christopher Staker, "The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared", in Louise Arbour, Albin Eser, Kai Ambos and Andrew Sanders (eds.), *The Prosecutor of a Permanent International Criminal Court*, Freiburg im Breisgau, 2000, 123; McGoldrick, 2004, see *supra* note 91, 18.

96 Of the 28 charged, seven were sentenced to death by hanging; 16 to life imprisonment; two to lesser terms; two died; and one suffered a mental breakdown, was sent to a psychiatric ward and released in 1948; see Bergsmo *et al*., 2000, *supra* note 95, 123; McGoldrick, 2004, see *supra* note 91, 21.

97 It would of course also be unacceptable today that only the members of the defeated Axis powers were put on trial.

trials and the sheer institutional inability of the Rwandan authorities following a devastating genocide. The Statutes of both Tribunals, however, formally recognised the concurrent jurisdiction of national courts.[98] During the first decade or so of the Tribunals' mandates there were some domestic proceedings at the national level. This included trials before Specialised Chambers and *gacaca* jurisdictions in Rwanda,[99] *in absentia* and other proceedings in Croatia and Serbia, proceedings resulting from returned domestic case files that were reviewed by the ICTY Prosecutor's Office under the *Rules of the Road*,[100] as well as a handful of cases in third States.[101] Burden sharing, however, was not implemented as a component of institutional design until the adoption by each Tribunal of a completion strategy.[102] While each strategy were undoubtedly driven by political fatigue and resource considerations within the Security Council, less attention is given to the diminishing justifications for retaining a strict primacy model in view of the evolving situation at the national level. Over the course of the several years since the establishment of the Tribunals the various territorial States, some with international assistance, and with mixed levels of success, had engaged in numerous rounds of reform aimed at transforming the domestic rule of law landscape. Such efforts were aimed, in part, at increasing the prospects for genuine core crimes proceedings. As these developments progressed, they provided further justification for an adjustment of initial

98 Article 9, ICTY Statute; Article 8, ICTR Statute.

99 *Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, Law No.8/96, (30 August 1996); *Organic Law on the Establishment of "Gacaca Jurisdictions" and the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994*, Law No 40/2000, Rwanda Official Gazette (26 January 2001).

100 *The Rome Statement on Sarajevo, Reflecting the Work of the Joint Civilian Commission Sarajevo* (18 February 1996), article 5. See generally David Tolbert and Aleksandar Kontić, "The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2009, 138-145.

101 Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D) (June 2006).

102 Tolbert and Kontić, 2009, 136-137.

assumptions in response to prevailing domestic circumstances. As a result of these several processes, the mandates of the Tribunals were adjusted, resulting in a division of labour similar to the post-WWII period with the Tribunals focussing on the most senior leaders responsible for the most serious crimes while national courts dealt with intermediate and lower ranked accused persons.[103] The task of forum determination, moreover, assumed judicial form to be entered by each Tribunal. Today, it is recognised that the vast majority of accused persons will need to be processed through national accountability mechanisms.[104]

Looking at the problem of mass criminality, thus, a managerial approach recognises that the response of the international community will need to be multifaceted and complementary. It acknowledges the concurrent responsibilities of both national and international actors: the latter asserting jurisdiction only where appropriate and with the primary burden residing at the domestic level. Drawing on these lessons learned, the ICC Prosecutor's Office stated early on that it would adopt a policy to encourage and assist national investigations and prosecutions.[105] The stated objective was not to compete for case allocation with national courts, but to ensure that the most serious crimes did not go unpunished through adoption of a policy of coordinated action between the ICC and national authorities.[106] This approach, labelled 'positive complementar-

[103] According to ICTY rule 11*bis*, this assessment required consideration of "the gravity of the crimes charged and the level of responsibility of the accused" in the light of Security Council resolution 1534 (2004), which refers, *inter alia*, to concentration on "the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal" and "the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions".

[104] In Bosnia and Herzegovina alone, the National War Crimes Strategy (adopted by the BiH Council of Ministers) estimates that as of end 2008, there were a total of 4,990 cases involving 9,879 suspects/accused in BiH; see Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Second Edition, Torkel Opsahl Academic EPublisher, 2010.

[105] *Policy Paper* (ICC-OTP 2003), pp. 2-3, 5.

[106] Luis Moreno-Ocampo, *Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC* (16 June 2003); Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003 – June 2006)*, para. 2, 12; *Informal Expert Paper on Complementarity*, 2003, paras. 2-3, 61. See also *Report of the African Union High-Level Panel on Darfur (AUPD): The Quest for Peace, Justice and Reconciliation*, PSC/AHG/2(CCVII (29 October 2009) ('Mbeki Report'):

ity', has been described by the Prosecutor's Office as meaning that it "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation". At the same time it has recalled that "according to the Statute national states have the primary responsibility for preventing and punishing atrocities" and that

> [a] Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing system of justice.[107]

The approach resonates with the a number of principles found in the preamble to the Rome Statute which emphasise that the "effective prosecution [of the most serious crimes of concern to the international community] must be ensured by taking measures at the national level and by enhancing international cooperation" and that the Court shall be "complementary to national criminal jurisdictions".[108]

Although the next section focuses on the role of State-to-State collaboration, arguably the ICC itself could play a significant role in promoting such an approach.[109] In particular, article 93(10) of the Statute provides that the Court may cooperate with and provide assistance to a State conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State. Such reverse cooperation[110] may include, *inter alia*, the transmission of statements, documents or other types of evidence obtained in the course of an investigation or trial; and the questioning of any person detained by order of the Court. Such assistance is framed under the Statute in discretionary rather than reciprocal terms, and therefore cannot be

"For the Panel, however, what matters, above all else, is that justice must be dispensed for Darfur in a credible, comprehensive, coherent and timely manner. The needs in this regard are immense, and it is equally clear that the entire burden of justice cannot be placed on any single institution or model, be it the ICC, special courts, traditional courts, other tribunals or a hybrid court"; para. 255.

