UNIVERSITY OF CAPE TOWN

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‘THE PRINCIPLE OF COMPLEMENTARITY THROUGH THE ROME SATUTE: A CRITICAL ANALYSIS OF ITS CONTENT, IMPLEMENTATION AND APPLICATION. CASE STUDY OF THE DRC’

Minor dissertation submitted to the faculty of law at the University of Cape Town in partial fulfilment of the requirements for the degree of Masters (LL M) in international law.

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ABSTRACT

The analysis of the principle of the complementarity formula set out in the Rome Statute is at the heart of this dissertation. The research aims to critically reflect on the complementarity regime under the Rome Statute in relation to international crimes committed in the DRC since the incorporation of the Rome Statute into the Congolese legal system. This research argues that the implementation of the principle of complementarity poses difficulties of application, implementation, and interpretation and thus remains a less effective means of putting an end to international crimes. The findings of this research indicate an urgent need for the principle of complementarity being rethought by clarifying its content and scope. Victims of international crimes cannot to date rely on its implementation to obtain justice. This research adopts an essentially conceptual approach; moreover, the methodological approach adopted is that of qualitative research. This research calls for the principle of complementarity being rethought by clarifying its content and scope.

Keywords: Rome Statute, Principle of complementarity, Court, International crimes, Sovereignty, Alternative forms of justice.

LIST OF ACRONYMS

ADF	Allied Democratic Forces
AJIL	American Journal of International Law
ASF	Avocats Sans Frontières
AU	African Union
CAR	Central African Republic
DDR	Démobilisation Désarmement et Réinsertion
DRC	Democratic Republic of Congo
EJIL	European Journal of International Law
FRPI	Force de Résistance Patriotique de l'Ituri
ICC	International Criminal Court
ICC-OTP	International Criminal Court-Office of the Prosecutor
LRA	Lord Resistance Army
M23	Mouvement du 23 Mars
MONUSCO	Mission des Nations Unies pour la Stabilité du Congo
NGO	Non-Governmental Organisation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council

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INTRODUCTION

Research context

The approval of the Rome Statute in 1998 was the culmination of negotiations between state actors with the aim of ending impunity for the most atrocious international crimes and bringing criminals to account.[1] This text, unlike those creating *ad hoc* tribunals prior to the institution of the International Criminal Court (ICC) (the Court), proposed a permanent international institution that would be capable of dealing with international crimes on a permanent basis in the event of the crimes not being prosecuted by national courts.[2] This intention appears in the preamble to the Rome Statute which declares that 'the most [heinous] crimes must not go unpunished'.[3]

However, certain States showed a measure of reluctance to approve the treaty in the Rome Statute negotiations because they were dubious about creating an institution that would encroach on their sovereignty.[4] The ICC thus is a key achievement that followed a long period of States' reluctance to form an international judicial body with powers to override national courts.[5] States, jealous of their sovereignty, therefore had to secure a compromise that reconciled their sovereignty with the need to make international criminal justice effective. This compromise lay with establishing an international criminal court with jurisdiction complementary to national courts, whose role was to prosecute international crimes on the unique condition that states were either unable or unwilling to prosecute them.[6] In other words, the jurisdiction of the ICC was superimposed on national courts to prosecute the perpetrators of the most serious crimes where the national judicial system had collapsed or where national judicial authorities failed or declined to prosecute the perpetrators of the crimes.[7] Thus, the principle of complementarity remains at the heart of the architecture of the Rome Statute by providing a viable relationship between the ICC as an institution and the sovereign interests of

[1] William W. Burke-White 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557.
[2] Robert Cryer et al *An Introduction to International Criminal Law and Procedure* 2 ed (2010) 144-46.
[3] Preamble to the Rome Statute, para 4.
[4] Ibid.
[5] Adriaan Bos 'From the International Law Commission to the Rome Conference (1994-1998)' in Cassese, Gaeta & Jones (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 56.
[6] Art 17, Rome Statute. In light of this provision, the ICC has to assess the admissibility of cases and determine whether the state is unable or unwilling to prosecute the perpetrators of the most serious crimes; for more details on the balance national and international criminal justice see Mohamed El Zeidy 'The Principle Of Complementarity: A New Machinery To Implement International Criminal Law' (2002) 23 *Mich. J. Int'l L*. 869-70
[7] Ibid.

the national states.[8] As pointed out by the Pre Trial Chamber in the *Joseph Kony* case, the principle of complementarity is the cornerstone of the Rome Statute.[9] The interpretation of this principle in the face of the reality on the ground determines whether a case meets the admissibility criteria before the Court can take the matter. However, problems of interpretation, application and implementation of this principle have arisen in a number of cases and situations, making it important to interrogate its effectiveness in ensuring an end to impunity for international crimes.

Problem statement

By ratifying the Rome Statute, states were allowing the ICC to prosecute persons suspected of committing crimes set out in the statute on the basis of the principle of complementarity.[10] Victims could have welcomed the prospect of an avenue for redress by way of the ICC's intervention when national courts were unable to prosecute the perpetrators of international crimes − and even if the ICC did not act, the hope remained that that national courts would prosecute the perpetrators of the crimes. However, the principle of complementarity presents challenges of interpretation, application and implementation that can result in the perpetrators of international crimes going unpunished.

The first problem that arises with respect to the implementation of the principle of complementarity relates to the tendency of states to resort to alternative, non-judicial forms to achieve peace in their countries.[11] These processes emphasise peace at the expense of justice. Whilst the principle of complementarity is considered on the one hand, the Prosecutor faces the dilemma of whether to investigate or wait for peace processes to be dealt with first.[12] A number of states especially in Africa have resorted to these methods without imposing sanctions on criminals.[13] The question, therefore, is whether these alternative processes are consistent with the purpose of the Rome Statute which makes it clear that crimes under its jurisdiction cannot suffer any limitation.

[8] Pre-Trial Chamber II decision in *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* 10 March 2009 ICC-02/04-01/05-377 (ICC) para 34.
[9] Ibid.
[10] Nidal Nabil Jurdi 'The prosecutorial interpretation of the complementarity principle: Does it really contribute to ending impunity on the National level?' (2010) 10 *International Criminal Law Review* 73.
[11] Maxime C. Tousignant 'L'instrumentalisation du principe de complémentarité de la CPI : Une question d'actualité' (2012) 25(2) *Revue Québécoise du Droit International* 79
[12] Leslie Vinjamuri 'The ICC and the Politics of Peace and Justice' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (2015) 13-27.
[13] These countries include *inter alia* DRC, Sudan, CAR, and Libya; *See* also Ifeonu Eberechi 'Who will save these Endangered Species? Evaluating The Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms' (2012) 20(1) *African Journal of International and Comparative law* 22-41.

The second problem regarding the principle of complementarity is the limitation of the Prosecutor's powers to prosecute in the face of claims on state sovereignty.[14] Although states may have agreed to relinquish a portion of their sovereignty by accepting the compromise or balance between their 'sovereignty' and the establishment of an autonomous and impartial judicial institution, the states have tended to tip the balance in favour of their sovereign interests in the face of international crimes committed on their territory.[15] The right of states to challenge the admissibility of cases to the ICC undermines the implementation of the principle of complementarity. States have frequently interpreted admissibility criteria in their favour on the basis of their 'sovereignty' even when objectively observable indicators demonstrate the opposite.[16]

The third problem relates to the interpretation and application of the admissibility criteria, namely unwillingness, inability and gravity.[17] The criteria of unwillingness and gravity are subjective determinations when under consideration by the Office of the ICC Prosecutor.[18] The concerns that often arise are when a state should be considered unwilling to investigate and prosecute. Added to this, the inability test embodies an inherent conflict that is likely to politicise the principle of complementarity. Indeed, when a preliminary hearing finds a state unable to prosecute its criminals, the best option would then be for the Court to take measures necessary to ensure that every suspect involved in the perpetration of international crimes is prosecuted. It follows that if the ICC, in terms of its mission, can only handle the 'big fish' it will fail to end impunity for international crimes because many 'lower-level' criminals are likely to go unpunished. This is exemplified in the *Lubanga* and *Katanga cases*, in which the ICC did intervene on the 'inability' criterion, but subordinate solders continued to perpetrate international crimes in the DRC – borne out by the fact that the DRC had not prosecuted such 'criminals'.[19]

These problems underscore the difficulty of applying, implementing and enforcing the principle of complementarity and raise the question of whether the victims of international

[14] Almoktar Ashnan *Le Principe de Complémentarité entre la Cour Pénale Internationale et la juridiction pénale nationale*' (unpublished Ph. D thesis, Université Francois-Rabelais des Tours, 2015) 199-206.
[15] Tousignant op cit note 11.
[16] A Tomarchio *Les Etats-Unis et la Cour Pénale Internationale: le fondement d'un refus* (unpublished LL.M thesis, Université Lumière Lyon II, 2003) 35.
[17] Ashnan op cit note 14 at 99.
[18] Jo Stigen 'The Relationship between the International Criminal Court and National Jurisdictions: the Principle of Complementarity' (2009) 7(2) *Journal of International Criminal Justice* 231.
[19] Sofia Candeias et al 'The legal Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)' (2015) *International* Center for *Transitional Justice* 1-2.

crimes, in particular in the DRC, can rely on the application and implementation of this principle to see the criminals prosecuted as envisaged in the Rome Statute? How can this principle be effectively enforced to achieve the objectives set out in the Rome statute?

Preliminary literature review

Much research has been conducted on the principle of complementarity, and legal researchers are not indifferent to the problems arising from its application, implementation and enforcement. While some researchers have been concerned to examine the virtues of the principle, describing it as an effective tool in the establishment of the rule of law at the international level, others have questioned its effectiveness in ending impunity. Some argue that the principle of complementarity remains the appropriate tool to achieve the objectives set out in the Rome Statute because it is based on cooperation between the ICC and states.[20] Proponents of this position have developed the proactive complementarity approach that it encourages states to take charge of situations that arise in their territories.[21] Mohammed El Zeidy is considered to have conceptualised the principle of complementarity in the three approaches of active complementarity, positive complementarity, and proactive complementarity.[22] The scholar is supported by Ovo Catherine, who argues that proactive complementarity based on clearly defined interactions and a division of labour between the ICC and national systems allows the two systems to combine efforts and thus end impunity.[23] This position implies that cooperation between the ICC and states is the foundation of the principle of complementarity. However, the major criticism to be addressed regarding this position is that it exaggerates cooperation while ignoring the reality that guides states in their participation in international regimes. Even if states claim to accept the Court's jurisdiction by renouncing a portion of their sovereignty, they have still shown excessive attachment to their sovereignty.[24] That is why Kenya did not hesitate to protest against the Court when it decided to prosecute incumbent Kenyan President Uhuru Kenyatta for his alleged involvement in the 2007 post-election violence. African States have vehemently opposed any attempt by the Court to act against heads of state, describing it as a humiliation.[25]

[20] Ovo Catherine 'The complementarity regime of the international criminal court: National implementation in Africa' (2017); Mohammed El Zeidy 'The genesis of complementarity' in: C Stahn, M El Zeidy (eds) *Complementarity from Theory to Practice* (2011) 77-8.
[21] Catherine op cit note 20 at 43.
[22] Ibid. at 43 (Footnote omitted)
[23] Ibid. at 44.
[24] Tim Murithi 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court' (2014) 1 *International Criminal Justice Series* 183.
[25] Ibid.

The second line of argument, by contrast, and one to which I adhere, considers that the implementation and enforcement of the principle of complementarity and its application present multiple challenges that have obstructed or at least mitigated the process of ending impunity for the most serious crimes. Federica Gioia, one of the proponents of this position, asserts its ineffectiveness compared to the primacy of *ad hoc* previous tribunals over national courts, contrasting them to the regime of complementarity that underlies the idea of the primary responsibility of states.[26] He argues that, in contrast to the benefits that have resulted from the principle of the primacy of international courts, the principle of complementarity is doomed to failure.[27] Since the obligations of the Rome Statute do have *erga omnes* effects, the Court should take responsibility on behalf of the international community to prosecute suspects without jurisdictional limitation so that states cannot side-step them through alternative measures of justice such as amnesties and pardons.[28] On the other hand, Eric Fish asserts, in relation to the implementation of the principle of complementarity in Uganda, that the Rome Statute would need to be amended to allow procedures such as negotiation and other alternative justice processes to be explicitly incorporated in the admissibility process.[29] He bases his argument on the Ugandan situation in which Joseph Koni took up arms again when proceedings were launched against him by the ICC while the negotiation process was under way in Juba (South Sudan).[30] It is important to note however that such a position risks undermining the principle of complementarity by transforming the ICC into an institution whose primary role is not to end impunity but rather to work for peace throughout the world. Indeed, achieving peace is one of the ICC's objectives, but this objective must be realised through criminal justice as pointed out by former Prosecutor Louis Moreno. While the ICC's goal is to end impunity with the aim of achieving peace, peace must not lead to making peace its priority and leaving justice behind, otherwise, we would be campaigning for an 'international pacific court' and not an 'international criminal court' to deliver justice. Nidal Nabil Jurdi, for his part, questions whether the interpretative approach to the complementarity regime effectively brings an end to crimes committed at the national level;[31] although the principle of complementarity is

[26] Federica Gioia 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1101 (footnote omitted).
[27] Ibid.
[28] Ibid at 1095.
[29] Eric S Fish 'Peace through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions' (2010) 119: 7 *Yale Law Journal* 1704.
[30] Ibid at 1705-1706.
[31] Nidal Nabil Jurdi 'The prosecutorial interpretation of the complementarity principle: Does it really contribute to ending impunity on the National level?' (2010) 10 *International Criminal Law Review* 73.

theoretically used to encourage and facilitate states to fulfil their international obligations, in particular to prosecute the perpetrators of the most serious crimes, the Prosecutor's interpretation of situations of inaction at national level could lead to results that do not conform to reality on the ground.[32] The author adds that the role of national courts as primary actors in prosecuting international crimes contrasts with the Court Prosecutor's approach in a number of cases to the admissibility of cases for inability or unwillingness.[33] He thus draws on the examples of the DRC and Uganda, arguing that while the DRC could, in some respects, be considered unable to prosecute the perpetrators, there was no justification for Uganda to be considered unable to prosecute them.[34] He thus criticises the court's decisions to declare these cases admissible without verifying whether they met the criteria set out in article 17 of the Rome Statute. Whilst these studies throw interesting light on of the principle of complementarity based on past cases in the DRC, very few have focused on the crimes now being perpetrated in the DRC.

Research hypothesis

In view of this brief description of the problems of application, implementation and enforcement of the principle of complementarity, in particular the politicisation of the principle, the limitation of the powers of the Prosecutor in determining admissibility, the recurrent invocation of states' sovereignty and the constant resort to alternative justice processes in Africa, this research proceeds on the assumption that the principle of complementarity set forth in the Rome Statute would need to be amended or rethought for effective repression of international crimes.

