

AMICC

THE PRINCIPLE OF COMPLEMENTARITY

INTRODUCTION

The Bush administration has repeatedly stated that one of its reasons for opposing the International Criminal Court (ICC or Court) is the belief that states, not international institutions, should be primarily responsible for ensuring justice in the international system.¹ This objection is the result of a misinterpretation of the articles contained in the Rome Statute defining the Court.

The principle of complementarity governs the exercise of the Court's jurisdiction. This means that states have the primary responsibility to prosecute and try alleged perpetrators of genocide, crimes against humanity and war crimes. The ICC may only exercise jurisdiction when national systems fail to do so, either because there is an absence of proceedings or because they are unable or unwilling to carry out the investigations or prosecutions they may have initiated.

This paper explains the content and meaning of the principle of complementarity and examines the Office of the Prosecutor's (OTP) approach to its implementation in practice.

COMPLEMENTARITY IN THE ICC NEGOTIATIONS

Under current international law, states have the duty and the right to prosecute international crimes. When states negotiated the Rome Statute, they agreed that this obligation was not to be overridden by the creation of a permanent criminal court. The idea was, in fact, that states would retain the primary obligation to investigate, prosecute and punish those responsible for genocide, crimes against humanity and war crimes, and that the ICC would only step in when trial procedures were not available or were ineffective.²

Although there was general agreement on this idea from the outset, the negotiation of the specific provisions dealing with complementarity was hampered by disagreement. States agreed that it should be up to the Court itself to decide whether a case was within its jurisdiction and admissible before it. However, many delegations were concerned that the Court would have too much discretion in making this decision and that the principle of complementarity would be abused. Others feared that the ICC would function as a kind of appeals court, which would be able to review decisions and proceedings of domestic courts. As there was common agreement that the ICC should not play such a role, states designed provisions to narrow the Court's margin of discretion and avoid subjectivity. They also created enough safeguards against abuse of the concept of complementarity by shaping an intricate system allowing for challenges to the Court's decisions in this regard.

¹ U.S. Department of State, Fact Sheet: *The International Criminal Court*, August 2002, <http://www.state.gov/t/pm/rls/fs/2002/23426.htm6/8/05>; M. Grossman, *American Foreign Policy and the International Criminal Court*, Remarks to the Center for Strategic and International Studies, Washington DC, May 6, 2002, <http://www.state.gov/p/9949.htm6/7/05>.

² Preamble of the Draft Statute for an International Criminal Court Prepared by the International Law Commission, in Report of the International Law Commission on the Work of its Forty-sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994), para. 42-91, p. 29-157, at 44.

COMPLEMENTARITY IN THE STATUTE

The principle of complementarity is included in both the Preamble and article 1 of the Rome Statute. This demonstrates that the idea of creating a court that would complement national prosecutions was a major concern for the framers of the ICC. The principle is further developed in article 17. Provisions included in articles 18 and 19 are also directly related to the concept of complementarity.

Article 17

Article 17 deals with the issue of admissibility of cases before the ICC. The core idea is that the Court will not take up cases that are being investigated or prosecuted, or have been investigated or prosecuted, by a national court. In principle, a case is admissible before the ICC when no state has initiated any investigation. However, the drafters of the Statute were aware that some states could conduct investigations in a way that might be inconsistent with the idea of bringing the person concerned to justice, or that would otherwise serve the purpose of shielding the accused from the jurisdiction of the Court. Therefore, the Statute also introduces some exceptions to the primacy of state jurisdiction: the Court can still declare a case to be admissible when a state has undertaken investigations or prosecutions, but is found to be unwilling or unable genuinely³ to carry out those proceedings.⁴

As both “unwillingness” and “inability” are subjective concepts, the drafters of the Statute included provisions that the Court must refer to in order to determine if there is such “unwillingness” or “inability” on the part of a domestic judicial system. A state is considered to be unwilling to carry out proceedings when they have been instituted to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; when an unjustified delay is inconsistent with a genuine effort to bring a person to justice; or when the competent domestic court is not independent or impartial. To assess whether a state is unable to act, the Court must determine that its national judicial system has totally or substantially collapsed; that the state lacks effective mechanisms to obtain the accused or the necessary evidence and testimony; or that it is otherwise unable to carry out proceedings.⁵

Articles 18 & 19

These two articles deal with claims brought by states which assert that they are conducting national investigations of the criminal acts the ICC is looking into. Each article applies to a different stage in the proceedings before the Court. According to article 18, the Prosecutor must notify all states of the

³ During the negotiation of the Rome Statute, “genuinely” proved to be the most objective word of a series of words and phrases proposed. See J.T. Holmes, “The Principle of Complementarity,” in *The International Criminal Court – The making of the Rome Statute*, ed. R. Lee, Kluwer Law International, The Hague, 1999, at 50.