107 *Report on Prosecutorial Strategy* (14 September 2006), p. 5. See also *Policy Paper* (ICC-OTP 2003), p. 3.

108 Preamble ICC Statute, paras. 4 and 10.

109 See *Prosecutorial Strategy 2009-2012*.

110 Gioia (2006), 1117-1119; Federica Gioia "Complementarity and Reverse Cooperation", in Stahn and El Zeidy, 2010.

imposed as a prerequisite by a State for the observance of its obligations to cooperate with the Court.[111] Nor can it be invoked in the context of admissibility litigation to suggest that organs of the Court carry a statutory burden to assist national authorities to investigate and prosecute any case before it.[112] Where the item in question has been collected with the assistance of a State, moreover, the provision is subject to the principle of originator consent. Any transmission of a statement or other evidence is also subject to the Court's obligations with respect to the protection of victims and witnesses, which cannot be put at peril as a result of such cooperation. Where the request originates from a national system in or emerging from a situation of conflict, it is possible that the Prosecutor and/or the Chambers may decide to consider the satisfaction of additional benchmarks before granting cooperation. This might include the existence of a credible local system for the protection of judicial personnel and witnesses. It may also extend to guarantees that any judicial assistance or evidence provided to a State will not lead to a violation of fundamental human rights standards, such as the prohibition against torture and inhumane treatment, the subjecting of persons to arbitrary arrest or detention, or the denial of the right to an effective remedy.[113] In other cases, limits could be placed on the categories of information that the

[111] The obligation to cooperate with the Court may derive from the Rome Statute for a State Party or a State accepting the jurisdiction of the Court on an *ad hoc* basis pursuant to article 12(3), from a bilateral agreement or arrangement, or otherwise from a Chapter VII Security Council resolution imposing cooperation obligations on a State.

[112] Thus in its admissibility challenge, while acknowledging the Statute does not impose such a burden, Defence for Katanga suggested that "there is a strong procedural duty incumbent upon the Prosecutor [to do so], as a relevant precondition for the substantive admissibility test"; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute*, ICC-01/04-01/07-949 (11 March 2009), para. 48. *Compare* Prosecution response observing "Compliance with a request [under article 93(10)] is discretionary and dependent of the fulfilment of the factors listed therein"; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)*, para. 101.

[113] See Christopher Hall, "Positive Complementarity in Action", in Stahn and El Zeidy 2010, who locates the imposition of additional preconditions for the provision of assistance by the Court to national authorities in article 21(3) of the Statute. *Compare* ICTY/R Rule 11*bis*, which requires as a precondition satisfaction of the fair trials guarantees and the non-imposition of the death penalty.

Prosecutor or the Court is prepared to provide, for example by excluding certain evidentiary items such as witness statements or the identity of sources, and concentrating instead on non-confidential information, crime patterns, leads and background information.[114] Particular care, moreover, will need to be given in cases involving particularly vulnerable victims or witnesses, including victims of sexual violence and violence against children.[115] Clearly, any information or assistance provided by the Court should not lead to harm.

As part of its approach to positive complementarity, the Office of the Prosecutor has also stated that it recognises the role of justice processes other than those performed by criminal trials. In line with the goal of developing comprehensive strategies to combat impunity, it has taken a position that it "fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice".[116] Such complementarity between punitive and reparative processes is notably located in the Statute itself since, in addition to determining criminal responsibility, the Court may issue orders against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.[117] The Statute also provides for the establishment of a Trust Fund for Victims, which may implement awards for reparation ordered by the Court against a convicted person or directly use its resources for the benefit of victims.[118] Similarly, the UN Secretary-General's *Report on the*

[114] See *Prosecutorial Strategy 2009-2012*, para. 17.

[115] A related policy issue is whether the Prosecutor or the Court should cooperate with national proceedings related to the prosecution of persons under 18; see also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules'); A/RES/40/33 (29 November 1985).

[116] *Policy Paper on the Interests of Justice* (OTP-ICC 2007), p. 8.

[117] Article 75, ICC Statute.

[118] Article 79, ICC Statute; Rule 98, ICC RPE. To date, the Fund has supported a large number projects in the eastern DRC and northern Uganda, including initiatives in physical rehabilitation, psychological rehabilitation and material support, reaching a projected 75,200 beneficiaries (directly and indirectly) in Uganda and 150,400 beneficiaries (directly and indirectly) in the DRC by the end of 2009; *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2008 to 30 June 2009*, ICC-ASP/8/18 (18 September 2009).

rule of law and transitional justice in conflict and post-conflict societies emphasizes the need to embrace an integrative and complementarity approach between different transitional justice tools. This may include a variety of goals including ending impunity, truth-seeking, reparations, institutional reform, vetting, dismissal and the transparent re-selection of qualified public servants, as well as the reform of law enforcement agencies and prison services, victim protection, legal education and crime prevention, as supported by transparent and accountable government.[119] Effectively combining different responses to situations of mass atrocity will enable complexity. Complementary approaches can be described as complex to the extent that they distribute benefits of different distinct types to a larger universe of persons than isolated activities.[120] Given the diversity of actors and institutional mandates involved, there will also be a need to promote internal and external coherence between different justice mechanisms.[121] Anti-impunity strategies that are complex and integrative are more likely to be comprehensive and therefore better able to contribute to maximizing the impact of accountability processes.

[119] *Rule of Law Report*, S/2004/616, para. 25.

[120] This framework of complexity is borrowed from *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (OHCHR 2008), p. 22.