Purpose and scope

This study aims to achieve a general objective and some specific objectives. Generally, this investigation aims to critically reflect on the complementarity regime under the Rome Statute. In particular, this research aims to:

- Understand and discuss the principle of complementarity in the Rome Statute;
- Examine the challenges relating to the implementation and enforcement of this principle;

[32] Ibid.
[33] Jurdi op cit note 31 at 74.
[34] Ibid.

- Discuss the principle of complementarity with respect to ongoing crimes in Beni and Ituri regions in the DRC.

In order to better understand the above problems and thus achieve the objectives set out in this dissertation, it appeared important to limit this dissertation, first from a subject-matter point of view, secondly from a spatial point of view and finally from a temporal point of view. On the subject-matter consideration, this work focuses on a critical analysis of the complementarity regime in the Rome Statute, justified by the ongoing crimes of its eastern part the DRC which have just lasted more than five years without the Court being able to use its powers to intervene under article 17. Moreover, this work is temporarily demarcated by international crimes committed from the time of the ratification of the Rome Statute by the DRC (2002) until the recent crimes of 2018. The choice of this period is justified by the need to understand whether the implementation and application of the principle of complementarity has had the effect of ending impunity for international crimes committed in this period or, at least, deterred prospective criminals. Finally, this study is spatially limited to the DRC because it is gradually emerging from terrible armed conflicts in which millions of victims have suffered or died.

Methodology

The methodological approach adopted in this study to achieve the above-listed objectives is based on an in-depth evaluation of the application and implementation of the complementarity principle the DRC. The general methodology employed is that of qualitative case-study research and quantitative research. These approaches are particularly relevant to this study as few quantitative data are coupled with the examination of the relationship between facts on the ground and the application of the complementarity principle. Several sources were consulted to ensure the credibility of the data, especially hard-copy books, articles and online documents dealing with the principle of complementarity with regard to war crimes and crimes against humanity, and also on the measures needed lessen impunity for serious crimes in the DRC. These documents included statutes, international conventions, journal articles, newspaper articles, books, case law, reports of various international NGOs and public statements.

Disposition

This investigation will be undertaken into two chapters. The first chapter will focus on understanding the principle of complementarity, attempting to explain its legal content and scope, before turning to the twin concepts of complementarity in the Rome statute ie jurisdiction and admissibility and finally, emerging types of complementarity. The second

chapter will focus on the implementation of the principle of complementarity and its application, identifying its major weaknesses. This chapter will demonstrate the paradox inherent in the inability criterion which makes it difficult to eradicate impunity ie if a state is deemed unable to prosecute a war criminal or perpetrator of a crime against humanity, the court should have the power to take over the prosecution of all criminals, regardless of their hierarchical role in the commission of the crime. Furthermore, the principle has been difficult to implement on the lines of the unwillingness criterion since most of the criminals occupy high positions in government. This chapter also demonstrates that the implementation of this principle can be thwarted by amnesty laws and pardons. The chapter concludes by arguing that redress for victims of international crimes should not be dependent on the implementation of the principle of complementarity for the ICC to obtain justice as it stands to date.

CHAPTER 1

THE PRINCIPLE OF COMPLEMENTARITY THROUGH THE ROME STATUTE: CONTENT, INTERPRETATION AND APPLICATION.

1.1. Introduction

This chapter aims to clarify the concept of the 'complementarity principle', which, as pointed out by the ICC's Preliminary Chamber, constitutes the cornerstone of the Rome Statute.[35] This chapter will first provide a general picture of this principle before providing a critical analysis of its application and interpretation by the Court. Although the concept might seem simple and easy to grasp, it nevertheless carries a broad impact, the understanding of which is of great importance to this study. This study requires the examination of this concept, as the dissertation revolves around it. As a start, article 17 of the Rome Statute, which forms the basis of the principle of complementarity, is not perfectly drafted, leaving its full understanding and interpretation to the discretion of the Court.[36] This chapter argues that though the content of the principle of complementarity has been delimited, the difficulties associated with its interpretation and application resulted in it being unable to put an end to the perpetration of international crimes, requiring the principle to be rethought. This conclusion is drawn from the shortcomings contained in art 17 and other provisions of the Rome Statute that are involved in the implementation of the principle of complementarity. Thus, this chapter will first shed light on the content of the principle of complementarity in its first section. Then, in the second section, attention will be placed on its associated concepts of jurisdiction and admissibility, concepts that are also involved in the assessment of complementarity. The third section will focus on the models of the principle of complementarity that have been developed to understand what complementarity approach the Court seems to favour. The conclusion of this chapter will provide some recommendations which can be explored to put the complementarity principle into practice.

1.2. Meaning and legal content of the principle of complementarity

What does the 'principle of complementarity' mean, and what does it entail? This concept, as conceived in the Rome Statute, has its origins in the draft drawn up by the International Law Commission on an international criminal court; but the terms of which were modified during

[35] Supra note 8.
[36] Tousignant op cit note 11 at 85-6 ; *See also* Éric Nsabimbona *La complémentarité de la Cour pénale internationale à l'épreuve de la lutte contre l'impunité des crimes internationaux* (unpublished LL.M thesis, Université de Montréal, 2016) 4.

the negotiations.[37] The nature of the international criminal jurisdiction to be set up *vis-à-vis* national systems had to be determined in advance to ensure that the most serious crimes were effectively repressed. According to Cryer, during the negotiations, there was an urgent need to agree on this notion of complementarity before even reaching any agreement on the establishment of a new international criminal court.[38] This determination was therefore important to dispel the shadows of so-called state sovereignty already looming over the role of the Court. Despite agreement on the content to be afforded to the concept of 'complementarity principle', it has not been clearly defined in the Rome Statute and not expressed in clear terms.[39] Indeed, the International Law Commission confined itself to deciding that the ICC should be 'complementary to national criminal justice systems',[40] without spelling out how complementarity would be understood in practice. The Rome Statute sought to resolve the uncertainty as legal scholars involved conducted an asymmetrical reading of its preamble coupled with article 17.[41]

While article 17 sets out the so-called admissibility criteria for situations or cases, the preamble of the Rome Statute merely uses the words 'emphasizing that the ICC established under statute shall be *complementary* to national criminal jurisdictions' but does not elaborate on the principle of complementarity (emphasis added). When the preamble is read with article 17 regarding the admissibility criteria, the concept of 'principle of complementarity' would seem to mean that the ICC would only supplement national courts when the latter were either unable or unwilling to investigate a specific crime or crimes. Despite this lack of definition in the Rome Statute, complementarity would seem to reflect the idea of two or more things acting in concert to improve each other.[42] This definition (that seems to be consistent with that adopted by plenipotentiaries at the Rome conference) is that suggested by the American English Dictionary, which defines the principle of complementarity as 'a principle of law which stipulates that jurisdictions will not overlap in legislation, administration, or prosecution of crime'.[43] Whilst this definition does not fully reflect the intention of the drafters of the Rome Statute, it is persuasive for the reason that it is similar to the underlying intention of the drafters.

[37] Robert Cryer et al *An Introduction to International Criminal Law and Procedure* 2 ed (2010) 153.
[38] Ibid at 153-4.
[39] William A Schabas *An Introduction to the International Criminal Court* (2007) 185.
[40] International Law Commission Draft Statute Report on the Work of its Forty-Sixth Session 2 May to 22 July (published in 1994 UN Doc A/49/10) 43–4.
[41] Nsabimbona op cit note 36 at 25.
[42] Catherine op cit note 20 at 21.
[43] Ibid. (Footnote omitted).

Indeed, it represents the idea that admissibility of a case is subject to the principle *non bis idem* ie the same case should not be heard twice.

Therefore the combined reading of article 17 and the preamble means that any ICC intervention should be 'complementary' to national criminal courts. The Court is thus not designed to try all international crimes falling within its jurisdictional subject-matter and temporal and geographical jurisdiction: as the preamble points out, states remain primarily responsible for the fight against impunity in their domestic systems, stating 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[44] This obligation to prosecute or extradite the perpetrators of international crimes also stems from general international law under which states must prosecute the perpetrators of crimes under international law.[45] It follows, therefore, that the ICC is only required to investigate and try crimes under its jurisdiction if the national courts do not deal with them: if they are in fact investigating, the ICC remains competent but the case is not in fact admissible. It is only when national courts are inactive that the principle of complementarity comes into play in favour of the ICC.[46]

This principle contrasts with that established for the *ad hoc* tribunals which had jurisdiction to try international crimes without having to demonstrate that the national court failed or proved unable to prosecute.[47] As shown above, the Rome Statute gives priority to national courts before the ICC may assume responsibility. Some researchers distinguish between the systems of complementarity with subsidiarity as reflecting the human rights precept that internal remedies be exhausted resorting to international bodies.[48] Although this principle is not defined by the International Law Commission (a body of experts helping to develop and codify international law), there is implicit recognition that it is a general theme that overrides any other theme of the Rome Statute. It bears repeating that, as the Preliminary Chamber pointed out, that the principle of complementarity was the cornerstone of the Rome Statute.[49]

The priority given to national bodies is explained by the fact that contemporary international criminal law requires states to either prosecute or extradite the perpetrators of

[44] Preamble to the Rome Statute, para 6.
[45] UN Final Report of the International Law Commission, 2014 *The Obligation to Extradite or Prosecute* (*aut dedere aut judicare*).
[46] Art 17, Rome Statute.
[47] Schabas op cit. note 39 at 175; See also Alina Kaczorowska *Public International Law* 4 ed. (2010) 321
[48] Ibid.
[49] Supra note 8.

crimes.[50] Moreover, national investigations or prosecutions only negate the admissibility of a case before the International Criminal Court if they concern the same person and substantially the same conducts as those being prosecuted before the Court. Similarly, in its jurisprudence, the Court infers the existence of national investigations or prosecutions from the adoption by national authorities of 'concrete, tangible and progressive' investigative measures.[51] There are, however, situations where national courts may have effectively initiated an investigation or prosecuted but where the case remains admissible before the International Criminal Court. In such cases, the Rome Statute (the Statute) defines the criteria for admissibility, namely that investigations or prosecutions by a competent state defeat admissibility '. . . unless the state is unwilling or unable genuinely to carry out the investigation or prosecution'.[52] These same exceptions also come into play when national courts have investigated but decided not to prosecute the person concerned.[53] In light of the Statute, the state's unwillingness is manifested when national proceedings have been conducted for 'the purpose of shielding the person concerned from criminal responsibility, where there has been an unjustified delay or alternatively where proceedings are not being carried out independently or impartially'.[54] ICC case law has held that overblown respect for the rights of the defence reflected unwillingness of the state to convict and alternatively violations of the rights of the accused were so serious that the possibility of a fair and genuine trial was impossible, and that the proceedings should then be considered as 'inconsistent with an intent to bring the person to justice'.[55] The state's inability is described as a 'collapse' or 'unavailability' of part or all of the state judiciary, which prevents the authorities from carrying out the proceedings, including the failure to arrest and detain the accused or from not being able to gather the necessary evidence.[56] The principle of complementarity suggests that the international and national systems are not mutually exclusive, but rather complement each other in the performance of their tasks and which, therefore, must coexist.[57] In this sense, the principle of complementarity is based not only on the idea that states have primary responsibility to prosecute, but also and above all on the need

[50] El Zeidy op cit note 20 at 71-141.
[51] *Prosecutor v. Simone Gbagbo* 27 May 2015 (ICC-02/11-01/12OA) para. 65 (ICC).
[52] Art 17, Rome Statute.
[53] Ibid.
[54] Ibid.
[55] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* 24 July 2014 (ICC-OI/II-OI/IIOA6) para. 3 (ICC).
[56] Art 17 (3), Rome Statute.
[57] Catherine op cit note 20 at 22.

for efficiency and effectiveness since states are best placed to access the information necessary to conduct investigations.[58]

However, this idea of mutual performance of a task ie complementarity has been questioned by some authors. William Schabas considers complementarity to be a 'misnomer' insofar as it establishes two systems which, in reality, are not complementary.[59] The author relies on the idea that the two systems are inherently antagonistic despite the fact that from a theoretical point of view they are supposed to perform their tasks in a complementary way.[60] Other scholars such as Robert Cryer are also antagonistic to the notion of complementarity, arguing that this principle was initially underpinned by the idea that the Court would perform its tasks in opposition with national systems, running up against the assertion of state sovereignty.[61] This argument finds relevance in the current crisis in some countries which consider their sovereignty to be the key issue in their reluctance to cooperate with the ICC. Further, Immi Tallgren describes complementarity as reflecting 'an open container of contradictory or at least inconsistent arguments' that better reflect the positions on international criminal law and jurisdiction in international criminal matters.[62] He presents complementarity not as a 'principle or a legal concept' *per se*, but rather as a conceptualised idea. His conceptualisation takes the form of two arguments. The first relates to the 'Butler ICC interpretation'[63] (the Butler) presenting the principle of complementarity as a way of imposing restrictions on the ICC's role in the prosecution of international crimes.[64] This approach links the presumption that national courts are omnipotent enough to prosecute international crimes.[65] Thus, this line of argument essentially considers that restricting the ICC's jurisdiction means that national prosecution is the rule while the ICC's intervention the exception. Tallgren's second line of argument is the so-called 'Master ICC interpretation'[66] (the Master) which considers the principle of complementarity to be the process of uniting criminal law; inasmuch as the international community has the responsibility to punish international crimes, the Master should not be willing to share primary responsibility to prosecute international crimes with anyone else lest it lose its power.[67] In this sense, the Master would always proceed to achieve

[58] Cryer et al op cit note 37 at 153.
[59] Schabas op cit note 39 at 175.
[60] Ibid
[61] Robert Cryer *Commentary on the Rome Statute* (2017) 1097–1119.
[62] Immi Tallgren 'Completing the international criminal order' (1998) 67(2) *Nor. J. Int'l. L* 124.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.

the best to ensure that complementarity is favourable to itself. Accordingly, believing that the international criminal system would operate successfully under the complementarity system as understood in the Rome Statute, resulting in a single coherent framework of values, was pure utopia.[68]

In the end, the principle of complementarity is based on two fundamental pillars: respect for the primary competence of states, characterised by the notion of jurisdiction; on the other hand, the fact that the ICC, as an institution with limited resources, is reduced to carrying out a limited number of prosecutions at any given time. The complementarity regime aims to encourage and facilitate states' compliance with their responsibility to investigate and prosecute perpetrators of international crimes. This understanding of complementarity now leads to an examination of the notions of admissibility and competence, which are concepts profoundly linked to the principle under primary consideration.

1.3. Jurisdiction and admissibility

The concepts of jurisdiction and admissibility are corollary to the principle of complementarity insofar as they are part of the implementation of this principle. This subsection analyses their interpretation and application.