⁴ The genuineness threshold is not passed when proceedings are inadequate for the purpose of bringing the perpetrators to justice. ICC-OTP, *Informal expert paper: The principle of complementarity in practice* [hereinafter Informal expert paper], <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>, at 8.

⁵ The provision on inability to investigate or prosecute was included to take into account situations where there might be a lack of central government, or a state of chaos due to a conflict or crisis, leading to collapse of the domestic judicial system. See ICC-OTP, *Paper on some policy issues before the Office of the Prosecutor* [hereinafter Paper on some policy issues], http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf, at 4.

opening of an investigation.⁶ Within a month of receipt of this notice, a state can inform the Court that it is investigating the criminal acts that were the object of the Prosecutor's notification and request the deferral of the case. Unless the Prosecutor seeks and obtains an authorization to proceed from the Pre-Trial Chamber, he must defer to the national investigation.⁷ Once the one-month period referred to in article 18 has elapsed, states can still challenge the admissibility of a case by presenting a formal claim before the Court's Chambers.⁸ Unlike the situation described in article 18, deferral is not automatic following such challenges. Rather, the Court's judges must rule on the admissibility of the case on the basis of the criteria set forth in article 17, and the Prosecutor will defer to the national investigation only when they find that the case is inadmissible.⁹

COMPLEMENTARITY IN PRACTICE

The principle of complementarity is based on respect for state sovereignty and states' primary obligation to exercise jurisdiction, as well as on considerations of efficiency and effectiveness since states generally have the best access to evidence and witnesses. Moreover, the ICC is a single institution with limited resources that can bring only a narrow number of prosecutions.¹⁰ Taking all this into consideration, complementarity is not only a principle that rules the exercise of the Court's jurisdiction, but it is also being developed into a tool to encourage states to exercise their obligation to prosecute atrocity crimes. Furthermore, the implementation of the principle of complementarity requires that the Court exercise monitoring functions involving assessment of the existence and genuineness of actual or potential national proceedings at different phases of an investigation. The OTP, which is deeply committed to respect the complementary nature of the Court, is gradually developing a practice that features, among others, the following aspects:

Encouraging national action

A major part of the external relations and outreach strategy of the OTP is to encourage and assist states to carry out their primary responsibility of investigating and prosecuting international crimes. This is done by the development of formal and informal networks of contacts to encourage states to undertake action themselves. Such encouragement could be directed to all states, for example, through general public statements. The OTP can also address certain states with regard to specific situations, through private meetings with government officials, fact-finding contacts or the requirement of information with respect to particular cases.¹¹

This interaction with states could also include provision of direct assistance and advice when a state is genuinely willing to carry out investigations or prosecutions.¹² The OTP could provide national agencies with information and evidence it might have collected. Technical advice regarding

⁶ The obligation to notify applies to situations referred by states parties and investigations initiated on the Prosecutor's own initiative, but not to situations referred by the Security Council. Rome Statute, article 18(1).

⁷ Rome Statute, article 18(2).

⁸ "Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber..." Rome Statute, article 19(6).

⁹ This decision may be appealed before the Appeals Chamber.

¹⁰ Paper on some policy issues, *supra* note 5, at 4.

¹¹ Informal expert paper, *supra* note 4, at 5.

¹² Paper on some policy issues, *supra* note 5, at 5.

international legal issues and practical questions concerning investigating and prosecuting mass crimes could also be shared.¹³

This dialogue and partnership between states and the OTP are important not only in cases where the OTP perceives the state's willingness to act and therefore decides not to interfere national prosecutions, but also in those situations where the Prosecutor undertakes his own investigation. As ICC trials solely focus on the persons who bear the greatest responsibility for the major crimes of international concern, a comprehensive approach against impunity requires that such efforts be complemented by national prosecutions of lower-level officials. By sharing of evidence and advice, the OTP could promote and facilitate the country's handling of such cases.