[121] See *ibid*., pp. 33-34. Compare the interoperability between concurrent criminal and truth and reconciliations processes in East Timor where, despite the challenges encountered in practice, the work of the Commission for Reception, Truth and Reconciliation was built into the serious crimes prosecution framework (UNTAET/REG/2001/10, 13 July 2001); and the experience of Sierra Leone where the Truth and Reconciliation Commission had already been established on paper by the 1999 Lomé Peace Accord several years before the creation of the Special Court for Sierra Leone and faced an uncoordinated relationship. A twin track mechanism with a national truth commission and a special criminal chamber, both internationalised, was similarly recommended for Burundi, but never implemented; *Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi, transmitted to the Security Council on 11 March 2005* (S/2005/158). See generally Elizabeth Evenson, "Truth and Justice in Sierra Leone: Coordination Between Commission and Court" *Colum. L Rev*, 2004, vol. 104, no. 3, 730; William Schabas, "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone", *HRQ*, 2003, vol. 25, 1035-1066; Marieke Wierda, Priscilla Hayner and Paul van Zyl, *Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*, ICTJ, 24 June 2002. Compare Nicole Fritz and Alison Smith, "Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone", *Fordham Int'l LJ*, 2001, vol. 25.

In line with the focus of this volume on the exercise of national jurisdiction, the section below examines three avenues for complementary national action to support domestic criminal accountability: (i) proceedings in the States directly affected by the crimes; (ii) proceedings in third States, including on the basis of universal jurisdiction; (iii) proceedings in third States, based on the accomplice liability of their own nationals.

3.3.1. Proceedings in the States Directly Affected by the Crimes

The focus of national prosecutions will normally reside in the States directly affected by the crimes, whether the State on whose territory the crimes occurred, whose nationals are the victims, or whose nationals are the alleged perpetrators. In some situations this may constitute a single territory; in others it may traverse the jurisdiction of several States. Experience shows, however, that the States directly affected by the crimes may often be the least equipped to undertake the type of large scale, politically sensitive and resource intensive investigations and prosecutions required. Even in peacetime, well functioning national jurisdictions find it difficult to undertake similar complex organised crime cases. Challenges include the need for specialised units with dedicated expertise; the risk of political interference in high-profile inquiries; security and protection for insiders, victims and witnesses; the obtaining of classified information, possibly including national security intelligence; the uncovering of linkage evidence tying the planners and organisers with those who execute the crime; the selection for prosecution and arrest of suspects who may be protected by the State apparatus or armed groups; the possible immunity of state officials; the need for inter-State judicial assistance; as well as the more general task of communicating the criminal process within the public discourse, which may be informed by highly contested and mutually exclusive historical narratives. Such challenges may be exacerbated several fold in the midst of the immediate conflict or post-conflict environment. The prevailing context may evince a rule of law vacuum, resulting in parts of the territory possibly being beyond effective government control. Where basic services exist chronic problems may persist, including a lack of the requisite human, financial and material infrastructure to support accountability processes. The legislative framework itself may show "the accumulated signs of neglect and political distortion" or contain discriminatory elements that fall short of

international human rights and criminal law standards.[122] Particular risks associated with volatile areas may also result in deficient security and protection for persons and premises and for the collection of evidence. State officials whose cooperation is required to undertake accountability processes may be complicit in the crimes or fear retribution. In other situations, former combatants may have been demobilized and integrated into the very same security structures that are now responsible for the safety of high-risk witnesses. More generally, there may be due process concerns over the dispensation of fair and impartial justice. Faced with uncertain political backing and weak institutional support, where investigations have been pursued in such circumstances, pragmatic risk calculations have typically resulted in domestic prosecutors focusing on low-mid level suspects rather than on senior members of the state security apparatus and armed opposition or of the political and business elite. The reality is that these conditions represent the type of situations that the ICC will most frequently confront.[123]

As daunting as the prospect is, for States in or recently emerging from conflict, ignoring massive crimes in lieu of blanket amnesties may simply not be a viable option.[124] The need to devise strategies to preserve

[122] *Rule of Law Report*, S/2004/616, para. 27. As the Report comments with regard to post-conflict settings: "National judicial, police and corrections systems … often lack legitimacy, having been transformed by conflict and abuse into instruments of repression. Such situations are invariably marked by an abundance of arms, rampant gender and sexually based violence, the exploitation of children, the persecution of minorities and vulnerable groups, organized crime, smuggling, trafficking in human beings and other criminal activities. In such situations, organized criminal groups are often better resourced than local government and better armed than local law enforcement. Restoring the capacity and legitimacy of national institutions is a long-term undertaking"; *ibid*.

[123] As Louise Arbour has commented, "No one should expect that States emerging from armed conflict marked by the commission of massive human rights violations, will revert to well-functioning and co-operative democracies as soon as hostilities cease", "The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court", *Windsor Yearbook of Access to Justice*, 1999, vol. 17, 207-220. See also Géraldine Mattioli and Anneke van Woudenberg, "Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo", in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, 2008.

[124] As observed by the OHCHR: "[E]xperience has shown that amnesties that foreclose prosecution or civil remedies for atrocious crimes are unlikely to be sustainable, even when adopted in the hope of advancing national reconciliation rather than with the

hard-won peace processes and to build democratic foundations will often necessitate an examination of accountability processes to combat the prevalence of a culture of impunity, and to prevent a relapse to the patterns of violence and discriminatory practices that precipitated past bloodshed.[125] That which is challenging in the best of times is what is asked of States in the worst, in the wake of conflict. One approach, therefore, could be to assess to what extent the political will and capacity of such States can be buttressed and supported by the international community. This may involve financial or technical support or the provision of judicial assistance.[126] Where the problem is one of unwillingness, it may be possible to resort to external inducement or coercion by instituting the adoption of issue-linkage strategies by the international community.[127]

The most recent example of a viable domestic model is the internationalised War Crimes Chamber within the State Court of Bosnia

cynical aim of shielding depredations behind a fortress of impunity … Amnesties that exempt from criminal sanction those responsible for human rights crimes have often failed to achieve their goals and instead seem to have emboldened beneficiaries to commit further crimes"; *Rule of Law tools for post conflict states - Amnesties*, HR/PUB/09/1, p. 1-3. See generally Darryl Robinson, "Serving the interests of justice: amnesties, truth commissions and the International Criminal Court", *European Journal of International Law*, 2003, vol. 14, 481.