1.3.1. Jurisdiction

The term 'jurisdiction' is defined as the 'power of the State to regulate affairs pursuant to its laws'.[69] This power can respectively take the forms of jurisdiction *ratione materiae*,[70] *ratione personae*,[71] *ratione temporis*[72] and *ratione loci*.[73] The jurisdiction *ratione temporis* limits the Court's intervention to crimes that occurred after the Rome Statute came into force.[74] This means that the Court cannot exercise its jurisdiction retroactively. This characteristic is unique to the ICC in that international criminal courts prior to the ICC could exercise jurisdiction over crimes committed prior to their installation.[75] The Court had indeed to determine whether it had temporal jurisdiction in the *Lubanga case*. The Pre-Trial Chamber proceeded on the basis

[68] Tallgren Immi 'The sensibility and sense of international criminal law' (2002) 13(3) *EJIL* 561–595, 568–69.
[69] Cryer op cit note 37 at 43.
[70] Ibid. at 43-5; Art 5-8, Rome Statute.
[71] Art 12, Rome Statute
[72] Art 11, Rome Statute
[73] Art 12, Rome Statute
[74] Art 11 (1), Rome Statute.
[75] SONG Sang-Hyun 'Preventive Potential of the International Criminal Court' (2013) 3 *Asian Journal of International Law* 206.

that the Court had jurisdiction on the basis that the DRC ratified the Statute on 1 July 2002.[76] The ICC also exercises *ratione personae* jurisdiction over the nationals of states party to the Statute.[77] This personal jurisdiction also extends to nationals not parties to the Rome Statute, provided that the states of which they are nationals declare acceptance of jurisdiction,[78] or where the jurisdiction is activated by a United Nations Security Council (UNSC) resolution.[79] This was the case for Darfur and Libya, which were not parties to the Rome Statute but whose situations had been referred to the ICC by Security Council Resolutions for consideration.[80] Moreover, the Court's territorial jurisdiction refers to the territory of the state parties on which the crimes were committed.[81]

Article 12 sets out the preconditions for exercising the ICC's jurisdiction. The first paragraph refers to the situation of a state party which has accepted the jurisdiction of the Court as determined by article 15 of its Statute.[82] The same provision grants the Court the jurisdiction to hear the case:

> 'if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.[83]

Finally, the Rome Statute contemplates the possibility of exercising its jurisdiction with regard to states not party to the Rome Statute provided that these non-states parties consent.[84] If a state accepts the jurisdiction of the Court, the latter will have jurisdiction over the situation, as set out in article 13 of the Rome Statute. While the jurisdictional review process is an integral part of the implementation of the principle of complementarity, so too is the consideration of the admissibility of a case or situation.

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[76] *Prosecutor v. Lubanga* 10 February 2006 (ICC-01/04-01/06) para 26: Decision concerning Pre-Trial Chamber Ps Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo.
[77] Art 12 (2) (b), Rome Statute.
[78] Art 12 (3), Rome Statute.
[79] Art 13 (b), Rome Statute.
[80] Security Council, S/RES/1564 (2004) Adopted by the Security Council at its 5040th meeting, on18 September 2004.
[81] Art 12 (2) *(a)*, Rome Statute.
[82] Art 12 (1), Rome Statute.
[83] Art 12 (2) *(b)* Rome Statute.
[84] Art 12 (3), Rome Statute.

1.3.1. Admissibility and issues of interpretation and application

The admissibility of a situation and/or case is considered at all stages of the proceedings and is thus not limited to articles 1 and 17 and the principles set out in the preamble to the Statute.[85] The application of the principle of complementarity requires the Pre-Trial Chamber to first assess the state of the case before national courts in order to determine whether it can conduct the case under and in terms of the criteria set out in the Statute.[86] As pointed out before, the Court does not enjoy supranational status intended to replace national systems,[87] but its jurisdiction is meant to balance national systems with those on the international arena.[88] From the stage of assessing the information brought to the Prosecutor's attention for the purpose of opening an investigation as provided under article 53(1), he or she must ascertain whether the case is or would be admissible under article 17. In the situation where the Prosecutor deals with a case based on his *proprio motu* powers within the meaning of article 13(c) and 15, paragraphs (3) and (4) of article 15 specify that the authorisation of the Preliminary Chamber is necessary to open such an investigation and to ascertain whether the Court has jurisdiction. Rule 48 of the ICC Procedure and Evidence Regulations (the Regulations) specifies that the determination of the reasonable basis for an investigation under the Prosecutor's *proprio motu* powers must be based on the considerations of article 53(1)(a), (b) and (c), as described under article 17. It is appropriate in light of the above to understand that admissibility refers to that particular time when the Court can effectively try a case for which it finds itself competent.[89] It is therefore understood that the admissibility issue is logically the continuation of the jurisdictional review without which an investigation cannot begin. Admissibility is in fact based on article 15 of the Statute, which underscores the idea of the preliminary examination, which aims to determine whether crimes under the jurisdiction of the Court can be investigated by the ICC-OTP (Office of the Prosecutor). If the facts available to the ICC-OTP fall within the jurisdiction of the court, it may therefore analyse the veracity of the facts brought to its attention article 15(1)) and then must explore the parameters of material, temporal, personal and territorial jurisdiction and finally the admissibility requirements provided for article 17 with a view to possibly opening investigations.[90] The complementarity relationship between national criminal courts and the

[85] Tousignant op cit note 11 at 79.
[86] El Zeidy op cit note 6 at 896-7.
[87] Kelly Pitcher *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* (2018).
[88] Linda E Carter 'The principle of complementarity and the International Criminal Court: The role of *Ne bis in idem*' (2010) *Santa Clara Journal of International Law* 165.
[89] Catherine op cit note 20 at 28.
[90] Lawyers Without Borders *'The principle of complementarity in the Rome statute and the Colombian situation: A case that demands more than a positive approach'* Working Paper 10.

ICC is explicitly stated in article 17 of the Statute, which deals with issues relating to the admissibility of situations or cases.

This provision states:

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court will determine that a case is inadmissible where:
    (a) The case is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
    (b) The case has been investigated by a state that has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
    (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
    (d) The case is not of sufficient gravity to justify further action by the Court.

The criteria for admissibility are therefore unwillingness, inability and gravity. The question of admissibility arises as the Court considers the suspect's judicial situation within the framework of the national jurisdiction. The 'duty' of states to try those responsible for the most serious crimes gives state parties to the Statute priority in terms of jurisdiction, and the ICC enjoys a complementary jurisdiction.[91] The Court will therefore only be able to exercise its jurisdiction if national authorities are investigating or if they have already done so. However, this condition is valid only to the extent that the State is unable to investigate or unwilling to prosecute the perpetrators of international crimes.[92] It is nevertheless unclear what the adverb 'genuinely' means in the Statute. It is argued that the expression 'effectively' would have been preferable as it suggests that admissibility would depend much more on the speed of the proceedings initiated at the national level.[93] However, the concept of admissibility underscores the idea of ensuring that states make efforts to end impunity for crimes. I will return to these issues, but for the moment the question to be asked in relation to article 17(1) is to what the extent the situation at the national level must be interpreted by the Preliminary Chamber to be admissible? This question actually raises the issue of subjectivity (which I will discuss in depth) that may be the subject of interpretation by the Court.[94] For example, arguing that a state or national authorities are either unwilling or are unable to prosecute criminals is a grave assertion which

[91] Supra note 44.
[92] Ibid.; Art. 17, Rome Statute.
[93] John Holmes 'Complementarity: National Courts versus the ICC' in Bekou & Cryer (eds) *The International Criminal Court* (2004) 260.
[94] Joe Stigen 'The Relationship between the International Criminal Court and National Jurisdictions: the Principle of Complementarity' (2009) 7(2) *Journal of International Criminal Justice* 231.

may be subject to subjectivity, and if a gratuitous assertion of inability were to be made on the basis of inconclusive facts, it would create severe tension between the Court and the states.[95] On the other hand, it is premature to support the existence of the parameters that can enable the assessment of complementarity, since the current ICC jurisprudence does not provide a complete analysis of the elements of complementarity.[96] In the *Lubanga* case, the Court developed the person/conduct test or the theory of the matching of offences both at the national and the Rome Statute level; the admissibility of a situation was a function of the fact that the 'national proceedings encompass both the person and the conduct which are the subject of the case before the Court'.[97] This test means that if national courts are prosecuting on a different factual matrix from the ICC, the case is still admissible to the Court. Contrarily, the Appeal Chamber had not considered it necessary, in the *Katanga* and *Ngudjolo Chui* cases to consider whether the person/test conduct could be considered correct, suggesting that this test did not require national authorities to prosecute or convict a person, requiring only that the person be genuinely prosecuted.[98] However, the same conduct test was reconsidered in the case of *Saif Al-Islam Gaddafi* but adjusted to cover the same conduct.[99] ICC jurisprudence suggests that the problem of overlapping national and international judicial institutions has received an abstract solution through the complementarity regime without being able to develop a practical guide that can be used to interpret the concept.[100] The application of these tests clearly shows that such an interpretation is open to question. Indeed, as Cryer asserts, it seems exaggerated to interpret complementarity by reducing it to decision of a national court to judge the admissibility of a case.[101] If such were the case, what would then happen to the ICC if a case before a national court was almost identical to the one of interest to the ICC? An alternative would be for the Court to allow national courts to change domestic charges in such a case.[102] As already noted, the admissibility process is aimed at compliance with the principle of complementarity that is evaluated in the first place during the preliminary review phase.

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[95] Ibid
[96] Catherine op cit note 20 at 30.
[97] Lubanga Dyilo ICC PT. Ch. I 10.2.2006 paras. 38–9
[98] *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Al*i; application on behalf of the government of Kenya pursuant to art 19 of the ICC Statute, 31 March 2011, Para 31.
[99] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein* ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the Admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013, paras 1 and 68-75.
[100] Catherine op cit note 20 at 32 (Footnote omitted)
[101] Cryer op cit note 37at 155.
[102] Ibid.

The second question is whether a state can prosecute for the sole purpose of ousting the ICC's jurisdiction. Indeed, crimes under the ICC's jurisdiction are subject to universal prosecution. Accordingly, a case will be declared inadmissible if a state with jurisdiction has launched prosecutions against the suspect.[103] For this reason, when the Office of the Prosecutor considers that there is a reasonable basis for an investigation,[104] it notifies all states parties and states with jurisdiction of the crimes in question,[105] allowing states that have initiated proceedings to come forward and notify the Court. The Prosecutor must then, in principle, leave it to the state to investigate and prosecute, but he may refer the matter to the Preliminary Chamber for the Prosecutor's office to continue to investigate the case.[106] The decision to prosecute or not is not final, and may be reviewed at any time by the Office of the Prosecutor if new circumstances show the unwillingness or the inability of the state to carry out the procedures within the meaning of the principle of complementarity.[107] Respect for the principle of complementarity may also be assessed − regardless of whether admissibility has been discussed at the preliminary level − after an arrest warrant has been issued. Indeed, the Chamber hearing the case may decide on its admissibility.[108] In addition, the accused or the state that considers itself competent can challenge the admissibility ruling. This procedure is evidence of the sovereign discretion of the Preliminary Chamber to assess whether a situation is admissible or not.[109] But this discretion does not mean that the Preliminary Chamber must consider situations *ad aeternum*.[110] The Prosecutor must therefore determine whether the situation qualifies for admissibility with due diligence and transparency.

Furthermore, the admissibility test obliges the Prosecutor's office to consider certain elements in order to arrive at the decision to prosecute, namely inability and unwillingness on the part of the state. The case can only be declared inadmissible in the first instance if it is shown that the state is conducting the investigations or that the state is prosecuting the perpetrators.[111] However, this requirement is subject to the 'genuineness' of the trial proceedings. The case cannot be found to be inadmissible if it is shown that the state concerned is unable to prosecute or is unwilling to do so. In light of article 17 of the Statute, requires the

[103] Ibid.
[104] Art. 53, Rome Statute.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Lawyers Without Borders op cit note 90.
[110] Ibid.
[111] Art 17, Rome Statute.

Pre-Trial Chamber to assess whether national courts are unable or unwilling to handle a case. Paragraph 2 of article 17 of the Statute sets out the criteria to be assessed while considering whether a case or situation may be addressed by the ICC. The determination will depend on how the principles of fair trial as recognised in international law are being implemented by national court.[112] If basic principles of a fair trial are not respected, such as the independence of the judiciary or unjustified delays are noted in the judicial process, such can demonstrate how effectively the national court is conducting or has conducted the matter. It is important first to understand how the unwillingness criterion is assessed.

1.3.1.1 The unwillingness criterion

The basis of the determination of unwillingness on the part of a state is set out in article 17, which states:

> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances is inconsistent with intent to bring the person concerned to justice.

The basic criteria for the determination of unwillingness include shielding a person from being prosecuted and convicted.[113] The difficulty for determining this basic criterion lies in objectively proving that a state is seeking to shield its criminals from being prosecuted, especially when politicians pretend to be acting in the best interests of justice but are in fact preventing justice from being executed.[114] This is indeed a test of good faith by the national authorities, insofar as the first test requires the Court to establish that the State has proceeded to investigate the case for the sole purpose of shielding criminals facing actual justice.[115] This approach was followed in the *Muthaura et al* case, in which the Pre-Trial Chamber decided that Kenya showed unwillingness in that it lacked political will to prosecute the criminals.[116]

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[112] Art 17(2), Rome Statute.
[113] Art 17(a), Rome Statute.
[114] Burke-White op cit note 1 at 575-76.
[115] Hans-Peter Kaul 'The International Criminal Court: Current Challenges and Perspectives' (2007) 6(3) *Washington University Global Studies Law Review* 577-79.
[116] *Prosecutor v Muthaura et al* supra note 98 para 67.

The approach requires the Prosecutor to carefully examine the facts in order to prove the hidden motives of the national authorities to make a particular decision, contrary to their apparent actions.[117]

Thus, the reference to the terms 'unjustified delays' and 'lack of independence or impartiality' in the performance of the internal procedure places objective limits to evaluation.[118] These limits are once again reinforced by the words 'the Court shall consider, having looked at the principles of due process recognised by international law' (article 17), and which are not objectively defined by the Statute. When politicians are involved in the perpetration of crimes, they do their best to ensure that they are not brought to account.[119] As John Holmes points out, the first concept is very broad and the other two criteria set out are merely corollaries of the intent to protect the person concerned from criminal liability.[120] Unjustified delays are not only incompatible with the intention to prosecute the perpetrators but also and above all can lead to the evidence disappearing.[121] However, this could raise issues of when exactly it can be argued that there is a delay and whether such a delay is intended to protect criminals? And if a delay does exist, when exactly does it qualify as being unjustified? It follows that if the Prosecutor succeeds in demonstrating that there is an unjustified delay, this may suggest that the state does not intend to bring the person concerned to justice.[122] Furthermore, how are delays due to technical constraints assessed? And how can it be proved, for example, that the state intentionally created technical constraints to create a justification for delays? The question of determining the willingness of states to prosecute is far from easy to resolve. While the wording of article 17(2) (b) of the Statute may be broad in its scope, the detailed context of this paragraph is not sufficiently clear.[123] Unjustified delays could also have the direct consequence of violating defence rights as reflected in international legal instruments.[124]

Furthermore, paragraph 17(2)*(a)* stresses that the state will be considered unwilling if 'the proceedings were or are being undertaken or the national decision was made for the

[117] Kaul op cit note 115.
[118] Burke-White op cit note 114.
[119] Nicolas Lionel *The International Criminal Court and the End of Impunity in Kenya* (2015) 43.
[120] Holmes op cite note 93 at 675.
[121] Caroline Franson *The principle of complementarity in the Rome Statute: the Security Council referral* (unpublished LL M Thesis, University of Lund, 2004) 43.
[122] Jakob Pichon 'The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court' (2008) 8 *International Criminal Law Review* 194.
[123] Stigen op cit note 94 at 259.
[124] Nidal Nabil Jurdi 'The complementarity regime of the international criminal court in practice: Is it truly serving the purpose? Some lessons from Libya' (2017) *Leiden Journal of International Law* 78.

purpose of shielding the person concerned from criminal responsibility . . .' The key concept of this paragraph being the 'purpose of shielding', which seems to require more than mere negligence or inadvertence from states.[125] In practice, the Prosecutor will have the difficult task of demonstrating that the purpose of the state is to protect the person concerned from criminal responsibility. John Holmes suggests that the Prosecutor's case may be based on clues.[126] In this sense, he argues that if the investigation or prosecution appears to be procedural acts, it would create a presumption in favour of the intent of the judges.[127] Accordingly, such wording may render the determination by the Pre-Trial Chamber of the unwillingness based on the ground of shielding of criminals difficult.