Assessment of complementarity at different stages

Complementarity issues can arise in different ways at different phases in ICC proceedings.¹⁴ The Court will certainly have to look at the question when a state or person presents a challenge claiming that an investigation is being conducted at the domestic level. But according to the Court's rules and practice, complementarity must also be analyzed in various other stages, even when admissibility is not a contested issue. The different Chambers will have to determine the Court's jurisdiction over each case and its admissibility, by verifying, among other factors, that the complementarity requirement has been met.¹⁵

Additionally, before the Prosecutor can begin an investigation, he is required to consider whether there is or has been an investigation at the national level.¹⁶ This is a factor for the Prosecutor to assess in determining whether to proceed with an investigation, either upon the referral of a situation by a state party or by the Security Council, or when deciding whether to seek authorization from the Pre-Trial Chamber to begin an investigation on his own initiative.¹⁷ At such points, complementarity is not an issue for litigation and judicial determination, but rather a matter for the OTP to consider and assess in reaching decisions.¹⁸

At the early phases of the OTP investigation, there is normally no "case" yet. The Prosecutor first examines a "situation" in order to establish the existence of particular cases. At this very early stage, when the Prosecutor must decide to proceed with an investigation, complementarity is assessed in a more general way, by analyzing whether possible cases arising under the situation concerned have been or are being investigated at the national level. It is important to note that this is not an analysis of a situation in general, since this would be contrary to what states understood when they negotiated the Rome Statute. Rather, the OTP identifies one or more events within a situation, such as, for example,

¹³ Informal expert paper, *supra* note 4, at 6.

¹⁴ *Id.* at 9.

¹⁵ Article 15(4) of the Rome Statute makes it clear that even in those cases where the Pre-Trial Chamber authorizes the Prosecutor to initiate an investigation at his own initiative, this decision is without prejudice of "subsequent determinations by the Court with regard to the [...] admissibility of the case", thereby implying that complementarity will be analyzed throughout the proceedings.

¹⁶ Rome Statute, article 53(1)(b).

¹⁷ Rules of Procedure and Evidence, rule 48.

¹⁸ Informal expert paper, *supra* note 4, at 9.

the massacre in a certain village, and considers whether there are or have been any proceedings at the national level in relation to such events.¹⁹

Assessment of the existence and genuineness of national proceedings by the OTP is continuous throughout an investigation. Even where the Prosecutor has determined at the start of an investigation that there was no national investigation that might overlap with his own, ongoing monitoring will allow him to identify any development or change of governmental policy in this regard. Moreover, it is essential that complementarity be re-examined once the OTP has selected specific cases.²⁰

Consideration of a broader context

The OTP's assessment might also involve the consideration of the relevant state's capabilities to conduct prosecutions and trials in relation to the criminal acts the Prosecutor might focus on. If the OTP finds that the state has the capability and willingness to undertake investigations itself, it will then promote and support national efforts. Moreover, by examining whether a national investigation could be initiated, the Prosecutor avoids interfering any such domestic initiative.

When analyzing complementarity, the OTP and the Court's Chambers must inevitably consider a general context of any relevant domestic investigation. Both the OTP and Chambers must assess specific laws, procedures, practices and standards of the state concerned, in order to determine whether any possible investigation or prosecution could be regarded as "genuine." Consideration of the broader context must not be confused with the scrutiny of the national judicial system. The contextual evaluation will always relate to particular cases and should in no way come down to a judgment on whether the domestic judiciary achieves a certain standard.

COMPLEMENTARITY IN THE FUTURE

Complementarity is a new concept in international procedural law which will be gradually shaped as the OTP formulates more detailed guidelines and the Court issues rulings to interpret its scope and implications. The drafting of the OTP's regulations, which is presently in progress, will help determine issues such as the standard monitoring activities the office should undertake, the approach to dialogue and agreements with states, and the development of more precise rules to assess unwillingness and inability to investigate and prosecute crimes.²¹

The Court's future work with regard to the definition of the complementarity will most probably be built upon the approach the OTP has already adopted on the issue. For this reason, the office's practice

¹⁹ "[T]he Prosecutor determined [...] the existence of sufficient information to believe that there are cases that would be admissible in relation to the Darfur situation. It is important to emphasize that this decision does not represent a determination on the Sudanese legal system as such, but it is essentially a result of the absence of criminal proceedings relating to the cases on which the OTP is likely to focus." Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005) [hereinafter Report of the Prosecutor on Darfur], http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf, at 4.

²⁰ "The admissibility assessment is an ongoing assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions." Report of the Prosecutor on Darfur, see *supra* note 19, at 4.

²¹ ICC-OTP, Draft Regulations of the Office of the Prosecutor, http://www.icc-cpi.int/library/organs/otp/draft_regulations.pdf, Book 3, at 13.

of respecting sovereignty and states' primary responsibility to conduct prosecutions of international crimes, as well as its refusal to use complementarity as a judgment of the legal and judicial system of a country, should be praised.

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