125 E.g. as the *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste* points out in relation to recurrence of violence in 2006, reportedly viewed by many Timorese as a continuum encompassing the violence and factionalism from the years of Indonesian occupation and the violence that accompanied the referendum of 1999: "the crisis which occurred in Timor-Leste can be explained largely by the frailty of State institutions and the weakness of the rule of law … It is vital to Timor-Leste that justice be done and seen to be done. A culture of impunity will threaten the foundations of the State. The Commission is of the view that justice, peace and democracy are mutually reinforcing imperatives. If peace and democracy are to be advanced, justice must be effective and visible", S/2006/822, pp. 3, 12. As Joseph Rikhof points out in Chapter 2 to this volume, resort to judicial proceedings of some form or another is actually more frequent than commonly assumed.

126 See, e.g., Review Conference of the Rome Statute, Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes, RC/ST/CM/INF.2 (30 May 2010).

127 See Rod Rastan, "The Responsibility to Enforce: Connecting Justice with Unity" in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2009, 163-182.

and Herzegovina.[128] The creation of the War Crimes Chamber in Sarajevo was viewed as an essential component of the ICTY Completion Strategy, enabling a stable downward distribution of case loads from the Tribunal to the domestic level.[129] The model of the War Crimes Chamber is not entirely typical due to the high level of institutional support and infrastructure that enabled its establishment, including the existing international presence *in situ* at the time which had already spent several years engaged with domestic reform efforts in BiH.[130] With ICTY backing, neighbouring States, representing former adversaries, were also brought into a regional programme to support international cooperation and judicial assistance.[131] The establishment of the necessary legal framework also relied in part on the ability of the Office of the High

[128] Established in 2005, almost decade after the end of conflict, the WCC is a hybrid court consisting of a mixed bench and staff of international and national personnel, to be phased over time into a fully national body. The Chamber is dealing primarily with four categories of cases: those cases transferred by the ICTY in accordance with rule 11*bis*; cases arising from other files, dossiers and investigative materials that did not led to indictments and which were transferred directly by the ICTY Prosecutor to the State Prosecutor's Office (so called 'Category 2 cases'); those approved Rules of the Road cases which, due to their sensitivity, the State Prosecutor's Office decided to pursue before the WCC; and cases arising from investigations begun after March 2003 under the State level BiH Criminal Code. See generally International Criminal Law Services, *Final report of the International Criminal Law Services (ICLS) experts on the sustainable transition of the Registry and international donor support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009* (15 December 2008).

[129] All but two ICTY rule 11*bis* cases have been transferred to the WCC (comprising 6 cases against 10 accused), as well as other 'Category 2 cases'; see generally Tolbert and Kontić, 2009, 157-159.

[130] This included variously the Office of the High Representative (OHR), the Organisation for Security and Cooperation in Europe (OSCE), the Council for Europe, the NATO-led SFOR, the Office of the High Commissioner for Human Rights (OHCHR), the UN Mission in BiH (UNMIBH) and later EU Police Mission (EUPM). Arrangements were also concluded with the OSCE to monitor the rule 11*bis* cases on behalf of the ICTY Prosecutor's Office and to report to it on the genuineness of the proceedings in view of the Tribunal's power to recall cases previously transferred; *Co-operation between the Organization for Security and Co-operation in Europe and the International Criminal Tribunal for the Former Yugoslavia*, OSCE Permanent Council Decision no. 673 (PC.DEC/673), 19 May 2005.

[131] See, *e.g.*, "The Palić Process" involving regional cooperation between relevant judicial and state administration actors from BiH, Croatia and Serbia and Montenegro; ICTY *Press Release* OK/PR1310e (30 March 2009) http://www.icty.org/sid/10092.

Representative to rely on its Bonn powers to impose laws where necessary, where parliament failed to do so.[132] This included the passage of a complex set of laws to provide for the transfer of accused persons and evidence from the international to the national level; to ensure that the charges contained in Tribunal indictments could not be withdrawn, although new charges could be added; and that evidence previously introduced in ICTY proceeding could be used before the State Court.[133] Other places may struggle to find such an integrated level of political and financial investment, and may face far greater capacity issues.[134] Nonetheless, the experience of the War Crimes Chamber illustrates the possibilities for external assistance to States directly affected by the crimes in the implementation of an effective model for complementary national and international action.[135]

There are obvious benefits from building the capacity of the States directly affected by the crimes rather than relying on the exercise of jurisdiction by international courts or third States. In some situations much of this assistance may not be possible early on, when the temporal proximity to the crimes may mean that the recovery, restructuring and

[132] The 'Bonn powers' as derived from Annex XI para. 2 of the Conclusions of the Peace Implementation Council (charged with implementing the Dayton Peace Agreement) in Bonn, 10 December 1997.

[133] This required the adoption, *inter alia*, of the Law on the Court of BiH; imposed by the decision of the High Representative on 12 November 2000, adopted by Parliamentary Assembly of BiH on 25 June 2002 and 3 July 2002; *Official Gazette of BiH*, no. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04 and 32/07; the Law on the Prosecutor's Office of BiH, *Official Gazette of BiH*, no. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, and 61/04; amendments to the BiH Criminal Code, *Official Gazette of BiH*, no. 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, and 32/07; the BiH Criminal Procedure Code, *Official Gazette of BiH*, no. 03/03, 26/04; and the Law on the Transfer of Cases, *Official Gazette of BiH*, no. 61/04, 46/06, 53/06, 76/06; http://www.sudbih.gov.ba/. As Tolbert and Kontić have described, "a series of steps were required to establish the legal mechanism whereby the ICTY, as an UN body, could, in accordance with international standards, turn over its cases to local courts. In order to ensure that these standards were protected, the ICTY needed internal legislation to establish its own procedures but also required some assurances as to the procedures and processes that would be followed in the countries to which the cases would be transferred"; Tolbert and Kontić, 2009, 146-8.