The discretionary nature of the Pre-Trial Chamber's assessment of the admissibility of a case can be a major obstacle to the effective implementation of the principle of complementarity in cases in which political elements are at stake.[128] It is not unprecedented for the Court to conclude unwillingness of a state to investigate or prosecute in cases where the victims reasonably believe that politicians are orchestrating a sham trial. In such cases the state may present reports which do not reflect the realities on the ground.

In summary, what are the specific and objective indicators upon which the Pre-Trial Chamber must conclude to the find that a state is shielding its criminals? Whilst unjustified delays or no prosecutions at all can indicate that a State is unwilling to prosecute criminals, these, are not sufficient criteria to conclude that a state is purposely dissembling the facts. Delays or not prosecuting may also depend on the difficulty of arresting criminals or even be motivated in the interest of public order.[129]

Further, the number of prosecutions conducted is not conclusive of the willingness of the state to seek justice, as some cases may be intended to ultimately shield criminals from justice. Indeed, it is one thing to investigate unprosecuted cases, but quite another to demonstrate bias in failing to conduct investigations.[130] As former Prosecutor Louis Moreno once asserted:

> '[A]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'[131]

[125] Stigen op cit. note 94 at 254.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] ASF op cit note 90 at 6-10.
[131] ICC-OTP Informal expert paper: *The principle of complementarity in practice* (2003) 3.

It is well established that most atrocities are linked to political considerations; and so political actors would tend to require their national courts to hold sham trials to prevent the ICC from intervening.[132] Even though some scholars believe that trials held in significant numbers indicate states' willingness to prosecute, it is, however, unlikely that such prosecutions are purely intended to see justice done. It is one thing to prosecute, but it is quite another to genuinely seek to bring the criminals to account; and as asserted by Caroline Franson, a state may well be able to prosecute, but what is more important is that the state in question is properly motivated, because if a state can delay the proceedings, the crimes(s) could be forgotten or the eyes of the international community diverted.[133] Article 17 sets up the admissibility criteria of inability and unwillingness. The Pre-Trial Chamber must therefore examine all the information before it, and subject it to the admissibility criteria to determine whether the Court can hear the matter. The crucial question is to decide whether a state is unwilling to prosecute. Despite the minimum criteria set out in the Statute, the court has a margin of discretion in such a case.[134]

It is therefore important to examine how the principle of complementarity operates. Research conducted in Columbia concluded that admissibility of a situation to the ICC cannot exclusively depend on assessing how many prosecutions have been undertaken.[135] The assessment of the Columbian situation by the Prosecutor's office is open to question because it has largely been based on quantitative, not qualitative, data,[136] causing Lawyers without Borders to question the effectiveness of the trials.[137] This criticism is convincing because it questions the value of assessments made by prosecuting authorities. As will be indicated in the second chapter of this study, the number of cases undertaken cannot be seen as evidence of states' willingness to genuinely prosecute perpetrators of crimes. In determining whether a state is genuinely willing to prosecute, the Court must objectively assess the situation to ensure that national authorities have put in place favourable conditions for worthwhile trials to be held. The Court must be satisfied that a case or situation is being properly handled by domestic courts if it declines to intervene and allows the domestic courts to carry on with prosecutions.

The other basic criterion set out by article 17(2)(c) of the Statute is issue of the unwillingness on the part of a state to prosecute, which is related to principles of fair trial.

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[132] Linda Carter *American Coalition for the International Criminal Court* 168.
[133] Franson op cit note 121.
[134] Jo Stigen 'The relationship between the ICC and National Jurisdictions: The principle of complementarity' (2009) 7(2) *Journal of International Criminal Justice* 217.
[135] ASF (Advocates without Borders) op cit note 90 at 3.
[136] Ibid.
[137] Ibid.

Article 17(2)(c) provides that a state can be considered to be unwilling to genuinely prosecute depending on whether the trial appears not to be independent or impartial, in the absence of which it may be concluded that the state's main purpose is not to bring the criminals to account but to protect them. Lack of compliance with principles of fair trial may indicate unwillingness to prosecute the criminals. Article 10 of the Universal Declaration of Human Rights (UDHR) states that: 'Everyone is entitled in full equality to a fair and public hearing by an independent and court…' It is one thing to hold proceedings, but it is quite another to ensure they are genuinely and properly being carried out.[138]

Article 17(2) (b) emphasises that delays in proceedings can indicate the unwillingness of a state to punish perpetrators of crimes. In this respect, Franson rightly points out that: 'If a state succeeds in delaying a trial, the case may be forgotten, or at least the eyes of the international community might turn elsewhere after a while.'[139] This argument seems convincing in that a case handled in a reasonable time gives victims the opportunity to testify with their memories still fresh, and, in the process, enhances their prospect of obtaining reparations for their sufferings.

Ultimately, an important concern is whether the elements set out in article 17(1) to determine the lack of willingness are exhaustive. A number of researchers, such as M El Seedy, persuasively argue that the conditions set out in sub-paragraph (2) of article 17 (which states that ' . . . the Court shall consider, having looked at the principles of due process recognised by international law, whether one or more of the following exist, as applicable . . . .') were 'illustrative' and not 'exhaustive', as the phrase 'the Court shall consider' did not involve 'imposing a fixed requirement'.[140] The expression further reinforces the subjective character associated with the assessment of the test of unwillingness. It is understandable that this power is left to the Preliminary Chamber to verify compliance without a comprehensive list of facts that must be taken into account by it and also allowing it to act as an evaluator of compliance according to international human rights standards.[141] Thus it is argued that non-compliance with the rights of the accused should make the case admissible before the Court.[142] In the same way as the Court may address the unwillingness criterion on the part of a state, it determines

[138] UDHR supra at 829-833.
[139] Franson op cit note 121 at 43.
[140] Mohammed El Zeidy *The principle of complementarity in international criminal law: origin, development and practice* (2008) 61.
[141] Federica Gioia, 'State Sovereignty, Jurisdiction and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *LJIL* 1110-113.
[142] Carsten Stahn, 'Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695 at 713.

when a state is unable to prosecute perpetrators of international crimes. The ICC is not just a human rights court; its primary purpose is not to detect violations of procedural rights, but rather to determine whether the national system is capable of prosecuting the main crimes under the Statute.[143]

1.3.1.2. The inability criterion

An additional criterion regarding the admissibility of cases is laid down in article 17(3):

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

This provision sets out conjunctive criteria that indicate that a state is unable to investigate or prosecute, including acute lack of resources, or judicial capacity. Lack of resources indicates that the consequent inability to investigate and prosecute criminals results in impunity.[144] Unlike the unwillingness criterion, the ability criterion is based on more objective criteria, insofar as the inability of a State to carry out investigations is not contingent on motive, but is examined by the Preliminary Chamber on the basis of objectively observable criteria.[145] The first element of inability is the total or substantial unavailability or collapse of the judicial system.[146] However, the criterion of unavailability, as with the unwillingness criteria, brings into play subjective grounds as its interpretation is open to debate.[147] It has been argued that the unavailability of national systems exists when they are non-existent.[148] However, such an eventuality is the least likely as a state whose judicial system is totally unavailable would amount to a non-existent state. Even in failed states, there is still a minimum availability of the judicial system. However, the complex issue lies in the distinction that must be made between unavailability and the total collapse of judicial systems. Whilst this distinction is difficult to make, it is clear that armed conflicts are generally the source of the total collapse of state institutions ie systems still exist but are unable to render services effectively, usually because

[143] Jon Heller 'The shadow Side of complementarity: the effect of article 17 of the Rome Statute on national due process*'* (2006) *Criminal Law Forum* 10
[144] Report of the International Commission of Inquiry on *Violations of International Humanitarian Law and Human Rights in Darfur* UN Doc. 5/ 2005/ 60 para 568.
[145] Cryer op cit note 37 at 157.
[146] Ibid.
[147] Nidal Nabil Jurdi op cit note 124 at 201.
[148] Claudia Cardenas 'The Admissibility Test Before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions' in Kleffner et al. (eds) *Complementary Views on Complementarity Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court* (2006) 8.

of the lack of human or financial resources.[149] Unavailability, on the other hand, is tantamount to the situation where the judicial systems walk away from their duties, illustrating the difficulty of interpretation that the Preliminary Chamber may have in assessing the situation of a state. The telling example of unavailability was the situation in Libya after the fall of Muamar Gaddafi.[150] However, it has been argued that a number of non-exhaustive factors may be indicative of this element,[151] including the glaring lack of judicial staff, the absence of investigators, the lack of infrastructure, and the lack of national legislation to address crimes.[152] Then, the substantial collapse of the judicial system served as the basis for determining the admissibility of cases referred to the ICC by the DRC and the Central African Republic.[153] But these indicators are not always sufficient to convince the Preliminary Chamber to rule a situation admissible. In the DRC the case failed;[154] at the time of the confirmation of the arrest warrant for Thomas Lubanga, it was considered that the situation had evolved to allow for trials of that magnitude following important reforms carried out since 2006.[155] The Court commented on the Prosecutor's application for an arrest warrant against Thomas Luangwa that 'it appears that the democratic Republic of Congo is indeed unable to undertake the investigation and prosecution . . .'[156] The comment was an accurate observation of the situation of the time, but the use of the phrase 'it appears' reveals doubt: even if the Congolese state seemed bankrupt at the time, the national system could not be said to have remained unavailable. The DRC was unable to try Lubanga because it lacked necessary resources to gather information and victims' evidence and to conduct a trial. The country was in such a state of institutional collapse that it could not exercise effective control over the most important part of its territory.[157] The same test prevailed after the CAR Court of Cassation noted that 'the national justice system was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes'.[158] Furthermore, Uganda had pointed out in relation to the inability test that it was unable to arrest persons who bore the greatest responsibility for international crimes.[159] It

[149] Ashnan op cit note 14 at 123.
[150] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, Pre-Trial Chamber I, 31 May 2013.
[151] Jurdi Nabil *The International Criminal Court and National Courts A Contentious Relationship* 230.
[152] Ibid.
[153] Toussignant op cit note 85.
[154] *The Prosecutor v Lubanga* ICC-01/04-01/06 Decision on the Prosecutor's Application for Warrant of Arrest, article 58 (10 February 2006) (ICC, Preliminary Chamber I) para 35.
[155] Ibid. para 36.
[156] Ibid. para 35.
[157] Kris Berwouts *Congo's violent peace/ Conflict and Struggle since the Great African War* (2017) 47-8.
[158] Press release from the Office of the Prosecutor 22.05.2007 (ICC-OTP-20070522-220).
[159] *Situation in Uganda* (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, paras 33 and 37; *Situation in Uganda* (ICC-02/04-54), Warrant of Arrest for Vincent Otti,

should be noted, however, that the Preliminary Chamber had only considered the spirit of the Uganda letter in considering that the case met the admissibility criteria.[160] The possibility of influencing the approach of the Preliminary Chamber in this sense has been strongly criticised on the ground that it was wrong for the Preliminary Chamber to make a finding on the basis of a mere statement that Uganda's judiciary was completely paralysed to the point where it was no longer able to conduct the investigation.[161] There was no supporting evidence to show that the Ugandan justice system was unable to conduct the investigation,[162] and some authors consider that Uganda had at the time one of the best judicial systems and the means to hold such trials.[163] The question is whether a government's statement of inability automatically is conclusive and that the case must automatically be considered admissible without further consideration. What would then be the validity of a declaration of a government through an amnesty law that declares itself unable to continue because of political constraints? Some authors rightly consider that the Prosecutor's reliance on Uganda's mere statement implied lack of willingness to prosecute.[164] Indeed, in arguing that the ICC had appropriate jurisdiction to try those with the highest responsibilities for international crimes, the Attorney-General of Uganda was affirming the opposite of the Rome Statute's insistence that states have primary responsibility for prosecuting the perpetrators of international crimes.[165] The criteria for the admissibility of a case before the Court (willingness or ability) are also linked to and dependent on the gravity of the crime.

1.3.1.3. The gravity criterion

If a crime is not of 'sufficient gravity', it is not admissible. The preamble of the Rome Statute affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[166] In the *Lubanga* case the Preliminary Chamber focused its attention on the gravity of the crime as an additional element and indicated that it was a second variant

8 July 2005, para 37; *Situation in Uganda* (ICC-02/04-55), Warrant of Arrest for Raska Lukwiya, 8 July 2005, para 25; *Situation in Uganda* (ICC-02/04-56), Warrant of Arrest for Okot Odhiambo, 8 July 2005, para 27; *Situation in Uganda* (ICC-02/04-57), Warrant of Arrest for Dominic Ongwen, 8 July 2005, para 25.

[160] *Situation in Uganda* (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, para 38; *Situation in Uganda* (ICC-02/04-54), Warrant of Arrest for Vincent Otti, 8 July 2005, para 38; *Situation in Uganda* (ICC-02/04-55), Warrant of Arrest for Raska Lukwiya, 8 July 2005, para 25; *Situation in Uganda* (ICC-02/04-56), Warrant of Arrest for Okot Odhiambo, 8 July 2005, para 28; *Situation in Uganda* (ICC-02/04-57), Warrant of Arrest for Dominic Ongwen, 8 July 2005, para 26.

[161] Nidal Nabil Jurdi op cit 86; Arsanjani & Reisman 'The Law-in-Action of the International Criminal Court' (2005) 99 *The American Journal of International Law* 397.

[162] Schabas op cit note 39 at 181.

[163] Ibid.

[164] Ibid.

[165] Ray Murphy 'Gravity Issues and the International Criminal Court' (2006) 17 *Criminal Law Forum* 281.