[134] For a similar view see *ibid*. 161.

[135] The WCC also demonstrates the potential catalyst effect of international proceedings on the domestic rule of law.

reform processes required to put such an effort in place may not have sufficiently matured. In other situations, the international community might be able to consider from the start how national and other possible international processes could potentially complement each other. In the context of the situations before the ICC, this task may fall to the Assembly of States Parties, the UN Security Council where it makes a referral, or to other regional bodies such as the African Union, the Arab League, the OAS, the OSCE or the EU.[136] A coherent pattern for collaborative action between the international community and national authorities could provide opportunities for synergies, including through the exchange of best practices and lessons learned; the cross-fertilisation of jurisprudence; operational assistance and collaboration in the investigation of and prosecution of crimes; the temporary secondment of legal professionals and specialised trainings; the transfer of knowledge management, legal tools and evidence storage techniques; the promotion of international co-operation and judicial assistance; as well as the promotion of the rule of law and transitional justice efforts more generally.[137]

3.3.2. Proceedings in Third States, Including on the Basis of Universal Jurisdiction

Where the State directly affected simply cannot assume the primary burden to prosecute crimes, either due to sheer incapacity or lack of political will, the role of other States in the international system may be invoked. As observed in the Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, "Of course, domestic justice systems should be the first resort in pursuit of accountability. But where domestic authorities are unwilling or unable to prosecute violators at home, the role of the international community becomes crucial".[138]

[136] See, *e.g.*, S/RES/1593, para. 5; Report of the African Union High-Level Panel on Darfur (AUPD), *supra* n. 98.

[137] Tolbert and Kontić, 2009, 159-162. In practice the opportunities for such synergies have typically been underutilised, see Cesare Romano, Andre Nollkaemper and Jann Kleffner (eds.), *Internationalized Criminal Courts Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004.

[138] As the *Rule of Law Report* notes, "Of course, domestic justice systems should be the first resort in pursuit of accountability. But where domestic authorities are unwilling

One possible base for the exercise of jurisdiction is that of universality. Jurisdiction is asserted not on the basis of any nexus with the forum State, but by virtue of common interests which threaten the international community as a whole and in which all states have a interest in their repression. Although an act may have been committed by a foreigner against a foreign target outside the territory of the State, jurisdiction is asserted as a matter of international public policy.[139] The offender "is treated as an outlaw, as the enemy of all mankind - *hostis humanis generis* - whom any nation may in the interests of all capture and punish".[140] This echoes the well-known dictum in the *Barcelona Traction* case regarding the observance of obligations *erga omnes*.[141] A limited number of crimes attract universal jurisdiction. The crime of piracy is the classical instance,[142] but the modern day classification can be said to include slave trading,[143] genocide,[144] apartheid,[145] and certain categories

or unable to prosecute violators at home, the role of the international community becomes crucial"; S/2004/616, para. 40.

139 Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 2003, 304.

140 *France v. Turkey* (*Lotus case*), PCIJ, Series A. No.10 (1927), Dissenting Opinion of Judge Moore, 70; *Eichmann case*, District Court of Jerusalem, *ILR*, 1961, vol. 36, no. 5.

141 The ICJ distinguished between obligations owed to particular States and those owed "towards the international community as a whole" which "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*"; *Barcelona Traction case*, para. 33. The statement finds expression in draft article 48(1)(b) of the ILC *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), which provides that "[a]ny State other than an injured State is entitled to invoke the responsibility of another State … if … the obligation breached is owed to the international community as a whole"; A/56/10 (2001). This is subject to draft articles 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility).

142 While there may be uncertainty as to the customary law definition of piracy (Jennings and Watts, *op. cit.*, §.272), its customary status is beyond doubt. For a treaty definition *see* article 15, *Convention on the High Seas* (1958).

143 Jennings and Watts, *op. cit.* §429.

144 *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951, 15; *Barcelona Traction, Light and Power Company, Limited, Second Phase*, ICJ Rep. 1970; *Report of the Secretary General*, S/25704, para. 35; *Restatement of the Law: Third Restatement of US Foreign Relations Law*, vol. 2 (1987), §702, 3.

of war crimes, notably as reflected in grave breaches of the 1949 Geneva Conventions.[146] Thus, as the United Nations War Crimes Commission declared "the right to punish war crimes ... is possessed by any independent State whatsoever".[147]

There has been an increased tendency for third States to exercise their concurrent jurisdiction through a range of extra-territorial jurisdictional bases, including active personality, passive personality and universality.[148] The relatively recent upswing of national activity over offences committed abroad has in part been based on a reinvigorated legislative framework for the prosecution of serious human rights and humanitarian law violations that has been introduced in many States under the rubric of legislation implementing for the Rome Statute. Action has also been forthcoming through intergovernmental organisations. In the context of EU, for example, Members States have established a *European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes* to enable direct communication and facilitated exchange of information between centralised, specialised contact points.[149] The EU has also encouraged the exchange of core crimes information between national law enforcement and immigration authorities within and between EU Member States, the establishment of dedicated war crimes units and regular coordination meetings together with representatives of the *ad hoc* Tribunals and the

[145] *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Rep. 1971, 57.

[146] *Report of the Secretary General*, S/25704.