[166] Supra note 3.

of the determination of admissibility.[167] As former Prosecutor Luis Moreno Ocampo said: 'Crimes falling within the jurisdiction of the Court are by definition of certain gravity such as they constitute a determining factor for their admissibility.'[168] As with the unwillingness criteria, the test of gravity, at least its threshold, is a much more a subjective rather than an objective notion, in particular because of its dependence on the discretion of the Prosecutor.[169] Apart from the grave nature of the crimes under the Statute, how many victims must be considered to rank the crime as grave? One? Ten? Or hundreds of the victims? The Court has so far failed to define the number of crimes that render a case grave. The issue of gravity has been central to the admissibility in Uganda's situation. Indeed, in justifying his position, the former Prosecutor (Ocampo) stated, in his speech of 24 October 2005 in New York, that: 'In Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in northern Uganda committed by all groups − the Lord's Resistance Army, the UPDF and other forces…'[170] In light of the above, does the Court's jurisdiction extend to all crimes of a 'serious nature'? In his letter 'Letter of Prosecutor dated 9 February 2006 (Iraq)', the Prosecutor had indeed argued that a number of the crimes within the ICC's jurisdiction had been committed, but that was not enough to justify ICC intervention, and that, moreover, the Statute required an additional threshold of gravity test, although it could be shown that the subject-matter jurisdiction was satisfied.[171] This way of assessing the gravity of the facts is questionable. Considering the gravity of the crimes solely on the basis of the number of victims is too formalistic. The Court might not qualify a case or situation as admissible when victims or persons on the ground would see a situation as meeting the criteria of gravity and therefore admissible.

In any event, articles 6, 7 and 8 of the Statute provide guidance for the interpretation of the concept; article 8 requires the existence of a war crime that is part of a plan or policy or has been committed on a large scale for it to be prosecuted by the Court. Article 7 stipulates that the Court can prosecute crimes against humanity when they are committed in a widespread or systematic manner. But again, these notions fall to be interpreted at the sole discretion of the Prosecutor. The most appropriate assessment of the facts would be according to the very nature

[167] Schabas op cit note 39 at 65-6. See also Ray Murphy op cit note 165 at 281.
[168] Informal meeting of legal advisors of Ministries of Foreign Affairs: statement by Luis Moreno Ocampo then Prosecutor of the ICC 24 October 2005 at 8-9.
[169] Jacques Mbokani 'L'impact de la stratégie de poursuite du Procureur de la CPI sur la lutte contre l'impunité et la prévention des crimes de droit international' (200) 7 *Droits fondamentaux* 18
[170] 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' 24 October 2005 at 7.
[171] Letter of Prosecutor dated 9 February 2006' (Iraq) at 8

of the crimes within the ICC's jurisdiction. While the verification of the principle of complementarity rests with the Prosecutor and in some cases with the Court, several approaches to this principle have been developed by legal scholars.

1.4. Models of the principle of complementarity

The models of the principle of complementarity are not provided for by the Rome Statute, but their conceptual approach has instead been developed by doctrine.[172] Mohammed El Zeidy is considered one of the authors who played a decisive role in this conceptualisation.[173] The regime of complementarity as expressed in the Rome Statute is not new; it originated with the peace treaties that concluded the World War 1.[174] In my view, the evolution of the complementarity regime tracked three types of complementarity: friendly, mandatory and optional.[175] The Nuremberg and Tokyo war crimes courts adopted a complementarity model because of the need for division of tasks between national and international courts in a friendly arrangement.[176] The crime of aggression could not be left to the sole jurisdiction of the national courts, so the friendly procedure was necessary to deal with such crime.[177] Mandatory complementarity, according to El Zeidy, is a result of article 17 of the Rome Statute, which contains the particular phrase: 'The court shall determine that a case is inadmissible . . . ' which underlines the requirement to verify that states have carried out investigations or that those guilty have been convicted at the national level.[178] Optional complementarity, according to this author, is associated with the procedure of self-referral, by which a state takes the initiative to refer the situation on its territory to the ICC.[179] Thus, three types of complementarity have been interpreted from the Rome Statute: a passive model, a positive model and finally, a proactive model.

1.4.1. Passive complementarity

Passive complementarity reflects the idea that the drafters of the Rome Statute envisage the 'Court' as a court of last resort ie giving the Court the window to act only in cases of incapacity or lack of will of a state.[180] This would significantly reduce the role of the Court if it only

[172] Catherine op cit 43.
[173] El Zeidy 'The genesis of complementarity' In Stahn & El Zeidy (eds) *Complementarity from theory to practice.* (2011) 77-78.
[174] Ibid.
[175] El Zeidy *The Principle of Complementarity in International Criminal Law* (2008) 126.
[176] Ibid.
[177] Ibid.
[178] Ibid. at 136.
[179] El Zeidy *The Principle of Complementarity in International Criminal Law* (2008), 212-214, 229
[180] Tousignant op cit note 79 at 80.

intervened when states did not fully fulfil their law-enforcement obligations.[181] This type of complementarity corresponds with that discussed above. According to Catherine, passive complementarity would simply mean that the ICC remains dormant until the mechanisms of state referral or Security Council referral are implemented.[182] In other words, this mechanism would give less weight to the *proprio motu* procedure available to the Prosecutor to set in motion an action before the court.[183] This system of complementarity, as seen above, does not seem most appropriate to achieve the Court's objective of ending impunity, especially considering the objectives of the Statute and the difficulty of certain African states in interpreting the principle to give rise to referrals.[184] The Prosecutor might find the need to set the actions in motion, thus paving the way for positive complementarity.

1.4.2. Positive complementarity

Positive complementarity involves encouragement to national jurisdictions ie to give the national courts the means to act in order to enable them to carry out the investigations. Positive complementarity was initially perceived to be limited to the Court's encouragement to national courts in their pursuit of crimes within the ICC's jurisdiction.[185] In other words, the Court would intervene to catalyse national systems to act.[186] However, this approach to positive complementarity has been limited to the Court's support for national courts in the event that they find themselves in difficulty. This new approach to positive complementarity has been defined as:

> [A]ll activities whereby national jurisdictions are strengthened . . . to conduct genuine national investigations and trials . . . Without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.[187]

Four types of support were thus contemplated under this head: legislative assistance, technical assistance, capacity building and development of physical infrastructure.[188] This type of

[181] William W. Burke-White 'Proactive complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49(1) *Harvard International Law Journal* 56.
[182] Catherine op cit note 20 at 45.
[183] Ibid.
[184] Ibid.
[185] Luis Moreno-Ocampo, Prosecutor of the ICC, statement of the Prosecutor to the Diplomatic Corps (12 February 2004)
[186] William W. Burke-White 'Proactive complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49(1) *Harvard International Law Journal* 57.
[187] Report of the Bureau on Stocktaking: Complementarity Annex IV ICC-ASP/8/Res.9 adopted at the 10th plenary meeting, on 25 March 2010 para 4. (Hereinafter 'Stocktaking on Complementarity') para 16.
[188] Ibid. para 17.

complementarity was adopted by the Prosecutor to encourage states to make referrals, rather than working with them to pursue national investigations and prosecutions:

> [T]he Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. This policy resulted in referrals for what would become the Court's first two situations: Northern Uganda and the DRC[189]

This version of complementarity also ignores reality by emphasising the good faith of states, which, as will be seen in the next chapter, have always been hostile to the Court examining their affairs.[190] The model would diminish the role of the Court charged with ending impunity.

1.4.3. Proactive complementarity

Proactive complementarity envisages a more efficient method of achieving the objectives of the Rome Statute, namely to end impunity for the most serious crimes.[191] It is based on the notion of States applying for support to the Court, which would actively in cooperate with states to enable them to carry out the investigations.[192] The essence of this collaboration is provided, but not exclusively, in articles 10 and 93 of the Statute, which provide for a framework for collaboration between the ICC and the State in conducting an internal investigation and who requests it. It has been argued that such complementarity is possible through the consensual sharing of the burden between the Court and national systems.[193]

1.5. Conclusion

This chapter set out to understand the principle of complementarity set forth in the Rome Statute by way of critical analysis. Despite the absence of a definition of the concept of 'the principle of complementarity' its text reveals that the Court is expected to supplement and encourage national courts in the fight against impunity for crimes under international law, with national courts having primary responsibility for prosecuting perpetrators. Thus, it has proved essential to critically examine the criteria for admissibility provided for by the Rome Statute. A number of problems of interpretation are inherent in the criteria for the admissibility and/or jurisdiction of situations or cases by the Preliminary Chamber. The criterion of unwillingness is tinged with subjectivity as its objective interpretation becomes difficult. Indicators that guide the Prosecutor in the interpretation of a situation or case are essentially so subjective that it

[189] Report on the Activities Performed During the First Three Years (June 2003-June 2006) (2006) at 7.
[190] See the recent clash between AU and the ICC.
[191] See William W. Burke-White op cit*;* Ovo Catherine op cit, Mohammed El Zeidy op cit.
[192] Catherine op cit note 20 at 47.
[193] Ibid.

becomes difficult to grasp their scope. This has led to conflicting interpretations between the state and the ICC. In addition, it has been shown that the inability test, although based on more objective criteria, remains based on contingencies that might not exist in practice or would exist in a very exceptional way. Moreover, this test reveals a contrast between its application and the ICC's objective of ending crimes under international law. The third criterion, the gravity of the crime, was characterised by subjectivism as much as the unwillingness test. This detracted from the value of the Preliminary Chamber's assessment of the gravity of the facts, especially when it has been argued that the extreme seriousness of international crimes underlies its jurisdiction. Finally, it was important to examine the emerging models of complementarity developed by practice of the doctrine, namely passive complementarity, positive complementarity and proactive complementarity. This general overview of the principle of complementarity sets up the study to discuss the challenges associated with the implementation of this principle.

CHAPTER 2

CHALLENGES TO THE IMPLEMENTATION AND ENFORCEMENT OF THE COMPLEMENTARITY PRINCIPLE

2.1. Introduction

This chapter focuses on the implementation and enforcement of the Rome Statute's complementary principle and examines the challenges presented by its implementation. The scholars, who describe the ICC's record as essentially a failure, or at best mixed, blame the difficulties on implementing the principle of complementarity. This chapter is not limited to the examination of article 17 of the Rome Statute in understanding these difficulties associated with the implementation and enforcement of the principle of complementarity, but will also take a combined look at other provisions involved in the implementation of this principle. These include articles 18, 19 and 53, which provide the pre-jurisdictional decision-making mechanism on admissibility and challenge. Therefore, this chapter argues on the one hand that the inconsistencies contained in the complementarity provisions are major obstacles to achieving the ICC's objective, and on the other hand that states resort to alternative justice

processes that are incompatible with the objectives of the Rome Statute, so diminishing the essential purpose of the Rome Statute. Therefore, all these challenges related to the implementation of the principle of complementarity contribute to what some scholars call, rightly in my view, the 'politicisation' of the principle of complementarity.[194] To demonstrate the relevance of this argument, this chapter will examine these challenges from a global perspective before focusing on international crimes committed in the DRC and particularly in its eastern part since 2014. Thus, the first section will discuss the challenges of implementing the principle of complementarity before examining whether these challenges apply in the context of crimes committed in the DRC.

2.2. Limitation of Prosecutor powers

According to Ashnan, article 18 of the Rome Statute forms, together with articles 1, 17 and 19, the cornerstone of the Rome Statute's complementarity regime.[195] Although article 18 is intended to strengthen the principle of complementarity, it also limits the powers of the Prosecutor.[196] When the Prosecutor wishes to open an investigation, he must first inform the state party or other states which exercise concurrent jurisdiction of the existence of valid information at his disposal, since the Court has complementary jurisdiction under article 17 of the Statute.[197] States must, in turn, respond to this notification, indicating whether they have conducted or are conducting investigations at the national level.[198] If the Prosecutor concludes that they have conducted these investigations or that they are investigating, he may refer the investigation to the state.[199] The Preliminary Chamber may or may not grant authorisation to the Prosecutor to also open the investigation.[200] However, the authorisation or refusal is subject to appeal by the state or the Prosecutor;[201] a party who is dissatisfied with the decision of the Preliminary Chamber may appeal. Moreover, the Preliminary Chamber, in to the process of confirming the admissibility of a case, may change the decision the Prosecutor feels that he has been deceived or if there is resistance on the part of a state to which the case has been referred for investigation.[202]

[194] Note 36 above.
[195] Ashnan op cit note 14 at 199.
[196] Ibid at 200.
[197] Art 53, Rome Statute.
[198] Ibid.
[199] Art 15; Art 18, Rome Statute.
[200] Art 53, Rome Statute.
[201] Art 18, Rome Statute.
[202] Art 18(3) and (5) Rome Statute.

The powers of the Prosecutor are therefore limited, as he is not directly affected by the admissibility of a situation or a case but also because of the states' ability to challenge the admissibility of the case. The situations of Libya and Kenya are cogent examples of this, where the two states challenged the admissibility of their situations before the ICC, alleging that legal proceedings were under way before their national courts.[203] The question that demands to be asked is whether these states were, in Libya's case able, and in Kenya's case willing to prosecute the accused so as to prevent the intervention of the Court. Kenyan authorities had alleged that judicial and institutional reforms were being put in place to ensure that post-election violence was effectively prosecuted and the perpetrators brought to account.[204] It further argued that it had already initiated the proceedings and that they were ongoing at national level and that they would continue to investigate the cases of senior figures. One could ask whether these protestations should have been decisive for the Court not to find the case admissible. Although Kenya's arguments may have been rejected by the Preliminary Chamber,[205] the challenge resulted in delaying the proceedings and possibly removing some elements of the charge. If the Prosecutor had not been limited in his powers, he could have commenced the proceedings without any objection and this could have allowed the Court to deal with the matter in good time. In the case of Libya, despite objectively verifiable indicators of its inability to prosecute Mr Gaddafi and Mr Al-Senussi on 1 May 2012 and 2 April 2013 respectively, they objected to the admissibility of the case[206] on grounds that 'its national judicial system [was] actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged criminal responsibility…'[207]

Whilst the ability of States to challenge the conclusions of the Prosecutor[208] reflects the basic position of principle of complementarity of the Statute to give national courts the priority to prosecute the perpetrators of crimes, states have used this principle to obstruct the ICC's intervention.[209] However, if the Prosecutor had broad powers to decide on the admissibility of cases without challenge, unjustified delays would be substantially reduced. The limitation to

[203] Supra note 98 paras 45-79.
[204] Ibid. paras 2, 5, 12 & paras 47-66.
[205] Ibid. para 70.
[206] Application on behalf of the Government of Libya challenging the admissibility of the case against Saif Al-Islam Gaddafi; and application on behalf of the Government of Libya challenging the admissibility of the case against Abdullah Al-Senussi.
[207] Ibid. para 1.
[208] Art 19, Rome Statute.
[209] Toussignant op cit note 180.

his powers is further accentuated when the sovereignty variable comes into play when the principle of complementarity is implemented.