[147] *War Crimes Reports*, 1949, vol. 15, no. 26. The British Manual of Military Law reads: "[w]ar crimes are crimes *ex jure gentium*" granting jurisdiction over persons of any nationality to the courts of all States; *British Manual of Military War*, 1958, 637. Similarly, the Supreme Military Tribunal of Italy in the *Wagener* trial held: "[t]hese norms [laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one ... They are .... crimes of *lese-humanite* ... and are to be opposed and punished, in the same way as the crime of piracy, trade in women and minors, and enslavement are to be opposed and punished, wherever they may have been committed"; 13 March 1950, *Rivista Penale* 753, 757 (unofficial translation).

[148] For an overview *see* Rikhof, Chapter 2 above.

[149] EU Council Decision 2002/494/JHA(13 June 2002). The Decision notably recalls the affirmation in Rome Statute preamble that the effective prosecution of the core crimes "must be ensured by taking measures at national level and by enhancing international cooperation".

ICC.[150] Interpol has also established a world-wide national focal points system to provide coordination and support for law enforcement agencies and international organisations responsible for the investigations of genocide, war crimes and crimes against humanity.[151]

Such heightened interaction between and within competent national authorities augments the scope for complementary support for the ICC's own investigative efforts. International cooperation between different jurisdictions may also increase the efficiency and viability of launching criminal proceedings on the basis of universal jurisdiction. This may involve the sharing of information and evidence, the transfer of criminal proceedings or the recognition of foreign judgments, the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance, or the extradition of suspects. The expectation, however, that national authorities will be able routinely engage significant resources into costly trials for crimes committed abroad, and which may have little connection to the forum State, appears misplaced. At present, investigations leading to domestic prosecutions for crimes committed abroad remain exceptional.[152] Instead, the majority of investigations lead to exclusion from refugee and immigration procedures and to deportations.[153] As important as is the guarantee of not providing a safe haven for persons suspected of committing international crimes, a global system for the enforcement of international criminal law norms cannot rest on the exercise of universal jurisdiction alone.

The experience of universal jurisdiction demonstrates that it may give rise to complex legal, political and diplomatic questions.[154]

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[150] EU Council Decision 2003/335/JHA(8 May 2003). *See also* FIDH and REDRESS, *Fostering a European Approach to Accountability for genocide, crimes against humanity, war crimes and torture: Extraterritorial Jurisdiction and the European Union* (April 2007).

[151] Source: http://www.interpol.int/public/CrimesAgainstHumanity/default.asp.

[152] For an overview *see AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8672/1/09 REV1 (16 April 2009); Rikhof, Chapter 2 above.

[153] This is pursuant, *inter alia*, to article 1(f), *Convention Relating to the Status of Refugees* (1951). *See* Joseph Rikhof, "War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context", *International Journal of Refugee Law*, 2009, vol. 21, no. 3, 453-507.

[154] *Rule of Law Report*, S/2004/616, para. 48.

Nonetheless, where there is no prospect for criminal trials being undertaken in the State(s) directly affected by the crimes, or in situations falling outside of the jurisdiction of the ICC, the exercise of universal jurisdiction may offer the only prospect for holding perpetrators accountable. The assertion of criminal jurisdiction by a foreign court, moreover, may catalyse public debate and a re-examination of domestic amnesties or immunities in the territorial State.[155] Universal jurisdiction will therefore continue to form a significant component of an overall global strategy to combat impunity. Enhancing the domestic extraterritorial jurisdiction will help close gaps in the global compliance regime, as will extending the number and range of treaties governing extradition and mutual legal assistance in criminal matters.

3.3.3. Proceedings in Third States, Based on the Accomplice Liability of their Nationals

Another way in which third States can exercise jurisdiction in response to situations of mass atrocity is to examine the liability of their own nationals. This may stem from their participation as a principal to crimes committed abroad. It may also take the form of accomplice liability. Complicity may arise from activities related to supporting fugitives or the channelling of material or other assistance to armed groups suspected of committing crimes. Another form of complicity, explored below, relates to corporate wrongdoing.

It is well known that conflict in unstable governance zones is often driven by financial gain. This may accrue from the exploitation of natural resources, the control of transportation and supply routes, or the corrupt influencing of government oversight mechanisms to protect vested business interests. As documented by numerous Security Council mandated Exert Panels, a significant number of allegations involve companies complicit in abuses committed by armed forces or groups.[156] In a survey of the allegations of the worst cases of corporate-related human rights harm, the Special Representative of the Secretary-General on

[155] *See, e.g.*, domestic debates triggered by proceedings in third States against, *inter alia*, Augusto Pinochet, Hissène Habré and Ricardo Miguel Cavallo.

[156] See *Report of the Secretary-General on the implementation of Security Council resolution 1625 (2005) on conflict prevention, particularly in Africa*, S/2008/18 (14 January 2008).

human rights and transnational corporations and other business enterprises, has noted that they

> … occurred, predictably, where governance challenges were greatest: disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high … The human rights regime cannot function as intended in the unique circumstances of sporadic or sustained violence, governance breakdown, and absence of the rule of law.[157]

The response of the international community has included targeted sanctions against individuals and corporate entities, such as asset freezes and travel bans, deemed to have contributed to conflicts.[158] The number of domestic jurisdictions in which charges for international crimes can be brought against corporations and their executives has also increased, as has the possibility for companies to incur non-criminal liability for complicity in human rights abuses.[159]

The criminal liability of corporate agents under international law may from stem a number of available modes of complicity. Under the Rome Statute, for example, this may arise by soliciting or inducing the commission of such a crime which in fact occurs or is attempted; or for the purpose of facilitating the commission of such a crime, aiding, abetting or otherwise assisting in its commission or its attempted commission, including providing the means for its commission; or in any

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[157] *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (7 April 2008), para. 16.

[158] "It is … imperative that we also broaden our responses and adopt a more comprehensive approach that includes the development of appropriate norms and frameworks aimed at ensuring that the activities of the business sector do not exacerbate or fuel conflicts … The Security Council has played a role in advancing that agenda, but more needs to be done to strengthen the international regulatory framework and encourage States to forcefully and constructively promote conflict-sensitive practices in their business sectors"; S/2008/18, paras. 19-20.

[159] A/HRC/8/5 (2008), para. 74. See also Andrea Reggio, "Aiding and betting In International Law The Responsibility of Corporate Agents and Businessman for Trading With The Enemy of Mankind", *ICLR*, 2005, vol. 5, 623-696; International Commission of Jurists (ICJ) Expert Panel on Corporate Complicity in International Crimes, http://www.icj.org/IMG/June_06_Update.pdf.

other way contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose. In the case of the latter, such contribution must be intentional and must either be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or be made in the knowledge of the intention of the group to commit the crime.[160] The responsibility of a civilian superior, moreover, may be invoked where crimes are committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates.[161]

Criminal prosecutions have precedents in the prosecutions of industrialists after WWII[162] and are reflected in a number of domestic test cases.[163] Despite the range of permissible jurisdictional bases, however,

[160] Article 25(3), ICC Statute. See also *Prosecutor v. Furundžija*, Judgment, No IT-95-17/1 (ICTY Trial Chamber, 10 December 1998) and *Prosecutor v. Akayesu*, Judgment, No ICTR-96-4-T (ICTR Trial Chamber 2 September 1998).

[161] Article 28(b), ICC Statute. Liability arises where: (i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[162] See cases against *Krupp* (Law Reports of Trials of War Criminals, Volume X, 69), *Flick* (Law Reports of Trials of War Criminals, Volume IX, 1), *I.G. Farben* (Law Reports of Trials of War Criminals, Volume X, 1), *Zyklon B* (Law Reports of Trials of War Criminals, Volume I, 93) and Roechling (Law Reports of Trials of War Criminals, Volume X, 56–57). See *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948).

[163] See prosecutions brought in The Netherlands against van Anraat (LJN: AX6406 Rechtbank's-Gravenhage, 09/751003-04 English translation; LJN: BA6734, Gerechtshof's-Gravenhage, 2200050906-2) and van Kouwenhoven (LJN: AY5160, Rechtbank's-Gravenhage, 09/750001-05 English translation; LJN: BC7 373, Gerechtshof's-Gravenhage, 22-004337-06V); prosecutions brought in France and Belgium against two executives of TotalFinaElf (CITE); and the Kilwa case involving three executives of Anvil (High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo; Press Release; Geneva, 4 July 2007). *See also* the more than forty civil class action suits brought in the US under the ATCA dealing with corporate liability for international crimes, such as: *Roe and Doe v. Unocal*, Case No. 00-56603; 00-56628 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co. et al.*, Case No.96 CIV 8386 (KMW) (S.D.N.Y. 2002); *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc*., Case No. 01CV9882 (S.D.N.Y. 2001); *Villeda et al. v.*

domestic criminal proceedings involving transnational corporate actors have to date rarely proved successful. Variations in national law for attributing liability within transnational corporate structures mean that a parent company often cannot be held responsible for the acts of its subsidiaries.[164] In particular, under the doctrine of separate corporate personality, each member of a corporate group will typically be treated as a distinct legal entity.[165] In criminal actions against individual agents, moreover, the substantiation of the mental element may prove a further challenge for domestic prosecutions.

Collaboration between international and national actors could facilitate linkages and create synergies for pursuing criminal proceedings. In the DRC, for example, the Security Council mandated Group of Experts has highlighted the connections between various armed groups and the ongoing exploitation of natural resources in the troubled Kivu regions, notably gold and cassiterite reserves, which the Group of Experts calculates continues to deliver millions of dollars in direct financing into the coffers of one group alone (*Forces démocratiques de libération du Rwanda*, FDLR) through trading networks comprising a variety of corporations operating in Africa, Asia, the Middle-East and Europe.[166]

Upon taking office, the ICC Prosecutor stated that according to information received, crimes reportedly committed in the DRC appeared to be directly linked to the control of resource extraction sites: "Those who direct mining operations, sell diamonds or gold extracted in these

Fresh Del Monte Produce Inc. et al., Case No. 01-CIV-3399 (S.D. Fla.2001); *Bowoto et al. v. Chevron et al*., Case No. C99-2506 (N.D. Cal. 2000); *Estate of Rodriguez et al. v. Drummond Company, Inc. et al*., Case No. CV-02-0665-W (N.D. Ala. 2002). For an overview see *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, International Peace Academy and Fafo, available at http://www.fafo.no/ liabilities; International Peace Information Service (a research institute focused on arms trade, exploitation of natural resources and corporate social responsibility in Sub-Saharan Africa): http://www.ipisresearch.be/?&lang=en.

[164] *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035 (9 February 2007), para. 29.

[165] *Ibid.*

[166] *Final report of the Group of Experts on the DRC submitted in accordance with paragraph 8 of Security Council resolution 1857 (2008)*, S/2009/603 (23 November 2009).

conditions, launder the dirty money or provide weapons could also be authors of the crimes, even if they are based in other countries".[167] More recently, the Office of the Prosecutor has announced that is developing a law enforcement network project for this purpose with a number of interested States.[168] Through such a collaborative approach, international investigators and prosecutors who have crime base information could potentially cooperate with third State counterparts to facilitate the building of complicity cases back home.[169] It has also entered into discussions with the Organisation for Economic Cooperation and Development to cooperation with its efforts to promote responsible behaviour of multinational enterprises in the mining sector in areas of conflict or fragility where the ICC is investigating.[170]