2.3. The invocation of state sovereignty as challenge to the implementation of the principle of complementarity

The claims of state sovereignty have always been a major obstacle to the implementation of the principle of complementarity of the Rome Statute. Indeed, the adoption of the principle of complementarity was the culmination of tension between the ideas of reconciling the sovereignty of states with international criminal justice.[210] It has always been stated that the Commission responsible for drafting the Statute understood the urgent need to include this complementary dimension of the Court in the Statute since agreement would not have been possible without a balance being struck between sovereignty and international criminal justice.[211] Tousignant argued that the recognition of the sovereignty of states through the principle of complementarity represented an acceptable compromise between respect for state sovereignty and the development of an autonomous and independent judicial institution, based on cooperation between states and the Court,[212] as supported by the Prosecutor's office:

> [T]he principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.[213]

This assertion underlines the primary responsibility of states to repress crimes under international law, and also and above all the idea of the sovereignty of states parties and non-parties in criminal justice issues. However, as argued above, the subjective nature of the admissibility criteria is prone to multiple interpretations by both states and the Preliminary Chamber, enabling states to evade their sovereign duties.[214] On the one hand, states applaud their national systems for fulfilling their sovereign duty to deal with crimes as a basis for the dismissal of the case by the Court, but on the other hand the Court will argue that national

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[210] Ashnan op cit note 14 at 241; Miles Jackson 'Regional Complementarity: The Rome Statute and Public International Law' 2016: 14 *J. INT'l CRIM. Just.* 1068; Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591-99.

[211] Ashnan op cit note 14 at 241.

[212] Tousignant op cit note 85. For more on the role of cooperation between the ICC and states *see* Beth van Schaack 'State Cooperation and The International Criminal Court: A Role for the United States?' (2011) available at *https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1615&context=facpubs* accessed on 27 June 2020

[213] Paper on *Some Policy Issues Before the Office of the Prosecutor* (September 2003) 2

[214] Toussignant op cit note 210.

systems are ineffective, unable or unwilling to prosecute perpetrators.[215] The Court has had to deal with such a dilemma. The situations of Libya and Kenya, as well as those of Sudan and the DRC, which will be discussed separately, clearly illustrate such a scenario. Indeed, when the Independent Commission of Inquiry asked the Security Council to refer the situation in Sudan to it under the powers conferred on it by article 13 of the Statute it said as follows:

> 'The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive especially undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan today contravene basic human rights standards . . . .'[216]

These allegations by the Independent Commission Inquiry revealed the inability and unwillingness of the Sudanese authorities to end impunity for the crimes reported to be committed on Sudanese territory. To these allegations, the Sudanese government replied:

> 'Our police and Prosecutors are prosecuting the perpetrators of these crimes. The Prosecutor learned about a great many cases that have been decided and about charges and allegations that have been followed up since a special Prosecutor was appointed to look into those cases in Darfur. Special courts have been established and have handed down many criminal sentences, including execution and life imprisonment. The Prosecutor also had the opportunity to better understand how best to deal with security and tribal problems and disputes…The Government of the Sudan will continue its efforts to establish the rule of law and justice through the courts and other mechanisms set up in Darfur, to put an end to impunity and to hold accountable all those convicted of violations of human rights and international humanitarian law.'[217]

Libya was unable to prosecute the perpetrators because of the unavailability of its institutions,[218] and Kenya's situation was characterised by inaction in prosecuting perpetrators, indicative of unwillingness to prosecute suspects.[219] Although the sovereignty discourse was not expressly reflected in the statements of those states, their attitude reflected that sovereignty in support of national systems was at the heart of their cases, especially considering the presence of solid objective facts that the cases were admissible before the Court.[220]

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[215] Tousigant op cit note 85 at 86.
[216] Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur UN Doc. S/2005/60 paras 566-7.
[217] Ibid.
[218] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, application on behalf of the government of Libya pursuant to art 19 of the ICC Statute 1 May 2012 para 205
[219] *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*. Application on behalf of the government of the Republic of Kenya pursuant to art 19 of the ICC Statute, 31 March 2011, para 70.
[220] Ekaterina Treandafilova 'Africa and The International Criminal Court: A Judge's perspective' (2014) 1 *International Criminal Justice Series* 26.

Moreover, another variant of state sovereignty was on the agenda of the dissension between African states and the ICC: the immunity of heads of state.[221] Immunity from prosecution may be granted to a head of state as a constitutional aspect of state sovereignty. Article 27 (2) of the Rome Statute states that political authorities of the state parties do not enjoy such immunity. It is however open to question whether the same rule applies to non-party states. Indeed, the Court had argued, when it issued an arrest warrant against Omar al-Bashir, following its referral by the UNSC, that Bashir's position as head of state could not affect the jurisdiction of the Court in his case.[222] The conflict on the issue between the ICC and mainly African states parties and non-parties, as well as the refusal of some states such as South Africa and Malawi to accept the waiver of immunity, show that although African states agreed to recognise the waiver of immunity in the Statute, they have nevertheless been very hostile to the concept, preferring to rely on article 98(1) of the Rome Statute.[223] This provision stresses that the Court should not proceed with a request for surrender or assistance that would require states to act in violation of other obligations of international law on the immunity of heads of state.[224] Criticism of the Court in this case and in Kenya's case with Uluru Kenyatta shows that states are still jealous of their sovereignty, which continues to be an obstacle to the implementation of the principle of complementarity. With no binding mechanism, the Court can only rely on the cooperation of states, which also means their consent. Thus, while the Court has attempted to demonstrate the ineffectiveness of certain national systems, states have asserted their ability or willingness to prosecute perpetrators of international crimes on the basis of their primary responsibility. Some of these claims have politicised the principle of complementarity, especially when the national political actors in power seem to have dirty hands.[225] As Burke-White has suggested, the nature of most international crimes are generally committed in complicity with state agents.[226] This challenge related to the sovereignty of states

[221] Art 27(2) Rome Statute ; The dissension between the AU and the ICC culminated in the AU passing a resolution in 2017 calling on its member states to stop cooperating with the Court and even to withdraw from it. (*See* Bachman & Nwibo 'Pull and Push- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges' (2018) 43:2 *Brooklyn Journal of International Law* 465.
[222] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Corrigendum to the Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir 13 December 2011 para 18.
[223] *See* Maunganidze & Du Plessis 'The ICC and the AU' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Cour*t (2015) 66-8; Thomas M. Dunn 'The ICC and Africa: Complementarity, Transitional Justice, and the Rule of Law' available at *https://www.e-ir.info/2014/07/12/the-icc-and-africa-complementarity-transitional-justice-and-the-rule-of-law/* accessed on 15 December 2020.
[224] *Prosecutor v. Omar Hassan Ahmad Al Bashir* supra para 8
[225] Tousignant op cit note 215.
[226] William W. Burke-White 'International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden J Int'l L* 590.

reflects the room to manoeuvre left to states, especially since the Rome Statute does not address the issue of amnesties and other alternative justice procedures.

2.4. Recourse to alternative means of justice: understanding their consistency with the Rome Statute.

There has been a general tendency for states to use alternative justice mechanisms to end conflicts involving international crimes.[227] Moreover, the imperative of restoring peace has taken precedence over the enforcement of criminal justice for the international crimes, especially on the African continent. For example in June 2019 a policy of transitional justice which included processes of amnesties and presidential pardons was adopted.[228] The major concern with these alternative processes is whether they are consistent with the purpose of the Rome Statute. In my view, these processes conflict with the intention of the Rome Statute to end impunity. I will try to demonstrate that in subsequent lines. First it is necessary to consider whether the judicial processes or whether it should be subjected to a narrow interpretation.[229]

The delicate question about alternative judicial processes is whether they are compatible with the purpose of the Rome Statute. In other words, what is the position of the Rome Statute towards a war criminal or a perpetrator of genocide in the face of an amnesty law or a pardon of which he is a beneficiary? In the *Saif Al-Islam Gaddafi case*, the Court was called upon to rule, for the first time, on the applicability of an amnesty law.[230] At first, the Preliminary Chamber stressed that there was a universal, strong and growing trend that international crimes could not be the subject of amnesty under international law[231] concluding that the Libyan amnesty law was inconsistent with international law.[232] The Appeals Chamber, however, adopted a more intermediate approach concluding that international law was still in the development stage on the issue of the applicability of amnesties. It refused to take a precise position on the subject, merely concluding that the amnesty law did not apply to the accused in this case.[233]

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[227] Ibid.
[228] African Union 'Transitional Justice Policy' February 2019.
[229] JD Ohlin 'Peace, Security and Prosecutorial Discretion' in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 187–205.
[230] *Prosecutor v. Saif Al-Islam Gaddafi* Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' ICC-01/11-01/11 5 Avril 2019 para. 61.
[231] Ibid para 78.
[232] *Prosecutor v. Saif Al-Islam Gaddafi* Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the 'Admissibility Challenge by Mr. Saif AlIslam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' of 5 April 2019, ICC-01/11-01/11, 9 March 2020 para. 96
[233] Ibid.

The legitimacy of the use of amnesties has changed significantly during the 20th century. Historically, amnesties have played a central role in the development of peace processes. The use of amnesties was common to end wars and facilitate national reconciliation.[234] It was not until the beginning of the 20th century, with the development of international human rights law and international criminal law, that the use of amnesties was framed as an obstacle to the fight against impunity.[235] However, the question of whether amnesties are prohibited for international crimes is still highly controversial, as the ICC Appeals Chamber (*Gaddafi*) has pointed out, and is the subject of much debate.[236] Despite the paradigm shift, no international treaty to date explicitly prohibits amnesties for international crimes, with some imposing only their being not subject to prescription.[237] In 2017, the Special Rapporteur of the Commission on International Law on Crimes against Humanity noted the lack of consensus on the issue in his report.[238] In practice, amnesties are still widely used, reinforcing the question of their compatibility with the Rome Statute. According to the Amnesty Database Project, 289 amnesties were issued in 75 countries between 1 January 1990 and 31 August 2016 during conflicts, during a peace agreement or shortly thereafter.[239] And only one-third of the agreements drawn up since the beginning of the 21st century exclude certain international crimes from amnesty measures.[240]

The Preamble to the Rome Statute states that 'the most serious crimes affecting the entire international community cannot go unpunished' and reminds us that 'it is the duty of each State to bring those responsible for international crimes to its criminal jurisdiction'. Under the Statute, the ICC is entrusted with the power to ensure that measures taken at the national level are not intended to be an obstacle to prosecuting crimes for which it has jurisdiction.[241] In other words, the role of the Court is limited to examining whether the amnesties meet the requirements of articles 17(1)(c) and 20 of the Rome Statute, namely whether the person concerned has already been tried. In order to determining whether a person has been tried, the

[234] Pierre Hazan 'Du bon usage de l'Amnisties dans les processus de paix' 2020 *Centre pour le dialogue humanitaire* 4
[235] Olivier Grondin 'Les amnisties des crimes internationaux : recherche sur l'état de droit' (2019) 32(1) *Revue québécoise de droit international* 3.
[236] Ibid. ; Declan Roche 'Truth Commission, Amnesties and the International Criminal Court' (2005) 45 *BRIT. J. CRIMINAL.* 567.
[237] Della Morte 'L'amnistie en droit international' 5-6.
[238] United Nations General Assembly Commission on International Law, 'Third Report on Crimes Against Humanity, by Sean D Murphy, Special Rapporteur' A/CN.4/704 23 January 2017 para 296.
[239] Hazan op cit note 7-8.
[240] L E Carter, M S. Ellis & C Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (2016) 189
[241] Federica Gioia 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1101.

Court must verify that the procedure was not intended to evade the person concerned from criminal responsibility, and took place before a court.[242] However, the Rome Statute contains no provision for amnesties, either for their authorisation or prohibition. It is maintained that the introduction of an amnesty provision was considered during the negotiations in Rome and was eventually ruled out.[243] Despite this silence, it was argued that article 53(1)(c) and (2)(c) of the Statute could be interpreted as paving the way for these alternative justice processes, in the light of which it was provided as follows: :

> 1. The Prosecutor will, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor will consider whether: . . .
>
> c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.'

This provision gives the Prosecutor the discretion to decide whether to prosecute or conduct investigations in terms of his 'in the interests of justice' power. However, the ambiguity contained in this definition has given rise to controversy over the meaning and scope of prosecutorial discretion.[244] Some scholars who advocate a broad interpretation of article 53 consider the term 'interests of justice' to be an important criterion that facilitates the Prosecutor's greater discretion in assessing the admissibility of a case or situation based not only on the limited elements listed in the article such as fair trial or budgetary limitations.[245] The vagueness of the elements of article 53 would thus allow other alternative justice processes to be included in its meaning, such as amnesties, pardons or reconciliations between communities. Accordingly, the Prosecutor may use his discretion to decide not to prosecute *proprio motu*, in accordance with article 15, on the grounds that the suspect has received amnesty. In this regard, some argue that criminal justice is often not the best option because it could jeopardise peace.[246] This position, reflected in the Prosecutor office's policy paper, refers

[242] Art 17, Rome Statute.
[243] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Report on the Preparatory Committee on the Establishment of an International Criminal Court' 1996 A/51/22 (1) para 174.
[244] Talita De Souza Dias 'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30 *Leiden Journal of International Law* 732.
[245] *See* Darryl Robinson 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *EJIL* 493-8; MR Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *JICJ* 71 81-82.
[246] JN Clark 'Peace, Justice and the International Criminal Court Limitations and Possibilities' (2011) 9 *JICJ* 521 at 541-3.

to additional criteria in the interest of justice in the form of ongoing peace processes and other alternative justice mechanisms organised at the national level.[247] However, so far the Prosecutor has never refused to open an investigation on this basis because even in the case of the M23 in the DRC the ICC opened investigations against Bosco Ntaganda; but this criterion was nevertheless considered in the case of Uganda in the face of a possible settlement between the LRA (Lord Resistance Army) and the Ugandan state.[248] Nevertheless, one might conclude that such a decision could jeopardise the independence of the Prosecutor by limiting his power in the face of political processes which are outside his traditional role. Thus, the Prosecutor must be very careful in conducting this analysis so as not to compromise his independence and impartiality.

A contrary view, however, suggests that the term 'interests of justice' must be strictly interpreted in such a way that it can only be relevant to procedural considerations set out in article 53.[249] Proponents of this position argue that lasting peace cannot be found without the exercise of criminal justice.[250] South Africa has always been cited as the most authoritative example in this regard. Indeed, although there is no consensus on the prohibition of amnesty laws covering international crimes, it seems to me that, in view of the ICC's objective to end impunity, a general amnesty for the most serious crimes and for those with the greatest responsibility (in the sense of the gravity test of article 17(1) (d)) would necessarily be incompatible with the Rome Statute. It is my opinion that an unconditional and total amnesty or amnesty granted by a truth and reconciliation commission, a non-judicial body, will most probably be found to be contrary to the principle of complementarity.

While general amnesties have been declared in DRC, Colombia and Libya, an individualised or conditional amnesty (eg involving recognition of responsibility, apologies, and reparation to victims), controlled and validated by a judge, could pose more difficulties for the Court, which will therefore have to determine on a case-by-case basis whether they are consistent with the principles of complementarity.[251] The ICC therefore does not need to take a position on their legality, but should only consider whether they are intended to take

[247] ICC, Office of the Prosecutor *Policy Paper on the Interests of Justice* (September 2007)
[248] Ibid.
[249] See *inter alia* M. Macpherson 'Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice' 17 June 2005 IOR 40/023/2005; JD Ohlin 'Peace, Security and Prosecutorial Discretion' in Stahn & Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (2009) at 187-208; D. Đukic, 'Transitional Justice and the International Criminal Court – in 'the interests of justice?' (2007) 89 *International Review of the Red Cross* 716.
[250] Talita De Souza Dias op cit note 244 at 246.
[251] Roche op cit note 236.

perpetrators out of the realm of justice, in which case they should be opposed.[252] However, the difficulty lies in the fact that the Prosecutor must adopt an approach that balances the interests of justice on a case-by-case basis. Thus, even if it has been decided that the charge is not justified, because of the weight of public interest, the decision does not belong to the state parties, but to the Court as an institution representing international interests.

As pointed out in the previous section, neither the Rome Statute nor the Rules of Procedure and Evidence determine how amnesty laws should be dealt with under the Rome Statute's mandate to end impunity.[253] The question that arises is whether states can legitimately grant amnesties or enact programmes that thwart the purpose of the Rome Statute simply to attain local peace. Article 26 of the Statute provides that 'the crimes within the jurisdiction of the Court will not be subject to any statute's limitations. Whilst states can determine penalties to be imposed on criminals in terms of their domestic laws, they are not allowed to pass whatever statute suits them. This emerges from article 25(4) of the Rome Statute which states that 'no provision in this statute relating to individual criminal responsibility will affect the responsibility of states under international law'. The responsibility of states regarding, *inter alia*, international crimes falls under the obligation either to prosecute or extradite perpetrators of international crimes,[254] and so it follows that states may not take any measure that has the effect of violating their obligations derived from international law, more particularly the obligation under the Statute to bring criminals to account.

Can the ICC condemn as *pro non scripto* national agreements or amnesty laws designed to sidestep perpetrators' criminal responsibility? As indicated above, the Rome Statute is not explicit on this issue; nevertheless, it can be asserted that the ICC does have the option of denouncing a country that does not follow the obligations set out in the Rome Statute regarding the prosecution of international crimes.[255] Some countries, including, the DRC, have enacted amnesty laws without imposing any penalty on war criminals, and these laws have not been challenged by the ICC. Granting amnesty to perpetrators of international crimes jeopardises the purpose of the Rome Treaty. Mohammed Zeidy, among other scholars, notes the danger to the Rome Statute of leaving the issue of amnesties and pardons unresolved.[256] He argues that

[252] Art. 17 (2), Rome Statute.
[253] Anja Seibert-Fohr 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties And Truth Commissions' (2003) 7 *Max Planck Yearbook of United Nations Law* 561.
[254] Ibid. at 560.
[255] Diba Majzub 'Peace or Justice? Amnesties and the International Criminal Court' (2002) 3 *Melbourne Journal of International Law* 6.
[256] El Zeidy op cit note 6 at 946.

the objective of the Court is incompatible with amnesties and pardons. Moreover, if a country, like the DRC had the freedom to enact amnesty laws in whatever way it wished, this would even endanger peace processes by neglecting victims' interests. These views have been reiterated by Nabil who believes that the failure of the ICC to denounce national laws granting amnesty to perpetrators of international crimes ignores the ultimate purpose of the Rome Statute.[257] He argues further that the ICC has shown a lack of consistency and clear vision with regard to the relationship between the Court and state parties.[258] This argument is convincing. Indeed, the nature of crimes listed in the Rome Statute cannot be derogated from since they constitute *jus cogens* norms.[259] As asserted by Alina Kaczorowska 'some crimes are so universally repugnant that their perpetrators are considered as *hosti humani generis* ie enemies of humanity'.[260] Thus, the enactment of amnesty laws should be considered as a violation of international law insofar as it secures impunity for 'enemies of humanity'. This stratagem of granting amnesties appears the one that has been chosen particularly by the DRC.

2.5. International crimes in the DRC *versus* the principle of complementarity

This section raises the question whether international crimes perpetrated in DRC should be admissible before the Court in terms of the admissibility criteria set out in article 17 of the Rome Statute, or whether they do not meet the said-criteria. Before turning to that question, it is important to mention that the deadly consequences of armed conflict in the DRC have caused some authors (rightly in my view) to consider these conflicts to be the most brutal since World War II, or as termed by Thomas Turner, one half a holocaust.[261] Despite the ICC's ambitious intention to end impunity for the most serious crimes, victims of international crimes perpetrated in the DRC have rarely received legal redress.[262] The responsibility for the extremely high number of deaths and sexual abuse, especially among the civilian population, has received little attention both at the international and at the national levels. Between 1998 and 2007 the number of victims of armed conflicts in the DRC was estimated at 5.4 million by international agencies,[263] and ongoing armed conflicts in the DRC continue to produce many

[257] Nidal N Jurdi 'The complementarity regime of the ICC in practice: Is it truly serving the purpose? Some lessons from Libya' (2016) 30 *Leiden Journal of International Law* 33.
[258] Ibid.
[259] Alina Kaczorowska op cit note 47 at 324.
[260] Ibid.
[261] Thomas Turner *The Congo Wars: Conflict, Myth, and Reality* (2007) 1-27.
[262] Sofia Candeias et al 'The legal Accountability Landscape in Eastern DRC: Analysis of The National Legislative and Judicial Response to International Crimes (2009-2014)' (2015) *International Center for Transitional Justice* 1-2.
[263] International Rescue Committee, Fifth Mortality Report on the DRC, January 2008 available at *www.theirc.org* accessed on 26 July 2020.

more victims to this day. These victims continue to await justice. Some have died, others have moved to distant regions, and many others are no longer willing to testify because of the loss of hope that justice will be done.[264] All these victims or their descendants are still waiting for justice to be done or to seek redress. Against the expectations of these victims, measures have been taken by the Congolese national authorities to call on those involved in the crimes to lay down their arms in return for the annulment of criminal proceedings against them. This section affirms that these measures have ensured impunity for crimes under international law and have been an obstacle to the implementation of the principle of complementarity of the Rome Statute. Thus, the first part of this section will focus on discussing the unwillingness criterion with the Law No. 014/ 006 of February 11, 2014 (hereinafter Act of 2014) and the DDR programmes; and the second section will discuss the inability criterion in relation to continuing crimes in Beni and Ituri territories**.**

2.5.1. Act of 2014, DDR programs and the unwillingness criterion

Despite the praiseworthy intention behind the Rome Statute, the principle of complementarity has been criticised, especially in the light of the amnesty laws enacted not only in the DRC but elsewhere.[265] The DRC has, in fact, enacted the Act of 2014 on amnesties regarding acts of insurrection, war, and political offences. Under the Act of 2014, amnesties and pardons may be granted to perpetrators of war crimes and crimes against humanity if they wish to participate to the peace process. The preamble outlines the following: 'Perpetrators of internationally-designated crimes and other offences that were not prosecuted yet should not be prosecuted anymore'[266] and if the prosecutions were engaged or were underway, these latter prosecutions must stop immediately; and finally criminal cases which had been handled and considered *res judicata* are declared void;[267] the criminal judgments which had become irrevocable are considered as if they never existed before.[268] These measures obviously violate the Rome Statute both by affording impunity to perpetrators of international crimes and also demonstrating 'unwillingness' on the part of DRC's authorities. One must also ask how the ICC Prosecutor's Office reacted to the Act of 2014. There is no official reaction on record so

[264] Freddy Kitoko 'What Justice For International Crimes in DRC' available at *https://www.legavox.fr/blog/maitre-freddy-kitoko/quelle-justice-pour-victimes-crimes-4512.pdf* accessed on 25 July 2020.
[265] Lawyers Without Borders op cit note 90 at 14-17.
[266] Preamble of Law No. 014/ 006 of 11 February 2014 on amnesties for acts of insurrection, war and political offences.
[267] Ibid.
[268] Ibid.

far. Significantly Bosco Ntaganda, a war criminal concerned by the Act of 2014, is subject to a sentence of 30 years imprisonment by the ICC,[269] was among those who could have profited from the Act of 2014. Importantly the Act of 2014 allows those with whom he perpetrated crimes in the DRC to be free from prosecution. A perplexing legal issue would arise if the ICC decides to extradite Bosco Ntaganda to DRC for the execution of his penalty. And if that happens, and if Ntaganda claims that he is benefits under the Act of 2014, can the ICC mount a challenge when it did not oppose the granting of amnesty to Ntaganda's fellow criminals? A serious problem exists concerning the implementation of laws of amnesty with regard to the Rome Statute. The Rome Statute would have no meaning if states were to implement amnesty laws at will. Whilst this eventuality had been perceived by the negotiators of the Rome Statute, Anja Seibert notes that 'the lack of a provision in the Rome Statute had been criticised as giving rise to ambiguity, and fear had been expressed that the matter might not be handled discreetly'.[270] We can therefore see that on the one hand, the ICC preferred to take the Ntaganda case in hand, believing that it could exercise its complementary jurisdiction; but on the other hand, it judged better to remain silent in relation to the general amnesties of the Act of 2014. The question then arises as to whether the ICC considered that the Ntaganda case was admissible before the Court, why not Did it not react to the granting of amnesties to other members who acted under the latter's responsibility? This question shows the difficulty linked to the implementation of the principle of complementarity, especially with regard to amnesty laws.

An additional difficulty with the laws of amnesty lies in the integration of perpetrators of international crimes into the national army − and some of them have even been promoted,[271] making it impossible for victims to obtain reparations − as they have to prove their cases to the perpetrators. Such a system cannot be independent or impartial. In addition, a programme known as *Démobilisation, Desarmement et Réinsertion* (DDR) has been established, designed for the reintegration of rebels with no reference to justice.[272] Further, the peace processes (mostly based on DDR programmes) do not provide for sanctions or any measures of victim redress. These programmes appear to be unfair to the victims in particular and some scholars

[269] *Prosecutor v Bosco Ntaganda* (ICC-01/04-02/06) Prosecution's Response to the Defence "Motion for Temporary Stay of Proceedings", 5 April 2019.
[270] Seibert-Fohr op cit note 253 at 562.
[271] Human Rights Watch report DR Congo: 'Army should not appoint war criminals: Congolese government must investigate and prosecute warlords, not reward them' available at *https://www.hrw.org/news/2005/01/13/dr-congo-army-should-not-appoint-war-criminals* accessed on 04 April 2020.
[272] Yvan Conoir 'Ending war, building peace: contribution of the national DDR program in DRC to peace in the African Great Lakes Region' (2012) 4-10.

have found them unacceptable. As asserted by Roht-Arriaza, amnesty laws are acceptable, provided that they impose sanctions on those who committed the gravest crimes.[273] Nevertheless, the DDR policy for criminals to be integrated in the national army also threatens the efficiency of the army,[274] which is all the more worrying with allegations of the involvement of high-ranking Congolese soldiers in armed conflicts in the Eastern part of DRC. Former Deputy Prosecutor James Stewart emphasised that the genuineness of legal proceedings included the matter of sentence; a criminal law which does not impose sanctions is an indication of the 'unwillingness' of the state. Therefore, nothing can justify the ICC's silence with regard to the law of 2014, especially when the hidden objective of this law might have been to shield war criminals. The former UN Secretary General affirmed at the time that 'justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives'.[275] Such a law in fact denies justice to the victims, and at the same time demonstrates a manifest unwillingness on the part of the Congolese State to prosecute the criminals − an implicit limitation to the Rome Statute. It is a well-established rule, in international law, as stated above, that no state can derogate from a *jus cogens* norm, nor can it limit it.

The reintegration of the criminals without providing for sanctions for their crimes constitutes not only a real breach of the Rome Statute but also of international law in general. The Columbian situation for instance has been highly criticised for not imposing severe sanctions on criminals due to unwillingness on the part of Columbian government.[276] How much worse is the DRC's law which does not provide any sanctions at all? Failure to denounce these kinds of laws or measures amounts to inertia on the part of the ICC and would not favour the implementation of the complementarity principle. The door has been left for terrible crimes to go unpunished. The need to attain peace does not justify states failing to prosecute international crimes. Peace without justice is fragile insofar as the victims will harbour feelings of revenge.[277] The DRC is now in a situation where it is the criminals who must set things in motion to achieve justice. Thus the question that arises is how can former warlords establish

[273] Naomie Roht-Arriaza 'Amnesty and the International Criminal Court' in Dinah Shelton (ed) *International crimes, peace and human rights: The Role of the International Criminal Court* (2000) 78.
[274] Jason Stearns et al *Armée nationale et groupes armés dans l'Est du Congo. Trancher le nœud gordien de l'insécurité* (2013) 47-55
[275] Report of the Secretary-General before the Security Council 'The rule of law and transitional justice in conflicts and post-conflicts societies' UN/ S/ 2004/ 616.
[276] Hector Olasolo 'Complementarity Analysis of National Sentencing' *Sentencing and Sanctioning in Supranational Criminal Law* 37 at 43 cited by Caroline D. Kelly op cit 826.
[277]Louise Mallinder & Kieran McEvoy 'Rethinking amnesties: atrocity, accountability and impunity in post conflicts societies' (2011) 6:1 *Contemporary Social Science* 107-111.

and promote the rule of law. The rule of law requires looking into the past, and former war criminals will hamper the normal working of justice. Most of the decision-makers in the DRC are former warlords,[278] compounding the problem of unwillingness.

High-ranking officials are now involved in the continuing atrocities being perpetrated in Beni territory, and civil society groups allege that some high-ranking officials have been involved in large-scale massacres.[279] The former president Joseph Kabila, while in office said: 'I hate these Banande; they think they are the strongest because of their trade.'[280] NGOs have requested that those accused of providing support to rebels be relieved of their positions as they hampered justice being done. The former President's statement gives credence to the allegations by several NGOs that he was linked to the killings in Beni.

Avocats Sans Frontières (ASF) say the biggest problem in implementing the principle of complementarity consists in wide discretion in interpretation of states' willingness given to the ICC chambers.[281] If the alleged crimes had been dealt with according to the Statute, amnesties would not have been granted. Sacrificing victims of the most serious crimes in the name of peace does not imply willingness to comply with the obligations under the Statute. The court cannot purport to end impunity while allowing perpetrators to evade criminal responsibility. This point has been demonstrated in the Libyan situation where the discretion afforded to ICC chambers has prevented the ICC from investigating cases which were obviously admissible.[282]

Criminals, known as the M23, enjoy impunity after being targeted for amnesty after the perpetration of their crimes. As will be seen later, for some specific contexts, stability can be achieved through amnesty and pardons, as in case of South Africa; but in other cases, justice is a prerequisite for stability, as in Rwanda and Sierra-Leone for example. The approach involving the need for justice is supported in this dissertation. As pointed out by Diba Majzub, the best way to respond to the most horrible human rights violations consists in prosecuting criminals.[283]

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[278] François E. Kisangani *Guerres civiles dans la République Démocratique du Congo : 1960-2010* (2015) 57-63.
[279] Boniface Musavuli Crise de Beni : Comprendre les raisons profondes du fiasco militaire et des promesses mensongères available at *http://desc-wondo.org/crise-de-beni-comprendre-les-raisons-profondes-du-fiasco-militaire-et-des-promesses-mensongeres-b-musavuli/* accessed on 9 March 2020.
[280] Ann Strimov 'The killings in Beni: Who's really behind the atrocities?' Available at *https://www.jww.org/conflict-areas/drc/killings-beni-whos-behind-atrocities/* accessed on 9 March 2020.
[281] Avocats Sans Frontières op cit note 57 at 10
[282] Nidal Jurdi op cit note 124 at 11-17.
[283] Diba Majzub op cit note 255 at 33.