As the experience of the DRC shows, repression of accomplice liability is not marginal to the commission of crimes: the economic benefits derived from the commission of crimes may be instrumental to exacerbating or fueling conflict. Efforts to curb the sources of funding to the parties of an armed conflict or to prevent illegal exploitation of natural resources may thus be intimately intertwined with efforts to disrupt the cycle of violence. States could take active steps to counter the permissive environment for corporate wrongdoing in conflict zones. Such action could

[167] *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC*, Mr. Luis Moreno-Ocampo on 8 September 2003. "The investigation of financial transactions, for example for the purchase of arms, may well provide evidence proving the commission of atrocities. Here again the interaction between State authorities and the Office of the Prosecutor will be crucial: national investigative authorities may pass to the Office evidence of financial transactions which will be essential to the Court's investigations of crimes within the Court's jurisdiction; for its part, the Office may have evidence of the commission of financial crimes which can be passed to national authorities for domestic prosecutions. Such prosecutions will be a key deterrent to the commission of future crimes, if they can curb the source of funding"; *ibid.*

[168] *See Prosecutorial Strategy, 2009-2012* (ICC-OTP). *See also* R. Gallmetzer, "Prosecuting Persons doing Business with Armed Groups in Conflict Areas – the Strategy of the OTP and the OTP's Law Enforcement Network", *JICJ* 2010, Special Issue.

[169] Examples include the *van Anraat case* where Dutch prosecutors collaborated with the Prosecutor's Office at the Special Court for Sierra Leone, which was concurrently investigating Charles Taylor, to build a case against a Dutch industrialist accused of complicity in the crimes; *supra* n. 155.

[170] *OTP Weekly Briefing 26 January-1 February (Issue #22)*; available at http://www.icc-cpi.int.

form an important part of a global system for the repression of international crimes.

3.4. Conclusion

The complementarity regime of the ICC is the cornerstone of the Rome Statute.[171] While confirming the notion of concurrent jurisdiction, it emphasises a preference for the exercise of domestic jurisdiction over international crimes. In doing so, the ICC is often described as the weaker sibling of *ad hoc* Tribunals because it lacks primacy. Arguably, however, the institutional relationship created between the ICC and national authorities is far more coherent than that of previous international courts and tribunals.[172] This is because the complementarity framework and the accompanying admissibility provisions grant the Court strong supervisory powers over national proceedings and create powerful incentives to promote domestic compliance. Indeed, compared to the oft unfulfilled obligations created by previous treaty regimes, the Statute establishes a far more profound set of interactions between international norms and domestic practice, resulting in heightened prospects for actual enforcement.

In this sense, the entry into force of the Rome Statute is about more than the establishment of a new court: it creates a global compliance system for the enforcement of international criminal law.[173] This is done by locating the ICC within the existing framework of customary and treaty obligations binding States. Within this system, the ICC operates as

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[171] *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377 (10 March 2009), para. 34.

[172] As discussed above, this has been tempered, in part, by the adoption and practice of rule 11*bis* transfers and the Tribunal's completion strategies.

[173] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2004, 86-127, in reference to the community of international courts and tribunals, suggests "the combined effect of more organized jurisdictional inter-fora relations and a higher degree of jurisprudential consistency could transform international courts and tribunals into a judicial system, enjoying meaningful levels of inner-coherence, and thus result in the strengthening of the unity of international law" – an observation that could equally apply to the relationship between States Parties and the ICC within the framework of the Rome Statute. See also William Burke-White, "A Community of Courts: Toward a System of International Criminal Law Enforcement", *Mich. J. Int'l L.* 2003, vol. 24, no. 1.

the exception and not the norm, since the primary responsibility for the repression of international crimes resides with domestic institutions. The Court can stir States to take action by contestual competition over forum allocation, but it can also encourage collaboration and synergies across multiple fora. The success of this global justice system will therefore rely on the balance struck between international and national action; between incentives and coercion; between contest and collaboration.

The Court has started to prosecute its first cases. At the same time, the international community appears to be increasingly concerned with emphasising the responsibility of national authorities to combat impunity. For some States this may mask a reactive posture to protect vested interests under the cloak of national sovereignty. But for an increasing number of States it appears to arise out of concern for the viability of a sustainable rule of law system.[174]

As described above, there are numerous ways in which complementarity national approaches can be implemented. While the primary locus of domestic action will tend to reside in the States most directly affected by the crimes, in many situations it may be premature or unrealistic to expect countries in the midst of or recently emerging from massive violence to resort to the investigations and prosecutions of atrocity crimes. In these situations, the role of third States may become invoked within the international system. This may take the form of institutional assistance to those States directly affected by the crimes; the exercise of universal jurisdiction; and the investigation of individual or corporate accomplice liability stemming from the territory of a third State.

[174] Notably the issue of complementarity, in view of what more States can do to combat impunity, formed one of the four thematic strands of the stocktaking exercise undertaken by ICC States Parties at the 2010 Review Conference. *See* Assembly of States Parties, *Report of the Bureau on stocktaking: Complementarity*, ICC-ASP/8/51 (18 March 2010); Resolution RC/Res.1, *Complementarity*, adopted at the 9th plenary meeting of the Review Conference (8 June 2010).

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Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes

Morten Bergsmo (editor)

This book concerns the relationship between the principles of complementarity and universal jurisdiction. Territorial States are normally affected most strongly by core international crimes committed during a conflict or an attack directed against its civilian population. Most victims reside in such States. Most damaged or plundered property is there. Public order and security are violated most severely in the territorial States. It is also on their territory that most of the evidence of the alleged crimes can be found. There are, in other words, obvious policy and practical reasons why States should accord priority to territoriality as a basis of jurisdiction.

But is there also an obligation for States to defer exercise of universal jurisdiction of core international crimes to investigation and prosecution of the same crimes by the territorial State? What – if any – is the impact of the principle of complementarity in this respect? These are among the questions discussed in this anthology.

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