2.5.2. Crimes in Ituri and Beni regions versus the inability criterion

This section discusses the 'inability' criterion set out in article 17 as it affects the continuing war crimes and crimes against humanity in Ituri and Beni. This criterion is challenged with regard to the *Katanga* and *Lubanga* cases. In addition, the impact of their convictions will be analysed in order to understand whether it deterred not only their respective militias but also other militias from perpetrating further international crimes.

In the *Lubanga case*, the ICC made reference to the alleged inability of the DRC to prosecute the accused, stating that 'it appears that the Democratic Republic of Congo is indeed unable to undertake the investigation and prosecution…'[284] The Court came to an 'inability' conclusion after an exhaustive analysis of article 17 of the Statute. The reasoning probably also applied in the *Katanga case* since his arrest coincided in time and context,[285] and both suspects were leaders of the two opposing militias operating in the same region of Ituri.

As indicated in Luis Moreno's statement '[c]omplementarity implies that the absence of trials before this Court, as a consequence of regular functioning of national institutions, would be a major success'.[286] This raises the question whether, if a state is deemed unable to prosecute one suspect criminal (here the commander), how will that state be able to prosecute the other criminals who were operating under the responsibility of the commander? The logical conclusion derived from the provisions of the Rome Statute is that the Court will only handle cases of 'big fish'. Nevertheless, such justice is selective and provides no assurance for victims as other criminals are likely to go unpunished due to the inability of the State concerned to prosecute them. In the same vein, the inability of the DRC's government to investigate, prosecute and convict the criminals remains notable on the ground as crimes continue to be perpetrated. Since 2014, the Congolese government has been unable to identify the perpetrators of the continuing massacres in the Beni and Ituri regions. Such a government cannot pretend to be able to investigate and prosecute crime. NGOs have warned the international community (in particular the ICC) that the DRC has proved such inability.[287] However, the ICC has not been active in giving effect to these warnings.

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[284] Supra note 76 para 35.

[285] Thomas Lubanga was arrested on 16 March 2006 and surrendered to the ICC on the 17 March 2006. See *ICC-01/ 0-1/ 06 Prosecutor v. Thomas Lubanga* para. 16; Germain Katanga was arrested in 2005 and transferred to the ICC on 17 October 2007.

[286] Louis Moreno Ocampo ceremony for the solemn undertaking of the chief prosecutor of the ICC, Monday 16 June 2003.

[287] Le Rallec & Forson 'RD Congo: Comprendre la guerre à Beni' available at *https://www.lepoint.fr/afrique/rd-congo-comprendre-la-guerre-a-beni-22-08-2016-2063005_3826.php* accessed on 23 November 2020.

In effect, the inability criterion is premised on the collapse of institutions to deal with internationally-designated crimes. This means that the complementarity formula is only effective as long as national systems are functioning normally. For instance, the principle of complementarity can objectively be implemented in developed countries where it is easy to prove that the country is unwilling or unable to prosecute criminals. However, the inability criterion means little when a state is unable to investigate or prosecute and its governance systems are in a state of collapse. 'Failed states' are more concerned about survival in the international arena. Therefore, if the DRC had been deemed unable to try Lubanga and Katanga, the same would be the case for other criminals who were acting under their responsibilities. The implementation of the inability criterion should have been drafted in a way that bound the ICC to investigate when a state was found unable to do the job − not only in the case of those who bear the highest responsibility but also of every criminal involved in the perpetrations of crimes. As pointed out above, the gravest crimes are never perpetrated by single actors or individuals but rather by units. Thus, by prosecuting one single person or just a few on the basis of their responsibly in the group does little to end impunity, and that is why international crimes continue to be perpetrated by armed groups, including those of Thomas Lubanga and Germain Katanga. Their prosecutions did not deter their subordinates.

While Lubanga's militia seems weakened, Katanga's militia (the FRPI) seems more active than ever; his conviction had little effect on the dismantlement of his militia. Katanga's FRPI is still listed among the most active groups in the Eastern DRC region,[288] and UN peace-mission reports show that the FRPI remains the most notorious for grave breaches of international law. Whilst Lubanga's militia has been transformed into a political party, its influence is still remarkable. Some of its military leaders, like Bosco Ntaganda who joined the M23 movement in the North-Kivu province, continued perpetrating war crimes and crimes against humanity.[289] In summary, the correlation between the prosecutions conducted based on the inability criterion and ending impunity has not proved to be significant in that DRC's institutions are not able to put an end to the continuing wars (and the prosecution of criminals). The state cannot end impunity for the crimes which have not been prosecuted by the Court. The table below illustrates human rights violations (including war crimes and crimes against humanity) by active militias operating in the Eastern part of DRC in 2017 and 2018.

[288] See UN Peace mission reports in DRC
[289] Giulia Marcucci 'The War Report 2018/ Democratic Republic of the Congo: Conflicts in the Eastern Regions' (2019) *Academy of International Humanitarian Law and Human Rights* 7.

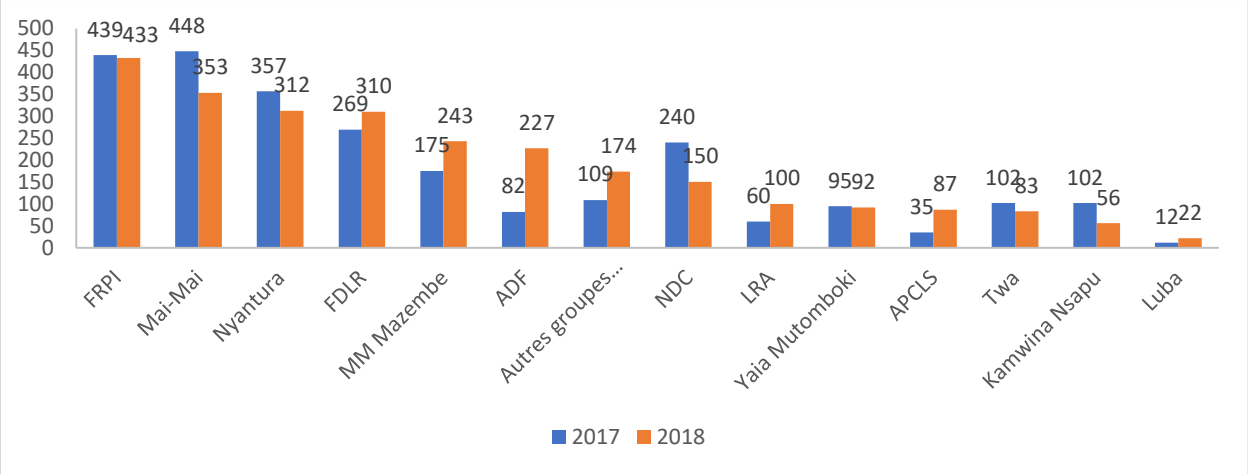

Figure 1: Human rights violations perpetrated by armed groups in DRC in 2017-2018. The original table of these violations can be accessed to at the following link *https://monusco.unmissions.org/droits-de-lhomme-rapports-et-publications*

This table has been compiled from United Nations Organization Stabilization Mission in the DR Congo (MONUSCO) reports of 2017-2018 to illustrate the crimes perpetrated by armed groups. It demonstrates that crimes in DRC are still a topical issue. Secondly, it identifies the most active militias that still operate in the east. Katanga's militia (FRPI) heads the human rights violations by armed groups in DRC, and in most UN peace-keeping mission reports the FRPI is listed as one of the most active militias in DRC. Although the Lubanga's militia does not appear on the list, many of its soldiers have joined the ADF and other militias which are suspected of war crimes and crimes against humanity in Beni and Ituri. The DRC's inability to identify who is actually behind the continuing crimes in the region is evidence of its lack of control.

In fact, the Congolese government has been unable to indicate exactly who has been massacring people in that region since 2014. The issue is either one of impossibility or inability to investigate or prosecute. The Court's silence with regard to the DRC's inability appears all the more surprising, especially if the DRC is able but unwilling to investigate because of the involvement of its officials. If it is unable then the ICC should intervene. Nevertheless, it appears that the Court has not made a decisive ruling on the ability or willingness criteria regarding crimes perpetrated on the Congolese territory.

The principle of complementarity, far from serving as a tool for the ICC's intervention or non-intervention, may have the effect of delaying proceedings. Ultimately, victims are the ones who suffer the most from delayed investigations both by national courts and the ICC.

They face the dilemma of whether they should turn to the ICC or national courts. The reality is that the ICC does not try everyone and can only intervene when a state is unwilling or unable to prosecute. Secondly, they have no guarantee of independent and fair proceedings. In the end, impunity prevails.

2.6. Conclusion

This chapter aimed to interrogate the implementation of the principle of complementarity regarding international crimes in the DRC. It concluded that cooperation is crucial for the implementation of the principle of complementarity. It nevertheless underlines that its effective implementation is hampered by serious problems relating on the one hand to the constant recourse to alternative justice processes and on the other to the invocation of sovereignty when those who have committed the crimes are in power or seek to cover those who committed them. Added to these problems are the limitations of the powers of the pre-trial chamber which may be challenged by states in their assessment of the admissibility of a case. It then set out the admissibility criteria in order to understand whether the situation (of criminal perpetration in DRC) met these criteria so as to allow the ICC to intervene. With regard to the 'inability' criterion, DRC as a 'failed state' could not pretend to be able to prosecute war criminals − as demonstrated by the continuation of the perpetration of the crimes. Thus, the ICC erred in only prosecuting 'commanders', with the result that other criminals would go unpunished. Further, the involvement of high-ranking authorities in the perpetration of international crimes in the DRC makes it difficult to believe that the national authorities are willing to genuinely investigate and prosecute criminals. Thus, that the more than 12 million victims of war crimes and crimes against humanity perpetrated in the DRC cannot rely on the ICC or national courts for justice. Should these victims be left to their sad fate? All the evidence indicates that a different mechanism should be explored to ensure that justice is done for these victims. The system needs to be re-evaluated.

CONCLUDING REMARKS AND RECOMMENDATIONS

The International Criminal Court operates on the basis of the principle of complementarity. This principle is thus the cornerstone of the relationship between the Court and the states parties. The critical analysis of this principle by examining the impact of its application, implementation and enforcement on the DRC was at the centre of this research. More specifically, the objective of this research was threefold:

- To understand and discuss the principle of complementarity in the Rome Statute;
- To examine the challenges relating to the implementation of this principle;
- To discuss the principle of complementarity with respect to ongoing crimes in Beni and Ituri regions in the DRC.

To achieve these objectives, a review of the principle of complementarity was necessary to reveal the meaning, content and application and interpretation of the principle of complementarity, showing that the ICC is not intended to replace the national courts of states parties. The latter remain primarily responsible for the prosecution of international crimes committed in their territories. In any event, the effectiveness of the rigorous system established by the Rome Statute requires good cooperation from national judicial systems. This type of interaction between national judicial systems and the ICC is the innovative point in the evolution of international criminal justice discussed throughout this study. However, this cooperation is far from being achieved, especially if it is the person who is the subject of investigations or prosecutions is close to the government in power. Moreover, it appears that the whilst the drafters of the Rome Statute limited themselves to mentioning the primary role of national judicial systems to prevent international crimes, a thorough analysis of the admissibility conditions of a case before the ICC has revealed the true meaning and scope of the ICC's complementary relationship with national courts.

Moreover, in the context of making the fight against impunity for international crimes a matter of all humanity, the examination of the types of complementarity has shown that academics favour the proactive approach to the principle of complementarity in order to effectively combat the inertia of the Court the state is either unable or unwilling to prosecute. However, a thorough scrutiny of the admissibility criteria has made it possible to understand certain paradoxes in the criteria of inability, unwillingness and gravity that make the implementation of the principle of complementarity difficult. If the assessment of the criteria

of unwillingness and gravity is subjective to determination, the inability test, even if based on more or less objective grounds, may not be objectively achievable. Even in cases where states are unable to initiate national legal proceedings, they demonstrate unwillingness or hold mock trials with the aim of removing the suspect from punitive justice. These difficulties have allowed the issue of the implementation of the principle of complementarity to be closely examined in the second chapter, at the centre of which were the issues of limitations of the powers of the prosecutor and the compatibility of alternative justice procedures that were invoked for international crimes in the Democratic Republic of Congo. On the one hand, the prosecutor does not have broad freedom to personally settle the case before the Court. The prerogative remains with the state seeking to investigate the crime. On the other hand, the use of alternative forms of justice to address crimes within the ICC's jurisdiction has proved incompatible with ICC's mission to end impunity. The Rome Statute does not explicitly refer to this and the DRC and other states parties to the Rome Statute that have resorted to them, thereby allowing criminals to go unpunished. Such alternative stratagems should be prohibited in the Rome Statute. This chapter concluded with an examination of the impact that the implementation of the principle of complementarity has had on the perpetration of international crimes in the Democratic Republic of Congo. The first problem revealed the frequent use of alternative justice processes and the implementation of DDR (disarmament, demobilisation and reintegration) programmes. These programmes have allowed criminals to go unpunished because they have held positions of responsibility in the Congolese administration, starkly illustrating the inconsistency of these processes with the purpose of the Rome Statute – as seen in the admissibility criteria for crimes committed in the territories of Beni and Ituri in eastern DRC. The examination of these criteria begins with the question of whether the crimes currently committed in the aforementioned territories do not meet the admissibility requirements set by the Rome Statute. It has been demonstrated in those situations that the state in some cases would have been unwilling or unable to prosecute, requiring the intervention of the ICC. The few cases in which the ICC has intervened according to the principle of complementarity has not influenced the perpetrators of the crimes to stop their actions. These problems inherent in the principle of complementarity and its interpretation and application suggest the need to rethink the complementarity regime. Two recommendations are essential in this regard:

The Rome Statute must clearly prohibit the application of alternative procedures because they are incompatible with the spirit of the Rome Statute; or if they are to be resorted to, the

Rome Statute must designate who should benefit from them at the national level. Secondly, the inability test should be revised to allow that where the Court concludes that a state is unable to prosecute its criminals, it (the Court) should responsibility for prosecuting all perpetrators without regard to their rank.

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